

# CONFIDENTIALITY: PART II (EXCEPTIONS TO 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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## TABLE OF CONTENTS

<u>Hypo No.</u>	<u>Subject</u>	<u>Page</u>
<b><u>(A) Joint Representations</u></b>		
1	Identifying Joint Representations .....	1
2	Confidentiality Duties in a Joint Representation .....	16
3	Power to Waive the Privilege in a Joint Representation .....	64
4	Effect of Adversity Among Jointly Represented Clients.....	70
5	Effect of a Joint Representation in Corporate Transactions .....	87
<b><u>(B) Common Interest Agreements</u></b>		
6	Availability of the Common Interest Doctrine in a Transactional Setting .....	102
7	Availability of the Common Interest Doctrine Among Participants with Claims Against One Another .....	104
8	Effect of Later Adversity Among Common Interest Agreement Participants .....	105
<b><u>(C) Compliance with Laws, Rules and Court Orders</u></b>		
9	Compliance with Law .....	108
10	Compliance with Court Orders .....	122
<b><u>(D) Impliedly Authorized Disclosure</u></b>		
11	Dealing with Service Providers Outside the Office.....	136
12	Outsourcing .....	153
13	Listservs.....	165
<b><u>(E) Dealing with Conflicts of Interest</u></b>		
14	Clearing Conflicts on a Daily Basis.....	185

<b><u>Hypo No.</u></b>	<b><u>Subject</u></b>	<b><u>Page</u></b>
15	Clearing Conflicts when Hiring Laterals.....	193
16	Clearing Conflicts in Hiring Adverse Lawyers .....	220
17	Information-Caused Complications in Applying the Normal Conflicts Rules .....	227
18	Information-Caused Conflicts Not Involving Direct Adversity to Current or Former Clients.....	248
19	Conflicts Caused by Information from Non-Clients.....	253

### **(F) Law Firm Management**

20	Disclosure to Law Firm Colleagues .....	265
21	Mentoring .....	269
22	Selling a Law Practice .....	278

### **(G) Defensive Use**

23	Lawyers Obtaining Advice about Their Own Conduct .....	282
24	Defending Against Clients' Attacks .....	285
25	Defending Against Clients' "Ineffective Assistance" Claims.....	299
26	Defending Against Clients' Criticism.....	311
27	Defending Against Non-Clients' Claims .....	321
28	Defending Against Non-Clients' Criticism.....	346

### **(H) Affirmative Use**

29	Lawyers' Claims Against Former Clients for Unpaid Fees .....	350
30	Lawyers' Affirmative Use in Collateral Matters Involving Fee Disputes .....	360
31	Disclosure when Seeking to Withdraw as Counsel of Record .....	381
32	In-House Lawyers Filing Wrongful Discharge or Qui Tam Actions.....	400

### **(I) Unusual Client Situations**

33	Clients with Newsworthy Representations .....	425
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<b><i>Hypo No.</i></b>	<b><i><u>Subject</u></i></b>	<b><i><u>Page</u></i></b>
34	Deceased Clients: The Testamentary Exception .....	429
35	Impaired Clients.....	445
36	Withholding Material Information from a Client.....	452

## Identifying Joint Representations

### Hypothetical 1

One of your firm's largest clients just hired you to represent it in a lawsuit filed against your client and several other companies, alleging personal injuries from exposure to chemicals that your client and the other companies used in their manufacturing process. You know from experience that co-defendants in cases like this never sue each other or even "point the finger" at each other, so you tell your client that you will be able to represent it in the lawsuit. Soon after speaking with this client, you received a call from one of your partners, who tells you that she has just accepted a representation of another defendant in the case.

Is your firm's representation of these defendants a joint representation?

**MAYBE**

### Analysis

Given all of the ethics, privilege, and other ramifications that can flow from properly characterizing a representation, many lawyers do not give it enough thought until it is too late.

Lawyers can (1) separately represent clients on separate matters (as most outside lawyers do on a daily basis); (2) separately represent clients on the same matter; or (3) jointly represent clients on the same matter. As in so many other contexts, lawyers should always explain the nature of a representation to clients at the start.

### **Existence of a Joint Representation**

The first step in analyzing the ethics (or privilege) effect of a joint representation is determining whether such a joint representation exists.

Surprisingly, very few authorities or cases deal with this issue. The ABA Model Rules do not devote much attention to the creation of an attorney-client relationship.

The relatively new rule governing "prospective" clients explains the creation of that relationship (ABA Model Rule 1.18(a)) and the absence of that relationship. Id. cmt. [2].

The many ABA Model Rule comments dealing with what the rules call a "common representation" focus on the effects and risks of such a common representation, not on its creation. ABA Model Rule 1.7 cmts. [29]-[33].

Thus, the ABA Model Rules implicitly look to other legal principles to define the beginning of an attorney-client relationship.

The Restatement's provision addressing what it calls "co-clients" essentially points back to the general section about the creation of an attorney-client relationship in a single-client setting.

Whether a client-lawyer relationship exists between each client and the common lawyer is determined under § 14, specifically whether they have expressly or impliedly agreed to common representation in which confidential information will be shared. A co-client representation can begin with a joint approach to a lawyer or by agreement after separate representations had begun.

Restatement (Third) of Law Governing Lawyers § 75 cmt. c (2000) (emphasis added).

Restatement § 14 includes the predictable analysis of such a relationship formation.<sup>1</sup>

That section of the Restatement does not even mention joint representations. Thus, the Restatement apparently assumes that a joint representation begins in the same way as a sole representation.

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<sup>1</sup> Restatement (Third) of Law Governing Lawyers § 14 (2000) ("A relationship of client and lawyer arises when: (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either (a) the lawyer manifests to the person consent to do so; or (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or (2) a tribunal with power to do so appoints the lawyer to provide the services.").

The few cases to have dealt with this issue have also pointed to the obvious indicia of an attorney-client relationship. For instance, the Third Circuit noted the obvious:

The keys to deciding the scope of a joint representation are the parties' intent and expectations, and so a district court should consider carefully (in addition to the content of the communication themselves) any testimony from the parties and their attorneys on those areas.

. . . .

When, for example, in-house counsel of the parent [company] seek information from various subsidiaries in order to complete the necessary public filings, the scope of the joint representation is typically limited to making those filings correctly. It does not usually involve jointly representing the various corporations on the substance of everything that underlies those filings.

. . . .

The majority -- and more sensible -- view is that even in the parent-subsidiary context a joint representation only arises when common attorneys are affirmatively doing legal work for both entities on a matter of common interest.

Teleglobe Commc'ns Corp. v. BCE, Inc. (In re Teleglobe Commc'ns Corp.), 493 F.3d 345, 363, 372-73, 379 (3d Cir. 2007) (emphases added).

An earlier First Circuit opinion provided a little more detailed explanation of what courts should look for, but also articulated the obvious factors.

In determining whether parties are "joint clients," courts may consider multiple factors, including but not limited to matters such as payment arrangements, allocation of decisionmaking roles, requests for advice, attendance at meetings, frequency and content of correspondence, and the like.

FDIC v. Ogden Corp., 202 F.3d 454, 461 (1st Cir. 2000) (emphasis added).

An earlier district court decision listed ten factors.

[S]ince the ultimate question is whether the law will deem two (or more) parties to have been "joint clients" of a particular lawyer, it also is necessary (in conducting this inquiry into all the relevant circumstances) to analyze all pertinent aspects of the relationship and dynamics between (a) the party that claims to have been a joint client and (b) the party that clearly was a client of the lawyer in question. This analysis should include (but not necessarily be limited to) (1) the conduct of the two parties toward one another, (2) the terms of any contractual relationship (express or implied) that the two parties may have had, (3) any fiduciary or other special obligations that existed between them, (4) the communications between the two parties (directly or indirectly), (5) whether, to what extent, and with respect to which matters there was separate, private communication between either of them and the lawyer as to whom a 'joint' relationship allegedly existed, (6) if there was any such separate, private communication between either party and the alleged joint counsel, whether the other party knew about it, and, if so, whether that party objected or sought to learn the content of the private communication, (7) the nature and legitimacy of each party's expectations about its ability to access communications between the other party and the allegedly joint counsel, (8) whether, to what extent, and with respect to which matters either or both of the alleged joint clients communicated privately with other lawyers, (9) the extent and character of any interests the two alleged joint parties may have had in common, and the relationship between common interests and communications with the alleged joint counsel, (10) actual and potential conflicts of interest between the two parties, especially as they might relate to matters with respect to which there appeared to be some commonality of interest between the parties, and (11) if disputes arose with third parties that related to matters the two parties had in common, whether the alleged joint counsel represented both parties with respect to those disputes or whether the two parties were separately represented.

Sky Valley Ltd. P'ship v. ATX Sky Valley, Ltd., 150 F.R.D. 648, 652-53 (N.D. Cal. 1993).

More recently, another court cited essentially the same basic factors.



As in the single-client representation, the joint-client relationship begins when the "co-clients convey their desire for representation, and the lawyer accepts." . . . Whether joint representation exists depends on the understanding of counsel and the parties in light of the circumstances.

Robert Bosch LLC v. Pylon Mfg. Corp., 263 F.R.D. 142, 145 (D. Del. 2009) (citation omitted).<sup>2</sup>

The creation of a joint representation requires a meeting of the minds, not just one or the other client's understanding or expectation. For instance, one court rejected the argument "that a joint representation of Party A and Party B may somehow arise through the expectations of Party B alone, despite Party A's views to the contrary."<sup>3</sup>

Creating a joint representation does not require any formal documentation.

- Merck Eprova AG v. ProThera, Inc., 670 F. Supp. 2d 201, 210, 211 (S.D.N.Y. 2009) (analyzing a law firm's claim that it did not jointly represent two companies, concluding that the lawyer had jointly represented both companies; explaining that "[n]o special formality is required to demonstrate the establishment of the [attorney-client] relationship."; ultimately finding that

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<sup>2</sup> Robert Bosch LLC v. Pylon Mfg. Corp., 263 F.R.D. 142, 145-46 (D. Del. 2009) ("As in the single-client representation, the joint-client relationship begins when the 'co-clients convey their desire for representation, and the lawyer accepts.' Just because clients of the same lawyer share a common interest does not mean they are co-clients. Whether joint representation exists depends on the understanding of counsel and the parties in light of the circumstances. It continues until it is expressly terminate[d] or circumstances indicate to all the joint clients that the relationship has ended. . . . In that relationship, the co-clients and their common counsel's communications are protected from disclosure to persons outside the joint representation. Waiver of the privilege requires the consent of all joint clients. A co-client, however, may unilaterally waive the privilege regarding its communications with the joint attorney, but cannot unilaterally waive the privilege for the other joint clients or any communications that relate to those clients." (footnotes omitted)).

<sup>3</sup> Neighborhood Dev. Collaborative v. Murphy, 233 F.R.D. 436, 441-42 (D. Md. 2005) ("What the Court takes exception to is NDC's effort to merge these two principles - to argue, in effect, that a joint representation of Party A and Party B may somehow arise through the expectations of Party B alone, despite Party A's views to the contrary. This position is untenable, because it would, as Defendant Murphy points out, 'allow the mistaken (albeit reasonable) belief by one party that it was represented by an attorney, to serve to infiltrate the protections and privileges afforded to another client.' . . . In other words, NDC suggests that Party A's (Murphy's) attorney-client privilege may be eviscerated by Party B's (NDC's) erroneous belief that it, too, was represented by Party A's counsel (AGG). Unsurprisingly, NDC cites no authority in support of this remarkable proposition. Moreover, NDC's argument runs contrary to the general policy that joint representations of clients with potentially adverse interests should be undertaken only when subject to very narrow limits." (footnote omitted)).

the law firm jointly represented the two companies; "Where counsel is engaged by two or more clients to represent them jointly in a matter, it is unrealistic to expect that each client will necessarily execute a separate retainer agreement, communicate with counsel independently, or provide individual payment for services rendered. It is at least equally likely that one representative will interact with the attorney on behalf of all of the clients. Where, for example, a husband and wife are engaged in a transaction with a third party concerning marital property, an attorney would generally understand that she represents both spouses, even if only one deals with the attorney in connection with the matter. Where one spouse establishes and effectuates the attorney-client relationship, it is understood that this is done on behalf of the other as well."; adding that "where two parties are jointly prosecuting a patent application, they are commonly considered to be joint clients"; disqualifying the law firm from adversity to one of the two former jointly represented clients).

Analyzing these factors often requires a fact-intensive examination of the situation. For instance, as discussed more fully below, the Delaware Bankruptcy Court conducted a hearing focusing on such issues in the Teleglobe case. The court took testimony from the clients and the lawyers involved. The court ultimately determined that there was no joint representation between now-bankrupt corporations and their former parent. Teleglobe USA Inc. v. BCE Inc. (In re Teleglobe Commc'ns Corp.), 392 B.R. 561, 589, 590 (Bankr. D. Del. 2008).

### **Clients' Arguments that a Joint Representation Did Not Exist**

In some situations, one client has an incentive to claim that a lawyer did not jointly represent it and another client.

Two scenarios seem to frequently involve this issue: (1) one of the arguable joint clients (usually a corporate family member) declares bankruptcy, and non-bankrupt arguable joint clients (usually corporate affiliates) argue that the same lawyer did not jointly represent all of them in the transaction resulting in the bankruptcy -- thus allowing those non-bankrupt companies to withhold documents from the bankruptcy trustee; or

(2) a corporation argues that the same lawyer did not jointly represent it and a current or former executive or employee -- thus allowing the company to withhold documents from the now-adverse executive/employee or to exercise sole power to waive the privilege protecting communications with its lawyer. In those situations, one of the arguable joint clients has an interest in arguing that no joint representation ever existed (at least on the pertinent matter).

The first scenario clearly sets up a fight over the existence of a joint representation. The trustee generally argues that the lawyer jointly represented the corporate family members on the same matter, while the non-bankrupt affiliate argues that the lawyer did not jointly represent the corporate family members on the matter. If the bankrupt affiliate wins, it generally obtains access to all of the lawyer's communications and documents. If the non-bankrupt affiliate wins, it usually can maintain the privilege that would protect its own communications with the lawyer.

Some large well-known law firms have found themselves dealing with this very troubling situation. For instance, a court ordered Troutman Sanders to produce to Mirant's bankruptcy trustee files that the firm created while jointly representing Mirant and its previous parent (The Southern Company) during Mirant's spin-off. In re Mirant Corp., 326 B.R. 646 (Bankr. N.D. Tex. 2005).

More recently, several courts extensively dealt with these issues in the bankruptcy of several well-known Canadian and U.S. companies. These courts' analyses provide perhaps the clearest discussion of the existence and effects of joint representations.

In Teleglobe, the Delaware District Court ordered several law firms to produce documents to bankrupt second-tier subsidiaries of Canada's largest broadcasting company -- finding that the law firms had jointly represented the entire corporate family.<sup>4</sup> The court even ordered the production of communications between Shearman & Sterling and the corporate parent, noting that the in-house lawyers who had received the Shearman & Sterling communications jointly represented the entire corporate family.

The Third Circuit reversed.<sup>5</sup> Although remanding for a more precise determination of which corporate family members the in-house lawyers and outside lawyers represented, the Third Circuit affirmed the basic premise that in-house and outside lawyers who jointly represent corporate affiliates generally cannot withhold documents relating to the joint representation from any of the clients.

Before remanding to the district court for an assessment of whether a joint representation existed, the Third Circuit provided some very useful guidance. Among other things, the Third Circuit explained how the district court should assess the existence of a joint representation (discussed above).

On remand, the bankruptcy court for the District of Delaware ultimately found that there had not been a joint representation. In assessing the existence of a joint representation, the bankruptcy court conducted a lengthy hearing, taking evidence and testimony from various business folks and lawyers.<sup>6</sup> Among other things, the

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<sup>4</sup> Teleglobe Commc'ns Corp. v. BCE, Inc. (In re Teleglobe Commc'ns Corp.), Ch. 11 Case No. 02-11518-MFW & Civ. No. 04-1266-SLR, 2006 U.S. Dist. LEXIS 48367 (D. Del. June 2, 2006), rev'd and remanded, 493 F.3d 345 (3d Cir. 2007).

<sup>5</sup> Teleglobe Commc'ns Corp. v. BCE Inc. (In re Teleglobe Commc'ns Corp.), 493 F.3d 345 (3d Cir. 2007).

<sup>6</sup> Teleglobe USA, Inc. v. BCE Inc. (In re Teleglobe Commc'ns Corp.), 392 B.R. 561 (Bankr. D. Del. 2008).

bankruptcy court noted that the ultimate parent was a Canadian company while the subsidiaries were American companies; that there was no retainer letter describing the relationship; and that the parent had a separate law department from the subsidiaries.

### **Third Parties' Arguments that a Joint Representation Did Not Exist**

While only a handful of courts have dealt with disputes among arguable joint clients about the existence of a joint representation, even fewer courts have addressed a third party's argument that a joint representation did not exist.

This is somewhat surprising, because third parties have a huge incentive to prove that a valid joint representation did not exist. Doing so presumably would give them access to communications among the parties incorrectly claiming privilege protection under the joint representation doctrine. This is because the clients will probably have disclosed privileged communications outside the intimate attorney-client relationship they enjoyed with their own lawyer. Yet very little case law deals with such predictable attacks. Perhaps this is because clients can generally agree to be jointly represented by the same lawyer without risking some third party challenging the wisdom of such an agreement. If the joint parties and the lawyer unanimously take the position that they had entered into such an arrangement, there is not much that a third party can do to challenge their testimony.

About the only arguable grounds for a third party's attack on the existence of a joint representation is that the joint clients' interests were so divergent that the same lawyer could not possibly have represented them both. Of course, this goes back to an ethics issue. Under ABA Model Rule 1.7(b), the only totally prohibited "concurrent" representation is one in which a lawyer asserts a claim against another client being

represented by the same lawyer or her partner "in the same litigation or other proceeding before a tribunal." ABA Model Rule 1.7(b)(3). That is not even a joint representation on the same matter -- so there are very few per se unethical joint representations.

To be sure, several ABA Model Rules comments warn lawyers that there might be limits on their joint representations of multiple clients in what the ABA Model Rules call a "common representation." See, e.g., ABA Model Rule 1.7 cmts. [29]-[33]. But the threshold is very low for such joint representations.<sup>7</sup>

Courts recognize some limits on a lawyer's ability to represent clients with divergent interests. For instance, one court pointed to "the general policy that joint representations of clients with potentially adverse interests should be undertaken only when subject to very narrow limits." Neighborhood Dev. Collaborative v. Murphy, 233 F.R.D. 436, 442 (D. Md. 2005).<sup>8</sup>

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<sup>7</sup> Jointly represented clients and their lawyer may also attempt to resolve any adversity by agreeing to prospective consents allowing the lawyer to keep representing one of the clients even in matters adverse to the other jointly represented clients. See, e.g., ABA Model Rule 1.7 cmt. [22]; Restatement (Third) of Law Governing Lawyers § 31(2)(e) (2000).

<sup>8</sup> Interestingly, even if a lawyer was found to have engaged in some improper conduct by jointly representing multiple clients with adverse interests, that would not necessarily result in loss of the privilege.

In its analysis of a possible joint representation among corporate affiliates, the Third Circuit's decision in Teleglobe explained that even as between the joint clients the privilege can protect communications with a joint lawyer who should not have represented joint clients whose interests are adverse to one another.

The Restatement's conflicts rules provide that when a joint attorney sees the co-clients' interests diverging to an unacceptable degree, the proper course is to end the joint representation. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121 cmts. e(1)-(2). As the Court of Appeals for the D.C. Circuit noted in Eureka Inv. Corp. v. Chicago Title Ins. Co., 240 U.S. App. D.C. 88, 743 F.2d 932 (D.C. Cir. 1984) (per curiam), courts are presented with a difficult problem when a joint attorney fails to do that and instead continues representing both clients when their interests become adverse. Id. at 937-38. In this situation, the black-letter law is that when an attorney (improperly) represents two

However, some courts and bars have approved joint representations even of opposite sides in transactions.

- Van Kirk v. Miller, 869 N.E.2d 534 (Ind. Ct. App. 2007) (approving the validity of a consent allowing a lawyer to represent both sides in a negotiated transaction).
- North Carolina LEO 2006-3 (1/23/09) (holding that a lawyer can represent both the buyer and seller in a real estate transaction).
- But see New York LEO 807 (1/29/07) ("The buyer and seller of residential real estate may not engage separate attorneys in the same firm to advance each side's interests against the other, even if the clients give informed consent to the conflict of interest.").

Thus, the ethics rules, ethics opinions and case law recognize that lawyers can jointly represent a client with potential or even actual adverse interests, as long as a lawyer reasonably believes that he or she can adequately represent all the clients, and as long as the clients consent after full disclosure.

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clients whose interests are adverse, the communications are privileged against each other notwithstanding the lawyer's misconduct. Id.; see also J. WIGMORE, EVIDENCE § 2312 (McNaughton rev. ed. 1961).

Teleglobe Commc'ns Corp. v. BCE, Inc. (In re Teleglobe Commc'ns Corp.), 493 F.3d 345, 368 (3d Cir. 2007).

The much older Eureka case did not receive much attention until Teleglobe cited it, but stands for the same proposition. Eureka Inv. Corp. v. Chi. Title Ins. Co., 743 F.2d 932, 937-38 (D.C. Cir. 1984) ("Given Eureka's expectations of confidentiality and the absence of any policy favoring disclosure to CTI, Eureka should not be deprived of the privilege even if, as CTI suggests, the asserted attorney-client relationship should not have been created. We need not express any view on CTI's contention that Fried, Frank should not have simultaneously undertaken to represent Eureka in an interest adverse to CTI and continued to represent CTI in a closely related matter. As Wigmore's second principle expressly states, counsel's failure to avoid a conflict of interest should not deprive the client of the privilege. The privilege, being the client's, should not be defeated solely because the attorney's conduct was ethically questionable. We conclude, therefore, that Eureka was privileged not to disclose the requested documents.").

Thus, joint clients can even keep from one another privileged communications if a lawyer has been improperly representing them (presumably in violation of the conflicts of interest rules). A fortiori, one would expect that a third party would be unable to pierce the privilege despite such adversity between the jointly represented clients.

Joint clients and their lawyer also have power to define the "information flow" within a joint representation -- although there are certainly some limits on this power, just as there are limits on the power to avoid any loyalty issues. ABA Model Rule 1.7 cmt. [31] ("In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential."); Restatement (Third) of Law Governing Lawyers § 60 cmt. I (2000) ("Co-clients can also explicitly agree that the lawyer is not to share certain information.").<sup>9</sup>

In the Teleglobe case (discussed in detail above), the Third Circuit indicated that in the corporate family context "a joint representation only arises when common attorneys are affirmatively doing legal work for both entities on a matter of common interest." Teleglobe Commc'ns Corp. v. BCE, Inc. (In re Teleglobe Commc'ns Corp.), 493 F.3d 345, 379 (3d Cir. 2007). However, the Third Circuit did not assess what would happen if a lawyer represented multiple corporations (or any other clients, for that matter) on a matter in which the client did not have a "common interest." Thus, it is unclear whether the Third Circuit was simply describing the situation before it, or what explains the contours of an acceptable joint representation.

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<sup>9</sup> To be sure, there are limits on such agreements, and courts reject obviously contrived arrangements, at least in disputes between former jointly represented clients. See, e.g., In re Mirant Corp., 326 B.R. 646 (Bankr. N.D. Tex. 2005) (rejecting the applicability of a "Protocol" entered into by a parent and a then-subsiary which authorized their joint lawyer Troutman Sanders to keep confidential from one client what it learned from the other; noting that the general counsel of the subsidiary agreed to the Protocol after the subsidiary became an independent company, but also explaining that the general counsel had ties both to the parent and to Troutman).

Thus, courts might reject an obvious effort to favor one of the former joint clients at the expense of another, although the authorities concede that jointly represented clients and their lawyer may agree to a limited information flow during a joint representation).



Significantly, the Third Circuit dealt with the possibility of adverse interests in discussing one jointly represented client's ability to withhold its own privileged communications -- when they were sought by another jointly represented client in a later dispute between them.

In any event, not many third parties seem to have challenged the existence of a joint representation.

One 2010 case highlights what a difficult task third parties might have in doing so. In Oppliger v. United States, Nos. 8:06CV750 & 8:08CV530, 2010 U.S. Dist. LEXIS 15251 (D. Neb. Feb. 8, 2010), the court rejected the United States Government's argument that the attorney-client privilege did not protect communications between a company's buyer and seller -- who claimed that they had hired the same lawyer to represent them both in resolving a dispute over the sale. In fact, the court explained that the issue on which the same lawyer represented the buyer and the seller "constitutes a claim for breach of the Purchase Agreement." Id. at \*14 (internal citation omitted). That comes close to the totally prohibited "concurrent" representation under ABA Model Rule 1.7 (explained above) -- although that prohibition applies only to the actual assertion of a claim "in the same litigation or other proceeding before a tribunal." ABA Model Rule 1.7(b)(3). Here, apparently, the parties had not asserted claims in litigation or other proceedings. However, it is remarkable that they would hire the same lawyer to represent them both in connection with such a possible claim.

The court's analysis showed how difficult it is for a third party to breach the privilege in this setting.

As a general rule, when individuals share an attorney as joint clients, the attorney-client privilege will protect

communications, between the attorney and the joint clients, from all third parties, absent effective waiver. . . . The issue before the court is whether Mr. Oppliger and Mr. Behrns were joint clients of Mr. Gardner [lawyer]. A number of factors are relevant to determine the relationship between the individuals and counsel including the reasonable subjective views and conduct of the individuals and the attorney. . . . In this case, the undisputed facts show the attorney and both clients reasonably believed joint representation existed. In fact, the document at issue begins: the law firm's attorneys 'have represented and continue to represent each of the persons and entities addressed in this letter.' . . . Mr. Oppliger and Mr. Behrns met with Mr. Gardner regarding legal representation for a single issue for which they sought a cooperative resolution. Furthermore, the legal representation resulted in a settlement agreement. . . . Accordingly, the court finds a joint client relationship existed.

Oppliger v. United States, Nos. 8:06CV750 & 8:08CV530, 2010 U.S. Dist. LEXIS 15251, at \*11-12 (D. Neb. Feb. 8, 2010) (emphasis added). The court rejected the government's argument that it "defies logic to find a common interest existed between two parties who had 'adverse interests' and were on opposite sides of a civil dispute."

Id. at \*13.

In this case, Mr. Oppliger and Mr. Behrns sought an apparently amicable and joint resolution of an issue "which allegedly constitutes a claim for breach of the Purchase Agreement." . . . Mr. Oppliger and Mr. Behrns sought joint counsel, agreed to joint representation, and ultimately resolved the potential problem between them through a settlement agreement. The facts show that at the time of the relevant communications, Mr. Oppliger and Mr. Behrns were reasonable in believing in the existence of common interests and possessed reasonable expectations of confidentiality sufficient to support the attorney-client privilege.

Id. at \*13-14.

If courts recognize an effective joint representation of companies on the opposite side of such a possible claim, it is difficult to see any situation in which a court would agree with a third party's challenge to a joint representation.

Surely a court would not honor an obviously contrived joint representation concocted solely to preserve an attorney-client privilege protection that would otherwise not exist. However, no courts seem to have found such a situation.

Perhaps there is a self-policing aspect to this issue. Any lawyer jointly representing clients in such a questionable arrangement would presumably be subject to disqualification from representing either client if either client wanted to end the relationship. It seems likely that no lawyer who has traditionally represented either one of the joint clients on other matters would want to take that risk.

For whatever reason, courts simply seem not to "look behind" joint representations whose existence is supported by the clients and their joint lawyer.

### **Best Answer**

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

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## Confidentiality Duties in a Joint Representation

### Hypothetical 2

For the past six months or so, you have represented a wealthy doctor and his second wife in preparing their elaborate estate plan. A few minutes ago, the doctor called you to say that he needed to provide some inheritance for an illegitimate child he fathered decades ago. This news came as a shock, because you had not heard anything about this illegitimate child until just now. The doctor asked you to keep the information secret from his second wife.

What do you do?

- (A) You must tell your other client (the second wife) about the husband's illegitimate child.
- (B) You may tell your other client about the illegitimate child, but you don't have to.
- (C) You may not tell your other client about the illegitimate child.

**(C) YOU MAY NOT TELL YOUR OTHER CLIENT ABOUT THE ILLEGITIMATE CHILD  
(PROBABLY)**

### Analysis

Any lawyer considering a joint representation of multiple clients on the same matter must deal with the issues of loyalty and information flow.<sup>1</sup>

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<sup>1</sup> Not surprisingly, lawyers representing separate clients on separate matters must maintain the confidentiality of the information learned from each of the separate clients. In other words, there is no information flow in such a setting, absent client consent.

The representation by one lawyer of related clients with regard to unrelated matters does not necessarily involve any problems of confidentiality or conflicts. Thus, a lawyer is generally free to represent a parent in connection with the purchase of a condominium and a child regarding an employment agreement or an adoption. Unless otherwise agreed, the lawyer must maintain the confidentiality of information obtained from each separate client and be alert to conflicts of interest that may develop. The separate representation of multiple clients with respect to related matters, discussed above, involves different considerations.

In some ways, the loyalty issue is easier to address -- because lawyers cannot be adverse to any current client (absent consent). It might be difficult to determine whether any adversity is acute enough to require disclosure and consent, but the "default" position is fairly easy to articulate -- the lawyer must withdraw from representing all of the jointly represented clients.

The issue of information flow can be far more complicated. It makes sense to analyze the information flow issue in three different scenarios: (1) when the lawyer has not raised the issue with the clients at the start of the representation, so there is no agreement among them about the information flow -- which necessarily involves the law supplying a "default rule"; (2) when the lawyer has arranged for the jointly represented clients to agree in advance that the lawyer will share secrets between or among the jointly represented clients; (3) when the lawyer has arranged for the jointly represented clients to agree in advance that the lawyer will not share secrets between or among the jointly represented clients.

### **"Default Rule" in the Absence of an Agreement Among the Clients: Authorities Recognizing a "Keep Secrets" Approach**

The ABA Model Rules and many courts and bars generally recognize that lawyers who have not advised their jointly represented clients ahead of time that they will share information may not do so absent consent at the time. Such a default position might be called a "keep secrets" rule.

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American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.6, at 77 (4th ed. 2006), [http://www.actec.org/Documents/misc/ACTEC\\_Commentaries\\_4th\\_02\\_14\\_06.pdf](http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf).

**ABA Model Rules.** Interestingly, some apparently plain language from the ABA Model Rules seems inconsistent with a later ABA legal ethics opinion involving the information flow issue.

As explained above, the ABA Model Rules explicitly advise lawyers to arrange for their jointly represented clients' consent to a "no secrets" approach -- but then immediately back off that approach.

The pertinent comment begins with the basic principle that makes sense.

As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4.

ABA Model Rule 1.7 cmt. [31] (emphasis added).

However, the comment then explains how this basic principle should guide a lawyer's conduct when beginning a joint representation -- in a sentence that ultimately does not make much sense.

The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other.

Id. (emphasis added).

This is a very odd comment. If a lawyer arranges for the jointly represented clients' consent to an arrangement where "information will be shared," one would think that the lawyer and the client would have to comply with such an arrangement.

However, the very next phrase indicates that a lawyer having arranged for such a "no secrets" approach "will have to withdraw" if one of the jointly represented clients asks that some information not be shared.

It is unclear whether that second phrase involves a situation in which one of the clients indicates that she does not want the information shared -- but has not yet actually disclosed that information to the lawyer. That seems like an unrealistic scenario. It is hard to imagine that a client would tell his lawyer: "I have information that I want to be kept secret from the other jointly represented client, but I'm not going to tell you what that information is." It seems far likelier that the client would simply disclose the information to the lawyer, and then ask the lawyer not to share it with the other jointly represented client. But if that occurs, one would think that the lawyer would be bound by the first phrase in the sentence -- which plainly indicates that "information will be shared" among the jointly represented clients.

Perhaps this rule envisions a third scenario -- in which one of the jointly represented clients begins to provide information to the lawyer that the lawyer senses the client would not want to share, but then stops when the lawyer warns the client not to continue. For instance, the client might say something like: "I have a relationship with my secretary that my wife doesn't know about." Perhaps the ABA meant to deal with a situation like that, in which the lawyer will not feel bound to share the information under the first part of the sentence, but instead withdraw under the second part of the sentence. However, it would seem that any confidential information sufficient to trigger the lawyer's warning to "shut up" would be sufficiently material to require disclosure to the other jointly represented client.

Such a step by the lawyer would also seem unfair (and even disloyal) to the other client. After all, the clients presumably have agreed that their joint lawyer will share all material information with both of them. The lawyer's warning to the disclosing client would seem to favor that client at the expense of the other client.

Even if this third scenario seems unlikely in the real world, this ABA Model Rules Comment's language makes sense only in such a context.

This confusing ABA approach continued in a 2008 legal ethics opinion. In ABA LEO 450 (4/9/08), the ABA dealt with a lawyer who jointly represented an insurance company and an insured -- but who had not advised both clients ahead of time of how the information flow would be handled. Thus, the lawyer had not followed the approach recommend in ABA Model Rule 1.7 cmt. [31].

In ABA LEO 450, the ABA articulated the dilemma that a lawyer faces if one client provides confidential information -- in the absence of some agreement on information flow. Such a lawyer faces a dilemma if he learns confidential information from one client that will cause that client damage if disclosed to the other client.

Absent an express agreement among the lawyer and the clients that satisfies the "informed consent" standard of Rule 1.6(a), the Committee believes that whenever information related to the representation of a client may be harmful to the client in the hands of another client or a third person, the lawyer is prohibited by Rule 1.6 from revealing that information to any person, including the other client and the third person, unless disclosure is permitted under an exception to Rule 1.6.

ABA LEO 450 (4/9/08) (footnote omitted) (emphasis added). The ABA then explained that a lawyer in that setting would have to withdraw from representing the clients.

Absent a valid consent, a lawyer must withdraw from representing the other client if the



lawyer cannot make the disclosure to the client, and cannot fulfill his other obligations without such a disclosure. Id.

One would have expected the ABA to cite the Rule 1.7 comment addressed above.

The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other.

ABA Model Rule 1.7 cmt. [31] (emphasis added).

However, the ABA legal ethics opinion instead inexplicably indicated that such a prior consent might not work. The ABA explained that it was "highly doubtful" that consents provided by the jointly represented clients "before the lawyer understands the facts giving rise to the conflict" will satisfy the "informed consent" standards. ABA LEO 450 (4/9/08).<sup>2</sup> This conclusion seems directly contrary to Comment [31] to ABA Model

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<sup>2</sup> ABA LEO 450 (4/9/08) ("When a lawyer represents multiple clients in the same or related matters, the obligation of confidentiality to each sometimes may conflict with the obligation of disclosure to each." Lawyers hired by an insurance company to represent both an insured employer and an employee must explain at the beginning of the representation whom the lawyer represents (which is based on state law). If there is a chance of adversity in this type of joint representation, "[a]n advance waiver from the carrier or employer, permitting the lawyer to continue representing the insured in the event conflicts arise, may well be appropriate." The lawyer faces a dilemma if he learns confidential information from one client that will cause that client damage if disclosed to the other client; "Absent an express agreement among the lawyer and the clients that satisfies the 'informed consent' standard of Rule 1.6(a), the Committee believes that whenever information related to the representation of a client may be harmful to the client in the hands of another client or a third person, the lawyer is prohibited by Rule 1.6 from revealing that information to any person, including the other client and the third person, unless disclosure is permitted under an exception to Rule 1.6." (footnote omitted). It is "highly doubtful" that consents provided by the jointly represented clients "before the lawyer understands the facts giving rise to the conflict" will satisfy the "informed consent" standards. Absent a valid consent, a lawyer must withdraw from representing the other client if the lawyer cannot make the disclosure to the client, and cannot fulfill his other obligations without such a disclosure. In the case of a lawyer hired by an insurance company to represent an insured, "[t]he lawyer may not reveal the information gained by the lawyer from either the employee or the witness, or use it to the benefit of the insurance company, when the revelation might result in denial of insurance protection to the employee." (footnote omitted). "Lawyers routinely have multiple clients with unrelated matters, and may not share the information of one client with other

Rule 1.7 -- which advises that lawyers should obtain such an informed consent "at the outset of the common representation."

All in all, the ABA approach to this elemental issue is confusing at best. The pertinent ABA Model Rule and comment apparently apply only in a setting that seems implausible in the real world. And the pertinent ABA legal ethics opinion compounds the confusion by apparently precluding exactly the type of "no secrets" joint representation arrangement that Comment [31] encourages lawyers to arrange.

**Courts and Bars.** Most courts and bars take the ABA Model Rules approach -- finding that a joint representation is not sufficient by itself to allow a lawyer jointly representing multiple clients to share all confidences among the clients.

Under this approach, the absence of an agreement on information flow results in the lawyer having to keep secret from one jointly represented client material information that the lawyer learns from another jointly represented client.

- Unnamed Attorney v. Ky. Bar Ass'n, 186 S.W.3d 741, 742, 743 (Ky. 2006) (privately reprimanding a lawyer who had jointly represented a husband and wife in connection with a criminal investigation for failing to explain to the jointly represented clients that he would share the investigation results with both of them; explaining that "Movant advised the Does that a conflict of interest could arise in the course of his work on their behalf. He also advised

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clients. The difference when the lawyer represents multiple clients on the same or a related matter is that the lawyer has a duty to communicate with all of the clients about that matter. Each client is entitled to the benefit of Rule 1.6 with respect to information relating to that client's representation, and a lawyer whose representation of multiple clients is not prohibited by Rule 1.7 is bound to protect the information of each client from disclosure, whether to other clients or otherwise." The insured's normal duty to cooperate with the insurance company does not undermine the lawyer's duty to protect the insured's information from disclosure to the insurance company, if disclosure would harm the insured. A lawyer hired by an insurance company to represent both an employer and an employee must obtain the employee's consent to disclose information that might allow the employer to seek to avoid liability for the employee's actions (the employee's failure to consent to the disclosure would bar the lawyer from seeking the employer's consent to forego such a defense). A lawyer facing this dilemma may have to withdraw from representing all of the clients, but "[t]he lawyer may be able to continue representing the insured, the 'primary' client in most jurisdictions, depending in part on whether that topic has been clarified in advance.").

them that if a conflict of interest did arise he might be required to withdraw from the joint employment. However, he did not advise them that any and all information obtained during the joint representation or obtained in any communication to him by them would be available to each client and exchanged freely between the clients in the absence of a conflict of interest. Movant asserts that he did not anticipate the possibility that the interests of the Does would become so materially divergent that there would be a conflict of interest in providing the results of the investigation to each of them. He acknowledges that he did not explain the potential ramifications of joint representation in that regard." (emphasis added); noting that "[t]he investigation produced information that indicated that one of the Does was directly involved in the shooting, contrary to what Movant had been told. Upon discovery of this information, and following communications with the KBA Ethics Hotline, Movant determined that he should withdraw from the joint employment. Furthermore, Movant concluded that he should not disclose certain results of his investigation to either Mr. or Mrs. Doe without the consent of each of them, which they declined to give. Movant encouraged each of them to obtain new counsel, and they followed this advice." (emphasis added); "In this case there was a lack of required communication by Movant. Specifically, Movant failed to explain that there would be no confidentiality as between the clients and the lawyer, that all information discovered would be furnished to both, and that each client was owed the same duty. When the investigation uncovered information that was favorable to one client but harmful to the other, Movant refused to release the information he had gathered without the acquiescence of both clients, which was not given. This resulted from his failure to initially explain the implications of common representation to both clients. When the investigation revealed that one of the clients was involved in the homicide, Movant had a duty with respect to that client to keep that fact confidential. On the other hand, he had a duty to the other client to provide exculpatory information which necessarily included information he was obligated to keep confidential." (emphasis added)).

- District of Columbia LEO 327 (2/2005) (addressing a situation in which a law firm which jointly represented several clients withdrew from representing some of the clients and continued to represent other clients; explaining that the law firm which began to represent the clients dropped by the first firm asked that firm to disclose all of the information it learned during the joint representation, which the firm refused to provide; ultimately concluding that the firm had to disclose to its successor all of the information it had acquired from any of the clients during the joint representation; "[I]t was 'understood that (a) we will not be able to advise you about potential claims you may have against any of the Other Individuals whom we represent and (b) information you provide to use in connection with our representation of you may be shared by us with the Other Individuals whom we represent.'"; "After apparently learning certain confidential information from one of the jointly

represented clients, the prior firm withdrew from representing the other clients and continued to represent only the client from whom the confidential information had been learned. Upon assuming the representation of the other clients, the inquiring law firm requested that the prior firm disclose all information relevant to its prior representation of those clients, including the confidential information that had led to its withdrawal. The prior firm refused. The inquirer seeks an opinion whether, under these circumstances, the prior firm is required to share with the other clients all relevant information learned during its representation, including any relevant confidences and secrets.";

"[T]he retainer agreement here expressly provided that information disclosed in connection with the representation "may be shared" with the other clients in the same matter.";

"The retainer agreement presumably reflects a collective determination by all co-clients that the interests in keeping one another informed outweighs their separate interests in confidentiality. Where the disclosing client has expressly or impliedly authorized the disclosure of relevant, confidential information to the lawyer's other clients in the same matter, the duty to keep the non-disclosing clients informed of anything bearing on the representation that might affect their interests requires the lawyer to disclose the confidential information. . . . Where the disclosing client has unambiguously consented to further disclosure, a lawyer's duty of loyalty to and the duty to communicate with the non-disclosing client tips the balance in favor of disclosure. Indeed, in light of the disclosing client's consent, there is nothing left on the other side of the balance. (footnote omitted);

"It is, of course, possible that a client who has otherwise consented to the disclosure of confidential information may withdraw such consent for a specific disclosure. Where a client informs the lawyer before disclosing certain confidential information that he or she intends to reveal something that may not be shared with the lawyer's other clients (notwithstanding a prior agreement to do so), the lawyer has an obligation at that point to inform the client that no such confidences may be kept. . . . Under the terms of the retainer agreement, the prior firm's duty to communicate any relevant information to the other clients included any relevant information learned from other clients in the same matter, and this duty attached at the moment the prior firm learned the information. This underscores how important it is for a lawyer carefully to explain to all clients in a joint representation that, when they agree that any relevant or material information may be shared with one another, they cannot expect that any relevant or material confidential information they may subsequently reveal to the lawyer will be kept from the other co-clients.";

"If the clients had not all agreed that the prior firm was authorized to share relevant or material information, the 'default' rule in our jurisdiction is that the prior firm would have been prohibited from sharing one client's confidences with the others. . . . But by contracting around this 'default' rule, the clients (and the prior firm) agreed that relevant or material information would be shared. Under these specific circumstances -- where the disclosing client has effectively consented to the disclosure -- an attorney's subsequent refusal to share such information with the other clients

- violates the D.C. Rules of Professional Conduct." (emphasis added); "[A] lawyer violates the D.C. Rules of Professional Conduct when her [sic] or she withholds from one client relevant or material confidential information obtained from a co-client who has consented to the disclosure."; "Where one client has given consent to the disclosure of confidential information by the lawyer to another client, we have already concluded that the lawyer may reveal the confidence or secret. Here we conclude that the lawyer must do so if the information is relevant or material to the lawyer's representation of the other client. Because the disclosing client previously has waived confidentiality, there is nothing to weigh against either the lawyer's duty of loyalty to the non-disclosing client or the lawyer's obligation to keep that client reasonably informed of anything bearing on the representation that might affect that client's interests.").
- Georgia LEO 03-2 (9/11/03) ("The obligation of confidentiality described in Rule 1.6, Confidentiality of Information, applies as between two jointly represented clients. An attorney must honor one client's request that information be kept confidential from the other jointly represented client. Honoring the client's request will, in most circumstances, require the attorney to withdraw from the joint representation." (emphasis added); "Unlike the attorney-client privilege, jointly represented clients do not lose the protection of confidentiality described in Rule 1.6, Confidentiality of Information, as to each other by entering into the joint representation. See, e.g., D.C. Bar Legal Ethics Committee, Opinion No. 296 (2000) and Committee on Professional Ethics, New York State Bar Association, Opinion No. 555 (1984). Nor do jointly represented clients impliedly consent to a sharing of confidences with each other since client consent to the disclosure of confidential information under Rule 1.6 requires consultation." (emphasis added); "When one client in a joint representation requests that some information relevant to the representation be kept confidential from the other client, the attorney must honor the request and then determine if continuing with the representation while honoring the request will: (a) be inconsistent with the lawyer's obligations to keep the other client informed under Rule 1.4, Communication; (b) materially and adversely affect the representation of the other client under Rule 1.7, Conflict of Interest: General Rule; or (c) or both." (emphasis added); "The potential problems that confidentiality can create between jointly represented clients make it especially important that clients understand the requirements of a joint representation prior to entering into one. . . . If it appears to the attorney that either client is uncomfortable with the required sharing of confidential information that joint representation requires, the attorney should reconsider whether joint representation is appropriate in the circumstances. If a putative jointly represented client indicates a need for confidentiality from another putative jointly represented client, then it is very likely that joint representation is inappropriate and the putative clients need individual representation by separate attorneys.").

- District of Columbia LEO 296 (2/15/00) ("The inquirer, a private law firm ('Firm'), has asked whether it is allowed or obligated to advise an employer, who paid the law firm to obtain a work trainee visa from the Immigration and Naturalization Service ('INS') for its alien employee, of its subsequent discovery that the employee had fabricated the credentials that qualified her for the visa."; "The Firm desires to advise fully at the least the petitioning Employer of the alien employee's falsification. However, it does not wish to violate any duty under Rule 1.6 to protect client confidences or secrets that may exist between the alien and the Firm."; "In a joint representation, a lawyer owes ethical duties of loyalty and confidentiality, as well as the duty to inform, to each client. A joint representation in and of itself does not alter the lawyer's ethical duties to each client, including the duty to protect each client's confidences." (emphasis added); "The best practice is clearly to advise clients at the outset of a representation of the potential for ethical conflicts ahead. Written disclosure of potential effects of joint representation and written consent can substantially mitigate, if not eliminate, the ethical tensions inherent in common representation."; "Where duties to the two clients conflict, and no advance consent has been obtained, the law firm should make an effort to fulfill its duties to the employer by seeking the employee's informed consent to divulge the information. In the alternative, the Firm should encourage the employee client to divulge the facts to the Employer client. The Firm's fiduciary duty to the Employer requires an affirmative effort to achieve disclosure within the bounds of Rule 1.6 before withdrawing from the representation."; "Without clear authorization, a lawyer may not divulge the secrets of one client to another, even where the discussion involves the subject matter of the joint representation. This is particularly true where disclosure would likely be detrimental to the disclosing client. None of the other exceptions set forth in Rule 1.6 applies. Thus, absent client consent, the Firm may not divulge the secret. This result may seem unpalatable to the extent that the Employer who is also a client is left employing a dishonest worker whose visa has been fraudulently obtained pursuant to a petition signed by the Employer under penalty of perjury. Striking the balance in favor of protecting client confidences and secrets is nonetheless required by our Rules. The guarantee of confidentiality of communication between client and attorney is a cornerstone of legal ethics." (emphases added); ultimately concluding that a "lawyer who undertakes representation of two clients in the same matter should address in advance and, where possible in writing, the impact of joint representation on the lawyer's duty to maintain client confidences and to keep each client reasonably informed, and obtain each client's informed consent to the arrangement. The mere fact of joint representation, without more, does not provide a basis for implied authorization to disclose one client's confidences to another."; "Where express consent to share client confidences has not been obtained and one client shares in confidence relevant information that the lawyer should report to the non-disclosing client in order to keep that client reasonably informed, to satisfy his duty to the non-disclosing client the lawyer should seek consent of

- the disclosing client to share the information directly to the other client. If the lawyer cannot achieve disclosure, a conflict of interest is created that requires withdrawal."). [Although Washington, D.C., revised its ethics rules in 2007, new comments [14] - [18] to D.C. Rule 1.7 follow the ABA approach, and thus presumably do not affect the continuing force of this earlier legal ethics opinion.]
- Florida LEO 95-4 (5/30/97) (analyzing a joint representation in an estate-planning setting; analyzing a situation in which the client husband confides in the lawyer that the husband would like to make "substantial beneficial disposition" to another woman with whom the husband had been having an affair; framing the issue as: "We now turn to the central issue presented, which is the application of the confidentiality rule in a situation where confidentiality was not discussed at the outset of the joint representation." (emphasis added); "It has been suggested that, in a joint representation, a lawyer who receives information from the 'communicating client' that is relevant to the interests of the non-communicating client may disclose the information to the latter, even over the communicating client's objections and even where disclosure would be damaging to the communicating client. The committee is of the opinion that disclosure is not permissible and therefore rejects this 'no-confidentiality' position." (emphasis added); "It has been argued in some commentaries that the usual rule of lawyer-client confidentiality does not apply in a joint representation and that the lawyer should have the discretion to determine whether the lawyer should disclose the separate confidence to the non-communicating client. This discretionary approach is advanced in the Restatement, sec. 112, comment l. [Proposed Final Draft, Mar. 29, 1996]. This result is also favored by the American College of Trusts and Estates in its Commentaries on the Model Rules of Professional Conduct (2d ed. 1995) (hereinafter the 'ACTEC Commentaries'). The Restatement itself acknowledges that no case law supports the discretionary approach. Nor do the ACTEC Commentaries cite any supporting authority for this proposition."; "The committee rejects the concept of discretion in this important area. Florida lawyers must have an unambiguous rule governing their conduct in situations of this nature. We conclude that Lawyer owes duties of confidentiality to both Husband and Wife, regardless of whether they are being represented jointly. Accordingly, under the facts presented Lawyer is ethically precluded from disclosing the separate confidence to Wife without Husband's consent." (emphasis added); "The committee recognizes that a sudden withdrawal by Lawyer almost certainly will raise suspicions on the part of Wife. This may even alert Wife to the substance of the separate confidence. Regardless of whether such surmising by Wife occurs when Lawyer gives notice of withdrawal, Lawyer nevertheless has complied with the Rules of Professional Conduct and has not violated Lawyer's duties to Husband."; ultimately concluding that "[i]n a joint representation between husband and wife in estate planning, an attorney is not required to discuss issues regarding confidentiality at the outset of

representation. The attorney may not reveal confidential information to the wife when the husband tells the attorney that he wishes to provide for a beneficiary that is unknown to the wife. The attorney must withdraw from the representation of both husband and wife because of the conflict presented when the attorney must maintain the husband's separate confidences regarding the joint representation." (emphasis added)).

- New York LEO 555 (1/17/84) (addressing the following situation: "A and B formed a partnership and employed Lawyer L to represent them in connection with the partnership affairs. Subsequently, B, in a conversation with Lawyer L, advised Lawyer L that he was actively breaching the partnership agreement. B preceded this statement to Lawyer L with the statement that he proposed to tell Lawyer L something 'in confidence.' Lawyer L did not respond to that statement and did not understand that B intended to make a statement that would be of importance to A but was to be kept confidential from A. Lawyer L had not, prior thereto, advised A or B that he could not receive from one communications regarding the subject of the joint representation that would be confidential from the other. B has subsequently declined to tell A what he has told Lawyer L. Lawyer L now asks what course he may or must take with respect to disclosure to A of what B has told him and with respect to continued representation of the partners."; ultimately concluding that "[i]t is the opinion of the Committee that (i) Lawyer L may not disclose to A what B has told him, and (ii) Lawyer L must withdraw from further representation of the partners with respect to the partnership affairs."; "The Committee believes that the question ultimately is whether each of the clients, by virtue of jointly employing the lawyer, impliedly agrees or consents to the lawyer's disclosing to the other all communications of each on the subject of the representation. It is the opinion of the Committee that, at least in dealing with communications to the lawyer directly from one of the joint clients, the mere joint employment is not sufficient, without more, to justify implying such consent where disclosure of the communication to the other joint client would obviously be detrimental to the communicating client. This is not to say that such consent is never to be found. The lawyer may, at the outset of the joint representation or even perhaps at some later stage if otherwise appropriate, condition his acceptance or continuation of the joint representation upon the clients' agreement that all communications from one on the subject of the joint representation shall or may be disclosed to the other. Where one joint client is a long-time client and the other is introduced to the lawyer to be represented solely in the one joint matter, it may be appropriate for the lawyer to obtain clear consent from the new client to disclosure to the long-time client. . . . Whatever is done, the critical point is that the circumstances must clearly demonstrate that it is fair to conclude that the clients have knowingly consented to the limited non-confidentiality." (footnote omitted) (emphasis added); "Both EC 5-16 and Rule 2.2 of the Model Rules emphasize that, before undertaking a joint representation, the lawyer should explain fully to each the implications of the joint representation.



Absent circumstances that indicate consent in fact, consent should not be implied."; "Of course, the instant fact situation is a fortiori. Here, the client specifically in advance designated his communication as confidential, and the lawyer did not demur. Under the circumstances, the confidence must be kept.").

### **"Default Rule" in the Absence of an Agreement Among the Clients: Authorities Recognizing a "No Secrets" Approach**

In stark contrast to the ABA Model Rules' and various state bars' requirement that lawyers keep secrets in the absence of an agreement to the contrary, some authorities take the opposite approach.

These authorities set the "default" position as either requiring or allowing disclosure of client confidences among jointly represented clients in the absence of an explicit agreement to do so.

**Restatement.** The Restatement takes this contrary approach.

Before turning to the Restatement's current language, it is worth noting that the Restatement itself explains both the history of the Restatement's conclusion and the lack of much other support for its approach.

The position in the Comment on a lawyer's discretion to disclose hostile communications by a co-client has been the subject of very few decisions. It was approved and followed in *A v. B.*, 726 A.2d 924 (N.J.1999). It is also the result favored by the American College of Trusts and Estates Counsel in its ACTEC Commentaries on the Model Rules of Professional Conduct 68 (2d ed. 1995) ("In such cases the lawyer should have a reasonable degree of discretion in determining how to respond to any particular case. . . ."); on the need to withdraw when a disclosing client refuses to permit the lawyer to provide the information to another co-client, see *id.* at 69; see generally Collett, *Disclosure, Discretion, or Deception: The Estate Planner's Ethical Dilemma from a Unilateral Confidence*, 28 *Real Prop. Prob. Tr. J.* 683 (1994). Council Draft No. 11 of the Restatement (1995) took the position that disclosure to an affected, noninformed co-client was mandatory, in view of the

common lawyer's duties of competence and communication and the lack of a legally protected right to confidentiality on the part of the disclosing co-client. That position was rejected by the Council at its October 1995 meeting, resulting in the present formulation.

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

Thus, the Restatement changed from required disclosure to discretionary disclosure in the final version.

Elsewhere the Restatement again admits that

[t]here is little case authority on the responsibilities of a lawyer when, in the absence of an agreement among the co-clients to restrict sharing of information, one co-client provides to the lawyer material information with the direction that it not be communicated to another co-client.

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

Perhaps because of the Restatement's changing approach during the drafting process, the Restatement contains internally inconsistent provisions. Some sections seem to require disclosure of one jointly represented client's confidences to the other, while other sections seem to merely allow such disclosure.

The mandatory disclosure language appears in several Restatement provisions.

The Restatement first deals with this issue in its discussion of a lawyer's basic duty of confidentiality.

Sharing of information among the co-clients with respect to the matter involved in the representation is normal and typically expected. As between the co-clients, in many such relationships each co-client is under a fiduciary duty to share all information material to the co-clients' joint enterprise. Such is the law, for example, with respect to members of a partnership. Limitation of the attorney-client privilege as applied to communications of co-clients is based on an assumption that each intends that his or her communications with the lawyer will be shared with the other co-clients but

otherwise kept in confidence . . . . Moreover, the common lawyer is required to keep each of the co-clients informed of all information reasonably necessary for the co-client to make decisions in connection with the matter . . . . The lawyer's duty extends to communicating information to other co-clients that is adverse to a co-client, whether learned from the lawyer's own investigation or learned in confidence from that co-client.

Id. (emphases added).

The same principle also appears in a broader discussion of joint representations.

A lawyer may represent two or more clients in the same matter as co-clients either when there is no conflict of interest between them . . . or when a conflict exists but the co-clients have adequately consented . . . . When a conflict of interest exists, as part of the process of obtaining consent, the lawyer is required to inform each co-client of the effect of joint representation upon disclosure of confidential information . . . , including both that all material information will be shared with each co-client during the course of the representation and that a communicating co-client will be unable to assert the attorney-client privilege against the other in the event of later adverse proceedings between them.

Id. (emphasis added).

Mandatory language also shows up in the Restatement provision dealing with attorney-client privilege issues.

Rules governing the co-client privilege are premised on an assumption that co-clients usually understand that all information is to be disclosed to all of them. Courts sometimes refer to this as a presumed intent that there should be no confidentiality between co-clients. Fairness and candor between the co-clients and with the lawyer generally preclude the lawyer from keeping information secret from any one of them, unless they have agreed otherwise.

Restatement (Third) of Law Governing Lawyers § 75 cmt. d (2000) (emphases added).

Co-clients may agree that the lawyer will not disclose certain confidential communications of one co-client to other co-

clients. . . . In the absence of such an agreement, the lawyer ordinarily is required to convey communications to all interested co-clients.

Id. (emphasis added).

The Restatement provides a helpful illustration explaining this "default" rule in the attorney-client privilege context.

Client X and Client Y jointly consult Lawyer about establishing a business, without coming to any agreement about the confidentiality of their communications to Lawyer. X sends a confidential memorandum to Lawyer in which X outlines the proposed business arrangement as X understands it. The joint representation then terminates, and Y knows that X sent the memorandum but not its contents. Subsequently, Y files suit against X to recover damages arising out of the business venture. Although X's memorandum would be privileged against a third person, in the litigation between X and Y the memorandum is not privileged. That result follows although Y never knew the contents of the letter during the joint representation.

Id. illus. 1 (emphasis added).

Although appearing in the privilege section, this language seems clear on its face -- requiring disclosure to the other jointly represented clients rather than just allowing it.

Thus, the Restatement's provision on privilege seems to require (rather than just allow) disclosure among jointly represented clients -- and also indicates that a lawyer who is jointly representing clients must disclose such information even once the joint representation has ended. Both of these provisions seem to contradict the discretionary language in the central rule on the information flow issue (discussed below). The latter provision seems especially ironic. It provides that a lawyer who is no longer even representing a former client must disclose information to that now-former client that the

lawyer earlier learned from another jointly represented client. If such a duty of disclosure exists after the representation ends, one would think that even a higher duty applies in the course of the representation.

The discretionary disclosure language appears elsewhere.

In one provision, the Restatement seems to back away from the position that a lawyer must share confidences (in the absence of an agreement dealing with information flow), and instead recognizes that the lawyer has discretion to do so -- when withdrawing from a joint representation.

There is little case authority on the responsibilities of a lawyer when, in the absence of an agreement among the co-clients to restrict sharing information, one co-client provides to the lawyer material information with the direction that it not be communicated to another co-client. The communicating co-client's expectation that the information be withheld from the other co-client may be manifest from the circumstances, particularly when the communication is clearly antagonistic to the interests of the affected co-client. The lawyer thus confronts a dilemma. If the information is material to the other co-client, failure to communicate it would compromise the lawyer's duties of loyalty, diligence . . . , and communication (see § 20) to that client. On the other hand, sharing the communication with the affected co-client would compromise the communicating client's hope of confidentiality and risks impairing that client's trust in the lawyer. Such circumstances create a conflict of interest among the co-clients. . . . The lawyer cannot continue in the representation without compromising either the duty of communication to the affected co-client or the expectation of confidentiality on the part of the communicating co-client. Moreover, continuing the joint representation without making disclosure may mislead the affected client or otherwise involve the lawyer in assisting the communicating client in a breach of fiduciary duty or other misconduct. Accordingly, the lawyer is required to withdraw unless the communicating client can be persuaded to permit sharing of the communication . . . . Following withdrawal, the lawyer may not, without consent of both, represent either co-client adversely to the other with respect to the same or a

substantially related matter . . . . In the course of withdrawal, the lawyer has discretion to warn the affected co-client that a matter seriously and adversely affecting that person's interests has come to light, which the other co-client refuses to permit the lawyer to disclose. Beyond such a limited warning, the lawyer, after consideration of all relevant circumstances, has the further discretion to inform the affected co-client of the specific communication if, in the lawyer's reasonable judgment, the immediacy and magnitude of the risk to the affected co-client outweigh the interest of the communicating client in continued secrecy. In making such determinations, the lawyer may take into account superior legal interests of the lawyer or of affected third persons, such as an interest implicated by a threat of physical harm to the lawyer or another person.

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

This seems like the reverse of what the rule should be. One would think that a lawyer should have discretion to decide during a representation whether to share confidences with the other clients, but have a duty to share confidences if the lawyer obtains information so material that it requires the lawyer's withdrawal.

The Restatement then provides three illustrations guiding lawyers in how they should exercise their discretion to disclose the confidence -- depending on the consequences of the disclosure.

These illustrations seem to adopt the discretionary approach rather than the mandatory approach of the other Restatement section.

Interestingly, all of the illustrations involve a client disclosing the confidence to the lawyer -- and then asking the lawyer not to share the confidence with another jointly represented client. As explained above, the ABA Model Rules provisions seem to address a much less likely scenario -- in which the client asks the lawyer not to share

information after telling the lawyer that the client has such information but before the client actually shares it with the lawyer.

The three Restatement illustrations represent a spectrum of the confidential information's materiality.

The first scenario involves financially immaterial information that could have an enormous emotional impact -- the lawyer's desire to leave some money to an illegitimate child of which his wife is unaware.

Lawyer has been retained by Husband and Wife to prepare wills pursuant to an arrangement under which each spouse agrees to leave most of their property to the other . . . . Shortly after the wills are executed, Husband (unknown to Wife) asks Lawyer to prepare an inter vivos trust for an illegitimate child whose existence Husband has kept secret from Wife for many years and about whom Husband had not previously informed Lawyer. Husband states that Wife would be distraught at learning of Husband's infidelity and of Husband's years of silence and that disclosure of the information could destroy their marriage. Husband directs Lawyer not to inform Wife. The inter vivos trust that Husband proposes to create would not materially affect Wife's own estate plan or her expected receipt of property under Husband's will, because Husband proposes to use property designated in Husband's will for a personally favored charity. In view of the lack of material effect on Wife, Lawyer may assist Husband to establish and fund the inter vivos trust and refrain from disclosing Husband's information to Wife.

Restatement (Third) of Law Governing Lawyers § 60 cmt. 1, illus. 2 (2000) (emphases added). The second scenario involves information that is more monetarily material.

Same facts as Illustration 2, except that Husband's proposed inter vivos trust would significantly deplete Husband's estate, to Wife's material detriment and in frustration of the Spouses' intended testamentary arrangements. If Husband refuses to inform Wife or to permit Lawyer to do so, Lawyer must withdraw from representing both Husband and Wife. In the light of all relevant circumstances, Lawyer may exercise

discretion whether to inform Wife either that circumstances, which Lawyer has been asked not to reveal, indicate that she should revoke her recent will or to inform Wife of some or all the details of the information that Husband has recently provided so that Wife may protect her interests. Alternatively, Lawyer may inform Wife only that Lawyer is withdrawing because Husband will not permit disclosure of relevant information.

Id. illus. 3 (emphases added). The final scenario involves very material information in another setting -- one jointly represented client's conviction for an earlier fraud.

Lawyer represents both A and B in forming a business. Before the business is completely formed, A discloses to Lawyer that he has been convicted of defrauding business associates on two recent occasions. The circumstances of the communication from A are such that Lawyer reasonably infers that A believes that B is unaware of that information and does not want it provided to B. Lawyer reasonably believes that B would call off the arrangement with A if B were made aware of the information. Lawyer must first attempt to persuade A either to inform B directly or to permit Lawyer to inform B of the information. Failing that, Lawyer must withdraw from representing both A and B. In doing so, Lawyer has discretion to warn B that Lawyer has learned in confidence information indicating that B is at significant risk in carrying through with the business arrangement, but that A will not permit Lawyer to disclose that information to B. On the other hand, even if the circumstances do not warrant invoking § 67, Lawyer has the further discretion to inform B of the specific nature of A's communication to B if Lawyer reasonably believes this necessary to protect B's interests in view of the immediacy and magnitude of the threat that Lawyer perceives posed to B.

Id. illus. 4 (emphases added).

Thus, the Restatement clearly takes a position that differs from the ABA Model Rules. In contrast to the ABA Model Rules approach, the Restatement does not require a lawyer to keep secret from one jointly represented client what the lawyer has learned from another jointly represented client.



However, the Restatement seems to conclude in some sections that in the absence of some agreement the lawyer must disclose such confidences, while in other sections seems to conclude that the lawyer has discretion whether or not to disclose confidences.

**ACTEC Commentaries.** The ACTEC Commentaries take the same approach as the Restatement -- rejecting a "no secrets" approach in the absence of an agreement on information flow among jointly represented clients.<sup>3</sup>

In the absence of any agreement to the contrary (usually in writing), a lawyer is presumed to represent multiple clients with regard to related legal matters jointly with resulting full sharing of information between the clients. The better practice in all cases is to memorialize the clients' instructions in writing and give a copy of the writing to the client. Nothing in the foregoing should be construed as approving the representation by a lawyer of both parties in the creation of inherently adversarial contract (e.g., marital property agreement) which is not subject to rescission by one of the parties without the consent and joinder of the other. See ACTEC Commentary on MRPC 1.7 (Conflicts of Interest: Current Clients). The lawyer may wish to consider holding a separate interview with each prospective client, which may allow the clients to be more candid and, perhaps, reveal conflicts of interest that would not otherwise be disclosed.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.6, at 75-76 (4th ed. 2006), [http://www.actec.org/Documents/misc/ACTEC\\_Commentaries\\_4th\\_02\\_14\\_06.pdf](http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf) (emphasis added).

Like the Restatement, the ACTEC Commentaries provide some guidance to a lawyer jointly representing clients who learns confidences from one client that might be

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<sup>3</sup> In fact, as explained above, the Restatement points to the ACTEC Commentaries as one of the sources of its guidance. Restatement (Third) of Law Governing Lawyers § 60 reporter's notes cmt. I (2000).

of interest to the other client (in the absence of a prior agreement dealing with the information flow).

The ACTEC Commentaries first explain that the lawyer should distinguish immaterial from material confidential information.

A lawyer who receives information from one joint client (the "communicating client") that the client does not wish to be shared with the other joint client (the "other client") is confronted with a situation that may threaten the lawyer's ability to continue to represent one or both of the clients. As soon as practicable after such a communication, the lawyer should consider the relevance and significance of the information and decide upon the appropriate manner in which to proceed. The potential courses of action include, inter alia, (1) taking no action with respect to communications regarding irrelevant (or trivial) matters; (2) encouraging the communicating client to provide the information to the other client or to allow the lawyer to do so; and (3) withdrawing from the representation if the communication reflects serious adversity between the parties. For example, a lawyer who represents a husband and wife in estate planning matters might conclude that information imparted by one of the spouses regarding a past act of marital infidelity need not be communicated to the other spouse. On the other hand, the lawyer might conclude that he or she is required to take some action with respect to a confidential communication that concerns a matter that threatens the interests of the other client or could impair the lawyer's ability to represent the other client effectively (e.g., "After she signs the trust agreement, I intend to leave her . . ." or "All of the insurance policies on my life that name her as beneficiary have lapsed"). Without the informed consent of the other client, the lawyer should not take any action on behalf of the communicating client, such as drafting a codicil or a new will, that might damage the other client's economic interests or otherwise violate the lawyer's duty of loyalty to the other client.

Id. at 76 (emphases added).

The ACTEC Commentaries suggest that the lawyer facing this awkward situation first urge that the client providing the information to disclose the information himself (or herself) to the other client.

In order to minimize the risk of harm to the clients' relationship and, possibly, to retain the lawyer's ability to represent both of them, the lawyer may properly urge the communicating client himself or herself to impart the confidential information directly to the other client. See ACTEC Commentary on MRPC 2.1 (Advisor). In doing so, the lawyer may properly remind the communicating client of the explicit or implicit understanding that relevant information would be shared and of the lawyer's obligation to share the information with the other client. The lawyer may also point out the possible legal consequences of not disclosing the confidence to the other client, including the possibility that the validity of actions previously taken or planned by one or both of the clients may be jeopardized. In addition, the lawyer may mention that the failure to communicate the information to the other client may result in a disciplinary or malpractice action against the lawyer.

Id. at 76-77 (emphases added).

The ACTEC Commentaries then describe the lawyer's next step -- ultimately concluding that the lawyer has discretion to disclose such confidential information.

If the communicating client continues to oppose disclosing the confidence to the other client, the lawyer faces an extremely difficult situation with respect to which there is often no clearly proper course of action. In such cases the lawyer should have a reasonable degree of discretion in determining how to respond to any particular case. In fashioning a response, the lawyer should consider his or her duties of impartiality and loyalty to the clients; any express or implied agreement among the lawyer and the joint clients that information communicated by either client to the lawyer or otherwise obtained by the lawyer regarding the subject of the representation would be shared with the other client; the reasonable expectations of the clients; and the nature of the confidence and the harm that may result if the confidence is, or is not, disclosed. In some instances the lawyer must also consider whether the situation involves such adversity that

the lawyer can no longer effectively represent both clients and is required to withdraw from representing one or both of them. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: Current Clients). A letter of withdrawal that is sent to the other client may arouse the other client's suspicions to the point that the communicating client or the lawyer may ultimately be required to disclose the information.

Id. at 77 (emphases added).

The ACTEC Commentaries' conclusion about a lawyer's withdrawal in this awkward situation makes little sense. There are a number of situations in which a lawyer must withdraw from a representation without explaining why. In a joint representation context, a lawyer who has arranged for a "keep secrets" approach might well have to withdraw from both representations if information the lawyer has learned from one client (and must keep secret from the other client) would materially affect the lawyer's representation of one or both clients. Even outside the joint representation context, lawyers might learn information from one client that would effectively preclude the lawyer from representing another client.

For instance, representing a client in a highly secret matter (which that client has asked to remain completely confidential) might become the possible target of another client's hostile takeover effort. A lawyer invited to represent that second client while simultaneously representing the first client would have to politely decline that piece of work -- without explaining why. The second client undoubtedly would have suspicions about the reason for the lawyer's refusal to take on the work (a simultaneous representation of the target in an unrelated matter), but the lawyer could not explicitly disclose the reason why the lawyer could not take on the work.

Thus, it does not make much sense to say (as the ACTEC Commentaries indicate) that the withdrawal letter "may arouse the other client's suspicions to the point that the communicating client or the lawyer may ultimately be required to disclose the information." Id. If there is a duty not to disclose the information, the lawyer sending the withdrawal letter simply cannot make the disclosure, regardless of any client's suspicions.

**Courts and Bars.** Although most states seem to take the "keep secrets" default position (discussed above), at least one state appears to adopt the approach taken by the Restatement and the ACTEC Commentaries -- recognizing lawyers' discretion in this situation.

In 1999, the New Jersey Supreme Court analyzed a situation in which a lawyer jointly representing a husband and a wife in estate planning learned from a third party that the husband had fathered a child out of wedlock. A. v. B., 726 A.2d 924 (N.J. 1999).

The court explained that the retainer letter signed by the husband and wife "acknowledge[d] that information provided by one client could become available to the other," but did not explicitly require such sharing. Id. at 928. As the court explained it,

[t]he letters, however, stop short of explicitly authorizing the firm to disclose one spouse's confidential information to the other. Even in the absence of any such explicit authorization, the spirit of the letters supports the firm's decision to disclose to the wife the existence of the husband's illegitimate child.

Id. The New Jersey Supreme Court ultimately explained that the lawyer in that situation had discretion to disclose the information.

In the absence of an agreement to share confidential information with co-clients, the Restatement reposes the resolution of the lawyer's competing duties within the lawyer's discretion.

Id. at 929.

The New Jersey Supreme Court recognized that the ACTEC Commentaries agreed with this approach, while other state bars have taken the opposite position. Among other things, the New Jersey Supreme Court noted that the lawyer had learned the information from a third party, rather than one of the jointly represented clients. The court ultimately found it unnecessary to "reach the issue whether the lawyer's obligation to disclose is discretionary or mandatory" -- but clearly rejected the "keep secrets" approach.<sup>4</sup>

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<sup>4</sup> A. v. B., 726 A.2d 924, 928, 929, 929-30, 931, 932 (N.J. 1999) (analyzing a situation in which a lawyer jointly representing a husband and wife in estate planning learned from a third party that the husband fathered a child out of wedlock; "In addition, the husband and wife signed letters captioned 'Waiver of Conflict of Interest.' These letters acknowledge that information provided by one client could become available to the other. The letters, however, stop short of explicitly authorizing the firm to disclose one spouse's confidential information to the other. Even in the absence of any such explicit authorization, the spirit of the letters supports the firm's decision to disclose to the wife the existence of the husband's illegitimate child."; "As the preceding authorities suggest, an attorney, on commencing joint representation of co-clients, should agree explicitly with the clients on the sharing of confidential information. In such a 'disclosure agreement,' the co-clients can agree that any confidential information concerning one co-client, whether obtained from a co-client himself or herself or from another source, will be shared with the other co-client. Similarly, the co-clients can agree that unilateral confidences or other confidential information will be kept confidential by the attorney. Such a prior agreement will clarify the expectations of the clients and the lawyer and diminish the need for future litigation. In the absence of an agreement to share confidential information with co-clients, the Restatement reposes the resolution of the lawyer's competing duties within the lawyer's discretion."; "In authorizing non-disclosure, the Restatement explains that an attorney should refrain from disclosing the existence of the illegitimate child to the wife because the trust 'would not materially affect Wife's own estate plan or her expected receipt of property under Husband's will.'"; noting that the American College of Trust and Estate Counsel agree with this discretionary standard; also acknowledging that "[t]he Professional Ethics Committees of New York and Florida, however, have concluded that disclosure to a co-client is prohibited. New York State Bar Ass'n Comm. on Professional Ethics, Op. 555 (1984); Florida State Bar Ass'n Comm. on Professional Ethics, Op. 95-4 (1997)."; emphasizing that the lawyer learned the information from a third party, not from either of the jointly represented clients; "Because Hill Wallack [lawyer] wishes to make the disclosure, we need not reach the issue whether the lawyer's obligation to disclose is discretionary or mandatory. In conclusion, Hill Wallack may inform the wife of the existence of the husband's illegitimate child."; "The law firm learned of the husband's paternity of the child through the mother's disclosure before the institution of the paternity suit. It does not seek to disclose the identity of the mother or the child. Given the wife's need for the information and law firm's right to disclose it, the disclosure of the child's existence to the wife

At least one bar also rejected the "keep secrets" approach in the absence of a previous agreement about information flow -- although in an opinion dealing with a lawyer's duty to disclose all pertinent information to former jointly represented clients. Although this scenario deals with privilege rather than ethics, it highlights the issue.

- Maryland LEO 2006-15 (2006) (holding that a lawyer fired by one of two jointly represented clients [who have now become adversaries] must withdraw from representing both clients, even if both clients consent to the lawyer's continuing to represent just one of the clients; "The lawyer is likely unable to provide competent and diligent representation to clients with interests that are diametrically opposed to one another. Further, (b)(3) [Maryland Ethics Rule 1.7(b)(3)] forbids the continued representation, even with a waiver, where one client asserts a claim against the other. That appears to be the case here, and, therefore, the conflict is not waivable."; also holding that the lawyer must provide both of the formerly jointly represented clients the lawyer's files; "With regard to the remaining two issues, former-Client B should have unfettered access to Attorney 1's files under what has been recognized by some courts as the 'Joint Representation Doctrine, ' which provides that: Generally, where the same lawyer jointly represents two clients with respect to the same matter, the clients have no expectation that their confidences concerning the joint matter will remain secret from each other, and those confidential communications are not within the privilege in subsequent adverse proceedings between the co-clients." (emphasis added)).

Although similar to a court's dicta, the Maryland LEO's approach places it on the "no secrets" side of the divide among courts and bars.

### **Wisdom of Agreeing in Advance on the Information Flow**

Given the surprising and troubling disagreement among ethics authorities and case law on the "default rule" in the absence of an information-flow agreement among jointly represented clients, lawyers should arrange for such an agreement.

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constitutes an exceptional case with 'compelling reason clearly and convincingly shown.'" (citation omitted)).

Although arranging for jointly represented clients to agree in advance on the information flow does not solve every problem, it certainly reduces the uncertainty and potentially saves lawyers from an awkward situation (or worse).

Thus, several authorities emphasize the wisdom of lawyers explaining the information flow to their clients at the beginning of any joint representation, and arranging for the clients' consent to the desired information flow. Whether the clients agree to a "keep secrets" or "no secrets" approach, at least an explicit agreement provides guidance to the clients and to the lawyer.

The ABA Model Rules advise lawyers to address the information flow issue at the beginning, but in essence directs the lawyer to arrange for a "no secrets" approach.

The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other.

ABA Model Rule 1.7 cmt. [31] (emphasis added).

The ACTEC Commentaries repeatedly advise lawyers to address the information flow at the beginning of a joint representation.

When the lawyer is first consulted by the multiple potential clients, the lawyer should review with them the terms upon which the lawyer will undertake the representation, including the extent to which information will be shared among them. . . . The better practice in all cases is to memorialize the clients' instructions in writing and give a copy of the writing to the client.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.6, at 75 (4th ed. 2006),



[http://www.actec.org/Documents/misc/ACTEC\\_Commentaries\\_4th\\_02\\_14\\_06.pdf](http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf)

(emphasis added).

Before, or within a reasonable time after commencing the representation, a lawyer who is consulted by multiple parties with related interests should discuss with them the implications of a joint representation (or a separate representation, if the lawyer believes that mode of representation to be more appropriate and separate representation is permissible under the applicable local rules). . . . In particular, the prospective clients and the lawyer should discuss the extent to which material information imparted by either client would be shared with the other and the possibility that the lawyer would be required to withdraw if a conflict in their interests developed to the degree that the lawyer could not effectively represent each of them. The information may be best understood by the clients if it is discussed with them in person and also provided to them in written form, as in an engagement letter or brochure.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.7, at 91-92 (4th ed. 2006),

[http://www.actec.org/Documents/misc/ACTEC\\_Commentaries\\_4th\\_02\\_14\\_06.pdf](http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf).

(emphases added).

The ACTEC Commentaries even provide an illustration emphasizing this point.

Example 1.7-1. Lawyer (L) was asked to represent Husband (H) and Wife (W) in connection with estate planning matters. L had previously not represented either H or W. At the outset L should discuss with H and W the terms upon which L would represent them, including the extent to which confidentiality would be maintained with respect to communications made by each.

Id. at 92 (emphasis added).

Not surprisingly, bars have provided the same guidance.

- Missouri Informal Advisory Op. 2008-0003 (2008) (assessing the following question: "Can one attorney represent co-defendants in a criminal trial?";

- answering as follows: "One attorney may represent two co-defendants, with appropriate disclosure and waivers. In order for this disclosure to be sufficient, the attorney must thoroughly advise co-defendants of the material advantages and disadvantages of joint representation, and discuss options and alternatives. Defendants should also be advised to seek independent advice from independent counsel. Both clients would have to agree there would be no confidentiality as between them. However, for example, if one co-defendant is considering a plea bargain that would be adverse to the interests of the other client, the conflict would become unwaivable and the attorney would have to withdraw. The informed consent must be confirmed in writing." (emphasis added)).
- North Carolina LEO 2007-7 (7/13/07) (holding that "a lawyer may continue to represent a husband and wife in a Chapter 13 bankruptcy after they divorce provided the conditions on common representation set forth in Rule 1.7 are satisfied."; "To obtain the informed consent of clients to a common representation, a lawyer must 'communicate adequate information and explanation appropriate to the circumstances.' Rule 0.1(f) (definition of 'informed consent.'). In the current situation, Attorney A must explain to Husband and Wife the effect, if any, that the law of privilege and disclosure requirements in a bankruptcy proceeding might have on the common representation. In addition, Attorney A must inform each client of the right to information about the representation. As noted in comment [31] to Rule 1.7, '[t]he lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other.' See 2006 FEO 1." (emphasis added)).
  - North Carolina LEO 2006-1 (4/21/06) ("Attorney A represents both the employer and the [insurance] carrier and therefore has a duty to keep each client informed about the status of the matter. As noted in comment [31] to Rule 1.7, ' . . . common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation.'"; "Loyalty to a client is impaired when a lawyer cannot keep the client reasonably informed or promptly comply with reasonable requests for information. Rule 1.4(a); RPC 153; 03 FEO 12. The employer and the carrier are both entitled to Attorney A's full, candid evaluation of all aspects of the claim. See 03 FEO12. If the carrier will not consent to Attorney A providing the same information to employer or the employer will not agree that certain information will be withheld, then Attorney A has a conflict and must withdraw from the representation of the employer and the carrier. If the carrier hires another lawyer to represent only the employer, Attorney A may -- with the employer's consent -- continue to represent the carrier and withhold evaluation and litigation strategy information from the employer." (emphasis added)).

- District of Columbia LEO 327 (2/2005) (addressing a situation in which a law firm which jointly represented several clients withdrew from representing some of the clients and continued to represent other clients; explaining that the law firm which began to represent the clients dropped by the first firm asked that firm to disclose all of the information it learned during the joint representation, which the firm refused to provide; ultimately concluding that the firm had to disclose to its successor all of the information it had acquired from any of the clients during the joint representation; "Under the terms of the retainer agreement, the prior firm's duty to communicate any relevant information to the other clients included any relevant information learned from other clients in the same matter, and this duty attached at the moment the prior firm learned the information. This underscores how important it is for a lawyer carefully to explain to all clients in a joint representation that, when they agree that any relevant or material information may be shared with one another, they cannot expect that any relevant or material confidential information they may subsequently reveal to the lawyer will be kept from the other co-clients." (emphasis added)).
- District of Columbia LEO 296 (2/15/00) ("A joint representation in and of itself does not alter the lawyer's ethical duties to each client, including the duty to protect each client's confidences."; "The best practice is clearly to advise clients at the outset of a representation of the potential for ethical conflicts ahead. Written disclosure of potential effects of joint representation and written consent can substantially mitigate, if not eliminate, the ethical tensions inherent in common representation."; reiterating that the "mere fact of joint representation, without more, does not provide a basis for implied authorization to disclose one client's confidences to another"; ultimately concluding that a "lawyer who undertakes representation of two clients in the same matter should address in advance and, where possible in writing, the impact of joint representation on the lawyer's duty to maintain client confidences and to keep each client reasonably informed, and obtain each client's informed consent to the arrangement." (emphasis added)). Later changes in the Washington, D.C., ethics rules affect the substantive analysis in this legal ethics opinion, but presumably do not affect the opinion's suggestion that lawyers and clients agree in advance on the information flow.).

At least one state supreme court has also articulated the wisdom of this approach.

[A]n attorney, on commencing joint representation of co-clients, should agree explicitly with the clients on the sharing of confidential information. In such a "disclosure agreement," the co-clients can agree that any confidential information concerning one co-client, whether obtained from

a co-client himself or herself or from another source, will be shared with the other co-client. Similarly, the co-clients can agree that unilateral confidences or other confidential information will be kept confidential by the attorney. Such a prior agreement will clarify the expectations of the clients and the lawyer and diminish the need for future litigation.

A. v. B., 726 A.2d 924, 929 (N.J. 1999) (emphases added).

Interestingly, authorities disagree about the necessity for lawyers to undertake this "best practices" step.

In a Florida legal ethics opinion arising in the trust and estate context, the Florida Bar acknowledged that lawyers did not have to address the information flow issue at the beginning of a representation. Still, the Bar's discussion of the analysis in the absence of such an agreement highlighted the wisdom of doing so.

- Florida LEO 95-4 (5/30/97) (analyzing a joint representation in an estate-planning setting; "In a joint representation between husband and wife in estate planning, an attorney is not required to discuss issues regarding confidentiality at the outset of representation. The attorney may not reveal confidential information to the wife when the husband tells the attorney that he wishes to provide for a beneficiary that is unknown to the wife. The attorney must withdraw from the representation of both husband and wife because of the conflict presented when the attorney must maintain the husband's separate confidences regarding the joint representation." (emphasis added)).

On the other hand, a Kentucky court punished a lawyer for not addressing the information flow with jointly represented clients (in a high-stakes context).

- Unnamed Attorney v. Ky. Bar Ass'n, 186 S.W.3d 741, 742, 743 (Ky. 2006) (privately reprimanding a lawyer who had jointly represented a husband and wife in connection with a criminal investigation for failing to explain to the jointly represented clients that he would share the investigation results with both of them; explaining that "Movant advised the Does that a conflict of interest could arise in the course of his work on their behalf. He also advised them that if a conflict of interest did arise he might be required to withdraw from the joint employment. However, he did not advise them that any and all information obtained during the joint representation or obtained in any communication to him by them would be available to each client and

exchanged freely between the clients in the absence of a conflict of interest. Movant asserts that he did not anticipate the possibility that the interests of the Does would become so materially divergent that there would be a conflict of interest in providing the results of the investigation to each of them. He acknowledges that he did not explain the potential ramifications of joint representation in that regard." (emphasis added); noting that "[t]he investigation produced information that indicated that one of the Does was directly involved in the shooting, contrary to what Movant had been told. Upon discovery of this information, and following communications with the KBA Ethics Hotline, Movant determined that he should withdraw from the joint employment. Furthermore, Movant concluded that he should not disclose certain results of his investigation to either Mr. or Mrs. Doe without the consent of each of them, which they declined to give. Movant encouraged each of them to obtain new counsel, and they followed this advice."; "In this case there was a lack of required communication by Movant. Specifically, Movant failed to explain that there would be no confidentiality as between the clients and the lawyer, that all information discovered would be furnished to both, and that each client was owed the same duty. When the investigation uncovered information that was favorable to one client but harmful to the other, Movant refused to release the information he had gathered without the acquiescence of both clients, which was not given. This resulted from his failure to initially explain the implications of common representation to both clients. When the investigation revealed that one of the clients was involved in the homicide, Movant had a duty with respect to that client to keep that fact confidential. On the other hand, he had a duty to the other client to provide exculpatory information which necessarily included information he was obligated to keep confidential." (emphasis added)).

Although the Kentucky case did not involve a trust and estate context, it highlights the wisdom of lawyers addressing the information flow at the beginning of any representation.

### **Information Flow Duties Under a "No Secrets" Agreement**

One might expect that lawyers arranging for a "no secrets" provision in a joint representation or retainer letter would have a fairly easy time analyzing their duty. However, the ethics rules reflect a surprising degree of uncertainty.

**ABA Model Rules.** The ABA Model Rules include a provision that seems to answer the question, but then introduces uncertainty.

The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other.

ABA Model Rule 1.7 cmt. [31] (emphasis added).

The first part of the sentence makes sense -- it would seem to require lawyers to honor such arrangements.

However, the reference to withdrawal is confusing. It is unclear whether the ABA Model Rules address the lawyer's withdrawal before advising the other client of the material information, or after doing so. Either way, one would expect a clearer explanation.

A 2008 ABA legal ethics opinion dealing with this issue indicated that the lawyer must maintain the confidence learned from one of the jointly represented clients "[a]bsent an express agreement among the lawyer and clients" to the contrary.<sup>5</sup> This

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<sup>5</sup> ABA LEO 450 (4/9/08) ("When a lawyer represents multiple clients in the same or related matters, the obligation of confidentiality to each sometimes may conflict with the obligation of disclosure to each." Lawyers hired by an insurance company to represent both an insured employer and an employee must explain at the beginning of the representation whom the lawyer represents (which is based on state law). If there is a chance of adversity in this type of joint representation, "[a]n advance waiver from the carrier or employer, permitting the lawyer to continue representing the insured in the event conflicts arise, may well be appropriate." The lawyer faces a dilemma if he learns confidential information from one client that will cause that client damage if disclosed to the other client.; "Absent an express agreement among the lawyer and the clients that satisfies the 'informed consent' standard of Rule 1.6(a), the Committee believes that whenever information related to the representation of a client may be harmful to the client in the hands of another client or a third person, . . . the lawyer is prohibited by Rule 1.6 from revealing that information to any person, including the other client and the third person, unless disclosure is permitted under an exception to Rule 1.6." It is "highly doubtful" that consents provided by the jointly represented clients "before the lawyer understands the facts giving rise to the conflict" will satisfy the "informed consent" standards. Absent a valid consent, a lawyer must withdraw from representing the other client if the lawyer cannot make the disclosure to the client, and cannot fulfill his other obligations without such a disclosure. In the case of a lawyer hired by an insurance company to represent an insured, "[t]he lawyer may not reveal the information gained by the lawyer from either the employee or the witness, or use it to the benefit of the insurance company, . . . when the revelation might result in denial of insurance protection to the employee." "Lawyers routinely have multiple clients with unrelated matters, and may not share the information of one client with other clients. The difference

language implies that the lawyer would be obligated to disclose the confidence to the other clients if the clients had agreed in advance that the lawyer would share any secrets.<sup>6</sup>

However, ABA LEO 450 instead inexplicably indicated that such a prior consent might not work. The ABA explained that it was "highly doubtful" that consents provided by the jointly represented clients "before the lawyer understands the facts giving rise to the conflict" will satisfy the "informed consent" standards. ABA LEO 450 (4/9/08). This conclusion seems directly contrary to Comment [31] to ABA Model Rule 1.7 -- which advises that lawyers should obtain such an informed consent "at the outset of the common representation."

All in all, the ABA approach to this elemental issue is confusing at best. The pertinent ABA Model Rule and comment apparently apply only in a setting that seems implausible in the real world. And the pertinent ABA legal ethics opinion compounds the confusion by apparently precluding exactly the type of "no secrets" joint representation arrangement that Comment [31] encourages lawyers to arrange.

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when the lawyer represents multiple clients on the same or a related matter is that the lawyer has a duty to communicate with all of the clients about that matter. Each client is entitled to the benefit of Rule 1.6 with respect to information relating to that client's representation, and a lawyer whose representation of multiple clients is not prohibited by Rule 1.7 is bound to protect the information of each client from disclosure, whether to other clients or otherwise." The insured's normal duty to cooperate with the insurance company does not undermine the lawyer's duty to protect the insured's information from disclosure to the insurance company, if disclosure would harm the insured. A lawyer hired by an insurance company to represent both an employer and an employee must obtain the employee's consent to disclose information that might allow the employer to seek to avoid liability for the employee's actions (the employee's failure to consent to the disclosure would bar the lawyer from seeking the employer's consent to forego such a defense). A lawyer facing this dilemma may have to withdraw from representing all of the clients, but "[t]he lawyer may be able to continue representing the insured, the 'primary' client in most jurisdictions, depending in part on whether that topic has been clarified in advance." (emphasis added)).

<sup>6</sup> In fact, that legal ethics opinion warns that such "an express agreement" might not work. The ABA explained that it was "highly doubtful" that a prospective consent provided by jointly represented clients "before the lawyer understands the facts giving rise to the conflict" will satisfy the "informed consent" standards. ABA LEO 450 (4/9/08).

**Restatement.** The Restatement also seems to provide explicit guidance requiring disclosure if the clients have agreed in advance that there would be no secrets.

Co-clients may understand from the circumstances those obligations on the part of the lawyer and their own obligations, or they may explicitly agree to share information. Co-clients can also explicitly agree that the lawyer is not to share certain information, such as described categories of proprietary, financial, or similar information with one or more other co-clients . . . . A lawyer must honor such agreements.

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

Thus, the Restatement apparently requires lawyers to comply with any "no secrets" agreement.

**ACTEC Commentaries.** The ACTEC Commentaries take a different approach. They explain that such a prior agreement is only one factor (apparently not dispositive) as the lawyer decides whether to share information the lawyer has learned from one jointly represented client with the other client.

The ACTEC Commentaries suggest that a lawyer facing this awkward situation first urge the client providing information to authorize the lawyer's disclosure of the information to the other jointly represented client.

In order to minimize the risk of harm to the clients' relationship and, possibly, to retain the lawyer's ability to represent both of them, the lawyer may properly urge the communicating client himself or herself to impart the confidential information directly to the other client. See ACTEC Commentary on MRPC 2.1 (Advisor). In doing so, the lawyer may properly remind the communicating client of the explicit or implicit understanding that relevant information would be shared and of the lawyer's obligation to share the information with the other client. The lawyer may also point out the possible legal consequences of not disclosing the confidence to the other client, including the possibility that



the validity of actions previously taken or planned by one or both of the clients may be jeopardized. In addition, the lawyer may mention that the failure to communicate the information to the other client may result in a disciplinary or malpractice action against the lawyer.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.6, at 76-77 (4th ed. 2006), [http://www.actec.org/Documents/misc/ACTEC\\_Commentaries\\_4th\\_02\\_14\\_06.pdf](http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf) (emphasis added).

This seems like an odd and illogical approach. If a client has explicitly agreed that the lawyer must share information with the other jointly represented clients, one would think that the lawyer would simply comply with that agreement -- rather than try to talk the client into making the disclosure himself or herself.

The ACTEC Commentaries' confusing approach continues in the next paragraph -- which describes a lawyer's responsibility if the client declines to comply with the explicit agreement that the joint lawyer would share all confidences with all jointly represented clients.

If the communicating client continues to oppose disclosing the confidence to the other client, the lawyer faces an extremely difficult situation with respect to which there is often no clearly proper course of action. In such cases the lawyer should have a reasonable degree of discretion in determining how to respond to any particular case. In fashioning a response, the lawyer should consider his or her duties of impartiality and loyalty to the clients; any express or implied agreement among the lawyer and the joint clients that information communicated by either client to the lawyer or otherwise obtained by the lawyer regarding the subject of the representation would be shared with the other client; the reasonable expectations of the clients; and the nature of the confidence and the harm that may result if the confidence is, or is not, disclosed. In some instances the lawyer must also consider whether the situation involves such adversity that

the lawyer can no longer effectively represent both clients and is required to withdraw from representing one or both of them. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: Current Clients). A letter of withdrawal that is sent to the other client may arouse the other client's suspicions to the point that the communicating client or the lawyer may ultimately be required to disclose the information.

Id. at 77 (emphasis added).

If the clients had already agreed that there will be no secrets, why does the lawyer have to "consider" anything? One would think that the lawyer would simply honor the agreement. In fact, it would be easy to envision that a lawyer declining to do so would be guilty of some ethics or fiduciary duty breach.

All in all, the ABA Model Rules' and the Restatement's approach seems logical -- requiring lawyers to comply with their jointly represented clients' "no secrets" agreement. The ACTEC Commentaries' contrary position (apparently giving a lawyer discretion to ignore such an agreement) seems wrong.

**State Authorities.** Only a few states seem to have dealt with this issue. These states require lawyers to honor such agreements.

A 2005 District of Columbia legal ethics opinion indicates that a lawyer in this setting must disclose the confidential information to the other jointly represented client.

- District of Columbia LEO 327 (2/2005) ("[I]t was 'understood that (a) we will not be able to advise you about potential claims you may have against any of the Other Individuals whom we represent and (b) information you provide to use in connection with our representation of you may be shared by us with the Other Individuals whom we represent.'"; "After apparently learning certain confidential information from one of the jointly represented clients, the prior firm withdrew from representing the other clients and continued to represent only the client from whom the confidential information had been learned. Upon assuming the representation of the other clients, the inquiring law firm requested that the prior firm disclose all information relevant to its prior representation of those clients, including the confidential information that had led to its withdrawal. The prior firm refused. The inquirer seeks an opinion

whether, under these circumstances, the prior firm is required to share with the other clients all relevant information learned during its representation, including any relevant confidences and secrets."; "[T]he retainer agreement here expressly provided that information disclosed in connection with the representation 'may be shared' with the other clients in the same matter."; "The retainer agreement presumably reflects a collective determination by all co-clients that the interests in keeping one another informed outweighs their separate interests in confidentiality. Where the disclosing client has expressly or impliedly authorized the disclosure of relevant, confidential information to the lawyer's other clients in the same matter, the duty to keep the non-disclosing clients informed of anything bearing on the representation that might affect their interests requires the lawyer to disclose the confidential information. . . . Where the disclosing client has unambiguously consented to further disclosure, a lawyer's duty of loyalty to and the duty to communicate with the non-disclosing client tips the balance in favor of disclosure. Indeed, in light of the disclosing client's consent, there is nothing left on the other side of the balance." (footnote omitted; emphases added); "It is, of course, possible that a client who has otherwise consented to the disclosure of confidential information may withdraw such consent for a specific disclosure. Where a client informs the lawyer before disclosing certain confidential information that he or she intends to reveal something that may not be shared with the lawyer's other clients (notwithstanding a prior agreement to do so), the lawyer has an obligation at that point to inform the client that no such confidences may be kept. . . . Under the terms of the retainer agreement, the prior firm's duty to communicate any relevant information to the other clients included any relevant information learned from other clients in the same matter, and this duty attached at the moment the prior firm learned the information. This underscores how important it is for a lawyer carefully to explain to all clients in a joint representation that, when they agree that any relevant or material information may be shared with one another, they cannot expect that any relevant or material confidential information they may subsequently reveal to the lawyer will be kept from the other co-clients." (emphasis added); "If the clients had not all agreed that the prior firm was authorized to share relevant or material information, the 'default' rule in our jurisdiction is that the prior firm would have been prohibited from sharing one client's confidences with the others. . . . But by contracting around this 'default' rule, the clients (and the prior firm) agreed that relevant or material information would be shared. Under these specific circumstance -- where the disclosing client has effectively consented to the disclosure -- an attorney's subsequent refusal to share such information with the other clients violates the D.C. Rules of Professional Conduct." (emphasis added); "[A] lawyer violates the D.C. Rules of Professional Conduct when her [sic] or she withholds from one client relevant or material confidential information obtained from a co-client who has consented to the disclosure."; "Where one client has given consent to the disclosure of confidential information by the lawyer to another client, we have already concluded that the lawyer may

reveal the confidence or secret. Here we conclude that the lawyer must do so if the information is relevant or material to the lawyer's representation of the other client. Because the disclosing client previously has waived confidentiality, there is nothing to weigh against either the lawyer's duty of loyalty to the non-disclosing client or the lawyer's obligation to keep that client reasonably informed of anything bearing on the representation that might affect that client's interests.").

New York has also dealt with this issue, and concluded that a lawyer in this circumstance must share material information if the clients have agreed in advance that the lawyer will do so.

- New York LEO 555 (1/17/84) (addressing the following situation: "A and B formed a partnership and employed Lawyer L to represent them in connection with the partnership affairs. Subsequently, B, in a conversation with Lawyer L, advised Lawyer L that he was actively breaching the partnership agreement. B preceded this statement to Lawyer L with the statement that he proposed to tell Lawyer L something 'in confidence.' Lawyer L did not respond to that statement and did not understand that B intended to make a statement that would be of importance to A but was to be kept confidential from A. Lawyer L had not, prior thereto, advised A or B that he could not receive from one communications regarding the subject of the joint representation that would be confidential from the other. B has subsequently declined to tell A what he has told Lawyer L. Lawyer L now asks what course he may or must take with respect to disclosure to A of what B has told him and with respect to continued representation of the partners."; ultimately concluding that "It is the opinion of the Committee that (i) Lawyer L may not disclose to A what B has told him, and (ii) Lawyer L must withdraw from further representation of the partners with respect to the partnership affairs."; "The Committee believes that the question ultimately is whether each of the clients, by virtue of jointly employing the lawyer, impliedly agrees or consents to the lawyer's disclosing to the other all communications of each on the subject of the representation. It is the opinion of the Committee that, at least in dealing with communications to the lawyer directly from one of the joint clients, the mere joint employment is not sufficient, without more, to justify implying such consent where disclosure of the communication to the other joint client would obviously be detrimental to the communicating client. This is not to say that such consent is never to be found. The lawyer may, at the outset of the joint representation or even perhaps at some later stage if otherwise appropriate, condition his acceptance or continuation of the joint representation upon the clients' agreement that all communications from one on the subject of the joint representation shall or may be disclosed to the other. Where one joint client is a long-time client and the other is introduced to the lawyer to be represented solely in the one joint matter, it may be

appropriate for the lawyer to obtain clear consent from the new client to disclosure to the long-time client. . . . Whatever is done, the critical point is that the circumstances must clearly demonstrate that it is fair to conclude that the clients have knowingly consented to the limited non-confidentiality." (emphases added); "Both EC 5-16 and Rule 2.2 of the Model Rules emphasize that, before undertaking a joint representation, the lawyer should explain fully to each the implications of the joint representation. Absent circumstances that indicate consent in fact, consent should not be implied."; "Of course, the instant fact situation is a fortiori. Here, the client specifically in advance designated his communication as confidential, and the lawyer did not demur. Under the circumstances, the confidence must be kept.").

In 1999, a New Jersey court found it unnecessary to decide whether a lawyer could, or was obligated to, disclose the client confidences to other jointly represented clients -- when the retainer agreement indicated that the lawyer could share confidences but not that the lawyer necessarily would disclose them.<sup>7</sup> The court was saved from this issue because the lawyer wanted to disclose the information.

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<sup>7</sup> A. v. B., 726 A.2d 924, 928, 929, 929-30, 931, 932 (N.J. 1999) (analyzing a situation in which a lawyer jointly representing a husband and wife in estate planning learns from a third party that the husband fathered a child out of wedlock; "In addition, the husband and wife signed letters captioned 'Waiver of Conflict of Interest.' These letters acknowledge that information provided by one client could become available to the other. The letters, however, stop short of explicitly authorizing the firm to disclose one spouse's confidential information to the other. Even in the absence of any such explicit authorization, the spirit of the letters supports the firm's decision to disclose to the wife the existence of the husband's illegitimate child."; "As the preceding authorities suggest, an attorney, on commencing joint representation of co-clients, should agree explicitly with the clients on the sharing of confidential information. In such a 'disclosure agreement,' the co-clients can agree that any confidential information concerning one co-client, whether obtained from a co-client himself or herself or from another source, will be shared with the other co-client. Similarly, the co-clients can agree that unilateral confidences or other confidential information will be kept confidential by the attorney. Such a prior agreement will clarify the expectations of the clients and the lawyer and diminish the need for future litigation. In the absence of an agreement to share confidential information with co-clients, the Restatement reposes the resolution of the lawyer's competing duties within the lawyer's discretion."; "In authorizing non-disclosure, the Restatement explains that an attorney should refrain from disclosing the existence of the illegitimate child to the wife because the trust 'would not materially affect Wife's own estate plan or her expected receipt of property under Husband's will.'"; noting that the American College of Trust and Estate Counsel agree with this discretionary standard; also acknowledging that "[t]he Professional Ethics Committees of New York and Florida, however, have concluded that disclosure to a co-client is prohibited. New York State Bar Ass'n Comm. on Professional Ethics, Op. 555 (1984); Florida State Bar Ass'n Comm. on Professional Ethics, Op. 95-4 (1997)."; emphasizing that the lawyer learned the information from a third party, not from either of the jointly represented clients; "Because Hill Wallack [lawyer] wishes to make the disclosure, we need not reach the issue whether the lawyer's obligation to disclose is discretionary or mandatory. In conclusion, Hill Wallack may inform the wife of the existence of the husband's illegitimate child."; "The law firm learned of the husband's paternity of the child through the mother's disclosure before the institution of

## **Information Flow Duties Under an Agreement to Keep Secrets**

Lawyers following the nearly universal guidance to define the appropriate information flow in a joint representation retainer letter occasionally arrange for what could be called a "keep secrets" arrangement -- under which the lawyer will not share with all jointly represented clients what the lawyer learns from one of the jointly represented clients. A lawyer arranging for an explicit "keep secrets" arrangement among jointly represented clients has contractually duplicated the ethics rules' principles governing separate representations on the same or unrelated matters.

Given the importance of confidentiality, it should come as no surprise that a lawyer generally must honor such a "keep secrets" arrangement among jointly represented clients. The real key to such a "keep secrets" joint representation is whether the lawyer can avoid conflicts of interest. Thus, such an arrangement inevitably involves the issue of loyalty in the joint representation context.

**ABA Model Rules.** The ABA Model Rules recognize that in certain situations clients can agree that their joint lawyer will not share all information.

In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

ABA Model Rule 1.7 cmt. [31] (emphasis added).

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the paternity suit. It does not seek to disclose the identity of the mother or the child. Given the wife's need for the information and law firm's right to disclose it, the disclosure of the child's existence to the wife constitutes an exceptional case with 'compelling reason clearly and convincingly shown.'" (citation omitted)).

The trade secrets example highlights the limited circumstances in which such a "keep secrets" approach might work. It seems clear that a lawyer representing multiple companies might be able to adequately serve all of them without disclosing one client's trade secrets to the other clients.

However, in other circumstances, such an arrangement would almost surely prevent the lawyer from adequately representing all of the clients. To be sure, the ABA Model Rules do not explicitly indicate that a lawyer must honor such a no-secrets agreement. However, the ABA generally takes the approach that lawyers maintain each client's secrets from the other even in the absence of any agreement -- so it seems safe to presume that lawyers must keep secrets to comply with such an explicit agreement that they will do so.

**Restatement.** The Restatement also recognizes that in some circumstances a "keep secrets" approach might work -- using a trust and estate example. However, the Restatement's acknowledgement of such a theoretical possibility comes with several warnings.

Occasionally, some estate-planning lawyers have urged or contemplated "co-representation" of multiple clients in nonlitigation representations, such as husband and wife. . . . The concept is that the lawyer would represent the two or more clients on a matter of common interest on which they otherwise have a conflict of interest only after obtaining informed consent of all affected clients. Its distinguishing feature is that the arrangement would entail, as a matter of specific agreement between the clients and lawyer involved, that the lawyer would provide separate services to each client and would not share confidential information among the clients, except as otherwise agreed or directed by the client providing the information. . . . The concept of simultaneous, separate representation apparently has not yet been the specific subject of litigation, statute, or professional rule. The risks of conflict and subsequent

claims for malpractice are obviously substantial, and any lawyer considering this novel form of representation presumably would fully inform clients of its risks. At least at this point, the advice should include informing the clients that the structure is untried and might have adverse consequences unintended by the lawyer or clients.

Restatement (Third) of Law Governing Lawyers § 130 reporter's note cmt. c (2000)

(emphases added). Thus, the Restatement's endorsement of this type of arrangement is half-hearted to say the least.

Not surprisingly, the Restatement indicates that a lawyer agreeing to keep one jointly represented client's confidential information from others must honor that agreement -- although the lawyer might have to withdraw from a representation depending on the information that the lawyer learns.

Co-clients may understand from the circumstances those obligations on the part of the lawyer and their own obligations, or they may explicitly agree to share information. Co-clients can also explicitly agree that the lawyer is not to share certain information, such as described categories of proprietary, financial, or similar information with one or more other co-clients . . . . A lawyer must honor such agreements.

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

The Restatement makes the same point later in the same comment.

Even if the co-clients have agreed that the lawyer will keep certain categories of information confidential from one or more other co-clients, in some circumstances it might be evident to the lawyer that the uninformed co-client would not have agreed to nondisclosure had that co-client been aware of the nature of the adverse information. For example, a lawyer's examination of confidential financial information, agreed not to be shown to another co-client to reduce antitrust concerns, could show in fact, contrary to all exterior indications, that the disclosing co-client is insolvent. In view of the co-client's agreement, the lawyer must honor the commitment of confidentiality and not inform the other client, subject to the exceptions described in § 67. The lawyer



must, however, withdraw if failure to reveal would mislead the affected client, involve the lawyer in assisting the communicating client in a course of fraud, breach of fiduciary duty, or other unlawful activity, or, as would be true in most such instances, involve the lawyer in representing conflicting interests.

Id. (emphasis added).

Thus, the Restatement acknowledges that a "keep secrets" approach is theoretically possible, but might result in the lawyer's mandatory withdrawal.

**ACTEC Commentaries.** The ACTEC Commentaries take the same basic approach as the Restatement, but provide a somewhat more optimistic analysis of whether such an arrangement will work.

There does not appear to be any authority that expressly authorizes a lawyer to represent multiple clients separately with respect to related legal matters. However, with full disclosure and the informed consents of the clients, some experienced estate planners regularly undertake to represent husbands and wives as separate clients. Similarly, some estate planners also represent a parent and child or other multiple clients as separate clients. A lawyer who is asked to provide separate representation to multiple clients should do so with great care because of the stress it necessarily places on the lawyer's duties of impartiality and loyalty and the extent to which it may limit the lawyer's ability to advise each of the clients adequately. For example, without disclosing a confidence of one spouse, the lawyer may be unable adequately to represent the other spouse. However, within the limits of MRPC 1.7 (Conflict of Interest: Current Clients), it may be possible to provide separate representation regarding related matters to adequately informed clients who give their consent to the terms of the representation. It is unclear whether separate representation could be provided within the scope of former MRPC 2.2 (Intermediary). The lawyer's disclosures to, and the agreement of, clients who wish to be separately represented should, but need not, be reflected in a contemporaneous writing. Unless required by local law, such a writing need not be signed by the clients.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.6, at 76 (4th ed. 2006), [http://www.actec.org/Documents/misc/ACTEC\\_Commentaries\\_4th\\_02\\_14\\_06.pdf](http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf) (emphases added).

Interestingly, the ACTEC Commentaries do not explicitly indicate that lawyers must honor such a "keep secrets" approach. However, there certainly is no indication in the Commentaries that lawyers can ignore such an explicit agreement.

The ACTEC Commentaries also explain this possible arrangement in its later discussion of Rule 1.7.

[S]ome experienced estate planners believe that a lawyer may represent a husband and wife as separate clients between whom information communicated by one spouse will not be shared with the other spouse. In such a case, each spouse must give his or her informed consent confirmed in writing. The same requirements apply to the representation of others as joint or separate multiple clients, such as the representation of other family members, business associates, etc.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.7, at 92 (4th ed. 2006) [http://www.actec.org/Documents/misc/ACTEC\\_Commentaries\\_4th\\_02\\_14\\_06.pdf](http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf) (emphasis added).

Thus, the ACTEC Commentaries acknowledge the possibility that a "keep secrets" approach might work, although twice pointedly using the term "experienced estate planners" in describing who might take that approach.

**Best Answer**

The best answer to this hypothetical is **(C) YOU MAY NOT TELL YOUR OTHER CLIENT ABOUT THE ILLEGITIMATE CHILD (PROBABLY).**

B 11/4

## Power to Waive the Privilege in a Joint Representation

### Hypothetical 3

You jointly represent two tenants in tense dealings with their landlord. One of your clients just called to ask whether she could provide certain documents or other information to the landlord during an upcoming meeting that she has scheduled with the landlord.

- (a) Without the other client's consent, may this client give the landlord a legal memorandum that you prepared for and sent to both of your clients?

**(B) NO**

- (b) Without the other client's consent, may this client disclose to the landlord the substance of communications that she had with you (outside the other client's presence).

**(A) YES**

### Analysis

Analyzing joint clients' power to waive their attorney-client privilege protection reflects the nature of the multiple representation.

**(a)-(b)** Joint clients must unanimously vote to waive privilege protection covering any of their joint communications, or communications from another client to their joint lawyer. In contrast, clients always maintain the power to waive privilege protection for their own communications with the joint lawyer.

The ABA Model Rules do not deal with waiver issues, but the Restatement discusses the waiver implications of joint representations, and case law has obviously focused on that issue too.

The Restatement contains provisions addressing a jointly represented client's power to waive the attorney-client privilege -- thus freeing that client to disclose privileged communications or documents to outsiders.

Not surprisingly, the Restatement confirms that all jointly represented clients must join in any waiver if a third party seeks the privileged communications.

If a third person attempts to gain access to or to introduce a co-client communication, each co-client has standing to assert the privilege. The objecting client need not have been the source of the communication or previously have known about it.

Restatement (Third) of Law Governing Lawyers § 75 cmt. e (2000). Thus, a joint client generally has the right to defend the privilege even if he or she was not aware of the communications.

The Restatement also recognizes that each client has the power to waive the privilege for that client's own communications with the joint lawyer.

[I]n the absence of an agreement with co-clients to the contrary, each co-client may waive the privilege with respect to that co-client's own communications with the lawyer, so long as the communication relates only to the communicating and waiving client.

Id. (emphasis added).

The reference to an agreement by co-clients "to the contrary" makes less sense here than in the context discussed below. As explained above, a "keep secrets" approach allows each client to maintain control over (and privilege for) its own confidential communications with the lawyer. Here, the issue is whether the client has the power to waive his or her own communications with the lawyer -- which seems obvious. There is no reason to give the other jointly represented clients any veto power

over that client's power to control his or her own communications with the lawyer. However, the reference to a possible agreement "to the contrary" in this provision apparently means that a client may voluntarily give the other jointly represented clients a veto over the client's waiver of such private communications. It is difficult to imagine why a client would ever agree to such a provision.

If a document contains the client's own communications (over which the client has sole power) and other communications over which the client does not have sole power, it may be necessary to redact part of the document.

One co-client does not have authority to waive the privilege with respect to another co-client's communications to their common lawyer. If a document or other recording embodies communications from two or more co-clients, all those co-clients must join in a waiver, unless a nonwaiving co-client's communication can be redacted from the document.

Id. (emphasis added). Thus, the rule might be applied on a sentence-by-sentence basis.

Another Restatement provision carries a frightening risk -- explaining the dramatic waiver effect of one jointly represented client's disclosure to another jointly represented client once they are adversaries.

Disclosure of a co-client communication in the course of subsequent adverse proceeding between co-clients operates as waiver by subsequent disclosure under § 79 with respect to third persons.

Id. (emphasis added).

Courts take a more understandable and comforting view.

The Trust's [successor to the affiliate] reading of the Restatement appears to state that if co-client communication is then used in an adversary between the former co-clients, it would then waive the privilege as to third parties. This would

effectively make the privilege superfluous. Protections can be placed on any future hearings between Duke [parent] and the Trust, and any co-client privileged information can remain privileged as to third parties even if used in a future adversary proceeding between Duke and the Trust.

In re Crescent Res., LLC, 457 B.R. 506, 529-30 (W.D. Tex. 2011).

It is unclear whether this Restatement provision applies only to a disclosure outside the former jointly represented clients, or whether it also includes one such client's disclosure to the other "in the course of the proceeding." The former interpretation makes the most sense, because disclosure among the former jointly represented clients might take place on a friendly basis.

Interestingly, this provision would seem to preclude any type of protective measures that the parties might agree to, or that a court might order in a fight between the clients. For instance, a court might enter orders requiring in camera disclosure, closing the courtroom during a trial, etc. While there might be constitutional limits on such steps, one might think that keeping the privileged information from third parties would allow the former jointly represented clients (now adversaries) to avoid "evaporation" of the privilege that might harm both of them. It would also prevent one of the parties from seeking some advantage in their dispute by explicitly or implicitly threatening to harm the other party by allowing such evaporation. Still, the Restatement provision seems clear, and would have a dramatic effect in event of such a dispute.

The Restatement does not address another interesting issue -- whether disclosure of privileged communications in this setting triggers a subject matter waiver that might allow third parties to obtain access to additional privileged communications

between former jointly represented clients on the same matter. Such an effect would exacerbate the damage caused by the waiver.

All in all, the Restatement provides detailed and sometimes counter-intuitive rules describing the impact of a falling-out among joint clients.

**Courts' and Bars' Approach.** Many courts have stated the general proposition that all jointly represented clients must join in a waiver absent a dispute among them.

It bears noting that waiver by one joint client of its communications with an attorney does not enable a third party to discover each of the other joint clients' communications with the same counsel. Rather, "[o]ne co-client does not have authority to waive the privilege with respect to another co-client's communications to their common lawyer."

Official Comm. of Asbestos Claimants of G-I Holding, Inc. v. Heyman, No. 01 Civ. 8539 (RWS), 2006 U.S. Dist. LEXIS 73272, at \*8 (S.D.N.Y. Oct. 6, 2006) (citation omitted).

Accord Interfaith Housing Del., Inc. v. Town of Georgetown, 841 F. Supp. 1393, 1402 (D. Del. 1994) ("[T]he Court predicts the Delaware Supreme Court would hold that when one of two or more clients with common interests waives the attorney-client privilege in a dispute with a third party, that one individual's waiver does not effect a waiver as to the others' attorney-client privilege.").

Thus, jointly represented clients usually must unanimously vote to waive the privilege covering any of their joint communications -- as long as they are still on friendly terms.

Courts also acknowledge that even jointly represented clients generally maintain sole control over their own unilateral communications with the joint lawyer, and therefore can waive protection covering those communications.



In one case, the Third Circuit addressed this issue. Not surprisingly, the Third Circuit's analysis started with the general rule -- requiring joint clients' unanimous consent to waive any jointly-owned privilege.

When co-clients and their common attorneys communicate with one another, those communications are "in confidence" for privilege purposes. Hence the privilege protects those communications from compelled disclosure to persons outside the joint representation. Moreover, waiving the joint-client privilege requires the consent of all joint clients.

Teleglobe Commc'ns Corp. v. BCE, Inc. (In re Teleglobe Commc'ns Corp.), 493 F.3d 345, 363 (3d Cir. 2007). The Third Circuit then described each jointly represented client's power to waive its own communications.

A wrinkle here is that a client may unilaterally waive the privilege as to its own communications with a joint attorney, so long as those communications concern only the waiving client; it may not, however, unilaterally waive the privilege as to any of the other joint clients' communications or as to any of its communications that relate to other joint clients.

Id. This power to waive apparently applies at all times, and thus clearly applies when the former jointly represented clients end up in a dispute. Thomas E. Spahn, The Attorney-Client Privilege and the Work Product Doctrine: A Practitioner's Guide, Ch. 24.302, 24.303 (3d. ed. 2013), published by Virginia CLE Publications.

### **Best Answer**

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

B 11/14

## Effect of Adversity Among Jointly Represented Clients

### Hypothetical 4

You formerly represented two co-defendants in litigating and ultimately settling a products liability case. One of your former clients has now sued the other for contribution and indemnity, and filed a third-party subpoena seeking all of your files. The other former client objected to the subpoena, claiming privilege protection for its unilateral communications with you and your colleagues during the joint representation.

Is the objecting former client likely to successfully assert privilege protection for the unilateral communications with you during the joint representation?

**(B) NO**

### Analysis

As in nearly every other way, joint representations generate complicated and subtle issues involving the fate of the attorney-client privilege if the joint clients have a falling-out. In that situation, one former jointly represented client might try to block the other former jointly represented client's access to communications and documents reflecting his or her private communications with their joint lawyer.

Of course, a lawyer in this awkward situation does not face a dilemma if both of the former jointly represented clients agree to the lawyer's disclosure of the joint files to both clients or their new lawyers. A controversy arises only if one of the former clients objects to the lawyer providing such access to both of the former clients.

It is important to recognize that the privilege issue focuses on the ability of the former clients to obtain and then use communications and documents that deserved privilege protection when created or made.<sup>1</sup> Most importantly, the privilege protection

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<sup>1</sup> As a matter of ethics, a lawyer in this setting theoretically might have to resist one joint client's request for the communications or documents -- if the other client insists that the lawyer do so. This

prevents third parties from obtaining access to those communications and documents -- absent a waiver (discussed below). Thus, the privilege generally continues to shield the communications and documents from the world -- the issue is whether one former jointly represented client can shield the communications and documents from the other former jointly represented client. As explained more fully below, however, the issue of one former jointly represented client's access to the other's communication might affect what third parties will also be given access to them.

One might have thought that the privilege effect of a dispute among former jointly represented clients would simply mirror the arrangement they had during happier days. Although the ABA Model Rules seem to indicate (although not very clearly) that a lawyer for jointly represented clients must keep secrets absent an agreement to the contrary, both the Restatement and the ACTEC Commentaries apparently take the opposite approach (although, again, not very clearly).

If a court applied one of these general principles during a joint representation, one would expect a court to apply the same standard after a joint representation ends -- whether the former jointly represented clients are in litigation with each other or not. And certainly if the law recognizes -- or the clients agree to -- a "no secrets" standard, there is no reason why the same standard would not apply after the joint representation ends. Thus, it is somewhat odd that the law developed a separate jurisprudence on the effect of former jointly represented clients' disputes with each other.

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presumably would generate some dispute in court, with the normal fight over discovery. Even though the lawyer could properly predict that he or she would ultimately be compelled to turn over the communications or documents, doing so unilaterally (without the formal clients' unanimous consent or court order) might put the lawyer at risk.

Although the authorities differ somewhat in their approach, the bottom line is that most authorities allow the former jointly represented clients to obtain such access, and then use the privileged communications and documents in a dispute with the other former clients. Although some of the authorities and case law use the term "waiver" in discussing this approach, it would seem more accurate to use the term "evaporation" in describing what happens to the privilege in that situation. Neither former jointly represented client can disclose any jointly owned privileged communications to third parties even if there is a falling-out among the former clients. Still, their use of such communications or documents might provide access to such third parties, thus causing the privilege to essentially "evaporate."

**ABA Model Rules.** The ABA Model Rules provide some guidance about the attorney-client privilege implications of a joint representation.

A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

ABA Model Rule 1.7 cmt. [30] (emphasis added).

Interestingly, this approach seems inconsistent with the ABA Model Rules' and an ABA legal ethics opinion's<sup>2</sup> statement that lawyers must maintain the confidentiality

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<sup>2</sup> ABA LEO 450 (4/9/08) ("When a lawyer represents multiple clients in the same or related matters, the obligation of confidentiality to each sometimes may conflict with the obligation of disclosure to each." Lawyers hired by an insurance company to represent both an insured employer and an employee must explain at the beginning of the representation whom the lawyer represents (which is based on state law). If there is a chance of adversity in this type of joint representation, "[a]n advance waiver from the carrier or employer, permitting the lawyer to continue representing the insured in the

of information obtained from each jointly represented client -- in the absence of an explicit "no secrets" agreement.

If the ABA's "default" position is that a lawyer jointly representing clients must keep confidences even in the best of times, one would expect a consistent approach if the joint clients have a falling-out. In other words, one would expect the ABA to allow now-adverse joint clients to withhold their privileged communications from the other, since that is what the ABA required (absent some agreement to the contrary) when the joint clients were not adverse to one another.

This inconsistency should come as no surprise -- the ABA Model Rules and the pertinent legal ethics opinions contain numerous internal inconsistencies.

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event conflicts arise, may well be appropriate." The lawyer faces a dilemma if he learns confidential information from one client that will cause that client damage if disclosed to the other client; "Absent an express agreement among the lawyer and the clients that satisfies the 'informed consent' standard of Rule 1.6(a), the Committee believes that whenever information related to the representation of a client may be harmful to the client in the hands of another client or a third person, . . . the lawyer is prohibited by Rule 1.6 from revealing that information to any person, including the other client and the third person, unless disclosure is permitted under an exception to Rule 1.6." It is "highly doubtful" that consents provided by the jointly represented clients "before the lawyer understands the facts giving rise to the conflict" will satisfy the "informed consent" standards. Absent a valid consent, a lawyer must withdraw from representing the other client if the lawyer cannot make the disclosure to the client, and cannot fulfill his other obligations without such a disclosure. In the case of a lawyer hired by an insurance company to represent an insured, "[t]he lawyer may not reveal the information gained by the lawyer from either the employee or the witness, or use it to the benefit of the insurance company, . . . when the revelation might result in denial of insurance protection to the employee." "Lawyers routinely have multiple clients with unrelated matters, and may not share the information of one client with other clients. The difference when the lawyer represents multiple clients on the same or a related matter is that the lawyer has a duty to communicate with all of the clients about that matter. Each client is entitled to the benefit of Rule 1.6 with respect to information relating to that client's representation, and a lawyer whose representation of multiple clients is not prohibited by Rule 1.7 is bound to protect the information of each client from disclosure, whether to other clients or otherwise." The insured's normal duty to cooperate with the insurance company does not undermine the lawyer's duty to protect the insured's information from disclosure to the insurance company, if disclosure would harm the insured. A lawyer hired by an insurance company to represent both an employer and an employee must obtain the employee's consent to disclose information that might allow the employer to seek to avoid liability for the employee's actions (the employee's failure to consent to the disclosure would bar the lawyer from seeking the employer's consent to forego such a defense). A lawyer facing this dilemma may have to withdraw from representing all of the clients, but "[t]he lawyer may be able to continue representing the insured, the 'primary' client in most jurisdictions, depending in part on whether that topic has been clarified in advance.").

**Restatement.** The Restatement takes the same basic approach as the ABA Model Rules.

A lawyer may represent two or more clients in the same matter as co-clients either when there is no conflict of interest between them . . . or when a conflict exists but the co-clients have adequately consented . . . . When a conflict of interest exists, as part of the process of obtaining consent, the lawyer is required to inform each co-client of the effect of joint representation upon disclosure of confidential information . . . , including both that all material information will be shared with each co-client during the course of the representation and that a communicating co-client will be unable to assert the attorney-client privilege against the other in the event of later adverse proceedings between them.

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

The same concept appears in a later Restatement section.

(1) If two or more persons are jointly represented by the same lawyer in a matter, a communication of either co-client that otherwise qualifies as privileged under §§ 68-72 and relates to matters of common interest is privileged as against third persons, and any co-client may invoke the privilege, unless it has been waived by the client who made the communication.

(2) Unless the co-clients have agreed otherwise, a communication described in Subsection (1) is not privileged as between the co-clients in a subsequent adverse proceeding between them.

Restatement (Third) of Law Governing Lawyers § 75 (2000) (emphases added).

However, the Restatement includes more subtle provisions than found in the ABA Model Rules, which provide more useful guidance.

First, a jointly represented client's general power to seek the lawyer's communications or documents relating to the joint representation generally covers even communications of which the jointly represented client was unaware at the time.

As stated in Subsection (2), in a subsequent proceeding in which former co-clients are adverse, one of them may not invoke the attorney-client privilege against the other with respect to communications involving either of them during the co-client relationship. That rule applies whether or not the co-client's communication had been disclosed to the other during the co-client representation, unless they had otherwise agreed.

Id. cmt. d (emphasis added).

An illustration explains how this principle works.

Client X and Client Y jointly consult Lawyer about establishing a business, without coming to any agreement about the confidentiality of their communications to Lawyer. X sends a confidential memorandum to Lawyer in which X outlines the proposed business arrangement as X understands it. The joint representation then terminates, and Y knows that X sent the memorandum but not its contents. Subsequently, Y files suit against X to recover damages arising out of the business venture. Although X's memorandum would be privileged against a third person, in the litigation between X and Y the memorandum is not privileged. That result follows although Y never knew the contents of the letter during the joint representation.

Id. illus. 1 (emphases added).

Second, the Restatement indicates that this general rule does not apply in all circumstances. The provision recognizes that the general rule governs "[u]nless the co-clients have agreed otherwise." Restatement (Third) of Law Governing Lawyers § 75 (2000). Presumably this refers to a "keep secrets" approach to which the clients have earlier agreed.

Co-clients may agree that the lawyer will not disclose certain confidential communications of one co-client to other co-clients. If the co-clients have so agreed and the co-clients are subsequently involved in adverse proceedings, the communicating client can invoke the privilege with respect to such communications not in fact disclosed to the former co-client seeking to introduce it. In the absence of such an

agreement, the lawyer ordinarily is required to convey communications to all interested co-clients . . . .

Id. cmt. d (emphasis added). The clients apparently therefore have at least some power to mold the effect of a later dispute on their attorney-client privilege.

Thus, the Restatement follows the ABA Model Rules in prohibiting jointly represented clients from withholding communications or documents from each other based on the attorney-client privilege -- but then adds an exception if the clients have agreed to a different approach.

Numerous courts and bars have articulated the basic rule that former jointly represented clients cannot withhold privileged communications from each other in a later dispute between them.

- In re Equaphor Inc., Ch. 7 Case No. 10-20490-BFK, 2012 Bankr. LEXIS 2129, at \*9-10 (Bankr. E.D. Va. May 11, 2012) (assessing a situation in which the same law firm jointly represented Equaphor and three individual co-defendants in a derivative action; holding that the bankruptcy trustee for Equaphor could access law firm's files; rejecting the individual clients' argument that in the derivative action Equaphor had only been a "nominal defendant"; noting that "while [Equaphor] may have been named as a nominal defendant, there is no such thing as a nominal client of a law firm," and that "there is no support in the case law for a 'nominal defendant exception' to the principle that all clients are entitled to an attorney's files." (emphasis added)).
- Ft. Myers Historic L.P. v. Economou (In re Economou), 362 B.R. 893, 896 (Bankr. N.D. Ill. 2007) ("When two or more clients consult or retain an attorney on matters of common interest, the communications between each of them and the attorney are privileged against disclosure to third parties. . . . However, those communications are not privileged in a subsequent controversy between the clients."; finding the common interest doctrine inapplicable because the situation did not involve joint clients hiring the same lawyer).
- Teleglobe Commc'ns Corp. v. BCE, Inc. (In re Teleglobe Commc'ns Corp.), 493 F.3d 345, 366, 368 (3d Cir. 2007) (assessing efforts by a trustee for bankrupt second-tier subsidiaries to discover communications between the parent and the parent's lawyers; ultimately reversing a district court's finding



that the trustee deserved all of the documents, and remanding for determination of whether the parent's lawyers jointly represented the now-bankrupt second-tier subsidiaries in the matter to which the pertinent documents relate; "The great caveat of the joint-client privilege is that it only protects communications from compelled disclosure to parties outside the joint representation. When former co-clients sue one another, the default rule is that all communications made in the course of the joint representation are discoverable."; rejecting the corporate parent's argument that the default rule could be the opposite when the lawyer jointly represents the parent company and its wholly owned subsidiaries; "Simply following the default rule against information shielding creates simpler, and more predictable, ground rules."; "We predict that Delaware courts would apply the adverse litigation exception in all situations, even those in which the joint clients are wholly owned by the same person or entity.").

- In re JDN Real Estate--McKinney L.P., 211 S.W.3d 907, 922 (Tex. App. 2006) ("Where the attorney acts as counsel for two parties, communications made to the attorney for the purpose of facilitating the rendition of legal services to the clients are privileged, except in a controversy between the clients.").
- Official Comm. of Asbestos Claimants of G-I Holding, Inc. v. Heyman, No. 01 Civ. 8539 (RWS), 2006 U.S. Dist. LEXIS 73272, at \*8, \*9-11 (S.D.N.Y. Oct. 6, 2006) (addressing efforts by the official Committee of Asbestos Claimants to seek communication relating to the company's spin-off of a subsidiary; "It bears noting that waiver by one joint client of its communications with an attorney does not enable a third party to discover each of the other joint clients' communications with the same counsel. Rather, '[o]ne co-client does not have authority to waive the privilege with respect to another co-client's communications to their common lawyer.' Restatement (Third) of The Law Governing Lawyers, § 75 cmt. 3 (2000). In instances where a communication involves 'two or more co-clients, all those co-clients must join in a waiver, unless a nonwaiving co-client's communication can be redacted from the document.' Id."; also analyzing the Committee's claim that what the court called the "joint client exception" applied; "The Committee contends that notwithstanding the above rule, the joint-client doctrine prohibits ISP from maintaining a privilege over materials relating to the 1997 Transactions that G-I also claimed as privileged. In other words, the Committee argues that prior to the spin-off, G-I and ISP were represented by the same attorney on a matter of common interest (the 1997 transactions) and that, as such, ISP and G-I jointly held the privilege. The Committee further contends that because G-I and ISP shared legal representation on a matter, neither can assert the privilege against the other. Under the joint client exception to the attorney-client privilege, 'an attorney who represents two parties with respect to a single matter may not assert the privilege in a later dispute between the clients.' . . . Under the general rule, the joint client exception may be invoked by one former joint client against another only in a subsequent proceeding in

which the two parties maintain adverse positions. . . . In the instant case, G-I and ISP do not maintain adverse positions in the underlying litigation. Indeed, it is not G-I that here seeks to invoke the joint client doctrine, but rather the Committee, a third-party, that seeks to do so. The Committee highlights the adversity between G-I and ISP that results from the April 28 Opinion -- namely that G-I's privilege with respect to materials surrounding the 1997 Transactions was eviscerated while ISP's was not. It is concluded that such adversity arising out of the application of the privilege or the production of documents does not warrant invocation of the joint client exception. Because ISP and G-I do not maintain adverse positions vis-A-vis [sic] the plaintiff Committee's claims, it is concluded that the joint client exception is inapplicable in the instant case.").

- Brandon v. W. Bend Mut. Ins. Co., 681 N.W.2d 633, 639 (Iowa 2004) ("[E]xceptions have been carved from the attorney-client privilege. . . . This exception is known as the 'joint-client' exception. Actual consultation by both clients with the attorney is not a prerequisite to the application of the joint-client exception. . . . The attorney is duty-bound to divulge such communications by one joint client to the other joint client. . . . Thus, when the same attorney acts for two parties, the communications are privileged from third persons in the controversy, but not in a subsequent controversy between the two parties.").
- Duncan v. Duncan, 56 Va. Cir. 262, 263, 263-64 (Va. Cir. Ct. 2001) (addressing efforts by a lawyer to avoid discovery sought by plaintiff (administrator of a daughter's estate) from the lawyer, who formerly represented both the plaintiff and his former wife (mother of the deceased daughter); "Although no Virginia Court appears to have addressed this issue directly, the clear majority of reviewing courts has held that the attorney-client privilege does not preclude an attorney, who originally represented both parties in a prior matter, from disclosing information in a subsequent action between the parties."; "Plaintiff's exhibits establish that Greenspun's [lawyer] representation of Plaintiff and Defendant was joint in nature. The parties executed a joint agreement engaging Greenspun's services. He represented both parties in an investigation related to the parties' common interest, namely criminal liability for their daughter's death and loss of parental rights. Furthermore, Greenspun freely shared information regarding elements of the case with, and between, both parties. The Defendant recognized that Greenspun was sharing information disclosed by the Defendant with Plaintiff during the parties' prior joint representation. Lastly, the parties did not have an implied or express agreement with Greenspun that he would maintain their respective confidences in this joint representation. Defendant's communications with Greenspun are not privileged in the absence of an agreement between the parties stipulating otherwise."; ordering the lawyer to answer deposition questions and produce documents to plaintiff).

- FDIC v. Ogden Corp., 202 F.3d 454, 461 (1st Cir. 2000) ("Despite its venerable provenance, the attorney-client privilege is not absolute. One recognized exception renders the privilege inapplicable to disputes between joint clients. . . . Thus, when a lawyer represents multiple clients having a common interest, communications between the lawyer and any one (or more) of the clients are privileged as to outsiders but not inter sese."; "In determining whether parties are 'joint clients,' courts may consider multiple factors, including but not limited to matters such as payment arrangements, allocation of decisionmaking roles, requests for advice, attendance at meetings, frequency and content of correspondence, and the like."; holding that the FDIC had established that it was a joint client of a law firm and therefore could obtain access to the law firm's documents in a dispute between the FDIC and the other clients).
- Ashcraft & Gerel v. Shaw, 728 A.2d 798, 812 (Md. Ct. Spec. App. 1999) (finding that a law firm which jointly represented clients must disclose privileged information if the clients later become adverse to one another; specifically finding that one of the clients may obtain information about communications between the other client and the joint lawyer even if the party was not present during those communications; "[T]he principles of duty, loyalty, and fairness require that when two or more persons with a common interest engage an attorney to represent them with respect to that interest, the attorney privilege against disclosure of confidential communications does not apply between them, regardless of whether both or all clients were present during the communication. To hold otherwise would be inconsistent with the high level of trust that we expect in an attorney-client relationship." (emphasis added)).
- Opus Corp. v. IBM, 956 F. Supp. 1503, 1506 (D. Minn. 1996) ("When an attorney acts for two different clients who each have a common interest, communications of either party to the attorney are not necessarily privileged in subsequent litigation between the two clients." (quoting Bituminous Cas. Corp. v. Tonka Corp., 140 F.R.D. 381, 387 (D. Minn. 1992))).
- Griffith v. Davis, 161 F.R.D. 687, 693 (C.D. Cal. 1995) (noting that the "joint client doctrine" applies "where two clients share the same lawyer. . . . Under this doctrine, communications among joint clients and their counsel are not privileged in disputes between the joint clients, but are protected from disclosure to others." (citation omitted)).
- Arce v. Cotton Club, No. 4:94CV169-S-O, 1995 U.S. Dist. LEXIS 21539 (N.D. Miss. Jan. 13, 1995) (holding that the dispute between jointly represented clients meant that none of the clients could assert the privilege as to communications shared with the joint lawyer).

- Scrivner v. Hobson, 854 S.W.2d 148, 151 (Tex. Ct. App. 1993) ("With regard to the attorney-client privilege, the general rule is that, as between commonly represented clients, the privilege does not attach to matters that are of mutual interest. . . . Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.").
- In re Grand Jury Subpoena Dated Nov. 26, 1974, 406 F. Supp. 381, 393-94 (S.D.N.Y. 1975) ("Relevant case law makes it clear that the rule thus described by McCormick . . . squarely applies when former joint clients subsequently face one another as adverse parties in litigation brought by any one of them. . . . The rule may also be invoked in an action brought by or against a successor-in-interest to a former joint client where any one of the other former joint clients stands as an opposing party in such action. . . . On the other hand, it has been ruled that the privilege of one joint client cannot be destroyed at the behest of the other where the two have merely had a 'falling out' in the sense of ill-feeling or divergence of interests.").

Bars have reached the same conclusion.

- North Carolina RPC 245 (4/4/97) ("When there is a joint representation of parties in a particular matter, each party is entitled to access to the legal file after the representation ends.").
- North Carolina RPC 153 (1/15/93) (holding that a lawyer who represents multiple clients must provide access to the lawyer's files to all of the clients; also holding that a lawyer must withdraw if adversity develops between multiple clients; "When a lawyer undertakes representation of codefendants, an impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony or incompatibility of positions. Identifying and resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation and not the client's responsibility. Once Attorneys A and B determined that Nurse's and Hospital's interests were the same and, presumably, that no conflict of interest existed and then undertook joint representation of Nurse and Hospital, with the consent of Hospital and its insurance company, information gathered on behalf of Nurse and Hospital (who were deemed to have the 'same interest') lost its confidential nature as between Nurse and Hospital by implied authorization, if not actual consent, under Rule 4(c)(1) and (2). Since Nurse relied on reasonable attorney-client expectations of protection of her interests and access to information, Attorneys A and B are now estopped to negate consent to the rights inuring to Nurse's benefit from the joint representation. Nurse is entitled to immediate possession of all information in the joint representation file or files of Attorney A and B accumulated to the date of termination of representation that would or could be of some value to her in protecting her interests. This includes the items specified in the inquiry and any others that would or could be of some

help to Nurse. The information must be surrendered unconditionally by Attorneys A or B without regard to whether the cost of its acquisition was advanced by either attorney or client (hospital). RPC 79. The attempt by Attorneys A and B to revoke the implied or actual authority to share information with Nurse can only apply prospectively to information gathered and work done after termination of representation." (emphasis added)).

All of these cases recite the same basic principle -- jointly represented clients cannot claim privilege protection when one seeks privileged communications from the other in a later dispute among them. However, courts disagree about what type of dispute will trigger this rule.

### **Degree of Adversity**

The key authorities and the case law take differing approaches in assessing the level of hostility between former jointly represented clients that must arise before the privilege evaporates.

The ABA Model Rules indicate that the privilege evaporates "if litigation eventuates" between the former jointly represented clients. ABA Model Rule 1.7 cmt. [30] (emphasis added). The Restatement indicates that the privilege evaporates "in a subsequent adverse proceeding" between the former jointly represented clients. Restatement (Third) of Law Governing Lawyers § 75 (2000) (emphasis added).

The "adverse proceeding" language seems broader than the "litigation" language. For instance, it might include administrative proceedings that do not count as litigation under some courts' standards. However, both the ABA Model Rules and the Restatement obviously require a high degree of adversity among the former joint clients before finding that the privilege "evaporates."

Courts have also taken differing positions on the degree of adversity among former jointly represented clients that triggers the privilege's evaporation. Some courts point to proceedings between the former clients.<sup>3</sup> However, other courts have found the same effect in the case of a dispute<sup>4</sup> or controversy<sup>5</sup> between the former jointly represented clients. One court used the phrase "truly becomes adverse to his former co-plaintiffs."<sup>6</sup>

Not many cases explain what type of adversity would not trigger this effect. One court provided at least some guidance.

Relevant case law makes it clear that the rule thus described by McCormick [preventing one former jointly represented client from invoking the privilege in a dispute among the former jointly represented clients] . . . squarely applies when former joint clients subsequently face one another as adverse parties in litigation brought by any one of them. . . . The rule may also be invoked in an action brought by or against a successor-in-interest to a former joint client where any one of the other former joint clients stands as an opposing party in such action. . . . On the other hand, it has been ruled that the privilege of one joint client cannot be destroyed at the behest of the other where the two have merely had a 'falling out' in the sense of ill-feeling or divergence of interests.

In re Grand Jury Subpoena Dated Nov. 26, 1974, 406 F. Supp. 381, 393-94 (S.D.N.Y. 1975) (emphasis added).

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<sup>3</sup> See, e.g., Tekni-Plex, Inc. v. Meyner & Landis, 674 N.E.2d 663, 670 (N.Y. 1996).

<sup>4</sup> Griffith v. Davis, 161 F.R.D. 687, 693 (C.D. Cal. 1995).

<sup>5</sup> Brandon v. W. Bend Mut. Ins. Co., 681 N.W.2d 633, 642 (Iowa 2004) ("[W]hen the same attorney acts for two parties, the communications are privileged from third persons in the controversy, but not in a subsequent controversy between the two parties.").

<sup>6</sup> Anderson v. Clarksville Montgomery Cnty. Sch. Bd., 229 F.R.D. 546, 548 (M.D. Tenn. 2005) ("[U]ntil such time as a plaintiff withdraws and truly becomes adverse to his former co-plaintiffs, it appears appropriate to maintain the attorney-client privilege absent a waiver by all plaintiffs.").

Of course, if a former jointly represented client wanted to assure "evaporation" of the privilege, that client could turn a "dispute" or a "controversy" into "litigation" or a "proceeding." Thus, any of the former jointly represented clients has the power itself to cause the privilege to "evaporate."

### **Joint Clients' Power to Change the Rules**

As explained above, the Restatement indicates that jointly represented clients can agree to change the general rules -- allowing them to withhold privileged communications from each other in the event of a dispute, and (apparently) even granting another jointly represented client a "veto power" over the client's waiver of its own personal communications with a joint lawyer. Restatement (Third) of Law Governing Lawyers § 75 cmt. d (2000).

Not many courts or authorities have dealt with this intriguing issue. In 2004, the New York City Bar issued a legal ethics opinion explaining that joint clients could affect the impact of any later adversity among them.

- N.Y. City LEO 2004-02 (6/2004) ("Multiple representations of a corporation and one or more of its constituents are ethically complex, and are particularly so in the context of governmental investigations. If the interests of the corporation and its constituent actually or potentially differ, counsel for a corporation will be ethically permitted to undertake such a multiple representation, provided the representation satisfies the requirements of DR 5-105(C) of the New York Code of Professional Responsibility: (i) corporate counsel concludes that in the view of a disinterested lawyer, the representation would serve the interests of both the corporation and the constituent; and (ii) both clients give knowledgeable and informed consent, after full disclosure of the potential conflicts that might arise. In determining whether these requirements are satisfied, counsel for the corporation must ensure that he or she has sufficient information to apply DR 5-105(C)'s disinterested lawyer test in light of the particular facts and circumstances at hand, and that in obtaining the information necessary to do so, he or she does not prejudice the interests of the current client, the corporation. Even if the lawyer concludes that the requirements of DR 5-105(C) are met at the

outset of a multiple representation, the lawyer must be mindful of any changes in circumstances over the course of the representation to ensure that the disinterested lawyer test continues to be met at all times. Finally, the lawyer should consider structuring his or her relationships with both clients by adopting measures to minimize the adverse effects of an actual conflict, should one develop. These may include prospective waivers that would permit the attorney to continue representing the corporation in the event that the attorney must withdraw from the multiple representation, contractual limitations on the scope of the representation, explicit agreements as to the scope of the attorney-client privilege and the permissible use of any privileged information obtained in the course of the representations, and/or the use of co-counsel or shadow counsel to assist in the representation of the constituent client." (emphases added)).

One year later, the court dealing with a similar situation indicated otherwise, although there may have been extenuating circumstances.

- In re Mirant Corp., 326 B.R. 646 (Bankr. N.D. Tex. 2005) (rejecting the applicability of a "Protocol" entered into by a parent and a then-subsiary which authorized their joint lawyer Troutman Sanders to keep confidential from one client what it learned from the other; noting that the general counsel of the subsidiary agreed to the Protocol after the subsidiary became an independent company, but also explaining that the general counsel had ties both to the parent and to Troutman).

### **Effect of a Lawyer's Improper Joint Representation**

Several cases have dealt with an exception to these general rules.

Under this rarely-applied principle, even if a lawyer was found to have engaged in some improper conduct by jointly representing multiple clients with adverse interests, that would not necessarily result in loss of the privilege in a later dispute between them.<sup>7</sup>

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<sup>7</sup> In its analysis of a possible joint representation among corporate affiliates, the Third Circuit's decision in Teleglobe explained that even as between the joint clients the privilege can protect communications with a joint lawyer who should not have represented joint clients whose interests are adverse to one another.

The Restatement's conflicts rules provide that when a joint attorney sees the co-clients' interests diverging to an unacceptable degree, the proper course is to end the joint representation. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121 cmts. e(1)-(2). As the Court of Appeals for the D.C. Circuit noted in Eureka Inv. Corp. v. Chicago Title Ins. Co., 240 U.S. App. D.C. 88, 743 F.2d 932 (D.C. Cir. 1984) (per



The much older Eureka case did not receive much attention until Teleglobe cited it, but stands for the same proposition.

Given Eureka's expectations of confidentiality and the absence of any policy favoring disclosure to CTI, Eureka should not be deprived of the privilege even if, as CTI suggests, the asserted attorney-client relationship should not have been created. We need not express any view on CTI's contention that Fried, Frank should not have simultaneously undertaken to represent Eureka in an interest adverse to CTI and continued to represent CTI in a closely related matter. As Wigmore's second principle expressly states, counsel's failure to avoid a conflict of interest should not deprive the client of the privilege. The privilege, being the client's, should not be defeated solely because the attorney's conduct was ethically questionable. We conclude, therefore, that Eureka was privileged not to disclose the requested documents.

Eureka Inv. Corp. v. Chi. Title Ins. Co., 743 F.2d 932, 937-38 (D.C. Cir. 1984).

Under this approach, joint clients can withhold from one another privileged communications if a lawyer has been improperly representing them (presumably in violation of the conflicts of interest rules). A fortiori, one would expect that a third party would not be able to pierce the privilege despite the adversity between the jointly represented clients.

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curiam), courts are presented with a difficult problem when a joint attorney fails to do that and instead continues representing both clients when their interests become adverse. Id. at 937-38. In this situation, the black-letter law is that when an attorney (improperly) represents two clients whose interests are adverse, the communications are privileged against each other notwithstanding the lawyer's misconduct. Id.; see also 8 J. WIGMORE, EVIDENCE § 2312 (McNaughton rev. ed. 1961).

Teleglobe Commc'ns Corp. v. BCE, Inc. (In re Teleglobe Commc'ns Corp.), 493 F.3d 345, 368 (3d Cir. 2007).

### **Effect of Now-Adverse Former Jointly Represented Clients' Use of Privileged Communications**

Surprisingly, few courts have dealt with the effect of now-adverse former joint clients using privileged communications against each other. Does such use allow third parties to access and use the same communications? Such a dramatic impact might give one of the former joint clients leverage in the dispute, and under any circumstance could harm one or all of the joint clients.

The Restatement takes the troubling position that now-adverse former joint clients' use of privileged communications against each other operates as a waiver as to the world -- thus allowing other third parties access to those communications.

Thomas E. Spahn, The Attorney-Client Privilege and the Work Product Doctrine: A Practitioner's Guide, Ch. 24.306 (3d. ed. 2013), published by Virginia CLE Publications.

### **Best Answer**

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

B 11/14

## Effect of a Joint Representation in Corporate Transactions

### Hypothetical 5

Last year, you represented your firm's largest corporate client in spinning off one of its subsidiaries to become an independent company. The timing could not have been any worse, and the newly-independent former subsidiary declared bankruptcy. This morning you received a call from the lawyer representing the recently-appointed bankruptcy trustee. The lawyer demanded all of your law firm's files created during your work on the transaction, claiming that you had jointly represented the parent and the then-subsiary in the spin. Given that lawyer's threatening tone, you have been trying to remember what damaging documents might exist in the file -- while considering the trustee's lawyer's legal position.

If you had jointly represented the parent and the then-subsiary in the spin transaction, does the bankruptcy trustee have the right to your law firm's file?

### (A) YES (PROBABLY)

### Analysis

In many transactions in which one member of a corporate "family" becomes an independent company through either a stock or asset sale, the same lawyers represent both entities in the transaction. Lawyers representing the entire corporate family in such transactions can include in-house and outside lawyers.

This scenario often implicates the well-recognized principle that jointly represented clients usually have an equal claim on their joint lawyer's files. For instance, in In re Equaphor Inc.,<sup>1</sup> the court dealt with files that a law firm created during its joint representation of Equaphor and three individual co-defendants in a derivative action. When Equaphor later declared bankruptcy, the bankruptcy trustee moved to compel the law firm to turn over its litigation files. The individual clients resisted the

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<sup>1</sup> Ch. 7 Case No. 10-20490-BFK, 2012 Bankr. LEXIS 2129 (Bankr. E.D. Va. May 11, 2012).

turnover -- emphasizing that Equaphor had been only a "nominal defendant" in the derivative action.<sup>2</sup> The court rejected this argument, noting that

while [Equaphor] may have been named as a nominal defendant, there is no such thing as a nominal client of a law firm . . . [T]here is no support in the case law for a 'nominal defendant exception' to the principle that all clients are entitled to an attorney's files.

In re Equaphor Inc., Ch. 7 Case No. 10-20490-BFK, 2012 Bankr. LEXIS 2129, at \*9-10 (Bankr. E.D. Va. May 11, 2012).

Application of the general principle means that a newly independent company generally may obtain access to the files generated by the law firm that jointly represented the companies while they were still members of the same corporate "family." If the newly independent company declares bankruptcy, a bankruptcy trustee can thus generally call upon the law firm or law department to produce all of its files generated during the former joint representation -- including communications between the lawyer and the parent that the lawyer also represented during the "transaction."

A number of cases highlight the frightening nature of this basic principle.

**Mirant.** In In re Mirant Corp., 326 B.R. 646 (Bankr. N.D. Tex. 2005), the Troutman Sanders law firm was required to produce files it generated while jointly representing the firm's long-time client The Southern Company and the subsidiary which became known as Mirant when it became an independent company and later declared bankruptcy. The court rejected Troutman Sanders' argument that Mirant's bankruptcy trustee was not entitled to communications between Troutman Sanders and The Southern Company created during the joint representation and noted that "[i]t is well

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<sup>2</sup> Id. at \*9.

established that, in a case of a joint representation of two clients by an attorney, one client may not invoke the privilege against the other client in litigation between them arising from the matter in which they were jointly represented." Id. at 649.

**Teleglobe.** In Teleglobe Communications Corp. v. BCE Inc. (In re Teleglobe Communications Corp.), 493 F.3d 345 (3d Cir. 2007), the Third Circuit analyzed the nature of an in-house lawyer's representation of her employer and its corporate affiliates.

In Teleglobe, Canada's largest broadcaster (BCE) had a wholly owned Canadian subsidiary (Teleglobe), which in turn had several wholly owned second-tier U.S. subsidiaries. Teleglobe and its U.S. subsidiaries were developing a global fiber optic network. Not surprisingly, by late 2001 BCE started to reassess the project, exploring such options as restructuring, maintaining its funding, or cutting off funding for Teleglobe and its subsidiaries. After this intensive reassessment involving in-house and outside lawyers (and undoubtedly generating troublesome documents), BCE decided to cut off funding.

Within just a few weeks, Teleglobe declared bankruptcy in Canada, and the second-tier subsidiaries declared bankruptcy in the United States. The bankrupt second-tier subsidiaries (now controlled by hostile creditors) sued BCE for cutting off their funding. They sought documents from BCE's law department and various outside law firms which had represented BCE, Teleglobe, and its subsidiaries. The second-tier subsidiaries claimed that they had been jointly represented by BCE's in-house lawyers and their outside law firms.

The District of Delaware agreed with this argument, and gave the bankrupt subsidiaries access to all otherwise privileged documents shared with BCE's law department. BCE appealed the district court's decision rather than turn over the documents.

In Teleglobe, the Third Circuit reversed and remanded. It agreed with the district court's analysis of both the ethics and privilege effects of a joint representation: (1) absent an agreement to the contrary, there can be no secrets among jointly represented clients; (2) former jointly represented clients generally can have access to their joint lawyer's files; (3) litigation adversity among jointly represented clients causes the privilege to evaporate, thus allowing any of them to use otherwise privileged communications in the litigation.

Although the Third Circuit's opinion started with a quote from the Righteous Brothers' song "You've Lost That Lovin' Feelin'," the opinion includes a serious analysis of several issues. Id. at 352 & n.1. Significantly, the Third Circuit specifically rejected arguments presented by amicus Association of Corporate Counsel.

Among other things, the Third Circuit rejected what in essence was the district court's automatic presumption that all lawyers representing BCE also jointly represented Teleglobe and its now bankrupt subsidiaries. The court remanded so the district court could assess with more care the nature of BCE's in-house and outside lawyers' representation of Teleglobe and its subsidiaries.

After the Third Circuit described the adverse consequences of a joint representation, it offered a roadmap for how in-house lawyers can avoid those consequences.

Most importantly, the court explained that in-house lawyers can limit the scope of their representation of corporate affiliates. The court provided the example of a corporate parent's gathering of information from subsidiaries in order to make public filings -- which does not necessarily "involve jointly representing the various corporations on the substance of everything that underlies those filings." Id. at 373. The court also acknowledged that "in some of these circumstances in-house counsel may not need to represent the subsidiaries at all," because the parent company's lawyer can have privileged communications with subsidiaries' employees without representing the subsidiary. Id. at 373 n.27.

In discussing situations where a parent's and a subsidiary's interests might later diverge ("particularly in spin-off, sale and insolvency situations"), the court advised that "it is wise for the parent to secure for the subsidiary outside representation." Id. at 373. The court emphasized that this "does not mean that the parent's in-house counsel must cease representing the subsidiary on all other matters." Id. The court assured in-house lawyers that

[b]y taking care not to begin joint representations except when necessary, to limit the scope of joint representations, and seasonably to [hire] separate counsel on matters in which subsidiaries are adverse to the parent, in-house counsel can maintain sufficient control over the parent's privileged communications.

Id. at 374. If in-house lawyers take this step, "they can leave themselves free to counsel a parent alone on the substance and ramifications of important transactions without risking giving up the privilege in subsequent adverse litigation [between a parent and a former subsidiary]." Id. at 383.

On remand, the Bankruptcy Court for the District of Delaware ultimately found that there had not been a joint representation.<sup>3</sup>

**625 Milwaukee.** Significantly, the same approach has been applied in the case of a parent's sale of a subsidiary in the ordinary course of its business, rather than in a bankruptcy setting.

In 625 Milwaukee, LLC v. Switch & Data Facilities Co., Case No. 06-C-0727, 2008 U.S. Dist. LEXIS 19943 (E.D. Wis. Feb. 29, 2008), law firms Blank Rome and Quarles & Brady represented a parent and its fully owned subsidiary in a transaction involving the subsidiary's sale to a new owner. The subsidiary later sued its former parent, and sought the law firms' files. The court ordered production of the files despite the law firms' argument that they never represented the subsidiary in the transaction. The court noted that the parent had presented "no evidence indicating that it ever hired separate counsel for [the subsidiary] before the date it was sold to [buyer]," so "the only attorneys who could have been representing [the subsidiary] at the moment the Lease Term Sheet was signed were Blank Rome and Quarles & Brady." Id. at \*12. The court even ordered the production of a post-transaction document -- Blank Rome's invoice which referred to the firm's pre-transaction work. Accord Brownsville General Hosp., Inc. v. Brownsville Prop. Corp. (In re Brownsville General Hosp., Inc.), 380 B.R. 385 (Bankr. W.D. Pa. 2008).

**New York City LEO 2008-2.** A 2008 New York City legal ethics opinion thoroughly analyzed this issue, and also warned in-house lawyers of the risk they run by

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<sup>3</sup> Teleglobe USA, Inc. v. BCE Inc. (In re Teleglobe Commc'ns Corp.), 392 B.R. 561 (D. Del. 2008).



jointly representing corporate affiliates.<sup>4</sup> The New York City Bar suggested that an in-house lawyer in this situation could obtain a prospective consent.

Careful drafting of the advance waiver will enhance the possibility that inside counsel will be able to continue to represent one or more clients after a conflict arises. In the

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<sup>4</sup> New York City LEO 2008-2 (9/2008) (addressing an in-house lawyer's representation of corporate affiliate in the face of conflicts of interest; explaining that "[i]t is inevitable that on occasion parents and subsidiaries will see their interests diverge, particularly in spin-off, sale, and insolvency situations. When this happens, it is wise for the parent to secure for the subsidiary outside representation. Maintaining a joint representation for the spin-off transaction too long risks the outcome of Polycast [Tech. Corp. v. Uniroyal, Inc.], 125 F.R.D. [47, 49 (S.D.N.Y. 1989)], and Medcom [Holding Co. v. Baxter Travenol Lab.], 689 F. Supp. [842, 844 (N.D. Ill. 1988)] -- both cases in which parent companies were forced to turn over documents to their former subsidiaries in adverse litigation -- not to mention the attorneys' potential for running afoul of conflict rules."; first analyzing an in-house lawyer's representation of a parent and one or more wholly owned affiliates; explaining that in their scenario "inside counsel's representation is not of entities whose interests may differ because the parent's interests completely preempt those of its wholly owned affiliates"; also analyzing an in-house lawyer's representation of a parent and an affiliate that is only partially owned by the parent, or several affiliates controlled by, but not wholly owned by, a common parent; explaining that in that situation "inside counsel must act on the basis that the parent and each of its represented affiliates is a separate entity with separate interests"; concluding that in the second scenario in-house lawyers must analyze whether they can jointly represent affiliates with conflicting interests; "Inside counsel should consider carefully these conflict-of-interest rules. Sometimes, a potential conflict will be apparent from the outset of the representation. At other times, the conflict may not become apparent until after the joint representation has begun. To pick just one example, at the outset of a litigation in which a parent and a majority-owned affiliate have been sued, their positions may appear identical and they may choose to be jointly represented by inside counsel. Then discovery may unexpectedly reveal that there is a basis for the parent to offload responsibility onto the affiliate."; also saluting the "disinterested lawyer" test, which determines if an objective lawyer would believe that he or she could adequately represent multiple affiliate corporations in the joint representation; noting that the in-house lawyer might consider obtaining prospective consents from the various clients; "Careful drafting of the advance waiver will enhance the possibility that inside counsel will be able to continue to represent one or more clients after a conflict arises. In the context of a joint representation of a parent and an affiliate, the advance waiver should: [i]dentify for the clients the potential or existing conflicts with as much specificity as possible; [m]ake clear to the clients that the confidences and secrets of the affiliate will be shared with the parent; and [o]btain agreement from the affiliate that if inside counsel can no longer represent both parent and affiliate, inside counsel can continue to represent the parent irrespective of the confidences and secrets that the affiliate may have shared with counsel and irrespective of what work counsel may have performed for the affiliate."; explaining that in some circumstances the in-house lawyer might conclude that separate lawyers should represent the affiliates; also noting that "[i]t also bears emphasis, as stated above, that the person giving informed consent to the advance waiver on behalf of the affiliate must have the degree of independence from the parent, or from other affected affiliates, required by applicable corporate law"; also noting that an in-house lawyer might alternatively limit the representation to one or more affiliates in order to avoid conflicts; "Limiting the representation of an affiliate is at times accompanied by retaining other counsel -- for example, outside counsel -- to represent the affiliate on those matters in which conflicts preclude joint representation. Separate counsel can protect the affiliate's interests in the conflicted matter, while allowing inside counsel to perform other useful roles for both clients."; warning that "[s]ensitivity to conflicts between represented affiliates will help forestall judicial criticism and avoid unnecessary curtailment of inside counsel's continued functioning in their expected capacity").

context of a joint representation of a parent and an affiliate, the advance waiver should: [i]dentify for the clients the potential or existing conflicts with as much specificity as possible; [m]ake clear to the clients that the confidences and secrets of the affiliate will be shared with the parent; and [o]btain agreement from the affiliate that if inside counsel can no longer represent both parent and affiliate, inside counsel can continue to represent the parent irrespective of the confidences and secrets that the affiliate may have shared with counsel and irrespective of what work counsel may have performed for the affiliate.

New York City LEO 2008-2 (9/2008). Not surprisingly, the New York City Bar also reminded in-house lawyers that anyone signing such a prospective consent on the corporation's behalf "must have the degree of independence from the parent, or from other affected affiliates, required by applicable corporate law." Id.

Echoing the Third Circuit's warning in Teleglobe (discussed above), the New York City Bar also suggested that in-house lawyers might want to avoid representing corporate affiliates in certain circumstances.

Limiting the representation of an affiliate is at times accompanied by retaining other counsel -- for example, outside counsel -- to represent the affiliate on those matters in which conflicts preclude joint representation. Separate counsel can protect the affiliate's interests in the conflicted matter, while allowing inside counsel to perform other useful roles for both clients.

Id.

**Crescent Resources.** In In re Crescent Resources, LLC, 457 B.R. 506 (Bankr. W.D. Tex. 2011), the Litigation Trust for bankrupt Crescent Resources sought the files of the Robinson, Bradshaw & Hinson law firm.

The Litigation Trust claimed that Robinson, Bradshaw had jointly represented Crescent and its parent Duke Ventures, LLC -- in a transaction that allegedly left

Crescent insolvent after a transfer of over \$1 billion to Duke. If there had been a joint representation, universally recognized principles would entitle either of the jointly represented clients to the law firm's files. As the undeniable successor to Crescent Resources, the Litigation Trust would therefore be entitled to the law firm's files -- including all communications between the law firm and Duke about the transaction, even if no Crescent representative participated in or received a copy of those communications.

The court succinctly stated the issue.

The major issue before the Court is whether the Trust is to be considered a joint or sole client, or no client at all, of RBH [Robinson, Bradshaw & Hinson] with respect to the Project Galaxy files.

Id. at 516.

The court also teed up the parties' positions.

The Trust argues that RBH did represent Crescent Resources, while Duke would have the Court believe that RBH jointly represented Crescent Resources before the 2006 Duke Transaction and after the 2006 Duke Transaction, but not during the 2006 Duke Transaction. Duke further alleges that Crescent Resources was not represented by counsel at all during the 2006 Duke Transaction. Duke is arguing, essentially, that for the purposes of the 2006 Duke Transaction only, RBH did not represent Crescent Resources. So the issue to be resolved is whether RBH represented Crescent Resources with respect to the 2006 Duke Transaction.

Id.

Duke and Robinson, Bradshaw staked out a firm position, and both

provided sworn testimony that Duke was RBH's sole client for Project Galaxy. Mr. Torning ["Duke's in-house attorney responsible for Project Galaxy and attorney in charge of outside counsel for Duke for Project Galaxy"] testified that it

was his understanding "that at all times during Project Galaxy, RBH represented Duke, not Crescent."

Id. at 519-20 (internal citation omitted). Thus, both Duke and Robinson, Bradshaw stated under oath that the law firm represented only Duke -- and did not represent Crescent.

The court looked at all the obvious places in assessing whether Robinson, Bradshaw solely represented Duke in the transaction, or jointly represented Duke and Crescent in the transaction.

First, the court found that a 2004 Robinson, Bradshaw retainer letter was somewhat ambiguous.

"The Firm is retained to represent Duke Energy (or any of its subsidiaries or affiliates) and to render legal advice or representation as directed and specified by a Duke Energy attorney . . . with respect to a given matter . . . However, the Duke Energy Office of General Counsel has the ultimate responsibility and authority for handling all decisions in connection with the Services."

Id. at 519 (internal citation omitted). A Robinson, Bradshaw lawyer testified that the firm "was unable to locate any engagement letter . . . in which Crescent Resources was a signatory." Id. Thus, there was no specific retainer letter for the pertinent transaction, but the earlier general retainer letter was not inconsistent with Robinson, Bradshaw's joint representation of Crescent in the transaction.

Second, the court pointed to Duke's payment of Robinson, Bradshaw's invoices. Id. at 520. The court explained that Duke's payment of Robinson, Bradshaw's legal fees did not necessarily preclude the firm's joint representation of Duke and Crescent.

The evidence shows that Duke, not Crescent, paid for the legal services provided in connection with Project Galaxy. However, that is not dispositive, as there can still be an

implied attorney-client relationship independent of the payment of a fee.

Id. at 522.

Third, the court noted Duke's argument that Robinson, Bradshaw "took direction from, reported to, and provided legal services to Duke." Id. at 520. In analyzing the direction issue, the court pointed to a Robinson, Bradshaw lawyer's testimony.

Mr. Buck testified that neither he nor any RBH attorneys represented Crescent in the Project Galaxy transaction. . . . Mr. Buck additionally testified that he did not report to Crescent nor take direction from Crescent during Project Galaxy.

Id. at 521. Of course, the Robinson, Bradshaw lawyers had interacted with Crescent employees in connection with the transaction.

Duke acknowledged that RBH worked with Crescent Resources on Project Galaxy, but downplayed that by stating that "of course [RBH interacted with Crescent], because they're representing Duke in the sale of . . . its 49 percent sharehold interest in Crescent. And of course, when you're providing information to the buyer—the prospective buyer—you're going to work with the company in which you're selling a portion of your shares." . . . Duke argues that this contact between RBH and Crescent Resources is not the same as RBH representing Crescent Resources with respect to Project Galaxy.

Id. at 519.

Thus, Duke and Robinson, Bradshaw argued that the firm had not jointly represented Duke and Crescent in the transaction, relying on sworn statements to that effect from both Duke and the law firm; the lack of a specific retainer letter with Crescent; Duke's payment of the legal bills; and Duke's direction to the law firm in connection with the transaction.

The court then turned to contrary evidence presented by the Litigation Trust.

First, the court pointed to evidence clearly establishing that Robinson, Bradshaw had represented Crescent before the transaction. Id. at 518. The court also noted the firm's failure to run conflicts when undeniably representing Crescent in a number of matters before the transaction.

Ironically, the court also pointed to Crescent's own application to retain Robinson, Bradshaw as its law firm in the bankruptcy -- which described the law firm's long-standing representation of Crescent.

The Trust presented the Application to Employ RBH submitted to this Court on June 11, 2009 (the "Application") . . . . That document details RBH's pre-petition relationship with the Debtors. "RB&H has been representing Crescent and many of its debtor and non-debtor subsidiaries since 1986 and has served as Crescent's primary corporate counsel for several years." . . . The Application states that "RB&H represented Crescent in connection with the formation, in 2006, of its current parent holding company, incident to a change in Crescent's historical ownership structure as a wholly-owned, indirect subsidiary of Duke Energy Corporation." . . . The Application also contains the Declaration of Robert C. Sink in Support of Application to Employ (the "Sink Declaration") . . . . Mr. Sink is a shareholder with RBH and the declaration was made on RBH's behalf. In the Sink Declaration, Mr. Sink echoes the Application and states that "RB&H has represented Crescent Resources and many of its debtor and non-debtor subsidiaries in various matters since 1986 and has served as Crescent's primary corporate counsel for several years."

Id. at 517-18 (emphasis added). The court concluded that

RBH represented both Crescent and Duke prior to Project Galaxy. There was no end to the attorney-client relationship and RBH attorneys were going through Crescent files in performing the due diligence for Project Galaxy. It is reasonable that a current client would believe that an attorney was representing them if the attorney showed up to that current client's office and started going through files.

Id. at 522 (emphasis added).

The court also noted Robinson, Bradshaw's representation of Crescent after the transaction.

Duke provided no evidence which would have given RBH cause to terminate their relationship with Crescent, nor did Duke provide any evidence that RBH gave notice to Crescent that RBH was terminating their relationship. Further, Duke acknowledges that RBH and Crescent continued to maintain an attorney-client relationship post Project Galaxy, which would negate any potential argument by Duke that RBH and Crescent's relationship may have terminated by implication.

Id. at 523.

Second, the court noted that Crescent did not have any other law firms represent it in connection with the transaction.

RBH had a long-term relationship with Crescent before Project Galaxy. Additionally, there was no other representation of Crescent during Project Galaxy.

Id. at 521 (emphasis added).

Third, the court pointed to several Robinson, Bradshaw lawyers' website bios boasting that they had represented Crescent in the transaction.

The Trust also discussed statements made by various RBH lawyers on RBH's website. Stephan J. Willen's page, under "Representative Experience" includes "Representing a real estate developer, as borrower, in connection with a \$1.5 billion revolving and term loan letter of credit facility used to recapitalize the developer." The Trust stated that this represents the 2006 Duke Transaction and shows Mr. Willen's understanding that Crescent Resources was RBH's client with respect to the 2006 Duke Transaction. Additionally, William K. Packard's page, under "Representative Experience" states "Representation of Crescent Resources, as borrower, in connection with a \$1.5 billion revolving and term loan letter of credit facility."

Id. at 518 (emphases added).

After examining both side's arguments, the court turned to the legal standard.

The court pointed to the Third Circuit's extensive analysis of this very issue in In re Teleglobe Communications Corp., 493 F.3d 345 (3d Cir. 2007).<sup>5</sup> The court noted that

**Teleglobe**, relied on by both parties, reads almost as an instructional manual to in-house counsel on how to avoid tangled joint-client issues. **Teleglobe** instructs that a court should consider the testimony from the parties and their attorneys on the areas of contention.

In re Crescent Res., 457 B.R. at 524. The court also pointedly noted that

RBH and in-house counsel for Duke should have heeded the warnings in **Teleglobe** and taken greater care to have in place an information shielding agreement or ensured that Crescent was represented by outside counsel.

Id.

The court ultimately concluded that Robinson, Bradshaw had jointly represented Duke and Crescent in the transaction. The court therefore held that the Litigation Trust was entitled to Robinson, Bradshaw's files generated during the firm's joint representation of Duke and Crescent in the transaction.<sup>6</sup>

In looking ahead to litigation between Litigation Trust and Duke, the court also held found that

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<sup>5</sup> In re Crescent Res., 457 B.R. at 516 ("The various cases cited by both the Trust and Duke involve cases where a parent corporation and subsidiary were represented by the same attorney during a spin-off, sale, or divestiture. See e.g. In re Teleglobe Commc'ns Corp., 493 F.3d 345 (3rd Cir. 2007) (in-house counsel of the parent corporation represented both the subsidiary and parent companies); Polycast Tech. Corp. v. Uniroyal, Inc., 125 F.R.D. 47 (S.D.N.Y. 1989) (in-house counsel of the parent corporation represented both the subsidiary and parent in the sale of the subsidiary); Medcom Holding Co. v. Baxter Travenol Labs., Inc., 689 F. Supp. 841 (N.D.Ill. 1988); In re Mirant Corp., 326 B.R. 646 (Bankr. N.D.Tex. 2005) (same law firm representing both parent and subsidiary in a public stock offering of the subsidiary). In those cases, the courts determined the parties were joint clients. The issue remaining before this Court is whether RBH represented Crescent Resources with respect to the 2006 Duke Transaction.").

<sup>6</sup> Id. at 524.



Duke cannot invoke an attorney-client privilege to stop the Trust from using the joint-client files in adversary proceedings between Duke and the Trust.

Id. at 528. In contrast, the court held that

the Trust may not unilaterally waive the joint-client privilege and use jointly privileged information in proceedings involving third parties, absent a waiver from Duke.

Id. at 530.<sup>7</sup> The court's conclusions follow the majority rule when joint clients become adversaries. The law generally allows either joint client access to their common law firm's files, and permits either joint client to use any of those documents in litigation with another joint client.

### **Best Answer**

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

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<sup>7</sup> Id. at 529-30 ("The Restatement [Restatement (Third) of Law Governing Lawyers § 75 cmt. e (2000)] says co-client communication is not privileged as between the co-clients. The Trust's reading of the Restatement appears to state that if co-client communication is then used in an adversary [sic] between the former co-clients, it would then waive the privilege as to third parties. This would effectively make the privilege superfluous. Protections can be placed on any future hearings between Duke and the Trust, and any co-client privileged information can remain privileged as to third parties even if used in a future adversary proceeding between Duke and the Trust.").

## Availability of the Common Interest Doctrine in a Transactional Setting

### Hypothetical 6

In your role as general counsel of a Silicon Valley company, you take the lead in exploring possible acquisitions of other companies. You often encounter resistance from potential sellers, who balk at providing you access to their privileged documents. This sometimes prevents you from conducting the type of due diligence you think necessary, and you are considering what you can do.

May you avoid a privilege waiver by arranging for a common interest agreement between your company and the potential acquisition target?

**(B) NO**

### Analysis

The common interest doctrine allows separately represented clients to share each other's privileged communications without triggering what would otherwise be a nearly inevitable privilege waiver. The doctrine affects the privilege analysis, rather than resting on ethics confidentiality principles.

Although superficially similar to joint representations (which involve both ethics and privilege issues), common interest agreements have dramatically different effects.

Unlike some authorities' and courts' interpretation of lawyers' duty in a joint representation setting, all courts agree that common interest participants need not share any privileged communications with other participants. In other words, they disclose to other participants only what they want to disclose.

Unfortunately for those looking for a way to share privileged communications without triggering a waiver, the common interest doctrine is available only at certain times.

Nearly every court requires that common interest agreement participants be involved in litigation or anticipate litigation before finding that a common interest agreement avoids a waiver. Thomas E. Spahn, The Attorney-Client Privilege and the Work Product Doctrine: A Practitioner's Guide, Ch. 20.5 (3d. ed. 2013), published by Virginia CLE Publications.

**Best Answer**

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

B 11/14

## Availability of the Common Interest Doctrine Among Participants with Claims Against One Another

### Hypothetical 7

You represent a large lettuce grower, which has been sued by plaintiffs claiming that they became sick after eating at a well-known restaurant chain. The plaintiffs have also sued the lettuce distributor. Your company and the lettuce distributor have filed cross claims against each other, essentially blaming each other for any possible contamination. However, you also want to cooperate with the lettuce distributor in trying to establish that the plaintiffs were sickened by some other food they ate -- not the lettuce.

May your company enter into an effective common interest agreement with the lettuce distributor, despite direct litigation adversity between the two companies?

**(A) YES**

### Analysis

As long as common interest agreement participants are in or anticipate litigation, they usually can safely exchange privileged communications about a common legal strategy -- even if they are simultaneously pointing the finger at each other on other matters. Thomas E. Spahn, The Attorney-Client Privilege and the Work Product Doctrine: A Practitioner's Guide, Ch. 20.805 (3d. ed. 2013), published by Virginia CLE Publications.

### **Best Answer**

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

B 11/14

## Effect of Later Adversity Among Common Interest Agreement Participants

### Hypothetical 8

You represent one of several defendants in high-stakes commercial litigation, all of whom entered into a "common interest" agreement when the case began. Unfortunately, there has been a serious falling-out among the defendants, and you and your colleagues are trying to sort out its effect.

- (a) If one of the other defendants files a cross claim against your client, will it be able to use at trial any of the communications and documents that you shared with the other common interest participants under the agreement?

**(A) YES**

- (b) In that situation, will the other defendants be able to access and use any private communications you had with your client, which were not shared with the other common interest participants?

**(B) NO**

- (c) If one of the other defendants files a cross claim against your client, will you be able to represent your client in defending against that cross claim?

**MAYBE**

### Analysis

Adversity among former common interest agreement participants causes some of the same ramifications as in a joint representation setting, but differs significantly in other ways from the joint representation context.

- (a) As in the joint representation context, common interest participants generally can use any shared privileged communications against other participants if adversity develops. Thomas E. Spahn, The Attorney-Client Privilege and the Work

Product Doctrine: A Practitioner's Guide, Ch. 24.404 (3d. ed. 2013), published by Virginia CLE Publications.

(b) Unlike the joint representation setting, common interest participants who have become adversaries can only discover and use privileged communications that have been disclosed among the participants.

This contrasts sharply with the joint representation created, in which the now-adverse former jointly represented clients generally can access and use any privileged communications that were part of the joint representation, even if they were not aware of those at the time. Thomas E. Spahn, The Attorney-Client Privilege and the Work Product Doctrine: A Practitioner's Guide, Ch. 24.304 (3d. ed. 2013), published by Virginia CLE Publications.

(c) Several courts have applied joint representation principles to common interest arrangements when analyzing the effect of adversity on participants' lawyers.

The Restatement takes that approach.

A lawyer who learns confidential information from a person represented by another lawyer pursuant to a common-interest sharing arrangement . . . is precluded from a later representation adverse to the former sharing person when information actually shared by that person with the lawyer or the lawyer's client is material and relevant to the later matter . . . . Such a threatened use of shared information is inconsistent with the undertaking of confidentiality that is part of such an arrangement.

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

This makes some sense, because the participants' lawyers presumably have obtained privileged communications from the other participants, and it would seem unfair that they could use those against their former contractual allies. However,

several ethics opinions have tried to move the law in the other direction. Thomas E. Spahn, The Attorney-Client Privilege and the Work Product Doctrine: A Practitioner's Guide, Ch. 20.1404 (3d. ed. 2013), published by Virginia CLE Publications.

**Best Answer**

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

B 11/14

## Compliance with Law

### Hypothetical 9

You work at a local legal services office, and have been discussing with your colleagues increasingly onerous federal laws governing your activities. Among other things, a new law requires you to disclose to the government a list of your clients and their yearly income. You and your colleagues wonder about this law's effect on your confidentiality duty. Courts have rejected other legal services offices' constitutional and statutory challenges to the law, so you and your colleagues agree that a court might consider a further challenge to be frivolous.

May you disclose this information to the government without violating your confidentiality duty?

**(A) YES**

### Analysis

Analyzing lawyers' duty to comply with law presents more complicated situations than one might think at first blush. If lawyers ignore the law, society suffers. However, some of the legal profession's greatest heroes have been those challenging unjust laws, such as discriminatory laws adopted by Democrat-controlled states in the American South.

The 1908 ABA Canons of Professional Ethics generally recognized that lawyers must comply with the law. In the Canon entitled "How Far a Lawyer May Go in Supporting a Client's Cause," an ABA Canon explained that

[t]he lawyer owes "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability," to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect



his lawyer to assert every such remedy or defense. But it is steadfastly to be borne in the mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client.

ABA Canons of Professional Ethics, Canon 15 (emphasis added).

The last original 1908 Canon also dealt with this issue.

No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive nor should any lawyer render, any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public. When rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation. Correspondingly, he advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, though until a statute shall have been construed and interpreted by competent adjudication, he is free and he is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent. But above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.

ABA Canons of Professional Ethics, Canon 32 (emphasis added).

The 1969 ABA Model Code of Professional Responsibility took a more subtle approach -- distinguishing between lawyers' violations of law that involve "moral turpitude" and those that do not.

A lawyer shall not . . . [e]ngage in illegal conduct involving moral turpitude.

ABA Model Code of Professional Responsibility, DR 1-102(A)(3). An Ethical Consideration contained lofty language.

A lawyer should maintain high standards of professional conduct and should encourage fellow lawyers to do likewise. He should be temperate and dignified, and he should refrain from all illegal and morally reprehensible conduct. Because of his position in society, even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession. Obedience to law exemplifies respect for law. To lawyers especially, respect for the law should be more than a platitude.

ABA Model Code of Professional Responsibility, EC 1-5 (emphasis added) (footnote omitted).

The ABA Code also introduced a looser standard that has faced criticism since then.

A lawyer shall not . . . [e]ngage in conduct that is prejudicial to the administration of justice.

ABA Model Code of Professional Responsibility, DR 1-102(A)(5).

The 1983 ABA Model Rules of Professional Conduct also implicitly acknowledged different types of criminal acts, but using a different standard than the 1969 ABA Model Code.

It is professional misconduct for a lawyer to . . . commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.

ABA Model Rule 8.4(b). A comment explains that the prohibition only extends to certain types of criminal conduct.

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses

involving 'moral turpitude.' That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

ABA Model Rule 8.4 cmt. [2].

Thus, lawyers' deliberate violation of some unjust law presumably would not violate this provision. In fact, this limited prohibition on criminal conduct contrasts sharply with the same ABA Model Rule's total prohibition on lawyers' dishonest conduct.

It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation

ABA Model Rule 8.4(c). Although this provision represents yet another ABA Model Rule that cannot possibly be enforced as written, the absence of the last phrase found in the prohibition on criminal conduct highlights the qualified nature of the latter prohibition.

The ABA Model Rules also repeat the vague standard found in the ABA Code.

It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice

ABA Model Rule 8.4(d).

Another ABA Model Rule permits lawyers to counsel clients about their obligation to comply with legal requirements.

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences

of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

ABA Model Rule 1.2(d). Ironically, a comment to ABA Model Rule 8.4 refers back to that provision.

A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

ABA Model Rule 8.4 cmt. [4] (emphasis added).

All in all, lawyers generally must comply with the law, but with significant and justifiable exceptions.

Of course, it can be more difficult to determine if a lawyer's compliance with law might justify disclosure of protected client information.

Not surprisingly, lawyers must ultimately disclose confidences if the law requires such disclosure. The key issue is whether a lawyer may disclose client confidences without challenging the legal requirement, or instead whether the lawyer must question the law before complying with it. And if the lawyer must take the latter path, how far must the lawyer pursue such a legal challenge?

The 1969 ABA Model Code dealt with the confidentiality issue.

A lawyer may reveal . . . [c]onfidences or secrets when permitted under Disciplinary Rules or required by law or court order.

ABA Model Code of Professional Responsibility, DR 4-101(C)(2) (emphasis added). A single sentence in one of the Code's Ethical Considerations described this point as "obvious."

The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information when his client consents after full disclosure, when necessary to perform his professional employment, when permitted by a Disciplinary Rule, or when required by law.

ABA Model Code of Professional Responsibility, EC 4-2 (footnote omitted) (emphasis added).

As adopted by the ABA in 1983, the ABA Model Rules of Professional Conduct did not contain a black letter exception allowing lawyers to disclose protected client information to comply with law. Instead, several comments dealt with the issue. One comment (not yet numbered)<sup>1</sup> indicated that

a lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

ABA Model Rule 1.6 cmt. (emphasis added).

Another comment acknowledged lawyers' obligation to comply with law, but doubted whether such an obligation would trump the ethics confidentiality duty.

[A] lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.

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<sup>1</sup> Now cmt. [3].

ABA Model Rule 1.6 former cmt. [21] (emphasis added). This was quite a surprising comment -- and tended to elevate the ethics confidentiality duty over other legal obligations to disclose protected client information.

A 1994 ABA legal ethics opinion noted that "unlike DR 4-101(C)(2), Rule 1.6 does not specifically provide that 'a lawyer may reveal confidences or secrets when required by law or court order.'" ABA LEO 385 (7/5/94).

In 2002, the ABA revised this portion of the ABA Model Rules. Old comment [20] was renumbered to become current comment [12] -- discussed below. The 2002 ABA Model Rules changes deleted the phrase "but a presumption should exist against such a supersession."

Interestingly, the 2002 amendment drafters explained that they did not intend to change lawyers' substantive obligations -- although dropping a presumption would seem to be a substantive change.

The ABA, acting on the recommendation of its Ethics 2000 Commission, restored the forced-disclosure exception to the text of Model Rule 1.6(b) in 2002. In suggesting that the exception be made explicit again, the drafters said they intended 'no change in substance.' ABA, A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1985-2005, at 126 (2006).

ABA/BNA Lawyers' Manual on Professional Conduct, 55:1202.

Most significantly, the 2002 changes to the ABA Model Rules moved back into the black letter rule a reference to lawyers' "safe harbor" in complying with other laws' obligation to disclose protected client information.

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

ABA Model Rule 1.6(b)(6) (emphasis added). Presumably the term "other" means law other than that incorporated in the ethics rules themselves.

A comment provides guidance.

Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

ABA Model Rule 1.6 cmt. [12] (emphases added).

Thus, lawyers must consult with clients if disclosure "appears to be required" by law. The comment also assures lawyers that they will not face ethics sanctions by complying with a law requiring disclosure. However, the ABA Model Rules do not clearly explain the extent to which a lawyer must resist a law requiring disclosure of protected client information.

The ABA Model Rules predictably advise lawyers to disclose the minimal amount of client information required to comply with other law, and take other measures to protect the information from more widespread disclosure than necessary to comply with other law.

Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that

limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

ABA Model Rule 1.6 cmt. [16].

The Restatement parallels the ABA Model Rules, but explicitly directs lawyers to reasonably resist disclosure.

A lawyer may use or disclose confidential client information when required by law, after the lawyer takes reasonably appropriate steps to assert that the information is privileged or otherwise protected against disclosure.

Restatement (Third) of Law Governing Lawyers § 63 (2000) (emphasis added).

The Restatement provides examples of laws requiring disclosure of client information.

A lawyer's general legal duty . . . not to use or disclose confidential client information . . . is superseded when the law specifically requires such use or disclosure. For example, a lawyer may be called as a witness and directed by the tribunal to testify to what the lawyer believes is confidential client information protected by the attorney-client privilege . . . , the work-product immunity . . . , or another evidentiary rule. The scope of the protection afforded by the attorney-client privilege and the work-product immunity may be debatable in various circumstances. Similar issues may arise in pretrial discovery or in supplying evidence to a legislative committee, grand jury, or administrative agency. A lawyer may be directly required to file reports, such as registering as the agent for a foreign government or reporting cash transactions. Other laws may require lawyers to turn over certain evidence and instrumentalities of crime to governmental agencies . . . . In such situations, steps by the lawyer to assert a privilege would not be appropriate and are not required.

Restatement (Third) of Law Governing Lawyers § 63 cmt. a (2000) (emphases added).



Unlike the ABA Model Rules, the Restatement describes what steps lawyers must take in resisting what appears to be a legal obligation to disclose protected client information.

A lawyer generally is required to raise any reasonably tenable objection to another's attempt to obtain confidential client information . . . from the lawyer if revealing the information would disadvantage the lawyer's client and the client has not consented . . . , unless disclosure would serve the client's interest . . . . The duty follows from the general requirement that the lawyer safeguard such information . . . and act competently in advancing the client's objectives . . . . The duty to object arises when a nonfrivolous argument . . . can be made that the law does not require the lawyer to disclose such information. Such an argument could rest on the attorney-client privilege . . . , the work-product immunity . . . , or a ground such as the irrelevance of the information or its character as hearsay. When the client is represented by successor counsel, a predecessor lawyer's decision whether to invoke the privilege is appropriately directed by successor counsel or the client.

Restatement (Third) of Law Governing Lawyers § 63 cmt. b (2000) (emphases added).

Thus, under the Restatement lawyers generally can rely on have a safe harbor in disclosing protected client information required by law, but may have a duty (and often have the incentive) to challenge legal disclosure obligations if they can point to some non-frivolous argument in doing so.

As with other confidentiality issues, various bar groups have expressed their own thoughts about the extent to which lawyers must challenge a legal disclosure requirement before complying with it. For instance, as the ABA debated what became the 1983 ABA Model Rules of Professional Conduct, the American Trial Lawyers took a pro-confidentiality approach in its proposed ethics guidelines.

A lawyer may reveal a client's confidence to the extent required to do so by law, rule of court, or court order,

but only after good faith efforts to test the validity of the law, rule, or order have been exhausted.

Monroe H. Freedman and Thomas Lumbard, Am. Lawyer's Code of Conduct, Proposed Revision of the Code of Prof'l Responsibility, Rule 1.3, Comm'n on Prof'l Responsibility, Roscoe Pound-Am. Trial Lawyers Found., Revised Draft (May 1982) (emphasis added).

Case law seems to have little patience for lawyers challenging legal disclosure requirements.

- Jay Stapleton, Immigration Lawyer Faces Sanctions For Withholding Clients' Names, The Connecticut Law Tribune, May 15, 2014 (discussing an immigration lawyer's refusal to disclose trust account information to the Connecticut Bar, which was investigating a bounced check from the lawyer's trust account; "Like attorneys in many practice areas, immigration law attorneys are often guarded when it comes to revealing information that might expose their clients to legal trouble. But as North Haven solo Paulus Chan has learned, there appears to be no special exception for lawyers who represent illegal immigrants. To the contrary, refusing to turn over client records when requested by the Office of Chief Disciplinary Counsel can lead to ethics charges against lawyers, according to a recent decision by the Statewide Grievance Committee, which paves the way for a disciplinary hearing involving Chan. 'I don't want to talk about it,' Chan said by telephone when asked about the pending disciplinary case against him, which could result in a suspension of his law license. 'The whole thing is ridiculous,' he said. 'It's a long story.' In February, the Statewide Grievance Committee issued a decision finding the Office of Disciplinary Counsel has legal cause to bring a disciplinary case against Chan. In its decision, the committee found by clear and convincing evidence that Chan did not cooperate with disciplinary authorities when asked to turn over his client trust account records. Chan claimed he did not want to turn over the books, out of concern it could reveal the names of undocumented immigrants to the government. But the Statewide Grievance Committee said it found Chan's argument that he was acting to protect the identities of immigrants 'unpersuasive.' 'An exception to the disciplinary authorities' right to review Interest on Lawyer's Trust Account (IOLTA) does not exist in the event that an attorney represents undocumented individuals,' the committee said in its decision. Adding to the seriousness of the case against Chan, the committee found evidence that Chan may have committed financial misconduct, including charging a client 'an improper \$50 check cashing fee.' The committee said there is additional evidence that Chan did not cooperate with disciplinary authorities 'because a proper review of his accounting records would reveal additional financial misconduct.'"; "Alex Meyerovich, a Bridgeport immigration lawyer, said clients

in his practice do generally have concerns about their information being released to the government. 'Illegal immigrants are even afraid to call the police when they are victims sometimes, because they afraid if they give their names that they will be arrested,' Meyerovich said. While he found Chan's argument 'plausible in abstract,' and 'pretty inventive,' Meyerovich said he's never heard of an immigration lawyer being given a pass from revealing client records out of concern their identities might be revealed. 'The rules are clear, when it comes to disclosure of client records, you have to disclose them. The grievance officials don't care if [the clients] are legal or illegal,' he said.').

- United States v. Cal. Rural Legal Assistance, Inc., 722 F.3d 424, 426, 427 (D.C. Cir. 2013) (holding that a California legal services entity must respond to the government's subpoena during an investigation, although the subpoena calls for privileged information protected by the lawyers' duty of confidentiality and communications protected by the attorney-client privilege; "[T]he district court concluded that only federal and not California state privileges and protections governed the scope of disclosure compelled under the subpoena. . . . CRLA appeals from the district court's order denying the applicability of California professional responsibility standards."; "Both the Supreme Court and circuit law are clear on this point. Federal law and not state law governs.").

This is not to say that lawyers never challenge such laws.

- Andrew Scurria, CFPB Faces Constitutional Challenge to Litigation Firm Probe, Law360, July 22, 2013 ("The Consumer Financial Protection Bureau (CFPB) was accused Monday of overstepping its constitutional bounds by demanding sensitive financial information on law firm clients from a litigation support outfit targeted for allegedly deceptive debt-settlement work."; "Morgan Drexen Inc. and a Connecticut solo practitioner it provided with paralegals lodged a suit in Washington, D.C., federal court challenging the CFPB's position that it has authority to investigate attorneys who are suspected of violating the federal Telemarketing Sales Rule, which it enforces alongside the Federal Trade Commission."; "The complaint alleges that the CFPB can't regulate the practice of law and is trying to usurp authority over the licensing and regulation of lawyers from state authorities.").

The growth in the federal government's reach seems to constantly generate intrusive rules that require disclosure.

- J. Randolph Evans & Shari L. Klevens, Department Of Labor Proposed Rule Change, Daily Report, July 2, 2013 ("Attorneys continue to face risks in some of the most unexpected places. One good example arises out of proposed regulations from the United States Department of Labor (DOL) relating to the unionization of employee workforces. For decades, the DOL has regulated

the conduct of employers in connection with efforts to either unionize or deunionize employee workforces. This authority traces its roots to 1917, when the DOL was created. These enactment of The Labor-Management Reporting and Disclosure Act of 1959 began to have an impact on attorneys. Pursuant to the authority of the 1959 Act, the DOL issued regulations that required employers to complete and submit disclosure forms that included information about vendors/consultants who assisted them. Based on the language of the Act itself, it appeared that Congress intended to steer clear of any intent to require the disclosure of information protected by the attorney client privilege. Indeed, the Act included this provision: 'Nothing contained in this chapter shall be construed to require an attorney who is in good standing of the bar of any State, to include in any report required to be filed pursuant to the provisions of this chapter any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship.' . . . The DOL has attempted to walk the fine line between protected attorney client communications and regulated activities subject to disclosure by applying the concept of 'Persuader Activities.' Without getting into the nuances of the various legal definitions, attorneys rendering legal advice remained largely unaffected by the DOL Regulations. Specifically, the DOL has previously interpreted its regulations in a way that exempts 'advice' to employer clients from the reporting requirements of the Act. As a result, the DOL has previously exempted attorneys from the disclosure rule when they provide legal advice so long as they have no direct contact with employees. Unfortunately, however, the DOL has now proposed new amended regulations that would require employers and attorneys to complete and submit a form disclosing information received from employers' attorneys, including the terms of attorney-client relationships, the amount paid, the nature of the services provided and the activities performed."; "The difficulty for attorneys involves the irreconcilable conflict between the proposed regulations and the obligations under various bar rules that govern their conduct. Indeed, as noted by the ABA, in many states (like Alabama, Texas, South Carolina, and Virginia), the terms of attorney-client relationships, including the identity of clients, the nature of the services of provided, the fees charged, and certainly the types of legal tasks performed, can fall within the protections afforded confidences and secrets. Such information also is protected by the attorney-client privilege as well as potentially other privileges. In some states, the disclosure of the information can, in fact, subject attorneys to penalties ranging from reprimand to disbarment. On the other hand, under the proposed regulations, attorneys must disclose that information or face the prospect of civil or criminal penalties including up to a year in jail and a \$10,000.00 fine.").

**Best Answer**

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

N 5/14; B 11/14, 1/15

## Compliance with Court Orders

### Hypothetical 10

You represent a client in contentious commercial litigation being overseen by an impatient judge. You have argued discovery motions nearly every Friday for two months, which has increasingly frustrated the judge. At this morning's hearing, the judge cut off your argument and hurriedly overruled several of your important privilege objections in ordering your client to produce clearly privileged documents. Your justifiably irritated client wants you to resist the order as vigorously as you can.

- (a) To comply with your ethics confidentiality duty, must you seek an interlocutory appeal of the judge's order?

**MAYBE**

- (b) If the only way to assure an interlocutory review is to ignore the court's order and then appeal the resulting contempt citation, must you take that step?

**(B) NO (PROBABLY)**

### Analysis

(a)-(b) Compliance with a court order requiring disclosure of protected client information involves both ethics issues and privilege principles. Lawyers must resist such court orders up to a certain point -- both to comply with their ethics confidentiality duty and to avoid a court finding that the lawyers' client voluntarily disclosed protected communications or documents and therefore waived any privilege or work product protection.

### **Ethics Confidentiality Duty**

The 1908 ABA Canons of Professional Ethics did not address lawyers' obligation to comply with or resist court orders (rather than "law") requiring disclosure of protected client information.

The 1969 ABA Code of Professional Responsibility provided a safe harbor for such disclosure.

A lawyer may reveal . . . [c]onfidences or secrets when permitted under Disciplinary Rules or required by law or court order.

ABA Model Code of Professional Responsibility, DR 4-101(C)(2) (emphasis added). An Ethical Consideration mentioned lawyers' compliance with law, but not a court order.

The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information when his client consents after full disclosure, when necessary to perform his professional employment, when permitted by a Disciplinary Rule, or when required by law.

ABA Model Code of Professional Responsibility, EC 4-2 (footnote omitted).

The 1983 ABA Model Rules of Professional Conduct did not initially contain a black letter provision allowing lawyers to disclose protected client information to comply with law or court orders.

This seems like a strange omission -- especially because the ABA Code had explicitly dealt with this very issue in its black letter provisions.

Comments to the 1983 ABA Model Rule recognized lawyers' obligation to comply with courts' "final order" -- but only if lawyers were called to give testimony as witnesses.

If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the clients.

ABA Model Rule 1.6 former cmt. [20].

In 1994, the ABA Standing Committee on Ethics and Professionalism essentially recognized the same safe harbor, despite the absence of a black letter rule. ABA LEO

385 (7/5/94) noted the absence of a specific rule, but pointed to narrow comment language in finding one anyway.

[U]nlike DR 4-101(C)(2), Rule 1.6 does not specifically provide that 'a lawyer may reveal confidences or secrets when required by law or court order.' Nevertheless, the Comment to Rule 1.6 does state that if a lawyer is 'called as a witness to give testimony concerning a client, absent waiver by the client, Paragraph (a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.'

Id. (footnotes omitted) (emphasis added). ABA LEO 385 explained that lawyers must resist such court orders, and certainly implied that lawyers must seek interlocutory relief if it was available.

This recognition that a court may supersede the lawyer's obligation of confidentiality under Rule 1.6, however, does not mean that the lawyer should be a passive bystander to attempts by a government agency -- or by any other person or entity, for that matter -- to examine her files or records. To the contrary, it is the opinion of the Committee that, in the situation here being considered -- i.e., where a governmental agency serves on the lawyer a subpoena or court order directing the lawyer to turn over to the agency the lawyer's files relating to her representation of the client -- the lawyer has a professional responsibility to seek to limit the subpoena, or court order, on any legitimate available grounds (such as the attorney-client privilege, work product immunity, relevance or burden), so as to protect documents as to which the lawyer's obligations under Rule 1.6 apply. Only if the lawyer's efforts are unsuccessful, either in the trial court or in the appellate court (in those jurisdictions where an interlocutory appeal on this issue is permitted), and she is specifically ordered by the court to turn over to the governmental agency documents which, in the lawyer's opinion, are privileged, may the lawyer do so.

Id. (footnote omitted) (emphasis added)).



In 2002, the ABA Model Rules revised its provisions dealing with this issue. Most importantly, the ABA Model Rules finally added a black letter rule allowing disclosure of protected client information to comply with law and court orders.

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

ABA Model Rule 1.6(b)(6) (emphasis added). Also in 2002, the ABA dropped old comment [20], which required lawyers to comply with "the final orders of a court" requiring lawyers to provide testimony if called as witnesses.

A comment (added in 2002 as comment [11], and now appearing as comment [15]) backed off a bit from the 1994 ABA legal ethics opinion's insistence that lawyers seek an interlocutory appeal.

A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

ABA Model Rule 1.6 cmt. [15] (emphasis added). Thus, the comment indicates that lawyers "should" assert nonfrivolous claims resisting a court order. The comment requires that lawyers consult with their clients about an appeal, but does not clearly require that lawyers comply with a client's direction to appeal an adverse ruling.

However, the comment recognizes that the lawyer might appeal a court order requiring disclosure of protected client information.

The ABA/BNA Manual notes the absence of any requirement that lawyers resist court orders, but explain that lawyers should nevertheless do so.

There is no support in the black letter of either Model Rule 1.6(b)(6) or Model Rule 3.4(c) for requiring the lawyer to resist a court's disclosure order. Nevertheless, as a matter of competence (Rule 1.1) and communication (Rule 1.4), courts and ethics opinions clearly expect the lawyer to make sure there has been a chance for the client's objections to be aired before the lawyer discloses any protected information. In practice this may mean challenging the order and waiting for a ruling before complying with it.

ABA/BNA Lawyers' Manual on Professional Conduct, 55:1209 (emphasis added).

Another ABA Model Rule comment predictably warns lawyers to comply with any ultimate disclosure obligations as narrowly as possible, and to avoid disclosure beyond those persons entitled to the client information under such obligation.

Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

ABA Model Rule 1.6 cmt. [16] (emphasis added).

The ABA dealt with this issue again in 2010. ABA LEO 456 (7/14/10) addressed lawyers' right to defend themselves from criminal clients' ineffective assistance of

counsel claims. In addressing lawyers' response to an order compelling disclosure of arguably protected client information, the ABA indicated that a lawyer may appeal such an order -- but did not indicate whether the lawyer had to do so.

- ABA LEO 456 (7/14/10) ("Ordinarily, if a lawyer is called as a witness in a deposition, a hearing, or other formal judicial proceeding, the lawyer may disclose information protected by Rule 1.6(a) only if the court requires the lawyer to do so after adjudicating any claims of privilege or other objections raised by the client or former client. Indeed, lawyers themselves must raise good-faith claims unless the current or former client directs otherwise."; "[T]he criminal defendant may be able to object based on relevance or maintain that the attorney-client privilege waiver was not broad enough to cover the information sought. If the court rules that the information sought is relevant and not privileged or otherwise protected, the lawyer must provide it or seek appellate review." (emphasis added)).

Thus, the ABA again took a narrower approach than articulated in its 1994 ABA legal ethics opinion -- which had seemingly required lawyers to seek interlocutory review "in those jurisdictions where an interlocutory appeal on this issue is permitted." ABA LEO 385 (7/5/94).

The Restatement takes essentially the same approach as the ABA Model Rules, but provides more guidance to lawyers wondering what steps they must take to challenge a court order before relying on the safe harbor.

A lawyer may use or disclose confidential client information when required by law, after the lawyer takes reasonably appropriate steps to assert that the information is privileged or otherwise protected against disclosure.

Restatement (Third) of Law Governing Lawyers § 63 (2000).

Although the provision only refers to "law," a comment mentions scenarios involving court orders.

A lawyer's general legal duty . . . not to use or disclose confidential client information . . . is superseded when the law specifically requires such use or disclosure. For

example, a lawyer may be called as a witness and directed by the tribunal to testify to what the lawyer believes is confidential client information protected by the attorney-client privilege . . . , the work-product immunity . . . , or another evidentiary rule. The scope of the protection afforded by the attorney-client privilege and the work-product immunity may be debatable in various circumstances. Similar issues may arise in pretrial discovery or in supplying evidence to a legislative committee, grand jury, or administrative agency. A lawyer may be directly required to file reports, such as registering as the agent for a foreign government or reporting cash transactions. Other laws may require lawyers to turn over certain evidence and instrumentalities of crime to governmental agencies . . . . In such situations, steps by the lawyer to assert a privilege would not be appropriate and are not required.

Restatement (Third) of Law Governing Lawyers § 63 cmt. a (2000) (emphasis added).

The Restatement then discusses lawyers' possible duty to appeal an adverse court order, and whether lawyers must suffer a contempt citation if that is the only route to an interlocutory appeal.

Whether a lawyer has a duty to appeal from an order requiring disclosure is determined under the general duties of competence . . . . A lawyer may be instructed by a client to appeal . . . . If a lawyer may obtain precompliance appellate review of a trial-court order directing disclosure only by being held in contempt of court . . . , the lawyer may take that extraordinary step but is generally not required to do so by the duty of competent representation. In any event, . . . the lawyer should inform the client of an attempt to obtain the client's confidential information if it poses a significant risk to the material interests of the client and when circumstances reasonably permit opportunity to inform the client.

Restatement (Third) of Law Governing Lawyers § 63 cmt. b (2000) (emphasis added).

Thus, the Restatement seems to require lawyers to seek interlocutory review, but does not require lawyers to be held in contempt if that is the only way to obtain such interlocutory review.

In the run-up to the ABA's 1983 adoption of its ABA Model Rules, the American Trial Lawyers published proposed ethics rules. That group's approach to lawyers' compliance with court orders would require lawyers to challenge such orders' validity before complying with them.

A lawyer may reveal a client's confidence to the extent required to do so by law, rule of court, or court order, but only after good faith efforts to test the validity of the law, rule, or order have been exhausted.

Monroe H. Freedman and Thomas Lumbard, Am. Lawyer's Code of Conduct, Proposed Revision of the Code of Prof'l Responsibility, Rule 1.3, Comm'n on Prof'l Responsibility, Roscoe Pound-Am. Trial Lawyers Found., Revised Draft (May 1982) (emphasis added).

### **State Ethics Rules**

Some states provide even more specific guidance. For instance, Florida's ethics rules explicitly indicate that lawyers may appeal court orders requiring disclosure of protected client information.

When required by a tribunal to reveal such information ["relating to representation of a client"], a lawyer may first exhaust all appellate remedies.

Florida Rule 4-1.6(d). As with the current ABA Model Rules approach, this provision does not require lawyers to seek interlocutory appellate review of an order requiring disclosure of protected client information.

### **Legal Ethics Opinions and Case Law**

Some legal ethics opinions parallel the 1994 ABA legal ethics opinion that seemed to require lawyers to file an interlocutory appeal if such a remedy is available --

but follow the current version of the ABA Model Rules in declining to require lawyers to suffer a contempt citation.

- District of Columbia LEO 288 (2/16/99) (analyzing the ethics rules governing a lawyer's response to a congressional subpoena seeking client confidences from the lawyer; "The inquirer seeks to know how far he and the firm must go to meet their obligations to protect the client's confidences under the D.C. Rules of Professional Conduct. Implicitly, he raises the question of whether a lawyer must stand in contempt of a subcommittee and face the prospect of a criminal conviction, imprisonment and fines in order to vindicate the client's interest in confidentiality."; "When threatened by the chairman with contempt of Congress and possible criminal prosecution and sanctions, the subpoenaed partner produced the documents, despite protests and a threat of suit by the client."; "[O]ur opinions and all of the other authorities we can identify bearing on the question suggest that a lawyer is not required to stand in contempt of a court order and risk criminal prosecution in order to protect the subpoenaed information." (emphasis added); "The fact that a lawyer may deem himself or herself 'required by law' to produce the documents at the point the subcommittee demands it does not mean that the lawyer must produce the documents at that time. . . . [T]he lawyer retains the discretion to risk being held in contempt and litigate the issue in the courts, based on the totality of the circumstances."; "At the point that the lawyer has made and pressed every appropriate objection to the Congressional subpoena and has no avenues of appeal available, and in the absence of any judicial order to the contrary, a lawyer faced with a Congressional directive and a threat of contempt of Congress may deem himself or herself 'required by law' to comply with the subpoena within the meaning of D.C. Rule 1.6(d)(2)(A). A lawyer has satisfied his or her professional obligation to maintain client confidences once all objections have been made and exhausted and is not required by the Rules to stand in contempt of Congress if the subcommittee overrules the objections." (emphasis added)).

Not surprisingly, courts require lawyers to ultimately comply with court orders mandating disclosure of protected client information.

- Disciplinary Bd. v. Dyer (In re Disciplinary Action Against Dyer), 817 N.W.2d 351, 357-58, 359, 360, 360-61, 361 (N.D. 2012) (holding that lawyers accused of trust account violations must testify despite the reliance on Rule 1.6 confidentiality principles; "Rule 1.6(c)(4) states that a lawyer may reveal information to respond to allegations in any proceeding concerning the lawyer's representation of the client. Dyer and Summers claim this exception only applies in cases or controversies between an attorney and his or her client, and therefore it does not apply in this case because none of their clients filed a disciplinary complaint. Under the plain language of the rule,

however, we conclude the exception is not limited to controversies between the lawyer and his or her client."; "We conclude Dyer and Summers were permitted to disclose the requested information to both the inquiry committee and the hearing panel under Rule 1.6(c)(4). Because Dyer and Summers were permitted to disclose the information the inquiry committee and hearing panel requested under Rule 1.6, and the disclosure was required under Rule 8.1."; "Rule 1.6(c)(5) permits a lawyer to comply with any law or court order requiring disclosure, but the lawyer should also assert all nonfrivolous claims to protect confidential information."; "In this case, Dyer and Summers resisted Disciplinary Counsel's motion to compel and later sought a supervisory writ from this Court to vacate the hearing panel's discovery order. A lawyer 'should not be penalized for properly seeking further information or challenging a request for information before complying with it.' Annotated Model Rules of Prof'l Conduct, R. 8.1 annot. At p. 584 (7th ed. 2011). Dyer and Summers' decision to seek a writ was appropriate; however, they were required to comply with the hearing panel's order after their request was denied." (emphases added); "However, this matter is different. The plain language of Rule 1.6 states a lawyer may disclose information relating to the representation of a client to respond to allegations in any proceeding concerning the lawyer's representation of the client. The clear language of the rule permitted Dyer and Summers to disclose the requested information. Although Dyer and Summers initially acted appropriately by objecting to the request to disclose the information, there is no evidence in this record indicating that Dyer and Summers attempted to negotiate with the inquiry committee to limit the disclosure of confidential information. . . . The hearing panel granted Disciplinary Counsel's motion to compel, this Court denied Dyer and Summers' request for a supervisory writ, but they continued to refuse to comply with the hearing panel's order. A lawyer knowingly fails to respond when he or she fails to comply with an order requiring disclosure. . . . An attorney violates Rule 8.1(b) when he or she repeatedly fails to respond to requests for information from the disciplinary authority."; "Dyer and Summers were not prohibited from disclosing the information the inquiry committee and hearing panel requested under Rule 1.6, and we conclude they violated Rule 8.1 by failing to provide the requested information.").

Interestingly, a 2007 case explained that the word "may" in that jurisdiction's Rule 1.6 (and in ABA Model Rule 1.6) does not actually confer any discretion.

- Adams v. Franklin, 924 A.2d 993, 997 (D.C. Ct. App. 2007) (ordering a lawyer to disclose privileged communications authenticating a letter that the lawyer wrote several years earlier, because the court had ordered the lawyer to do so; "Rule 1.6 does not, however, act as an unequivocal shield to disclosing the sought-after information. There are situations where a lawyer may disclose privileged information without client approval. Rule 1.6(d)(2)(A) specifically allows, and in fact mandates, such disclosure of confidences or

secrets when 'required by law or court order.' Admittedly, there is some inherent confusion in the drafting of subsection (d)(2)(A), specifically in the drafter's use of the word 'may.' D.C. RULE OF PROF'L CONDUCT R. 1.6(d)(2)(A) (stating '[a] lawyer may use or reveal client confidences or secrets . . . [w]hen permitted by these Rules or required by law or court order'). The use of the word 'may' in subsection (d)(2)(A) could lead one to believe that there is an opportunity to exercise discretion and choice. Such a reading, however, makes little sense given the use of the phrase 'when . . . required by law or court order' in the same subsection of the rule. *Id.* (Emphasis added [indicated by italics]). There is nothing discretionary about the term 'required,' and use of this word in the subsection clearly evidences a mandatory obligation to disclose. Any other reading would be illogical and inconsistent with established court practices: we do not allow the discretion of an individual attorney to supersede the mandate of the trial court." (footnote omitted) (emphasis added); "As Professor Hazard succinctly said, '[t]he essence of the matter is that every case in which a lawyer is 'required by law' to disclose information is also a case in which she cannot be prohibited from doing so.' G. HAZARD & W. HODES, THE LAW OF LAWYERING § 9.25. He clearly explained, 'if a judge in open court orders a lawyer to provide information about a client, having rejected a claim of privilege, the judge's order is 'law,' and must be obeyed. The lawyer's testimony is required by law.' *Id.*"; "Although the obligation to obey a court order is clear, our rules also admonish a lawyer to make 'every reasonable effort' to preserve the option to appeal."; "See D.C. Bar Legal Ethics Committee Opinion 214, Disclosure to Internal Revenue Service of Name of Client Paying Fee in Cash (Sept. 18, 1990) ('In light of our prior decisions and Comment 26, we conclude that the law firm here may comply with a final judicial order enforcing an IRS summons without seeking appellate review of that order, but only after giving its client notice of the courts' order and a reasonable opportunity to seek review independently of the firm.');" "We agree with the opinions of the District of Columbia Bar Legal Ethics Committee concluding that an attorney is not required to suffer an adjudication of contempt in order to create or preserve the option of appellate review."; "Appellant argues, in essence, that the ethical obligation to preserve client confidences and secrets expands the scope of her evidentiary privilege. This is clearly wrong. In the instant case, the trial court issued an order compelling Mr. Koenick to submit to the deposition. Because of the trial court's order, Rule 1.6 is no bar to Mr. Koenick's being deposed. The only potential obstacle to the sought-after deposition is the attorney-client privilege.").

Not surprisingly, some lawyers grandstand.

- Alyson M. Palmer, Lawyer Vows To Go To Jail Rather Than Give Up Information, Daily Report, Aug. 13, 2013 ("Atlanta criminal defense lawyer Jerome Froelich Jr. vows he will go to jail before disclosing his communications in representing a disbarred lawyer who scammed millions of



dollars from a woman he met on a dating website."; "Earlier this month, the United States Court of Appeals for the Eleventh Circuit turned away Froelich's bid for protection from subpoena by the woman, who is trying to recover her money through a lawsuit. A three-judge panel faulted Froelich for appealing too soon, saying the appeals court didn't have jurisdiction given that he had neither turned over the documents nor taken a contempt citation."; "Froelich said he'll wait for the woman's attorneys to make the next move - and will go to jail if he has to. 'I'm not going to give up communications that I had with people in defense of a case,' said Froelich. 'It's not going to happen.'"; "Froelich's client was Mitchell Gross, who lost his Georgia bar license in 1991 and was sentenced to 12½ years in prison last year."; "Johnson's [woman suing] attorneys pointed to the settlement between Gross and Johnson, in which Gross had waived the attorney-client privilege and work product doctrine as to 'hidden assets.' Froelich responded that the attorney work product doctrine belongs to the attorney, so he had a right to assert it regardless of what Gross might have waived."; "United States District Judge Timothy Batten, who oversaw the civil case, overruled Froelich's objections and, on March 30, 2012, ordered Froelich to comply with the subpoena. Batten later held Froelich in contempt, but he vacated the contempt order and certified the March 30 order for appeal to the Eleventh Circuit."; "More than a year later, in an August 2 ruling, a panel of Eleventh Circuit Judge William Pryor Jr., Senior Judge Emmett Cox and visiting United States District Judge Donald Walter of Louisiana dismissed Froelich's appeal for lack of jurisdiction. The appeal's panel unsigned order said that because the civil case already had been settled, Batten's order wasn't considered a final order that would normally be appealable. Froelich might have gotten around that rule by either complying with the order, then appealing, or by being held in contempt and appealing from that order, the panel said, but he did neither of those things. Given that Batten certified the order for appeal, Froelich also could have asked for the Eleventh Circuit's permission to appeal, the panel said, but he didn't do that, either."; "Froelich said the communications sought by Johnson's lawyers took place because he was defending his client in a criminal case. If Johnson's lawyers want to know more, Froelich said, they can depose the folks they think were on the other end of the conversations."; "Garbarini [Johnson's lawyer] said the communications sought aren't work product, saying the issue is limited to how Gross paid his bills. Plus, he said, Gross' criminal case is over.").

Most stories like this evaporate, presumably because the lawyer ultimately complies with a court order requiring disclosure of protected client information. If not, one would expect continuing news coverage -- similar to that describing reporters' stints

in jail for refusing to turn over information protected by the less clearly defined and universally-accepted reporter's privilege.

### **Privilege/Work Product Waiver Issues**

Lawyers assessing their duty to resist court orders requiring disclosure of protected client information must also focus on privilege/work product waiver issues.

By definition, a client waives privilege or work product protection only by voluntarily disclosing protected communications or documents. Thus, a compelled disclosure does not waive any privilege. However, all courts require the client's lawyer to put up a fight -- although they disagree about how vehement that fight must be. Every court agrees that lawyers must object to discovery and lose before they can claim a compelled disclosure. Some courts go even further, and require lawyers to appeal disclosure orders or risk another court later finding that the disclosure was voluntary. Thomas E. Spahn, The Attorney-Client Privilege and the Work Product Doctrine: A Practitioner's Guide, Ch. 25.805 (3d. ed. 2013), published by Virginia CLE Publications.

Fortunately for nervous lawyers, Federal Rule of Evidence 502 reduces the high stakes often involved in this issue.

Before Rule 502, the "voluntary" disclosure of protected communications or documents sometimes triggered a "subject matter waiver" -- requiring clients to disclose even more protected communications or documents on the same subject.

The subject matter waiver doctrine rests on a common-sense refusal to allow clients to use protected communications or documents as a "sword" in litigation while simultaneously using the applicable privilege or work product protection as a "shield" to withhold related documents or connections. But the subject waiver doctrine never made

any sense unless the client intended to use protected communications or documents as a "sword." In other words, a client disclosing such protected information or documents should always have been able to avoid a subject matter waiver by simply disclaiming any intent to use them to gain some advantage in litigation. Yet, some jurisdictions inexplicably applied the subject matter waiver doctrine to any voluntary disclosure. The District of Columbia even applied the subject matter waiver doctrine to inadvertent disclosure.

Federal Rule of Evidence 502 limits the reach of the subject matter waiver doctrine, returning it to the limited circumstances it should always have been -- requiring clients to produce related privileged or work product-protected communications or documents only if they intentionally disclose and then rely on such protected communications or information to gain an advantage in litigation.

Although Rule 502 applies only in limited circumstances, courts seem to be applying the same principle in other circumstances involving disclosures. In most courts, this trend allows lawyers to avoid extraordinary resistance to a court order requiring disclosure -- to eliminate the risk that some other court will later find that they voluntarily disclosed protected communications or information, and thus triggered a subject matter waiver. Thomas E. Spahn, The Attorney-Client Privilege and the Work Product Doctrine: A Practitioner's Guide, Ch. 30.404 (3d. ed. 2013), published by Virginia CLE Publications.

### **Best Answer**

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

## Dealing with Service Providers Outside the Office

### Hypothetical 11

You just asked a paralegal to take a CD containing client documents and several boxes of client documents for copying at a local copy service near your office. The paralegal asked you a question, and seemed taken aback when you did not immediately know the answer.

May you disclose client documents on the CD and in the box to the copy service without the client's explicit consent?

### (A) YES (PROBABLY)

### Analysis

Under any of the ethics rules adopted by the ABA or by individual states, lawyers may disclose protected client information with the client's consent. However, disclosure to those outside the law firm raises a more serious question if the disclosing lawyer has not obtained client consent.

The 1908 ABA Canons of Professional Ethics addressed confidentiality mostly as creating conflicts of interest dilemmas, but acknowledged that the client's "knowledge and consent" permitted disclosure of protected client information.

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

ABA Canons of Professional Ethics, Canon 37, amended Sept. 30, 1937.

The 1969 ABA Model Code of Professional Responsibility took the same basic approach.

A lawyer may reveal . . . [c]onfidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

ABA Model Code of Professional Responsibility, 4-101(C). An Ethical Consideration provided an explanation.

The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information when his client consents after full disclosure, when necessary to perform his professional employment, when permitted by a Disciplinary Rule, or when required by law. Unless the client otherwise directs, a lawyer may disclose the affairs of his client to partners or associates of his firm. It is a matter of common knowledge that the normal operation of a law office exposes confidential professional information to non-lawyer employees of the office, particularly secretaries and those having access to the files; and this obligates a lawyer to exercise care in selecting and training his employees so that the sanctity of all confidences and secrets of his clients may be preserved. If the obligation extends to two or more clients as to the same information, a lawyer should obtain the permission of all before revealing the information. A lawyer must always be sensitive to the rights and wishes of his client and act scrupulously in the making of decisions which may involve the disclosure of information obtained in his professional relationship. Thus, in the absence of consent of his client after full disclosure, a lawyer should not associate another lawyer in the handling of a matter; nor should he, in the absence of consent, seek counsel from another lawyer if there is a reasonable possibility that the identity of the client or his confidences or secrets would be revealed to such lawyer. Both social amenities and professional duty should cause a lawyer to shun indiscreet conversations concerning his clients.

ABA Model Code EC 4-2 (emphasis added).

The 1983 ABA Model Rules of Professional Conduct parallel these earlier formulations.

A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

ABA Model Rule 1.6(a) (emphasis added). A comment describes the consent requirement.

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. See Rule 1.0(e) for the definition of informed consent. 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]. ABA Model Rule 1.0(e) defines "informed consent."

'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

ABA Model Rule 1.0(e).

The Restatement takes the same common-sense approach.

A lawyer may use or disclose confidential client information when the client consents after being adequately informed concerning the use or disclosure.

Restatement (Third) of Law Governing Lawyers § 62 (2000) (emphasis added). A comment contains an equally obvious principle, requiring lawyers to adequately provide sufficient information for the client to make an informed decision.

A lawyer is required to consult with a client before the client gives consent under this Section. The legal effect of failure to consult depends upon whether the question concerns the lawyer's duty to the client or the rights or interests of third persons. When the question concerns the lawyer's duty to the client, the client's consent is effective only if given on the basis of information and consultation reasonably appropriate in the circumstances. When the question concerns the effect of consent with respect to the client's legal relationship with third persons, the principles of actual and apparent authority control.

Restatement (Third) of Law Governing Lawyers § 62 cmt. c (2000).

Absent client consent, lawyers must turn elsewhere in the ethics rules for authority to disclose protected client information outside their firm.

The 1908 ABA Canons of Professional Ethics did not deal with this issue, perhaps because they addressed confidentiality in the context of conflicts of interest rather than in the abstract.

The 1969 ABA Model Code of Professional Responsibility dealt explicitly with lawyers' disclosure outside the firm that enabled lawyers to practice law.

Unless the client otherwise directs, it is not improper for a lawyer to give limited information from his files to an outside agency necessary for statistical, bookkeeping, accounting, data processing, banking, printing, or other legitimate purposes, provided he exercises due care in the selection of the agency and warns the agency that the information must be kept confidential.

ABA Model Code EC 4-3 (emphasis added).

The 1983 ABA Model Rules of Professional Conduct added a phrase to the black letter rule recognizing implied client authority.

A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

ABA Model Rule 1.6(a) (emphasis added). To be sure, the accompanying comment seems more limited than one might expect.

Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

ABA Model Rule 1.6 cmt. [5] (emphasis added).

The Restatement acknowledges that this implied authorization sometimes permits lawyers to disclose protected client information outside a law firm or law department.

A lawyer also may disclose information to independent contractors who assist in the representation, such as investigators, lawyers in other firms, prospective expert witnesses, and public courier companies and photocopy shops, to the extent reasonably appropriate in the client's behalf . . . . Such disclosures are not permitted contrary to a client's instructions, even within the lawyer's firm . . . , or when screening is required to avoid imputed disqualification of the lawyer's firm.

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



Of course lawyers disclosing protected client information to outsiders assisting the lawyer must take reasonable steps to assure that the recipients protect the information.

A lawyer must take reasonable steps so that law-office personnel and other agents such as independent investigators properly handle confidential client information. That includes devising and enforcing appropriate policies and practices concerning confidentiality and supervising such personnel in performing those duties . . . . A lawyer may act reasonably in relying on other responsible persons in the office or on reputable independent contractors to provide that instruction and supervision . . . . The reasonableness of specific protective measures depends on such factors as the duties of the agent or other person, the extent to which disclosure would adversely affect the client, the extent of prior training or experience of the person, the existence of other assurances such as adequate supervision by senior employees, and the customs and reputation of independent contractors.

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

A Restatement reporter's note articulates the same approach.

The same implied authority permits a lawyer to disclose confidential client information to the extent necessary to obtain assistance from appropriate experts, lawyers, and other agents outside the lawyer's firm.

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

This Restatement section's comments elaborate on this general principle.

A lawyer's authority to disclose information for purposes of carrying out the representation is implied and therefore does not require express client consent . . . . Agents of a lawyer assisting in representing a client serve as subagents and as such independently owe a duty of confidentiality to the client.

Restatement (Third) of Law Governing Lawyers § 60 cmt. f (2000). The next comment provides examples of permissible disclosure.

A lawyer may disclose confidential client information for the purpose of facilitating the lawyer's law practice, where no reasonable prospect of harm to the client is thereby created and where appropriate safeguards against impermissible use or disclosure are taken. Thus, disclosure is permitted to other lawyers in the same firm and to employees and agents such as accountants, file clerks, office managers, secretaries, and similar office assistants in the lawyer's firm, and with confidential, independent consultants, such as computer technicians, accountants, bookkeepers, law-practice consultants, and others who assist in furthering the law-practice business of the lawyer or the lawyer's firm.

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

Another Restatement provision takes the same basic approach, but does not explicitly frame the disclosure as impliedly authorized.

A lawyer may use or disclose confidential client information when the lawyer reasonably believes that doing so will advance the interests of the client in the representation.

Restatement (Third) of Law Governing Lawyers § 61 (2000).

This provision relies on lawyers to decide whether the disclosure sufficiently advances the client's interest. A comment provides some examples.

A lawyer has general authority to take steps reasonably calculated to further the client's objectives in the representation . . . . This Section is a particular application of that general authority. No explicit request or grant of permission is required.

. . .

This Section requires that a lawyer have a reasonable belief that the use or disclosure will further the objectives of the client in the representation. In certain instances, permissible use or disclosure under this Section may create a risk, reasonable in the circumstances, that may extend beyond

what is permitted under § 60(1) alone. The fact that the client's interests are not in fact furthered does not demonstrate that the lawyer's belief at the point of use or disclosure was unreasonable. A lawyer must often contend with uncertainties, unexpected decisions, and the need for immediate action. For example, offering a witness reasonably believed to have generally favorable testimony may entail the risk of also revealing embarrassing or counterproductive facts about the client. So long as reasonably calculated to advance the client's interests, such use or disclosure is permissible under this Section.

Restatement (Third) of Law Governing Lawyers § 61 cmt. b (2000) (emphasis added).

The Restatement provides several additional examples from the litigation setting.

A lawyer may use or disclose confidential client information when presenting evidence or argument or engaging in other proceedings before a court, governmental agency, or other forum in behalf of a client. Thus, a lawyer may disclose such information in pleadings or other submissions, in presenting the testimony of witnesses and other evidence, in submitting briefs and other memoranda, or in discussing the matter with potential witnesses. Information thus disclosed may be not entirely favorable to the client. For tactical reasons, a lawyer may reasonably decide to present partly unfavorable information, even though it is confidential. A lawyer may do so in the interest of mitigating its damaging effect (for example, to prevent it from being brought out first by an adversary) or in order to present a complete account and thus gain the confidence of the factfinder.

A lawyer who reasonably believes that it is in the interests of the client to do so may refrain from objecting to an adversary's attempt to introduce otherwise inadmissible confidential client information, even if that failure will cause the waiver of a privilege . . . . For example, a lawyer may acquiesce in an adversary's eliciting testimony from the lawyer's client that, although privileged under the attorney-client privilege, is favorable to the client's litigation position.

Restatement (Third) of Law Governing Lawyers § 61 cmt. d (2000) (emphasis added).

A reporter's note provides further guidance.

The law generally permits a lawyer negotiating a settlement to make statements "without prejudice" or under a similar rubric that makes the statements inadmissible in evidence to establish liability in subsequent proceedings. . . . Modern evidence codes generally make inadmissible in evidence, at least for most purposes, both settlement offers and statements made in settlement discussions, even without the ceremony of stating that a disclosure is "without prejudice." . . . Ordinarily a lawyer will be well advised to consult with a client in advance when a lawyer proposes to take the risk of divulging particularly compromising client information that need not otherwise be divulged.

Restatement (Third) of Law Governing Lawyers § 61 reporter's note cmt. d (2000).

The Restatement comment dealing mostly with litigation also mentions lawyers' disclosure of protected client information in a transactional setting.

A lawyer has the same authority in matters other than litigation. A lawyer may, for example, exchange confidential client information reasonably calculated to further settlement of a lawsuit or negotiation of a business transaction. In most jurisdictions, statements made in the course of settlement negotiations are not thereafter admissible in evidence to establish liability against the person who or whose lawyer made the statement. In so using or disclosing information, a lawyer must use due care . . . to avoid unintended waiver of the attorney-client privilege or other injury to the interests of the client.

Restatement (Third) of Law Governing Lawyers § 61 cmt. d (2000) (emphasis added).

Although most states follow the ABA Model Rules in recognizing lawyers' implied authorization to disclose protected client information in certain circumstances, not all states have adopted that ABA Model Rules provision. For instance, in 2006 the ABA/BNA Lawyers' Manual of Professional Conduct noted that several large states as of that time did not have the implied authorization provision.

There are some jurisdictions whose confidentiality rules make no mention of 'implied' authorization to reveal confidential information. These include California, Illinois,

Maine, Michigan, New York, and Ohio. The absence of a specific black-letter provision permitting disclosures that are impliedly authorized does not, however, mean that such disclosures are prohibited. These jurisdictions have confidentiality rules that, like DR 4-101 of the Model Code, protect from disclosure a client's 'confidences' and 'secrets,' rather than 'information relating to the representation.' 'Confidences' and 'secrets' as defined in these jurisdictions' rules do not encompass information 'impliedly authorized to carry out the representation.'

ABA/BNA Lawyers' Manual on Professional Conduct, 55:502. The acknowledgement that as of that time these states followed the more logic ABA Model Code confidentiality formulation highlights the ABA Model Rules formulation's overbreadth.

Although the issue rarely comes up in case law, courts occasionally deal with lawyers' reliance on the implied authorization provision when challenged by their clients for having disclosed protected client information.

- Client Funding Solutions Corp. v Crim, No. 10-cv-482, 2014 U.S. Dist. LEXIS 43022, at \*34-36 (N.D. Ill. Mar. 31, 2014) (holding that a lawyer could justifiably have relied on the implied authorization provision then in the Illinois ethics rules; disclosing protected client information in connection with a loan; "Although the text of Rule 1.6 did not expressly provide that information could be disclosed with 'implied authorization' or 'when the lawyer reasonably believes that doing so would advance the interests of the client in the representation,' expert George Collins testified to the former, Tr. 80, July 12, 2013, and expert Mary Robinson testified to the latter. Tr. 66, July 12, 2013. The Court concludes that either or both of these conditions were satisfied as to Crim's [client] desire to check the numbers. To the extent that Vrdolyak [lawyer] was not formally or expressly authorized to disclose information about Crim's desire to check the numbers pursuant to the loan documents that Crim signed, see VLG 31, he was impliedly authorized to do so under the circumstances. See Tr. 81, July 12, 2013. Vrdolyak had, with Crim's authorization, already told Lustig [third party] that he could have the check; Lustig was on his way to pick up the check when Crim rescinded Vrdolyak's authorization to release it to him. Vrdolyak was left with little choice but to provide Lustig with some explanation for why he was unable to hand over the check. As Collins put it, 'the relationship requires an explanation, and that's not wrong to do that.' Tr. 81, July 12, 2013. Providing an explanation also improved Vrdolyak's subsequent ability to obtain information about Crim's loans from Lustig, thereby advancing her interests by providing her with the

information she sought to make an informed decision about releasing payment to CFS.").

Not surprisingly, the "implied authorization" issue has arisen more frequently as legal practice has become more sophisticated. Perhaps most acutely, lawyers' increasing use of electronic communications and related services focuses attention on this standard.

In 2013, a New York legal ethics opinion concluded that a lawyer's proposed disclosure did not meet that standard.

- NY 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 'impliedly authorized' exception is intended mainly for situations in which time is of the essence and it is impractical for the lawyer to wait for the client's informed consent (such as during settlement negotiations or trial), or for situations in which revealing information about a client with diminished capacity is 'necessary to take protective action to safeguard the client's interests.' See Rule 1.6, Cmt. [5] (giving examples of circumstances in which disclosure of confidential information is impliedly authorized). Nothing suggests that those situations apply here." (emphasis added)).

As law practice has become more sophisticated and efficiency-driven, lawyers have increasingly used third parties to make copies, run their back-office operations, etc. Somewhat surprisingly, bars seem not to require lawyers to either obtain their client's explicit consent or point to a black letter confidentiality exception before such disclosure.

- Texas LEO 572 (06/06) (explaining that lawyers may disclose protected client information to third party independent contractors such as copy service, as long as they take reasonable steps to assure confidentiality; "The Committee . . . concludes that, unless the client has instructed otherwise, a lawyer may deliver materials containing information subject to the lawyer-client privilege to an independent contractor hired by the lawyer to provide a service to the lawyer in furtherance of the lawyer's representation of the client without the express consent of the client if the lawyer reasonably expects that the independent contractor will not disclose or use materials or their contents

except as directed by the lawyer. Although the lawyer's expectations as to the independent contractor's confidential treatment of the materials could be based on the reputation of, or the lawyer's prior experiences in dealing with, the independent contractor, a good basis for such expectations would normally be a written agreement between the lawyer and the independent contractor as to the confidential treatment required for materials provided by the lawyer to the independent contractor.").

This emphasis on lawyers' duty of care rather than client consent or reliance on a confidentiality exception reflects both lawyers' and clients' evolving expectations. When lawyers and their employees handled nearly every aspect of the practice, lawyers and their clients would probably have expected the lawyer to obtain client consent before bringing in a temp, using a courier to run a pleading to court, etc. Clients now understand that they benefit when lawyers use more efficient means of delivering legal services. Still, one would expect legal ethics opinions to at least make a passing reference to the implied authorization confidentiality exception.

At the dawn of the electronic age, the ABA issued an ethics opinion explaining that lawyers could give third parties access to protected client information as long as they were careful.

- ABA LEO 398 (10/27/95) (explaining that a law firm may provide a computer maintenance company access to the law firm's computer system which contains clients' files; "The subject situation -- like many that arise in this era of rapidly developing technology -- is not specifically mentioned in the Model Rules. The Committee is nevertheless aware that lawyers now use outside agencies for numerous functions such as accounting, data processing and storage, printing, photocopying, computer servicing, and paper disposal. Such use of outside service providers that inevitably entails giving them access to client files involves a retention of nonlawyers that triggers the application of Rule 5.3." (emphasis added); "Under Rule 5.3, a lawyer retaining such an outside service provider is required to make reasonable efforts to ensure that the service provider will not make unauthorized disclosures of client information. Thus, when a lawyer considers entering into a relationship with such a service provider he must ensure that the service provider has in place, or will establish, reasonable procedures to protect the confidentiality of information to which it gains access, and moreover, that it

fully understands its obligations in this regard." (emphasis added); "In connection with this inquiry, a lawyer might be well-advised to secure from the service provider in writing, along with or apart from any written contract for services that might exist, a written statement of the service provider's assurance of confidentiality." (emphasis added); also explaining that a lawyer may be obligated to advise the client if there is a breach of confidentiality in such a setting, and would be required to disclose such a breach if the "unauthorized release of confidential information could reasonably be viewed as a significant factor in the representation").

More recent legal ethics opinions dealing with lawyers' use of electronic communications and storage warn lawyers to be careful when doing so -- but do not address the possible need for client consent or application of the implied authorization exception.

For instance, the growing series of legal ethics opinions permitting lawyers to use electronic storage (including the "cloud") simply do not deal with the issue. Instead, these opinions essentially assume that lawyers carefully vetting such arrangements do not disclose protected client information, and therefore do not require client consent or an applicable exception.

- 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.").
- Illinois LEO 10-01 (7/2009) ("A law firm's utilization of an off-site network administrator to assist in the operation of its law practice will not violate the Illinois Rules of Professional Conduct regarding the confidentiality of client information if the law firm makes reasonable efforts to ensure the protection of confidential client information.").



- Maine LEO 194 (12/11/07) ("An attorney has asked for guidance on the ethical propriety of using third party vendors to process and store electronically held firm data. The data would be transmitted to the third parties over a presumptively secure network connection. Processing of firm data may include transcription of voice recordings and transfer of firm computer files to an off-site 'back-up' of the firm's electronically held data. More specifically, the question is whether the use of such services and resources, which may involve disclosure of client information to technicians who maintain the relevant computer hardware and non-lawyer transcribers outside the sphere of the attorney's direct control and supervision, would violate the lawyer's obligation to maintain client confidentiality."; finding that the lawyer may undertake such activities, as long as the lawyer assured confidentiality; "At a minimum, the lawyer should take steps to ensure that the company providing transcription of confidential data storage has a legally enforceable obligation to maintain the confidentiality of the client data involved.").
- Nevada LEO 33 (2/9/06) ("The lawyer's duty to protect client confidentiality under Supreme Court Rule 156 is not absolute. In order to comply with the rule, the lawyer must act competently and reasonably to safeguard confidential client information and communications from inadvertent and unauthorized disclosure. This may be accomplished while storing client information electronically with a third party to the same extent and subject to the same standards as with storing confidential paper files in a third party warehouse. If the lawyer acts competently and reasonably to ensure the confidentiality of the information, then he or she does not violate SCR 156 simply by contracting with a third party to store the information, even if an unauthorized or inadvertent disclosure should occur."; "Subsequent ABA opinions concerning client confidentiality in the electronic age have to some degree reflected the evolution of electronic technology itself. In 1986, an ABA committee issued a report cautioning lawyers against electronic client communications and concluded that an attorney should not communicate with clients electronically without first obtaining the client's informed consent or being reasonably assured of the security of the electronic system in question. ABA Committee on Lawyers' Responsibility for Client Protection, Lawyers on Line: Ethical Perspectives in the Use of Telecomputer Communication (1986). The committee did not ban all such communication, but rather described the lawyer's obligation in this regard as an affirmative duty to competently investigate the electronic communications system and form a reasonable conclusion as to its security. *Id.* The ABA Committee addressed an issue much closer to that discussed here in Formal Opinion number 95-398, and concluded that a lawyer may give a computer maintenance company access to confidential information in client files, but that in order to comply with the obligation of client confidentiality, he or she 'must make reasonable efforts to ensure that the company has in place, or will establish, reasonable procedures to protect the confidentiality of client information.' The

ABA Committee recognized in that opinion the growing practicality and availability of third party electronic data services, but clearly concluded that the duty of confidentiality is not breached so long the attorney is reasonable and competent in the creation and management of the outside contractor arrangement. In a later formal opinion, the ABA Committee continued this trend and retreated substantially from the 1986 opinion concerning the encryption of e-mail. That opinion concluded that sending confidential client communications by unencrypted email does not violate the lawyer's duty of confidentiality because unencrypted email still affords a reasonable expectation of privacy from both legal and technological standpoints. ABA Committee on Ethics and Professional Responsibility, Formal Opinion No. 99-413 (1999). The committee left open the likelihood, however, that cases of particularly sensitive client communications may require extraordinary security precautions, since the reasonableness and competence of the lawyer's actions must be judged in the context of the relative sensitivity of the particular confidential information or communication at stake. See Model Rule 1.6, comments 16 and 17.").

Given the fast-paced development of electronic communications the issue seems to come up again and again.

- Daniel J. Siegel, [Are You Unknowingly Disclosing Client Information to Google?](#), Legal Intelligencer, Sept. 24, 2013 ("How would you feel if you learned that the U.S. Postal Service was opening and reading every letter you sent or received from your clients, scanning the letters so it could market additional products to you and also claimed it had the right to disclose the contents of your mail to anyone it wanted? You would be outraged."; "Fortunately, it is a federal offense for someone to read your mail. It isn't a federal offense, however, for an email provider to do exactly what the post office cannot -- email providers can read, store and even disseminate the contents of your email, and do so with impunity. Why? Because when you signed up for your account, you agreed to their terms of service, which you almost certainly didn't read."; "If you use Google's Gmail service, for example, you have agreed that your presumably confidential attorney-client communications are no longer private, and are instead available for Google to use in almost any way it wants."; "Similarly, if you use AOL as your email provider, you are no better off. AOL's privacy policy states that 'you or the owner of any content that you post to our services retain ownership of all rights, title and interests in that content. However, by posting content on a service, you grant us and our assigns, agents and licensees the irrevocable, royalty-free, perpetual, worldwide right and license to use, reproduce, modify, display, remix, perform, distribute, redistribute, adapt, promote, create derivative works and syndicate this content in any medium and through any form of technology or distribution. We own all rights, title and interests in any compilation, collective work or other derivative work created by us using or

incorporating your content (but not your original content)."; "Thus, it is clear that email users give these mega-corporations literally free rein to do anything they want with their customers' email. This isn't supposition. In a recent Associated Press [AP] report, Google attorney Whitty Somvichian said it was 'inconceivable' that Gmail users would not be aware that the information in their email would be known to Google. The article further explained that 'Google repeatedly described how it targets its advertising based on words that show up in Gmail messages,' although the company claims that 'the process is automated and no humans read your email.'"; "Although Google believes it is inconceivable that its customers don't know that the contents of their email are known to Google, the opposite is actually true. Every time I consult with a law firm about email security or lecture to attorneys about the dangers of unprotected email, they profess incredulity when they learn this information. As the AP article noted, quoting Consumer Watchdog President Jamie Court, "'People believe, for better or worse, that their email is private correspondence, not subject to the eyes of a \$180 billion corporation and its whims.'"; "By simply using Gmail, AOL and similar services, you risk disclosing confidential client communications and violating your ethical obligation to preserve that information. This danger is not confined to online email services such as Gmail; it applies to all email."; "Despite the lack of privacy with email, it is not difficult for lawyers and law firms to take affirmative actions to protect their electronic communications with or about clients. I suggest the following initial steps: Stop using services like Gmail and AOL for client-related communications. Instead, set up a private email account for your law firm. In other words, get a Web domain such as weareyourlawyers.com and set up email accounts for you and your staff. Stop using these online services. This will, at a minimum, avoid allowing Google and others to read, index and use your email for whatever purposes they want."; "Disclose to clients in your fee agreements and engagement letters that email communications may not be private, and also explain that the client must (1) decide whether to permit email communications, and (2) if the client approves, determine how to preventing disclosure of confidential information.").

Given the fragility of the attorney-client privilege, lawyers must also remember the risk of jeopardizing that protection if they disclose protected client information to third parties. In nearly every situation, third-party service providers fall within the narrow group of non-clients considered necessary for the lawyers' communications with their clients or otherwise necessary for the lawyers to do their job. A classic example is an outside copy service whose workers read highly confidential privileged communications

as they copy. Even as fragile as the law considers it, the privilege survives such disclosure if lawyers take care to select the copier.

However, every now and then an aberrational case comes to a shocking conclusion.

- 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).

### **Best Answer**

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

B 11/14

## Outsourcing

### Hypothetical 12

You have been intrigued by the possibility of saving your clients some money by arranging for lawyers other than partners and full-time associates to prepare fairly basic transactional documents. As you analyze the possibilities, you want to make sure that you comply with all of the ethics rules.

- (a) Without the client's consent, may you arrange for the client's routine transactional documents to be prepared by a part-time associate who occasionally works from home?

**(A) YES (PROBABLY)**

- (b) Without the client's consent, may you arrange for the client's routine transactional documents to be prepared by a part-time paralegal who works out of his home (both for your firm's clients and for other local firms' clients)?

**(B) NO (PROBABLY)**

- (c) Without the client's consent, may you arrange for the client's routine transactional documents to be prepared by a document preparation service based in Indianapolis?

**(B) NO (PROBABLY)**

- (d) Without the client's consent, may you arrange for the client's routine transactional documents to be prepared by a document preparation service based in India?

**(B) NO (PROBABLY)**

### Analysis

(a)-(d) Some law firms have relied on outsourcing for routine legal work.

The ABA has explicitly explained that lawyers may hire "contract" lawyers to assist in projects -- although the ABA's legal ethics opinion focused on billing questions.<sup>1</sup>

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

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

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

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

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

The ABA has explicitly approved foreign outsourcing of legal services as long as the lawyers take common-sense precautions.

- ABA LEO 451 (8/5/08) (generally approving the use of outsourcing of legal services, after analogizing them to such "[o]utsourced tasks" as reliance on a local photocopy shop, use of a "document management company," "use of a third-party vendor to provide and maintain a law firm's computer system" and "hiring of a legal research service," or "foreign outsourcing"; lawyers arranging for such outsourcing must always "render legal services competently," however the lawyers perform or delegate the legal tasks; lawyers must comply with their obligations in exercising "direct supervisory authority" over both lawyers and nonlawyers, "regardless of whether the other lawyer or the nonlawyer is directly affiliated with the supervising lawyer's firm"; the lawyer arranging for outsourcing "should consider" conducting background checks of the service providers, checking on their competence, investigating "the security of the provider's premises, computer network, and perhaps even its recycling and refuse disposal procedures" (emphasis added); 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

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<sup>3</sup> Virginia LEO 1735 (10/20/99) (a law firm may employ independent contractor lawyers under the following conditions: whether acting as independent contractors, contract attorneys or "of counsel," the lawyers must be treated as part of the law firm for confidentiality and conflicts of interest purposes; the firm must advise clients of any "mark-up" between the amount billed for the independent contractor lawyers' services and the amount paid to them if "the firm bills the amount paid to Attorney as an out-of-pocket expense or disbursement," but need not make such disclosure to the clients if the firm bills for the lawyers' work "in the same manner as it would for any other associate in the Firm" and the independent contractor lawyer works under another lawyer's "direct supervision" or the firm "adopts the work product as its own"; the independent contractor lawyers may be designated as "of counsel" to the firm if they have a "close, continuing relationship with the Firm and direct contact with the firm and its clients" and avoid holding themselves out as being partners or associates of the firm; the firm must disclose to clients that an independent contractor lawyer is working on the client's matter if the lawyers "will work independently, without close supervision by an attorney associated with the Firm," but need not make such disclosure if the "temporary or contract attorney works directly under the supervision of an attorney in the Firm"; the firm may pay a "forwarding" or "referral" fee to the independent contractor lawyers for bringing in a client under the new Rules).

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, "written confidentiality agreements are . . . strongly advisable in outsourcing relationships" (emphasis added)); to minimize the risk of disclosure of client confidences, the lawyer should verify that the service providers are not working for the adversary in the same or substantially related matter; explaining that (among other things) lawyers can charge "reasonable" fees for the outsourced lawyer's work by deciding whether to treat the outsourced lawyer in one of two ways: (1) like a contract lawyer (noting that "a law firm that engaged a contract lawyer [and directly supervises the contract lawyer] could add a surcharge to the cost paid by the billing lawyer provided the total charge represented a reasonable fee for the services provided to the client," and that "the lawyer is not obligated to inform the client how much the firm is paying a contract lawyer" as long as the fee is reasonable); or (2) as an expense to be passed along to the client (noting that "[i]f the firm decides to pass those costs through to the client as a disbursement," the lawyer cannot absent client consent add any markup other than "associated overhead" -- which in the case of outsourced legal services "may be minimal or nonexistent" to the extent that the outsourced work is "performed off-site without the need for infrastructural support").

State bars have taken the same approach.

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



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

- Ohio LEO 2009-6 (8/14/09) (offering guidance for lawyers outsourcing legal services; defining "legal services" as follows: "[L]egal services include but are not limited to document review, legal research and writing, and preparation of briefs, pleadings, legal documents. Support services include, but are not limited to ministerial services such as transcribing, compiling, collating, and copying."; ultimately concluding that a lawyer was not obligated to advise the client if a "temp" lawyer was working inside the firm under the direct supervision of a firm lawyer; also ultimately concluding that a lawyer can decide whether to bill for outsourced services as a fee, but that the lawyer must advise the client of how the lawyer will bill for those services; "[P]ursuant to Prof. Cond. Rules 1.4(a)(2), 1.2(a), and 1.6(a), a lawyer is required to disclose and consult with a client and obtain informed consent before outsourcing legal or support services to lawyer or nonlawyers. Disclosure, consultation, and informed consent is not necessary in the narrow circumstance where a lawyer or law firm temporarily engages the services of a nonlawyer to work inside the law firm on a legal matter under the close supervision and control of a lawyer in the firm, such as when a sudden illness of an employee requires a temporary replacement who functions as an employee of the law firm. Outside this narrow circumstance, disclosure, consultation, and consent are the required ethical practice."; explaining how the lawyer may bill for the outsourced services; explaining how the duty of confidentiality applies; "[P]ursuant to Prof. Cond. Rules 1.5(a) and 1.5(b), a lawyer is required to establish fees and expenses that are reasonable, not excessive, and to communicate to the client the basis or rate of the fee and expenses; these requirements apply to legal and support services outsourced domestically or abroad. The decision as to whether to bill a client for outsourced services as part of the legal fee or as an expense is left to a lawyer's exercise or professional judgment, but in either instance, if any amount beyond cost is added, it must be reasonable, such as a reasonable amount to cover a lawyer's supervision of the outsourced services. The decision must be communicated to the client preferably in writing, before or within a reasonable time after commencing the representation, unless the lawyer will charge a client whom the lawyer has regularly represented on the same basis as previously charged.").
- Colorado LEO 121 (adopted 5/17/08) (approving outsourcing of legal services to lawyers licensed only in other states or only in other countries; ultimately concluding that paying a "temp" lawyer does not amount to a fee-split for ethics rules purposes; also concluding that the lawyer can add a markup when billing the client for the foreign lawyer's outsourced services, and does not have to disclose that markup to the client even if it is "substantial"; warning Colorado lawyers that they must undertake certain steps; "Reasonable efforts include: (a) confirming that the Domestic or Foreign Lawyer is licensed and in good standing in his or her home jurisdiction; (b) confirming that the Domestic or Foreign Lawyer is competent to undertake the work to be assigned; and (c) supervising the work of any nonlawyer hired by

the Colorado Lawyer to assist in assigned tasks."; also warning that "in general, the Colorado Lawyer must determine whether the activities of the Domestic or Foreign Lawyer constitute the practice of law in Colorado, and, if so, whether and to what extent those activities are authorized by virtue of the Colorado lawyer's supervision of and responsibility for the Domestic or Foreign Lawyer's work."; advising the Colorado lawyer to assure that the temporary lawyer does not have a conflict of interest; finding that the fee-splitting rules do not apply "if the firm is responsible for paying the Domestic or Foreign Lawyer regardless of whether the client pays the firm, and if the Domestic or Foreign Lawyer's compensation is not a percentage or otherwise directly tied to the amount paid by the client. If the payment to a Domestic or Foreign Lawyer under this analysis constitutes the division of a fee, then the hiring Colorado Lawyer must comply with Colo. RPC 1.5(d)."; "Whether the delegation of tasks to a Domestic or Foreign Lawyer constitutes a significant development that the Colorado Lawyer must disclose to the client depends on the circumstances. If the lawyer reasonably believes that a client expects its legal work to be performed exclusively by Colorado Lawyers, the Colorado Lawyer may be required to disclose the fact of delegation, as well as its nature and extent. The Committee continues to conclude that a Colorado lawyer is not required to affirmatively disclose the amount of fees paid to, and profits made from, the services of Domestic and Foreign Lawyers, even where the mark-up is substantial."; "[W]hether the Colorado Lawyer must inform a client of the use of Foreign or Domestic Lawyers will depend upon the facts of the matter, particularly the client's expectations. At least as of this writing, the Committee is of the opinion that most clients of Colorado Lawyers do not expect their legal work to be outsourced, particularly to a foreign county. Thus in the vast majority of cases, a Colorado Lawyer outsourcing work to a Foreign Lawyer who is not affiliated with the Colorado law firm would constitute a 'significant development' in the case and disclosure to the client would be required.").

- North Carolina LEO 2007-12 (4/25/08) (analogizing foreign outsourcing and lawyers' reliance on the services of "any nonlawyer assistant"; concluding that a lawyer in that circumstance must advise the client of any foreign outsourcing; indicating that lawyers may arrange for foreign outsourcing, as long as the lawyers: "determine that delegation is appropriate"; make "'reasonable efforts' to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer"; "exercise due diligence in the selection of the foreign assistant" (including taking such steps as investigating the assistant's background, obtaining a resume and work product samples, etc.); "review the foreign assistant's work on an ongoing basis to ensure its quality"; "review thoroughly" the foreign assistant's work; make sure that "[f]oreign assistants may not exercise independent legal judgment in making decisions on behalf of the client"; "ensure that procedures are in place to minimize the risk that confidential information might be disclosed" (including the selection of a mode of communication); obtain the client's "written

informed consent to the outsourcing," because absent "a specific understanding between a lawyer and client to the contrary, the reasonable expectation of the client is that the lawyer retained by the client, using the resources within the lawyer's firm, will perform the requested legal services").

- Florida LEO 07-2 (1/18/08) (addressing foreign outsourcing; concluding that a lawyer might be obligated to advise the client of such foreign outsourcing; "A lawyer is not prohibited from engaging the services of an overseas provider to provide paralegal assistance as long as the lawyer adequately addresses ethical obligations relating to assisting the unlicensed practice of law, supervision of nonlawyers, conflicts of interest, confidentiality, and billing. The lawyer should be mindful of any obligations under law regarding disclosure of sensitive information of opposing parties and third parties."; "The committee believes that the law firm should obtain prior client consent to disclose information that the firm reasonably believes is necessary to serve the client's interests. Rule 4-1.6 (c)(1), Rules Regulating The Florida Bar. In determining whether a client should be informed of the participation of the overseas provider an attorney should bear in mind factors such as whether a client would reasonably expect the lawyer or law firm to personally handle the matter and whether the non-lawyers will have more than a limited role in the provision of the services."; "The law firm may charge a client the actual cost of the overseas provider, unless the charge would normally be covered as overhead.").
- San Diego County LEO 2007-1 (2007) (assessing a situation in which a lawyer in a two-lawyer firm was retained to defend a "complex intellectual property dispute" although he was not experienced in intellectual property litigation; noting that the lawyer hired an Indian firm "to do legal research, develop case strategy, prepare deposition outlines, and draft correspondence, pleadings, and motions in American intellectual property cases at a rate far lower than American lawyers could charge clients if they did the work themselves"; also noting that the lawyer had not advised his client that he had retained the Indian firm; explaining that the lawyer eventually was successful on summary judgment in the case; holding that: (1) the lawyers did not assist in the unauthorized practice of law; explaining that it is not necessary for a non-lawyer to be physically present in California to violate the UPL Rules, as long as the non-lawyer communicated into California; concluding that "[t]he California lawyer in this case retained full control over the representation of the client and exercised independent judgment in reviewing the draft work performed by those who were not California attorneys. His fiduciary duties and potential liability to his corporate client for all of the legal work that was performed were undiluted by the assistance he obtained from Legalworks [the Indian firm]. In short, in the usual arrangement, and in the scenario described above in particular, the company to whom work was outsourced has assisted the California lawyer in practicing law in this state, not the other way around. And that is not

prohibited."; (2) the lawyer had a duty to inform the client of the firm's retention of the Indian firm, because the work was within the "reasonable expectation under the circumstances" that the client would expect the lawyer to perform (citation omitted); (3) whether the lawyer violated his duty of competence depended on whether he was capable of adequately supervising the Indian firm; "The Committee concludes that outsourcing does not dilute the attorney's professional responsibilities to his client, but may result in unique applications in the way those responsibilities are discharged. Under the hypothetical as we have framed it, the California attorneys may satisfy their obligations to their client in the manner in which they used Legalworks, but only if they have sufficient knowledge to supervise the outsourced work properly and they make sure the outsourcing does not compromise their other duties to their clients. However, they would not satisfy their obligations to their clients unless they informed the client of Legalworks' anticipated involvement at the time they decided to use the firm to the extent stated in this hypothetical.").

- New York City LEO 2006-3 (8/2006) (assessing the ethics ramifications of New York lawyers outsourcing legal support services overseas; distinguishing between the outsourcing of "substantive legal support services" (and "administrative legal support services" such as transcriptions, accounting services, clerical support, data entry, etc.; holding that New York lawyers may ethically outsource such substantive services if they: (1) avoid aiding non-lawyers in the unauthorized practice of law, which requires that the lawyer "must at every step shoulder complete responsibility for the non-lawyer's work. In short, the lawyer must, by applying professional skill and judgment, first set the appropriate scope for the non-lawyer's work and then vet the non-lawyer's work and ensure its quality."; (2) adequately supervise the overseas workers, which requires that the "New York lawyer must be both vigilant and creative in discharging the duty to supervise. Although each situation is different, among the salutary steps in discharging the duty to supervise that the New York lawyer should consider are to (a) obtain background information about any intermediary employing or engaging the non-lawyer, and obtain the professional résumé of the non-lawyer; (b) conduct reference checks; (c) interview the non-lawyer in advance, for example, by telephone or by voice-over-internet protocol or by web cast, to ascertain the particular non-lawyer's suitability for the particular assignment; and (d) communicate with the non-lawyer during the assignment to ensure that the non-lawyer understands the assignment and that the non-lawyer is discharging the assignment according to the lawyer's expectations."; (3) preserve the client's confidences, suggesting "[m]easures that New York lawyers may take to help preserve client confidences and secrets when outsourcing overseas include restricting access to confidences and secrets, contractual provisions addressing confidentiality and remedies in the event of breach, and periodic reminders regarding confidentiality"; (4) avoid conflicts of interest, advising that "[a]s a threshold matter, the

outsourcing New York lawyer should ask the intermediary, which employs or engages the overseas non-lawyer, about its conflict-checking procedures and about how it tracks work performed for other clients. The outsourcing New York lawyer should also ordinarily ask both the intermediary and the non-lawyer performing the legal support service whether either is performing, or has performed, services for any parties adverse to the lawyer's client. The outsourcing New York lawyer should pursue further inquiry as required, while also reminding both the intermediary and the non-lawyer, preferably in writing, of the need for them to safeguard the confidences and secrets of their other current and former clients."; (5) bill appropriately, noting that "[b]y definition, the non-lawyer performing legal support services overseas is not performing legal services. It is thus inappropriate for the New York lawyer to include the cost of outsourcing in his or her legal fees. . . . Absent a specific agreement with the client to the contrary, the lawyer should charge the client no more than the direct cost associated with outsourcing, plus a reasonable allocation of overhead expenses directly associated with providing that service."; (6) obtain the client's consent when necessary, as "there is little purpose in requiring a lawyer to reflexively inform a client every time that the lawyer intends to outsource legal support services overseas to a non-lawyer. But the presence of one or more additional considerations may alter the analysis: for example, if (a) non-lawyers will play a significant role in the matter, e.g., several non-lawyers are being hired to do an important document review; (b) client confidences and secrets must be shared with the non-lawyer, in which case informed advance consent should be secured from the client; (c) the client expects that only personnel employed by the law firm will handle the matter; or (d) non-lawyers are to be billed to the client on a basis other than cost, in which case the client's informed advance consent is needed.").

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

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

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

specifically describing the work the lawyers require, and reviewing the work before adopting it as their own.

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

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

Fifth, lawyers must bill appropriately. As explained above, if the lawyers are not "adding value" to the outsourced workers, they should pass along the outsourcing bill directly to their client as an expense. In that situation, the lawyer generally may add overhead expenses to the bill (although the ABA noted that there will be very few overhead expenses in a foreign outsourcing operation).

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

Bar indicated that lawyers arranging for outsourcing must always obtain their clients' written informed consent.

**Best Answer**

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

B 11/14



## Listservs

### Hypothetical 13

Although you began your legal practice before the popularity of electronic communications, you pride yourself on having become fairly tech-savvy. Among other things, you have begun to use listservs to monitor developments in your area of practice, seek specific advice about some abstract legal issues, and heighten your professional profile by offering what you think are helpful insights to others. You were taken aback when one of your less tech-savvy colleagues questioned your participation in such listservs.

Does your participation in listservs violate your ethics confidentiality duty?

### **(B) NO (PROBABLY)**

### Analysis

Lawyers have always consulted about legal matters with other lawyers who are not in the same firm. One can easily picture Abraham Lincoln discussing issues with fellow Illinois lawyers on courthouse steps.

Such communications can range from the very abstract ("What do you think of that new statute?") to the more client-centric ("I have a client who has not paid me in three months -- what do you think I should do?") to the very specific ("I have a client who is running for City Council and wants me to keep his impending divorce secret, even though I told him that it would inevitably leak out -- do you think I did the right thing?"). Along that spectrum, lawyers at some point improperly disclose protected client information.

Of course, electronic communications allow countless lawyers anywhere in the world to engage in such communications. They frequently use listservs or other types of mass communication, which normally involve hundreds or even thousands of lawyers

engaging in electronic chatting about legal matters. As with the courthouse steps conversations, these range from the very abstract to the very specific.

It is worth noting the very different motivations of those seeking guidance and those offering guidance in semi-private or even widely public communications of this sort. The lawyer seeking guidance looks for assistance in representing a client. These lawyers can point to their client-centric motivation in relying on an implied authorization, etc. In contrast, lawyers providing advice are at least not directly advancing their own clients' interests. In fact, they are assisting other clients. These lawyers might point to some vague reciprocity often inherent in such communications, but that would be a stretch.

All of these communications would easily pass ethics muster with client consent. But they could not occur if lawyers required client consent to each disclosure. A general client consent for lawyers to engage in listserv conversations seems to fall short of the type of full disclosure that must underlie a valid client consent. In the real world, lawyers rarely if ever ask for client consent to engage in their courthouse steps or the listserv communications. So the obvious question arises -- how do such lawyers avoid violating their ethics confidentiality duty?

Perhaps they can rely on the impliedly authorized confidentiality exception.

The 1908 ABA Canons of Professional Ethics did not deal with this issue, perhaps because they addressed confidentiality in the context of conflicts of interest rather than in the abstract.

The 1969 ABA Model Code of Professional Responsibility dealt explicitly with lawyers' disclosure outside the firm that enabled lawyers to practice law.

Unless the client otherwise directs, it is not improper for a lawyer to give limited information from his files to an outside agency necessary for statistical, bookkeeping, accounting, data processing, banking, printing, or other legitimate purposes, provided he exercises due care in the selection of the agency and warns the agency that the information must be kept confidential.

ABA Model Code EC 4-3 (emphasis added).

The 1983 ABA Model Rules of Professional Conduct added a phrase to the black letter rule recognizing implied client authority.

A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

ABA Model Rule 1.6(a) (emphasis added). To be sure, the accompanying comment seems more limited than one might expect.

Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

ABA Model Rule 1.6 cmt. [5] (emphasis added).

The Restatement acknowledges that this implied authorization sometimes permits lawyers to disclose protected client information outside a law firm or law department.

A lawyer also may disclose information to independent contractors who assist in the representation, such as

investigators, lawyers in other firms, prospective expert witnesses, and public courier companies and photocopy shops, to the extent reasonably appropriate in the client's behalf . . . . Such disclosures are not permitted contrary to a client's instructions, even within the lawyer's firm . . . , or when screening is required to avoid imputed disqualification of the lawyer's firm.

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

Of course lawyers disclosing protected client information to outsiders assisting the lawyer must take reasonable steps to assure that the recipients protect the information.

A lawyer must take reasonable steps so that law-office personnel and other agents such as independent investigators properly handle confidential client information. That includes devising and enforcing appropriate policies and practices concerning confidentiality and supervising such personnel in performing those duties . . . . A lawyer may act reasonably in relying on other responsible persons in the office or on reputable independent contractors to provide that instruction and supervision . . . . The reasonableness of specific protective measures depends on such factors as the duties of the agent or other person, the extent to which disclosure would adversely affect the client, the extent of prior training or experience of the person, the existence of other assurances such as adequate supervision by senior employees, and the customs and reputation of independent contractors.

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

A Restatement reporter's note articulates the same approach.

The same implied authority permits a lawyer to disclose confidential client information to the extent necessary to obtain assistance from appropriate experts, lawyers, and other agents outside the lawyer's firm.

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

This Restatement section's comments elaborate on this general principle.

A lawyer's authority to disclose information for purposes of carrying out the representation is implied and therefore does not require express client consent . . . . Agents of a lawyer assisting in representing a client serve as subagents and as such independently owe a duty of confidentiality to the client.

Restatement (Third) of Law Governing Lawyers § 60 cmt. f (2000). The next comment provides examples of permissible disclosure.

A lawyer may disclose confidential client information for the purpose of facilitating the lawyer's law practice, where no reasonable prospect of harm to the client is thereby created and where appropriate safeguards against impermissible use or disclosure are taken. Thus, disclosure is permitted to other lawyers in the same firm and to employees and agents such as accountants, file clerks, office managers, secretaries, and similar office assistants in the lawyer's firm, and with confidential, independent consultants, such as computer technicians, accountants, bookkeepers, law-practice consultants, and others who assist in furthering the law-practice business of the lawyer or the lawyer's firm.

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

Another Restatement provision takes the same basic approach, but does not explicitly frame the disclosure as impliedly authorized.

A lawyer may use or disclose confidential client information when the lawyer reasonably believes that doing so will advance the interests of the client in the representation.

Restatement (Third) of Law Governing Lawyers § 61 (2000).

This provision relies on lawyers to decide whether the disclosure sufficiently advances the client's interest. A comment provides some examples.

A lawyer has general authority to take steps reasonably calculated to further the client's objectives in the representation . . . . This Section is a particular application of that general authority. No explicit request or grant of permission is required.

. . .

This Section requires that a lawyer have a reasonable belief that the use or disclosure will further the objectives of the client in the representation. In certain instances, permissible use or disclosure under this Section may create a risk, reasonable in the circumstances, that may extend beyond what is permitted under § 60(1) alone. The fact that the client's interests are not in fact furthered does not demonstrate that the lawyer's belief at the point of use or disclosure was unreasonable. A lawyer must often contend with uncertainties, unexpected decisions, and the need for immediate action. For example, offering a witness reasonably believed to have generally favorable testimony may entail the risk of also revealing embarrassing or counterproductive facts about the client. So long as reasonably calculated to advance the client's interests, such use or disclosure is permissible under this Section.

Restatement (Third) of Law Governing Lawyers § 61 cmt. b (2000) (emphasis added).

The Restatement provides several additional examples from the litigation setting.

A lawyer may use or disclose confidential client information when presenting evidence or argument or engaging in other proceedings before a court, governmental agency, or other forum in behalf of a client. Thus, a lawyer may disclose such information in pleadings or other submissions, in presenting the testimony of witnesses and other evidence, in submitting briefs and other memoranda, or in discussing the matter with potential witnesses. Information thus disclosed may be not entirely favorable to the client. For tactical reasons, a lawyer may reasonably decide to present partly unfavorable information, even though it is confidential. A lawyer may do so in the interest of mitigating its damaging effect (for example, to prevent it from being brought out first by an adversary) or in order to present a complete account and thus gain the confidence of the factfinder.

A lawyer who reasonably believes that it is in the interests of the client to do so may refrain from objecting to an adversary's attempt to introduce otherwise inadmissible confidential client information, even if that failure will cause the waiver of a privilege . . . . For example, a lawyer may acquiesce in an adversary's eliciting testimony from the

lawyer's client that, although privileged under the attorney-client privilege, is favorable to the client's litigation position.

Restatement (Third) of Law Governing Lawyers § 61 cmt. d (2000) (emphasis added).

A reporter's note provides further guidance.

The law generally permits a lawyer negotiating a settlement to make statements "without prejudice" or under a similar rubric that makes the statements inadmissible in evidence to establish liability in subsequent proceedings. . . . Modern evidence codes generally make inadmissible in evidence, at least for most purposes, both settlement offers and statements made in settlement discussions, even without the ceremony of stating that a disclosure is "without prejudice." . . . Ordinarily a lawyer will be well advised to consult with a client in advance when a lawyer proposes to take the risk of divulging particularly compromising client information that need not otherwise be divulged.

Restatement (Third) of Law Governing Lawyers § 61 reporter's note cmt. d (2000).

The Restatement comment dealing mostly with litigation also mentions lawyers' disclosure of protected client information in a transactional setting.

A lawyer has the same authority in matters other than litigation. A lawyer may, for example, exchange confidential client information reasonably calculated to further settlement of a lawsuit or negotiation of a business transaction. In most jurisdictions, statements made in the course of settlement negotiations are not thereafter admissible in evidence to establish liability against the person who or whose lawyer made the statement. In so using or disclosing information, a lawyer must use due care . . . to avoid unintended waiver of the attorney-client privilege or other injury to the interests of the client.

Restatement (Third) of Law Governing Lawyers § 61 cmt. d (2000) (emphasis added).

Although most states follow the ABA Model Rules in recognizing lawyers' implied authorization to disclose protected client information in certain circumstances, not all states have adopted that ABA Model Rules provision. For instance, in 2006 the

ABA/BNA Lawyers' Manual of Professional Conduct noted that several large states as of that time did not have the implied authorization provision.

There are some jurisdictions whose confidentiality rules make no mention of 'implied' authorization to reveal confidential information. These include California, Illinois, Maine, Michigan, New York, and Ohio. The absence of a specific black-letter provision permitting disclosures that are impliedly authorized does not, however, mean that such disclosures are prohibited. These jurisdictions have confidentiality rules that, like DR 4-101 of the Model Code, protect from disclosure a client's 'confidences' and 'secrets,' rather than 'information relating to the representation.' 'Confidences' and 'secrets' as defined in these jurisdictions' rules do not encompass information 'impliedly authorized to carry out the representation.'

ABA/BNA Lawyers' Manual on Professional Conduct, 55:502. The acknowledgement that as of that time these states followed the more logical ABA Model Code confidentiality formulation highlighted the ABA Model Rules formulation's overbreadth.

The implied authorization argument might provide some support to lawyers seeking guidance in listserv conversations, but probably not for lawyers providing the guidance.

The ethics analyses for such communications usually eschew any reliance on confidentiality exceptions, and instead focus on the absence of any disclosure requiring consent or an exception. These analyses typically warn lawyers not to disclose sufficiently detailed information during such communications that the recipients can identify lawyers' client who requires the help. In some situations, this can be easy. Lawyers asking listserv colleagues what they think of a new statute clearly meets the acceptable standard of disclosure, but as the questions move toward the more detailed end of the spectrum, troubles can arise.



The ethics rules have dealt with this.

The ABA Model Code warned lawyers to be careful when reaching out to colleagues.

[I]n the absence of consent of his client after full disclosure, a lawyer should not associate another lawyer in the handling of a matter; nor should he, in the absence of consent, seek counsel from another lawyer if there is a reasonable possibility that the identity of the client or his confidences or secrets would be revealed to such lawyer. Both social amenities and professional duty should cause a lawyer to shun indiscreet conversations concerning his clients.

ABA Model Code of Professional Responsibility, EC 4-2 (emphasis added).

The ABA Model Rules do not explicitly deal with this scenario. A provision implicitly describes such communication as an exception to the general prohibition on disclosing protected client information.

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. [4] (emphasis added).

Of course, the ABA Model Rules do not permit even harmless disclosures of protected client information, so the use of hypotheticals provides the only real possibility for such communications.

In contrast, the Restatement permits disclosures of protected client information unless "there is a reasonable prospect that doing so will adversely affect the material

interests 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).

The Restatement provides more blunt guidance in permitting the disclosure of such information if it does not create a "material risk."

When no material risk to a client is entailed, a lawyer may disclose information derived from representing clients for purposes of providing professional assistance to other lawyers, whether informally, as in educational conversations among lawyers, or more formally, as in continuing-legal-education lectures. Thus, a lawyer may confer with another lawyer (whether or not in the same firm) concerning an issue in which the disclosing lawyer has gained experience through representing a client in order to assist the other lawyer in representing that lawyer's own clients.

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

However, the Restatement warns lawyers to be careful.

Greater precautions may be necessary when use or disclosure is not directed toward representation of the client . . . or facilitating the lawyer's law practice . . . , for example when information is provided to a lawyer outside the firm to assist that lawyer's own representations. A lawyer must not engage in casual or frivolous conversation about a client's matters that creates an unreasonable risk of harm to the interests of the client.

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

Because everyone knows that many lawyers engage in such beneficial communication, one might expect the ABA Model Rules and the Restatement would be clearer about the ground rules.

The ABA Model Rules' inherent permission to engage in such communications as long as they involve "hypotheticals" makes sense. In fact, such an approach is really the only way that the ABA Model Rules could reconcile this common practice and the

Model Rules' overbroad definition of protected client "information." As usual, the Restatement approach makes more sense -- focusing on any real-life risk to the client if a lawyer discloses client-related information.

At the dawn of the electronic communication age, the ABA dealt with this issue in a legal ethics opinion. ABA LEO 411 (8/30/98).<sup>1</sup>

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<sup>1</sup> ABA LEO 411 (8/30/98) (addressing lawyer's consultation with another lawyer outside the firm and not already involved as co-counsel, when there is "no intent to engage the consulted lawyer's services"; "The decision to seek another lawyer's advice may be precipitated by an atypical fact pattern, a knotty problem, a novel issue, or a matter that requires specialized knowledge. A lawyer who practices alone, or who has no colleague in or associated with his firm with the necessary competence will, and indeed often must, seek assistance from a lawyer outside the firm. Even the most experienced lawyers sometimes will find it useful to consult others who practice in the same area to get the benefit of their expertise on a difficult or unusual problem."; explaining that such communications involve a spectrum from a question and answer CLE program to "detailed discussions to obtain substantial assistance with the analysis or tactics of a matter"; finding that the disclosing lawyer may rely on the implied authorization of comment 7 in undertaking such communications; "Comment [7] explains: 'A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority.' We interpret Rule 1.6(a), as illuminated by Comment [7], to allow disclosure of client information to lawyers outside the firm when the consulting lawyer reasonably believes the disclosure will further the representation by obtaining the consulted lawyer's experience or expertise for the benefit of the consulting lawyer's client. However, the consulting lawyer's implied authority to disclose client information in consultation is limited, as our further discussion reflects." (footnote omitted) (emphasis added); concluding that "[a] consultation that is general in nature and does not involve disclosure of client information does not implicate Rule 1.6 and does not require client consent. For instance, a lawyer representing a client accused of tax fraud might consult a colleague about relevant legal authority without disclosing any information relating to the specific representation. Similarly, a lawyer might consult a colleague about a particular judge's views on an issue. Neither consultation requires the disclosure of client information." (emphasis added); acknowledging that presenting a hypothetical to consulted lawyer normally does not violate Rule 1.6 as long as there is "no disclosure of information identifiable to a real client or real situation"; warning that "if a lawyer reasonably can foresee at the time he seeks a consultation that even the hypothetical discussion is likely to reveal information that would prejudice the client or that the client would not want disclosed, then he must obtain client consent for the consultation." (emphasis added); noting that the disclosing lawyer may obtain the client's informed consent to any disclosure; advising the disclosing lawyer to avoid such communications with a consulted lawyer who may represent the adverse party, and suggesting that the disclosing lawyer "should consider requesting an agreement from the consulted lawyer to maintain the confidentiality of information disclosed, as well as an agreement that the consulted lawyer will not engage in adverse representations." (emphasis added); concluding that the consulted lawyer generally does not assume any duty of confidentiality, but noting possible exceptions to the general rule; "A consulting lawyer may request and obtain the consulted lawyer's express agreement to keep confidential the information disclosed in the consultation. There also may be situations in which an agreement to preserve confidentiality can or should be inferred from the circumstances of the consultation. If the consulting lawyer conditions the consultation on the consulted lawyer's maintaining confidentiality, the consulted lawyer's agreement should be inferred if she goes forward even in the absence of an expression of agreement. Similarly, the information imparted may be of such a nature that a reasonable lawyer would know that confidentiality is assumed and expected. . . . For instance, assume a lawyer is consulted anonymously about a tax issue; she discusses the matter only hypothetically and makes no promise to

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maintain the confidentiality of the information. Later, the consulted lawyer meets with a new client about a divorce and in the course of the first meeting realizes that the tax issue consultation was on behalf of the new client's spouse. The consulted lawyer has no duty of confidentiality under Rule 1.6 or a conflict of interest under Rule 1.7 in representing her new client merely because she has learned, after the consultation, the identity of the consulting lawyer's client. This is true regardless of how obvious it seems after the fact that the consulting lawyer should have insisted on a confidentiality agreement if he had intentionally disclosed the information or anticipated it could be ascertained from the 'hypothetical' facts." (emphasis added); also warning the consulted lawyer to avoid giving any advice adverse to one of that lawyer's clients; "The need for caution is illustrated by the following example. A lawyer skilled in real estate matters is consulted for ideas to help the consulting lawyer's tenant client void a burdensome lease. No information about the identities of the parties is exchanged, nor does the consulting lawyer reveal any confidential information about his client. Based on the consulted lawyer's ideas, as implemented by the consulting lawyer, the tenant repudiates the lease and abandons the leased premises. The consulted lawyer subsequently learns that the landlord is a long-time client of the firm who wants the firm to pursue a breach of lease action against the former tenant. Because the consulted lawyer did not know the identities of the consulting lawyer's client or the landlord, she has, albeit unwittingly, helped the consulting lawyer's client engage in conduct adverse to the interest of her own client in a way that Rule 1.7(a) would have prevented her from doing if the tenant had sought her advice directly as a prospective client. . . . The consulted lawyer who failed to clear conflicts may find herself in the intractable position of having given advice to and received information from both parties to a dispute. When a lawyer learns that this has occurred, and assuming no agreement was made to keep the consultation confidential, Rule 1.4 requires the consulted lawyer to inform her client of the consultation and the possible consequences of it." (footnote omitted); explaining that the consulted lawyer could clear conflicts after learning the identity of the consulting lawyer's client, or ask the consulting lawyer for a conflict waiver; also noting the logistical issues; "As a practical matter, the consulted lawyer who undertakes to maintain confidentiality in a consultation will have to include the name of the consulting lawyer's client in her own client database in order to avoid inadvertently undertaking an adverse representation that implicates Rule 1.7(b)." (emphasis added); concluding with a list of protective measure; "1) The consultation should be anonymous or hypothetical without reference to a real client or a real situation. 2) If actual client information must be revealed to make the consultation effective, it should be limited to that which is essential to allow the consulted lawyer to answer the question. Disclosures that might constitute a waiver of attorney-client privilege, or which otherwise might prejudice the interests of the client must not be revealed without consent. The consulting lawyer should advise the client about the potential risks and consequences, including waiver of the attorney-client privilege, that might result from the consultation. 3) The consulting lawyer should not consult with someone he knows has represented the opposing party in the past without first ascertaining that the matters are not substantially related and that the opposing party is represented by someone else in this matter. Similarly, a lawyer should exercise caution when consulting a lawyer who typically represents clients on the other side of the issue. 4) The consulted lawyer should ask at the outset if the consulting lawyer knows whether the consulted lawyer or her firm represents or has ever represented any person who might be involved in the matter. In some circumstances, the consulted lawyer should ask the identity of the party adverse to the consulting lawyer's client. 5) At the outset, the consulted lawyer should inquire whether any information should be considered confidential and, if so, should obtain sufficient information regarding the consulting lawyer's client and the matter to determine whether she has a conflict of interest. 6) The consulted lawyer might ask for a waiver by the consulting lawyer's client of any duty of confidentiality or conflict of interest relating to the consultation, allowing for the full use of information gained in the consultation for the benefit of the consulted lawyer's client. 7) The consulted lawyer might seek advance agreement with the consulting lawyer that, in case of a conflict of interest involving the matter in consultation or a related matter, the consulted lawyer's firm will not be disqualified if the consulted lawyer 'screens' herself from any participation in the adverse matter.").

Relying on what was then comment [7] to ABA Model Rule 1.6, ABA LEO 411 warned both lawyers involved in such communications to be careful. Among other things, the legal ethics opinion suggested that the consulting lawyer

should consider requesting an agreement from the consulted lawyer to maintain the confidentiality of information disclosed, as well as an agreement that the consulted lawyer will not engage in adverse representations.

ABA LEO 411 (8/30/98). Of course, that type of formal arrangement seems contrary to the generally informal nature of such communications, and might also chill such worthwhile dialogue.

However, ABA LEO 411 warned about the possible effect of the consulting lawyer not arranging for such an agreement.

[A]ssume a lawyer is consulted anonymously about a tax issue; she discusses the matter only hypothetically and makes no promise to maintain the confidentiality of the information. Later, the consulted lawyer meets with a new client about a divorce and in the course of the first meeting realizes that the tax issue consultation was on behalf of the new client's spouse. The consulted lawyer has no duty of confidentiality under Rule 1.6 or a conflict of interest under Rule 1.7 in representing her new client merely because she has learned, after the consultation, the identity of the consulting lawyer's client. This is true regardless of how obvious it seems after the fact that the consulting lawyer should have insisted on a confidentiality agreement if he had intentionally disclosed the information or anticipated it could be ascertained from the 'hypothetical' facts.

Id.

ABA LEO 411 also warned about a similar nightmarish situation facing a consulted lawyer providing advice without checking for conflicts.

The need for caution is illustrated by the following example. A lawyer skilled in real estate matters is consulted for ideas to help the consulting lawyer's tenant client void a

burdensome lease. No information about the identities of the parties is exchanged, nor does the consulting lawyer reveal any confidential information about his client. Based on the consulted lawyer's ideas, as implemented by the consulting lawyer, the tenant repudiates the lease and abandons the leased premises. The consulted lawyer subsequently learns that the landlord is a long-time client of the firm who wants the firm to pursue a breach of lease action against the former tenant. Because the consulted lawyer did not know the identities of the consulting lawyer's client or the landlord, she has, albeit unwittingly, helped the consulting lawyer's client engage in conduct adverse to the interest of her own client in a way that Rule 1.7(a) would have prevented her from doing if the tenant had sought her advice directly as a prospective client. . . . The consulted lawyer who failed to clear conflicts may find herself in the intractable position of having given advice to and received information from both parties to a dispute. When a lawyer learns that this has occurred, and assuming no agreement was made to keep the consultation confidential, Rule 1.4 requires the consulted lawyer to inform her client of the consultation and the possible consequences of it.

Id. (emphases added).

The legal ethics opinion closed with a lengthy series of possible protective measures.

- 1) The consultation should be anonymous or hypothetical without reference to a real client or a real situation.
- 2) If actual client information must be revealed to make the consultation effective, it should be limited to that which is essential to allow the consulted lawyer to answer the question. Disclosures that might constitute a waiver of attorney-client privilege, or which otherwise might prejudice the interests of the client must not be revealed without consent. The consulting lawyer should advise the client about the potential risks and consequences, including waiver of the attorney-client privilege, that might result from the consultation.
- 3) The consulting lawyer should not consult with someone he knows has represented the opposing party in the past without first ascertaining that the matters are not substantially related and that the opposing party is represented by someone else in this matter. Similarly, a lawyer should exercise caution when consulting a lawyer

who typically represents clients on the other side of the issue. 4) The consulted lawyer should ask at the outset if the consulting lawyer knows whether the consulted lawyer or her firm represents or has ever represented any person who might be involved in the matter. In some circumstances, the consulted lawyer should ask the identity of the party adverse to the consulting lawyer's client. 5) At the outset, the consulted lawyer should inquire whether any information should be considered confidential and, if so, should obtain sufficient information regarding the consulting lawyer's client and the matter to determine whether she has a conflict of interest. 6) The consulted lawyer might ask for a waiver by the consulting lawyer's client of any duty of confidentiality or conflict of interest relating to the consultation, allowing for the full use of information gained in the consultation for the benefit of the consulted lawyer's client. 7) The consulted lawyer might seek advance agreement with the consulting lawyer that, in case of a conflict of interest involving the matter in consultation or a related matter, the consulted lawyer's firm will not be disqualified if the consulted lawyer 'screens' herself from any participation in the adverse matter.

Id.

State bar legal ethics opinions have taken the same basic approach.

- Illinois LEO 12-15 (5/2012) ("Lawyer A may consult with other lawyers in an online discussion group. If the nature of the discovery dilemma is general and abstract, if there is no risk that Lawyer A's client can be identified from the inquiry, and if Lawyer A does not disclose information relating to the representation of the client, then Lawyer A will not need to obtain her client's informed consent to engage in the consultation. If however, Lawyer A's client can be identified from the inquiry or if Lawyer A needs to disclose information relating to the representation, then Lawyer A must confer with the client and obtain the client's informed consent. Lawyer A must also take reasonable steps to avoid consulting with counsel for the adverse party in the discovery dispute." (emphasis added); "The consulted lawyer should also take reasonable steps to avoid providing information to Lawyer A that could impair any obligations to the consulted lawyer's clients."; "An online discussion group can serve to educate a lawyer and allows a lawyer to test her understanding of legal principles by asking questions of other lawyers. Such a service can help a lawyer to provide competent representation pursuant to Rule 1.1 of the Illinois Rules of Professional Conduct, particularly when the lawyer does not have a partner or co-counsel to whom she can turn to for advice. However, both the consulting lawyer and the consulted lawyer must abide by their professional responsibilities."; "[A] consultation or inquiry that is general or

abstract in nature and that does not involve the disclosure of information relating to the representation of the client does not violate Rule 1.6. Similarly, a question posed as a hypothetical may not generally violate Rule 1.6, as long as there is not a reasonable likelihood from the question or the discussion that the identity of the client could be determined."; "If the consulted lawyer or other persons viewing the inquiry could determine the identity of the client or if the inquiry otherwise risks disclosure of information relating to the representation that could harm the client, then the lawyer must consult with the client pursuant to Rule 1.4 and obtain the client's informed consent. 'Informed consent' is defined by Rule 1.0(e) as denoting 'the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.' As set forth in ABA Formal Ethics Opinion 98-411, informed consent might include an explanation as to how the disclosure could harm the client, including that the disclosure may constitute a waiver of the attorney-client privilege. See also Maine Ethics Op. 171 (1999)."; "[T]he consulting lawyer should not view the consultation as a substitution for the lawyer's legal research and judgment. As set forth in Comment 5 to Rule 1.1, competent handling of a client's matter 'includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners.'"; "Generally, a consulted lawyer does not create a client-lawyer relationship with the consulting lawyer's client by virtue of the consultation alone. However, the consulted lawyer must consider the duty of loyalty to his or her own clients when consulting for the benefit of the clients of a consulting lawyer. . . . In a situation where the identity of the consulting lawyer's client is not protected, the consulted lawyer will need to check for possible conflicts of interest. In other situations, the consulted lawyer should take reasonable steps to insure that the information provided to the consulting lawyer will not impair the obligations to the consulted lawyer's [sic] current or former clients.").

- Oregon LEO 2011-184 (3/2011) ("It is not uncommon for a lawyer working on a client matter to seek the guidance or assistance of a knowledgeable colleague. Except where the client has specifically instructed otherwise, lawyers may consult with colleagues within their own firms or who are formally associated on a client's matter without violating the duties to safeguard confidential information and avoid conflicts of interest."; "A lawyer may also on occasion seek the advice of colleagues who are not members of the lawyer's firm or associated on a client matter. Whether those discussions arise in the context of a formal mentoring relationship or through informal discussions, such as on a professional LISTSERV or in casual conversation, both the lawyer seeking the advice and the lawyer giving the advice must exercise care to avoid violating their duties to their respective clients."; "Lawyer faces a significant risk of violating Oregon RPC 1.6 when posing hypothetical questions if the facts provided permit persons outside the



lawyer's firm to determine the client's identity. Where the facts are so unique or where other circumstances might reveal the identity of the consulting lawyer's client even without the client being named, the lawyer must first obtain the client's informed consent for the disclosures." (emphasis added); "A lawyer should avoid consulting with another lawyer who is likely to be or to become counsel for an adverse party in the matter. In the absence of an agreement to the contrary, the consulted lawyer does not assume any obligation to the consulting lawyer's client by simply participating in the consultation. The consulting lawyer thus risks divulging sensitive information to a client's current or future adversary, who is not prohibited from subsequently using the information for the benefit of his or her own client. This should be a particular concern to Lawyer C if she posts her inquiry to a LISTSERV, whose members may represent parties on all sides of legal issues. Moreover, no LISTSERV, regardless the restrictions and limitations upon those who participate in it, can insure that messages will be read only by person aligned with the interests of the lawyer posting an inquiry. Lawyer C, in seeking to consult about an unusual fact pattern, must be careful about using a LISTSERV to obtain assistance from other attorneys, at least not without the informed consent of her client about the potential risks of the consultation." (footnote omitted) (emphasis added); "One way for a consulting lawyer to avoid some of the foregoing risks is to obtain an agreement that the consulted lawyer will both maintain the confidentiality of information disclosed and not engage in representation adverse to the consulting lawyer's client."; "[I]f there was no confidentiality agreement between the lawyers, Lawyer B has a duty to inform the landlord client about the consultation and its possible consequences. While doing so does not breach any duties to Lawyer A's client or to Lawyer B's client, the practical result may be allegations of negligence or ethical misconduct by the landlord client and the destruction of the relationship. Had Lawyers A and B entered a confidentiality agreement regarding the consultation, then Lawyer B and his firm could be disqualified under Oregon RPC 1.10, if Lawyer B's obligations under that agreement would materially limit his ability to represent the landlord in the matter."; "Lawyer B can avoid the problems posed by the above example by insisting, prior to any consultation with Lawyer A about a client matter, that Lawyer A provide the identity of the client so that Lawyer B can check for possible conflicts with clients of Lawyer B's firm. In addition to checking for possible conflicts, Lawyer B might seek an agreement from Lawyer A, on behalf of Lawyer A's client, that the consultation will not create any obligations by Lawyer B to Lawyer A's client." (emphasis added)).

- District of Columbia LEO 316 (7/2002) (generally allowing lawyers to communicate with other lawyers about legal information, but warning the lawyers not to create an attorney-client relationship or disclose client confidences; "[B]efore undertaking the kind of communication that would give rise to an attorney-client relationship as determined by applicable substantive law, the attorney must, in our view, ensure that the formation of that

- relationship does not give rise to impermissible conflicts under D.C. Rules 1.7, 1.8, 1.9, and 1.11. The attorney must also safeguard the secrets and confidences of that client under Rule 1.6. This may be true even if an attorney-client relationship has not formed but the lawyer is in a situation in which he or she properly should regard an advice seeker as a prospective client, as might be especially likely to arise in settings in which lawyers are permitted to solicit or follow up with chat room visitors. See D.C. Rule 1.10(a) comments [7]-[12]; see generally Restatement (Third) of the Law Governing Lawyers § 15(1)(a) (2000) (lawyer owes duties to prospective clients to protect confidential information). Accordingly, even if a communication begins as a public communication in a chat room or similar exchange service, the attorney may be required at some point to reserve his or her communications for the eyes of a particular advice seeker only. And the attorney must always take care in cyberspace, as in face-to-face communications, that information he or she receives through on-line communications does not end up creating conflict of interest problems with respect to existing clients. Likewise, the attorney must ensure that such requirements as that of competence under D.C. Rule 1.1, diligence and zeal under Rule 1.3, and adequate communication under Rule 1.4 are met." (footnotes omitted); "It is permissible for lawyers to take part in on-line chat rooms and similar arrangements through which attorneys engage in back-and-forth communications, in 'real time' or nearly real time, with Internet users seeking legal information, provided they comply with all applicable rules of professional conduct. To avoid formation of attorney-client relationships through such chat room conversations, lawyers should avoid giving specific legal advice. If a lawyer subject to the D.C. Rules of Professional Conduct engages in chat room communications of sufficient particularity and specificity to give rise to an attorney-client relationship under the substantive law of a state with jurisdiction to regulate the communication, that lawyer must comply with the full array of D.C. Rules governing attorney-client relationships.").
- New Mexico LEO 2001-1 (2001) (allowing lawyers to communicate with other lawyers on a Listserve, but warning them to be careful; "On the outset, the Committee recognizes that the party placing the question on the Listserve has already divulged information in a less than private setting. As such, the confidentiality of any information in an initial query is unlikely to exist. However, the party's expectation of privacy may be based upon a misunderstanding of the nature of the Listserve. The expectation of privacy may exist, rightly or wrongly, in the mind of the party. Any lawyer proceeding to respond to such a question should be mindful of this and cautious with regard to any response. Specifically, the lawyer should not respond in any fashion which solicits additional information of a confidential character. An appropriate disclaimer of the attorney-client relationship should accompany any response. However, any statement which would suggest to a reasonable person that, despite the disclaimer, a relationship is being or has been established, would negate the disclaimer. In short, the lawyer must be

vigilant and cautious if the intention is to not create an attorney-client relationship."; "The answer to this question depends in part upon the type of questions being presented by persons utilizing the Listserve and the type of answers being provided by the lawyer. General legal questions, such as 'What are the pros and cons of an LLC versus a corporation?' might be answered by general responses (e.g., 'An LLC might provide certain tax benefits unavailable to a corporation'). This type of general statement is unlikely to involve the transfer of confidential information and therefore would not invoke Rule 16-106 NMRA 2001. Nonetheless, lawyers involved in such communications may be wise in insisting that the Listserve indicate that only general information of a legal nature should be sought and that information provided in a question or answer would not be protected by the attorney-client privilege." (emphasis added); "Specific questions (e.g., 'I have failed to inform my partners of my borrowing of funds from the partnership . . . what do I do now?') create more difficult situations. The difficulty is that, by making legal information available on its Listserve, such access to Listserve lawyers may unintentionally encourage the placement of confidential information on the Listserve thereby causing the information to lose its confidential character." (emphasis added)).

- Maine LEO 171 (12/24/99) (analyzing a lawyer's communications with another lawyer about a client matter in a situation not involving the possible retention of the consulted lawyer; "In answer to question (1), the Commission concludes that, if consultation is for the benefit of X [client], the consent of X is not required; provided that, neither B [consulted lawyer] nor any member of B's firm represents a party with an interest adverse to X in the matter on which consultation is to occur or a substantially related matter and one of the following additional conditions is satisfied: (i) B undertakes an attorney-client relationship with X, at least for the limited purpose of the consultation; (ii) If B declines to undertake an attorney-client relationship with X, the facts to be discussed will not include facts disclosed to A in a privileged communication but may include secrets, as defined in Maine Bar Rule 3.6(h), if B agrees to neither disclose nor use any of the secrets."; "Just as authority to disclose client information in consultations may be implied from the Maine Bar Rules and Maine Rules of Evidence, so limitations on these disclosures may be implied. Disclosures may extend no further than is necessary for a fruitful consultation. If it is not necessary to identify client X, if information adequate for the consultation may be conveyed in the form of hypothetical cases, if an abstract discussion of legal principles will suffice, these limitations should be observed. In any case, we conclude that A may not make a disclosure that would risk a waiver of the attorney-client privilege without client consent." (emphasis added) (footnote omitted)).

Upon reflection, it seems that the only ethically acceptable approach to listservs is to keep the questions so abstract as to avoid crossing the line into disclosure of any

protected client information. As a practical matter, lawyers simply cannot obtain client consent to disclosing their protected client information. And only the questioning lawyer can even arguably rely on the implied authorization exception. Given the overbroad ABA Model Rule definition of protected client information, it would seem that bars have to essentially turn a blind eye to the black letter ABA Model Rule definition in permitting lawyers to participate in such listservs.

**Best Answer**

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

B 12/14

## Clearing Conflicts on a Daily Basis

### Hypothetical 14

One of your partners just received a call from a potentially lucrative new client, which wants to hire your firm to pursue a trademark action against Acme (one of your firm's smaller clients). You are rarely involved in the "conflicts clearance" process, and you wonder what to do next.

- (a) Without Acme's consent, may you tell the potential new client that your firm represents Acme?

**(B) NO (PROBABLY)**

- (b) Without Acme's consent, may you tell the potential new client what matters your firm is handling for Acme?

**(B) NO (PROBABLY)**

- (c) Without the potential new client's consent, may you ask Acme for a consent to represent the potential new client adverse to Acme in the trademark matter?

**(B) NO**

### Analysis

(a)-(c) Despite nearly every law firm's need to clear conflicts when beginning representations (and sometimes during the course of representations), the ethics rules do not contain an explicit exception allowing the disclosure of protected client information when doing so.

The 1908 ABA Canons of Professional Ethics did not deal with this issue. Perhaps the absence of any guidance reflected the unlikelihood of most lawyers facing conflicts of interest on a frequent basis.

The 1969 ABA Model Code of Professional Responsibility contained a fairly limited, but very logical, confidentiality duty. Absent client consent or some other

exception, ABA Model Code DR 4-101(B) prohibited lawyers from knowingly disclosing client confidences or secrets. The ABA Model Code also defined those protected types of client information.

'Confidence' refers to information protected by the attorney-client privilege under applicable law, and 'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

ABA Model Code of Professional Responsibility, DR 4-101(A).

In most situations, lawyers could freely make the type of disclosures required to clear conflicts. For instance, lawyers' disclosure of a client's identity or even the general nature of the lawyers' work for the client normally would not harm that client. On the other hand, the ABA Model Code prohibited lawyers from disclosing certain types of client information -- thus preventing lawyers from undertaking some work because they could not clear conflicts. For example, a lawyer representing a wife in secretly preparing to divorce her husband would have to decline the husband's request that the lawyer represent the husband in some unrelated business matter -- without explaining why (absent the wife's consent).

The ABA Code also provided some potentially helpful language buttressing lawyers' general freedom to disclose some protected client information when clearing conflicts on a day-to-day basis. Although the black letter ABA Model Code did not recognize implied client authorization for lawyers to do their job, an Ethical Consideration acknowledged the obvious fact.

The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information when his client consents after full disclosure, when necessary to

perform his professional employment, when permitted by a Disciplinary Rule, or when required by law. Unless the client otherwise directs, a lawyer may disclose the affairs of his client to partners or associates of his firm. It is a matter of common knowledge that the normal operation of a law office exposes confidential professional information to non-lawyer employees of the office, particularly secretaries and those having access to the files; and this obligates a lawyer to exercise care in selecting and training his employees so that the sanctity of all confidences and secrets of his clients may be preserved.

ABA Model Code of Professional Responsibility, EC 4-2 (emphasis added).

In sharp contrast to the ABA Model Code and the Restatement, (discussed below) the ABA Model Rules contain an expansive definition of protected client information.

A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

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

A comment seems to extend the scope of the duty, and therefore the scope of the prohibition, even further.

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. [4] (emphasis added).

Lawyers hoping to make disclosures required to clear conflicts in reliance on the "impliedly authorized" exception face a comment that takes a very limited view of that exception.

Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

ABA Model Rule 1.6 cmt. [5] (emphasis added). Because nearly every lawyer must clear conflicts, one might have expected that the ABA Model Rules would have used that scenario as an example if it meant to approve such disclosure under the "impliedly authorized" general provision.

And of course, disclosing an existing client's identity to a prospective new client to start the conflicts clearance process does not assist in "carrying out the representation" of the existing client. And disclosing the prospective client's identity to an existing client does not meet that standard either -- because the representation has not yet begun.

Thus, lawyers are left to rely on some unstated but universally recognized implied exception.

Interestingly, the ABA Ethics 20/20 Commission dealt with this very issue in connection with law firms' lateral hiring. As a result of the Commission's work, the ABA adopted a specific black letter rule dealing with that situation. ABA Model Rule



1.6(b)(7). However, the new rule and the accompanying comments deal only with lateral hiring, and not the type of day-to-day conflicts clearing process that most law firms continuously undertake.

In some situations, lawyers will immediately know that they cannot undertake a representation because of an inherent conflict. For instance, lawyers would have to immediately decline a husband's request to represent him in planning a divorce if the law firm already represents the wife. In other situations, lawyers cannot possibly clear conflicts -- because making the necessary disclosure would prejudice the prospective new client. For instance, a company seeking to hire a law firm to represent it in initiating a hostile takeover effort would never consent to the law firm's disclosure of that still-secret plan to the target company which the law firm represents on unrelated matters.

However, in normal situations, lawyers routinely disclose protected client information to clear conflicts, although such disclosure seems to clearly violate the black letter ABA Model Rules. For instance, a lawyer asked to represent a new client in a fairly friendly transaction with Baker might find that her law firm already represents Baker in unrelated matters. Disclosing that fact to the potential new client violates the black letter ABA Model Rule confidentiality provision. Yet, lawyers do that every day.

Such lawyers would then ask the new client if it wishes the lawyer to seek consent from Baker to represent the new client in the transactional matter adverse to Baker. The new client might decide to retain another lawyer without any "baggage," but in non-litigation settings usually authorizes the lawyer to make such a disclosure and seek Baker's consent. Ironically, giving the prospective new client this option actually honors the confidentiality of its information more than the information of the lawyer's

existing client Baker -- whose identity the lawyer has already disclosed to the prospective new client.

Alternatively, the lawyer could first turn to Baker, and disclose the request from the prospective new client (without its consent). In doing so, the lawyer would be violating his or her confidentiality duty to the prospective new client.

In the more frequent scenario, the lawyer then discloses to Baker the identity and request of the prospective new client, and requests a consent to represent the new client in the transactional matter adverse to Baker. At this point, both Baker and the prospective new client know about each other's identity and the general nature of the issue -- thanks to the lawyer's violation of his or her confidentiality duty to either Baker or the prospective new client, or both.

Lawyers rarely if ever face disciplinary troubles by undertaking this everyday process. This provides yet another example of how the ABA Model Rules have adopted a completely unworkable confidentiality duty.

The Restatement takes the same basic approach to lawyers' disclosure of protected client information as the 1969 ABA Model Code -- generally permitting disclosure of protected client information if the disclosure would not prejudice the client.

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).

A Restatement provision addressed disclosure of protected client information in a conflicts-clearing scenario. However, it does not provide a very helpful analysis.

Disclosing information about one client or prospective client to another is precluded if information necessary to be conveyed is confidential . . . . The affected clients may consent to disclosure . . . , but it also might be possible for the lawyer to explain the nature of undisclosed information in a manner that nonetheless provides an adequate basis for informed consent. If means of adequate disclosure are unavailable, consent to the conflict may not be obtained.

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

### **Best Answer**

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

B 12/14

## Clearing Conflicts when Hiring Laterals

### Hypothetical 15

Your firm's chairman asked you to meet with a potential lateral hire to discuss the possibility of her joining your firm. You have conducted some independent research about the lateral hire, but a few questions cross your mind as you prepare for your lunch together.

- (a) Without your clients' consent, may you identify some of your law firm's clients during your lunch conversations?

**(A) YES (PROBABLY)**

- (b) Without your clients' consent, may you describe your work for some of your law firm's clients during your lunch conversations?

**(A) YES (PROBABLY)**

- (c) Without her clients' consent, may the potential lateral hire identify some of her clients during your lunch conversation?

**(A) YES (PROBABLY)**

- (d) Without her clients' consent, may the potential lateral hire describe her work for some of her clients during your lunch conversation?

**(A) YES (PROBABLY)**

### Analysis

**(a)-(d)** The process of law firms hiring currently practicing laterals implicates a number of basic conflicts principles -- including the ethics rules' emphasis on mobility, lawyers' fiduciary duties to their employers, and lawyers' ethics and fiduciary duties to their clients -- including the confidentiality duty.

Every states' ethics rules encourage job-hopping, by (among other things) prohibiting restrictions on lawyers' right to practice when they leave their current position.

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

ABA Model Rule 5.6(a). A comment describes the societal benefit of such lawyer mobility.

An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

ABA Model Rule 5.6 cmt. [1].

Despite the ethics rules' undeniable encouragement of lawyer mobility, such moves necessarily require disclosure of protected client information.

Without disclosing protected client information, lawyers could not move from firm to firm. The hiring law firm needs to know information about such a lateral hire -- to avoid bringing on board a "Typhoid Mary" whose presence might disqualify the firm from current representations, or prevent the firm from taking on future representations. On a more mundane level, the law firm needs to know about the lateral hire's experience and rainmaking skills, and what clients the lateral hire might bring with him or her. On the other side of the coin, the lateral hire needs to know about the law firm's client base and practice focus.

The 1908 ABA Canons of Professional Ethics did not deal with this issue. Perhaps the absence of any guidance reflected the unlikelihood of most lawyers facing conflicts of interest on a frequent basis, or the rarity at that time of lawyers moving from firm to firm.

The 1969 ABA Model Code of Professional Responsibility contained a fairly limited, but very logical, confidentiality duty. Absent client consent or some other exception, ABA Model Code DR 4-101(B) prohibited lawyers from knowingly disclosing client confidences or secrets. The ABA Model Code defined those protected types of client information.

"Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

ABA Model Code of Professional Responsibility, DR 4-101(A).

In most situations, lawyers operating under this approach could freely make the types of disclosures required to clear conflicts. For instance, lawyers' disclosure of a client's identity or even the general nature of the lawyers' work for the client normally would not harm that client. On the other hand, the ABA Model Code prohibited lawyers from disclosing certain types of client information -- thus preventing lawyers from undertaking some work because they could not clear conflicts. For example, a lawyer representing a wife in secretly preparing to divorce her husband would not be able to disclose that representation, the client's identity, or her plans if the lawyer interviewed for a new job. The ban presumably would apply regardless of the firm at which the

lawyer interviewed -- because any firm could conceivably be secretly representing the husband in planning to divorce his wife.

It might be possible for such a lawyer to simply list the clients for whom the lawyer has worked or was then working -- unless disclosing an individual client's identity (such as the wife's identity) might somehow tip off the interviewing law firm about the wife's plans. For instance, if the lawyer was a matrimonial lawyer, disclosing the identities of his or her clients would clearly signal the nature of the representation. Absent unusual circumstances such as this, lawyers operating under the ABA Model Code provisions normally could make the type of limited disclosure necessary to interview and then join another law firm. Similarly, law firms normally could interview and then hire laterals without violating the ABA Model Code confidentiality provisions.

In 1983, the ABA adopted its Model Rules of Professional Conduct, with a dramatically wider scope of lawyers' confidentiality duties. Under ABA Model Rule 1.6,

[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

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

Lateral hires and law firms interested in hiring them might be tempted to rely on the "impliedly authorized" exception. However, the accompanying ABA Model Rule Comment takes a very limited view of that exception.

Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a



disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

ABA Model Rule 1.6 cmt. [5] (emphasis added).

And of course, neither the hiring law firm's nor the lateral hire's disclosure of protected client information during the hiring process meets the "in order to carry out the representation" requirement. Instead, the disclosures serve the law firm's and lateral hire's interests, not any client's interests. The law firm and lateral hire might half-heartedly contend that the lateral lawyer must move to a new law firm to "carry out" a client's representation, but that would be a stretch.

Thus, law firms interested in hiring a lateral and laterals interested in moving to another law firm presumably must solely rely on client consent before disclosing to the other any "information relating to the representation of a client."

In principle, hiring law firms presumably could often meet this standard -- their clients normally would not object to disclosing certain information as part of the law firms' interview process.

But obtaining client consent could be a logistical nightmare for law firms. And the consent requirement would frequently preclude the sort of informal discussions with potential hires that may come up at unexpected times. Absent every law firm clients' consent to the disclosure, no law firm lawyer could have the sort of wide-ranging discussion of the law firm's practice and client base. The law firms' lawyers probably would not know in advance where the conversation with a possible lateral hire might go, and would be stymied (absent client consent) from discussing with the lateral hire

current business opportunities that might come from the hiring, or how to avoid conflicts because of some portable representations that the lateral hire discloses for the first time during the conversation.

Furthermore, obtaining a client's informed consent might require specific disclosure to the client about the potential lateral hire. For instance, a client might acquiesce in disclosure of limited information to a second-year associate, but balk at similar disclosure to a senior partner at a law firm which represents its adversary (given the chance that the senior partner might decide not to move from his or her firm).

These logistical roadblocks could effectively prevent law firm lawyers from having any meaningful discussions with lateral hires, absent every law firm clients' standing consent to disclose essentially every non-damaging piece of information about it.

The potential lateral hire has all of these logistical problems, and even a more fundamental dilemma. Unless the lateral has firmly committed to leaving her current firm, she often would not want to reveal to firm clients that she is looking elsewhere -- because the news almost surely would work its way back to the law firm and could cause obvious tension between the firm and the lawyer exploring even at the earliest stages the possibility of leaving the law firm.

The Restatement takes the same basic approach as the ABA Model Code to lawyers' disclosure of protected client information.

[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).

One of the Restatement's comments 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 apparently does not deal with the lateral hire scenario, but contains an unhelpful discussion of disclosures occurring during normal conflicts-clearing.

Disclosing information about one client or prospective client to another is precluded if information necessary to be conveyed is confidential . . . . The affected clients may consent to disclosure . . . , but it also might be possible for the lawyer to explain the nature of undisclosed information in a manner that nonetheless provides an adequate basis for informed consent. If means of adequate disclosure are unavailable, consent to the conflict may not be obtained.

Restatement (Third) of Law Governing Lawyers § 122 cmt. c(i) (2000). Thus, as in so many other areas, the Restatement's common-sense approach parallels that of the ABA Model Code -- avoiding some of the nightmarish dilemmas triggered by the ABA Model Rules' unrealistic and unworkable confidentiality duty.

Astoundingly, until just a few years ago the ABA simply never addressed the seemingly irreconcilable tension between the immovable object of confidentiality and the irresistible force of lateral lawyer movement.

In the absence of any ABA Model Rule dealing with this issue, states had to fend for themselves.

Of course, the states following the ABA Model Code formulation had a much easier time in pointing to their rules' provisions permitting such disclosures.

- Virginia LEO 1712 (7/22/98) (addressing rules governing both the hiring and handling of "temp" lawyers; pointing to ABA LEOs 356 and 400 as providing some guidance, but acknowledging the irreconcilable nature of the ABA Model Rules' confidentiality duty and the necessary conflict-clearing disclosures; "Exactly how the ABA opinions expect 'an appropriate inquiry' and 'screening for conflicts' to occur in all situations is unclear. Even the identity of clients and the subject of their legal matters may be entitled to confidentiality under DR: 4-101 as client secrets. Virginia Legal Ethics Op. 1300 (1989). This Committee has previously opined, however, that it would not be improper to reveal the identity of a former client in order to cure a possible conflict of interest where the former client is the opposing counsel in a pending matter and such information needed to be disclosed to the current client to obtain consent. Virginia Legal Ethics Op. 1147 . . . (1989). The Committee has also opined that once the fact of representation of a client is a matter of public record, then disclosure of the mere fact of such representation would not violate DR: 4-101 unless the client has requested such information to remain confidential or the disclosure of such information would be detrimental or embarrassing to the client. . . . Hence, the Lawyer Temp's disclosure of his/her current or former clients on assignments with other law firms is tested by DR: 4-101(A)'s definition of a 'secret.' It is 'information gained in the professional relationship [which includes the fact of the representation] that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.' If the Lawyer Temp's current or former client does not request him/her or the law firm to hold the fact of representation in confidence, and if the Lawyer Temp reasonably determines that disclosure of the fact of representation would not be embarrassing to the client or would not likely be detrimental to the client's interests, then the Lawyer Temp may include such clients in his/her client log for disclosure to another hiring law firm without client consent. The committee cautions, however, that a client's request that information gained 'be held inviolate' is a function of inquiry of the client. The broad public perception is that information gained by lawyers is confidential. Indeed, lawyers foster that perception. Thus, the client's failure to exact an affirmation of confidentiality, or to instruct the lawyer to hold information inviolate, does not permit the lawyer to assume without inquiry that the client consents to disclosure of the fact of representation to third persons. Client consent permits disclosure of confidences and secrets under DR: 4-101(C)(1), but the consent contemplated is a meaningful one that entails the lawyer's disclosure to the client of the significance and ramifications of revealing confidences and secrets. There are two practical considerations for Lawyer Temps. First, if the Lawyer Temp concludes that client consent to disclosure is not necessary under DR: 4-101(B), the Lawyer Temp should confirm his conclusion with the law firm with which he/she worked or works for those clients. It seems fair to say that the client would have a more intimate relationship with the law firm than with the Lawyer Temp assigned to work on the client's matter. The Lawyer Temp thus can be

guided by the law firm's perception or informed judgment of the client's desires as to disclosure of the fact of the Lawyer Temp's representation. The second practical consideration is that whether the Lawyer Temp is permitted to disclose the fact of representation of a client should be addressed at the outset of the placement with the law firm. The risk of wrongful disclosure could be minimized if each of the Lawyer Temp's hiring law firms made a disclosure to clients for whom he/she would work, explained that the nature of transitory placement with law firms required the Legal Temp to maintain a client log, and requested consent to inclusion of the client's name in the Lawyer Temp's log. If a client objects to disclosure of the fact of the Lawyer Temp's representation, the Lawyer Temp acts at his/her peril under DR: 4-101 in disclosing the fact of the client's representation. Likewise, the hiring law firm acts at its peril under DR 5-105 if it fails to assess the possibility of conflicts of interests between clients. In those situations where an exchange of information between the Lawyer Temp and the hiring firm is not permitted with respect to identification of current or former clients of the Lawyer Temp, the Lawyer Temp must be cognizant of conflicts of interest and decline employment when required to do so under the applicable rules. In effect, the personal conflicts of a Lawyer Temp are to be analyzed and resolved in the same manner as the personal conflicts of any lawyer switching firms. LE Op. 1419, LE Op. 1428, LE Op. 1430 and LE Op. 1629. Both the Lawyer Temp and the lawyers hiring the Lawyer Temp would be barred from representing any party adverse to any client in whose legal matter the Lawyer Temp has 'actively participated,' or from whom the Lawyer Temp gained confidences and secrets, unless the clients consent after full disclosure. DR: 5-105; Legal Ethics Opinion . . . 1428." (emphases added)).

- New York LEO 720 (8/27/99) ("When a lawyer moves from Firm A to Firm B, Firm B must seek the names of clients represented by the Moving Lawyer and, depending upon the size of Firm A, the names of all clients of Firm A for a reasonable period of time, and the Moving Lawyer may provide this information, except to the extent that (a) this information is protected as a confidence or secret of the clients of Firm A or (b) the Moving Lawyer has a contractual or fiduciary duty to Firm A that forbids disclosing this information. If the information is protected from disclosure, then the Moving Lawyer may disclose only general information, not protected as a client confidence or secret, about the nature of his or her representations at Firm A." (emphasis added); "A law firm's database with information about its own clients will usually include information as to the full name of each client and a brief description of the matter for which the firm was engaged. It may not, however, be possible for a Moving Lawyer to give such information, since the name of the client of Firm A and the fact and nature of the representation may constitute a confidence or secret of the client. DR 4-101 generally requires a lawyer to preserve the confidentiality of both 'confidences' (i.e., attorney-client privileged information) and 'secrets' (i.e., other information 'gained in the professional relationship that the client has requested be held inviolate or the

disclosure of which would be embarrassing or would be likely to be detrimental to the client'). Although the fact that the client consulted a lawyer and the general nature of the consultation will not usually be privileged, see, e.g., Colton v. United States, 306 F.2d 633 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963), the client's name, the fact that the client consulted a lawyer and the general nature of the consultation may nevertheless constitute 'secrets' of the client which the lawyer may not disclose. Firm B should admonish a prospective hire not to disclose client confidences or secrets in responding to its conflicts questionnaire. Where information identifying a client or the client's matter constitutes a confidence or secret that the Moving Lawyer may not ethically disclose, Firm B may be limited to obtaining more general information about the nature of the Moving Lawyer's prior work. General information will enable Firm B to identify some possible conflicts of interest. See, e.g., Evans [Evans, Ethical Issues and Financial Data, 1004 PLI/Corp 229 (1997)], supra, at 239. Additionally, the Moving Lawyer may make personal efforts to ascertain whether there are or may be conflicts of interest in light of any information that may not be disclosed. The Moving Lawyer may also seek to obtain the consent of the former client to the disclosure of additional information, where it is needed. Firm A may believe that information about the names of Firm A's clients is proprietary to Firm A. If the information is not protected as a confidence or secret of Firm A's clients, then whether Firm A may prevent the disclosure by Moving Lawyer of such information which is known to Moving Lawyer is a matter of contract and fiduciary law governing the relationship between Firm A and Moving Lawyer, and not a matter of legal ethics on which this Committee may opine." (emphasis added)).

- District of Columbia LEO 312 (4/2002) (explaining that lawyers withdrawing from a law firm may disclose to other law firms from which they might seek a job information about their clients that is not a client confidence or secret; "Typically, when a lawyer contemplates joining a new firm, the lawyer provides information to that firm indicating the clients, adversaries, and an indication of the subject matter on which the lawyer has worked at the lawyer's existing firm so that the potential new firm may check to see whether the lawyer's joining it would create a conflict of interest with any of that firm's clients."; explaining that a representation that is "generally known" does not fall into the "secret" category; explaining that in most cases this type of disclosure will be permissible, and will allow the lawyer to work with a potential new firm in identifying conflicts; "Without the former client's consent, therefore, a lawyer may, in checking conflicts at a new firm, reveal information about representations that is not privileged and is not a secret because it has not been requested by that client to be held inviolate and the revelation of which would not be harmful or embarrassing to that client or has become generally known. In the great majority of cases, we believe, this leaves lawyers free to reveal sufficient information to carry out a reliable conflict check. Information about many representations would not harm or embarrass

the client where the basic facts of the representation are unexceptionable or already known to opponents or others who are not the client, including, for example, regulatory agencies or other government bodies." (emphasis added); also explaining that in some situations the withdrawing lawyer will not be able to disclose information allowing the new law firm to check conflicts; "There are, of course, many instances in which the facts surrounding a representation (such as that client X is contemplating a takeover of another business or has consulted a divorce lawyer or a criminal defense lawyer) may be extremely sensitive and so fraught with the possibility of injury or embarrassment to that client that absent a waiver that information is not subject to disclosure even for the purpose of checking conflicts. . . . There is no specific exemption to the confidentiality rules in Rule 1.6 or elsewhere that permits a lawyer to reveal confidential information for the purpose of checking or seeking waiver of a conflict."; explaining that lawyers and hiring law firms in that situation might be able to simply exchange lists of names (without explaining whether the names are of clients or adversaries) or make other limited disclosures in an effort to identify and clear conflicts).

States following the new ABA Model Rules confidentiality approach had a much more difficult time dealing with this issue.

- Pennsylvania and Philadelphia LEO 2007-300 (6/2007) ("This Opinion does not attempt to resolve definitively the difficult question of what information, if any, relating to a client might be disclosed by a lawyer in discussions with another firm regarding a potential new association, prior to the lawyer's joining the new firm, in the absence of client consent. On a practical level, we perceive a need, for conflicts checking purposes, to disclose pre-departure at least some limited information regarding the identity of the lawyer's clients, both those who might, and those might not, join the lawyer at the new firm, as well as the nature of the work done for those clients, and the parties opposite those clients in current matters that may become matters of the new firm. We also recognize that, as a practical matter, this type of exchange of client information and conflicts checking is routinely done in connection with lawyer's changing law firms. In Formal Opinion No. 99-414, the ABA Committee recognized the need for limited disclosure of otherwise confidential client information in this context and seemed to assume that such disclosure is permissible under the Rules. Formal Opinion No. 99-414 at 6 n. 12 ('The departing lawyer must ensure that her new firm would have no disqualifying conflict of interest in representing the client in a matter under Rule 1.7, or other Rules, and has the competence to undertake the representation. In order to do so, she may need to disclose to the new firm certain limited information relating to this representation.'). The ABA Committee, however, cited no authority in the Rules or otherwise to support this assumption. We note the apparent absence of any express authorization in the Rules of Professional Conduct or elsewhere for a lawyer's making

these types of pre-departure disclosures to another law firm without client consent. See Tremblay, Migrating Lawyers and the Ethics of Conflicts Checking, 14 Geo. J. Legal Ethics 489 (Spring 2006). Of course, where client consent is obtained, there can be no ethical issue regarding the propriety of disclosures under Rule 1.6. Thus, obtaining client consent would insulate the lawyer from allegations of ethical improprieties in making such disclosures. Moreover, where such client consent is sought prior to departure, the lawyer may be obligated to disclose the fact of the discussions and the communication with the client regarding the same, to the old firm. . . . Further, when a lawyer involved in discussions with another firm regarding a new association discloses client information without client consent, such disclosures should go no further than necessary to insure the new firm's ability to comply with its own ethical obligations, e.g., to avoid conflicts and ensure the ability to competently and diligently represent a prospective client." (emphases added)).

- Kansas LEO 07-01 (3/1/07) (analyzing the following issue: "Requesting attorney (Lawyer A) has recently left a law firm and asks the following question: May law firm formerly employing Lawyer A (Firm 1) refuse to disclose a list of the parties to all suits filed by Lawyer A during A's tenure at Law Firm 1 for the purpose of checking on conflict of interest with prospective law firm (Firm 2)."; "The rule of client-lawyer confidentiality applies in all situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. First, while Law Firm 1 may rightfully refuse to reveal confidential matters under Rule 1.6, it is difficult to see how the mere identity of Law Firm 1's clients who are potential adverse parties to those of Law Firm 2 would be entitled to specific protection, particularly where public records are involved, i.e., pleadings filed on their behalf. On the other hand, there may be instances where a law firm's practice is so sensitive and so specialized that the release of a clients [sic] name may be a breach of confidentiality. Firms that predominantly represent impaired lawyers, or take only insider trading cases spring to mind; however, the Committee is unaware of any such firms, at least in Kansas. Second, clients of Firm 1 were also clients of Lawyer A during the term of employment, so disclosure to Lawyer A is not a breach of confidentiality but merely a refreshing of confidential knowledge previously held. Third, conflicts checking are imperative in today's legal climate of law firm mergers, breakups and lateral hiring. To refuse disclosure of a client list exposes Lawyer A not only subjects Lawyer A and Firm 2 to disciplinary complaints for conflict of interest, but also legal malpractice charges. Disqualification of Firm 2 from a case after thousands of billable hours for a conflict of interest due to its hiring of Lawyer A is almost a prima facie case, not to mention the possible forfeiture of fees. Furthermore, if it developed that



Lawyer A had exclusive knowledge of cases assigned while at . . . Firm 1, it is likely that Firm 1 could also be disqualified from those cases. And Firm 1 also has a duty to its clients to avoid conflicts of interest regarding their cases." (footnotes omitted) (emphasis added); "Therefore the Committee concludes that a law firm may not refuse to disclose a list of clients previously assigned to a departing attorney for the purpose of conflict checking by the attorney's new firm. The Kansas Comments to KRPC 1.6 seem to support this conclusion when it states that an exception to nondisclosure is '. . . required by the Model Rules of Professional Conduct. . . .' The answer raises a second question: Given the concerns by Firm 1 of confidentiality and possible loss of clients to Attorney A and Firm 2, how is such disclosure of a client list best accomplished? Use of an intermediary appears to be the most obvious method. In discussing a similar fact scenario, the Boston Bar Association Ethics Committee proposed that Firm 2 institute procedures to limit access to the information, such as a retired partner who is not otherwise privy to client information in the firm, or a paralegal employed in a separate conflict-checking unit. Professor Tremblay, while favoring this approach, which he labels 'middle counsel', also suggests that Firm 2 share its entire client list with Attorney A, a solution perhaps more plausible if it involves a younger associate, with fewer cases and better memory than a middle-aged partner may have. A third solution also seems plausible. Since Firm 2 appears to have a greater risk for conflicts than Firm 1, perhaps sharing its entire client list with a 'middle counsel' of Firm 1 would solve the problem." (footnote omitted) (emphases added)).

Some of those states adopted explicit provisions dealing with this scenario.

A lawyer moving (or contemplating a move) from one firm to another is impliedly authorized to disclose certain limited non-privileged information protected by Rule 1.6 in order to conduct a conflicts check to determine whether the lawyer or the new firm is or would be disqualified. Thus, for conflicts checking purposes, a lawyer usually may disclose, without express client consent, the identity of the client and the basic nature of the representation to insure compliance with Rules such as Rules 1.7, 1.8, 1.9, 1.10, 1.11 and 1.12. Under unusual circumstances, even this basic disclosure may materially prejudice the interests of the client or former client. In those circumstances, disclosure is prohibited without client consent. In all cases, the disclosures must be limited to the information essential to conduct the conflicts check, and the confidentiality of this information must be agreed to in advance by all lawyers who receive the information.

Colorado Rule 1.6 cmt. [5A] (emphasis added).

In 1996, the ABA issued an ethics opinion dealing with a subset of this issue -- lawyers interviewing for a job with a law firm representing an adversary.

In ABA LEO 400 (1/24/96), the ABA dealt almost exclusively with the conflicts of interest ramifications of discussions between a law firm and a possible lateral hire who was currently working on a matter adverse to the potential hiring law firm's client. The legal ethics opinion's conclusion focused on the conflicts issues.

In sum, we conclude that, for the protection of clients, Rule 1.7(b) requires a lawyer who is actively representing a client in a matter, and who is considering an association with a firm or party to whom he is opposed in the matter, to consult with his client and obtain the client's consent to his continuing to work on the matter while the lawyer explores such association. Generally, the required consultation should occur before the lawyer engages in a substantive discussion of his experience, clients, or business potential with the opposing firm or party. If the client consents, the lawyer may continue the representation. If the client does not consent, the lawyer must either discontinue the job search that created the conflict, or withdraw from participation in the representation and transfer his work to others in the firm, if withdrawal can be accomplished properly under Rule 1.16. Where the lawyer has had a limited role in a matter or has had limited client contact, it will ordinarily be more appropriate for him to inform his supervisor. The supervisor can then determine whether to relieve the lawyer of responsibility, or to seek the client's consent for the lawyer to continue to work on the matter. While the negotiating lawyer's conflict of interest is not imputed to other lawyers in his firm, those other lawyers must each evaluate whether they may themselves have a conflict by virtue of their own interest in their colleague's negotiations. The lawyers in a law firm seeking to employ a lawyer who is involved in a matter adverse to the firm have similar obligations to their client.

This Committee regularly addresses, as in this Opinion, important issues relating to conflicts of interest. We recognize that among all of the issues this Committee confronts, conflicts of interest decisions generate much attention from the bar because of the possibilities they

present for the disqualification of counsel. While there are, undoubtedly, many situations in which disqualification on grounds of conflict is warranted if not compelled, the opportunities for mischief presented by disqualification motions are numerous as well. Thus, we conclude this Opinion with a cautionary note. We do not intend, by this Opinion, to provide additional opportunities for merely tactical or dilatory motions to disqualify where the role of the negotiating lawyer has been such that no real harm can arise by permitting the lawyer to secure a new position of employment. As stated in the Rules themselves, 'the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons.' Scope para. [18]. It is our hope that members of the profession will approach motions to disqualify in this context, as in any other context, responsibly and with prudence.

ABA LEO 400 (emphasis added).

ABA LEO 400 mentioned the confidentiality duty almost as an afterthought -- identifying it as the third of four duties requiring some attention.

A third duty is the preservation of confidentiality under Rule 1.6. Job-seeking lawyers must guard against the risk that in the course of the interviews to determine the compatibility of the lawyer with the opposing firm, or the discussions between the lawyer and the firm about the lawyer's clients and business potential, the lawyer might inadvertently reveal 'information relating to the representation' in violation of Rule 1.6.

Id. (emphasis added).

This paragraph reflects a remarkably naïve approach or (more likely) an implicit acknowledgement that lateral hiring simply could not occur if lateral hire candidates and the hiring law firms' lawyers complied with the black letter of ABA Model Rule 1.6. The lawyers involved in this process do not risk "inadvertently" disclosing protected client information. The discussion simply cannot take place without disclosing such

information. Lawyers on either side of the employment discussion must "reveal 'information relating to the representation' in violation of Rule 1.6."

Under the ABA Model Rule scope of the confidentiality duty, the potential lateral hire could not even disclose to the potential hiring law firm that the lawyer represents the client on the other side of a matter the hiring law firm is handling -- even if the lateral hire and the interviewing law firm lawyer argued against each other that morning in court. After all, ABA Model Rule 1.6 "applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." ABA Model Rule 1.6 cmt. [3]. Even information in the public record falls within the ABA Model Rules' confidentiality duty.

ABA LEO 400's glancing mention of the confidentiality rule almost surely represents the legal ethics opinion authors' inability to reconcile the ABA Model Rules' encouragement of mobility and the ludicrously overbroad confidentiality duty.

Less than four years later, the ABA returned to the general issue, and issued another opinion that implicitly acknowledged the inability of lawyers following the ABA Model Rules to know what they can and cannot disclose during a lateral interview or hiring process.

In ABA LEO 414 (9/8/99),<sup>1</sup> the ABA dealt mostly with lawyers' need to balance their fiduciary duties to their law firms and their primary duties to clients. Amazingly, the

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<sup>1</sup> ABA LEO 415 (9/8/99) (explaining that a lawyer planning to leave a firm has an ethical obligation to inform the pertinent clients in a timely manner, but must comply with applicable restrictions on solicitation; noting that any notice before the lawyer leaves the firm should be "limited to clients whose active matters the lawyer has direct professional responsibility at the time of the notice"; should "not urge the client to sever its relationship with the firm, but may indicate the lawyer's willingness and ability to continue her responsibility for the matters upon which she currently is working"; and should emphasize that the client may choose to stay with the firm or hire the withdrawing lawyer; explaining that despite implications to the contrary in earlier informal opinions [1457 and 1466], "we reject any implication . . . that

legal ethics opinion did not address the process that would necessarily have occurred before lawyers changing firms had to deal with balancing these duties. For instance, the opinion does not address lawyers' ability to tell their potential new colleagues at another firm what clients the lateral lawyer represents. And, of course, many if not most lawyers would engage in at least preliminary discussions with a number of potential new hiring law firms. The legal ethics opinion's silence is understandable, because there is nothing the ABA could have said about it. Having adopted an overly broad definition of protected client information in 1983, the ABA would not be able to point to any rules permitting disclosure of protected client information by the lateral lawyer or any law firm who was interviewing such a lawyer.

The ABA finally tiptoed directly into this issue in a 2009 ethics opinion. Interestingly, much of the opinion addressed the lack of rules justification for what every lawyer knows happens every day.

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the notices to current clients and discussions as a matter of ethics must await departure from the firm;" warning that the departing lawyer "must ensure that her new law firm would have no disqualifying conflicts of interest" preventing the new firm from representing the client; noting that although it would be best for the firm and the departing lawyer to provide joint notice to the clients, the firm's failure to cooperate entitles the departing lawyer to send a separate notice; acknowledging that legal rules govern a departing lawyer's actions before the firm receives notice of the departure; assuring that "the departing lawyer may avoid charges of engaging in unfair competition and appropriation of trade secrets if she does not use any client lists or other proprietary information in advising clients of her new association, but uses instead only publicly available information and what she personally knows about the clients' matters"; citing the case of Graubard Mollen v. Moskovitz, 653 N.E.2d 1179 (N.Y. 1995) and providing helpful guidance on a departing lawyer's fiduciary duties, including the fact that "informing firm clients with whom the departing lawyer has a prior professional relationship about his impending withdrawal and reminding them of their right to retain counsel of their choice is permissible"; also assuring that a withdrawing lawyer generally may retain documents the lawyer prepared or which are in the public domain, although "principles of property law and trade secret law" govern these issues; noting that a lawyer "does not violate any Model Rule in notifying the current clients of her impending departure by in-person or live telephone contact before advising the firm of her intentions to resign, so long as the lawyer also advises the client of the client's right to choose counsel and does not disparage her law firm or engage in conduct that involves dishonesty, fraud, deceit, or misrepresentation. After her departure, she also may send written notice of her new affiliation to any firm clients regardless of whether she has a family or prior professional relationship with them.").

In ABA LEO 455 (10/8/09),<sup>2</sup> the ABA acknowledged the obvious need for lateral hires and for hiring law firms to analyze conflicts issues -- and then acknowledged the ABA Model Rules inexplicable failure to deal with that scenario.

Despite the need for both a lawyer considering a move and the prospective new firm to detect and resolve conflicts of interest, some commentators have expressed concern that the Model Rules do not specifically permit disclosure of the information required for conflicts analysis. This concern arises from the definition of information covered by Rule 1.6(a), which is "all information relating to the representation, whatever its source." Thus, the persons and issues involved in a matter generally are protected by Rule 1.6 and ordinarily may not be disclosed unless an exception to the Rule applies or the affected client gives informed consent.

ABA LEO 455 (10/8/09) (footnotes omitted) (emphasis added).

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<sup>2</sup> ABA LEO 455 (10/8/09) (explaining that lawyers moving from one firm to another and law firms that hire them cannot rely on any specific rule allowing the exchange of information about clients necessary for a conflicts analysis, but may exchange such otherwise protected information -- although the disclosure "should be no greater than reasonably necessary to accomplish the purpose of detection and resolution of conflicts of interest"; noting that the exception in Rule 1.6 for disclosure "impliedly authorized" to represent a client does not apply, because the disclosures by the moving lawyer and the hiring law firm do not serve the client's interests; also pointing out that the exception in Rule 1.6 for disclosures necessary to "comply with other law" does not apply, because the exception refers to law, not ethics rules; acknowledging that although client consent would resolve any issue, obtaining the consent normally is impractical; emphasizing that the ethics rules are "rules of reason," and the recent rule change allowing the screening of lateral hires to avoid imputed disqualification highlights the permissibility of basic conflicts data disclosure that necessarily precedes such a lateral hire; explaining that in some situations, neither the moving lawyer nor the firm can disclose privileged information when the disclosure would "prejudice a client or former client" -- as with a planned hostile takeover, contemplated divorce, etc.; also noting that in other situations, it will quickly become apparent that conflicts will prevent the firm from hiring the moving lawyer -- such as situations in which there are "numerous existing matters" involving conflicts, or the law firm and the potential lateral hire "regularly represent[s] commonly antagonistic groups"; explaining that "conflicts information normally should not be disclosed when conversations concerning potential employment are initiated, but only after substantive discussions have taken place"; further explaining that if checking for conflicts will require a "fact-intensive analysis of information beyond just the persons and issues involved in a representation" (as when analyzing the "substantial relationship" between a current and former representation), the law firm might be able to analyze conflicts by obtaining information other than from the moving lawyer -- if not, the moving lawyer must seek the client's consent to disclose such detailed information, or rely on the new Rule 1.10 provision permitting screening of lateral hires to avoid imputed disqualification; concluding that the law firm receiving any confidential information as part of the conflicts analysis should limit use of the information "to the detection and resolution of conflicts of interest, and dissemination of conflicts information should be restricted to those persons assigned to or involved in the conflicts analysis with respect to a particular lawyer.").

ABA LEO 455 then candidly explained that none of the black letter exceptions to ABA Model Rule 1.6 applied when lawyers and law firms are really serving their own interests rather than their clients' interests in discussing a possible employment arrangement.

Disclosure of conflicts information does not fit neatly into the stated exceptions to Rule 1.6. The exception in Rule 1.6(a) for disclosures "impliedly authorized in order to carry out the representation" typically is limited to disclosures that serve the interests of the client.

Id.

Similarly, ABA LEO 455 acknowledged the inapplicability of one of the other ABA Model Rule 1.6 exceptions.

A second stated exception to Rule 1.6(a) that might arguably allow disclosure of conflicts information incident to lawyers moving between firms is Rule 1.6(b)(6), which permits disclosure of information "the lawyer reasonably believes necessary . . . to comply with other law." However, Comment [12] to Rule 1.6 seems to limit "other law" to law other than the Rules.

Id.

ABA LEO 455 also recognized the practical difficulties of seeking client consent to the inevitable disclosure of protected client information during the interviewing process.

Obtaining clients' informed consent, as defined in Rule 1.0(e), before a lawyer explores a potential move could resolve the tension between the broad scope of Rule 1.6(a) and the need to disclose conflicts information, but there are serious practical difficulties in doing so. Many contemplated moves are never consummated. In the common situation where a lawyer interviews more than one prospective new firm, multiple consents would be required. Consent of all former clients, as well as all current clients, also would be necessary. Further, seeking prior informed consent likely

would involve giving notice to the lawyer's current firm, with unpredictable and possibly adverse consequences.

Id. (footnotes omitted) (emphasis added).

ABA LEO 455 eventually relied on a general, ambiguous, and essentially meaningless phrase in the Scope section of the ABA Model Rules.

In most situations involving lawyers moving between firms, however, lawyers should be permitted to disclose the persons and issues involved in a matter, the basic information needed for conflicts analysis. The Model Rules are "rules of reason" to be "interpreted with reference to the purposes of legal representation and of the law itself." Interpreting Rule 1.6(a) to prohibit any disclosure of the information needed to detect and resolve conflicts of interest when lawyers move between firms would render impossible compliance with Rules 1.7, 1.9, and 1.10, and prejudice clients by failing to avoid conflicts of interest. Such an interpretation would preclude lawyers moving between firms from conforming with the conflicts rules.

Id. (footnote omitted) (emphasis added).

The ethics opinion then noted the obvious -- in a sentence that implicitly condemned the ABA Model Rules' overbroad definition of protected client information.

Opinions from jurisdictions that did not adopt the Model Rules definition of protected information, but rather retained the 1969 Model Code of Professional Responsibility formulation of confidences and secrets, reached similar results.

Id. The legal ethics opinion could have, and perhaps should have, pointed to those other states' rules, not just their opinions. Of course, the other states' opinions take the common sense approach that ABA LEO 455 ultimately adopted -- because those states rejected the 1983 ABA Model Rules undeniably overbroad definition of protected client information. So it is not just those states' opinions that took the only practical approach, it is their ethics rules.



Not surprisingly, ABA LEO 455 warned that the inevitable disclosure of protected client information during the interviewing and hiring process should not exceed that which is reasonably necessary.

Permissive disclosure of conflicts information otherwise protected by Rule 1.6(a) incident to the process of lawyers moving between firms is limited in scope. Consistent with Comment [14] to Rule 1.6, any disclosure of conflicts information when lawyers move between firms should be no greater than reasonably necessary to accomplish the purpose of detection and resolution of conflicts of interest.

Id. The legal ethics opinion later provided some examples.

Another important limitation is that disclosing conflicts information must not compromise the attorney-client privilege or otherwise prejudice a client or former client. There are matters, albeit rare, in which the identity of the client or the nature of the representation or both are protected by the attorney-client privilege. There are also situations (e.g., clients planning a hostile takeover, contemplating a divorce, or appearing before a grand jury) in which disclosure of non-privileged information to the prospective new firm of the persons and issues involved would likely prejudice the client or former client.

Id. (footnotes omitted).

Finally, ABA LEO 455 took the only logical and reasonable approach to the timing of disclosures during this interviewing and hiring process.

Timing is also important. Conflicts information should not be disclosed until reasonably necessary, but the process by which firms decide to offer lateral lawyers positions varies widely among firms and usually differs within firms according to the age and experience level of the lawyer under consideration. Many firms might not ask conflicts information of younger lawyers until making an offer of employment, which will be contingent on resolution of conflicts. For partner-level lawyers, the process is more complicated. As a consequence, conflicts issues may need to be detected and resolved at a relatively early stage. In any event, negotiations between the moving lawyer and the

prospective new firm should have moved beyond the initial phase and progressed to the stage where a conflicts analysis is reasonably necessary, which typically will not occur until the moving lawyer and the prospective new firm have engaged in substantive discussions regarding a possible new association.

Id. (footnote omitted) (emphasis added).

All in all, ABA LEO 455 could not avoid the implications of the ABA Model Rules' broad confidentiality duty -- and thus simply ignored it. The reference to the ABA Model Rules as "rules of reason" seems particularly ironic. In 1983, the ABA explicitly abandoned the much more common-sense driven ABA Model Code confidentiality formulation, which generally would have permitted such hiring discussions. In fact, ABA LEO 455 essentially represented a justifiable abandonment of the black letter ABA Model Rules confidentiality duty, and an acknowledgment that hundreds of thousands of lawyers may have violated the ABA Model Rules' technical provisions.

The ABA addressed this issue again several years later.

In 2011, the ABA Ethics 20/20 Commission issued a Report explaining its approach to what was really an age-old dilemma.

The ABA Commission on Ethics 20/20 has examined various ways in which globalization and technology are changing the legal profession, including increased lawyer mobility. The Commission found that this increased mobility has produced a number of ethics-related issues and that one question in particular commonly arises: Before a lawyer becomes associated with a firm, to what extent can the lawyer disclose to the firm confidential information about current and former clients to permit the lawyer and the firm to identify possible conflicts of interest arising from the lawyer's potential association? The Commission concluded that the Model Rules of Professional Conduct are not clear in this regard and that lawyers and firms would benefit from more guidance. . . . Formal Opinion 09-455 from the ABA Standing Committee on Ethics and Professional

Responsibility recently recognized that, before becoming associated with a firm, a lawyer must have some discretion to disclose confidential information about current and former clients to permit the lawyer and the firm to determine if a conflict would arise from the lawyer's association. Despite the reasonableness of this conclusion, the Formal Opinion concluded that '[d]isclosure of conflicts information does not fit neatly into the stated exceptions to Rule 1.6.' The Commission reached the same conclusion and determined that, given the importance of the issue and the increasing frequency with which it arises, the Commission should propose an amendment to Model Rule 1.6 that provides a firmer doctrinal basis for these disclosures and more guidance on the limitations on such disclosures. The Commission considered a number of ways to address this issue, but concluded that the most effective way to do so is to propose the creation of Model Rule 1.6(b)(7). In particular, the proposed amendment would permit a lawyer to disclose confidential information to the extent that it is reasonably necessary to determine if a conflict of interest would arise from the lawyer's association with a firm. Any disclosure, however, is subject to several important exceptions. First, the lawyer must determine that the disclosure is reasonably necessary to permit the lawyer and the firm to determine if a conflict of interest would arise from the lawyer's association with the firm. As the proposed new Comment [14] explains, this condition means that a lawyer can reveal only limited information, typically a client's identity and the general nature of the work that the lawyer performed for that client. Even this limited disclosure, however, is not permissible if it will adversely affect the client. For example, the Comment explains that, if a lawyer knows that a particular corporate client is seeking advice on a corporate takeover that has not yet been publicly announced or if an individual consults a lawyer about the possibility of a divorce before the spouse is aware of such an intention, it may be impossible for that lawyer to disclose sufficient information to permit another firm to ensure compliance with the conflict of interest rules. Under those circumstances, the lawyer may have to postpone any association with the firm until the information, if disclosed to that firm, will no longer prejudice the client. Second, the discussions between the lawyer and the firm must be such that there is a reasonable possibility that the lawyer may become associated with the firm. Typically, this moment occurs before a formal offer of employment is made or is imminent. For example, the

disclosure can occur once the lawyer and the firm begin to engage in substantive discussions regarding the lawyer's possible association with the firm. The last sentence of the proposed new paragraph is intended to remind firms that they must not use or reveal the information that they receive from a potential lateral lawyer, except to determine whether a conflict would arise from that lawyer's possible association with the firm.

ABA Commission on Ethics 20/20 Report, Sept. 7, 2011 (emphasis added).

Along with its Report, the ABA Ethics 20/20 Commission issued its proposed addition to ABA Model Rule 1.6. The Commission's proposed rule would allow lawyers to

reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to determine if a conflict of interest would arise from the lawyer's association with a firm, but only when there is a reasonable possibility of such an association and the revealed information would not adversely affect the lawyer's client. Information revealed under this paragraph may not be used or revealed by the lawyers receiving the information for any purpose except the identification and resolution of potential conflicts of interest.

Proposed ABA Model Rule 1.6(b)(7) (9/7/11).

The ABA Ethics 20/20 Commission also proposed an explanatory comment.

Paragraph (b)(7) recognizes that, before a lawyer becomes associated with a firm, it may be necessary for the lawyer to reveal limited information about the lawyer's current and former clients to permit the lawyer and the firm to identify conflicts of interest that would arise from the lawyer's association with the firm. A lawyer is permitted to reveal this limited information, typically no more than the client's identity and the general nature of the work that the lawyer performed for that client, but only to the extent reasonably necessary to permit the lawyer and the firm to determine if a conflict of interest would arise from the lawyer's association with the firm. In no event may disclosure prejudice a client or former client. In most cases, prejudice will not occur from the mere disclosure of a client's or former client's identity or a brief

summary of the type of work that the lawyer performed for that client or former client. In certain cases, however, such a disclosure could adversely affect the client's interests (e.g., the lawyer reveals that a particular corporate client is seeking advice on a corporate takeover that has not yet been publicly announced or that a person has consulted with a lawyer about the possibility of seeking a divorce before the person's intentions are known to the person's spouse). If disclosure could prejudice a client or former client, the lawyer must obtain the client's consent before disclosing any information or delay the association with the firm until the disclosure of the information would no longer adversely affect the client's interests. Moreover, information revealed under paragraph (b)(7) may not be used or revealed by the lawyers receiving the information for any purpose except the identification and resolution of potential conflicts of interest. This prohibition does not apply to other lawyers in the same firm who have obtained the information from an independent source.

Proposed ABA Model Rule 1.6 cmt. [14] (9/7/11).

After some public input, the ABA Ethics 20/20 Commission issued an amended proposed addition to ABA Model Rule 1.6, which the ABA House of Delegates adopted on September 6, 2012.

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

ABA Model Rule 1.6(b)(7) (emphasis added).

Several as-adopted comments provide guidance.

Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17,

Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

Any information disclosed pursuant to paragraph (b)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(7) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(7). Paragraph (b)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

ABA Model Rule 1.6 cmt. [13], [14] (emphases added).

This new rule presumably has had little impact, because lawyers have always been doing this. In fact, this provision represents a vindication of the ABA Model Code confidentiality formulation, and a repudiation of the 1983 overbroad ABA Model Rules

formulation. Just like the ABA Model Code, this provision permits disclosure of non-privileged client information, as long as it would not harm the client. That is precisely what the ABA Model Code permitted.

Unfortunately, the ABA did not extend this approach to lawyers' day-to-day conflicts clearing process. Although perhaps not as starkly as lateral hire conversations, that process also normally requires disclosure of client information protected by the ABA Model Rules. Lawyers presumably can take some comfort in the ABA's recognition of reality in connection with the lateral hiring process. This is not to say that lawyers practicing in ABA Model Rules states have worried about this -- since 1983 they have been violating the ABA Model Rules in their day-to-day conflicts clearing, and undoubtedly will continue to do so even in the absence of a black letter rule permitting the necessary disclosures in that process.

### **Best Answer**

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

b 10/14

## Clearing Conflicts in Hiring Adverse Lawyers

### Hypothetical 16

As a mid-level associate working on a large litigation matter, you must frequently deal with the law firm representing your client's adversary. You have really grown to admire that other firm, and its associates seem much more satisfied with their salaries and responsibility than associates at your firm. You have actually considered seeking a job at that other firm, and you wonder about the confidentiality and conflicts ramifications of taking such a step.

- (a) Without advising your law firm and its client whom you are representing in the current litigation, may you mention to one of that other law firm's partners that you might be interested in applying for a job there at some point?

#### (A) YES (PROBABLY)

- (b) Without advising your law firm and its client whom you are representing in the current litigation, may you meet with one of the other firm's partners to discuss possible salary and job assignments?

#### (B) NO (PROBABLY)

- (c) If one of the other firm's partners senses your interest without your having said anything about it, must you advise your firm and its client if the partner offers you a job?

#### MAYBE

### Analysis

Clearing conflicts when hiring lawyers from other firms primarily involves confidentiality issues. However, conflicts issues can arise as well.

(a)-(b) Unless and until the lateral hire actually moves to another firm, the potential conflict involves the amorphous principle focusing on any material effect on lawyers' judgment based on some other interest.



The ethics rules describe two types of conflicts of interest. Lawyers are most familiar with the first type -- in which "the representation of one client will be directly adverse to another client." ABA Model Rule 1.7(a)(1). Some folks describe this as a "light switch" conflict, because a representation either meets this standard or it does not. This is not to say that it can be easy to analyze such conflicts. But a lawyer concluding that a representation will be "directly adverse to another client" must deal with the conflict.

The second type of conflict involves a much more subtle analysis. As the ABA Model Rules explain it, this type of conflict exists if

there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

ABA Model Rule 1.7(a)(2) (emphasis added).

This has been called a "rheostat" conflict. Unlike making a "yes" or "no" determination as required in analyzing the first type of conflict, a lawyer dealing with a "rheostat" conflict has a more difficult task. The lawyer must determine if some other duty, loyalty, or interest has a "significant risk" of "materially" limiting the lawyer's representation of a client. This often involves a matter of degree rather than kind.

For instance, in the hiring context, an associate is not likely to "pull punches" when dealing with the adversary's lawyer just because the other lawyer and the associate had a fleeting conversation about the associate possibly joining the adversary's law firm at some point in the future. However, the associate might be less aggressive on behalf of her client when dealing with one of the adversary's lawyers who just offered the associate a partnership at the other law firm accompanied by a huge

pay increase. Thus, this second type of conflict requires a far more subtle analysis than a "light switch" type of conflict arising from direct adversity to another client.

As with the first of type of conflict, a lawyer dealing with a "rheostat" conflict may represent a client only if the lawyer "reasonably believes" that she can "provide competent and diligent representation," the representation does not violate the law, and each client provide "informed consent." ABA Model Rule 1.7(b)(1). Perhaps the possible lateral hire can talk himself into thinking that he can continue providing competent and diligent representation to the existing client after receiving a solid job offer from the adversary's law firm, but making the necessary disclosures and obtaining the necessary consents could be a logistical nightmare.

As lawyers' lateral moves became more common, the ABA dealt with this issue in 1996.

In ABA LEO 400 (1/24/96), the ABA addressed the conflicts of interest ramifications of discussions between a law firm and a possible lateral hire who was currently working on a matter adverse to the potential hiring law firm's client. ABA LEO 400's conclusion primarily focused on the conflicts issues.<sup>1</sup>

In sum, we conclude that, for the protection of clients, Rule 1.7(b) requires a lawyer who is actively representing a client in a matter, and who is considering an association with a firm or party to whom he is opposed in the matter, to consult with his client and obtain the client's consent to his continuing to work on the matter while the lawyer explores such association. Generally, the required consultation should

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<sup>1</sup> Interestingly, ABA LEO 400 mentioned the confidentiality duty almost as an afterthought -- identifying it as the third of four duties requiring some attention. ABA LEO 400 (1/24/96) ("A third duty is the preservation of confidentiality under Rule 1.6. Job-seeking lawyers must guard against the risk that in the course of the interviews to determine the compatibility of the lawyer with the opposing firm, or the discussions between the lawyer and the firm about the lawyer's clients and business potential, the lawyer might inadvertently reveal 'information relating to the representation' in violation of Rule 1.6.").

occur before the lawyer engages in a substantive discussion of his experience, clients, or business potential with the opposing firm or party. If the client consents, the lawyer may continue the representation. If the client does not consent, the lawyer must either discontinue the job search that created the conflict, or withdraw from participation in the representation and transfer his work to others in the firm, if withdrawal can be accomplished properly under Rule 1.16. Where the lawyer has had a limited role in a matter or has had limited client contact, it will ordinarily be more appropriate for him to inform his supervisor. The supervisor can then determine whether to relieve the lawyer of responsibility, or to seek the client's consent for the lawyer to continue to work on the matter. While the negotiating lawyer's conflict of interest is not imputed to other lawyers in his firm, those other lawyers must each evaluate whether they may themselves have a conflict by virtue of their own interest in their colleague's negotiations. The lawyers in a law firm seeking to employ a lawyer who is involved in a matter adverse to the firm have similar obligations to their client.

This Committee regularly addresses, as in this Opinion, important issues relating to conflicts of interest. We recognize that among all of the issues this Committee confronts, conflicts of interest decisions generate much attention from the bar because of the possibilities they present for the disqualification of counsel. While there are, undoubtedly, many situations in which disqualification on grounds of conflict is warranted if not compelled, the opportunities for mischief presented by disqualification motions are numerous as well. Thus, we conclude this Opinion with a cautionary note. We do not intend, by this Opinion, to provide additional opportunities for merely tactical or dilatory motions to disqualify where the role of the negotiating lawyer has been such that no real harm can arise by permitting the lawyer to secure a new position of employment. As stated in the Rules themselves, 'the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons.' Scope para. [18]. It is our hope that members of the profession will approach motions to disqualify in this context, as in any other context, responsibly and with prudence.

ABA LEO 400 (1/24/96) (emphases added).

States have also issued legal ethics opinions addressing this scenario. As with ABA LEO 400, these opinions almost apologetically acknowledge there can be no "bright-line" rule, as much as lateral hires and hiring law firms might wish for one.

- District of Columbia LEO 367 (7/2014) ("When a lawyer is seeking employment with an entity or person adverse to his client, or with the adversary's lawyer, a conflict of interest may arise under Rule 1.7(b)(4) if the lawyer's professional judgment on behalf of the client will be, or reasonably may be, adversely affected by the lawyer's own financial, business, property, or personal interests (for purposes of this Opinion, a lawyer's own financial, business, property, or personal interests are collectively referred to as a 'personal interest conflict'). Both subjective and objective tests must be applied to determine whether a personal interest conflict exists. There is no 'bright line' test for determining the point during the employment process when a personal interest conflict arises, and that point may vary. There are a number of factors to consider in determining whether a personal interest conflict exists, including whether the individual lawyer is materially and actively involved in representing the client and, if so, whether the lawyer's interest in the prospective employer is targeted and specific, and/or has been communicated to, and reciprocated by, the prospective employer. Where the prospective employer is affiliated with, but separate and distinct from, the entity adverse to the job-seeking lawyer's client, there may be no personal interest conflict in the first instance, because the adversary and the prospective employer may be separate entities for conflicts purposes. If a personal interest conflict arises, there are three possible courses of action that may be available to the individual lawyer, each of which is subject to applicable requirements of the D.C. Rules of Professional Conduct: (a) disclosing to the client the existence and nature of the personal interest conflict and the possible adverse consequences of the lawyer's representation of the client and obtaining the client's informed consent to the representation; (b) withdrawing from the representation; or, (c) discontinuing seeking employment with the client's adversary or the adversary's lawyer until all pending matters relating to that potential new employment have been completed. The personal interest conflict of an individual lawyer in a law firm, nonprofit, or corporate legal department is not imputed to the other lawyers in the law firm, nonprofit, or corporate legal department, so long as the personal interest conflict does not present a significant risk of adversely affecting the representation of the client by such other lawyers. The imputation rule does not apply to a government agency. A subordinate lawyer who discusses a potential personal interest conflict with his supervisory lawyer, and acts in accordance with the supervisory lawyer's reasonable determination of whether the subordinate lawyer has a personal interest conflict and follows the supervisory lawyer's recommended course of action, will not be held professionally responsible even if it is subsequently determined that the

supervisory lawyer's determination of whether there was a personal interest conflict, and/or the recommended course of action, were incorrect under the Rules." (footnote omitted) (emphasis added)).

- Kentucky LEO E-399 (5/1997) ("Question: When law firms represent adverse parties in a matter, may a lawyer in one of the law firms negotiate for employment with the other law firm? If so must disclosure of the fact of the negotiations be made to the firms' client who is involved in the adverse representation?"; "Answer: If there is an appearance of side-switching by a lawyer who is actually working on the case, the negotiations should not be initiated without the client's consent. If the lawyer is involved in the case or has actual knowledge of protected client information within the meaning of KRPC 1.9 and 1.10, then the lawyer should not negotiate for employment with the law firm representing the adverse party without the client's consent. If the lawyer seeking employment is not involved in the case, the negotiations are not necessarily violative of the Rules, but disclosure to the firm's client may be appropriate and prudent in specific cases." (emphasis added)).

(c) In 1991, the New York City Bar indicated that a lawyer must advise her client about such a job offer unless she promptly declines it.

- New York City LEO 1991-1 (1991) ("This Opinion addresses whether and under what circumstances a lawyer has a duty to disclose to a current or prospective client that the lawyer is seeking or is considering whether to accept future employment with a person or entity having interests that are adverse to the interests of that current or prospective client."; "A serious issue arises as to when, in the process of looking for and deciding to accept new employment, the lawyer's interest in such employment becomes sufficiently concrete and serious to require disclosure under DR 5-101(A). The Committee is quite aware of the desirability of a 'bright-line' rule that would be easy to apply and would provide unambiguous guidance. However, we have concluded that no such 'bright-line' test can adequately accommodate the variety of circumstances in which the issues addressed herein might arise." (emphases added); "Nevertheless, the Committee believes that disclosure would be required under DR 5-101(A) in any case no later than when an offer of conflicting employment is extended to the lawyer, which offer is not promptly declined. Therefore, disclosure would always be necessary at least where an offer of future employment is outstanding and being considered (or has been accepted). This rule, however, is not sufficient. Although disclosure at the point an offer is extended would protect against certain of the types of conflict identified above; it is not sufficient as to others. In particular, it does not deal at all with the potential conflicting influences that may arise in connection with the process of securing the offer of employment. Therefore, the Committee notes that, in many cases, the disclosure obligations under DR 5-101(A) may arise as soon as the lawyer either (i) has

taken clear affirmative steps to seek to obtain specific conflicting employment (e.g., applied for such a position) or (ii) is seriously considering the pursuit of such employment in response to some expression of interest by the potential employer. Both situations can raise the ethical problems identified above. We are not prepared, however, to opine that in all cases the obligation to decline proffered representation or make disclosure will arise at these earlier identified points in the process." (emphasis added)).

This approach seems to allow for a "wink and a nod" offer that probably should be disclosed if the lateral hire recognizes that the hiring law firm is essentially making a standing offer that will remain open until the litigation ends. But perhaps New York intended to avoid the mischief that would come from a disclosure duty automatically arising from a job offer. An automatic disclosure approach would allow law firms to sow dissension in the adversary's ranks by offering jobs to its associates -- triggering their law firms' doubts about the associates' loyalty.

### **Best Answer**

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

b 10/14

## Information-Caused Complications in Applying the Normal Conflicts Rules

### Hypothetical 17

After nearly five years of intense discovery and pre-trial motions, the largest case you have ever handled is moving toward trial. You received the other side's expert designations this morning. The adversary's main expert is your former client. While representing him years ago in an unrelated matter, you learned confidences that you could use now to destroy his credibility.

What do you do?

- (A) File a motion to preclude the other side's reliance on that expert.
- (B) Arrange for "conflicts counsel" to cross-examine that expert at his deposition and at trial.
- (C) Tell your current client that you have to withdraw as its counsel on the eve of trial.

**(A) FILE A MOTION TO PRECLUDE THE OTHER SIDE'S RELIANCE ON THAT EXPERT (PROBABLY)**

**OR**

**(B) ARRANGE FOR "CONFLICTS COUNSEL" TO CROSS-EXAMINE THAT EXPERT AT HIS DEPOSITION AND AT TRIAL (PROBABLY)**

### Analysis

In the litigation context, lawyers sometimes face conflicts dilemmas because the adversary has designated fact witnesses or expert witnesses whom the lawyer currently or formerly represented. These scenarios can result in lawyers having to choose from among a number of unpalatable options.

This scenario itself can spawn a number of variations.

First, the conflicts issue can arise at various times. In some situations, lawyers know before they even take a litigation matter that a current or former client is likely to

be a material witness for the adversary. This would force the lawyer to immediately confront a conflicts issue. In contrast, the issue might arise later in the litigation when new issues require the involvement of new witnesses. For obvious reasons, the later the issue arises, the more troublesome for the lawyer.

Second, the pertinent witness whose presence creates the dilemma might be a fact witness or an expert witness. Expert witnesses present the most difficult problems. Adversaries cannot select fact witnesses with material pertinent information, but have that power when hiring testifying experts. This creates an enormous chance of mischief -- because it allows adversaries to deliberately select a lawyer's former client as his or her testifying expert. To make matters worse, the timing of the litigation schedule often results in both sides designing testifying experts very late in the process -- which can exacerbate the dilemma.

Third, the adverse fact or testifying expert witness could be the lawyer's current or former client. Most courts or bars would agree that cross-examining a current client involves adversity that normally requires consent. That is, the very act of cross-examination usually amounts to adversity, even if the lawyer does not possess confidential information that could be used against the adverse witness. The participation of former clients as adverse witnesses creates a more subtle issue. Lawyers' ability to be adverse to a former client depends on information that the lawyer learned while representing the client. So there is a chance that a lawyer could ethically cross-examine a former client, depending on the information the lawyer possesses.

Fourth, lawyers finding themselves in this unfortunate scenario might have to deal with one or both of the basic conflicts rules. As mentioned above, lawyers might



have to assess the applicability of the pertinent state's parallel to ABA Model Rule 1.7(a)(1) -- which prohibits direct adversity to a client absent consent. A much more difficult dilemma could involve the pertinent state parallel to ABA Model Rule 1.7(a)(2) -- which creates a conflict if there is a "significant risk" that the lawyer's representation of a client will be "materially limited" by the lawyer's other responsibilities or interests. For instance, a lawyer prohibited from, or agreeing to refrain from, using a former client's confidential information in cross-examining the former client might confront this type of conflict, because the lawyer would find her duty of loyalty and diligence to her client "materially limited." In other words, the lawyer could not adequately serve the current litigation client because the lawyer would essentially have one arm tied behind her back.

All of these variables make this among the most difficult conflicts dilemma lawyers can face.

Lawyers confronting this scenario seem to have six choices.

**First**, lawyers can obtain former clients' consent to use the former clients' protected client information against their cross-examination. Courts and bars have acknowledged this possibility, but it seems implausible that any rational former client would ever grant such a consent.

**Second**, lawyers might be able to cross-examine former clients if they do not have any pertinent confidential information that they could use against the former client.

- State v. Frisco, 119 P.3d 1093, 1098 (Colo. 2005) (refusing to disqualify a criminal lawyer from representing a drug defendant even though the lawyer might be called upon to cross examine a former client named as a co-conspirator and a possible prosecution witness; explaining that the former client had not established a "substantial risk that confidential factual information as would normally have been obtained by defense counsel in the

prior representation would materially advance the position of the defendant in this prosecution").

Alternatively, such lawyers might be able to use harmful information they obtained from the former client to the former client's disadvantage during the cross-examination -- if the information is "generally known." ABA Model Rule 1.9 permits such use. In 2013, the Ohio Bar explained that lawyers may undertake such cross-examinations if the harmful information they would like to use has become generally known.

- Ohio LEO 2013-4 (10/11/13) ("When a lawyer learns that a current representation may require a cross-examination of an adverse witness who is a former client, the lawyer must analyze the potential conflict under Prof.Cond.R. 1.7 and 1.9. Prof.Cond.R. 1.7(a)(2) indicates that a conflict of interest is created in the current representation if there is a substantial risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for the client will be materially limited by the lawyer's responsibilities to the former client. The lawyer's responsibilities to the former client are articulated in Prof.Cond.R. 1.9. If a current representation involves the same or a substantially related matter and the current client's interests in the matter are materially adverse to the former client, Prof.Cond.R. 1.9(a) dictates that the lawyer may not continue the current representation without the former client's informed consent, confirmed in writing."; "If the current matter and the matter involving the former client are unrelated, the former client does not have to consent to the current representation, but the lawyer must comply with Prof.Cond.R. 1.9(c). That provision prohibits the lawyer from using information relating to the representation of the former client to the disadvantage of the former client unless the information has become generally known or the Rules of Professional Conduct permit or require such use. Prof.Cond.R. 1.9(c) also prohibits the lawyer from revealing information relating to the representation of the former client except as permitted or required by the Rules."; "In this opinion, the Board was asked whether a public defender may present evidence of a prior conviction to impeach a former client. The public defender represented the former client in the case that led to the conviction and did not learn of the former client's potential adverse testimony until the current representation was underway. Impeachment of the former client violates Prof.Cond.R. 1.9(c) because the public defender would be using information relating to the prior representation to attack the credibility of the former client, which would disadvantage the former client. However, the public defender may proceed with the current representation if the former client's criminal conviction is generally known, the

use of former-client information is permitted or required by the Rules of Professional Conduct, or the former client provides informed consent. Absent these conditions, the public defender must seek permission from the court to withdraw from the current representation." (emphasis added); "For purposes of this opinion, the Board is asked to assume that the public defender no longer represents the prosecution witness, that the witness was convicted in the prior case, and that the underlying crime is an impeachable offense under Evid.R. 609. As part of the current representation, the public defender may have to cross-examine the prosecution witness/former client regarding the prior offense in an effort to attack their credibility. Because the requester of this opinion is a public defender, we will address the issue presented in that context, but our analysis is also applicable in both private criminal and civil representations where a lawyer must cross-examine a former client."; "Neither Prof.Cond.R. 1.7 nor Prof.Cond.R. 1.9 automatically ban a lawyer from representing a client when an adverse trial witness is a former client and the current matter is unrelated to the representation of the former client. Accord Ill. State Bar Assn., Op. 05-01 (Jan. 2006); Md. State Bar Assn., Commt. On Ethics, Op. 2004-24 (May 14, 2004); Utah State Bar, Ethics Advisory Op. Commt. Op. 02-06 (June 12, 2002)."; "[T]he starting point for any conflict of interest analysis, the public defender must determine whether his or her ability to carry out an appropriate course of action for the current client will be materially limited by the public defender's responsibilities to the former client . . . . If the public defender concludes that the cross-examination does not required him or her to use information relating to the representation of the former client to the disadvantage of the former client or to reveal such information, the public defender does not run afoul of Prof. Cond. R. 1.9(c) and the current representation may continue absent other conflict of interest issues."; "The requester, though, indicates that the public defender may be required to use evidence of the former client's criminal conviction for impeachment purposes at trial. Because the public defender represented the former client in the criminal case providing the basis for impeachment, evidence of the conviction would be 'information relating to the representation' under Prof.Cond.R. 1.9(c)(1). Unlike the 'confidences and secrets' approach to confidentiality in the now-repealed Code of Professional Responsibility, information relating to the representation of a client includes both 'matters communicated in confidence by the client' and 'all information relating to the representation, whatever its source.' Prof.Cond.R. 1.6, Comment [3]."; "The phrase 'generally known,' however, is not defined in the Rules, Model Rules, or any of the accompanying comments. As a result, the following Restatement definition has been referenced when determining whether information relating to a representation is 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 depositories 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.' Restatement of the Law 3d, The Law Governing Lawyers, Section 59, Comment d (2001)."; "Upon review of motions for withdrawal or disqualification of counsel in criminal cases that are based upon former-client conflicts, courts have taken the view that a former client's criminal conviction is generally known because it is a matter of public record."; "In general, criminal convictions are matters of public record and are usually accessible through public databases not requiring any particular expertise to obtain the conviction information. Standard practice for prosecutors would be to obtain the criminal records of their witnesses, possibly from the witnesses themselves, and this information must be supplied to the public defender during discovery."; "Based upon the Restatement definition, the fact that criminal histories of witnesses are exchanged during discovery, and the case law on former-client conflict allegations, the Board's view is that as long as the public defender's cross-examination of the former client is limited to the existence of the prior conviction for impeachment, the public defender can satisfy the 'generally known' exception in Prof.Cond.R. 1.9(c)(1). If competent representation of the current client requires the public defender to use additional information relating to the representation of the former client to their disadvantage, the public defender must make an individual determination as to whether this additional information is also generally known."; "Outside the context of the record of a criminal conviction in the scenario before the Board, lawyers are cautioned that the presence of information 'in the public record does not necessarily mean that the information is generally known within the meaning of Rule 1.9(c).' See Bennett, Cohen & Whittaker, Annotated Model Rules of Professional Conduct, 175 (7<sup>th</sup> Ed. 2011), citing Pallon v. Roggio, D.N.J. Nos. 04-3625 (JAP) and 06-1068 (FLW), 2006 WL 2466854 (Aug. 24 2006); Steel v. Gen. Motors Corp., 912 F. Supp. 724 (D.N.J. 1995); In re Anonymous, 932 N.E. 2d 671 (Ind. 2010). '[T]he 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.' 1 Restatement, Section 59, Comment d. The following cases provide additional instruction on this issue: Disciplinary Counsel v. Cicero, 134 Ohio St. 3d 311, 2012-Ohio-5457, 982 N.E. 2d 650 (drug raid in which federal agents seized college football memorabilia was generally known, information learned during a meeting with a prospective client was not); In re Gordon Properties, L.L.C., U.S. Bankr. Ct., E.D. Va., Nos. 09-18086-RGM and 12-1562-RGM, 2013 WL 681430, f.n. 6 (Feb. 25, 2013), quoting Va. State Bar, Legal Ethics Commt., Op. 1609 (Sept. 4, 1995) ('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'); Emmanouil v. Roggio, D.N.J. No. 06-1068, 2008 WL 1790449 (Apr. 18, 2008) (information regarding

civil defendant's testimony in a prior case was generally known when defendant disclosed the information to the plaintiff and the prior case was a matter of public record); Sealed Party v. Sealed Party, S.D. Tex. No. Civ. A. H-04-2229, 2006 WL 1207732 (May 4, 2006) (information in press release announcing a civil settlement that was in the public record was generally known, the fact that the case settled and the lawyer's impressions about the case were not); In re Adelpia Communications, supra, (list of properties owned by particular parties was not generally known information; information was publicly available, but would require substantial difficulty or expense to produce a list of the properties owned by the parties and related entities); Cohen v. Woglin, E.D. Pa. No. 87-2007, 1993 WL 232206 (June 24, 1993) (magazine and newspaper articles, published court decisions, court pleadings, and public records in a government office are generally known; pleadings filed under seal and records of an international court are not). As evidenced by these cases, particularly in civil matters, whether information in a public record is generally known may require a review of the applicable facts and circumstances."; "When faced with the cross-examination of a former client that requires the use of information relating to the prior representation to the detriment of the former client, a public defender may conclude that he or she cannot satisfy either of the exceptions in Prof. Cond. R. 1.9(c)(1). That is, the information is not generally known and the use of the information is not permitted or required by the Rules. In this situation, the public defender may either obtain the former client's informed consent or seek permission to withdraw from the current representation." (emphasis added); "The public defender may not be able to obtain the former client's informed consent to the use of disadvantageous information about the former client's representation. Given that the former client is an adverse witness, competent and diligent representation of the current client probably requires the cross-examination and potential impeachment of the former client. If the public defender is unable to fulfill this obligation to the current client, cannot satisfy one of the exceptions in Prof. Cond. R. 1.9(c)(1), or secure the former client's informed consent, the public defender must withdraw from the current representation."; "[E]ven when a different public defender in the same office represented the former client/adverse witness, if that public defender would be prohibited by Prof. Cond. R. 1.7 or 1.9 from representing the current client, all of the public defenders in the office are disqualified under Prof. Cond. R. 1.10." (emphasis added)).

A 2011 North Carolina legal ethics opinion also analyzed lawyers' ability to use generally known information in cross-examining a former client -- in contrast to a total prohibition on the inherent adversity involved in cross-examining a current client.

- North Carolina LEO 2010-3 (1/21/11) (holding that a criminal defense lawyer may not cross-examine a police officer whom the lawyer represents in an

unrelated matter; "If Lawyer must cross-examine Officer in Defendant's criminal matter, Lawyer has a concurrent conflict of interest. Comment [6] to Rule 1.7 specifically provides that a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. Any attempt to discredit Officer's credibility through cross-examination would violate Lawyer's duty of loyalty to Officer. Conversely, the failure to challenge Officer's damaging testimony through rigorous cross-examination would violate Lawyer's duty to competently and diligently represent Defendant. Lawyer cannot cross-examine Officer without the risk of either jeopardizing Defendant's case by foregoing a line of aggressive questioning or breaching a duty of loyalty and/or confidentiality owed to Officer."; "If Lawyer must cross-examine Officer in Defendant's criminal matter, the resultant conflict of interest is nonconsentable."; "In the given fact scenario, Lawyer cannot reasonably conclude that he can protect the interests of each client, or competently and diligently represent each client, if Lawyer must cross-examine Officer in Defendant's criminal matter."; explaining that the lawyer could depose the Officer if he was a former client and any information that the lawyer had acquired from the client was generally known; "An exception to Rule 1.9(c) provides that a lawyer may use confidential information of a former client to the disadvantage of the former client when the information has become 'generally known.' Rule 1.9(c)(1). If certain information as to the internal affairs investigation is generally known, that information may be used to cross-examine Officer without obtaining the consent of Officer. See Rule 1.9, cmt. [8].").

Upon reflection, this type of analysis seems superficial at best. A lawyer cross-examining a former client by using "generally known" adverse information undoubtedly has more detailed information that is not "generally known." As a practical matter, there seems to be no way that a lawyer could only use "generally known" information while adequately serving his or her current client.

**Third**, lawyers might cross-examine former clients about whom lawyers have adverse information -- but refrain from using that information.

The Restatement provides an illustration of this principle -- but reaching what some might see as an implausible conclusion.

Lawyer, now a prosecutor, had formerly represented Client in defending against a felony charge. During the course of a confidential interview, Client related to Lawyer a willingness to commit perjury. Lawyer is now prosecuting another person, Defendant, for a matter not substantially related to the former prosecution. In the jurisdiction, a defendant is not required to serve notice of defense witnesses that will be called. During the defense case, Defendant's lawyer calls Client as an alibi witness. Lawyer could not reasonably have known previously that Client would be called. Because of the lack of substantial relationship between the matters, Lawyer was not prohibited from undertaking the prosecution. Because Lawyer's knowledge of Client's statement about willingness to lie is confidential client information under § 59, Lawyer may not use that information in cross-examining Client, but otherwise Lawyer may cross-examine Client vigorously.

Restatement (Third) of Law Governing Lawyers § 312 cmt. f, illus. 6 (2000) (emphases added). It is difficult to imagine that the prosecutor in this illustration could adequately serve the public while foregoing use of such valuable information

In 2009, a Vermont opinion explained that this tactic might work.

- Vermont LEO 2009-4 (2009) (holding that a law firm could represent a client adverse to the principal of a corporation which the law firm had previously represented, although the law firm could not use information obtained from the principal; explaining the situation: "The requesting attorney's firm represents A and has done so for a number of years. One matter handled by the requesting attorney was A's purchase of a parcel of land that adjoins lands owned by a corporation in which B is a principal. The firm has never represented the landowner corporation but has formed an LLC for B and has performed collection work for a different corporation in which B is also a principal. Both files are now closed. There are no open files in which either B or any of his business entities are represented by the firm."; "Recently, on A's behalf, the firm sent a letter to the landowner corporation disputing the landowner corporation's claimed right of access onto A's adjoining property. In response to that letter, B has claimed a conflict of interest and requested that the firm refrain from representing A in connection with the dispute."; "In B's claim of conflict he asserts that the requesting attorney's firm's representation of A 'creates at least the appearance of conflict'. He also expresses a concern that his interest may have been compromised by dual loyalties. He goes on to claim that the firm is privy to financial and legal concerns that would compromise him in his negotiations with A. The firm has

no active case files for B, and no retainer arrangement exists."; noting that the principal was never the law firm's client; "In the matter at hand, the firm has never actually represented the corporation which is the landowner. Rather, it has represented one of the principals of the landowner corporation in the formation of an LLC and it has performed collection work for an entirely different corporation. On these facts, we do not believe that the landowner corporation is even a former client. While this may seem an overly technical conclusion, clients should understand that they have separate legal identities from the entities they create so long as those entities have been properly formed and maintained."; warning the law firm that it could not use information obtained from the principal; "Having reached that conclusion, however[,] does not mean that the firm may use information obtained in the course of its work for B and B's other corporation in a manner which is adverse to B's interests. The firm has a continuing duty under Rule 1.9(c) to maintain the confidentiality of information obtained and not to use any information that it may have against B or B's interests."; "It is noted that Rule 1.9(c) does not preclude representation of A. Rather it prohibits the requesting attorney from using or revealing information relating to the former representation of B against B. Even if we (1) assume that the requesting attorney's firm has confidential or secret information obtained during the prior representations of B or B's other corporation; and (2) infer that the requesting attorney has access to all of the firm's files, Rule 1.9(c) does not preclude the requesting attorney from representing A. Rather it precludes the use of confidential or secret information to B's disadvantage." (emphases added)).

Not surprisingly, other courts and bars reject this as a possible solution to the lawyer's dilemma.

- In re Compact Disc Minimum Advertized Price Antitrust Litig., MDL Docket No. 1361, 2001 U.S. Dist. LEXIS 25818, at \*11-12, \*12-14 (D. Me. Mar. 12, 2001) (disqualifying Milberg Weiss because until just a few days earlier the law firm had been representing other retailers in a class action alleging essentially the same improper conduct; rejecting the law firm's argument that it would not be adverse to its former retail clients; "Milberg Weiss does not plan to name any of its retailer clients as defendants; it does not expect any other plaintiff to name these retailers (a consolidated amended complaint has been filed and does not name them); it does not expect to take any discovery from the retailers; and therefore, its expert says, the consumer class action will not have any adverse effects on the economic interests of the retailers. Simon Report at 8-9. In addition, Professor Simon notes that 'Milberg Weiss has made it clear that it will not use [any confidential retailer] information in consumer actions,'" (emphasis added) (footnote omitted); "These measures may eliminate any adverse effect on Milberg Weiss's prior retailer clients, but unfortunately they carry the distinct potential of reducing Milberg Weiss's effectiveness in representing the putative consumer plaintiff class vigorously



here. The prior representation has created an incentive for Milberg Weiss not to name those retailers as defendants or to seek any information from them that may be helpful in prosecuting the consumer case. And it has already agreed not to use certain information it acquired in the earlier case. Milberg Weiss characterizes its former retailer clients as 'mom and pop operations,' thereby suggesting that there would be no reason to name them as defendants here. Given its interest, I cannot rely on the Milberg Weiss statement to make it so. Even if I treat the decision by other law firms not to name these four retailers as defendants in the Consolidated Amended Complaint as confirming the lack of any reason to name them as defendants, I cannot be confident that even 'mom and pop operations' would have no useful information to discover or, indeed, that Milberg Weiss is not already in possession of such information that it has agreed not to use. I conclude that the retailer and consumer representations are inescapably adverse. Therefore, Milberg Weiss must be disqualified." (emphasis added) (footnote omitted)).

- Los Angeles County LEO 463 (12/17/90) (analyzing the following situation: "Law Firm advised A to rectify its intentional concealment. A refused and made clear its desire that Law Firm not reveal A's securities fraud to anyone. Law Firm withdrew from further representation of A, having represented it for a total of about six weeks. Corporation B has been a client of Law Firm for many years and has received various legal services. After Law Firm terminated its representation of A, B informed Law Firm that it had received from A a proposal for the financing of one of B's ventures and that it wanted Law Firm's advice in responding to A."; holding that the law firm could not disclose the former's security fraud, which would impact the firm's representation of the new client; "[W]ithout A's consent to reveal this information to B, Law Firm would be caught between the rock of protecting A's confidences and the hard place of zealously representing B. Knowing of A's dishonesty, Law Firm might be tempted to recommend that B take special precautions to protect itself, but would be forbidden from using A's confidences to its detriment in this manner. Thus, Law Firm would constantly have to second-guess whether its advice to B was affected by Law Firm's secret knowledge of A's dishonesty." (emphasis added); "[I]f Law Firm were to represent B without revealing its knowledge of A's dishonesty, it would create an impermissible appearance of impropriety. B would quite justifiably become upset if it later learned that Law Firm acted as its lawyer in the transaction without warning B that its proposed borrower lacked integrity. Law Firm's response that it was merely maintaining its obligation of confidentiality to A would be little solace to B, who had its lawyer conceal admittedly relevant information. Even if Law Firm provided exactly the same advice as would another law firm that was ignorant of A's wrongdoing, it would not dispel the appearance of impropriety." (emphasis added); "If A's consent is required and A declines to give consent for Law Firm to represent B, it should be fairly easy for Law Firm to explain without revealing any confidential information why it

cannot undertake the representation. Law Firm may simply tell B that it had previously represented A and that a conflict of interest prevents Law Firm from undertaking the representation. If B inquires further, Law Firm may say that it is bound not to say more for fear of revealing client confidences."; "[I]f A's dishonesty is deemed material to the representation, then Law Firm may not represent B without A's consent to disclose that information. On the other hand, if A's dishonesty is deemed not to be material for some reason, then it need not be disclosed for B's consent to be 'informed,' unless for some reason it appears that this information might adversely affect the representation.").

This seems like a completely unworkable option. It is difficult to think that the former client would accept any of the lawyer's assurances that the lawyer would not use confidential information. In fact, the lawyer could not help but be affected by pertinent adverse information -- and would undoubtedly fashion the cross-examination in light of such information. And if the lawyer did not do that, he or she would almost undoubtedly fall short of adequately serving the current litigation client.

**Fourth**, lawyers might seek a court order precluding the adversary from calling a fact or expert witness whose participation creates this dilemma. This step would appear unavailable in the case of fact witnesses, although it is possible to imagine a court precluding the adversary from calling some redundant fact witness whose participation would create the conflict.

This scenario is more likely to occur in the case of one party hiring the other side's lawyer's former client as a testifying expert. This is the sort of mischief mentioned above.

One bar acknowledged this as a possible solution.

- Los Angeles County LEO 513 (7/18/05) (addressing an adverse party's designation (as an expert witness on its behalf) of a former client of a lawyer representing a litigant; "If an attorney is asked to accept representation of a client in a matter in which a former client of the attorney has already been designated as an expert witness, the attorney must determine if his or her

present employment might require the attorney to use or disclose confidences obtained from the former client and now expert. If so, Rule 3-310(E) mandates that the attorney may accept the representation only with the informed written consent of the former client. Where the attorney's involvement in the matter preceded the former client/expert's designation, or if the former client does not consent to such involvement, the attorney has options other than asking for the consent of the former client. In such a case, the attorney may ethically seek an appropriate order from the court, which could include that the expert be precluded from testifying if another expert is available to the opposing party; that the former client's decision to serve as an expert constitutes a waiver of the privilege; or that the former client may not serve as an expert witness unless the former client agrees to a limited waiver of any duty of confidentiality as it pertains to the pending case." (emphasis added)).

Another bar has acknowledged the possibility of this solution working.

- Vermont LEO 2008-4 (2008) (holding that a lawyer cannot cross-examine a former client if the lawyer could use confidential information against the former client; explaining the following factual situation: A lawyer representing a mother who was seeking to terminate a guardianship, while the guardian sought to terminate the mother's parental rights; explaining that just before the third day of a hearing, one of the lawyer's clients (on an unrelated matter) came forward as a fact witness in support of the guardian and adverse to the lawyer's client; explaining that the lawyer had filed a motion seeking to preclude the fact witness' testimony as cumulative, but analyzing the lawyer's responsibility should the court deny that motion; "Law Firm A had acquired information regarding Witness C in the course of its prior and ongoing representation of her that would be extremely valuable for cross-examination (bearing directly upon credibility and truthfulness, among other things), meaning that Law Firm A's duties to Mother require that it be aired. However, this information is adverse to Witness C, meaning that exposing it would violate Law Firm A's duties of loyalty and confidentiality to Witness C, quite aside from the ethical conflict that would be presented by cross examining a current client." (emphasis added); "Law Firm A is correct in its understanding that if the current client/witness is called to testify, Law Firm A must resign from its representation. This conclusion applies not only to Rule 1.6 (governing confidentiality obligations) but also under Rule 1.7."; concluding that "[a] lawyer may not continue to represent a client in trial if another current client will be called as a directly adverse witness by opposing counsel and where the lawyer possesses confidential client information adverse to the client witness that should be used during cross-examination of the client witness"; also holding that "[w]hether the mid-trial disclosure of the client/witness requires preclusion of the witness, a new trial, or some other consequences is a legal question for the court and outside the scope of this Section's authority"; explaining that "we cannot opine on how to resolve the

trial dilemma. The suggestion that has been made to use a special counsel for cross examination of the client witness strikes us as problematic [explaining that "[o]n these facts, for example, we note that the Mother is entitled to have her attorney attack the testimony of the client witness in closing argument as well as during cross examination."] At the same time, we are not in a position to weigh, let alone decide, whether the witness is cumulative, what the consequences of mid-trial notice of the witness ought to be, whether her exclusion would be prejudicial, or the host of other possible legal issues presented." (emphasis added); "In conclusion, we would like to reemphasize that there is no dilemma under the Rules. If the current client is permitted to testify as an adverse witness in the circumstances presented, Law Firm A must withdraw." (emphasis added)).

This seems like a logical solution that would preserve a lawyer's ability to continue representing the client. Ironically, however, precluding the adversary from calling a flawed testifying expert might actually harm the lawyer's current client. If another lawyer (unencumbered with a conflict) would ultimately discover the adversary's testifying expert's weaknesses, the client would be better off by retaining a new lawyer rather than precluding the adversary's designation of a testifying expert vulnerable to being destroyed by cross-examination.

**Fifth**, lawyers might seek to arrange for another lawyer (usually called "conflicts counsel") to cross-examine the testifying expert.

A surprising number of courts have permitted this solution.

- Corp. Express Ofc. Prods., Inc. v. Gamache (In re Motion to Quash Deposition Subpoena to Lance Wagar), Civ. No. 1:06-MC-127 (LEK/RFT), 2006 U.S. Dist. LEXIS 90345, at \*44-45 (N.D.N.Y. Dec. 13, 2006) (recognizing that co-counsel could handle a deposition if another counsel could not undertake the deposition because of a conflict; "[I]t is represented by the Defendants that Verrill Dana LLP has not been tainted by any proximity to Wagar's confidential information or him personally. Verrill Dana LLP has never represented Wagar, was not involved in the New Jersey Litigation, and avers that they have not received any of Wagar's confidential information. See generally, Dkt. No. 7, the Affidavit & Declarations. To have them conduct the deposition as opposed to Nixon Peabody and Rider would be efficacious safeguard.").

- United States v. Canty, Case No. 01-80571, 2006 U.S. Dist. LEXIS 86422, at \*6 (E.D. Mich. Nov. 30, 2006) (recognizing that co-counsel could undertake a cross-examination if counsel had a conflict, as long as the client consented to the arrangement; "To the extent a conflict does exist, however, the court finds that it is not 'severe' and is remedied by (1) Mr. Lustig's representation that he will not cross-examine or be involved in the cross-examination of Mr. Jones; and (2) Mr. Canty's knowing, intelligent waiver of any such conflict in open court.").
- Sykes v. Matter, 316 F. Supp. 2d 630, 632, 633 & n.4, 636 (M.D. Tenn. 2004) (recommending use of conflicts counsel to depose the defendant's expert, after explaining that the plaintiff's law firm had represented the defendant's expert's employer; "This motion to disqualify must be denied. Boulton Cummings is the conflicted party here, and the one to which the ethical rules cited in the motion apply. If anyone is to be disqualified because of an ethical dilemma, it would seem only logical that it should be those members of the profession whose rules present the dilemma. Moreover, the alternative argument that Mr. Kopra's voluntary appearance in this action impliedly waives any privilege held by LBMC is without merit, inasmuch as the rule relating to such use of information obtained during representation of a former client . . . clearly requires that such consent be given after consultation." (footnote omitted); "Lacking consent to reveal client confidences, counsel states that the continued participation of Mr. Kopra in this lawsuit leaves them with a Hobson's choice, between utilizing confidential information during cross-examination in violation of ethical duties on the one hand, and failing to zealously represent Mr. Sykes on the other hand, in violation of ethical duties, if potentially damaging confidential information is not so utilized. However, this argument ignores the third alternative that is always available to counsel laboring under, as the motion papers put it, 'an irreconcilable difficulty under the Rules of Professional Conduct': withdrawal from representation. While counsel argues that 'it is basically unfair to require Mr. Sykes or his counsel' to make this choice, inasmuch as this conflict was not of their making, such is the sometimes unfortunate reality of proper practice within the legal profession. However, giving due consideration to Mr. Sykes' substantial interest in retaining and proceeding with counsel of his choice, the undersigned concludes that withdrawal is not required here, inasmuch as the potential for conflict can be removed by allowing plaintiff to retain other counsel for purposes of cross-examining Mr. Kopra at his deposition and at trial." (emphasis added); explaining that "[c]ounsel also argued that requiring them to withdraw or disqualifying them would declare an 'open season' on lawyers who could be conflicted out by the deliberate selection of an expert they had represented in the past. This concern is a bit overstated. The circumstance in which counsel would have knowledge of an adversary's prior representation of an expert or his/her firm would seem to be rare."; "In sum, the undersigned finds that the ethical demands of the Tennessee Rules of Professional Conduct, as well as the competing interests of (1) plaintiff in

- being represented by counsel of his choosing, (2) defendants in going forward with the expert of their choosing, and (3) LBMC/Mr. Kopra in maintaining the confidentiality of information imparted to Boulton Cummings during the course of the prior representation, will be adequately complied with and best served by allowing defendants' expert and plaintiff's counsel to remain, but disqualifying Boulton Cummings from participating in any manner in the cross-examination of Mr. Kopra at deposition and during the trial of this matter. Plaintiff's counsel is admonished that outside counsel shall have absolutely no exposure to any information of any kind relating to Boulton Cummings' prior representation of LBMC and its affiliates, or obtained therefrom.").
- United States v. Fawell, No. 02 CR 310, 2002 U.S. Dist. LEXIS 10415, at \*24-25, \*25, \*28, \*29-30 (N.D. Ill. June 11, 2002) (recognizing that counsel unable to cross-examine government witnesses can hire another lawyer to do so; "Yet another argument for disqualification of Altheimer & Gray relates to the Firm's representation of dozens of witnesses before the grand jury. Some five to ten of these individuals will, according to the government, be trial witnesses as well. The government asserts that their interests will be materially adverse to those of Defendant CFR, creating a conflict too significant to be subject to waiver."; "Defendant CFR has made a substantial effort to address this issue. First, as CFR notes, an attorney's prior representation of government witnesses does not always require disqualification, so long as appropriate waivers are obtained and appropriate safeguards are established. Since the filing of the motion to disqualify the Firm, CFR has hired Thomas M. Breen, an experienced former prosecutor and criminal defense attorney, to conduct cross-examinations of the ten persons identified by the government as potential trial witnesses. . . . This procedure -- of 'screening off' a conflicted attorney for purposes of cross-examination -- was approved by the Seventh Circuit only last month in United States v. Britton, 289 F.3d 976, 2002 U.S. App. LEXIS 8805, 2002 WL 922106 (7th Cir. 2002)."; "More troublesome is CFR's own waiver of the conflict created by its attorneys' inability to cross-examine, or even to argue the weight of, this damaging testimony."; "The court is concerned for protecting the integrity of the process and the rights of each Defendant and witness. Under some circumstances, it might also be concerned about the wisdom of a defendant's decision to waive the right to have its own attorneys cross-examine critical government witnesses. In the circumstances presented here, however, the court believes CFR has made a competent and counseled decision concerning the issue and is not inclined to second-guess a determination made by a responsible official with full access to relevant information.").
  - United States v. Britton, 289 F.3d 976, 979, 979-80, 982, 983 (7th Cir. 2002) (affirming criminal defendant's mail fraud conviction; rejecting defendant's argument that the trial court erred in denying her second-chair defense counsel's motion to withdraw because of a conflict; agreeing with the trial

court that co-counsel could cross-examine a government witness that the second-chair defense counsel could not cross-examine because of the conflict; "On November 17, 2000, approximately two and one-half weeks before the scheduled start of the trial, Britton filed a motion to continue the trial date in order to allow second-chair defense counsel Christopher A. DeRango to withdraw. The motion stated that DeRango had a conflict of interest in that he had previously represented a government witness named Bruce Swanson."; "[T]he court initially ruled that because the potential impeachment material related to a billing record, it was not covered by the attorney-client privilege. The court noted that defendant's lead counsel, Daniel Cain, could obtain this record with a trial subpoena. Additionally, in order to avoid the 'appearance of impropriety' presented by an attorney cross-examining his former client, the court held that DeRango would not be allowed to participate in the cross-examination of Swanson or to disclose any information related to the billing record."; "Britton next contends that the district court erred by denying DeRango's motion to withdraw due to his conflict of interest. In the alternative, Britton contends that the district court erred by prohibiting DeRango from questioning Swanson."; "[W]e see no err [sic] in the district court's actions as the testimony that DeRango sought to give was easily available through another source, and we conclude that neither 'extraordinary circumstances' nor 'compelling reasons' existed to find otherwise. We also see no problem with the district court's screening off of DeRango as we have previously approved the use of such measures in order to avoid potential ethical violations." (footnote omitted)).

- Swanson v. Wabash, Inc., 585 F. Supp. 1094, 1097 (N.D. Ill. 1984) (recognizing that co-counsel could cross-examine a witness whom counsel could not undertake to cross-examine because of a conflict; "Assuming that the CUHS lawyers who dealt with Crawford have refrained from disclosing Crawford's confidences, no conflict of interest is possible in this case if Crawford is cross-examined at trial only by non-CUHS attorneys. Coffield and Flynn have indicated that such an arrangement could easily be made. Their present clients are aware of Crawford's concerns, yet they all desire Coffield and Flynn to continue as their counsel. Moreover, several attorneys from firms other than CUHS represent other defendants in this action; these lawyers might conduct any cross-examination of Crawford if he is called as a witness. Thus, disqualification of Coffield and Flynn (and other partners and associates of CUHS) is unnecessary if the following conditions are met: (1) attorneys Coffield, Carden, Slavin and Pope file affidavits with his Court stating that they have not revealed any of Crawford's confidences; and (2) the four defendants represented by Coffield and Flynn file written waivers of any right they may possess to have Coffield and Flynn cross-examine Crawford should he testify at trial. In addition, this Court hereby enters a protective order prohibiting the CUHS attorneys who dealt with Crawford from revealing to any of the other defendants' attorneys herein or to any other individual whomsoever any of Crawford's confidences in the future.

Fulfillment of these conditions, coupled with the cross-examination of Crawford by non-CUHS lawyers, obviates the need for disqualifying any attorneys from this case." (footnote omitted)),

In 2002, a court blocked a conflicts lawyer from taking a deposition, but held out hope that he could conduct the trial examination.

- Advanced Mfg. Techs., Inc. v. Motorola, Inc., No. CIV 99-01219 PHX-MHM (LOA), 2002 U.S. Dist. LEXIS 12055, at \*23 (D. Ariz. July 2, 2002) (prohibiting a lawyer from deposing a nonparty witness because it had a conflict, but putting off until later whether the lawyer could examine the witness at trial; "It is ordered that Non-Party M. Dean Corley's Rule 26(c) Motion For Protective Order (doc. #164) is **GRANTED**. Attorney Douglas L. Irish and the law firm of Lewis & Roca, LLP, are hereby precluded from taking or otherwise participating in M. Dean Corley's future deposition, if any, due to their impermissible conflict of interest between dual clients, Motorola and Corley, whose interests at this time appear to be materially adverse. Whether Irish may be permitted to examine or cross examine Corley at time of trial will abide by further order of the trial judge.").

Arranging for conflicts counsel presents a tempting solution, but it might not always work. Presumably, the lawyer handling the case would have to brief conflicts counsel on the issues. During that briefing session, the lawyer possessing damaging confidential client communication about the adversary's expert would have to resist (through language or even body language) pointing conflicts counsel in the direction of the damaging information that the lawyer's existing client would want to use -- but which the lawyer's continuing confidentiality duty to the former client would prohibit the lawyer from using.

Not surprisingly, at least one bar has recognized that this tactic generally would not work.

- Vermont LEO 2008-4 (2008) (holding that a lawyer cannot cross-examine a former client if the lawyer could use confidential information against the former client; explaining the following factual situation: A lawyer representing a mother who was seeking to terminate a guardianship, while the guardian sought to terminate the mother's parental rights; explaining that just before



the third day of a hearing, one of the lawyer's clients (on an unrelated matter) came forward as a fact witness in support of the guardian and adverse to the lawyer's client; explaining that the lawyer had filed a motion seeking to preclude the fact witness' testimony as cumulative, but analyzing the lawyer's responsibility should the court deny that motion; "Law Firm A had acquired information regarding Witness C in the course of its prior and ongoing representation of her that would be extremely valuable for cross-examination (bearing directly upon credibility and truthfulness, among other things), meaning that Law Firm A's duties to Mother require that it be aired. However, this information is adverse to Witness C, meaning that exposing it would violate Law Firm A's duties of loyalty and confidentiality to Witness C, quite aside from the ethical conflict that would be presented by cross examining a current client." (emphasis added); "Law Firm A is correct in its understanding that if the current client/witness is called to testify, Law Firm A must resign from its representation. This conclusion applies not only to Rule 1.6 (governing confidentiality obligations) but also under Rule 1.7."; concluding that "[a] lawyer may not continue to represent a client in trial if another current client will be called as a directly adverse witness by opposing counsel and where the lawyer possesses confidential client information adverse to the client witness that should be used during cross-examination of the client witness"; also holding that "[w]hether the mid-trial disclosure of the client/witness requires preclusion of the witness, a new trial, or some other consequences is a legal question for the court and outside the scope of this Section's authority"; explaining that "we cannot opine on how to resolve the trial dilemma. The suggestion that has been made to use a special counsel for cross examination of the client witness strikes us as problematic [explaining that "[o]n these facts, for example, we note that the Mother is entitled to have her attorney attack the testimony of the client witness in closing argument as well as during cross examination."] At the same time, we are not in a position to weigh, let alone decide, whether the witness is cumulative, what the consequences of mid-trial notice of the witness ought to be, whether her exclusion would be prejudicial, or the host of other possible legal issues presented." (emphasis added); "In conclusion, we would like to reemphasize that there is no dilemma under the Rules. If the current client is permitted to testify as an adverse witness in the circumstances presented, Law Firm A must withdraw." (emphasis added)).

**Sixth**, lawyers finding themselves in this awkward position might have no choice but to withdraw.

Some bars have quickly reached this conclusion.

- Virginia LEO 1407 (3/12/91) (analyzing a situation in which a law firm represented a doctor in two malpractice cases; explaining that the doctor later appeared as an expert witness for plaintiff in a case defended by another of

the firm's lawyers; further explaining that the doctor denied ever having been a defendant in a malpractice action, but the defense lawyer learned from a partner that the firm had earlier represented the doctor on two occasions; holding that this information was a "secret" (although it could be obtained from public records) because it was gained in a professional relationship; prohibiting the lawyer's continued representation of the client, because the lawyer could not effectively cross-examine the plaintiff's expert doctor (unless the doctor consented to disclosure of the confidential information).).

In 2007, a Philadelphia legal ethics opinion was not quite as blunt, but recognized this as the probable outcome.

- Philadelphia LEO 2007-11 (07/07) (declining to decide whether a law firm must be disqualified; explaining that the law firm was representing a plaintiff suing a medical professional who had previously been represented by one of the firm's lateral hires; noting that during the lateral hire's previous representation of the same medical professional, the lawyer concluded that the medical professional had provided incorrect testimony, and therefore had dismissed the medical professional's lawsuit with prejudice; "Significant concerns are however raised by the provisions of Rule 1.9c. The inquirer has confidential information about the defendant. First, that the defendant has lied under oath, not once but at least twice, the second time after he had been specifically directed to tell the truth. This could lead a reasonable attorney to conclude that the defendant might have a propensity to lie when giving sworn testimony. Second, the inquirer possesses at least some economic information about the defendant's earnings at the time of the first litigation. It is quite possible, depending on the outcome of the present matter[,] that there could be issues regarding the defendant's financial ability to pay an excess judgment. As such, the economic information gleaned from the first representation could in fact be material to the firm's representation of its present client."; "[E]ven assuming it can not [sic] be admitted at trial, there are a number of subtle, even unconscious ways in which awareness of this information could be used to the detriment of the inquirer's former client. The attorney handling the case, aware that the defendant has lied under oath in the past, might use a different form of cross examination knowing that the defendant is not truthful all the time. On the other hand, the lawyer might avoid certain issues in discovery that he normally might pursue because of the firm's obligation to protect the former client's confidentiality. If learned by a different attorney without the confidentiality constraint, it could be used in settlement negotiations on behalf of the current client, i.e.,] an attempt could be made to admit it, resulting in a greater willingness on the part of the defendant to settle the matter. Should the inquirer believe that absent its confidential nature, is [sic] constrained from even considering its use, and this impacts the representation of the firm's current client, posing a conflict under Rule 1.7a2. Because of confidentiality, the firm's present client can not [sic]

be told of the conflict, and thus the present client can not [sic] waive it based on informed consent."; "In conclusion, while the Committee is not prepared to conclude based on the limited facts as they are presently understood that the inquirer's firm must withdraw from the present matter, it is advising that the inquirer must go beyond simply positing that the firm could not and would not use the information. The inquirer must address whether the constraints imposed on him by his Rule 1.6 obligations to his former client potentially place his present firm at odds with its ethical obligations to its present client.").

The 2013 Ohio legal ethics opinion discussed above concluded that the lawyer would have to withdraw if the lawyer possessed protected client confidential information not generally known, which could be used against the witness.

- See Ohio LEO 2013-4 (10/11/13) (discussed above).

The Vermont legal ethics opinion mentioned above indicated that a lawyer would have to withdraw if unsuccessful in precluding the adversary from designating the lawyer's former client as a testifying expert.

- See Vermont LEO 2008-4 (2008) (discussed above).

### **Best Answer**

The best answer to this hypothetical is **(A) FILE A MOTION TO PRECLUDE THE OTHER SIDE'S RELIANCE ON THAT EXPERT (PROBABLY) OR (B) ARRANGE FOR "CONFLICTS COUNSEL" TO CROSS-EXAMINE THAT EXPERT AT HIS DEPOSITION AND AT TRIAL (PROBABLY).**

B 2/14, 12/14

## Information-Caused Conflicts Not Involving Direct Adversity to Current or Former Clients

### Hypothetical 18

You represent two national drugstore chains. This morning you met with the regional manager of one of your clients, who told you that she just arranged for the purchase of real estate in a fast-growing area of Houston. She said that her company planned to rush its development there, and open a new drugstore within six months.

You are now in the middle of a luncheon meeting with your other client's regional manager and some other company executives. You overhear the regional manager saying that his company is looking at investing \$50,000 in a study to determine whether that same area of Houston could support a drugstore. The regional manager says that the study would be a waste of money if another chain built a drugstore in that area in the near future -- but that he is not aware of any other company's plans to do that.

What do you do?

- (A) Remain silent.
- (B) Speak up, and tell the regional manager that it would be a waste of money for his company to undertake the study.
- (C) Something else.

### **(A) REMAIN SILENT**

### Analysis

Lawyers possessing information from one client can be put in an awkward position if another client would find that information useful.

Outside lawyers nearly always represent more than one client, and therefore must constantly maintain each client's confidentiality -- unless the ethics rules permit or require disclosure. On a daily basis, such lawyers may learn information from one client that another client would love to know. However, the rules nearly always require lawyers to maintain the confidentiality of that information. This might prejudice the client

who could use the information, but that fact is almost beside the point. If the information deserves protection under the applicable ethics rules, the lawyer may not disclose that information to another client -- even if the silence results in that other client's harm or a forfeited opportunity to benefit.

At the extreme, the lawyer's possession of such information might cause an insoluble conflict that requires the lawyer's withdrawal.

Under ABA Model Rule 1.7(a)(2), lawyers face a conflict if

there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

ABA Model Rule 1.7(a)(2) (emphasis added). This type of conflict can arise if the lawyer finds himself or herself incapable of providing neutral advice to a client without constantly second-guessing whether the lawyer would have given different advice absent information the lawyer possesses from another client.

A 2005 New York City legal ethics opinion focused on conflicts triggered by lawyers' acquisition of information from other clients and from non-clients.

The New York City Bar listed a number of factors that must guide this determination: (1) the materiality of the information the lawyer has learned during the representation; (2) whether the information is already generally known or would inevitably be discovered by any lawyer representing the other client -- including the importance of the lawyer possessing the information sooner rather than later; (3) whether the information learned in the earlier representation can easily be segregated from the file in the second matter; and (4) whether the lawyer can be

effectively screened from a colleague who can undertake the later representation of the other client.

In the course of representing clients, lawyers frequently come into possession of information that would be of use to other clients but that they cannot use for the latter clients' benefit. The possession of that information does not, without more, create a conflict of interest under the Code. The critical question is whether the representation of either client would be impaired. In particular, the lawyer has a conflict if the lawyer cannot avoid using the embargoed information in the representation of the second client or the possession of the embargoed information might reasonably affect the lawyer's independent professional judgment in the representation of that client. Whether that is the case will often depend on the materiality of the information to the second representation and the extent to which the information can be effectively segregated from the work on the second representation. Even if the lawyer has a conflict, it may be possible in certain circumstances for the clients to waive the conflict without revealing the information in question. If the lawyer must withdraw, the lawyer should not reveal the embargoed information.

New York City LEO 2005-02 (3/2005) (emphases added).

The legal ethics opinion rejected the concept that a lawyer's acquisition of client information always requires the lawyer's withdrawal from another representation where that information is material.

We are aware that there is language and reasoning in ethics opinions and some court cases that treat the mere possession of information that might be of use to one client, but that is protected as a confidence or secret, as creating a conflict requiring withdrawal. . . . [T]he implications of such an analysis are boundless, because the duty to use information for the benefit of a client is very broad. It makes little sense to disqualify a lawyer because he or she has information that might be useful to the second client, regardless of materiality or significance. A more sensible result, at least where the interests of the clients are not adverse, and one more faithful to the language of the Code, (1) recognizes that lawyers regularly have information that

they cannot use for the benefit of a client, and (2) focuses on the effect that possession of the information has on the representations in question.

Id. (emphasis added). Thus, the New York City legal ethics opinion takes a more optimistic view than some commentators on whether lawyers may continue representations in such circumstances.

Unfortunately, if a lawyer faces such a conflict, the lawyer often cannot continue the representation of the other client -- because the lawyer may not be able to disclose sufficient information to obtain that client's consent to the continued representation.

In such a situation, lawyers must sometimes withdraw without even explaining why they must withdraw. The New York City ethics opinion discusses that possibility.

[T]he Code does not contemplate an exception to the duty of confidentiality simply because the information may be highly relevant to another client. Rather, as we have said, the duty to use all available information for the benefit of the client is qualified by obligations of confidentiality to others. We conclude that where a lawyer is forced to withdraw from a representation because the lawyer cannot disclose or use material information of another client's, the lawyer is not at liberty to disclose the information. The lawyer should simply state that a conflict has arisen that requires withdrawal for professional reasons. As long as doing so does not effectively disclose the information, the lawyer may state that he or she has acquired information that raises a conflict that requires the lawyer to withdraw. Where identifying the client that 'created' the conflict is not tantamount to disclosing the information, that client may be revealed.

Id. (emphasis added).

Conflicts can arise in an almost unlimited number of situations. For instance, in 2013, Greenberg Taurig attempted (albeit unsuccessfully) to disqualify Epstein Becker from representing a client in a malpractice case against Greenberg -- arguing that

Epstein Becker improperly gained information it could later use in the malpractice case while acting as co-counsel with Greenberg in representing the client.

- Roberts v. Corwin, No. 115370/2009, 2013 NY Slip Op 51637(U), at 2, 3, 6 (N.Y. Sup. Ct. Oct. 3, 2013) (analyzing an alleged information-based conflict; declining to disqualify Epstein Becker, despite Greenberg Traurig's assertion; Epstein Becker acted as co-counsel with Greenberg Traurig in representing plaintiff Roberts, while simultaneously coordinating with Roberts to represent him in a malpractice case against Greenberg Traurig; "Greenberg Traurig contends that Epstein Becker misused its position as co-counsel 'to build a record against [Greenberg Traurig] to support a purported malpractice claim.' . . . In support, Greenberg Traurig cites Mr. Corwin's testimony that he 'disclosed to [Epstein Becker] and Cozier, without reservation of any kind, as I would to any of my own colleagues at [Greenberg Traurig], or to any other qualified lawyer selected by Roberts to be my co-counsel, all information that would be helpful to them in understanding the background of the case and, in particular, all aspects of the underlying arbitration.'" (internal citation omitted); "Significantly, Greenberg Traurig does not allege that Epstein Becker, through its position as co-counsel, gained any information, confidential or privileged, which it could not have obtained from Mr. Roberts himself."; "[A]lthough Mr. Roberts was Greenberg Traurig's client, he was free to disclose to Epstein Becker whatever communications he had with Mr. Corwin or whatever documents he received from Mr. Corwin, including strategy discussions and drafts."; "Epstein Becker's simultaneous representation of Mr. Roberts for purposes of both mitigating damages in the arbitration proceeding and preparing for a possible malpractice action raises ethical concerns. . . . However, this case does not involve the egregious conduct in obtaining confidential information through deceptive means, or an inherent conflict of interest, which has been held to require the severe remedy of disqualification."; "Epstein Becker further claims that a formal written litigation hold was not necessary as Mr. Roberts acted to preserve his documents and the attorneys at Epstein Becker were under an independent ethical obligation to maintain and preserve client files."; "Greenberg Traurig submits no authority that the litigation hold must always be written and that the form of the litigation hold may not vary with circumstances. Moreover, Greenberg Traurig makes no showing that an automatic email deletion protocol was in place at Epstein Becker or, as held above, that Mr. Roberts or Epstein Becker deleted any emails or otherwise destroyed any documents. Under these circumstances, a spoliation sanction is not appropriate.").

### **Best Answer**

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



## Conflicts Caused by Information from Non-Clients

### Hypothetical 19

You represent a company that is planning and will build a commuter rail line. During this representation, you have learned incriminating information about a subcontractor that your client recently terminated. You also have seen the still-secret map of the likeliest routes.

- (a) May you represent another contractor in an unrelated lawsuit against the subcontractor about whom you learned the incriminating information?

### MAYBE

- (b) May you represent a developer interested in acquiring parcels of land along the possible rail line routes?

### (B) NO (PROBABLY)

### Analysis

(a)-(b) Although it seems counterintuitive, lawyers' confidentiality duty can extend to information about non-clients and even about adversaries. The lawyers' inability to disclose or use such information might preclude other representations, even if they are not adverse to any client's interests.

### ABA Model Rules

Although it is not an easy fit, these lawyers' ethical dilemmas arise under the lesser-known type of ABA Model Rule 1.7 conflict of interest.

Every lawyer is familiar with the chief type of conflict of interest -- which exists if "the representation of one client will be directly adverse to another client." ABA Model Rule 1.7(a)(1). At the extreme, this type of direct conflict involves a representation that the ABA Model Rules flatly prohibit. Lawyers can never undertake a representation that

involves "the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal." ABA Model Rule 1.7(b)(3). Even if a representation does not violate that flat prohibition, adversity might nevertheless create a conflict of interest if a lawyer represents one client "directly adverse" to another client. For instance, a lawyer jointly representing two co-defendants in a lawsuit obviously cannot "point the finger" at one of the clients (without consent), even if such an argument does not amount to "the assertion of a claim."

Some folks describe this first variety of conflict as a "light switch" conflict, because a representation either meets this standard or it does not. This is not to say that it can be easy to analyze such conflicts. But a lawyer concluding that a representation will be "directly adverse to another client" must address the conflict.

The other type of conflict involves a much more subtle analysis. As the ABA Model Rules explain it, this type of conflict exists if

there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

ABA Model Rule 1.7(a)(2) (emphasis added).

This has been called a "rheostat" conflict. Unlike making a "yes" or "no" determination as required in analyzing the first type of conflict, a lawyer dealing with a "rheostat" conflict has a more difficult task. The lawyer must determine if some other duty, loyalty, or interest creates a "significant risk" of "materially" limiting the lawyer's representation of a client. This often involves a matter of degree rather than kind. For example, a lawyer with mixed feelings about abortion might feel awkward representing an abortion clinic, but would be able to adequately represent such a client. However, a

vehemently pro-life lawyer might well find her representation of such a client "materially limited" by her personal beliefs. Thus, this second type of conflict requires a far more subtle analysis than a "light switch" type of conflict arising from direct adversity to another client.

As with the first of type of conflict, a lawyer dealing with a "rheostat" conflict may represent a client only if: (1) the lawyer "reasonably believes" that she can "provide competent and diligent representation," (2) the representation does not violate the law, and (3) each client provide "informed consent." ABA Model Rule 1.7(b)(1), (4).

Although the ABA Model Rules do not deal with it, this type of "rheostat" conflict can arise if the lawyer obtains information about a non-client during the lawyer's representation of a client. Of course, even that information (about a non-client) can be within the definition of the client's protected "information."

And from a conflicts standpoint, lawyers might find themselves confronting a "rheostat" conflict even if they will not be adverse to a current or former client. Under ABA Model Rule 1.7(a)(2), such lawyers might find that there is a "significant risk" that their representation of a client will be "materially limited" by their responsibilities to "another client, a former client or a third person." This might occur if their disclosure or use of the information about a non-client might violate their client's contractual duties to such a non-client. For instance, a lawyer representing a bank might put the bank at risk by disclosing or using information about one of the bank's clients, which the lawyer obtained while representing the bank.

Unfortunately, the ABA Model Rules do not really address this subtle but potentially disabling type of conflict.

## Restatement

The Restatement deals more extensively with this issue. As the Restatement explains, the lawyer's disclosure or use of clients' information can put the client in jeopardy.

A lawyer might have obligations to persons who were not the lawyer's clients but about whom information was revealed to the lawyer under circumstances obligating the lawyer not to use or disclose the information. Those obligations arise under other law, particularly under the law of agency. For example, a lawyer might incur obligations of confidentiality as the subagent of a principal whom the lawyer's client serves as an agent,

Restatement (Third) of Law Governing Lawyers § 132 cmt. g(ii) (2000) (emphasis added). The Restatement provides several illustrations that illuminate the issue.

In the first illustration, a lawyer representing a hospital has learned that a patient in the hospital has been convicted of a drug offense. That patient is now a witness in an unrelated case in which the lawyer is representing another client. Somewhat surprisingly, the Restatement suggests that the lawyer may continue to represent the client in that other case if the client consents after the lawyer discloses the nature of the conflict and its effect on limiting the lawyer's cross-examination of the patient.

Lawyer has represented Hospital in several medical-malpractice cases. In the course of preparing to defend one such case, Lawyer reviewed the confidential medical file of Patient who was not a party in the action. From the file, Lawyer learned that Patient had been convicted of a narcotics offense in another jurisdiction. Patient is now a material witness for the defense in an unrelated case that Lawyer has filed on behalf of Plaintiff. Adequate representation of Plaintiff would require Lawyer to cross-examine Patient about the narcotics conviction in an effort to undermine Patient's credibility. Lawyer may not reveal information about Patient that Hospital has an obligation to keep confidential. That limitation in turn may preclude

effective representation of Plaintiff in the pending case. However if, without violating the obligation to Plaintiff, Lawyer can adequately reveal to Plaintiff the nature of the conflict of interest and the likely effect of restricted cross-examination, Lawyer may represent Plaintiff with Plaintiff's informed consent.

Restatement (Third) of Law Governing Lawyers § 132 cmt. g(ii), illus. 7 (2000)

(emphases added). This seems like an unrealistic remedy. How could such a lawyer adequately disclose the dilemma to the current client without disclosing protected information, or providing such obvious hints that the current client can easily surmise the protected information? In fact, the lawyer's effort to explain the conflict to the current client might make the protected information sound even more important than it really is.

The other illustration involves a lawyer's acquisition of confidential information about a company while representing an underwriter assisting the company in selling its bonds. The Restatement concludes that the lawyer cannot represent another client in a breach of contract action against the company, unless the information has become generally know.

Lawyer represents Underwriter in preparing to sell an issue of Company's bonds; Lawyer does not represent Company. Several questions concerning facts have arisen in drafting disclosure documents pertaining to the issue. Under applicable law, Underwriter must be satisfied that the facts are not material. Lawyer obtains confidential information from Company in the course of preparing Lawyer's opinion for Underwriter. Among the information learned is that Company might be liable to A for breach of contract. Unless the information has become generally known . . . , Lawyer may not represent A in a breach of contract action against Company because the information was learned from Company in confidence.

Restatement (Third) of Law Governing Lawyers § 132 cmt. g(ii), illus. 8 (2000)

(emphases added). This conclusion makes more sense than the Restatement's conclusion about the other scenario.

Although the ABA Model Rules presumably would impute an individual lawyer's disqualification under this standard to the lawyer's entire firm, the Restatement looks to agency law in finding such imputation inappropriate.

An important difference between general agency law and the law governing lawyers is that general agency law does not normally impute a restriction to other persons. Thus, when a lawyer's relationship to a nonclient is not that of lawyer-client but that, for example, of subagent-principal, imputation might not be required under the law governing subagents.

Restatement (Third) of Law Governing Lawyers § 132 cmt. g(ii) (2000) (emphasis added). In describing this situation, the Restatement indicates that perhaps another lawyer at the firm could represent the client suing the company.

In the circumstances described in Illustration 8, standards of agency law or other law might permit the underwriter to provide services to another customer in a subsequent transaction so long as the underwriter takes appropriate steps to screen its employees. A lawyer affiliated with the disqualified lawyer could represent the underwriter in the second transaction after appropriate screening of the disqualified lawyer.

Id.

### **New York City Legal Ethics Opinion**

A 2005 New York City legal ethics opinion analyzed conflicts triggered by lawyers' acquisition of information about non-clients.

The New York City Bar listed a number of factors that must guide this determination: (1) the materiality of the information the lawyer has learned during the

representation; (2) whether the information is already generally known or would inevitably be discovered by any lawyer representing the other client -- including the importance of the lawyer possessing the information sooner rather than later; and (3) whether the information learned in the earlier representation can easily be segregated from the file in the second matter; (4) whether the lawyer can be effectively screened from a colleague who can undertake the later representation of the other client.

In addition to focusing on information lawyers obtain from clients about other clients, the legal ethics opinion also addressed the implications of information lawyers obtain from clients about non-clients.

The first of the New York City legal ethics opinion's scenarios paralleled the Restatement illustration 8. The legal ethics opinion held out a slight hope that the lawyer could represent the other client in a transactional matter adverse to the company about which the lawyer acquired information about representing the underwriter.

- New York City LEO 2005-02 (3/2005) (analyzing, among other things, the following situation: "Scenario 1: A lawyer represents the underwriters in a securities issuance and in the course of due diligence learns confidential information about the issuer. The lawyer owes a duty to the lawyer's clients, the underwriters, arising out of the underwriters' duties to the issuer, to keep the information learned about the issuer in due diligence confidential. After the securities issuance is completed, a long-time client requests the lawyer's assistance in seeking to acquire or enter into a transaction with the issuer. May the lawyer undertake the representation of the acquirer?" (emphasis added); addressing the conflict implications: "In the first [scenario], the lawyer represented the underwriters in the first representation and is adverse to the issuer in the second. The lawyer is not adverse to his former clients, because at the time of the second representation, the underwriters (unless they are involved in the second matter as well) are indifferent to whether the acquirer or counterparty succeeds or not. But the lawyer has confidential information about the issuer that may be used against the issuer in representing the acquirer or counterparty. For example, the lawyer may have reviewed and kept copies of projections of financial results that would be useful to an

acquirer or counterparty in deciding what price to bid or offer. Or the lawyer may have learned very damaging information -- such as the prospect of indictment -- that caused the earlier securities issuance not to go forward. While the acquirer or counterparty might eventually learn that information in the course of due diligence in the second transaction, having it earlier in the sales process might be useful. That information cannot, however, be disclosed because of the underwriters' demand (derived from undertakings to the issuer and from the securities laws) that their lawyer not disclose due diligence information not otherwise disclosed in the prospectus." (footnote omitted) (emphasis added); also analyzing the materiality of the information; "Under either test, whether the possession of the information will create a conflict will depend on the totality of the circumstances. A critical factor is the materiality of the information to the second representation. The more material the information, the more likely that a lawyer cannot avoid using it or, at least, that the lawyer's professional judgment on behalf of the client may be affected by knowledge of it. One element of materiality is whether the information in question would be uncovered in the ordinary course of the other matter. If so, then the information would be material only if it was important to have the information earlier than it would have been obtained in the ordinary course. In Scenario[] 1 . . . , it may be that the information possessed by the lawyer from the prior due diligence and from the insurance company representation would inevitably be sought in conducting due diligence for the first transaction (either because there are standard questions that would uncover the information or because publicly available information about the target would signal the need to make such inquiry). In that case, unless when the information is known is important, the possession of the information would not likely affect the representation." (footnote omitted) (emphases added); "The existence of financial projections in due diligence files that were not focused on in the earlier matter and are not recalled is unlikely to have any effect on the lawyer's judgment as long as the lawyer does not look at the files and the files are effectively sealed." (footnote omitted)).

The second scenario involved a lawyer representing an insurer in analyzing one of its insured's claims for legal fees incurred during a regulatory investigation. Another client then asks the lawyer to represent it in forming a joint venture with the insured. Although acknowledging that the insurance company "may be indifferent to whether the business is transferred to the joint venture," the lawyer might not be able to obtain the necessary consent from the insurer client to represent the other client in forming the joint venture -- because that client's business plans might be confidential.



- New York City LEO 2005-02 (3/2005) (analyzing, among other things, the following situation: "Scenario 2: A law firm represents an insurer in determining whether a claim by Company A for legal fees incurred in connection with an ongoing regulatory investigation is covered by Company A's 'directors and officers' insurance policy. In that connection Company A supplies information about the investigation to the insurer's law firm under an understanding that the lawyers and the insurer will keep the information confidential. The law firm is then approached by regular Client B for assistance in forming a potential joint venture with Company A to which Company A will contribute the business being investigated by the regulators. May the law firm undertake the representation of Client B?"; analyzing the ethics implications of the lawyer's information; "[I]n the second scenario, the insurance company may acquire relatively detailed information about the insured that might be useful to the acquirer (e.g., the significance of the investigation, the insurance company's position on coverage). The insurance company may be indifferent to whether the business is transferred to the joint venture."; also analyzing the materiality element "Under either test, whether the possession of the information will create a conflict will depend on the totality of the circumstances. A critical factor is the materiality of the information to the second representation. The more material the information, the more likely that a lawyer cannot avoid using it or, at least, that the lawyer's professional judgment on behalf of the client may be affected by knowledge of it. One element of materiality is whether the information in question would be uncovered in the ordinary course of the other matter. If so, then the information would be material only if it was important to have the information earlier than it would have been obtained in the ordinary course. In Scenario[] . . . 2, it may be that the information possessed by the lawyer from the prior due diligence and from the insurance company representation would inevitably be sought in conducting due diligence for the first transaction (either because there are standard questions that would uncover the information or because publicly available information about the target would signal the need to make such inquiry). In that case, unless when the information is known is important, the possession of the information would not likely affect the representation." (footnote omitted); "[T]he ability to obtain consent may be hampered by the inability to disclose the information in question. In Scenario 2, for example, if the fact that the joint venture is being considered is itself confidential, the lawyer could not approach the insurance company for permission to use the information derived from the earlier representation." (emphasis added)).

The third scenario involved a materially different situation, in which the lawyer's knowledge would not be used against a non-client about which the lawyer has acquired information while representing a client. In that scenario, a lawyer representing a state

agency learns about the possible route of a new rail line. The New York City legal ethics opinion concluded that this lawyer was probably unable to undertake the representation of another client interested in purchasing land in the "general direction of the rail line."

- New York City LEO 2005-02 (3/2005) (analyzing, among other things, the following situation: "Scenario 3: A lawyer represents a state transportation agency in connection with planning a new rail line. To avoid land speculation, the agency insists that its deliberations about the route of the rail line be kept confidential. Another client asks the lawyer to assist it in acquiring one of several parcels of land in the general direction of the rail line. May the lawyer undertake the representation of the land purchaser?"; "In the third scenario, the lawyer is likely to know in advance of the general public the precise route of the rail line, information that would be very valuable if known to the land purchaser." (emphasis added); discussing the conflicts implications of a lawyer's possession of information in simultaneous representations; "Scenario 3 illustrates this problem. If the lawyer learns the precise routing of the rail route in advance of the public but at a time when it would be useful to the prospective land purchasing client, the lawyer could not pretend not to know that information in advising the client on which parcel to buy." (emphasis added); also analyzing the materiality element; "Under either test, whether the possession of the information will create a conflict will depend on the totality of the circumstances. A critical factor is the materiality of the information to the second representation. The more material the information, the more likely that a lawyer cannot avoid using it or, at least, that the lawyer's professional judgment on behalf of the client may be affected by knowledge of it. One element of materiality is whether the information in question would be uncovered in the ordinary course of the other matter. If so, then the information would be material only if it was important to have the information earlier than it would have been obtained in the ordinary course. . . . In Scenario 3 . . . , the value of the information about the rail routing is in its early possession, so the fact that the routing will eventually be public would not mitigate the conflict presented." (footnote omitted) (emphasis added); "A second factor is the ease with which the information can be segregated from the work on the second matter to ensure that the information is not used. Here a significant consideration is the specificity of the information and whether it is of a kind that the lawyer will likely recall. The rail routing in Scenario 3 . . . [is an] example[] of information that, once learned, cannot be pushed from the mind." (emphases added)).

This New York City legal ethics opinion presents one of the only analyses of this subtle issue. Its approach seems well ground in basic conflicts rules, which probably do not vary much from state to state.

### **Case Law**

In 2011, a Florida court dealt with this issue -- disqualifying a lawyer from representing a bank in an action against a borrower, because the lawyer was simultaneously representing the borrower's lawyer in a malpractice claim brought by the borrower.

- Frye v. Ironstone Bank, 69 So.3d 1046, 1050, 1052 (Fla. Dist. Ct. App. 2011) (disqualifying a lawyer from representing a bank in a lawsuit against a borrower who sought to enforce a loan guarantee, because the lawyer was simultaneously defending in a malpractice action the lawyer who had originally represented the borrower in defending against a bank's action; explaining that the lawyer simultaneously represented the bank and the malpractice defendant would learn confidences about the borrower from his malpractice defendant lawyer client that he could use on behalf of his bank client in the loan guarantee action; "Mr. Frye's argument for disqualification is based upon Henderson Franklin's receipt in the context of the Bank's action against Mr. Frye of privileged information from Mr. Frye's former counsel as a result of Henderson Franklin's simultaneous representation of the Bank and of Mr. Trupp and the Arnstein firm. The legal malpractice action concerns, in part, Mr. Trupp's representation of Mr. Frye in the same action in which Henderson Franklin is currently representing the Bank. The allegations of the malpractice complaint also concern Mr. Trupp's representation of Mr. Frye on estate and asset planning matters, during which Mr. Frye alleges that Mr. Trupp gained detailed knowledge of his financial circumstances. Such knowledge could be invaluable to the Bank in collecting a judgment against Mr. Frye."; "[B]ecause Mr. Frye has sued Mr. Trupp in connection with that representation, Mr. Trupp may lawfully reveal those privileged communications to the extent necessary for the defense of the malpractice action."; "In accordance with the applicable ethical rules, Mr. Frye's privileged attorney-client communications with Mr. Trupp may now be disclosed to his opponent's counsel in the Bank's action on the guaranty, Henderson Franklin. It follows that Henderson Franklin must be disqualified from representing the Bank in its action against Mr. Frye because of the unfair informational advantage Henderson Franklin has gained by virtue of its representation of

Mr. Trupp and the Arnstein firm in the defense of Mr. Frye's malpractice action.").

**Best Answer**

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

B 2/14, 12/14

## Disclosure to Law Firm Colleagues

### Hypothetical 20

Having just attended a remarkably instructive and entertaining ethics program on exceptions to lawyers' confidentiality duty, you returned to your office with a question that had never before crossed your mind.

Without a client's consent, may you disclose information about that client to law firm colleagues not working on the client's matters?

**(A) YES**

### Analysis

Although lawyers must comply with a remarkably strong and extensive confidentiality duty, every rule and bar opinion recognizes that in most situations lawyers may disclose confidences to their colleagues in the normal course of representing their clients.

The 1908 ABA Canons of Professional Ethics did not deal with the sort of impliedly authorized disclosure of client information that would normally occur in the ordinary course of a lawyer's work. In fact, it would have been surprising for those early ABA Canons to have extensively dealt with disclosure within law firms. In 1908, most lawyers presumably practiced in very small law firms or by themselves.

The 1969 ABA Model Code of Professional Responsibility took a common sense approach, prohibiting lawyers from revealing client confidences or secrets. ABA Model Code DR 4-101(B). The ABA Model Code defined those terms.

'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).

Although the black letter ABA Model Code did not recognize implied client authorization for lawyers to do their job, an Ethical Consideration acknowledges the obvious fact.

The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information when his client consents after full disclosure, when necessary to perform his professional employment, when permitted by a Disciplinary Rule, or when required by law. Unless the client otherwise directs, a lawyer may disclose the affairs of his client to partners or associates of his firm. It is a matter of common knowledge that the normal operation of a law office exposes confidential professional information to non-lawyer employees of the office, particularly secretaries and those having access to the files; and this obligates a lawyer to exercise care in selecting and training his employees so that the sanctity of all confidences and secrets of his clients may be preserved.

ABA Model Code of Professional Responsibility, EC 4-2 (emphasis added).

In fact, such intrafirm disclosure presumably might not have violated the ABA Model Code in any event -- although the attorney-client privilege might protect communications that lawyers share with their colleagues. After all, lawyers and nonlawyers within a firm have ethical, fiduciary, and perhaps other duties to prevent disclosure of such information outside the firm. In any event, either the black letter ABA Model Code provisions or the Ethical Consideration authorized intrafirm disclosure of protected client information absent some client direction to the contrary.

The 1983 ABA Model Rules contain a remarkably broad confidentiality duty.

A lawyer shall not reveal information relating to the representation of a client unless the client gives informed

consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

ABA Model Rule 1.6(a).

A comment explicitly mentions intrafirm sharing of protected client information.

Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

ABA Model Rule 1.6 cmt. [5] (emphasis added). A 2008 ABA legal ethics opinion confirmed this principle.

- ABA LEO 453 (10/17/08) (explaining that law firms' in house ethics counsel: may disclose and receive client confidences to and from other firm lawyers, because "unless a client has expressly instructed that information be confined to specific lawyers within the firm, the lawyer handling the matter does not violate the duty of confidentiality by consulting within the firm about the client's matter." (emphasis added)).

The Restatement takes the same position.

A lawyer generally has authority to use or disclose confidential client information to persons assisting the lawyer in representing the client. Those include other lawyers in the same firm and employees such as secretaries and paralegals.

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

In addition to the explicit reference to client direction that lawyers not share protected client information with their colleagues, law firms occasionally screen lawyers within the firm from each other under various ethics rules, or pursuant to contracts

(usually in return for a consent). Clients can sue law firms for violating such internal ethics screens.

- Spur Prods. Corp. v. Stoel Rives LLP, 122 P. 3d 300 (Idaho 2005) (allowing a former client to sue Stoel Rives law firm on a theory of negligence, based on the firm's apparently accidental disclosure of client confidences to a Stoel Rives partner analyzing ethics issues -- in violation of an internal ethics screen within the firm).

Not surprisingly, the various ethics rules and Restatement provision approving intrafirm disclosure rest on the exception permitting disclosure to help serve clients.

Theoretically, these provisions do not permit internal law firm communications for other purposes, such as general "office talk" about clients' matters, or (especially) office gossip. However, as a practical matter, lawyers do not face discipline unless the protected client information leaves the firm.

### **Best Answer**

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

B 12/14



## Mentoring

### Hypothetical 21

You just signed up for your local bar's mentor program, and you are anxious to work with new lawyers in your town. On your first mentoring "assignment," you meet with a new lawyer who says that she has several very thorny issues arising in her immigration practice. Before turning to any of the issues, she asks a few introductory questions.

- (a) Without her clients' consent, may the new lawyer disclose protected client information to you as part of your local bar's "mentoring" program?

**(B) NO (PROBABLY)**

- (b) Without her clients' consent, may the new lawyer present hypothetical situations to you as part of your local bar's "mentoring" program?

**MAYBE**

### Analysis

#### Introduction

(a)-(b) The truly professional and responsible lawyers have always "mentored" younger colleagues with whom they do not practice. While laudable, such activities raise confidentiality and other issues (primarily conflicts of interest, and perhaps malpractice).

To make matters more complicated, few if any lawyers involved in such communications obtain client consent before doing so. In fact, it would be nearly impossible to obtain client consent for the type of spontaneous and informal type of communications that such mentoring often involves. So the requesting newer lawyer and the responding more experienced lawyer generally must look elsewhere for some comfort in communicating as part of a mentoring process.

To at least a certain degree, these type of communications parallel lawyers' increasingly frequent participation in listservs and other types of general communications about legal issues. In fact, the requesting newer lawyer is essentially in the same position as lawyers who participate in such listservs. The requesting lawyer is attempting to serve his or her clients as part of a mentoring process. Of course, such inexperienced lawyers are more likely to cross the line into prohibited disclosure of protected client information than the type of more experienced lawyers who generally participate in listservs.

As with listserv participants, the requesting lawyers can rely on the impliedly authorized language of ABA Model Rule 1.6(a). That does not provide an exact match with what the newer lawyer is doing, but at least provides a colorable justification. As with listserv participants, newer lawyers probably try to avoid disclosing any protected client information -- although that can be difficult, given the tremendous breadth of the ABA Model Rules confidentiality in states adopting that broad confidentiality approach.

The more experienced mentoring lawyer faces a much greater dilemma. He or she is not participating in a mentoring communication to serve any client. Instead, those lawyers are serving the profession. They really cannot point to any ethics provision in justifying their disclosure of any protected client information during mentoring communications.

These lawyers can try to avoid any disclosure of protected client information. To the extent that they respond to the newer requesting lawyer's questions with general advice, that approach should work. To the extent that the mentoring lawyer gives examples of how he or she handled similar situations in the past, they are at risk.

On the conflicts of interest front, the mentoring lawyer faces the risk that an inexperienced requesting lawyer will blurt out some confidence that will taint the mentoring lawyer. The newer lawyer's breach of confidentiality duty would not provide a defense to some conflict of interest triggered by the mentoring lawyer's receipt of such information.

The ABA Model Code warned lawyers to be careful when reaching out to colleagues.

[I]n the absence of consent of his client after full disclosure, a lawyer should not associate another lawyer in the handling of a matter; nor should he, in the absence of consent, seek counsel from another lawyer if there is a reasonable possibility that the identity of the client or his confidences or secrets would be revealed to such lawyer. Both social amenities and professional duty should cause a lawyer to shun indiscreet conversations concerning his clients.

ABA Model Code of Professional Responsibility, EC 4-2 (emphasis added).

The ABA Model Rules do not explicitly deal with a "mentoring" scenario. A provision implicitly describes such communication as an exception to the general prohibition on disclosing protected client information.

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. [4] (emphasis added).

Of course, the ABA Model Rules do not permit even harmless disclosures of protected client information, so the use of hypotheticals provides the only real possibility for such mentoring communications.

In contrast, the Restatement permits disclosures of protected client information unless "there is a reasonable prospect that doing so will adversely affect the material interests 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).

The Restatement provides more blunt guidance in permitting the disclosure of such information if it does not create a "material risk."

When no material risk to a client is entailed, a lawyer may disclose information derived from representing clients for purposes of providing professional assistance to other lawyers, whether informally, as in educational conversations among lawyers, or more formally, as in continuing-legal-education lectures. Thus, a lawyer may confer with another lawyer (whether or not in the same firm) concerning an issue in which the disclosing lawyer has gained experience through representing a client in order to assist the other lawyer in representing that lawyer's own clients.

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

However, the Restatement warns lawyers to be careful.

Greater precautions may be necessary when use or disclosure is not directed toward representation of the client . . . or facilitating the lawyer's law practice . . . , for example when information is provided to a lawyer outside the firm to assist that lawyer's own representations. A lawyer must not engage in casual or frivolous conversation about a client's matters that creates an unreasonable risk of harm to the interests of the client.

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

Because everyone knows that many lawyers engage in such beneficial communication, one might expect the ABA Model Rules and the Restatement would be clearer about the ground rules.

The ABA Model Rules' inherent permission to engage in such communications as long as they involve "hypotheticals" makes sense. In fact, such an approach is really the only way that the ABA Model Rules could reconcile this common practice and the Model Rules' overbroad definition of protected client "information." As usual, the Restatement approach makes more sense -- focusing on any real-life risk to the client if a lawyer discloses client-related information.

Both the requesting and the mentoring lawyer can assess the risks by examining the listserv ethics opinions. In 1998, the ABA issued an extensive legal ethics opinion focusing primarily on the listserv setting, but equally applicable in the mentoring setting. ABA LEO 411 (8/30/98).<sup>1</sup>

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<sup>1</sup> ABA LEO 411 (8/30/98) (addressing lawyer's consultation with another lawyer outside the firm and not already involved as co-counsel, when there is "no intent to engage the consulted lawyer's services"; "The decision to seek another lawyer's advice may be precipitated by an atypical fact pattern, a knotty problem, a novel issue, or a matter that requires specialized knowledge. A lawyer who practices alone, or who has no colleague in or associated with his firm with the necessary competence will, and indeed often must, seek assistance from a lawyer outside the firm. Even the most experienced lawyers sometimes will find it useful to consult others who practice in the same area to get the benefit of their expertise on a difficult or unusual problem."; explaining that such communications involve a spectrum from a question and answer CLE program to "detailed discussions to obtain substantial assistance with the analysis or tactics of a matter"; finding that the disclosing lawyer may rely on the implied authorization of comment 7 in undertaking such communications; "Comment [7] explains: 'A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority.' We interpret Rule 1.6(a), as illuminated by Comment [7], to allow disclosure of client information to lawyers outside the firm when the consulting lawyer reasonably believes the disclosure will further the representation by obtaining the consulted lawyer's experience or expertise for the benefit of the consulting lawyer's client. However, the consulting lawyer's implied authority to disclose client information in consultation is limited, as our further discussion reflects." (footnote omitted) (emphasis added); concluding that "[a] consultation that is general in nature and does not involve disclosure of client information does not implicate Rule 1.6 and does not require client consent. For instance, a lawyer representing a client accused of tax fraud might consult a colleague about relevant legal authority without disclosing any information relating to the specific representation. Similarly, a lawyer might consult a colleague about a particular judge's views on

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an issue. Neither consultation requires the disclosure of client information." (emphasis added); acknowledging that presenting a hypothetical to consulted lawyer normally does not violate Rule 1.6 as long as there is "no disclosure of information identifiable to a real client or real situation"; warning that "[i]f a lawyer reasonably can foresee at the time he seeks a consultation that even the hypothetical discussion is likely to reveal information that would prejudice the client or that the client would not want disclosed, then he must obtain client consent for the consultation." (emphasis added); noting that the disclosing lawyer may obtain the client's informed consent to any disclosure; advising the disclosing lawyer to avoid such communications with a consulted lawyer who may represent the adverse party, and suggesting that the disclosing lawyer "should consider requesting an agreement from the consulted lawyer to maintain the confidentiality of information disclosed, as well as an agreement that the consulted lawyer will not engage in adverse representations." (emphasis added); concluding that the consulted lawyer generally does not assume any duty of confidentiality, but noting possible exceptions to the general rule; "A consulting lawyer may request and obtain the consulted lawyer's express agreement to keep confidential the information disclosed in the consultation. There also may be situations in which an agreement to preserve confidentiality can or should be inferred from the circumstances of the consultation. If the consulting lawyer conditions the consultation on the consulted lawyer's maintaining confidentiality, the consulted lawyer's agreement should be inferred if she goes forward even in the absence of an expression of agreement. Similarly, the information imparted may be of such a nature that a reasonable lawyer would know that confidentiality is assumed and expected. . . . For instance, assume a lawyer is consulted anonymously about a tax issue; she discusses the matter only hypothetically and makes no promise to maintain the confidentiality of the information. Later, the consulted lawyer meets with a new client about a divorce and in the course of the first meeting realizes that the tax issue consultation was on behalf of the new client's spouse. The consulted lawyer has no duty of confidentiality under Rule 1.6 or a conflict of interest under Rule 1.7 in representing her new client merely because she has learned, after the consultation, the identity of the consulting lawyer's client. This is true regardless of how obvious it seems after the fact that the consulting lawyer should have insisted on a confidentiality agreement if he had intentionally disclosed the information or anticipated it could be ascertained from the 'hypothetical' facts." (emphasis added); also warning the consulted lawyer to avoid giving any advice adverse to one of that lawyer's clients; "The need for caution is illustrated by the following example. A lawyer skilled in real estate matters is consulted for ideas to help the consulting lawyer's tenant client void a burdensome lease. No information about the identities of the parties is exchanged, nor does the consulting lawyer reveal any confidential information about his client. Based on the consulted lawyer's ideas, as implemented by the consulting lawyer, the tenant repudiates the lease and abandons the leased premises. The consulted lawyer subsequently learns that the landlord is a long-time client of the firm who wants the firm to pursue a breach of lease action against the former tenant. Because the consulted lawyer did not know the identities of the consulting lawyer's client or the landlord, she has, albeit unwittingly, helped the consulting lawyer's client engage in conduct adverse to the interest of her own client in a way that Rule 1.7(a) would have prevented her from doing if the tenant had sought her advice directly as a prospective client. . . . The consulted lawyer who failed to clear conflicts may find herself in the intractable position of having given advice to and received information from both parties to a dispute. When a lawyer learns that this has occurred, and assuming no agreement was made to keep the consultation confidential, Rule 1.4 requires the consulted lawyer to inform her client of the consultation and the possible consequences of it." (footnote omitted); explaining that the consulted lawyer could clear conflicts after learning the identity of the consulting lawyer's client, or ask the consulting lawyer for a conflict waiver; also noting the logistical issues; "As a practical matter, the consulted lawyer who undertakes to maintain confidentiality in a consultation will have to include the name of the consulting lawyer's client in her own client database in order to avoid inadvertently undertaking an adverse representation that implicates Rule 1.7(b)." (emphasis added); concluding with a list of protective measure; "1) The consultation should be anonymous or hypothetical without reference to a real client or a real situation. 2) If actual client information must be revealed to make the consultation effective, it should be limited to that which is essential to allow the consulted lawyer to answer the question. Disclosures that might constitute a waiver of attorney-client privilege, or which otherwise might prejudice the interests of the client must not be revealed without consent. The consulting lawyer should advise the client about the potential risks and consequences, including waiver of the attorney-client privilege, that might result from

Some states' ethics rules explicitly deal with this "mentoring" scenario.

- Virginia Rule 1.6 cmt. [5a] ("Lawyers frequently need to consult with colleagues or other attorneys in order to competently represent their clients' interests. An overly strict reading of the duty to protect client information would render it difficult for lawyers to consult with each other, which is an important means of continuing professional education and development. A lawyer should exercise great care in discussing a client's case with another attorney from whom advice is sought. Among other things, the lawyer should consider whether the communication risks a waiver of the attorney-client privilege or other applicable protections. The lawyer should endeavor when possible to discuss a case in strictly hypothetical or abstract terms. In addition, prior to seeking advice from another attorney, the attorney should take reasonable steps to determine whether the attorney from whom advice is sought has a conflict. The attorney from whom advice is sought must be careful to protect the confidentiality of the information given by the attorney seeking advice and must not use such information for the advantage of the lawyer or a third party.").

Other states have dealt with the mentoring situation in legal ethics opinions.

- Illinois LEO 12-16 (5/2012) ("Formal mentoring programs create an opportunity for a new or recently licensed lawyer to receive professional guidance and practical knowledge from a more experienced lawyer. However, both the new lawyer and the mentor must take care to protect client confidentiality and the attorney-client privilege and take care to avoid creating a conflict of interest with existing clients."; "Thus, an inquiry by the new lawyer that is general or abstract in nature and that does not involve the disclosure of information relating to the representation of the client does not violate Rule 1.6. For instance, a general question about discovery procedures in personal injury matters probably would not violate client confidentiality. Similarly, a

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the consultation. 3) The consulting lawyer should not consult with someone he knows has represented the opposing party in the past without first ascertaining that the matters are not substantially related and that the opposing party is represented by someone else in this matter. Similarly, a lawyer should exercise caution when consulting a lawyer who typically represents clients on the other side of the issue. 4) The consulted lawyer should ask at the outset if the consulting lawyer knows whether the consulted lawyer or her firm represents or has ever represented any person who might be involved in the matter. In some circumstances, the consulted lawyer should ask the identity of the party adverse to the consulting lawyer's client. 5) At the outset, the consulted lawyer should inquire whether any information should be considered confidential and, if so, should obtain sufficient information regarding the consulting lawyer's client and the matter to determine whether she has a conflict of interest. 6) The consulted lawyer might ask for a waiver by the consulting lawyer's client of any duty of confidentiality or conflict of interest relating to the consultation, allowing for the full use of information gained in the consultation for the benefit of the consulted lawyer's client. 7) The consulted lawyer might seek advance agreement with the consulting lawyer that, in case of a conflict of interest involving the matter in consultation or a related matter, the consulted lawyer's firm will not be disqualified if the consulted lawyer 'screens' herself from any participation in the adverse matter.").

question posed as a hypothetical may not generally violate Rule 1.6, as long as there is no risk from the question or the discussion that the identity of the client could be determined." (emphasis added); "If the mentor can determine the identity of the client or if the inquiry otherwise risks disclosure of information relating to the representation that could harm the client, then the new lawyer must consult with the client pursuant to Rule 1.4 and obtain the client's informed consent prior to the consultation with the mentor."; "A new lawyer should also take steps to avoid a mentoring relationship with another lawyer who is or is likely to be counsel for an adverse party in any of the new lawyer's client matters. Similarly, the mentor must take reasonable steps to avoid creating any conflicts of interest with existing or former clients of the mentor or of the mentor's law firm by virtue of the creation of the mentoring relationship."; "Finally, the consulting lawyer should not view the consultation as a substitution for the lawyer's legal research and judgment. As set forth in Comment 5 to Rule 1.1, competent handling of a client's matter 'includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners.'"; "Lawyer A may discuss general information relating to discovery procedures with his or her mentor, Lawyer B. However, Lawyer A should take caution not to reveal any information relating to the representation of a particular client with Lawyer B. Moreover, both Lawyer A and Lawyer B should avoid the creation of a conflict of interest with any existing or former clients by virtue of the creation of the mentoring relationship.").

One state recommended that lawyers communicating in such a scenario create an "of counsel" relationship.

- Iowa LEO 13-04 (8/27/13) (encouraging mentoring arrangements, and recommending "of-counsel" relationships as the best vehicle; "Recognizing the need for training, the Iowa State Bar Association and other state bars have adopted mentorship programs and have encouraged members of the bar to enter into mentorship relationships with newly admitted lawyers."; "However a significant problem does occur when the mentoring relationship occurs outside of the parameters of a law firm. . . . [T]he relationship may exist between a mentor-mentee who are not in the same law firm. Mentoring external to one's law firm directly impacts Iowa R. Prof'l Conduct 32:16. Comment [5], prohibiting the disclosure of client confidential information without the express consent of the client."; "Iowa lawyers are encouraged to form mentorship relationships. Both the profession and the administration of justice benefit from a legal profession that is well formed and trained. However in doing so lawyers should remember that their duty to train the profession is secondary to their duty to the client. Using a formal, albeit time limited, of-counsel relationship to facilitate the mentorship relationship provides the ability to discuss real life situations as needed during the period



of the relationship, while maintaining the degree of confidentiality required by Iowa Rules of Prof'l Conduct Iowa R. Prof'l Conduct 32:1.6.").

This sounds like an unrealistic approach. Such "of counsel" relationships normally require the related lawyers to treat all of their clients as both lawyer's clients for conflicts purposes. That impact presumably would discourage any lawyer from taking such a formal step, and therefore deter any worthwhile mentoring.

As in the listserv context, both the newer requesting lawyer and the mentoring lawyer should try to avoid even arguable disclosure of protected client information. This might be difficult in states following the overbroad definition of such information found in the ABA Model Rules. And because newer lawyers might not appreciate the breadth of the confidentiality duty, a mentoring lawyer's first advice might be to warn the requesting lawyer to be very careful when posing any questions or presenting any issues to the mentoring lawyer.

It makes the most sense to take a practical approach -- acknowledging that clients benefit when lawyers exchange ideas, but warning lawyers not to disclose protected information if that would harm the clients whom the lawyers intend to help.

### **Best Answer**

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

B 12/14

## Selling a Law Practice

### Hypothetical 22

You have practiced law by yourself for decades, and have seen many changes in the profession. One of the most welcome changes involves your state's adoption of an ethics rule allowing lawyers to sell their practice -- which traditionally was unethical. However, some old habits remain, and you wonder how you can sell your law practice without violating one of the profession's core duties.

Without each client's consent, may you disclose protected client information to prospective purchasers of your law practice?

**(A) YES**

### Analysis

Ironically, the ABA Model Code's ethical consideration emphasizing lawyers' continuing confidentiality duty explicitly warned lawyers not to attempt to sell their law practice -- because it would violate that duty.

The obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment. Thus a lawyer should not attempt to sell a law practice as a going business because, among other reasons, to do so would involve the disclosure of confidences and secrets. 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 EC 4-6 (emphasis added).

In 1990, the ABA Model Rules adopted a provision allowing lawyers to sell their practices.

ABA Model Rule 1.17 allows lawyers wishing to sell their practice to

give[ ] written notice to each of the seller's clients regarding: (1) the proposed sale; (2) the client's right to retain other counsel or to take possession of the file; and (3) the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.

ABA Model Rule 1.17(c) (emphasis added). Thus, ABA Model Rule 1.17 essentially adopts an "opt-out" process, under which a client's silence will result in transfer of the client's files (including any protected client information) to the purchasing lawyer.

Another provision addresses clients who cannot be notified -- presumably including situations in which the selling lawyer's notification is returned to the lawyer without being delivered.

If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.

ABA Model Rule 1.17(c)(3) (emphasis added).

Of course, none of these logistical provisions address the sort of earlier discussion that necessarily takes place between the selling lawyer and possible purchasers. Those conversations would always have disclosed at least some protected client information, but would not have been covered by any explicit authorization for such disclosure.

In 2010, the Pennsylvania Bar noted this gap in the ethics rule permitting lawyers to sell their practice.

- Pennsylvania LEO 2010-100 (2010) (analyzing the process under which a lawyer sells a law practice; "Comment [4] to Rule 1.17(c) interprets the text of the rule to require that the 1.17(c) information be provided to each of seller's clients in writing before the selling lawyer may disclose client specific information to the potential purchasing lawyer. Comment [4] states that 'the Rule provides that before such information can be disclosed by the seller to the purchaser, the client must be given [1.17(c) information].'; "However, the text of Rule 1.17 does not itself require that the 1.17(c) information be furnished 'before' the exchange of information which will occur in the negotiations for the sale of a law practice." (emphasis added); "If informed consent, or even mere notice to clients, were required prior to furnishing information to a prospective purchaser, that would likely severely harm the selling lawyer. Once a notice is sent advising that client information is being sent to the prospective purchaser, and thus that the selling lawyer is leaving the practice of law, many clients may seek new counsel. This is a particular danger because the selling lawyer cannot be certain that the 'sale' will go forward, and thus is not able to identify counsel on whom the client may, if he wishes, rely. The clients of the selling lawyer, faced with such uncertainty, might well begin to leave, to the selling lawyer's detriment. The Rules suggest that the Court did not intend to impose such a burden on a lawyer who wishes to leave the practice of law and sell his practice. The Pennsylvania Ethics Rules have created the exception of 1.6(c)(6) only in the circumstances of sale of a practice -- but not in the circumstance of a lateral transfer or law firm merger. There is nothing in the Supreme Court Rules which suggests that the Court intended to impose such a burden on a lawyer who wishes to leave the practice of law and sell his practice." (emphases added); "Suppose for example that the selling lawyer sends a notice to his clients that prospective Purchaser A is receiving information about the seller's clients. Suppose then that A declines to purchase the practice perhaps because they cannot agree on price. The selling lawyer's client base has been notified that the selling lawyer is leaving the practice of law, but has no indication that any other person will be responsible for their case. While the selling lawyer searches for a second prospective purchaser, his client base would likely deteriorate further.").

The ABA finally dealt with an analogous situation in adopting a Rule 1.6 provision explicitly allowing limited disclosure of protected client information in connection with lawyers moving to another firm.

After the ABA adopted that rule addressing lateral hires, ABA Model Rule 1.17 could safely point to that provision.

Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Model Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. See Rule 1.6(b)(7). Providing the purchaser access to detailed information relating to the representation, such as the client's file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the identity of the purchaser, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the sale is presumed.

ABA Model Rule 1.17 cmt. [7] (emphasis added).

### **Best Answer**

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

B 12/14

## Lawyers Obtaining Advice about Their Own Conduct

### Hypothetical 23

You were rattled this morning when one of your clients suggested that you had acted unethically in disclosing its confidences (without its consent) to a document preparation service headquartered in Germany. You want to make sure that you did not violate any applicable ethics rules. Unfortunately, you realize that you need to go outside your firm for the kind of specific ethics advice you think you need, but the last thing you want to do is compound any possible confidentiality breach.

Without your client's consent, may you seek the advice of an outside lawyer on the ethical propriety of your actions?

**(A) YES**

### Analysis

In some situations, lawyers want to seek advice about their own conduct. Unless the lawyer seeking such advice can obtain sufficient guidance through communications limited to a hypothetical situation, lawyers normally must disclose protected client information to the consulted lawyer.

The 1908 ABA Canons of Professional Ethics did not contain a provision dealing with this situation.

The 1969 ABA Model Code of Professional Responsibility contained a very general catch-all exception.

The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information when his client consents after full disclosure, when necessary to perform his professional employment, when permitted by a Disciplinary Rule, or when required by law.

ABA Model Code EC 4-2 (emphasis added).

The 1983 ABA Model Rules of Professional Conduct did not deal with this issue. However, in 2002 the ABA adopted an explicit exception to the general confidentiality duty, permitting the disclosure of protected client information in such a scenario.

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to secure legal advice about the lawyer's compliance with these Rules.

ABA Model Rule 1.6(b)(4) (emphasis added). A comment adopted at the same time in 2002 (but since renumbered) provides further guidance.

A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

ABA Model Rule 1.6 cmt. [9] (emphases added).

Interestingly, this exception does not authorize disclosure of protected client information as part of a lawyer's request for advice about compliance with other law. However, the requesting lawyer generally should be able to pose just about any question about his or her conduct as a request for ethics advice.

At first blush, one might think that the ethics rules did not need to include such an explicit provision, because lawyers requiring such advice might rely on the more general exception allowing disclosures that are "impliedly authorized in order to carry out the representation." ABA Model Rule 1.6(a). However, as a practical matter lawyers seeking advice about their own conduct frequently focus on ways in which the lawyers' own interests diverge from those of the clients. Thus, in most situations, lawyers would

not be seeking advice from an outside lawyer "in order to carry out the representation"  
of a client.

**Best Answer**

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

B 12/14



## Defending Against Clients' Attacks

### Hypothetical 24

One of your former clients unexpectedly sued your firm for malpractice, claiming that it mishandled a real estate transaction. Your firm's outside defense lawyer needs your input into the firm's response, because you led your firm's team on the real estate transaction. When you see the proposed response, you worry about some of the protected client information your firm's outside defense lawyer has included.

Without your former client's consent, may you disclose protected client information in your law firm's answer to the former client's malpractice claim?

### (A) YES

### Analysis

Basic fairness principles should allow lawyers to defend themselves from a client's attacks, even if that would require disclosing some protected client information.

### ABA Canons, Code and Rules

The 1937 ABA Canons of Professional Ethics acknowledged this common sense approach.

If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation.

ABA Canons of Professional Ethics, Canon 37, amended Sept. 30, 1937.

In 1940, an ABA legal ethic opinion acknowledged this self-defense exception -- applicable to clients' (but not nonclients') accusations against lawyers.

- ABA LEO 202 (5/25/40) (analyzing the ethics implications of a trust company's lawyer who learned that a manager hired by trust beneficiaries to oversee property transactions and pay the proceeds to the trust company had embezzled money -- creating a liability for the trust company to the beneficiaries; explaining that a trust company officer requested the lawyer to draft a contract under which the embezzling manager will purchase the beneficial interest in the trust -- which the lawyer advises will be proper only if

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

The 1969 ABA Model Code of Professional Responsibility similarly indicated that

A lawyer may reveal . . . confidences or secrets necessary to establish or collect his fee or defend himself or his employees or associates against an accusation of wrongful conduct.

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

The 1983 ABA Model Rules provide a somewhat narrower provision permitting the disclosure of protected client information under this self-defense principle.

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

ABA Model Rule 1.6(b)(5) (emphasis added).

A comment provides further guidance.

Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

ABA Model Rule 1.6 cmt. [10].

Not surprisingly, the ABA Model Rules permit such disclosure in this setting only to the extent reasonably necessary.

Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

ABA Model Rule 1.6 cmt. [16].

The current ABA Model Rule self-defense exception thus covers three separate but normally related situations.

First, lawyers may disclose protected client information "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client." ABA Model Rule 1.6(b)(5). This first scenario thus requires a dispute between the lawyer and the client. The phrase "claim or defense" sounds like this part of the Rule applies only in official proceedings. The term "controversy" clearly takes a broader approach.

Second, lawyers may disclose protected client information "to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved." Id. This scenario apparently involves something more formal than a "controversy." The phrase "criminal charge or civil claim" should be fairly easy to define, and would seem to require some official action in a judicial setting. This

scenario must also involve lawyers' "conduct in which the client was involved." This is a strange phrase, which seems to limit the scope of this self-defense principle. It is also difficult to know what the word "involved" means here. That phrase seems to require more direct client involvement than the phrase "conduct involving the client," or similar formulations. Instead, it seems to require some direct client action.

Third, lawyers may disclose protected client information "to respond to allegations in any proceeding concerning the lawyer's representation of the client." Id. As with the second scenario, this Rule seems to apply only if there is a "proceeding" -- although it might encompass non-tribunal "proceedings" such as disciplinary proceedings against the lawyer, disqualification motions, etc. This scenario also seems to involve less direct client involvement than the previous scenario. Here the allegations must concern "the lawyer's representation of the client" -- not "conduct in which the client was involved."

Despite the black letter language of the second and third scenarios (which on their face require criminal charges, civil claims or a "proceeding"), the pertinent comment seems more subtle. The first portion of that comment seems to cover all three of the scenarios described in the black letter rule.

Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together.

ABA Model Rule 1.6 cmt. [10].

However, the second portion of the comment inexplicably seems limited to certain types of allegations against the lawyer -- without explaining whether the significant discussion of lawyers' self-defense timing applies just to that subset of situations, or to all three of the black letter rule scenarios.

Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

ABA Model Rules 1.6 cmt. [10]. Thus, it is unclear when a lawyer may freely rely on the self-defense exception in a scenario that does not involve "an action or proceeding that charges . . . complicity" with the client. As explained above, the first of the three Rule 1.6 black letter scenarios does not involve an "action or proceeding" -- it focuses on a "controversy" between lawyer and client.

### **Restatement**

The Restatement takes the same approach.

A lawyer may use or disclose confidential client information when and to the extent that the lawyer reasonably believes necessary to defend the lawyer or the lawyer's associate or agent against a charge or threatened charge by any person that the lawyer or such associate or agent acted wrongfully in the course of representing a client.

Restatement (Third) of Law Governing Lawyers § 64 (2000). A lengthy comment explains the breadth of the self-defense exception.

American law has long recognized the right of a lawyer to employ confidential client information in self-defense. A similar exception is found in general agency law. . . . The general definition of confidential client information . . . is

broad, and the prohibition against adverse use or disclosure . . . is rigorous. Charges against lawyers will often involve circumstances of client-lawyer relationships that can be proved only by using confidential information. Thus, in the absence of the exception stated in the Section, lawyers accused of wrongdoing would be left defenseless against false charges in a way unlike that confronting any other occupational group.

Two additional considerations often justify a lawyer's use of confidential client information in self-defense. First, when a client charges a lawyer with wrongdoing in the course of a representation, the client thereby waives the attorney-client privilege by putting the lawyer's services into issue . . . . Second, some charges against a lawyer brought by nonclients involve a course of conduct in which the lawyer's client is implicated in crime or fraud. In such situations, the crime-fraud exception to the attorney-client privilege . . . may independently permit the lawyer to defend based on otherwise confidential client information.

Restatement (Third) of Law Governing Lawyers § 64 cmt. b (2000) (emphasis added).

Like the ABA Model Rule 1.6 cmt. [10], the Restatement indicates that lawyers may start defending themselves before the initiation of some formal proceeding.

A lawyer may act in self-defense under this Section only to defend against charges that imminently threaten the lawyer or the lawyer's associate or agent with serious consequences, including criminal charges, claims of legal malpractice, and other civil actions such as suits to recover overpayment of fees, complaints in disciplinary proceedings, and the threat of disqualification . . . . Imminent threat arises not only upon filing of such charges but also upon the manifestation of intent to initiate such proceedings by persons in an apparent position to do so, such as a prosecutor or an aggrieved potential litigant.

Restatement (Third) of Law Governing Lawyers § 64 cmt. c (2000) (emphasis added).

A comment explains that the same Rule applies to lawyers defending their colleagues.

This Section extends to charges against an associate or agent of a lawyer. Thus a lawyer may defend against charges of vicarious responsibility for the charged wrong, failure to exercise proper supervision of the person who allegedly perpetrated the wrong, or culpability on some other basis. The lawyer also may provide information in an effort to exonerate the associate or agent from charges against that person.

Restatement (Third) of Law Governing Lawyers § 64 cmt. d (2000).

The reporter's note mentions the ABA Model Rules' failure to explicitly include lawyers' colleagues in the basic self-defense rule, but charitably explains that the ABA Model Rules imply such a disclosure right.

The reach of the exception to charges involving persons for whose conduct the lawyer is responsible is explicitly mentioned in DR 4-101(C)(4) of the 1969 Code, quoted in the Reporter's Note to Comment b. It is implied by the language in ABA Model Rules of Professional Conduct, Rule 1.6(b)(2) (1983), which refers, for example, to 'a controversy between the lawyer and the client' without limitation, which is open to the interpretation that the lawyer's responsibility on a respondeat superior basis comes within the exception. See the language quoted in the Reporter's Note to Comment b.

Restatement (Third) of Law Governing Lawyers § 64 reporter's note cmt. d (2000).

Another comment describes the relationship between this ethics principle and attorney-client privilege waiver rules.

A client who files a charge of wrongdoing against a lawyer thereby waives the attorney-client privilege with respect to information relevant to the client's claim . . . . This Section in effect recognizes a counterpart waiver for confidential client information . . . , including information not subject to the privilege. It also permits the accused lawyer to respond in ways other than defensive testimony, for example, by responding to a letter of grievance to a lawyer-disciplinary agency or discussing the charge with a disciplinary investigator . . . . A lawyer may decline to reveal confidential client information except in response to a formal client charge of wrongdoing.



Restatement (Third) of Law Governing Lawyers § 64 cmt. f (2000).

As in other similar settings, the Restatement warns lawyers to disclose only what is reasonably necessary to defend themselves or their colleagues.

Use or disclosure of confidential client information under this Section is warranted only if and to the extent that the disclosing lawyer reasonably believes it necessary. The concept of necessity precludes disclosure in responding to casual charges, such as comments not likely to be taken seriously by others. The disclosure is warranted only when it constitutes a proportionate and restrained response to the charges. The lawyer must reasonably believe that options short of use or disclosure have been exhausted or will be unavailing or that invoking them would substantially prejudice the lawyer's position in the controversy.

The lawyer may divulge confidential client information only to those persons with whom the lawyer must deal in order to obtain exoneration or mitigation of the charges. When feasible, the lawyer must also invoke protective orders, submissions under seal, and similar procedures to limit the extent to which the information is disseminated. A lawyer may not invoke or threaten to invoke the exception without a reasonable basis, nor for an extraneous purpose such as inducing a client to forgo a disciplinary complaint or a complaint for damages . . . . When a client has made a public charge of wrongdoing, a lawyer is warranted in making a proportionate and restrained public response.

Prior to making disclosure, a lawyer must if feasible inform the affected client that the lawyer contemplates doing so and call upon the client to authorize the disclosure or take other effective action to meet the charge.

Restatement (Third) of Law Governing Lawyers § 64 cmt. e (2000).

The Restatement applies the same principle to lawyers defending themselves from disqualification motions.

A client or former client may challenge . . . a lawyer's representation of another client or other activities on the ground of conflict of interest . . . . The rationale for permitting disclosure under this Section . . . applies as well

to a such a charge. Adequate defense of such a charge may require use of otherwise confidential client information, and this Section permits the lawyer to do so. A lawyer so responding, . . . , must make only proportionate and restrained disclosure. For example, in camera procedures or sealing a record may be appropriate.

Restatement (Third) of Law Governing Lawyers § 64 cmt. h (2000) (emphasis added).

The next Restatement section follows the same basic principle.

Use or disclosure of confidential client information is permitted only to the extent that the lawyer reasonably believes necessary. The limitations on use or disclosure for purposes of self-defense also apply under this Section . . . . For example, use or disclosure of information that is not relevant to the dispute is unwarranted.

Restatement (Third) of Law Governing Lawyers § 65 cmt. d (2000).

### **State Ethics Rules and Legal Ethics Opinions**

Various state rules, ethics opinions, and bar groups have assessed lawyers' self-defense justifications for disclosing protected client information. Predictably, the key issue is whether lawyers must wait for some formal client accusation or instead may disclose protected client information preemptively.

In the run-up to the ABA's 1983 adoption of its Model Rules, the American Trial Lawyers took a very restrictive view of lawyers' self-defense exception.

A lawyer may reveal a client's confidence to the extent necessary to defend the lawyer or the lawyer's associate or employee against charges of criminal, civil, or professional misconduct asserted by the client, or against formally instituted charges of such conduct in which the client is implicated.

Monroe H. Freedman and Thomas Lumbard, The American Lawyer's Code of Conduct, Including A Proposed Revision of the Code of Professional Responsibility, Commission

on Professional Responsibility, Roscoe Pound-American Trial Lawyers Foundation,  
Revised Draft (May 1982) (emphasis added).

Every state's ethics rules permit lawyers to disclose protected client information  
to defend themselves against clients' allegations against the lawyer.

Even jurisdictions which do not allow such disclosure to support lawyers'  
affirmative claims against clients permit such self-defense use.

- District of Columbia Rule 1.6(e)(3) ("A lawyer may use or reveal client confidences or secrets . . . to the extent reasonably necessary to establish a defense to a criminal charge, disciplinary charge, or civil claim, formally instituted against the lawyer, based upon conduct in which the client was involved, or to the extent reasonably necessary to respond to specific allegations by the client concerning the lawyer's representation of the client").
- District of Columbia Rule 1.6 cmt. [25] ("If a lawyer's client, or former client, has made specific allegations against the lawyer, the lawyer may disclose that client's confidences and secrets in establishing a defense, without waiting for formal proceedings to be commenced. The requirement of subparagraph (e)(3) that there be 'specific' charges of misconduct by the client precludes the lawyer from disclosing confidences or secrets in response to general criticism by a client; an example of such a general criticism would be an assertion by the client that the lawyer 'did a poor job' of representing the client. But in this situation, as well as in the defense of formally instituted third-party proceedings, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable." (emphasis added)).

State ethics opinions take the same approach.

- Illinois LEO 94-10 (11/1994) (addressing the following scenario: "A lawyer was retained by a client to handle a dissolution of marriage case, which he tried to judgment. The client refused to pay the lawyer fees and the lawyer filed a post-trial motion for attorney's fees against his client. The client responds by discharging the attorney and filing a pro se motion for a new trial. As grounds for his motion, the client alleges numerous breaches of duty by his former lawyer. . . . Although under the fact situation presented the lawyer is not required to reveal his former client's confidences, he 'may' reveal them to defend himself from accusations of wrongful conduct.").

## **Attorney-Client Privilege Implications**

This self-defense exception also plays out in the context of discovery and attorney-client privilege protection. In most situations, courts address the privilege principles that parallel the ethics rules' self-defense exception. However, some courts have addressed the exception in the discovery context.

Every court acknowledges that the self-defense exception permits lawyers to defend themselves by disclosing privileged communications.

Courts take differing positions on accused lawyers' right to conduct discovery of communications between their former client and their replacement counsel. That does not involve the lawyers' disclosure of their own protected client information, but demonstrates the difficulty of defining the scope of the self-defense exception.

- Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp., 937 N.E.2d 533, 535, 541, 542, 544, 545, 546, 547 (Ohio 2010) (applying the self-defense exception in both the attorney-client privilege and the ethics contexts in a lawsuit by Squire Sanders in pursuing its claim for fees from a former client and defending against a legal malpractice lawsuit by the former client; "The issue in this case is whether the common-law self-protection exception to the attorney-client privilege, permitting an attorney to reveal attorney-client communications when necessary to establish a claim or defense on the behalf of the attorney, applies as an exception to R.C. 2317.02(A), which provides that an attorney 'shall not testify \* \* \* concerning a communication made to the attorney by a client in that relation or the attorney's advice to a client.'"; "Pursuant to the common-law self-protection exception to the attorney-client privilege, an attorney should be permitted to testify concerning attorney-client communications where necessary to collect a legal fee or to defend against a charge of malpractice or other wrongdoing in litigation against a client or former client. Ohio recognizes this exception."; "The self-protection exception dates back over 150 years to its articulation by Justice Selden in Rochester City Bank v. Suydam, Sage & Co. (N.Y. Sup. Ct. 1851), 5 How. Pr. 254, 262, 3 Code Rep. 249. There he wrote 'Where the attorney or counsel has an interest in the facts communicated to him, and when their disclosure becomes necessary to protect his own personal rights, he must of necessity and in reason be exempted from the obligation of secrecy [sic].' (Emphasis added in part.)."; "Since that time, this exception has become firmly rooted in American jurisprudence. The Supreme Court of

the United States recognized it in 1888 in Hunt v. Blackburn (1888), 128 U.S. 464, 470-471, 9 S.Ct. 125, 32 L.Ed. 488, and courts and commentators have accepted the self-protection exception as black-letter law defining which communications are subject to the attorney-client privilege."; "Thus, our caselaw recognizes that the attorney-client privilege does not prevent an attorney from testifying to the correctness, amount, and value of the legal services rendered to the client in an action calling those fees into question."; "Further, the self-protection exception to the attorney-client privilege permitting the attorney to testify also applies when the client puts the representation at issue by charging the attorney with a breach of duty or other wrongdoing. . . . Thus, a client may not rely on attorney-client communications to establish a claim against the attorney while asserting the attorney-client privilege to prevent the attorney from rebutting that claim."; "Ohio recognizes the common-law self-protection exception to the attorney-client privilege, which permits an attorney to testify concerning attorney-client communications where necessary to establish a claim for legal fees on behalf of the attorney or to defend against a charge of malpractice or other wrongdoing in litigation between the attorney and the client."; "When the attorney-client relationship has been put at issue by a claim for legal fees or by a claim that the attorney breached a duty owed to the client, good cause exists for the production of attorney work product to the extent necessary to collect those fees or to defend against the client's claim."; "Thus, attorney work product, including but not limited to mental impressions, theories, and legal conclusions, may be discovered upon a showing a good cause if it is directly at issue in the case, the need for the information is compelling, and the evidence cannot be obtained elsewhere."; "Here, attorney work product, including information sought from King and Garfinkel regarding the staffing of the butter-flavor litigation, trial strategy, resources committed, and views that the firm provided inadequate representation through counsel lacking sufficient leadership, qualification, and experience, is directly at issue, as the reasonable value of the legal services performed by Squire Sanders and the quality of its legal work are the pivotal issues in this lawsuit, and the need for this evidence is compelling."; "[G]ood cause exists for discovery of otherwise unavailable attorney work product to the extent that the work product has been placed at issue in litigation by a claim for legal fees or by a charge that the attorney breached a duty owed to the client.").

Thomas E. Spahn, The Attorney-Client Privilege and the Work Product Doctrine: A Practitioner's Guide, Ch. 28.702, 28.704 (3d. ed. 2013), published by Virginia CLE Publications.

**Best Answer**

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

B 12/14, 1/15

## Defending Against Clients' "Ineffective Assistance" Claims

### Hypothetical 25

Under the "no good deed goes unpunished" rule, you should have seen this one coming. After diligently but unsuccessfully seeking to defend your court-appointed client from serious criminal charges, he has now claimed "ineffective assistance of counsel" in a habeas petition. Within just a few hours of your ungrateful former client's filing, the prosecutor calls you to ask for a meeting to discuss the case.

May you meet with the prosecutor, and disclose protected client information to defend yourself from your former client's allegation of "ineffective assistance."

### MAYBE

### Analysis

The "ineffective assistance of counsel" issue plays out in both the ethics and the attorney-client privilege waiver contexts.

The ethics issue would seem easy.

Under the 1937 ABA Canons of Professional Ethics, a lawyer "accused by his client . . . is not precluded from disclosing the truth in respect to the accusation." ABA Canons of Professional Ethics, Canon 37, amended Sept. 30, 1937.

Under ABA Model Code DR 4-101(C)(4), lawyers could reveal "[c]onfidences or secrets necessary to . . . defend himself or his employees or associates against an accusation of wrongful conduct." ABA Model Code of Professional Responsibility, DR 4-101(C)(4). Although "ineffective assistance" might not be considered "wrongful conduct," it seems close.

Under the ABA Model Rules, the self-defense exception applies to three scenarios.

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

ABA Model Rule 1.6(b)(5).

A disgruntled former criminal client's "ineffective assistance of counsel" allegation might not constitute a "claim or defense," or a "criminal charge or civil claim," but would seem to fit the final scenario -- allowing lawyers "to respond to allegations in any proceeding concerning the lawyer's representation of the client." In fact, this third scenario's use of the term "allegations" seems to describe different circumstances from a "claim" mentioned in the first scenario or a "civil claim" mentioned in the second scenario.

The word "claim" seemingly refers to the client's or third party's effort to obtain some money or other benefit from a lawyer. The word "allegation" seems broader. However, courts routinely refer to an "ineffective assistance of counsel claim." Perhaps the ABA Model Rules meant the terms to be synonyms.

In addition to the apparent clear applicability of the black letter rule's self-defense exception to a former client's ineffective assistance of counsel allegations, the accompanying ABA Model Rule comment seems to permit lawyers' disclosure of protected client information outside the formal proceeding.

Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an



assertion. The right to defend also applies, of course, where a proceeding has been commenced.

ABA Model Rule 1.6 cmt. [10].

Use of the term "complicity" might limit those sentences to the second of the three black letter scenarios ("establish[ing] a defense to a criminal charge or civil claim against the lawyer based upon conduct which the client was involved"). However, there is no reason to think that lawyers could defend themselves from a charge of "complicity" before some proceeding begins, but not defend themselves from a client's direct claim before a proceeding begins. The only logical interpretation of a black letter ABA Model Rule (supplemented by the comment) would allow lawyers to defend themselves from former clients' ineffective assistance of counsel claims outside the context of the criminal proceeding.

Despite all of this, it should come as no surprise that the ABA would bend over backwards in favor of criminal defendants.

In 2010, ABA LEO 456 (7/14/10)<sup>1</sup> analyzed this issue. The opinion focused on lawyers' ability to disclose protected client information in a non-judicial setting.

This opinion addresses whether a criminal defense lawyer whose former client claims that the lawyer provided

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<sup>1</sup> ABA LEO 456 (7/14/10) (warning that although most courts hold that a criminal defendant's claim of "ineffective assistance of counsel" waives the attorney client privilege, it does not relieve the defendant's lawyer of the ethics duty of confidentiality; explaining that if the court overrules a privilege claim, the defendant's lawyer "must provide [the information sought] or seek appellate review."; noting that in analyzing possible exceptions to the ethics duty of confidentiality, the lawyer might rely on the self-defense exception under which "the lawyer may disclose information relating to the representation insofar as necessary to dissuade a prosecuting, regulatory or disciplinary authority from initiating proceedings against the lawyer or others in the lawyer's firm, and need not wait until charges or claims are filed before invoking the self-defense exception."; concluding that the lawyer may rely on that exception only if the charges "imminently" threaten the lawyer with "serious consequences," and only to the extent that disclosure is necessary; also explaining that given the narrowness of the self-defense exception, "it is highly unlikely that a disclosure in response to a prosecution request, prior to a court supervised response by way of testimony or otherwise, will be justifiable.").

constitutionally ineffective assistance of counsel may, without the former client's informed consent, disclose confidential information to government lawyers prior to any proceeding on the defendant's claim in order to help the prosecution establish that the lawyer's representation was competent. This question may arise, for example, because a prosecutor or other government lawyer defending the former client's ineffective assistance claim seeks the trial lawyer's file or an informal interview to respond to the convicted defendant's claim, or to prepare for a hearing on the claim.

ABA LEO 456 (7/14/10) (footnote omitted) (emphasis added). The ABA contrasted this context with the more formal setting of a lawyer's role as a witness.

Ordinarily, if a lawyer is called as a witness in a deposition, a hearing, or other formal judicial proceeding, the lawyer may disclose information protected by Rule 1.6(a) only if the court requires the lawyer to do so after adjudicating any claims of privilege or other objections raised by the client or former client. Indeed, lawyers themselves must raise good-faith claims unless the current or former client directs otherwise.; [T]he criminal defendant may be able to object based on relevance or maintain that the attorney-client privilege waiver was not broad enough to cover the information sought. If the court rules that the information sought is relevant and not privileged or otherwise protected, the lawyer must provide it or seek appellate review.

Id. (emphasis added).

ABA LEO 456 then turned to the situation in which a criminal defense lawyer may be called upon to respond to a former client's ineffective assistance of counsel claim.

Where the former client does not give informed consent to out-of-court disclosures, the trial lawyer who allegedly provided ineffective representation might seek to justify cooperating with the prosecutor based on the 'self-defense exception' of Rule 1.6(b)(5), which provides that '[a] lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil

claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.' The self-defense exception grows out of agency law and rests on considerations of fairness. Rule 1.6(b)(5) corresponds to a similar exception to the attorney-client privilege that permits the disclosure of privileged communications insofar as necessary to the lawyer's self-defense.

Id. (footnotes omitted). The ethics opinion discussed the self-defense principle's history, and endorsed the Restatement's "imminence" standard.

The self-defense exception applies in various contexts, including when and to the extent reasonably necessary to defend against a criminal, civil or disciplinary claim against the lawyer. The rule allows the lawyer, to the extent reasonably necessary, to make disclosures to a third party who credibly threatens to bring such a claim against the lawyer in order to persuade the third party that there is no basis for doing so. For example, the lawyer may disclose information relating to the representation insofar as necessary to dissuade a prosecuting, regulatory or disciplinary authority from initiating proceedings against the lawyer or others in the lawyer's firm, and need not wait until charges or claims are filed before invoking the self-defense exception. Although the scope of the exception has expanded over time, the exception is a limited one, because it is contrary to the fundamental premise that client-lawyer confidentiality ensures client trust and encourages the full and frank disclosure necessary to an effective representation. Consequently, it has been said that '[a] lawyer may act in self-defense under [the exception] only to defend against charges that imminently threaten the lawyer or the lawyer's associate or agent with serious consequences . . . .'

Id. (footnotes omitted). This reliance on the Restatement is somewhat ironic, because the Restatement frequently disagrees with the ABA Model Rules' confidentiality approach, and contains numerous criticisms of the ABA's confidentiality rules.

In any event, ABA LEO 456 analyzed the applicability of three Rule 1.6 black letter self-defense scenarios to a former client's ineffective assistance of counsel claim.

When a former client calls the lawyer's representation into question by making an ineffective assistance of counsel claim, the first two clauses of Rule 1.6(b) (5) do not apply. The lawyer may not respond in order 'to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client,' because the legal controversy is not between the client and the lawyer. Nor is disclosure justified 'to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved,' because the defendant's motion or habeas corpus petition is not a criminal charge or civil claim against which the lawyer must defend.

Id. (footnotes omitted) (emphases added). As discussed above, a criminal defendant's ineffective assistance of counsel argument is usually called a "claim." The ABA apparently thinks that a "civil claim" is different from a "claim" that arises in the criminal or the civil context.

For some reason, ABA LEO 456 described as a "more difficult question" whether an ineffective assistance of counsel claim fits into the third scenario -- which allows lawyers to disclose protected client information "to respond to allegations in any proceeding concerning the lawyer's representation of the client." On its face, this seems like a perfect match.

ABA LEO 456 correctly noted that lawyers may rely on this branch of the self-defense exception only if they reasonably believe it is necessary.

Under Rule 1.6(b)(5), however, a lawyer may respond to allegations only insofar as the lawyer reasonably believes it is necessary to do so. It is not enough that the lawyer genuinely believes the particular disclosure is necessary; the lawyer's belief must be objectively reasonable.

Id. (footnotes omitted) (first emphasis added).

ABA LEO 456 then closed with a flourish -- requiring that lawyers seeking to defend themselves from an ineffective assistance of counsel claim wait until "court-supervised proceedings."

Permitting disclosure of client confidential information outside court-supervised proceedings undermines important interests protected by the confidentiality rule. Because the extent of trial counsel's disclosure to the prosecution would be unsupervised by the court, there would be a risk that trial counsel would disclose information that could not ultimately be disclosed in the adjudicative proceeding. Disclosure of such information might prejudice the defendant in the event of a retrial. Further, allowing criminal defense lawyers voluntarily to assist law enforcement authorities by providing them with protected client information might potentially chill some future defendants from fully confiding in their lawyers. Against this background, it is highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable. It will be rare to confront circumstances where trial counsel can reasonably believe that such prior, ex parte disclosure, is necessary to respond to the allegations against the lawyer. A lawyer may be concerned that without an appropriate factual presentation to the government as it prepares for trial, the presentation to the court may be inadequate and result in a finding in the defendant's favor. Such a finding may impair the lawyer's reputation or have other adverse, collateral consequences for the lawyer. This concern can almost always be addressed by disclosing relevant client information in a setting subject to judicial supervision. As noted above, many ineffective assistance of counsel claims are dismissed on legal grounds well before the trial lawyer would be called to testify, in which case the lawyer's self-defense interests are served without the need ever to disclose protected information. If the lawyer's evidence is required, the lawyer can provide evidence fully, subject to judicial determinations of relevance and privilege that provide a check on the lawyer disclosing more than is necessary to resolve the defendant's claim. In the generation since Strickland [Strickland v. Washington, 466 U.S. 668 (1984)], the normal practice has been that trial lawyers do not disclose client confidences to the prosecution outside of court-supervised proceedings. There is no published evidence establishing that court resolutions have

been prejudiced when the prosecution has not received counsel's information outside the proceeding. Thus, it will be extremely difficult for defense counsel to conclude that there is a reasonable need in self-defense to disclose client confidences to the prosecutor outside any court-supervised setting.

Id. (footnotes omitted) (emphases added).

In 2005, the Utah Bar took the same basic approach ultimately accepted by the ABA in ABA LEO 456.

- Utah LEO 05-01 (4/28/05) (addressing the following scenario: "The client hired the attorney (the 'reviewing attorney') for the limited purpose of reviewing and advising about a plea offer made by the prosecution to the client in a matter where the client had been charged with a first-degree felony. The client had retained another attorney to represent him at trial ('trial attorney') for the purposes of entering a guilty plea. The client subsequently moved to set aside the plea of guilty, asserting that he had become 'confused' in his discussions with the reviewing attorney, and that the confusion resulted in an improvident entry of a plea of guilty." (emphasis added); finding that the lawyer may not disclose protected client information; "The twist in this case is the affirmative desire of the reviewing attorney to be allowed to speak freely regarding otherwise confidential or privileged communications."; "Exception 1.6(b)(3) allows disclosure '[t]o establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client or to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved.' While an arguable case might be made for disclosure under this exception, it too is fraught with problems. The primary problem is that the 'controversy' is not between lawyer and client, except quite tangentially. While there may well be a dispute over the facts between lawyer and client, there is no 'controversy' between them in the sense contemplated by the rule. Nor is there a criminal or civil action against the lawyer."; "However, should the court issue an order permitting any such disclosures, either sua sponte or in response to a motion from the reviewing attorney or the prosecutor, this would constitute 'other law' under Rule 1.6(b)(4) and would permit the lawyer to disclose prior attorney-client communications in strict compliance with such an order."; As a matter of professional ethics under the Utah Rules of Professional Conduct, in the absence of a court order to the contrary, the reviewing lawyer may not divulge any aspect of the communications with the former client." (emphasis added)).

Since ABA LEO 456, some states have adopted the ABA approach.

- Virginia LEO 1859 (6/6/12) (explaining that criminal defense lawyers whose clients have claimed ineffective assistance of counsel may not disclose client confidences to defend themselves immediately upon the filing of the habeas petition, because it is "unlikely that it is reasonably necessary for the lawyer to disclose confidential information at the time the petition is filed, when the court has not made a determination whether the petition is legally and procedurally sufficient."; concluding that the lawyer would be justified in disclosing confidential information under the Rule 1.6 self-defense exception "under judicial supervision at a formal proceeding, after a full determination of what information should be revealed.").

Other courts and bars have rejected the ABA approach.

- Office of Lawyer Regulation v. Thompson (In re Thompson), 847 N.W.2d 793, 796-97, 799, 797-98, 800, 801, 802 (Wis. 2014) (reversing the bar's public reprimand of a lawyer using protected client information in the letter to a judge responding to a former client's ineffective assistance of counsel claim; "What can a lawyer permissibly disclose in response to a former client's claim of ineffective assistance of counsel? When a defendant charges that his or her attorney has been ineffective, the defendant's lawyer-client privilege is waived to the extent that counsel must answer questions relevant to the charge of ineffective assistance"; explaining that the lawyer responded to successor counsel's claim of ineffective assistance by sending a letter to the judge; "Attorney Thompson's six-page, single-spaced letter directed to Judge Counsell was thorough in its response and admittedly scathing of both his former client and Attorney Leeper. The letter included: . . . . Details of an early discussion with the client about alibi defenses, informing the court that the defendant had never provided alibi information until the end of the June hearing. . . . Describing his client's demeanor as 'calm, deliberate, articulate, glib, impenetrable and cocky.'"; "It is undisputed that Attorney Thompson did not have the consent of Derek C., informed or otherwise, directly or by counsel, to send the letter to the court. However, absent consent, SCR 20:1.6(c) authorizes disclosures a lawyer 'reasonably believes necessary' to 'respond to allegations in any proceeding concerning the lawyer's representation of the client.' SCR 20:1.6(c)(4). The question then is whether Attorney Thompson's letter of September 30, 2008 transcended the boundaries of permissible disclosure in this case. We conclude it did not."; "Defense counsel preparing to respond to a motion alleging ineffective assistance of counsel must be mindful of continuing ethical obligations to former clients. As written, however, Wisconsin's confidentiality rule does not limit permitted disclosures to a 'court-supervised' setting. We decline to impose this restriction on our rule generally or in this case specifically. Moreover, the Formal Opinion issued after Attorney Thompson sent the September 29, 2008 letter; this ethical guidance was not available to Attorney Thompson when he sent the letter."; "Our rule does not limit permissible disclosures to judicially supervised settings so we reject that aspect of the

- referee's statement. We agree that the tone of the letter is abrasive and that Attorney Thompson expresses contempt for both his former client and successor counsel. This angry rhetoric pervades Attorney Thompson's appellate brief, as well. While unprofessional, it is not necessarily unethical."; "Attorney Thompson was required to limit his confidential disclosures as reasonably necessary to respond to his former client's allegations. He was not, however, required to 'fall on his sword' to enable his former client to obtain a new trial. . . . Finally, we are mindful that Attorney Thompson did request and receive the circuit court's permission to address 'certain motions and assertions that Attorney Leeper has been making' and 'to respond to these and other issues by the close of business on Monday, September 29th.' We caution lawyers that a former client's pursuit of an ineffective assistance of counsel claim 'does not give the lawyer carte blanche to disclose all information contained in a former client's file.' See 2011 Formal Op. 16, North Carolina State Bar Ethics Opinion (January 27, 2012). Typically, the better practice is to wait for a subpoena and the Machner [State v. Machner, 285 N.W.2d 905 (Wis. Ct. App. 1979)] hearing before disclosing confidential client information. In the context of this particular case, we decline to hold that Attorney Thompson's letter of September 29, 2008 violated SCR 20:1.6(a).").
- District of Columbia LEO 364 (1/2013) ("D.C. Rule 1.6(e)(3) permits a defense lawyer whose conduct has been placed in issue by a former client's ineffective assistance of counsel claim to make, without judicial approval or supervision, such disclosures of information protected by Rule 1.6 as are reasonably necessary to respond to the client's specific allegations about the lawyer's performance. Even so, a lawyer should reflect before making disclosures of protected information to prosecutors, courts, or others. A lawyer's confidentiality obligations to her former client are broader than the attorney-client privilege. Although the former client's claim likely waives the evidentiary privilege, that alone does not eliminate the broader confidentiality obligation owed under Rule 1.6. Nor does the limited 'self-defense' exception to confidentiality in Rule 1.6(e)(3) open the door to unlimited disclosures to prosecutors, courts or others of protected information. The rule allows a lawyer to disclose protected information only to the extent 'reasonably necessary' to respond to 'specific allegations' by the former client. Reasonableness is a fact-bound issue about which others may later disagree. Lawyers who are uncertain about the permissibility of disclosing protected information in response to an IAC claim should consider seeking independent advice or judicial approval of the disclosure." (emphasis added)).
  - North Carolina LEO 2011-16 (1/27/12) (declining to adopt the reasoning of ABA LEO 456 (2010), which held that defense lawyer could not disclose confidential information to defend herself from an ineffective assistance charge outside a court-supervised setting; "We decline to adopt ABA Formal Op. 10-345 (2010). Rule 1.6(b)(6), which applies to state and federal criminal representations, specifically provides that a lawyer may reveal confidential



information protected from disclosure by Rule 1.6(a) to the extent the lawyer reasonably believes necessary to respond to allegations concerning the lawyer's representation of the client. Rule 1.6(b)(6) also affords the lawyer discretion to determine what information is reasonably necessary to disclose, and there is no requirement that the lawyer exercise that discretion only in a 'court-supervised setting.'" (emphasis added); "We take additional guidance from the North Carolina General Assembly in reaching this conclusion. Regarding state court post-conviction actions, N.C. Gen. Stat. § 15A-1415(e) provides that where a defendant alleges ineffective assistance of prior trial or appellate counsel as a ground for the illegality of his conviction or sentence, the client 'shall be deemed to waive the attorney-client privilege with respect to both oral and written communications between such counsel and the defendant to the extent the defendant's prior counsel reasonably believes such communications are necessary to defend against the allegations of ineffectiveness.' The statute further provides that the waiver of the attorney-client privilege 'shall be automatic upon the filing of the motion for appropriate relief alleging ineffective assistance of prior counsel, and the superior court need not enter an order waiving the privilege.'"; "Adoption of the ABA opinion would contradict the legislature's determination that lawyers should have the discretion, without court direction or supervision, to disclose privileged information in response to such claims in the narrowly-tailored fashion contemplated by Rule 1.6(b)(6). Adoption of the opinion would also contradict the language of Rule 1.6(b)(6) itself, which does not require a court-supervised setting to make a narrowly-tailored disclosure of confidential information in response to such claims. We decline to adopt an opinion that contradicts existing state law and rules governing disclosure of otherwise confidential and privileged information under these limited circumstances." (emphasis added)).

In the attorney-client privilege context, courts rather than bars have also narrowed such accused lawyers' self-defense rights.

All courts agree that former clients who claim "ineffective assistance of counsel" waive their privilege protection. However, some courts warn clients of this implication, and give them the chance to reconsider. Other courts have applied the waiver doctrine very narrowly. Thomas E. Spahn, The Attorney-Client Privilege and the Work Product Doctrine: A Practitioner's Guide, Chs. 28.703, 30.801, 31.604 (3d. ed. 2013), published by Virginia CLE Publications.

**Best Answer**

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

B 12/14

## Defending Against Clients' Criticism

### Hypothetical 26

One of your partners just sent you an email linked to a front-page article in this morning's newspaper containing an ugly statement about you by a former client. One of your former clients called you "a sleazy lawyer who billed too much for doing too little." Right after you read the article, you receive a call from the reporter who wrote the story. She wants your "on the record" response to your former client's criticism.

Without your former client's consent, may you disclose protected client information in talking with the reporter?

### (B) NO (PROBABLY)

### Analysis

Clients have always criticized their lawyers or former lawyers, but the increasing ubiquity of social media has dramatically expanded the possible adverse effects of such allegations -- and tempted lawyers to respond in kind.

The 1937 ABA Canons of Professional Ethics indicated that

[i]f a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation.

ABA Canons of Professional Ethics, Canon 37, amended Sept. 30, 1937.

The 1969 ABA Model Code of Professional Responsibility similarly indicated that

A lawyer may reveal . . . confidences or secrets necessary to establish or collect his fee or defend himself or his employees or associates against an accusation of wrongful conduct.

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

The 1983 ABA Model Rules provide a somewhat narrower provision permitting the disclosure of protected client information under this self-defense principle.

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

ABA Model Rule 1.6(b)(5) (emphasis added).

The second and third scenarios would not apply to clients' non-judicial criticism of lawyers. Such a criticism obviously does not include a "criminal charge or civil claim," and similarly does not involve a "proceeding." Therefore, lawyers wishing to respond to such criticism must look to the self-defense exception applicable to lawyers "establish[ing] a claim or defense on behalf of the lawyer in a controversy between the lawyer and client." In the case of an extra-judicial criticism, the client clearly has created a "controversy" -- so the issue focuses on whether the lawyer's response made "to establish a . . . defense on behalf of the lawyer" in the controversy.

Although ABA Model Rule 1.6(b)(5) would seem to allow lawyers' limited disclosure of protected client information to "establish a . . . defense" in a "controversy" with a client or former client, courts have dealt very harshly with such extrajudicial disclosure of protected client information.

- In re Skinner, 758 S.E.2d 788, 789 (Ga. 2014) (issuing a public reprimand of a lawyer who responded to a former client's online criticism by disclosing protected client information; "Around this time, the client posted negative reviews of Skinner on three consumer Internet pages. When Skinner learned of the negative reviews, she posted a response on the Internet, a response that contained personal and confidential information about her former client that Skinner had obtained in the course of her representation of the client. In particular, Skinner identified the client by name, identified the employer of the client, stated how much the client had paid Skinner, identified the county in which the divorce had been filed, and stated that the client had a boyfriend.

The client filed a grievance against Skinner, and in response to the grievance, Skinner said in August 2011 that she would remove her posting from the Internet. It was not removed, however, until February 2012.").

- In re Tsamis, Comm'n No. 2013PR00095, at ¶17, ¶20, ¶21, ¶22 (Ill. Attorney Registration & Disciplinary Comm'n Hearing Bd., Aug. 26, 2013), *available at* <http://www.iardc.org/13PR0095CM.html> (publicly reprimanding a lawyer who had improperly disclosed client confidences in responding to the client's criticism of her posted on a website; "On or about February 5, 2013, Rinehart [former client] posted a client review of Respondent's services on the legal referral website AVVO, in which he discussed his dissatisfaction with Respondent's services. Rinehart stated in the posting that 'She only wants your money, claims 'always on your side' is a huge lie. Paid her to help me secure unemployment, she took my money knowing full well a certain law in Illinois would not let me collect unemployment. [N]ow is billing me for an additional \$1500 for her time.'" (emphasis added); "On or about April 10, 2013, Rinehart posted a second client review of Respondent on AVVO. In the April 10, 2013 posting, Rinehart stated that 'I paid Ms. Tsamis \$1500 to help me secure unemployment while she knew full well that a law in Illinois would prevent me from obtaining unemployment benefits.'"; "On or about April 11, 2013, Respondent posted a reply to Rinehart's April 10, 2013 client review. In that reply Respondent stated that: 'This is simply false. The person did not reveal all the facts of his situation up front in our first and second meeting [sic]. When I received his personnel file, I discussed the contents of it with him and informed him that he would likely lose unless the employer chose not to contest the unemployment (employers sometimes do is [sic]). Despite knowing that he would likely lose, he chose to go forward with a hearing to try to obtain benefits. I dislike it very much when my clients lose but I cannot invent positive facts for clients when they are not there. I feel badly for him but his own actions in beating up a female coworker are what caused the consequences he is now so upset about.'" (emphasis added); "By stating in her April 11, 2013 AVVO posting that Rinehart beat up a female coworker, Respondent revealed information that she had obtained from Rinehart about the termination of his employment. Respondent's statements in the posting were designed to intimidate and embarrass Rinehart and to keep him from posting additional information about her on the AVVO website.").
- In re Quillinan, 20 DB Rptr. 88, 289-90 (Or. 2006), *available at* [http://www.osbar.org/\\_docs/dbreport/dbr20.pdf](http://www.osbar.org/_docs/dbreport/dbr20.pdf) (suspending for ninety days a lawyer who had sent a critical email to a workers' compensation agency (without explaining what prompted the email); "On October 27, 2005, the Accused sent an email message to members of the Oregon State Bar Workers Compensation Section listserv (consisting of 275 bar members) regarding a former client. This email disclosed personal and medical information that the Accused had learned during the course of her

representation of the client. The Accused's email also characterized the Accused's former client as 'difficult' and suggested that she was now 'attorney shopping' because she was unwilling to accept a 'very fair' offer from a workers compensation insurer. The Accused stated in her email that the reason she was sending this information to the listserv attorneys was to 'provide some background on (the client's) case, in the event you are contacted by her.' The Accused's disclosures in her email were or were likely to be disadvantageous to the Accused's former client's efforts to find another qualified attorney to represent her.").

In nondisciplinary contexts, bars have similarly rejected the self-defense exception's applicability in this setting.

Not surprisingly, this issue has increasingly arisen in the context of clients' or former clients' criticisms posted on lawyer-rating websites or expressed in social media.

- New York LEO 1032 (10/30/14) (prohibiting lawyers from disclosing client confidences in response to clients' criticism posted on lawyer-rating websites; "The inquirer, a New York law firm, believes that a 'disgruntled' former client has unfairly characterized the firm's representation of the former client on a website that provides reviews of lawyers. A note posted by the former client said that the former client regretted the decision to retain the firm, and it asserted that the law firm provided inadequate services, communicated inadequately with the client, and did not achieve the client's goals. The note said nothing about the merits of the underlying matter, and it did not refer to any particular communications with the law firm or any other confidential information. The former client has not filed or threatened a civil or disciplinary complaint or made any other application for civil or criminal relief."; "The law firm disagrees with its erstwhile client's depiction of its services and asserts that the firm achieved as good a result for the client as possible under the difficult circumstances presented. The firm wishes to respond to the former client's criticism by telling its side of the story if it may do so consistently with its continuing duties to preserve a former client's confidential information."; "The inquiry raises the question whether a lawyer may rely on this [self-defense] exception to disclose a former client's confidential information in response to a negative web posting, even though there is no actual or threatened proceeding against the lawyer. We do not believe that a lawyer may do so." (emphasis added); "The language of the exception suggests that it does not apply to informal complaints such as this website posting. The key word is 'accusation,' which has been defined as '[a] formal charge against a person, to the effect that he is guilty of a punishable offense,' Black's Law Dictionary 21 (5th ed. 1979), or a 'charge of wrongdoing, delinquency, or fault,' Webster's Third International Dictionary Unabridged 22 (2002). See Roy D. Simon, Simon's New York Rules of Professional Conduct Annotated

230 (2013 ed.) ('An accusation means something more than just casual venting.') (emphasis added); noting that other states prohibit lawyers from disclosing confidences to defend themselves from such criticism; "In California there is no ethical counterpart to New York Rule 1.6(b)(5)(i), but the Evidence Code contains a self-defense exception to attorney-client privilege. Opinions interpreting that exception have concluded that California law does not permit a lawyer 'to disclose otherwise confidential information in an online attorney review forum, absent client consent or a waiver.' San Francisco Opinion 2014-1; see Los Angeles County Opinion 525 (2012) (attorney may respond to former client's internet posting if (1) 'response does not disclose confidential information'; (2) response will not injure former client in matter involving the former representation; and (3) response is proportionate and restrained). An Arizona opinion concluded that the right to disclose was not limited to 'a pending or imminent legal proceeding,' relying on a provision found in the Arizona rule (and in the ABA Model Rule) but not in the New York rule. Arizona Opinion 93-02 (reasoning that one category of cases within the exception, for a claim or defense 'in a controversy' between the lawyer and the client, would include cases not covered by another category within the exception, for 'allegations in any proceedings')."; "We do not mean to say that a formal proceeding must be actually commenced to trigger the authorization of disclosure by Rule 1.6(b)(5)(i). There may be circumstances in which the material threat of a proceeding would give rise to that right."; "This result properly respects the vital purpose of Rule 1.6(a) in preserving client confidentiality and fostering candor in the private communications between lawyers and clients, and it does not unduly restrict the self-defense exception. That exception reflects the fundamental unfairness of a current or former client -- or others -- being able to make consequential accusations of wrongful conduct against a lawyer, while the lawyer is disabled from revealing information to the extent reasonably necessary to defend against such accusations. Unflattering but less formal comments on the skills of lawyers, whether in hallway chatter, a newspaper account, or a website, are an inevitable incident of the practice of a public profession, and may even contribute to the body of knowledge available about lawyers for prospective clients seeking legal advice. We do not believe that Rule 1.6(b)(5)(i) should be interpreted in a manner that could chill such discussion." (emphasis added)).

- Pennsylvania LEO 2014-200 (2014) ("The PBA Legal Ethics and Professional Responsibility Committee has been asked whether the Pennsylvania Rules of Professional Conduct ('PA RPC') impose restrictions upon a lawyer who wishes to publicly respond to a client's adverse comments on the internet about the lawyer's representation of the client. The Committee concludes that the lawyer's responsibilities to keep confidential all information relating to the representation of a client, even an ungrateful client, constrains the lawyer. We conclude, therefore, that the lawyer cannot reveal client confidential information in response to a negative online review without the client's

informed consent."; "We further believe that any decision to respond should be guided by the practical consideration of whether a response calls more attention to the review. Any response should be proportional and restrained. For example, a response could be, 'A lawyer's duty to keep client confidences has few exceptions and in an abundance of caution I do not feel at liberty at respond in a point-by-point fashion in this forum. Suffice it to say that I do not believe that the post presents a fair and accurate picture of the events.'"; analyzing the possible applicability of self-defense exception triggered by a "controversy between the lawyer and the client"; "Oxford Dictionaries Online defines 'controversy' as a 'disagreement, typically when prolonged, public, and heated.' <http://www.oxforddictionaries.com>. A disagreement as to the quality of a lawyer's services might qualify as a 'controversy.' However, such a broad interpretation is problematic for two reasons. First, it would mean that any time a lawyer and a client disagree about the quality of the representation, the lawyer may publicly divulge confidential information. Second, Comment [14] makes clear that a lawyer's disclosure of confidential information to 'establish a claim or defense' only arises in the context of a civil, criminal, disciplinary or other proceeding. Although a genuine disagreement might exist between the lawyer and the client, such a disagreement does not constitute a 'controversy' in the sense contemplated by the rules to permit disclosures necessary to establish a 'claim or defense.' The literal language of Rule 1.6(c)(4) (the self-defense exception) does not authorize responding on the internet to criticism."; citing other states' and city's legal ethics opinion coming to the same conclusion).

In states emphasizing confidentiality even more than the ABA Model Rules do, bars have a fairly easy time prohibiting lawyers from responding to clients' public criticism.

For instance, a District of Columbia ethics rule comment specifically precludes lawyers from disclosing protected client information to defend themselves against clients' or former clients' general criticism.

- District of Columbia Rule 1.6 cmt. [25] ("If a lawyer's client, or former client, has made specific allegations against the lawyer, the lawyer may disclose that client's confidences and secrets in establishing a defense, without waiting for formal proceedings to be commenced. The requirement of subparagraph (e)(3) that there be "specific" charges of misconduct by the client precludes the lawyer from disclosing confidences or secrets in response to general criticism by a client; an example of such a general criticism would be an assertion by the client that the lawyer 'did a poor job' of representing the client. But in this situation, as well as in the defense of formally instituted



third-party proceedings, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable." (emphasis added)).

In 2012, the Los Angeles Bar noted differences between the ABA Model Rules and the California ethics rules in finding that lawyers in this position could not disclose protected client information.

- Los Angeles County LEO 525 (12/6/12) ("Attorney previously represented Former Client in a civil proceeding. Attorney no longer represents Former Client in any respect. Subsequent to the conclusion of the representation, Former Client posts a message on a website discussing lawyers, stating that Attorney was incompetent and over-charged him, and others should refrain from using Attorney. This Opinion assumes that no confidential information is disclosed in the message and Former Client's conduct does not constitute a waiver of confidentiality or the attorney-client privilege. There is no litigation or arbitration pending between Attorney and Former Client." (footnotes omitted); "There are some authorities from outside California that suggest an exemption to an attorney's duties of loyalty and confidentiality may exist in certain circumstances when necessary in 'self-defense.' See e.g., Rule 1.6(b)(5) of the ABA Model Rules of Professional Conduct. It is important to bear in mind, however, that California has not adopted the ABA Model Rules, and they may be consulted for guidance only when there is no California rule directly applicable." (emphasis added); "Therefore, under these circumstances, Attorney may respond to Former Client's internet posting, so long as: (1) Attorney's response does not disclose confidential information; (2) Attorney does not respond in a manner that will injure Former Client in a matter involving the former representation; and (3) Attorney's response is proportionate and restrained." (emphasis added)).

More recently, the San Francisco Bar similarly noted California's unique rule in concluding that lawyers may respond to a former client's unfavorable online review, but cannot disclose any protected client information.

- San Francisco LEO 2014-1 (1/2014) (analyzing the following situation: "A former client has posted a review on a free public online forum that rates attorneys. The review does not disclose any confidential information but is negative and contains a discussion in which the former client makes general statements that Attorney mismanaged the client's case, did not communicate

appropriately with the former client, provided sub-standard advice and was incompetent. Attorney wishes to respond to the negative review by posting a reply in the electronic forum; and, if permitted, discuss the details of Attorney's management of the case, the frequency and content of communications Attorney had with the former client and the advice Attorney provided to the former client and why Attorney believes the advice was appropriate under the circumstances."; "In California, the duty of confidentiality is codified in the State Bar Act (Cal. Bus. & Prof. C. §6000 et seq.) and embodied in the California Rules of Professional Conduct ("CRPC"), Rule 3-100. Pursuant to Bus. & Prof.C. §6068(e) an attorney must 'maintain inviolate the confidence, and at every peril to himself or herself [] preserve the secrets, of his or her client.' See also Rule 3-100(A) ('A member shall not reveal information protected from disclosure by Business & Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule.').; "'Secrets' refers to other information gained in the professional relationship the client has requested be held inviolate or the disclosure of which would be embarrassing or likely detrimental to the client. . . . The duty to protect client secrets applies to all information relating to client representation, whatever its source. . . . It even encompasses matters of public record communicated in confidence that might cause a client or former client public embarrassment. . . . 'Confidence' also refers to information protected by the attorney-client privilege."; "The factual information Attorney would like to disclose is information obtained during the course of the prior representation. It includes details regarding the management of the case, the frequency and content of communications with the former client, and advice provided by Attorney. Such information falls within the definition of a 'confidence.' It also falls within the definition of 'secrets,' as the former client would not likely want the information publicly disclosed. The proposed disclosure could be particularly detrimental to the client if the former client's action is ongoing."; "Unlike the ABA Model Rules of Professional Conduct, and the numerous jurisdictions that have adopted versions of the ABA Model Rules, California's rules of professional conduct do not have an express exception to the duty of confidentiality that permits a lawyer to disclose otherwise confidential information in disputes with a client or former client." (emphasis added); "To the extent there is a 'self-defense' exception in California, it is statutory and its scope and application are defined by case law." (emphasis added); "The Committee notes that because Ev.C. §958 relates to the admissibility of evidence in the context of a legal proceeding, it is doubtful it would have any lawful application outside a formal legal or administrative proceeding."; "The Model Rules, which are instructive, especially where the California rules of professional conduct are silent on a matter, suggest disclosure of otherwise confidential information may be appropriate in certain circumstances outside a formal legal proceeding."; California state courts have rejected the argument that a privilege exception can exist outside the specific parameters of the Evidence Code."; "Here, Attorney's disclosure in a public online forum

has no judicial supervision and is accessible to anyone. Although the former client's assertion could impact Attorney's reputation, it is the Committee's opinion that such potential impact, by itself, is not of a nature that reasonably requires Attorney to disclose in a public forum what would otherwise be confidential information. Attorney may seek to mitigate any potential impact from the negative review by submitting a response that generally disagrees with the former client's assertions and notes that Attorney is not at liberty to discuss details regarding confidential client matters unless the information comes within Bus. & Prof. C. §6068(e)(2). This approach strikes an appropriate balance between the rationale for the self-defense exception, the need to limit disclosures to information reasonably necessary to defend the lawyer, and the importance of maintaining a client's confidential information and promoting full and candid disclosure of information by clients to their attorneys." (emphasis added); "Here, the assertions against Attorney, albeit general in nature, go beyond casual charges not likely to be taken seriously by others. They have been posted on a forum that is publicly available and dedicated to providing reviews of attorneys. Absent a response from Attorney, it is possible that a party might give the review credence and question Attorney's professional skills, thus impacting his or her potential retention. Notwithstanding this fact, Attorney's proposed response would be in a public forum that has no ability to impose any restriction or liability on Attorney. The Committee does not believe applicable California law permits a lawyer to disclose otherwise confidential information in an online attorney review forum, absent client consent or a waiver. Disclosure is not, in the Committee's view, reasonably necessary, or sufficiently tailored to establishing a self-defense. The absence of the inclusion of any self-defense exception in California's Rules of Professional Conduct, the longstanding policy in California that precludes judicial exceptions to the attorney-client privilege, and the breadth of California's duty of confidentiality (which goes beyond the evidentiary privilege) is further support for the conclusion that Ev.C. § 958 would not apply under the facts presented." (footnote omitted) (emphasis added); "Even where the self-defense exception applies and a response is reasonably necessary to establish a defense or claim on behalf of the attorney, the disclosure of any confidential information must be narrowly tailored to respond to the specific issues raised by the former client. In such situations, disclosure is therefore limited to relevant communications between the client and the attorney whose services gave rise to the breach of duty claim. . . . Even assuming Ev.C. §958 could apply in a public, non-legal forum, Attorney would have to limit any response to the general issues raised by the former client. In the Committee's view, disclosing the details and content of communications, the advice provided to the client, and the rationale for such advice, is not reasonably necessary to respond to and defend oneself from generalized assertions of malfeasance."; "Attorney is not barred from responding generally to an online review by a former client where the former client's matter has concluded. Although the residual duty of loyalty owed to the former client does not prohibit a response, Attorney's on-going

duty of confidentiality prohibits Attorney from disclosing any confidential information about the prior representation absent the former client's informed consent or a waiver of confidentiality. California's statutory self-defense exception, as interpreted by California case law, has been limited in application to claims by a client (against or about an attorney), or by an attorney against a client, in the context of a formal or imminent legal proceeding. Even in those circumstances where disclosure of otherwise confidential information is permitted, the disclosure must be narrowly tailored to the issues raised by the former client. If the matter previously handled for the former client has not concluded, it may be inappropriate under the circumstances for Attorney to provide any substantive response in the online forum, even one that does not disclose confidential information." (emphasis added)).

### **Best Answer**

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

B 12/14

## Defending Against Non-Clients' Claims

### Hypothetical 27

You were just served with a lawsuit claiming that your firm and one of its clients defrauded the plaintiff in a transaction. You and the client had a falling out after that transaction, and you doubt that the former client will be very cooperative in allowing you to defend your firm.

Without your former client's consent, may you disclose protected client information in defending yourself?

**(A) YES**

### Analysis

Common sense and fairness justify lawyers' disclosure of protected client information to defend themselves against a client's attack.

However, it is not as intuitive to permit lawyers' disclosure of protected client information to defend themselves from non-clients' attacks. Given the importance of confidentiality, one might expect the ethics rules to demand that lawyers essentially "take a bullet" for the client.

### **ABA Canons, Code and Rules**

The 1937 ABA Canons of Professional Ethics explicitly limited the self-defense exception to clients' accusations.

If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation.

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

In 1940, an ABA legal ethic opinion implicitly limited a lawyer's self-defense disclosure discretion to a client's (or presumably former client's) accusation against the lawyer.

- ABA LEO 202 (5/25/40) (analyzing the ethics implications of a trust company's lawyer who learned that a manager hired by trust beneficiaries to oversee property transactions and pay the proceeds to the trust company had embezzled money -- creating a liability for the trust company to the beneficiaries; explaining that a trust company officer requested the lawyer to draft a contract under which the embezzling manager will purchase the beneficial interest in the trust -- which the lawyer advises will be proper only if the trust company discloses the embezzlement to the beneficiaries; further explaining that the lawyer later learned that the manager had purchased the beneficiaries' interest at nominal prices, and without the disclosure of the embezzlement -- "with the apparent purpose of eliminating the beneficiaries and concealing from them [the manager's] embezzlements in the trust company's liability"; noting that the lawyer then learned that the trust company's general counsel knew of this action; concluding that the lawyer may not disclose the manager's embezzlement to the beneficiaries without the trust company's consent, because the purchase transaction had already been consummated; also concluding that the lawyer may advise the trust company's board of directors of the situation, but may not start disciplinary proceedings against trust company officers acting as lawyers without the trust company's consent -- although the lawyer may disclose confidential client information if the trust company makes a false accusation against the lawyer; "Knowledge of the facts respecting [the manager's] defalcations, the trust company's liability therefor, and the plan to purchase the outstanding certificate[s] was imparted to A as attorney for the trust company, and was acquired during the existence of his confidential relations with the trust company. He may not divulge confidential communications, information, and secrets imparted to him by the client or acquired during their professional relations, unless he is authorized to do so by the client."; "Had A been advised that the trust company intended to carry out the plan to purchase the outstanding certificates without making the disclosures which he advised should be made, and if such transaction would have constituted an offense against criminal law when carried out, he might have made disclosure at that time."; "But, since it does not appear that A was advised of such intention on the part of the trust company, and since the transaction has been consummated, we conclude the exception is not applicable and that A must keep the confidences of his client inviolate."; "Since, however, the board of directors of the trust company is its governing body, we think A, with propriety, may and should make disclosures to the board of directors in order that they make take such action as they deem necessary to protect the trust company from the wrongful acts of its executive officers. Such a disclosure

would be to the client itself and not to a third person."; "We are of the opinion that A may not, without consent of the trust company, institute disciplinary action against the officers of the trust company who are members of the Bar, if to do so would involve a disclosure of confidential communications to A."; "Neither do we think A may initiate, without consent of the trust company, any proceeding to protect himself which would involve a disclosure of such confidential communications. He would be justified in making disclosure only if he should be subject to false accusation by the trust company." (emphasis added)).

The 1969 ABA Model Code of Professional Responsibility did not contain that limitation.

A lawyer may reveal . . . confidences or secrets necessary to establish or collect his fee or defend himself or his employees or associates against an accusation of wrongful conduct.

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

The 1983 ABA Model Rules permit self-defense disclosure in a wider range of scenarios.

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

ABA Model Rule 1.6(b)(5) (emphasis added).

The ABA/BNA Manual on Professional Conduct explains that the self-defense exception was expanded at the last minute.

This expansion of the exception is the result of a last-minute modification to Model Rule 1.6 in May 1983; as originally proposed, the rule would have permitted disclosure only to respond 'to the client's allegations in any legal proceeding concerning the lawyer's professional conduct for

the client.' ABA, A Legislative History: The Development of the ABA Model Rules of Professional Conduct 1982-2005, at 109 (2006).

ABA/BNA Lawyers' Manual on Professional Conduct, 55:705.

ABA Model Rule 1.6 cmt. [10] clearly envisions such third parties' claims against lawyers, and acknowledges lawyers' right to defend themselves.

Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

ABA Model Rule 1.6 cmt. [10] (emphasis added).

In fact, lawyers arguably enjoy even greater freedom to disclose protected client information if a third party attacks them than if a client or former client attacks them. The last sentence of comment [10] explicitly indicates that lawyers do not have to wait for a proceeding to begin before disclosing protected client information to defend themselves from charges of "complicity" -- which presumably involves some third party's allegations of "complicity" between the lawyer and the client.



The 2010 ABA legal ethics opinion addressing the self-defense exception in the context of a former client's ineffective assistance of counsel claim adopts this view.

The self-defense exception applies in various contexts, including when and to the extent reasonably necessary to defend against a criminal, civil or disciplinary claim against the lawyer. The rule allows the lawyer, to the extent reasonably necessary, to make disclosures to a third party who credibly threatens to bring such a claim against the lawyer in order to persuade the third party that there is no basis for doing so. For example, the lawyer may disclose information relating to the representation insofar as necessary to dissuade a prosecuting, regulatory or disciplinary authority from initiating proceedings against the lawyer or others in the lawyer's firm, and need not wait until charges or claims are filed before invoking the self-defense exception.

ABA LEO 456 (7/14/10) (emphasis added).

### **Restatement**

The Restatement also recognizes the self-defense exception's applicability to non-client third-parties claims and accusations.

A lawyer may use or disclose confidential client information when and to the extent that the lawyer reasonably believes necessary to defend the lawyer or the lawyer's associate or agent against a charge or threatened charge by any person that the lawyer or such associate or agent acted wrongfully in the course of representing a client.

Restatement (Third) of Law Governing Lawyers § 64 (2000) (emphasis added).

A lengthy comment explains the breadth of the self-defense exception.

American law has long recognized the right of a lawyer to employ confidential client information in self-defense. A similar exception is found in general agency law. . . . The general definition of confidential client information . . . is broad, and the prohibition against adverse use or disclosure . . . is rigorous. Charges against lawyers will often involve circumstances of client-lawyer relationships that can be proved only by using confidential information.

Thus, in the absence of the exception stated in the Section, lawyers accused of wrongdoing would be left defenseless against false charges in a way unlike that confronting any other occupational group.

Two additional considerations often justify a lawyer's use of confidential client information in self-defense. First, when a client charges a lawyer with wrongdoing in the course of a representation, the client thereby waives the attorney-client privilege by putting the lawyer's services into issue . . . . Second, some charges against a lawyer brought by nonclients involve a course of conduct in which the lawyer's client is implicated in crime or fraud. In such situations, the crime-fraud exception to the attorney-client privilege . . . may independently permit the lawyer to defend based on otherwise confidential client information.

Restatement (Third) of Law Governing Lawyers § 64 cmt. b (2000) (emphasis added).

Several illustrations provide examples of the self-defense exception's applicability to non-clients' claims. The first of the three illustrations involves the classic case of government regulators and purchasers of stock suing a lawyer as a co-defendant.

Lawyer was employed by a Firm of lawyers that represented Client in a pending public stock offering. Lawyer had unsuccessfully objected to other lawyers in Firm about a secret finder's fee that Client paid to Firm in connection with the stock offering, but which neither Client nor the other Firm lawyers proposed to disclose in the offering documents. The stock offering went forward without such disclosure. Purchaser bought some of the shares. Lawyer learns that a regulatory agency has begun to investigate the activities of Client, Firm, and Lawyer and contemplates a regulatory proceeding that, among other sanctions, will seek to bar Lawyer from participating in transactions within the regulatory jurisdiction of the agency. Lawyer also learns that lawyers for Purchaser are about to file suit seeking substantial damages and naming Lawyer as a codefendant. To the extent necessary to gain exoneration from or to mitigate the charges imminently threatened, Lawyer may disclose confidential information about Client to the regulatory agency and to the lawyers for Purchaser.

Restatement (Third) of Law Governing Lawyers § 64 illus. 1 (2000).

The second illustration addresses a law firm's allegations against one of its own lawyers.

Lawyers in a law firm of which Lawyer is a member file a charge with a lawyer-disciplinary agency that Lawyer has converted funds belonging to Client, whom Lawyer had represented. In order to defend against the charges, Lawyer reasonably believes that it is necessary to disclose confidential client information about Client to show that Client had consented to Lawyer's use of the funds. Client, however, refuses to discuss the charges, to testify, or to consent to Lawyer disclosing any matter about Client or Client's funds. The agency decides to file charges against Lawyer because it believes that it has sufficient evidence from other sources. To the extent reasonably necessary to obtain exoneration from or to mitigate the disciplinary charges, Lawyer may reveal otherwise confidential information about Client and the funds. Before doing so, Lawyer should inform Client of Lawyer's need to use the information and seek Client's consent to its use, unless Client has already made it clear that Client will not consent. In making the disclosure, Lawyer must limit the extent to which the information is disclosed.

Restatement (Third) of Law Governing Lawyers § 64 illus. 2 (2000).

The final Restatement illustration defines the limit on the self-defense exception.

The same facts as in Illustration 2, except that Lawyer also wishes to defend against the disciplinary charges by offering as evidence confidential information concerning the law firm's treatment of funds of other clients. The affected clients refuse to consent. Unless the evidence can be offered without identifying the other clients involved, such disclosure is not warranted under this Section because it does not concern the representation whose circumstances are in dispute.

Restatement (Third) of Law Governing Lawyers § 64 illus. 3 (2000).

The Restatement explicitly indicates that the self-defense exception applies when a non-client charges a lawyer with wrongdoing.

If a person other than a client asserts that a lawyer engaged in wrongdoing in the course of representing a client, this Section permits the lawyer to disclose otherwise confidential client information in self-defense, despite the fact that the client involved has not waived confidentiality or had any role in threatening or making the charges. The analogous exception to the attorney-client privilege permits a lawyer to testify to otherwise privileged communications in self-defense against such charges.

Restatement (Third) of Law Governing Lawyers § 64 cmt. g (2000) (emphasis added).

Like the ABA Model Rule 1.6 cmt. [10], the Restatement indicates that lawyers can start defending themselves before the initiation of some formal proceeding.

A lawyer may act in self-defense under this Section only to defend against charges that imminently threaten the lawyer or the lawyer's associate or agent with serious consequences, including criminal charges, claims of legal malpractice, and other civil actions such as suits to recover overpayment of fees, complaints in disciplinary proceedings, and the threat of disqualification . . . . Imminent threat arises not only upon filing of such charges but also upon the manifestation of intent to initiate such proceedings by persons in an apparent position to do so, such as a prosecutor or an aggrieved potential litigant.

Restatement (Third) of Law Governing Lawyers § 64 cmt. c (2000) (emphases added).

Interestingly, the Restatement warns that prosecutors should be punished if they abuse this principle, by asserting "unfounded charges" against the lawyer in an effort to induce the lawyer's disclosure of protected client information.

There is a risk that a government agency or other complainant may assert unfounded charges against a lawyer to induce the lawyer to supply the complainant with information inculcating the lawyer's client. The risk of such abuse is to some extent unavoidable. The lawyer must minimize the risk by objecting to such abusive tactics and invoking the discretion to disclose only when it reasonably appears to the lawyer that the charge, although false, will in fact be pressed. Governmental interference with the client-lawyer relationship by unwarranted accusations, when

established, should lead to severe sanctions against the governmental lawyers involved.

Restatement (Third) of Law Governing Lawyers § 64 cmt. c (2000).

The Restatement contains warnings to lawyers about limiting disclosure of protected client information to that necessary for their self-defense provisions which apply to lawyers defending themselves from non-clients' allegations as much as from clients' allegations.

Use or disclosure of confidential client information under this Section is warranted only if and to the extent that the disclosing lawyer reasonably believes it necessary. The concept of necessity precludes disclosure in responding to casual charges, such as comments not likely to be taken seriously by others. The disclosure is warranted only when it constitutes a proportionate and restrained response to the charges. The lawyer must reasonably believe that options short of use or disclosure have been exhausted or will be unavailing or that invoking them would substantially prejudice the lawyer's position in the controversy.

The lawyer may divulge confidential client information only to those persons with whom the lawyer must deal in order to obtain exoneration or mitigation of the charges. When feasible, the lawyer must also invoke protective orders, submissions under seal, and similar procedures to limit the extent to which the information is disseminated. A lawyer may not invoke or threaten to invoke the exception without a reasonable basis, nor for an extraneous purpose such as inducing a client to forgo a disciplinary complaint or a complaint for damages . . . . When a client has made a public charge of wrongdoing, a lawyer is warranted in making a proportionate and restrained public response.

Prior to making disclosure, a lawyer must if feasible inform the affected client that the lawyer contemplates doing so and call upon the client to authorize the disclosure or take other effective action to meet the charge.

Restatement (Third) of Law Governing Lawyers § 64 cmt. e (2000).

## State Variations

As with other disclosure issues, bars have taken different positions on lawyers' ability to disclose protected client information in defending themselves from nonclients' charges.

This has been a long-running issue. In the run-up to the ABA's 1983 adoption of its Model Rules, the American Trial Lawyers took a very narrow view of this self-defense exception.

A lawyer may reveal a client's confidence to the extent necessary to defend the lawyer or the lawyer's associate or employee against charges of criminal, civil, or professional misconduct asserted by the client, or against formally instituted charges of such conduct in which the client is implicated.

Monroe H. Freedman and Thomas Lumbard, Am. Lawyer's Code of Conduct, Proposed Revision of the Code of Prof'l Responsibility, Rule 1.5, Comm'n on Prof'l Responsibility, Roscoe Pound-Am. Trial Lawyers Found., Revised Draft (May 1982) (emphasis added).

As in other ethics areas, some states have adopted different variations.

For instance, the New York Rules contain a variation of the ABA Model Rules approach.

A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary . . . to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct.

New York Rule 1.6(b)(5)(i). This is the ABA Model Code formulation. ABA Model Code of Professional Responsibility, DR-101(C)(4).

Bars have generally taken a broad approach when addressing the self-defense exception in the context of formal allegations.

- District of Columbia Rule 1.6 cmt. [23] ("Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Charges, in defense of which a lawyer may disclose client confidences and secrets, can arise in a civil, criminal, or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together.").
- Nebraska LEO 12-11 (2012) ("[W]here a civil action has been filed by a federal agency against a lawyer and his current or former clients, alleging fraud and violation of federal regulations relating to the representation of the clients, the lawyer could reasonably believe it was necessary to establish his/her own defense to the charges by releasing confidential documents relating to the representation to the federal agency even though that information may adversely affect his/her clients."; "Particularly where this information may be adverse to the client's interest, the lawyer should only release what he/she 'reasonably believes' to be necessary to accomplish the purpose of establishing a defense to the civil claim. Even then, in the context of a judicial proceeding, the lawyer should make every practicable effort to limit access to the information on a need to know basis through appropriate protective orders or other arrangements.").

Some jurisdictions recognize such a self-defense exception only when lawyers face formal accusations, rather than informal non-client criticism.

- District of Columbia Rule 1.6 cmt. [24] ("The lawyer may not disclose a client's confidences or secrets to defend against informal allegations made by third parties; the Rule allows disclosure only if a third party has formally instituted a civil, criminal, or disciplinary action against the lawyer. Even if the third party has formally instituted such a proceeding, the lawyer should advise the client of the third party's action and request that the client respond appropriately, if this is practicable and would not be prejudicial to the lawyer's ability to establish a defense." (emphasis added)).

As in other areas, California follows a different rule. In 2007, the Los Angeles County Bar explained that the self-defense provision in California's attorney-client privilege law did not appear in the parallel confidentiality duty statute. The Los Angeles

Bar thus concluded that a lawyer sued by a non-client may not disclose protected client information to defend himself or herself.

- Los Angeles County LEO 519 (2/26/07) (explaining that the lawyer seeking the opinion had assisted a corporate client in preparing a private placement memorandum, but that the client had declared bankruptcy after the attorney-client relationship ended; noting that a Chapter 7 trustee filed a legal malpractice case against the lawyer on behalf of the corporation, and that a class of note purchasers filed a class action against the lawyer and other parties, alleging violations of state and federal securities laws and, among other causes of action; also noting that the malpractice case and the class action have not been consolidated or coordinated, and that the trustee "has not acknowledged that this suit constitutes a waiver of the corporation's attorney-client privilege"; explaining the lawyer's position; "Attorney contends that she cannot defend against the class claims without disclosing communications between her and representatives of the corporation. Nonetheless, the bankruptcy trustee has refused to waive the attorney-client privilege for purposes of the class action and has instructed Attorney that under no circumstances is she to disclose in the class action any privileged communications between herself and the corporation's representatives regarding her representation of the corporation."; holding that a lawyer could disclose client confidences to defend himself or herself from a client's malpractice claim, but could not disclose client confidences to defend against a class action filed by third parties against the lawyer; ultimately concluding that "[n]o matter how critical the client's information is to the lawyer's defense, there is no statutory 'self-defense' exception to the attorney-client privilege or the lawyer's duty to maintain the confidentiality of the client information under Business and Professional Code § 6068(e). Of course, such evidence would be available upon the client's informed consent to such disclosure or as to information otherwise protected by the lawyer-client privilege. While there is authority for such disclosures in other jurisdictions and in the federal courts, it remains an open question whether a California court, on application by the attorney, may order the limited disclosure of the privileged communication or, in the alternative, may dismiss the action against the attorney because of the attorney's inability to use the evidence to defend the third party action." (emphasis added); noting that California's law relating to privilege contains a "self-defense" exception, while the law governing lawyers' confidentiality duty does not; "Of import here, Evidence Code § 958 [memorializing California's attorney-client privilege] permits an attorney to disclose attorney-client communications in a dispute with a client or former client when the communication is 'relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship.' As with sections 956 and 962, this self-defense exception is not recognized in section 6068(e) [memorializing lawyers' confidentiality duty]. Nonetheless, it is clear that attorneys are allowed to make disclosures in aid of their defense to a client



malpractice action, in support of a claim for unpaid legal fees against a client and in defense of client-initiated State Bar disciplinary complaints. Less clear are the circumstances where a terminated lawyer-employee may make disclosures in aid of his or her wrongful termination claim against the employer-client based on an alleged public policy violation. What is clear, however, is that attorneys may themselves seek legal advice concerning whether and to what extent disclosures are permitted and in the course of which disclose to the consulting attorney confidential communications with the client. It is likewise true that the client may seek advice whether to risk disclosures by alleging a breach on the part of prior counsel, without fear that such communications with successor counsel will be subject to scrutiny." (emphasis added) (footnotes omitted); "Second, section 958 is not premised to the concept of 'waiver.' The statutory language instead states 'There is no privilege . . . .' This, coupled with the client's well established right to preserve unrelated confidential information, and the public policy underlying section 958, leads us to conclude that the targeted Attorney is not ethically permitted to exploit the confidential information disclosed in the malpractice action for other, unrelated purposes, whether it be public disclosure outside the confines of the malpractice litigation proceedings, or use in connection with other third party initiated litigation, such as the class litigation referenced in the subject inquiry." (emphasis added); "We therefore conclude that even if the Attorney is allowed to make or compel disclosures in the Trustee's malpractice action that would otherwise be relevant to the class action, section 958 does not sanction such disclosures in defense of the third party action initiated by the investor class." (emphasis added); "This then brings us to the question whether there is a self-defense exception in California that permits an attorney to disclose confidential information when necessary to defend a third party's claims and in the absence of the client's consent or waiver."; "Clearly, there is no California authority that allows an attorney to disclose attorney-client communications or confidential information in her defense of a lawsuit or other attack by a third party (i.e., someone other than the client or former client). There is no such exception in the Business and Professional Code or the Evidence Code; nor do the Rules of Professional Conduct recognize such an exception." (emphasis added); "[A]bsent such judicial authorization, client consent or further development in the case law, we conclude that the attorney in the inquiry may not disclose confidential client communications in aid of her defense."; "[T]he Committee concludes that so long as there is the potential for a conflict between the attorney's interest in being able to use confidential communications to mount a defense and the client's right to keep such communications confidential, the attorney, in requesting an existing or former client's consent to a waiver of the attorney-client privilege in the same, past, related and/or unrelated matter, should follow the guidelines common to both Rule 3-300 and Rule 3-400 and obtain the client or former client's written informed consent.").

## Case Law

Case law has recognized a self-defense exception for over 150 years.

A 2010 Ohio case explains some of the history.

- Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp., 937 N.E.2d 533, 541 (Ohio 2010) (applying the self-defense exception in both the attorney-client privilege and the ethics contexts in a lawsuit by Squire Sanders in pursuing its claim for fees from a former client and defending against a legal malpractice lawsuit by the former client; "The self-protection exception dates back over 150 years to its articulation by Justice Selden in Rochester City Bank v. Suydam, Sage & Co. (N.Y. Sup. Ct. 1851), 5 How. Pr. 254, 262, 3 Code Rep. 249. There he wrote 'Where the attorney or counsel has an interest in the facts communicated to him, and when their disclosure becomes necessary to protect his own personal rights, he must of necessity and in reason be exempted from the obligation of secrecy [sic].' (Emphasis added in part.); "Since that time, this exception has become firmly rooted in American jurisprudence. The Supreme Court of the United States recognized it in 1888 in Hunt v. Blackburn (1888), 128 U.S. 464, 470-471, 9 S.Ct. 125, 32 L.Ed. 488, and courts and commentators have accepted the self-protection exception as black-letter law defining which communications are subject to the attorney-client privilege.").

More recent case law on this issue tends to recognize a trio of 1970s and 1980s cases from New York as articulating the self-defense case law on both the ethics front and the attorney-client privilege front.

Courts began to develop this expanded self-defense exception over thirty years ago. In Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190 (2d Cir.), cert. denied, 419 U.S. 998 (1974), a law firm associate believed that his firm was not properly insisting that its client Empire Fire and Marine Insurance make a full and complete disclosure in public offering documents. The associate left the firm, but was nevertheless named as a defendant in several lawsuits based on the offering documents. The Second Circuit held that the lawyer could disclose his role in the

offering documents' preparation -- reversing the district court's finding that the lawyer had violated his ethics duty of confidentiality.

- Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190, 1193, 1194, 1195 (2d Cir.) (assessing the disclosure rights and obligations of a lawyer (Goldberg) who had practiced at a firm which had represented a client in a transaction; noting that one of the plaintiffs had purchased stock in the transaction and sued Goldberg's former firm; explaining that Goldberg had "expressed concern" while at his firm about the way that it was handling the transaction, and left the firm after the transaction; explaining that Goldberg had met with the plaintiff's law firm "to demonstrate that he had been unaware of the finder's fee arrangement which, he said, Empire and the Sitomer firm had concealed from him all along."; reversing the district court's disqualification of the plaintiff's firm based on Goldberg's disclosure to it; emphasizing Goldberg's right to defend himself; "There is no proof -- not even a suggestion -- that Goldberg had revealed any information, confidential or otherwise, that might have caused the instigation of the suit. To the contrary, it was not until after the suit was commenced that Goldberg learned that he was in jeopardy. The District Court recognized that the complaint had been based on Empire's -- not Goldberg's -- disclosures, but concluded because of this that Goldberg was under no further obligation 'to reveal the information or to discuss the matter with plaintiffs' counsel.'" (emphasis added); "Under these circumstances Goldberg had the right to make an appropriate disclosure with respect to his role in the public offering. Concomitantly, he had the right to support his version of the facts with suitable evidence." (emphasis added)), cert. denied, 419 U.S. 998 (1974).

A few years later, two other New York federal court cases took a narrower view of lawyers' self-defense rights.

- Housler v. First Nat'l Bank of East Islip, 484 F. Supp. 1321, 1323 (E.D.N.Y. 1980) (assessing a situation in which the defendant's general counsel had helped a law firm assisting plaintiff in a law suit against the company; explaining that the general counsel's actions were improper; distinguishing Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190 (2d Cir. 1974), because in this situation the general counsel had assisted the plaintiffs before the lawsuit was filed against the company; explaining that in the future the general counsel may disclose confidences only "in the narrow context of [his] own defense").
- Morin v. Trupin, 728 F. Supp. 952, 955, 956 (S.D.N.Y. 1989) (declining to disqualify a plaintiff's lawyer who received information from defendant's former in-house lawyer (who himself was a defendant in the lawsuit); nevertheless finding that the in-house lawyer's disclosure was too broad, and

enjoining further disclosure as well as requiring the plaintiff's lawyer to destroy notes of the conversation; noting that "[t]he scope of the ethical rules is not equivalent to that of the evidentiary privilege. The ethical rules of client-lawyer confidentiality forbid a lawyer from knowingly disclosing a 'confidence' or 'secret' of his client."; "To the contrary, the written agreement Haber entered into with plaintiffs' counsel obligated him to cooperate fully with plaintiffs' lawyers' investigation into the matters at issue in the two actions, not just provide such information as was necessary to establish his innocence. Moreover, the questioning at times elucidated information that, although perhaps helpful to plaintiffs' investigation, did not directly bear on the propriety or legality of Haber's activities. Thus, Haber's disclosures, made at the prompting of plaintiffs' lawyers, cannot be said to have conformed with the requirements of DR 4-101, even if, as Haber and plaintiffs' counsel contend, no breach of the evidentiary attorney-client privilege occurred.").

However, several years after those fairly narrow decisions, the Southern District of New York recognized a broader self-defense exception.

- First Fed. Sav. & Loan Ass'n v. Oppenheim, Appel, Dixon & Co., 110 F.R.D. 557, 559, 560 n.3, 560-61, 561-62, 566, 567 (S.D.N.Y. 1986) (assessing a situation in which a securities dealer's customers sued the dealer's auditors, which in turn sued the dealer's former general counsel and outside lawyers (among others); noting that the parties "are in dispute as to the preliminary showing, if any, that must be made before a party-attorney may override the privilege, and as to the scope of the disclosure that may be made if the exception is established."; noting that federal law governs the attorney-client privilege, and that "[t]he choice-of-law rule adopted will be significant since the California self-defense exception is narrower than the version that appears to have been implicitly approved by the Second Circuit. As will be seen, that rule permits disclosure by an attorney sued by someone other than the client even if the attorney is not accused of failing to fulfill his duty to his client. California law does not so provide." (emphasis added); "The most frequently invoked rule, which was principally a product of nineteenth-century American common law, permitted disclosure by the attorney if he was suing the client to collect a fee . . . ; if he was being sued by the client for malpractice . . . ; or if his client challenged his competence or integrity even though the attorney was not a party to the lawsuit. . . . In each of these circumstances, the factual dispute is, in effect, between the attorney and his client. . . . To the extent that the client initiates the dispute, he can be said to have put in issue his communications with his attorney and thus waived his right to the protection of the privilege."; noting that "[i]f the foregoing authority were deemed to govern the scope of the privilege and the exceptions to it in this case, it is at least doubtful that the proposed disclosure by Harkins would be tenable since his former client does not charge him with a breach of duty in the attorney-client relationship, or indeed in any other respect. Accordingly,

to justify his proposed disclosure Harkins points to a different body of law, comprising principally a provision of the ABA's Code of Professional Responsibility--DR 4-101(C)(4) [allowing a lawyer to disclose confidences "to defend himself or his employees or associates against an accusation of wrongful conduct"] -- and a Second Circuit decision interpreting that provision."; noting that Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190 (2d Cir.), cert. denied, 419 U.S. 998 (1974), dealt with ethics rather than privilege; concluding that "[i]n sum, the exception for attorney self-defense is recognized and accepted by the courts, albeit with varying degrees of warmth. The key issue, then, involves what limitations--both procedural and substantive--must be placed on its invocation."; ultimately holding that the claim must be "legally sufficient" in order to trigger the self-defense exception, and that "[a]ccordingly, the Court can limit the scope of the disclosure in order to reconcile, to the extent possible, the competing interests of Harkins in disproving OAD's allegations of wrongdoing by him and of his client Comark in protecting the confidentiality of its communications with its attorneys."; adopting a "standard of reasonable necessity," which would allow the lawyer to provide evidence about "what he knew about the issue, what he did about it, what he advised his client to do about it, and what he did not do about it. Necessarily, the production of documents must be similar in scope."; also holding that "I conclude that fairness would require disclosure of all documents pertaining to the communications at issue, whether Harkins volunteered them or not. This is a logical and unavoidable extension of the long-settled rule that a client's disclosure of a portion of an attorney-client privileged document, or of some but not all privileged documents relating to a particular event, may constitute a waiver of the privilege.").

The year after that, the same court applied the exception even before the lawyer had been named as defendant in any proceedings.

- SEC v. Forma, 117 F.R.D. 516, 524, 524-25, 525, 525-26, 526 (S.D.N.Y. 1987) (an opinion by Magistrate Judge James Francis, assessing a situation in which a former outside lawyer for British American Petroleum disclosed confidential communications to the SEC during the SEC's action against BAP's Chairman of the Board; noting that the SEC had not brought any charges against the lawyer Tucker, who had represented both BAP and its Chairman; noting the factual dispute over whether BAP's Chairman had actually waived his individual attorney-client privilege; "The self-defense doctrine permits an attorney to disclose attorney-client communications in order to defend himself against accusations of wrongful conduct."; "Here, Mr. Tucker had not yet been named as a defendant in any proceeding when he sought the waiver from Mr. Forma. However, formal charges need not have been issued for the self-defense exception to apply." (emphasis added); "Here, Jeffrey Tucker was entitled to invoke the self-defense doctrine during the SEC investigation. Requiring him to wait until he was named as a

defendant would have required him to expend substantial resources in his defense, tarnished his professional reputation, and threatened his livelihood as a securities lawyer." (emphasis added); noting that "[t]here remains the issue of the quantum of evidence necessary before an agency investigation of an attorney may breach the attorney-client privilege."; ultimately concluding that "[s]ince this consequence is more significant than the waste of resources that accompanies pretextual pleadings or frivolous lawsuits, a showing that an accusation against an attorney is 'not pretextual' is not sufficient to relieve the attorney of the obligation of preserving client confidences. The best balance here is one that addresses the unique relationship of attorney and client. There will always be some suspicion that the client who engages in illegal activity in a heavily regulated industry may be aided and abetted by his attorney. But before an attorney can reveal confidential client information, the investigating agency must have facts supporting a reasonable suspicion that the attorney's involvement exceeded that of counsel legitimately providing legal advice and instead constituted illegal activity."; concluding that "[a]ccordingly, it was proper for Mr. Tucker to reveal discussions with Mr. Forma under the self-defense exception to the attorney-client privilege").

In the meantime, courts also began to adopt a broad view of the self-defense exception's application to nonclients' attack.

- United States v. Weger, 709 F.2d 1151, 1156, 1156-57 (7th Cir. 1983) (allowing a lawyer to defend himself by disclosing communications with his client, which (among other things) demonstrated the type font in documents, which tended to show that the client had forged a document in a fraudulent effort to obtain a loan; "While it is true that there were no formal charges brought against the law firm in the instant case, based on the fact that the fraudulent title opinion was submitted on the law firm's letterhead stationery, there could have been a reasonable belief on the part of government officials that the law firm had been involved in the preparation of the fraudulent title opinion until such time as the firm could show that its letterhead stationery was used without its permission. The code of legal ethics thus affords an attorney the opportunity to exonerate himself and defend against potential criminal charges or charges of attorney misconduct by allowing the attorney to disclose information to the government when a client has allegedly used the attorney's letterhead stationery and/or legal forms in the furtherance of the commission of a fraud. Contrary to the defendant's argument that the Petrie, Stocking law firm should not have released the letter because no formal charges had been brought against the firm, DR4-101(C)(4) of the Attorney's Code of Professional Responsibility has been interpreted by the courts to allow attorneys to reveal their clients' confidences even though the attorneys have not been charged with a crime or ethical misconduct." (emphasis added); "In the instant case, the law firm released the letter to demonstrate to federal authorities that the firm had nothing to do with the drafting of the

fraudulent title opinion and only incidentally to allow the government to make an analysis of the characteristics of the type style. As in Friend [Application of Friend], 411 F. Supp. 776 (S.D.N.Y. 1975)], it would be senseless to require the law firm to be stigmatized by an indictment prior to allowing them to invoke DR4-101(C)(4) in their own defense. Furthermore, since the defendant's 1978 letter did not relate to the substance of any criminal charges against her, this case is far more clear than one where a law firm releases an incriminating document. However, even if the document in the instant case related to the substance of the charges against the defendant, we would most likely hold that the law firm was correct in releasing the defendant's letter to demonstrate to the government that the law firm was not in any way involved in the preparation of the fraudulent title opinion.").

Cases decided since Meyerhofer and the other early cases demonstrate that their broad view carried the day.

- In re Friend, 411 F. Supp. 776, 777 & n.\* (S.D.N.Y. 1975) (finding that a lawyer could turn over documents containing protected client information to a Grand Jury, without waiting for any formal accusations; "The government and Mr. Friend contend that, pursuant to the Code of Professional Responsibility, Disciplinary Rule 4-101(C), Mr. Friend is entitled to turn over the documents to the Grand Jury. See Meyerhofer v. Empire Fire and Marine Insurance Co., 497 F.2d 1190 (2d Cir. 1974). I agree. . . . 'Although, as yet, no formal accusation has been made against Mr. Friend, it would be senseless to require the stigma of an indictment to attach prior to allowing Mr. Friend to invoke the exception of DR4-101(C)(4) in his own defense.'").
- In re Nat'l Mortg. Equity Corp. Mortg. Pool Certificates Sec. Litig., 120 F.R.D. 687, 689, 690-91, 692 (C.D. Cal. 1988) (holding that the law firm of Lord, Bissell & Brook could rely on the self-defense exception to defend itself against charges by "numerous third-parties" in a securities fraud action; "The self defense exception lies at the congeries of two seemingly unrelated but important legal doctrines: the law of broad evidentiary privileges and the rules which govern the ethical conduct of lawyers. Because these consolidated cases invoke both federal and state claims, under F. R. Evid. 501, whether or not such an exception exists is an issue of federal law. This issue also involves the ethical standards which govern the conduct of lawyers. With respect to the standards which govern such conduct, under Local Rule 2.5.1, members of the bar of this Court are bound to comply with the Rules of Professional Conduct of the State Bar of California. However, those rules contain no provision specifically governing an attorney's conduct in this area. In such a situation, the Court may look to the American Bar Association ('ABA') Model Rules of Professional Conduct (1983) (the 'Model Rules') as an appropriate standard to guide the conduct of members of its bar." (footnotes omitted); noting that Meyerhofer v. Empire Fire & Marine Ins.

- Co., 497 F.2d 1190 (2d Cir.), cert. denied, 419 U.S. 998 (1974), was an ethics, not a privilege, case, but that the same basic principles applied to the privilege context; "The Court has been cited to no case decided since the seminal Meyerhofer case which, either on ethical or evidentiary grounds, disallowed invocation of the self defense exception to defend against third-party allegations of wrongdoing."; "[T]he Court rejects the suggestion made by some parties that 'selective' disclosure should not be allowed, that if the exception is permitted to be invoked, all attorney-client communications should be disclosed. This suggestion is rejected as directly contrary to the reasonable necessity standard. The Court does agree that in order to avoid unfairness, all previously withheld communications which concern the same discrete subject matter (narrowly construed) as to which the self defense exception is invoked, should be disclosed.").
- Stirum v. Whalen, 811 F. Supp. 78, 83-84 (N.D.N.Y. 1993) (holding that defendants' lawyers could defend themselves from allegations of wrongdoing; "Courts have held that when an attorney is accused of wrongful conduct, whether or not the attorney is named as a formal party to the litigation, the attorney is permitted under DR 4-101(C)(4) to reveal confidential communications in an effort to clear his or her name. . . . Plaintiffs' second amended complaint in the case at bar includes numerous allegations of wrongdoing by Bartlett, Pontiff (law firm) in connection with securities fraud and other causes of action leveled against the Whalen defendants. While the court draws no conclusions as to the truthfulness of the allegations against the attorney defendants, the court finds the allegations to be objectively reasonable given the facts in the record at this time. . . . Hence, the attorney defendants certainly must be permitted to defend themselves, and in so doing must be permitted to reveal confidential communications between themselves and the Whalen defendants consistent with DR 4-101(C)(4). Therefore, the court grants the attorney defendants' motion for an order authorizing them to disclose documents and testify about their role in all aspects of the events which gave rise to this lawsuit. In view of this authorization, the attorney defendants are directed to respond to item 22 of plaintiffs' document production request, and any other outstanding discovery request." (emphasis added)).
  - Trepel v. Dippold, No. 04 Civ. 8310 (DLC), 2005 U.S. Dist. LEXIS 19782, at \*8-9 (S.D.N.Y. Sept. 12, 2005) (assessing a situation in which a plaintiff sued a law firm, which sought to sue other lawyers who represented the plaintiff; ultimately allowing that suit to proceed; rejecting plaintiff's argument that the complaint against the other law firms should not be allowed because they would have to remain silent; noting that "Trepel's [plaintiff in the initial suit against his law firm and the law firm representing his opponent in the underlying litigation] argument that the third-party defendants will be prejudiced because they will be silenced by the attorney-client privilege is misplaced, because the applicable disciplinary rule in New York permits a



lawyer to reveal confidences necessary to defend himself even where the accusation of wrongdoing is made by someone other than the client" (emphasis added)).

In 2008, this issue played out in a widely-publicized case between two high-tech companies. During the trial pitting Qualcomm against Broadcom, evidence came to light that Qualcomm had failed to produce over 300,000 responsive emails that went to the heart of the dispute. Qualcomm blamed its outside lawyers at Day Casebeer Madrid & Batchelder and Heller Ehrman. The lawyers wanted to defend themselves, but the court declined to grant them the opportunity.

- Qualcomm Inc. v. Broadcom Corp., Case. No. 05cv1958-B (BLM), 2008 U.S. Dist. LEXIS 911, at \*41-43, \*44-45, \*44 n.3 (S.D. Cal. Jan. 7, 2008) (sanctioning plaintiff Qualcomm for its failure to produce 300,000 pages of responsive emails that it should have realized had been overlooked during discovery; explaining that various outside lawyers at Day Casebeer Madrid & Batchelder and Heller Ehrman improperly ignored warning signs that their client Qualcomm had not produced all responsive emails, and reporting six of the outside lawyers to the California state bar; addressing the outside lawyers' misconduct: "The next question is what, if any, role did Qualcomm's retained lawyers play in withholding the documents? The Court envisions four scenarios. First, Qualcomm intentionally hid the documents from its retained lawyers and did so so effectively that the lawyers did not know or suspect that the suppressed documents existed. Second, the retained lawyers failed to discover the intentionally hidden documents or suspect their existence due to their complete ineptitude and disorganization. Third, Qualcomm shared the damaging documents with its retained lawyers (or at least some of them) and the knowledgeable lawyers worked with Qualcomm to hide the documents and all evidence of Qualcomm's early involvement in the JVT [Joint Video Team]. Or, fourth, while Qualcomm did not tell the retained lawyers about the damaging documents and evidence, the lawyers suspected there was additional evidence or information but chose to ignore the evidence and warning signs and accept Qualcomm's incredible assertions regarding the adequacy of the document search and witness investigation. Given the impressive education and extensive experience of Qualcomm's retained lawyers . . . , the Court rejects the first and second possibilities. It is inconceivable that these talented, well-educated, and experienced lawyers failed to discover through their interactions with Qualcomm any facts or issues that caused (or should have caused) them to question the sufficiency of Qualcomm's document search and production. Qualcomm did not fail to produce a document or two; it withheld over 46,000 critical documents that

extinguished Qualcomm's primary argument of non-participation in the JVT. In addition, the suppressed documents did not belong to one employee, or a couple of employees who had since left the company; they belonged to (or were shared with) numerous, current Qualcomm employees, several of whom testified (falsely) at trial and in depositions. Given the volume and importance of the withheld documents, the number of involved Qualcomm employees, and the numerous warning flags, the Court finds it unbelievable that the retained attorneys did not know or suspect that Qualcomm had not conducted an adequate search for documents." (footnote omitted); "Thus, the Court finds it likely that some variation of option four occurred; that is, one or more of the retained lawyers chose not to look in the correct locations for the correct documents, to accept the unsubstantiated assurances of an important client that its search was sufficient, to ignore the warning signs that the document search and production were inadequate, not to press Qualcomm employees for the truth, and/or to encourage employees to provide the information (or lack of information) that Qualcomm needed to assert its non-participation argument and to succeed in this lawsuit. These choices enabled Qualcomm to withhold hundreds of thousands of pages of relevant discovery and to assert numerous false and misleading arguments to the court and jury. This conduct warrants the imposition of sanctions." (footnote omitted); noting that the lawyers had not been given the opportunity to defend themselves, because their client Qualcomm continued to assert privilege protection; "Qualcomm asserted the attorney-client privilege and decreed that its retained attorneys could not reveal any communications protected by the privilege. . . . Several attorneys complained that the assertion of the privilege prevented them from providing additional information regarding their conduct. . . . This concern was heightened when Qualcomm submitted its self-serving declarations describing the failings of its retained lawyers. . . . Recognizing that a client has a right to maintain this privilege and that no adverse inference should be made based upon the assertion, the Court accepted Qualcomm's assertion of the privilege and has not drawn any adverse inferences from it. . . . However, the fact remains that the Court does not have access to all of the information necessary to reach an informed decision regarding the actual knowledge of the attorneys. As a result, the Court concludes for purposes of this Order that there is insufficient evidence establishing option three." (emphases added)).

About two months later, the court reversed itself -- inexplicably pointing to client Qualcomm's presentation of evidence against the lawyers, which the court found had triggered the lawyers' self-defense exception.

- Qualcomm Inc. v. Broadcom Corp. No. 05CV1958-RMB (BLM), 2008 U.S. Dist. LEXIS 16897, at \*4, \*7, \*8, \*9 (S.D. Cal. Mar. 5, 2008) (vacating an earlier ruling denying lawyers' request to rely on a self-defense exception to

the attorney-client privilege, and allowing lawyers from several firms to defend themselves from accusation that the lawyers committed wrongful acts in connection with their client Qualcomm's failure to produce thousands of responsive emails in patent litigation against Broadcom; explaining that "[o]n September 17, six of the named retained attorneys filed a Motion for an Order Determining that the Federal Common law Self-Defense Exception to Disclosing Privileged and/or Confidential Information Applies to the sanctions motion. All the remaining named retained attorneys joined in this motion. After an accelerated briefing schedule, this intervening motion was heard on September 28, and denied on the same date."; noting that Qualcomm's earlier pleading on the sanctions issue was not supported by a declaration, and did not criticize its outside counsel "other than two passing unsworn comments regarding conduct by its attorneys"; "The self-defense motion was unopposed by Qualcomm, if the hearing could be sealed, and with Broadcom excluded, which was not acceptable to Broadcom. Broadcom did not oppose the motion. The court's order denying the motion is supported primarily because Qualcomm had not presented any evidence, such as declarations, against its attorneys. Thus, no adversity between Qualcomm and its attorneys was presented by Qualcomm." (emphasis added); explaining that Qualcomm later filed declarations that were "critical of the services and advice of their retained counsel"; "This [later] introduction of accusatory adversity between Qualcomm and its retained counsel regarding the issue of assessing responsibility for the failure of discovery changes the factual basis which supported the court's earlier order denying the self-defense exception to Qualcomm's attorney-client privilege. Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190, 1194-95 (2d Cir. 1974); Hearn v. Rhay, 68 F.R.D. 574, 581 (E. D. Wash. 1975); First Fed. Sav. & Loan Ass'n v. Oppenheim, Appel, Dixon & Co., 110 F.R.D. 557, 560-68 (S.D.N.Y. 1986); A.B.A. Model Rules of Prof. Conduct 1.6(b)(5) & comment 10. Accordingly, the court's order denying the self defense exception to the attorney-client privilege is vacated. The attorneys have a due process right to defend themselves under the totality of circumstances presented in this sanctions hearing where their alleged conduct regarding discovery is in conflict with that alleged by Qualcomm concerning performance of discovery responsibilities." (emphases added)).

The court's initial position was inconsistent with the established law and the ethics rules. Once the third party (Broadcom) accused Qualcomm's outside lawyers of misconduct, the lawyers should have been permitted to defend themselves -- even before their own client Qualcomm presented evidence blaming the lawyers.

At least one commentator noted this issue at the time.

Many lawyers have followed the frightening turn of events in Qualcomm's patent case against Broadcom.

In that highly publicized case, several of Qualcomm's lawyers allegedly failed to produce many thousands of relevant e-mails.

In January, a magistrate judge issued a lengthy and extremely harsh opinion criticizing Qualcomm's lawyers for these lapses. (Qualcomm Inc. v. Broadcom Corp., No. 05CV1958-B (BLM) (S.D. Cal. 2008)).

But most lawyers have overlooked a sideshow in the litigation that implicates a critical but often counter-intuitive principle -- that lawyers are allowed to disclose client confidences when defending themselves from a non-client's attacks.

The magistrate judge's opinion noted that Qualcomm's assertion of its attorney-client privilege prevented its lawyers from disclosing client confidences in defending against Broadcom's allegations of discovery abuse. However, on March 5, the U.S. District Court judge vacated the magistrate's earlier opinion, citing the "self-defense exception to the attorney-client privilege of Qualcomm." (Qualcomm Inc. v. Broadcom Corp., No. 05CV1958-RMB (BLM) (S.D. Cal. 2008)). The court pointed to four affidavits filed by Qualcomm employees that were "exonerative of Qualcomm and critical of the services and advice of their retained counsel." It explained that "[t]his introduction of accusatory adversity between Qualcomm" and its lawyer "changes the factual basis which supported the court's earlier order denying the self-defense exception." The district judge remanded the case for further proceedings, during which Qualcomm's lawyer will be able to disclose confidences even over their client's objection.

It is clear that the District Court's decision in Qualcomm stands in the mainstream of the self-defense exception jurisprudence.

In fact, the court could have applied the exception even before Qualcomm's employees filed "accusatory" affidavits "critical of the services and advice of their retained counsel." Broadcom's allegations of misconduct by the Qualcomm lawyers almost surely would have satisfied the

self-defense exception. But the court may have preferred to base its ruling on the client's attack on their own lawyers -- the original setting from which the self-defense exception developed.

Thomas Spahn, The 'Self-defense' exception to lawyers' duty of confidentiality, Lawyers USA, Apr. 21, 2008).

**Best Answer**

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

B 12/14, 1/15

## Defending Against Non-Clients' Criticism

### Hypothetical 28

Last month, you settled a product liability case in which the plaintiff claimed he was injured while using one of your defendant client's skateboards. The plaintiff's case had fallen apart when you caught him lying about his injuries, so your client paid only a nominal settlement. However, your client was still dissatisfied with your bill, and fired you right after the settlement. On this morning's local television news, you saw the plaintiff claiming that you had acted unethically during the litigation, hiding evidence and lying about your client's product. The plaintiff told a reporter that the client must have agreed, because it just fired you.

As you pick up the phone to call the reporter, you wonder whether you need your former client's consent to explain what really happened during the litigation, and why the client fired you.

- (a) Without your former client's consent, may you give the reporter copies of publicly available pleadings demonstrating that the plaintiff lied during the litigation?

**(B) NO (PROBABLY)**

- (b) Without your former client's consent, may you tell the reporter that the client fired you because it was dissatisfied with your bill?

**(B) NO**

### Analysis

Under the ABA Model Rules and most states' ethics rules, both the information about the plaintiff's lying and the client's reason for firing you constitute protected client information. Absent the former client's consent, a lawyer may not disclose such information unless it falls outside the confidentiality duty, or some exception allows its disclosure.

- (a) Information about the plaintiff's lying clearly falls within the protected ABA Model Rule 1.6 definition of "information related to the representation of the client."

ABA Model Rule 1.6(a). Therefore, a lawyer wishing to disclose the information must obtain the former client's consent unless an exception applies.

In some states that continue to follow the ABA Model Code formulation, it might be possible to contend that disclosure of such information does not prejudice the former client and therefore does not deserve protection. ABA Model Code of Professional Responsibility, DR 4-101(A).

However, that would be a risky analysis, because the bar or a court likely would conclude that the lawyer should err on the side of confidentiality and disclose such information only with the former client's consent. In those few states that follow the Restatement approach to confidentiality, information about the plaintiff's lying might have become "generally known," and therefore fall outside the lawyer's confidentiality duty. However, the fact that some evidence of the plaintiff's lying might be available in publicly filed pleadings does not automatically satisfy such a "generally known" standard.

If a lawyer must rely on an exception permitting disclosure of information about the plaintiff's lying, the obvious place to look is ABA Model Rule 1.6(b)(5).

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

ABA Model Rule 1.6(b)(5).

The first two of the three exceptions obviously would not apply, so the only possible exception is the reference to a lawyer's ability to "respond to allegations in any proceeding concerning the lawyer's representation of the client." That exception does not apply unless there is a "proceeding."

Some jurisdictions have adopted ethics rules explicitly articulating the position that most bars would take without such a formal rule.

- District of Columbia Rule 1.6 cmt. [24] ("The lawyer may not disclose a client's confidences or secrets to defend against informal allegations made by third parties; the Rule allows disclosure only if a third party has formally instituted a civil, criminal, or disciplinary action against the lawyer. Even if the third party has formally instituted such a proceeding, the lawyer should advise the client of the third party's action and request that the client respond appropriately, if this is practicable and would not be prejudicial to the lawyer's ability to establish a defense." (emphasis added)).

**(b)** Information about a former client's termination of the lawyer clearly falls within the ABA Model Rule's definition of protected client information. ABA Model Rule 1.6(a).

In states following the ABA Model Code approach, such information would also seem protected, because its disclosure could reasonably be seen as harming the client (even if just reputationally). It is also unlikely to be "generally known," meaning that the few states following the Restatement confidentiality approach would also find the information protected by the confidentiality duty.

None of the three ABA Model Rule 1.6(b)(5) exceptions would seem to apply to allow lawyers to disclose the reason for their termination.



**Best Answer**

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

B 12/14

## Lawyers' Claims Against Former Clients for Unpaid Fees

### Hypothetical 29

After several months of trying to collect your fee from a troublesome ex-client, you have taken the matter to your firm's management with the suggestion that you file a lawsuit against your former client. One of your partners who serves on your firm's executive committee just attended a seminar on the importance of confidentiality, and wonders whether your firm can disclose protected client information in such a lawsuit.

Without your former client's consent, may you disclose protected client information in a lawsuit to collect your fees.

### (A) YES

### Analysis

It seems fair to permit lawyers' disclosure of protected client information to defend themselves from client attacks. It seems less intuitive to permit such disclosures when lawyers defend themselves from non-clients' attacks. But even then, lawyers should have the right to protect themselves in a defensive posture.

If lawyers are in an offensive position, their use of protected client information seems more troublesome. However, if a lawyer's claim is simply to recover fees or costs from a former client who refuses to pay those, such disclosure seems appropriate.

### ABA Canon, Code and Rules

The 1908 ABA Canons of Professional Ethics did not contain a provision dealing with lawyers' disclosure of protected client information in affirmatively asserting a claim against a former client.

To be sure, a Canon entitled "Suing a Client for a Fee" acknowledged such an affirmative claim, but without mentioning the confidentiality issue.

Controversies with clients concerning compensation are to be avoided by the lawyer so far as shall be compatible with his self-respect and with his right to receive reasonable recompense for his services; and lawsuits with clients should be resorted to only to prevent injustice, imposition or fraud.

ABA Canons of Professional Ethics, Canon 14.

In 1937, the ABA added a Canon entitled "Confidences of a Client" -- but that Canon contained an exception limited to lawyers defending themselves from clients accusations.

It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though 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. If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation. The announced intention of a client to commit a crime is not included within the confidences which he is bound to respect. He may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened.

ABA Canons of Professional Ethics, Canon 37 (emphasis added). Thus, the 1937 ABA Canon implicitly prohibited lawyers from disclosing protected client information when attempting to collect their fees.

The ABA soon took a very different approach -- although adopting the shift in a legal ethics opinion rather than a rules change. In a 1943 legal ethics opinion, the ABA explicitly recognized lawyers' ability to disclose protected client information in collecting their fees.

- ABA LEO 250 (6/26/43) ("We are of the opinion that the lawyer may disclose confidential communications in subsequent litigation between the attorney and client where it becomes necessary so to do protect the lawyer's rights. The general rule should not be carried to the extent of depriving the lawyer of the means of obtaining or defending his own rights. Here, the lawyer is seeking to obtain payment of his fees. If grounds for attachment exist, and use of confidential information as to the client's property is reasonably necessary to compel the client to respond to the lawyer's just claim for a fee, then we are of the opinion that the lawyer is not inhibited by the canon from using or disclosing such information, since such disclosure is necessary to enable the lawyer to obtain his rights. The client should not be permitted to take advantage of the rule to defeat the just rights of the lawyer growing out of the lawyer-client relation. Ours is a learned profession, not a mere money-getting trade. . . . Suits to collect fees should be avoided. Only where the circumstances imperatively require, should resort be had to a suit to compel payment. And where a lawyer does resort to a suit to enforce payment of fees which involves a disclosure, he should carefully avoid any disclosure not clearly necessary to obtaining or defending his rights." (emphases added)).

The ABA's strong language might have come as a surprise, given the absence of any reference in the ABA Canons to such a confidentiality exception.

About twenty-five years later, the ABA formally incorporated the exception into its ethics rules.

The 1969 ABA Model Code of Professional Responsibility identified lawyers' attempts to establish or collect fees as the only affirmative claim in which lawyers could disclose protected client information without consent.

A lawyer may reveal . . . confidences or secrets necessary to establish or collect his fee.

ABA Model Code of Professional Responsibility, DR 4-101(C)(4). Somewhat surprisingly, the ABA Model Code did not contain any explanatory comments.

The 1983 ABA Model Rules contain a potentially broader provision.

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to establish a claim or defense on

behalf of the lawyer in a controversy between the lawyer and the client.

ABA Model Rule 1.6(b)(5) (emphasis added).

A comment explains that the "claim" reference includes a claim for payment of fees.

A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

ABA Model Rule 1.6 cmt. [11] (emphasis added).

In fact, this broad reference to a "claim" permits lawyers to disclose protected client information in other unusual situations, such as filing tort claims against their clients.

- Pampattiwar v. Hinson, 756 S.E.2d 246, 248, 249 (Ga. App. 2014) (upholding a jury verdict in favor of a plaintiff lawyer who claimed that his client was defrauded; "Vivek A. Pampattiwar hired Jan V. Hinson, Esq., and her law firm, Jan. V. Hinson, P.C. (collectively, 'Hinson') to file a divorce action on his behalf. Hinson ultimately terminated the representation and brought this action against Pampattiwar, alleging, among other things, that Pampattiwar and committed fraud by intentionally misleading Hinson during his initial consultation with her, and had published statements about her and her firm on the Internet that were libelous and placed her in a false light. Pampattiwar filed a motion to dismiss for failure to state a claim for fraud, which the trial court denied. The case proceeded to trial, and the jury returned a verdict in favor of Hinson on her claims for fraud, libel per se, and false light invasion of privacy. Pampattiwar filed motions for judgment notwithstanding the verdict and for new trial, which the trial court denied. Pampattiwar now appeals, challenging the trial court's denial of his motions. For the reasons discussed below, we affirm."; "In November 2010, Hinson became concerned because 'the phones just stopped ringing' in her office. One of Hinson's assistants 'Googled' Hinson's name on the Internet and discovered a review of her law firm that had recently been posted on the website Kudzu.com under the screen name 'STAREA.' The reviewer described Hinson as 'a CROOK Lawyer' and an 'Extremely Fraudulent Lady.' The reviewer claimed that Hinson 'inflates her bills by 10 times' and had 'duped 12 people i[n] the last couple of years.' Further investigation revealed that the Internet protocol ('IP')

address used for the STAREA review matched the IP address used by Pampattiwar in several emails that he had sent to Hinson.").

As with all ABA Model Rule 1.6(b) exceptions, lawyers must limit any disclosure to that reasonably necessary to satisfy the exception, and must also take advantage of court processes to shield even that information from third parties.

Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

ABA Model Rule 1.6 cmt. [16].

### **Restatement**

A Restatement provision parallels the ABA Model Rules' authorization to disclose protected client information to recover fees.

A lawyer may use or disclose confidential client information when and to the extent that the lawyer reasonably believes necessary to permit the lawyer to resolve a dispute with the client concerning compensation or reimbursement that the lawyer reasonably claims the client owes the lawyer.

Restatement (Third) of Law Governing Lawyers § 65 (2000) (emphasis added). A comment explains the justification for this affirmative use of protected client information.

Without this exception, a lawyer could be deprived of important evidence to prove a rightful claim. Clients would thus sometimes be immune from honest claims for legal fees. Moreover, at least some disclosures necessary to

establish a fee will not involve information that a client would find embarrassing or prejudicial, other than in defeating the client's position in the dispute.

Restatement (Third) of Law Governing Lawyers § 65 cmt. b (2000) (emphasis added).

A reporter's note makes essentially the same point. Interestingly, the note surmises that lawyers would contract around their confidentiality duty in that scenario, if a provision did not allow disclosure necessary to collect their fee.

A rationale sometimes asserted in support of the exception is that any other result would permit a client to cheat a lawyer by imparting confidences to the lawyer, an unlikely strategy. . . . Another rationale, not adopted in this Restatement, is that information about fees is categorically not within the attorney-client privilege and, by extension, the confidentiality rule. . . . A more appealing rationale is that, if lawyers were generally prohibited from using confidential client information to establish their fees, they would certainly be motivated to negotiate to contract around the prohibition. Clients, most of whom presumably intend to pay their bills, would have little reason to resist. Thus, the Section can be regarded as the result that would often be reached by agreement in the absence of the exception here recognized. Conversely, lawyer and client are free to negotiate restrictions on the lawyer's use of confidential information for the purposes of fee collection that are more stringent than those of this Section.

Restatement (Third) of Law Governing Lawyers § 65 reporter's note cmt. b (2000) (emphasis added).

However, the Restatement also acknowledges some criticism of this exception.

Lawyer use of confidential client information to collect fees is controversial. The exception has been criticized as "scandalously self-serving." See A. Goldman, *The Moral Foundations of Professional Ethics* 101 (1980). A discussion draft of one ethics code for lawyers would have eliminated it. See Roscoe Pound-American Trial Lawyer's Ass'n, *The American Lawyer's Code of Conduct*, Rule 1.4 (Discussion Draft, June 1980). The exception is, however, justifiable. In the absence of such an exception, clients could refuse to

pay just compensation to lawyers with impunity. Moreover, lawyers would be uniquely burdened, as no other professional privilege extends or is so relevant to compensation claims. Finally, restrained disclosure would not often result in revelation of information that, for other purposes, the client would not wish disclosed.

Restatement (Third) of Law Governing Lawyers § 65 reporter's note cmt. b (2000)

(emphasis added).

Not surprisingly, lawyers may only disclose protected client information to the extent necessary to recover their fees.

Use or disclosure of confidential client information is permitted only to the extent that the lawyer reasonably believes necessary. The limitations on use or disclosure for purposes of self-defense also apply under this Section . . . . For example, use or disclosure of information that is not relevant to the dispute is unwarranted.

Restatement (Third) of Law Governing Lawyers § 65 cmt. d (2000).

Although the ABA Model Rules do not deal with it, the Restatement addresses lawyers' attempts to obtain fees owed by non-clients for the lawyers' representation of the client.

A Restatement comment indicates that lawyers may not disclose the client's protected information in that context without the client's consent.

Claims asserted by a lawyer against a nonclient for compensation will typically be asserted on behalf of a client. Because § 61 permits use of confidential client information to advance the client's interests, it is reasonable to employ such information in establishing the client's claim for lawyer's fees, for example, a claim against a third person under a fee-shifting statute or contract . . . .

If the claim for fees against a third person is that of the lawyer and not the client, client consent to use or disclose confidential client information to press such a claim can normally be inferred from the fact that the client retained the



lawyer, unless it was agreed that the lawyer would serve without compensation. If, however, use or disclosure of the information would adversely affect a material interest of the client . . . , it would not be reasonable to infer such consent, and explicit client consent . . . is required.

Restatement (Third) of Law Governing Lawyers § 65 cmt. e (2000) (emphases added).

### **Bars and Courts Approach**

As in other confidentiality contexts, bars' approaches have evolved in favor of disclosure.

As explained above, as early as 1943 the ABA favored lawyers' ability to disclose protected client information when collecting their fees. The 1969 ABA Model Code of Professional Responsibility explicitly included such a confidentiality exception, and the 1983 ABA Model Rules of Professional Conduct expanded the exception.

To be sure, some bars fought a rear-guard action. In the run-up to the ABA's 1983 adoption of its Model Rules, the American Trial Lawyers adopted a proposed set of ethics rules explicitly rejecting a confidentiality exception for lawyers' fee collection efforts.

These Rules reject the previously recognized exception permitting lawyers to violate confidentiality to collect an unpaid fee. The reason for that exception -- the lawyer's financial interest -- is not sufficiently weighty to justify impairing confidentiality. On the other hand, a limited exception is permitted, when a lawyer or the lawyer's associate is formally charged with criminal or unprofessional conduct.

Monroe H. Freedman and Thomas Lumbard, Am. Lawyer's Code of Conduct, Proposed Revision of the Code of Prof'l Responsibility, Ch. 1 cmt., Comm'n on Prof'l Responsibility, Roscoe Pound-Am. Trial Lawyers Found., Revised Draft (May 1982) (emphasis added).

However, every state's ethics rule now permits lawyers to disclose protected client information when collecting their fees.

Courts take the same approach.

- Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp., 937 N.E.2d 533, 535, 542, 544, 545, 546, 547 (Ohio 2010) (applying the self-defense exception in both the attorney-client privilege and the ethics contexts in a law suit by Squire Sanders in pursuing its claim for fees from a former client and defending against a legal malpractice lawsuit by the former client; "The issue in this case is whether the common-law self-protection exception to the attorney-client privilege, permitting an attorney to reveal attorney-client communications when necessary to establish a claim or defense on the behalf of the attorney, applies as an exception to R.C. 2317.02(A), which provides that an attorney 'shall not testify \* \* \* concerning a communication made to the attorney by a client in that relation or the attorney's advice to a client.'"; "Pursuant to the common-law self-protection exception to the attorney-client privilege, an attorney should be permitted to testify concerning attorney-client communications where necessary to collect a legal fee or to defend against a charge of malpractice or other wrongdoing in litigation against a client or former client. Ohio recognizes this exception." (emphasis added); "Thus, our caselaw recognizes that the attorney-client privilege does not prevent an attorney from testifying to the correctness, amount, and value of the legal services rendered to the client in an action calling those fees into question."; "Further, the self-protection exception to the attorney-client privilege permitting the attorney to testify also applies when the client puts the representation at issue by charging the attorney with a breach of duty or other wrongdoing. . . . Thus, a client may not rely on attorney-client communications to establish a claim against the attorney while asserting the attorney-client privilege to prevent the attorney from rebutting that claim."; "Ohio recognizes the common-law self-protection exception to the attorney-client privilege, which permits an attorney to testify concerning attorney-client communications where necessary to establish a claim for legal fees on behalf of the attorney or to defend against a charge of malpractice or other wrongdoing in litigation between the attorney and the client." (emphasis added); "When the attorney-client relationship has been put at issue by a claim for legal fees or by a claim that the attorney breached a duty owed to the client, good cause exists for the production of attorney work product to the extent necessary to collect those fees or to defend against the client's claim."; "Thus, attorney work product, including but not limited to mental impressions, theories, and legal conclusions, may be discovered upon a showing a good cause if it is directly at issue in the case, the need for the information is compelling, and the evidence cannot be obtained elsewhere."; "Here, attorney work product, including information sought from King and Garfinkel regarding the staffing of the butter-flavor litigation, trial strategy, resources committed,

and views that the firm provided inadequate representation through counsel lacking sufficient leadership, qualification, and experience, is directly at issue, as the reasonable value of the legal services performed by Squire Sanders and the quality of its legal work are the pivotal issues in this lawsuit, and the need for this evidence is compelling."; "[G]ood cause exists for discovery of otherwise unavailable attorney work product to the extent that the work product has been placed at issue in litigation by a claim for legal fees or by a charge that the attorney breached a duty owed to the client.").

- Shulman Hodges & Bastian, LLP v. Carroll, 78 Va. Cir. 245, 246 (Va. Cir. Ct. 2009) (holding that a law firm suing a client for unpaid fees and seeking to enforce the judgment may disclose client confidences to the extent reasonably necessary; "The basis for the Defendant's objection is that because this matter involves the enforcement of a judgment, Virginia's legal ethics rules do not permit the lawyer, Mr. Hodges, to disclose confidences he learned in the course of his representation of the Defendant in the underlying action. Defendant asserts that '[i]t can only be assumed that Hodges knows something he learned while representing Carroll and the other defendants which he seeks to use at the debtor's interrogatories hearing.' . . . Pursuant to Rule 1.6(b)(2) of the Rules of Professional Conduct, an attorney may reveal information protected by the attorney-client privilege '[t]o the extent a lawyer reasonably believes necessary' in order 'to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client.' An action to collect a fee is covered by Rule 1.6(b)(2). See also Comment 10a to Rule 1.6(b)(2). The Comment cautions that 'the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having a need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.'" (emphasis added)).

### **Best Answer**

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

B 12/14, 1/15

## Lawyers' Affirmative Use in Collateral Matters Involving Fee Disputes

### Hypothetical 30

What was once a good relationship with a corporate client has deteriorated so much that things have turned ugly. When your former client refused to pay your fee, you carefully disclosed only enough protected client information to obtain a judgment, but your former client still seeks to avoid paying.

(a) May you turn the unpaid bill over to a collection agency?

**(A) YES (PROBABLY)**

(b) May you report the unpaid bill to a credit bureau?

**(B) NO (PROBABLY)**

(c) If your former client declares bankruptcy to avoid paying your unpaid bill, may you use protected client information in an effort to block discharge of the client's unpaid bill?

**MAYBE**

(d) May you try to pierce the corporate veil and seek payment of the unpaid bill from your former corporate client's owners?

**MAYBE**

### Analysis

Not surprisingly, ethics rules permit lawyers to disclose protected client information when attempting to collect unpaid fees from their clients. As with all such limited exceptions, lawyers must disclose only the minimal amount of protected client information when seeking to collect their fees. Bars have also dealt with lawyers' justifiable but arguably improper disclosure of protected client information in ancillary proceedings or other collection efforts.

## **ABA Canon, Code and Rules**

The 1969 ABA Model Code of Professional Responsibility explicitly permitted lawyers to disclose protected client information in an effort to collect their fees, although they could disclose only what is reasonably necessary to do so. ABA Model Code of Professional Responsibility, DR 4-101(C)(4). The 1983 ABA Model Rules contain the same exception. ABA Model Rules of Professional Conduct 1.6(b)(5).

However, the ABA Canons, ABA Model Code and ABA Model Rules did not, and do not, explicitly deal with this issue.

## **Restatement**

The Restatement addresses this more subtle issue in three separate sections.

First, the Restatement addresses the issue in its basic confidentiality section -- but mentions competing approaches.

The Restatement indicates that lawyers may go as far as attaching a lawful lien in an effort to recover unpaid fees.

A lawyer may use confidential client information in asserting or supporting a claim for a fee or an unpaid advance of costs, expenses, or the like, and in other steps, such as asserting a lawful lien or attachment . . . against the client's property. The information may be used defensively, as in resisting a client's claim that a fee already paid was unreasonable.

Restatement (Third) of Law Governing Lawyers § 65 cmt. c (2000) (emphasis added).

However, a reporter's note explains that the exception does not extend to collateral proceedings. The note cites a 1988 case holding that lawyers could not use protected client information in an effort to defeat former clients' attempted bankruptcy discharge of unpaid fees.

The exception does not extend to collateral proceedings, even if there is some economic point to the lawyer's collateral search for payment or the means thereof. See *In re Rindlisbacher*, 225 B.R. 180 (9th Cir. Bank.App. 1998) (lawyer may not employ confidential client information in attempt to defeat effort of client to obtain bankruptcy discharge).

Restatement (Third) of Law Governing Lawyers § 65 reporter's note cmt. c (2000)

(emphasis added).

Second, the Restatement deals with this issue in its provisions focusing on fee disputes and collection.

This section acknowledges the several contexts in which fee proceedings might take place, and the general burden of proof.

A fee dispute between a lawyer and a client may be adjudicated in any appropriate proceeding, including a suit by the lawyer to recover an unpaid fee, a suit for a refund by a client, an arbitration to which both parties consent unless applicable law renders the lawyer's consent unnecessary, or in the court's discretion a proceeding ancillary to a pending suit in which the lawyer performed the services in question. . . .

In any such proceeding the lawyer has the burden of persuading the trier of fact, when relevant, of the existence and terms of any fee contract, the making of any disclosures to the client required to render a contract enforceable, and the extent and value of the lawyer's services.

Restatement (Third) of Law Governing Lawyers § 42 (2000). A comment describes the long history of such actions.

Since the early 19th century, courts in the United States have recognized actions brought by lawyers to recover fees. Procedurally, such actions have been treated as contract suits, whether in quantum meruit or based on an explicit contract. Usually each party is entitled to trial by jury.

Restatement (Third) of Law Governing Lawyers § 42 cmt. b(ii) (2000).

The Restatement acknowledges that clients might initiate such proceedings.

A client may sue a lawyer to recover excessive fees paid . . . . In light of the power of the court to prevent overreaching by lawyers and under principles of restitution, a client's payment of a fee does not always preclude a later suit for a refund . . . . However, when the client was informed of the facts needed to evaluate the fee's appropriateness and made payment upon completion of the lawyer's services, payment of a fee can constitute a contract enforceable by the lawyer under § 18, especially if the client was sophisticated in such matters.

Restatement (Third) of Law Governing Lawyers § 42 cmt. b(iii) (2000). Another comment mentions the possibility of clients and their lawyers arbitrating fee disputes.

In many jurisdictions, fee-arbitration procedures entitle any client to obtain arbitration; in others, both lawyer and client must consent. The procedures vary in the extent to which arbitration results are binding on one or both parties. Lawyers and clients might agree to arbitration under general arbitration statutes. An agreement to arbitrate should meet standards of fairness, particularly as regards designation of arbitrators. A client and lawyer may also resort to other forms of nonjudicial dispute resolution.

Restatement (Third) of Law Governing Lawyers § 42 cmt. b(iv) (2000).

The Restatement clearly places the burden of persuasion on lawyers.

Whatever the forum or procedure, the lawyer must persuade the trier of fact of the existence and provisions of any fee contract, the making of required disclosures to the client, and the extent and value of the lawyer's services, when such matters are relevant and in dispute. The client does not lose the benefit of that allocation when the client is plaintiff, for example when the client sues for a refund or has agreed to arbitration. The customary rules of allocation apply to such matters of defense as the statute of limitations.

This Section deals only with the burden of persuasion -- that is, how the case should be decided if the evidence is equally balanced. It does not regulate the burden of pleading; ordinarily the party who initiates a proceeding must set forth allegations showing it is entitled to relief. Nor does this

Section regulate the burden of coming forward, that is, the rules stating what evidence a party must submit to avoid a directed verdict against it. However, the policies expressed in this Section might be relevant to allocating that burden.

This Section's allocation of the burden of persuasion applies whether the client or the lawyer initiates the proceeding. Any other rule would be an incentive to maneuver in which lawyers' knowledge and skills would often give them an unfair advantage. A lawyer, moreover, will usually have better access than a client to evidence about the lawyer's own services, the lawyer's terms of employment, and customary practices concerning fee arrangements.

Restatement (Third) of Law Governing Lawyers § 42 cmt. c (2000). The Restatement provides an illustration.

Client and Lawyer agree that Lawyer will represent Client for a fee of \$ 100 per hour and that Client will make a deposit of \$ 5,000. When the representation has been concluded, the parties dispute what fee is due. Client sues to recover \$ 2,000, alleging and introducing evidence tending to show that Lawyer devoted no more than 30 hours to the matter. Lawyer denies this and testifies to devoting 50 hours. If the conflicting evidence leaves the trier of fact in equipoise, it should find for Client.

Restatement (Third) of Law Governing Lawyers § 42 illus. 1 (2000).

Acknowledging the confidentiality exception discussed elsewhere in the Restatement (and quoted above), the Restatement then describes limits on lawyers' efforts to collect their fees.

In seeking compensation claimed from a client or former client, a lawyer may not employ collection methods forbidden by law, use confidential information . . . when not permitted under § 65, or harass the client.

Restatement (Third) of Law Governing Lawyers § 41 (2000) (emphasis added). A comment provides more detailed guidance.



A lawyer's duty to preserve client information contains an exception for use or disclosure reasonably believed to be necessary to resolve a dispute with the client concerning compensation or reimbursement reasonably claimed by the lawyer . . . . For example, a lawyer may use confidential knowledge about a former client's assets when it is necessary for the lawyer to attach them as a necessary step in fee litigation. Likewise, if a client claims that a lawyer wasted time by needless work, the lawyer may testify to the client's confidential disclosures that persuaded the lawyer of the appropriateness of the work.

The lawyer may not disclose or threaten to disclose information to nonclients not involved in the suit in order to coerce the client into settling. The lawyer's fee claim must be advanced in good faith and with a reasonable basis. The client information must be relevant to the claim, for example because the client advances defenses that need to be rebutted by disclosure. Even then, the lawyer should not disclose the information until after exploring whether the harm can be limited by partial disclosure, stipulation with the client, or a protective order . . . .

Restatement (Third) of Law Governing Lawyers § 41 cmt. c (2000) (emphases added).

The Restatement confirms that lawyers may use collection agencies or their lawyers in an effort to collect fees, but again emphasizes limits on collection efforts.

In collecting a fee a lawyer may use collection agencies or retain counsel. On the other hand, lawyers may not use or threaten tactics such as personal harassment or assert frivolous claims . . . . A lawyer has special duties to adhere to the law and to the legal process, to treat clients fairly, and not to secure unreasonably large fees . . . . Collection methods hence must preserve the client's right to contest the lawyer's position on its merits.

In the absence of a statute, rule, or other law providing to the contrary . . . , a lawyer may not use possession of the client's funds or documents to compel a settlement, for example by retaining documents or unearned fees after the representation ends or otherwise denying the client funds the client is entitled to receive. . . . A lawyer may hold, but may not commingle, contested funds so long as they are segregated from other funds . . . . Likewise, a lawyer may

not take advantage of a client's belief in the lawyer's legal expertise by making misleading assertions to the client about the lawyer's fee claim.

Collection methods that unreasonably impede a decision on the merits of a fee claim are also improper. For example, a lawyer may not use a confession-of-judgment note to collect a fee if it would impede the client's ability to contest the reasonableness of the fee . . . .

Restatement (Third) of Law Governing Lawyers § 41 cmt. d (2000) (emphases added).

Third, the Restatement acknowledges that lawyers may use a lien in an effort to collect these fees, but describes limits on that tool as well.

The fee claim with respect to which a lien is asserted must be advanced in good faith and with a reasonable basis in law and fact. The lawyer must not commingle with the lawyer's own funds any payments subject to the lien . . . . The lawyer must not unreasonably delay resolution of disputes concerning the lien and claimed fee.

One possible remedy for a lawyer's breach of the duties imposed by this Section is forfeiture of the lawyer's fee claim under § 37 or § 41. Alternatively or in addition to partial forfeiture, the tribunal may simply release the lien . . . . Thus a lawyer's inability to attend a prompt hearing on the fee by reason of previous commitments would not warrant fee forfeiture but would be a circumstance in which the tribunal could release the lien.

Restatement (Third) of Law Governing Lawyers § 43 cmt. h (2000) (emphasis added).

### **Bars and Courts Approach**

Bars and courts have tried to draw the line between permissible and impermissible collection efforts.

Courts have severely sanctioned lawyers who disclose more protected client information than necessary to collect their fees, or disclose the information too widely.

In some situations, the only plausible reason why a lawyer disclosed too much information or disclosed information too widely was to pressure the client into paying the lawyer's bill.

- Bd. Of Prof'l Responsibility v. Casper, 318 P.3d 790, 797 (Wyo. 2014) (suspending for thirty days a lawyer who was guilty of several ethics rules violations relating to fees, and who also improperly disclosed protected client information in attempting to collect a fee; "Respondent attached to the Lien Statement a copy of the LSA ['Legal Services Agreement'], as well as a copy of her complete billing records containing confidential client information. The client had agreed in the LSA that Respondent 'may file and record this LIEN and/or file this Agreement;' however, she did not agree to filing the billing records" (emphasis added); "Wyo. R. Prof. Conduct 1.6 pertains to the client. That rule does permit a lawyer to reveal confidential information to the extent the lawyer reasonably believes necessary 'to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client . . . .' Wyo. R. Prof. Conduct 1.6(b)(3). Comment 16 to the rule states: '*A lawyer entitled to a fee is permitted by paragraph (b)(3) to prove the services rendered in an action to collect it.*' Therefore, when collecting a legitimate fee, a lawyer may be permitted to reveal confidential information. See, Ringolsby v. Johnson, 2008 WY 127, ¶ 23, 193 P.3d 1167, 1171 (Wyo. 2008) (Court affirms denial of attorney fee motion because redacted billing records insufficient to allow district court to assess reasonableness of fees). In this case, Respondent was not entitled to the fees that she claimed, and she did not file her lien in accordance with the law, and therefore, her breach of client confidentiality is not justified. The Court finds the record supports the stipulation; Respondent's actions violated Wyo. R. Prof. Conduct 1.9." (emphasis added; emphasis in original indicated by italics)).
- New Hampshire LEO 2010/11-01 (2010) (providing the following "short answers" to questions about a lawyer's freedom to provide government agencies information about a client's unpaid fees; "It is a violation of Rule 1.9 (Duties of Former Client) and Rule 1.6 (Confidentiality of Information) for an attorney to inform the Internal Revenue Service that the attorney has written off the account receivable and considers that the unpaid legal fees are a debt that has been forgiven. . . . It is a violation of Rule 1.9 (Duties of Former Client) and Rule 1.6 (Confidentiality of Information) for an attorney to inform a regulatory agency that a client owes unpaid fees to the attorney." (emphasis added); "For the attorney to file a Form 1099 with the Internal Revenue Service showing debt forgiveness would potentially subject the former client to liability for payment of income tax for the amount of debt that was written off by the attorney. This would be disclosing confidential information, whether or not the disclosure is to the disadvantage of the former client. The attorney's intention in providing information to the IRS or to the Attorney

General's office is to encourage the client to pay the attorney's bill; it is not to establish a claim or defense in a controversy between the lawyer and client; and it is not information that would be generally known." (emphasis added); concluding that "[n]ot being paid by a client is always a frustrating experience. However, in attempting to collect fees from former clients, an attorney may not use or reveal information about a client or use information to the disadvantage of a client, unless permitted by the Rules. The lawyer may use other methods to guarantee payment for work, such as requiring a retainer. Also, should the lawyer seek to collect the fee or be required to defend a suit by the client, she may then use confidential client information as is reasonably necessary." (emphasis added)).

- Akron Bar Ass'n v. Holder, 810 N.E.2d 426, 430, 434, 435 (Ohio 2004) (suspending a lawyer for two years (although staying the suspension), based on the lawyer's disclosure during a fee dispute with a former client that the client admitted to a criminal record in a public deposition; explaining the factual situation; "[O]pposing counsel in the Child First lawsuit had deposed Wright. Wright's testimony during the deposition disclosed that Wright had a history of felony convictions and other behavior that respondent found objectionable." (emphasis added); "The next day, respondent sued Wright individually and as president of Child First for legal fees and fraud. The fraud claim alleged that Wright did not inform respondent truthfully about Wright's criminal record and background. Respondent attached to his complaint Wright's deposition from the Child First lawsuit." (emphasis added); rejecting the lawyer's argument that the information about his former client's criminal record was not a "secret"; "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."; "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); "[W]e 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. . . . [R]espondent 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. Similarly, respondent's allegations of fraud, which were obviously unnecessary to his claim for legal fees, were intended to intimate Wright. These disclosures

surely worked to Wright's disadvantage and constituted the use of secrets at Wright's expense." (emphasis added)).

On the other hand, some bars take a surprisingly broad view of what lawyers may disclose without running afoul of ethics rules.

In 2007 a Missouri court found that a lawyer had not violated that state's confidentiality rule in sending a letter to the Immigration and Naturalization Service indicating that immigration clients who had not paid their \$7,000 bill lacked "the good moral character needed to obtain immigration benefits." Not surprisingly, the court found a violation of Rule 1.16, which deals with protected former clients' interests when withdrawing from a representation -- but not a Rule 1.6 violation.

- In re Lim, 210 S.W.3d 199, 201, 201-02 (Mo. 2007) (finding that a lawyer had violated Missouri Rule 1.16 disclosing information to the Immigration and Naturalization Service about clients who had not paid their bill; noting that a Missouri disciplinary authorities had suspended the lawyer for six months, finding a violation of Rule 1.6 and other ethics rules; ultimately issuing a public reprimand for violation of Rule 1.16, but declining to find a violation of Rule 1.6; "Respondent instructed his daughter and law partner to send a letter, on Lim & Lim letterhead, to the Krishnamurthys, threatening to report them to the United States Immigration and Naturalization Service (INS) if they failed to pay immediately. In February 2004, Respondent sent a letter to the INS reporting that the Krishnamurthys 'lack the good moral character needed to obtain immigration benefits' because they had 'lied and deceived our office' and had an outstanding balance of 'over \$ 7000.' Respondent asked the INS to place the letter in the Krishnamurthy's file 'to prevent them from obtaining any further immigration benefits.'"; "The remaining alleged violations arise from Respondent's letter to the INS. While such vindictive behavior casts shame on the entire profession, the Court is not persuaded that the expressions of Respondent's personal opinion regarding the Krishnamurthys' character constitutes a disclosure of confidential information under the rules. The cases cited by the CDC [Chief Disciplinary Counsel] are distinguishable in that they involve situations where attorneys divulged substantive facts learned in the scope of representation as opposed to subjective opinions formed thereafter. Further, the outstanding debt was a matter of public record by virtue of the collection action. Lastly, the law firm of Lim & Lim need not have registered with the secretary in order to be a valid partnership. The Court does not find a preponderance of evidence establishing violations of Rules 4-1.6(a), 4-1.9, or 4-7.5." (footnotes omitted) (emphasis added)).

In 2007, an Illinois court permitted lawyers to assert various claims against a former client who had not paid the lawyer. The court noted that despite many affirmative claims against the former client (including even "fraudulent misrepresentation"), "monetary values sought by [the lawyers] in the various claims" did not exceed the unpaid fees.

- Pedersen & Houpt, P.C. v. Summit Real Estate Grp., LLC, 877 N.E.2d 4, 7, 9, 10 (Ill. App. Ct. 2007) (reversing a trial court's disqualification of a law firm which had filed various causes of action against former clients in an effort to recover fees the law firm claimed that the clients owed; ultimately concluding that the law firm could disclose client confidences in fulfilling these causes of action, because they were all aimed at recovering fees, and not damages from the former client; "In counts I through XXXIII, P&H [plaintiff] asserts multiple claims for breach of contract, quantum meruit, and account stated against Summit RE, Summit Development, Main Street West, and Tynan for the legal fees incurred during P&H's representation of the companies. In count XXXV, P&H then seeks to pierce the corporate veil of Summit RE to hold Tynan, LLC and Schulte, LLC, liable for the legal debts that Summit RE has accrued to P&H. . . . Similarly, in counts XXXVI and XXXVII, P&H seeks to pierce the corporate veils of Tynan, LLC, and Schulte, LLC, to hold Tynan and Schulte, respectively, responsible for the legal indebtedness of their companies, which it also alleges are 'mere facade[s].'; "In addition, P&H claims recovery of its legal fees under a theory of unjust enrichment (count XL) and successor liability (count XXXVIII) against Main Street West."; "Finally, P&H seeks recovery of its legal fees on theories of promissory estoppel (count XLII) and fraudulent misrepresentation (count XLIV) against all defendants except Summit Development, based on defendants' alleged false promises to pay."; "Defendants . . . contend that the exceptions to confidentiality of client information in Rule 1.6(c)(3) and by implication in Rule 3.7(a)(3) only apply to P&H's breach of contract, quantum meruit, and account stated claims, which seek simple collection of fees due and owing. P&H, on the other hand, urges that all of its alleged causes of action fall under the broad language of Rule 1.6(c)(3)."; "If attorneys' rights under Rule 1.6(c)(3) to breach client confidentiality were limited only to simple actions for breach of contract, quantum meruit, or account stated, they would have no recourse to recover fees in cases where clients employed fraudulent transfers and conveyances or other devices to divest themselves of their assets. According to the allegations that P&H makes in its complaint, it would be unable to collect its fees merely by asserting claims for breach of contract, quantum meruit, and account stated against the parties it directly contracted with, since the real parties in interest -- the ghosts inside the machine, as it were -- have moved their assets away from those original companies.

Rather, in order to actually 'obtain payment of that sum' instead of winning a meaningless judgment against the dissolved and assetless Summit Development and Summit RE, P&H is required to use additional legal theories to pursue its remedies. To require disqualification in such situations would be unnecessary and would unfairly restrict and obstruct the retrieval of fees from unscrupulous clients. Indeed, it would reward the kind of fraudulent conduct that P&H alleges Tynan and Schulte engaged in. Such use of other legal theories still fits within the definition of the phrase 'to establish or collect,' so long as the use of these theories is deployed solely for the purpose of retrieving fees and costs, not to establish other items of damage." (emphasis added); "The monetary values sought by P&H in the various claims also support the conclusion that P&H is not going beyond fee collection in the disputed claims. . . . These synchronized dollar amounts demonstrate that P&H is not using counts XXXIV through XLIV to expand liability beyond that which it alleges in its breach of contract, quantum meruit, and account stated claims; rather, it is using these later claims as alternative means of recovering the same amount." (emphasis added)).

**(a)-(b)** Several bars have indicated that lawyers may rely on a collection agency, but may not report a client's delinquent bill to a credit bureau.

- Alaska LEO 2000-3 (8/18/00) (reaffirming an earlier Alaska legal ethics opinion; concluding that lawyers can disclose protected client information while attempting to collect their bill, but may not disclose a client's delinquency to a credit bureau; "It is important to note the difference between employing a collection agent and reporting a delinquent client to a credit bureau. A collection agency seeks the unpaid fees directly from the delinquent client. The client is assured of procedural safeguards because legal proceedings must be commenced in order to collect the unpaid sum. By comparison, listing a delinquent client with a credit bureau is at best an indirect method of collecting an unpaid fee whereby notice is provided to other businesses that the client is a potential credit risk. In theory, listing an unpaid fee with a credit bureau will prompt a delinquent client to pay his or her bill. However, the pressure to pay an unpaid fee results more from the *in terrorem* affect of a bad credit rating than from any merit to the claim." (emphasis added; emphasis in original indicated by italics); "The referral of a client's debt to a credit bureau is fraught with questions of procedural fairness. When a collection agency files an action to collect fees, the requirements of the legal process must be followed. Similarly, the Alaska Bar Rules provide for a procedure, including reasonable safeguards, to resolve attorney fee disputes. If an attorney concludes that the matter should be referred to a credit bureau however, it automatically becomes a stain on the client's credit record. A delinquent client may respond to a listing by filing an exception to his or her credit report, which must be included in a credit bureau's file. . . . Even so, the potential to damage a client's credit rating remains high because

- potential lenders have reason to be suspicious." (emphasis added); "Further, while the statute of limitations for commencing a collection action is likely to be only three years under present Alaska law, the credit bureau report may include negative information for as long as seven years. The Committee can see no rationale under the rules of professional conduct that justifies a continuing penalty in the form of a bad credit rating long after the attorney's ability to collect the fee has been barred by the applicable statute of limitations." (emphasis added); "Although the law has advanced since the earlier opinion, and provides for some protection against wrongful listings with credit bureaus, the underlying fact remains that an attorney who lists a client with a credit agency has revealed confidential information about the client for a purpose not permitted by ARPC 1.6(b)(2) since such a referral is at most an indirect attempt to pressure the client to pay the fee. For these reasons the Committee reaffirms the conclusions of Opinion 86-3.").
- New York State LEO 684 (32-96) (11/27/96) (lawyers may not report delinquent clients to a credit bureau; "An attorney inquires whether he may ethically report to a credit bureau his client's failure to pay a fee that the lawyer believes is past due. We conclude that the lawyer may not make such a report." (emphasis added); "We believe that the client's unpaid account status will almost always constitutes a 'secret' within the meaning of DR 4-101(B), because it is information 'gained in the professional relationship,' and because revelation 'would be embarrassing or would be likely to be detrimental to the client,' in the words of the Rule's definition of the term 'secret' in DR 4-101(A). Since a lawyer will be hard pressed to collect if even that limited information cannot be revealed, however, the Code provides in DR 4-104(C) an exception to the general rule of DR 4-101(B)."; "The exception in DR-101(C)(4) permits a disclosure of '[c]onfidences or secrets necessary to establish or collect the lawyer's fee.' The question at issue here therefore reduces to whether the report of a client's delinquent account to a credit bureau qualifies as necessary 'to establish or collect the lawyer's fee' within the meaning of that exception."; "We believe that it does not. First, such a report is hardly 'necessary' to collect a fee because a delinquent fee can be collected without it. Second, to the extent it aids the collection process at all, it would appear to do so only by virtue of its in terrorem effect on the client, arising from the likely adverse impact of the report to the credit bureau on the client's credit rating. Such use of a client's secret by a lawyer would plainly violate DR 4-101(B)'s prohibitions on the use of a client secret 'to the disadvantage of the client' and 'for the advantage of the lawyer.'"; "Where the client's potential injury arising from the disclosure of the client secret is the very vehicle of collection, such disclosure cannot be viewed as the type that is 'necessary' for the collection that justifies a departure from the client's reasonable expectation of confidence. See EC-2-32, (even where withdrawal is permitted 'on the basis of compelling circumstances,' a lawyer must 'minimize the possible adverse effect' upon the client 'and otherwise [endeavor] to minimize the possibility of harm.'").



- South Carolina LEO 94-11 (1994) ("A lawyer should not report non-paying clients to credit bureaus: a) it is not necessary for establishing the lawyer's claim for compensation, b) it risks disclosure of confidential information, and c) it smacks of punishment in trying to lower the client's credit rating.").

One old legal ethics opinion took the opposite approach.

- Florida LEO 90-2 (3/1/91) ("The inquiring attorney asks whether it would be permissible for a law firm to 'subscribe to a credit reporting service and provide such service with information about clients who are delinquent in their fees.' The Committee concludes that this action would be ethically permissible under these circumstances: (1) only former clients, rather than current clients, may be reported to the credit bureau; (2) confidential information unrelated to the collection of the debt must not be disclosed; and (3) the debt must not be in dispute."; "[T]he Committee believes that the reporting of a former client to a credit reporting service is permissible only when the debt is undisputed but has not been paid; if there is a dispute concerning the former client's obligation to pay the fee in question, an attorney's use of a credit reporting service would not be permissible.").

Interestingly, a 1994 Kansas legal ethics opinion prohibited lawyers from obtaining prospective consents allowing such reporting.

- Kansas LEO 94-5 (8/15/94) ("There is a tendency in recent years for law firms to use up-front waivers as to known possible conflicts of interest. Can the firm, when negotiating a fee, negotiate a waiver of this rule, and in essence get the client's permission to turn over to the credit bureau a limited amount of information necessary to establish the claim?"; "*KRPC 1.8(b)* allows a lawyer to use information relating to the representation of the client to the disadvantage of the client only when the client consents after consultation. However, the client cannot, under 1.8(b) consent to the use of information acquired under or subject to Rule 1.6 or 3.3. Thus while a knowing waiver might occur in other areas, the client cannot waive -- even after consultation with another attorney or firm -- the use of embarrassing information about the client. We believe this broad prohibition includes the use of information by a credit bureau." (emphasis added; emphasis in original indicated by italics); "Kansas Considerations It is our understanding that credit bureaus in Kansas operate in two modes: (a) a collections side, in which they operate much like a credit bureau, and (b) a credit reporting division where accounts may be sent by the collection department (or the creditor) depending on the instructions given by the client forwarding the accounts for collection. We believe that if the creditor attorney has such an option, consistent with the rules above, counsel should instruct the credit bureau not to report the name of the debtor to the Credit Reporting Service."; "We do not think it ordinarily prudent to use a credit bureau to collect overdue fees. We do not, however,

believe use of a credit bureau under limited circumstances violates the Model Rules. We do not, by this opinion, preclude attorneys from collecting debts using collection agencies or collection attorneys.").

(c) Bankruptcy proceedings' unique rules can complicate this confidentiality issue. Among other things, bankruptcy normally involves multiple parties, rather than just a one-on-one dispute between a lawyer suing a client for unpaid fees. Bankruptcy proceedings can also involve a number of subtleties, such as creditors' ability to oppose the bankrupt's discharge of debts.

In 1993, a District of Columbia legal ethics opinion permitted unpaid lawyers to seek recovery in bankruptcy, but only if they had a reasonable belief that they would recover more than de minimis recovery.

- District of Columbia LEO 236 (3/1993) ("The inquirer presents the following situation. His firm was retained by a California resident for whom it provided services and by whom it is owed fees. Upon threat of a collection action, the client began to make monthly payments. The client subsequently filed a petition for bankruptcy seeking to discharge, among other debts, the debt to the inquiring law firm. This petition has preempted any effort by the firm to collect the fees which it is owed. The bankruptcy is being treated as a 'no asset' proceeding. The inquiring firm has been instructed not to file a proof of claim with the trustee and it is quite unlikely, if the proceeding continues in this form, that the firm will recover any of its fee which is still outstanding."; "As a result of its representation of the client, the firm has reason to believe that the client's representations to the bankruptcy court regarding the nature of her assets and liabilities may not be accurate or complete. This information is based on information supplied during the course of the representation although some of the information is also a matter of public record. The inquirer asks whether, as part of an effort to collect its fees, it is permissible to disclose through proceedings available in the bankruptcy court, the information in the firm's possession regarding the client's assets."; "The course of action proposed by the inquirer regarding the collection of his fees is permitted under the governing Rule assuming several conditions are met. First, so long as the proposed disclosure is made by the lawyer in a proceeding initiated by the attorney or otherwise in the context of an ongoing legal proceeding, it is properly considered to be part of an 'action instituted by the lawyer.' In the absence of any specific authority to the contrary, it is the view of the Committee that this language limits only disclosures made out of the context of formal proceedings. Second, the proposed disclosure to the

bankruptcy court must be as narrow as possible, providing only the minimal information necessary to establish or collect a fee. In addition, if possible, the inquirer should use protective orders, in camera proceedings, John Doe pleadings, and/or other appropriate mechanisms to protect the identity and interests of the client."; Finally, the inquirer must have a good faith expectation of recovering more than a *de minimis* amount of the outstanding fee. It must be emphasized that the exception in the Rule only goes to an attempt to 'establish or collect' a fee. It does not permit the disclosure of client confidences or secrets for any other reason. This includes an effort to bring a potential fraud to the attention of the court, salutary as the underlying policy concern may be. . . . As a result, if, for whatever reason, the lawyer does not have a reasonable expectation of more than a *de minimis* recovery, the disclosure would violate the rule. (footnotes omitted) (emphases added; emphasis in original indicated by italics); "In sum, the well-established but narrow exception to the general rule against revealing client confidences and secrets based in Rule 1.6(d)(5) permits the disclosure of such information in connection with actions to establish or collect fees in bankruptcy proceedings in limited circumstances.").

As with other confidentiality exceptions, the trend clearly favors lawyers' collection efforts at the expense of clients' confidentiality.

In 2014, the Philadelphia Bar explained that lawyers seeking payment for their fees may file bankruptcy pleadings disclosing a former client's unreported property.

- Philadelphia LEO 2014-7 (10/14) (finding that a lawyer who filed a claim for fees after his client declared bankruptcy had discretion to disclose the bankrupt former client's failure to disclose in bankruptcy filings overseas property of which the lawyer is aware; "The inquirer represented A over the last six years in various litigations, primarily defense of mortgage foreclosure actions and/or confession of judgment actions and other collection actions by creditors. Last year, while still a client, A advised the inquirer that he had property in a foreign country that he was trying to sell, and that the sale price was \$300,000. Apparently he had had at least one buyer at that price, but the deal fell through."; "The relationship between A and the inquirer ended, with A having an unpaid bill due the inquirer. A has since filed for bankruptcy, and the inquirer filed a Proof of Claim for his unpaid legal services as a creditor in that bankruptcy. None of the parties against whom the inquirer represented A during the course of their attorney-client relationship are creditors or claimants in the bankruptcy. In reviewing the bankruptcy filings, the inquirer has seen that the property in the foreign country was not listed as an asset. He contacted A's bankruptcy counsel who advised that the inquirer needed to inform the Trustee of the existence of this property immediately. In addition, the inquirer consulted with an ethics attorney who advised that the inquirer

'had the right, if not an obligation, to disclose this information to the Trustee in order to prevent any fraud upon the Court and/or creditors.'"; "After much consideration, the Committee believes that the exceptions to Confidentiality as contained in Rules 1.6c2 and 4 relate to the issue at hand and provide the inquirer with the discretion to make the disclosures. Rule 1.6c2 applies to the situation at hand because, here, failure to disclose the asset to the Bankruptcy Court and Trustee is a federal crime that will result in substantial injury to the financial interests of another. There is no question that the client's failure to disclose is resulting in the shielding of assets." (emphasis added) (footnote omitted); "The same analysis applies to the exception as found in Rule 1.6c4. Comment 15 makes it clear that the purpose of the exception is to allow an attorney to respond to any type of fee dispute brought by the client against the lawyer, or to allow the lawyer in a proceeding to establish his right to a fee. The disclosure relates to the fee and possible assets that are available to protect and pay that fee. The disclosure, if made, will possibly increase the amount of money available to pay all creditors, and therefore benefits all of the creditors including the inquirer." (emphasis added); "Turning next to Rule 3.3, the inquirer is not technically before the court in representing his former client in the bankruptcy proceeding. Here, because the inquirer is not providing any representation to the client in that context, the Committee as a whole felt that disclosure in this context was discretionary.").

In 2013, the New York Bar indicated that lawyers could use protected client information to resist the former client's discharge in bankruptcy.

- New York LEO 980 (9/4/13) ("While the inquiring attorney was representing a client in a contested judicial proceeding in which the client's finances were at issue, the client disclosed confidential information to the attorney about the client's finances (including that the client was working 'off the books'). The information was inconsistent with what the client was providing to the court. The attorney, according to the inquiry, did not 'promote' this information in the judicial proceeding. . . . Subsequently, the client filed for protection from creditors, including the inquiring lawyer, who is owed a legal fee from the prior representation. The lawyer wishes to reveal the confidential information from the first proceeding in the bankruptcy proceeding so as to aid the lawyer's effort to be paid the legal fee." (emphasis added); "We caution that Rule 1.6(b)(5)(ii) is no license for counsel to reveal any confidential information beyond what is 'reasonably believe[d] necessary' to collect the fee. The Rules do not shed much light on these terms. Nonetheless, these terms provide significant limits beyond which a lawyer may not go in seeking to collect a fee. . . . First, a lawyer should not resort to disclosure to collect a fee except in appropriate circumstances. Second, the lawyer should try to avoid the need for disclosure. Third, disclosure must be truly necessary as part of some appropriate and not abusive process to collect the fee. Fourth,

disclosure may not be broader in scope or manner than the need that justifies it, and the lawyer should consider possible means to limit damage to the client." (footnotes omitted); "Of course the limits on the exception also apply in bankruptcy proceedings. Indeed, there is some authority as to how those limits may apply to particular uses of confidential information in the bankruptcy context. However, because the inquiry does not specify the particular planned uses of confidential information, we leave to the inquiring attorney a careful consideration of whether disclosure is appropriate under the above principles, and if so, how to limit it to the minimum necessary. . . . The inquiring attorney should also consider whether the information from the client is not only confidential under the rules of ethics, but also subject to attorney-client privilege, and whether such privilege might affect the permissibility of the proposed disclosure. However, questions of privilege are legal matters on which we do not opine." (footnotes omitted); "A lawyer who in one proceeding obtains confidential information about a client's financial affairs may disclose that information in a subsequent bankruptcy proceeding if, but only to the extent that, the lawyer reasonably believes that disclosure is necessary to collect a fee that the former client owes to the lawyer and disclosure is not barred by attorney-client privilege.").

Of course, states' general approach to confidentiality affects their attitude toward this exception. In 1998, the Ninth Circuit took the opposite approach, citing California's unique and exceedingly strong confidentiality duty.

- Dubrow v. Rindlisbacher (In re Rindlisbacher), 225 B.R. 180, 183, 185 (9th Cir. 1998) (analyzing steps taken by a lawyer owed approximately \$24,000 in attorney's fees in a former client's bankruptcy proceeding; noting that California's ethics rules differed from the ABA Model Rules in finding that the lawyer could not seek to avoid discharge; "Unlike the Model Rules of Professional Conduct and the American Bar Association's Code of Professional Responsibility, cited in those cases, the California ethical rules relating to duties of an attorney do not contain any explicit exception allowing use of client confidences when it is necessary to defend the attorney's rights. The exception to the prohibition on disclosure of client confidences is, however, codified in California's privilege rules. The privilege does not apply to any 'communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship.' Cal. Evid. Code § 958." (emphasis added); "Thus, an attorney may reveal confidences and secrets where it is necessary to do so to get paid."; "There is no question that debtor's communication to Dubrow that he had lied at the dissolution trial was confidential when made. The question is whether Dubrow's use of that communication in this discharge proceeding is related to Dubrow's protection of his own rights against a breach of a duty by debtor. We conclude that it is not. Debtor acknowledges that the purpose of this adversary proceeding to

deny debtor a discharge is to enable Dubrow to collect his fees. That does not necessarily mean that the use of the otherwise confidential communication to deny debtor a discharge is the type of use that is allowed under the ethical rules and the privilege. The idea behind the exception to the confidences rule for collection of an attorney's fee is that the client has breached a duty by failing to pay, and the attorney must be able to defend himself against the client's charges of attorney misconduct. In other words, the client puts the attorney's actions in issue and, in fairness, the attorney must be allowed to defend, even if that defense involves the use of communications that the attorney would otherwise be bound to maintain as confidential. A debtor's pursuit of a discharge is not a breach of the duty to pay; it is a right provided by the Bankruptcy Code. By seeking a discharge the client does not in any way call into question the validity of the attorney's fee or the attorney's actions. He merely seeks to obtain a benefit that the law allows. Because there is no breach of duty by the client, and no claim against the attorney which the attorney must in fairness be permitted to defend, the exception to the confidences rule for disclosure of communications necessary to allow the attorney to collect a fee does not apply." (footnote omitted) (emphases added); "Dubrow's complaint is barred by his ethical obligations and his obligations under the attorney client privilege to preserve client confidences.").

Ten years earlier, the Los Angeles Bar issued an opinion on this topic, also limiting unpaid lawyers' ability to disclose protected client information in a bankruptcy setting.

- Los Angeles County LEO 452 (11/21/88) (holding that a lawyer whose client had declared bankruptcy without paying the lawyer could seek recovery in the bankruptcy setting, but with limits to the type of disclosure; emphasizing California's duty of confidentiality; "Any of the information that is not confidential information certainly does qualify as a client secret, because the attorney himself proposes to use it to the detriment of the former client. . . . Thus unless the former client authorizes disclosure, the information may not be disclosed, unless an exception to section 6068(e) is applicable. There is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship."; permitting the unpaid lawyer to file a claim in bankruptcy; "In collecting a fee or defending against a malpractice action an attorney may disclose both confidential information and client secrets, but only to the extent necessary to the action."; Filing a claim in a bankruptcy case to collect a fee is covered by this exception. Thus an attorney may file his or her claim and may use confidences and secrets to litigate if the claim is contested. However, the attorney should seek appropriate protective orders to prevent disclosure of confidences or secrets beyond what is necessary to litigate the

claim." (emphasis added); "An adversary proceeding to have a debt declared non-dischargeable under Bankruptcy Code S 523 is also a fee-collection process that permits the disclosure of client confidences and secrets. Thus the attorney may prosecute such a proceeding, if the attorney has such a cause of action under section 523. However, as in an fee collection action, the attorney should avoid the disclosure of confidences and secrets to the extent feasible, and should obtain appropriate confidentiality orders for this purpose." (emphasis added); in contrast, explaining that the lawyer could not engage in "collective collection" efforts (emphasis added); "The inquiring attorney apparently also desires to participate in the collective collection effort of the bankruptcy process, and to exercise the rights of any other creditor in this process. This might include providing information to the trustee, examining the debtor in the presence of the trustee or other creditors, and objecting to the discharge of the debtor's debts. Such participation may substantially enlarge the pool of assets available for distribution to the attorney. This raises the question of whether such conduct falls within the fee-collection exception to section 60689e)." (emphasis added); "In the opinion of this Committee, collective actions to collect debts generally from a former client do not fall within the scope of this (or any other) exception. It is improper for a former attorney to disclose any confidential or secret information concerning a client in the collective collection effort in the client's bankruptcy case. This includes information obtained both during the representation of the former client and outside this time period. In effect, this requires the attorney to be a bystander in the collective effort. Thus the attorney may not use confidential or secret information to challenge the right of his former client to a discharge, and may not disclose such information to the trustee or other creditors." (emphasis added); concluding that the lawyer could not disclose bankruptcy fraud by the former client, because the California ethics rule permitted such disclosure only if it occurred on the lawyer's watch; "A failure by the former client to disclose all of the assets **known** to the attorney in the bankruptcy case may constitute bankruptcy fraud by the former client. Competing with the obligation to protect client confidences and secrets is an attorney's obligation to rectify any fraud or deception which has been imposed upon the court or a party. . . . However this exception applies only to fraud committed during the course of the attorney's representation of the client. . . . Because any such nondisclosure would come after the termination of the attorney-client relationship, the attorney may not base any disclosure of the former client's business relations on this exception to section 6068(e).").

(d) In 2004, the North Carolina Bar indicated that a lawyer could attempt to pierce a corporate veil in an effort to collect fees.

- North Carolina LEO 2004-6 (7/16/04) (analyzing the following scenario: "Attorney was engaged by Husband to represent a corporation in several

matters. Husband's wife (Wife) is the corporation's sole shareholder. Husband and the corporation failed to pay the fee for Attorney's services. Pursuant to Rule 1.5(f), Attorney's firm sent the necessary notice of right to participate in the State Bar's fee dispute resolution program to the client. The client did not respond to the notice within the requisite 30 days. Attorney would now like to sue the corporation to collect the fee, and he would like to include a claim in the complaint that the corporate veil should be pierced in order to impose personal liability on Wife and gain access to her assets. During his representation of the corporation, Attorney learned that Husband has experienced legal trouble before and, therefore, titled most of his assets in Wife's name. By reason of the representation of the corporation, Attorney is also aware that the corporation does not follow the corporate formalities. In the litigation, may Attorney reveal the information that he learned during the representation of the corporation in order to establish the basis for asking the court to pierce the corporate veil?"; allowing the lawyer to assert a corporate piercing agreement "In light of limited nature of the disclosure allowed under Rule 1.6(b)(6), Attorney may disclose the information necessary to establish the claim that the corporate veil should be pierced, provided Attorney has a good-faith belief that the piercing claim is warranted by the law and the facts and, further provided, appropriate protective orders or actions are undertaken to limit access to the information."; "[A] lawyer may disclose confidential information to collect a fee, including information necessary to support a claim that the corporate veil should be pierced, provided the claim is advanced in good faith.").

It is unclear whether other bars would allow such steps.

### **Best Answer**

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

B 12/14, 1/15



## Disclosure when Seeking to Withdraw as Counsel of Record

### Hypothetical 31

You need to withdraw as counsel of record for a client who has become increasingly hostile and uncooperative. Among other things, the client stopped paying you three month ago, and this morning refused to send you non-privileged responsive documents you must produce in an upcoming document production.

- (a) In your motion to withdraw as counsel of record, or during the resulting hearing, may you disclose that you are withdrawing because the client has not paid your bill?

**MAYBE**

- (b) In your motion to withdraw as counsel of record, or during the resulting hearing, may you disclose that you are withdrawing because the client has refused to provide non-privileged responsive documents that must be produced?

**MAYBE**

### Analysis

(a)-(b) Lawyers' motions to withdraw as counsel of record involve complicated confidentiality issues.

### **ABA Canon, Code and Rules**

The 1908 ABA Canons of Professional Ethics mentioned confidentiality in the conflicts of interest provision. ABA Canons of Professional Ethics, Canon 6 (8/27/1908). The ABA added another reference to confidentiality in 1928, which it amended in 1937. Id. Canon 37.

The Canons' first mention of permissible disclosure appeared in the 1937 Canons -- which permitted such disclosure only defensively.

It is the duty of a lawyer to preserve his client's confidences.  
This duty outlasts the lawyer's employment, and extends as

well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though 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. If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation. The announced intention of a client to commit a crime is not included within the confidences which he is bound to respect. He may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened.

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

The 1969 ABA Model Code of Professional Responsibility provided a more detailed list of lawyers' permissible disclosure of protected client information.

A lawyer may reveal . . . confidences or secrets necessary to establish or collect his fee or defend himself or his employees or associates against an accusation of wrongful conduct.

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

The 1983 ABA Model Rules provide a somewhat narrower provision permitting the disclosure of protected client information under this self-defense principle.

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

ABA Model Rule 1.6(b)(5) (emphasis added).

A comment provides further guidance.

Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

ABA Model Rule 1.6 cmt. [10].

Not surprisingly, the ABA Model Rules permit such disclosure in this setting only to the extent reasonably necessary.

Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

ABA Model Rule 1.6 cmt. [16].

It is unclear how any of these three scenarios fit lawyers' disclosure of protected client information in a motion to withdraw as counsel of record. Such a motion is not a "claim or defense." And a lawyer-initiated motion to withdraw does not involve lawyers' responding to allegations in any proceeding (although that scenario might present itself if the client resists the withdrawal motion, and asserts some allegation of wrongdoing by the lawyer).

Another ABA Model Rule deals with lawyers' termination of the representation and withdrawal as counsel of record. Part of the Rule deals with situations in which a lawyer must withdraw from representing a client, and another deals with situations in which a lawyer may withdraw.

The mandatory withdrawal provision indicates that

a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of the rules of professional conduct or other law;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) the lawyer is discharged.

ABA Model Rule 1.16(a).

A comment focusing on mandatory withdrawal mentions the confidentiality issue.

When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the

lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

ABA Model Rule 1.16 cmt. [3] (emphasis added).

The other portion of ABA Model Rule 1.16 deals with what the Rule calls "optional" withdrawal.

[A] lawyer may withdraw from representing a client if:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
- (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (3) the client has used the lawyer's services to perpetrate a crime or fraud;
- (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (7) other good cause for withdrawal exists.

ABA Model Rule 1.16(b).

The next section explains the lawyer's duty to comply to court rules.

A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a

representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

ABA Model Rule 1.16(c). Not surprisingly, lawyers successfully terminating the representation must take steps to protect the client's interests.

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

ABA Model Rule 1.16(d).

In contrast to the mandatory withdrawal comment's discussion of the disclosure issue, the two comments dealing with optional withdrawal do not provide any guidance.

A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement. . . .

A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

ABA Model Rule 1.16 cmt. [7], [8].

Because lawyers much more frequently rely on the optional withdrawal provision, it is both surprising and unfortunate that the comments do not address the confidentiality disclosure issue in that much more common scenario.

It is unclear why a disclosure discussion appears in comments dealing with mandatory withdrawal, but not discretionary withdrawal. Perhaps the ABA worried about disclosure in the former scenario, given the necessarily egregious client wrongdoing that would require lawyers' withdrawal -- rather than just permit it. Perhaps the absence of the disclosure reference in the latter context provides lawyers more freedom to make such disclosures when they would like to, but do not have to, withdraw as counsel of record. However, the ABA Model Rules do not indicate as much.

### **Restatement**

The Restatement parallels the ABA Model Rules approach to lawyer withdrawal. One section deals with mandatory withdrawal.

[A] lawyer may not represent a client or, where representation has commenced, must withdraw from the representation of a client if:

- (a) the representation will result in the lawyer's violating rules of professional conduct or other law;
- (b) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (c) the client discharges the lawyer.

Restatement (Third) of Law Governing Lawyers § 32(2) (2000).

The next section deals with discretionary withdrawal.

Subject to Subsections (4) and (5), a lawyer may withdraw from representing a client if:

- (a) withdrawal can be accomplished without material adverse effect on the interests of the client;
  - (b) the lawyer reasonably believes withdrawal is required in circumstances stated in Subsection (2);
  - (c) the client gives informed consent;
  - (d) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal, fraudulent, or in breach of the client's fiduciary duty;
  - (e) the lawyer reasonably believes the client has used or threatens to use the lawyer's services to perpetrate a crime or fraud;
  - (f) the client insists on taking action that the lawyer considers repugnant or imprudent;
  - (g) the client fails to fulfill a substantial financial or other obligation to the lawyer regarding the lawyer's services and the lawyer has given the client reasonable warning that the lawyer will withdraw unless the client fulfills the obligation;
  - (h) the representation has been rendered unreasonably difficult by the client or by the irreparable breakdown of the client-lawyer relationship; or
  - (i) other good cause for withdrawal exists.
- (4) In the case of permissive withdrawal under Subsections (3)(f)-(i), a lawyer may not withdraw if the harm that withdrawal would cause significantly exceeds the harm to the lawyer or others in not withdrawing.

Restatement (Third) of Law Governing Lawyers § 32(3), (4) (2000).

Like the ABA Model Rules, the Restatement salutes lawyers' obligation to seek a tribunal's permission to withdraw as counsel of record.

Notwithstanding Subsections (1)-(4), a lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation and with a valid order of a tribunal requiring the representation to continue.

Restatement (Third) of Law Governing Lawyers § 32(5) (2000).



The Restatement then provides a surprisingly short discussion of the type of permissible disclosure a lawyer may make in connection with a motion to withdraw. In contrast to the ABA Model Rules' comments, the Restatement's comment refers both to mandatory and discretionary withdrawal.

Rules of tribunals typically require approval of the tribunal when a lawyer withdraws from a pending matter . . . . In applying to a tribunal for approval of withdrawal, a lawyer must observe the requirements of confidentiality . . . , unless an exception . . . applies. In applying to withdraw under Subsection (3)(f), for example, it would not be permissible for the lawyer to state that the client intended to pursue a repugnant objective. A lawyer therefore will often be limited to the statement that professional considerations motivate the application.

Restatement (Third) of Law Governing Lawyers § 32 cmt. d (2000) (emphasis added).

Thus, the Restatement speaks to the lawyers' limitation on disclosure. In contrast, ABA Model Rule 1.16 cmt. [3] essentially expresses the hope that courts will accept such a limited statement: "The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient."

### **Bars' and Courts' Approach**

A few bars have dealt with this issue.

Not surprisingly, bars give the sort of generic advice that does not prove very helpful -- warning lawyers not to disclose protected client information, but without explaining what lawyers should do if a court finds such limited disclosure insufficient.

- Maine Bar Counsel Informal Advisory Ethics Notes, Non-prejudicial withdrawal from Representation (6/12/14) ("Attorney's client has just been found guilty of OUI by a jury. Sentencing has been set to occur in two weeks. The day after the verdict, the client called Attorney and made various

complaints about her trial conduct and then made personal threats against her. Attorney has concluded that the client's actions have made it impossible for her to properly represent his interests at sentencing. How does Attorney properly seek court approval for her withdrawal without harming client's interests at sentencing by the same court that will handle her withdrawal request?"; "The Attorney should file her Motion to Withdraw very quickly so that any replacement counsel has adequate time to prepare and assist the client at sentencing. That motion should be based upon M. R. Prof. Conduct 1.7(a)(2) and 1.16(b)(4)(6) or (7). The contents of that motion and/or any related affidavit she may execute, however, should be phrased using the most effective but general language and terms as she deems reasonably possible. She needs to avoid causing prejudice to the client at his sentencing. In doing so, Attorney should not reveal any of client's confidences, including his personal threats against her that could disadvantage him at that sentencing by the court.").

In 2011, the Oregon Bar dealt with the issue on an abstract level. The Oregon Bar indicated that lawyers may carefully disclose some protected client information if the court orders such disclosure.

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

Client under Oregon RPC 1.6(b)(5) but may only do so to the extent 'reasonably necessary' to comply with the court order. Lawyer should therefore take steps to limit unnecessary disclosure of confidential information by, for example, offering to submit such information under seal (or outside the presence of the opposing party) so as to avoid prejudice or injury to the client." (emphasis added)).

This issue normally plays out in case law, because the issue obviously arises in a court.

Not surprisingly, courts and bars generally prohibit lawyers from disclosing the grounds for their withdrawal motion in settings outside the formal pleadings or court arguments.

- Neb. ex rel. Counsel for Discipline of the Neb. Supreme Court v. Tonderum, 840 N.W.2d 487, 489 (Neb. 2013) ("On September 7, 2012, Tonderum called the prosecutor to discuss the pending case. Tonderum stated that she no longer represented her former client because he had rejected her advice and hired the other attorney. Tonderum stated that she 'hated' the other attorney, that she knew her former client was guilty, and that she wanted to make sure the prosecutor sent Tonderum's former client to prison. Tonderum gave the prosecutor the names of several witnesses related to the former client's case, stated what their testimonies would be, provided contact information for certain witnesses, and stated what she expected the defense strategy to be.").
- Rhode Island LEO 2003-04 (9/11/03) (explaining that an unincorporated condominium association's lawyer seeking to withdraw as its counsel may not disclose the reason for the withdraw to an individual unit owner against whom the association has filed suit; "The inquiring attorney seeks to withdraw from the litigation and from the representation of the association, citing breach of the written representation agreement and consistent failure of the board of directors to accept his/her legal advice. The inquiring attorney believes that it would benefit the association to disclose his/her reasons for withdrawing to the individual unit owners."; "It is a violation of Rule 1.6 for the inquiring attorney to disclose to the individual unit owners his/her reasons for withdrawing from the representation of the association, as those reasons constitute 'information relating to the representation' of his/her client, the condominium association, and as such are protected by Rule 1.6." (emphasis added); not addressing the scope of ethical disclosure permitted in the lawyer's withdraw motion).

In the more normal situation, lawyers simply want to withdraw -- disclosing sufficient information to gain that result, but without harming the client or putting the lawyer in jeopardy.

Unfortunately, only a few courts follow the ABA Model Rules comment's suggestion that they essentially take at face value lawyers' explanation that an ethics issue makes it impossible for the lawyers to continue representing their clients.

- Page v. Stanley, No. 2:11-cv-02255-CAS(SSx), 2014 U.S. Dist. LEXIS 76363, at \*4 n.2 & \*5 n.3 (C.D. Cal. June 2, 2014) ("Plaintiff states in his submission that he is willing to waive the attorney-client privilege with respect to the asserted conflict. This offer of waiver does not alter the fact that, according to plaintiff's counsel, a breakdown in attorney-client communications has occurred, and it has become unreasonably difficult to continue to represent plaintiff. . . . While plaintiff's counsel do not provide significant detail regarding the factual basis for this conflict and breakdown, the Court recognizes that plaintiff's counsel is obligated to 'not reveal [their client's] confidences.' . . . . Moreover, the Court has no reason to doubt the sincerity of plaintiff's counsel's assertions regarding the conflict.").

In other courts, the stakes can be remarkably high. Lawyers might justifiably think that they must be fairly explicit in explaining why they seek a court order permitting their withdrawal. After all, the judicial system favors transparency and openness.

However, courts have severely sanctioned lawyers who disclose too much protected client information when seeking to withdraw.

- In re Ponds, 876 A.2d 636 (D.D.C. 2005) (per curium) (publically censuring a lawyer for disclosing information in a motion to withdraw as defense counsel; the lawyer's disclosure is described in the D.C. Court of Appeals Board on Prof'l Responsibility Report & Recommendation, bar dkt. 149-02, Apr. 27, 2005: "Even though counsel informed Mr. Perry [Ponds' client] of his obligation to appear in court . . . (on September 19), he failed to appear. [In a footnote, he wrote: "Counsel learned from Mr. Perry . . . that prior to September 19, 2000, Mr. Perry had removed his electronic monitoring bracelet without consent from the Court."] On September 28, 2001, Mr. Perry, unannounced, appeared at counsel's office. Counsel informed Mr. Perry that the Court had issued a warrant for his arrest because he did not appear in court on September 19, 2001. Counsel then informed Mr. Perry

- of his obligation to surrender to the United States Marshals. During counsel's conversation with Mr. Perry, he made implicit and explicit threats to counsel to secure a refund of the fee paid to counsel for legal representation. Shortly after Mr. Perry left counsel's office, counsel contacted Assistant United States Attorney Stuart Berman and left a message concerning Mr. Perry. Counsel issued a refund to Mr. Perry because he feared for the safety of his employees. The check was solely remitted to Mr. Perry based on the threats he made to counsel. On or about October 1, 2001, counsel placed a stop-payment on the check remitted to Mr. Perry. Counsel informed his bank to contact his office should Mr. Perry negotiate the check. On October 3, 2001, [an employee] of the Bank of America . . . contacted counsel's office. Counsel informed [the employee] that a stop-payment had been placed on the check. Counsel also informed [the employee] that she should contact law enforcement officials because of Mr. Perry's fugitive status. The bank contacted law enforcement officials, they arrived at the bank, detained Mr. Perry and confirmed that he was wanted on a federal fugitive warrant." (internal citation omitted); finding that the disclosure violated Maryland's ethics rules; "The scope of Maryland Rule 1.6 is very broad and includes 'all information relating to the representation, whatever its source.' Md. Rule 1.6 cmt. 5. However, a violation of Md. Rule 1.6 can only be found when the information revealed has the potential for harming the interests of the client. Harris v. The Baltimore Sun, 625 A.2d 941, 947 (Md. 1993). Respondent made statements in the motion to withdraw that revealed 'information relating to representation of' Mr. Perry. In the Board's view, Respondent's disclosure of Mr. Perry's whereabouts and knowledge of the outstanding warrant for his arrest had the potential for harming Mr. Perry because this information could have been used against him in future bail hearings or any prosecution of a Bail Act violation. Indeed, at his disciplinary hearing Respondent tacitly acknowledged the proscriptions contained in Md. Rule 1.6 when he testified that, had it not been for the threats made by Mr. Perry, he would not have made the disclosures to the Court. Tr. II at 114-15 ('if Mr. Perry came into my office and told me that he was not going back to court, that he was leaving the country, and he stopped by just to let me know that, I would have never said anything to the court.')).
- In re Gonzalez, 773 A.2d 1026, 1030, 1031-32 (D.D.C. 2001) (directing the bar to issue an informal admonition to a lawyer the court found had disclosed more protected client information than necessary in seeking to withdraw from a Virginia case, despite the lawyer's argument that a Virginia court would expect that level of disclosure; "In the body of the motion, which Gonzalez submitted to the court for filing and mailed to opposing counsel in the underlying litigation, Gonzalez alleged that A.A. not only missed appointments and failed to provide necessary information, but also 'made misrepresentations to her attorneys.' We think it obvious that a public allegation by a client's own lawyer that the client deliberately lied to him would be 'embarrassing' to the client and 'would be likely to be detrimental' to her,

- within the meaning of DR 4-101 (A)." (footnote omitted); "Gonzalez argues that he was obliged to disclose the information at issue because, under local court practice, his motion to withdraw would otherwise have been denied. This contention is somewhat undermined by Gonzalez' inability, at oral argument, to cite any authority for, or to identify a single concrete example of, the purported local practice to which he alluded. In any event, we agree with the Board that Gonzalez could have submitted his documentation *in camera*, and that he could also have made appropriate redactions of the material most potentially damaging to his clients (e.g., his allegations that A.A. had misrepresented facts to him and his suggestion, in one of the letters, that a demand of \$ 90,000 by the plaintiffs in the underlying litigation might be reasonable)." (footnote omitted) (emphasis added; emphasis in original indicated by italics)).
- Lawyer Disciplinary Bd. v. Farber, 488 S.E.2d 460, 462-63, 463, 465 (W. Va. 1997) (suspending for four months a West Virginia lawyer who disclosed too much protected client information at a motion to withdraw, after his criminal defendant client complained that the lawyer had misled him about the court's light sentence, and therefore filed a pro se motion to set a plea aside; describing the lawyer's disclosure in his motion to withdraw; "On October 17, 1995, the respondent filed a motion to withdraw as Skaggs' counsel. As indicated to the Hearing Panel Subcommittee and to this Court, the respondent based the motion to withdraw upon the contention that Skaggs had either testified falsely at the plea hearing (during which Skaggs had indicated that no promises had been made to him as to the punishment for the offense) or intended to testify falsely upon the motion to set the plea aside (in contradiction to the plea hearing). Upon the latter point, the respondent has asserted that it would be 'a fraudulent act by Mr. Skaggs to attempt to set aside his plea.'"; "Nevertheless, the respondent's motion to withdraw went beyond setting forth allegations supportive of the above contention and denying that the respondent had indicated that the circuit judge had agreed to a \$50 fine. An affidavit attached to the motion indicated that Skaggs had engaged in 'a flat-out-lie' and that 'Skaggs had expressed the view that he thought he would have been convicted of battery had the issue been presented to the jury.' It appears certain that Skaggs' statement concerning battery, as described by the respondent, was made to the respondent during the course of the attorney-client relationship. Moreover, the motion to withdraw containing Skaggs' statement was filed by the respondent prior to the final disposition of Skaggs' case." (emphasis added); also noting that the lawyer sent an ugly letter to his former client; "Shortly after the filing of the motion to withdraw as counsel, the respondent sent a letter to Skaggs dated October 25, 1995. As that letter stated in part: 'What you are doing here is so disgusting to me personally and professionally, I'm going to do everything in my power to even the score with you.'" (emphasis added); "In this case, the respondent's motion to withdraw and subsequent letter went beyond the type of communication appropriate to the termination of an attorney-client

relationship. In the experience of this Court gained in reviewing the many records in cases before us, we may safely say that motions to withdraw as counsel are ordinarily rather attenuated. . . . [T]he respondent's conduct culminated with the letter of October 25, 1995, in which the respondent stated to Skaggs that 'I'm going to do everything in my power to even the score with you.'; "Here, the respondent acted out of anger, rather than professionally, toward Skaggs.").

One well-respected ethics counsel has described the dilemma lawyers face in jurisdictions that prohibit or discourage disclosure of protected client information in withdrawal motions.

- Saul Jay Singer, Speaking of Ethics: Going Through "Withdrawal," Wash. Lawyer, Jan. 2011 (in an article by the Washington, D.C., Bar's ethics counsel, addressing the confidentiality rule's application to lawyers seeking to withdraw from representing a client in court; "Another minefield in motions to withdraw, an issue of which some lawyers seem dangerously unaware, is the applicability of Rule 1.6 (Confidentiality of Information), which includes not only the lawyer's duty to protect attorney–client communications, but extends broadly to any information which the lawyer learns in the course of the representation, whether directly from the client or from any other source, the disclosure of which would prove to be either embarrassing or detrimental to the client. What this effectively means is that the lawyer cannot write in his or her motion to withdraw, or otherwise represent to the tribunal, that 'client won't pay me; I have no idea where client is; client refuses to cooperate; client is psycho;' etc., all of which are protected as client secrets under Rule 1.6. Rather, the lawyer must employ the ultimate 'vanilla' language, i.e., 'a situation has arisen such that continued representation under the circumstances has been rendered impossible.'" (emphasis added); "Most judges understand very well the ethical limitations imposed by Rule 1.6, but that by no means prevents occasional calls from lawyers asking in sheer panic: 'The court won't grant my motion to withdraw unless I provide necessary facts sufficient to support my motion; what do I do?' The terrible answer is: you are stuck; you must not provide Rule 1.6-protected information to the court. The only solution to this monumental problem that this writer can think of is for tribunals to make the adjudication of motions to withdraw a procedural priority so that lawyers are not left hanging in the ethical twilight zone -- and, of course, that judges carefully consider the confidentiality restrictions imposed by Rule 1.6 in this context." (footnote omitted) (emphasis added)).

Some authors have similarly suggested the steps that lawyers may take.

- Dolores Dorsainvil, Withdrawing from a Representation? Mum's the Word, Wash. Lawyer, June 2012 (analyzing Washington, D.C.'s, Rule 1.16 comment; "Filing a motion with a court that reveals a client's confidence or secret can result in what is referred to as a 'noisy withdrawal.' Comment [3] to Rule 1.16 provides guidance to practitioners who may find themselves in an unenviable situation where they may have to file a motion to withdraw from a matter. A lawyer may cite 'irreconcilable differences' between the lawyer and the client as the basis for the need to terminate the relationship. If the court orders or other law requires further explanation for the withdrawal, a lawyer should think about ways to ensure that he or she keeps the client's confidentiality as well as comply with the ethical rules by either filing a motion under seal or requesting an *in camera* review." (emphasis added; emphasis in original indicated by italics)).
- Helen W. Gunnarsson, Avoiding Withdrawal Pains, Ill. Bar J., May 2010 ("[St. Louis lawyer Michael P.] Downey offers suggestions for drafting motions to withdraw. Be wary of including too much detail in the motion, he says, to avoid revealing sensitive or prejudicial information to opposing counsel or, unnecessarily, to the court. But, he continues, have your grounds documented as well as possible in your file. 'It's often OK to file a motion, appear, and say to the court I'll get into details if the court wishes, but I can't do it with opposing counsel here.' One diplomatic but effective wording for a motion premised on sensitive grounds, Chief Judge James Holderman of the federal district court for the Northern District of Illinois suggests, might be 'I have an ethical obligation not to represent this client.' If the court permits or directs, Downey says, you can then reveal to the court in chambers only as much as is necessary for the court to understand the need for you to withdraw.").

Some recent high-profile law firm withdrawals generated news articles about this issue.

- Jan Wolfe, Ex-Client Says Akin Gump Breached Duty By Airing Confession, The AmLaw Litig. Daily, May 27, 2014 ("Attorneys at Akin Gump Strauss Hauer & Feld said last week that LBDS Holding Company admitted to fabricating evidence at the heart of a \$25 million jury verdict. In its haste to flee the case, did Akin Gump reveal too much about its former client's conduct? In a pro se motion filed Tuesday, LBDS chief executive officer Albert Davis wrote that he won't oppose Akin Gump's decision to withdraw from representing the company. But Davis wrote that he 'does object to the inclusion of statements alleged to have been made by the company's representatives in Akin Gump's motion to withdraw, as the disclosure of those statements violates [LBDS's] attorney-client privilege.' Davis indicated that LBDS would file a longer brief outlining its objections. He also asked United States District Judge Leonard Davis in Tyler, Texas, for an extension so that



he could consult with a new legal team.; LBDS marketed software that it says improved the efficiency of magnetic resonance imaging (MRI) machines. The Dallas-based company alleged in a 2011 lawsuit that it entered into an agreement to sell its software to ISOL Technology Inc., a South Korean company that sells MRI machines. LBDS claimed that ISOL breached the distribution agreement and misappropriated trade secrets, causing LBDS to lose out on about \$25 million in business from a third-party called Cerner Corp. LBDS originally sought \$68 million in damages.; In March, jurors awarded LBDS \$24.4 million in lost profits and \$760,000 in damages on the trade secrets misappropriation claim. LBDS was represented by Akin Gump partners Sanford Warren Jr. and Charles 'Chad' Everingham IV, a former judge in the Eastern District of Texas. James Walker of Cole Schotz Meisel Forman & Leonard defended ISOL after taking over the case from Susman Godfrey a few months before trial.; We asked an Akin Gump spokesperson for a response to Tuesday's filing, but didn't hear back before our deadline. In its withdrawal motion, the firm said it was bound by ethical rules to 'take remedial measures, including disclosing LBDS' deception to the court.'").

- Michael D. Goldhaber, Who Wins in Donziger v. Squire Patton Boggs? The AmLaw Dailey, May 22, 2014 ("To call this a litigation about litigation about litigation is too simple. The case of Donziger v. Chevron has morphed into Chevron v. Donziger, which has morphed into Chevron v. Patton Boggs, which has morphed into Donziger v. Squire Patton Boggs.; It's not even clear what to call the motion filed Wednesday night by Steven Donziger, the embattled United States counsel to the plaintiffs who won a \$9.5 billion Amazon judgment against Chevron only to be labeled a fraud in a New York federal court judgment that is now on appeal. Is Donziger moving to unravel the settlement between Chevron and Donziger's former co-counsel Patton Boggs? Or is he moving to scuttle the potential merger between Patton Boggs and Squire Sanders? A legal analysis suggests that the latter aim is more realistic.; On May 7, a New York federal judge entered the settlers' Stipulation and Order of Dismissal by stamping 'So ordered.' Donziger is now asking the court to reconsider this 'approval' and 'to reject the agreement until it conforms to the ethical rules.' With the help of three independent ethicists -- Nora Freeman Engstrom of Stanford Law School, Morris Ratner of University of California Hastings College of Law, and Catherine Rogers of Penn State Law School -- let's examine the four ethical arguments he makes, from weakest to strongest.; First, Donziger argues that Patton Boggs lacked grounds to withdraw under New York Rule of Professional Conduct 1.16. Our panel of experts agrees that this is a weak argument. The judgment is good law notwithstanding the appeal. Judge Lewis Kaplan may recall the 485 pages of reasons he gave Patton Boggs to think it might be advancing crimes or frauds if it remained in the case. Second, Donziger says that with its public expression of regret[,] Patton . . . violated its duty under Rule 1.16 not to prejudice its clients' rights. Ratner says the problem here is that it is not clear how the court could unring that bell if it allowed Donziger's motion to proceed.

Rogers says this is too minor an objection to scuttle a deal, but one that might be addressed if there are greater ethical concerns. Third, Donziger complains that by sandbagging its clients with news of the settlement, Patton offended its Rule 1.4 duty to keep its client informed. Rogers says this, too, is generally a minor concern, except in cases of systematic client neglect. At any rate, even the plaintiffs have suggested they were on notice. An appendix to this very motion says Patton Boggs told Ecuadorian counsel Pablo Fajardo in March that it wouldn't undertake new work. After the May settlement, Fajardo stated: 'In December 2013, the attorneys working on this case asked us to authorize them to get off the case because they were in the process of merging with another law firm. [This presumably referred to Patton Boggs' previous flirtation with Locke Lord.] In order for the merger to happen they needed out of this case. We authorized it, but we couldn't stop it either.' More succinctly, Fajardo told a television station: 'That law firm hasn't worked on the case for the past five months. . . . Tell me, how does that [settlement] affect our case?").

## **Conclusion**

Unfortunately for lawyers in this position, there is no generally applicable rule for what disclosures they can make. If they disclose too much, a bar or even a court might find that they have acted improperly. If they disclose too little, a court might not allow them to withdraw as counsel of record.

Compounding the absence of any generally applicable approach, it seems that courts often have an unstated approach or "lore" about this issue. In fact, even within the same court different judges sometimes take differing positions on what disclosure they require or expect.

There are several options apart from disclosing protected client information in a pleading or in open court. For instance, lawyers seeking to withdraw might refer generically to their state's Rule 1.16, but either (1) ask to approach the court *ex parte* during the hearing, to provide more background information; or (2) invite the court to ask for such an *ex parte* discussion if the court requires it before permitting the lawyers' withdrawal.

**Best Answer**

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

B 12/14

## In-House Lawyers Filing Wrongful Discharge or Qui Tam Actions

### Hypothetical 32

You have spent a miserable five years working as an in-house lawyer for a Bay Area government contractor. In addition to the rowdy atmosphere at the company, you suspect that one or more of the company executives have engaged in some serious misconduct unrelated to the work you have handled for the company. The final straw came today, when the company fired you for not being a "team player" -- because you refused to participate at the annual company "wet T-shirt" contest. Now you wonder what to do.

(a) May you sue your former client/employer for wrongful discharge?

**(A) YES (IN MOST STATES)**

(b) If you find improper conduct in connect with government contracts, may you file a qui tam case?

**(B) NO (PROBABLY)**

### Analysis

The evolving ethics rules have generally moved in the direction of allowing lawyers to affirmatively use protected client information affirmatively rather than just defensively.

(a) Most states now permit in-house lawyers to file wrongful discharge actions against their employers, but often impose limitations. And not all states have moved in that direction.

### **ABA Canon, Code and Rules**

The 1908 ABA Canons of Professional Ethics (as supplemented in 1937) recognized lawyers' right to disclose protected client information only in a defensive posture.

If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation.

ABA Canons of Professional Ethics, Canon 37, amended Sept. 30, 1937.

The 1969 ABA Model Code of Professional Responsibility allowed lawyers to use protected client information affirmatively, but only to collect a fee.

A lawyer may reveal . . . confidences or secrets necessary to establish or collect his fee or defend himself or his employees or associates against an accusation of wrongful conduct.

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

The ABA Model Rules allow a much broader range of disclosure to support certain affirmative claims by lawyers against clients.

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client

ABA Model Rule 1.6(b)(5) (emphasis added). Interestingly, the accompanying comment only mentions lawyers' affirmative use of protected client information to collect a fee.

A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

ABA Model Rule 1.6(b) cmt. [11].

## Restatement

The Restatement takes essentially the same approach as the ABA Model Rules.

A lawyer may use or disclose confidential client information when and to the extent that the lawyer reasonably believes necessary to defend the lawyer or the lawyer's associate or agent against a charge or threatened charge by any person that the lawyer or such associate or agent acted wrongfully in the course of representing a client.

Restatement (Third) of Law Governing Lawyers § 64 (2000). A lengthy comment explains the breadth of the self-defense exception.

American law has long recognized the right of a lawyer to employ confidential client information in self-defense. A similar exception is found in general agency law. . . . The general definition of confidential client information . . . is broad, and the prohibition against adverse use or disclosure . . . is rigorous. Charges against lawyers will often involve circumstances of client-lawyer relationships that can be proved only by using confidential information. Thus, in the absence of the exception stated in the Section, lawyers accused of wrongdoing would be left defenseless against false charges in a way unlike that confronting any other occupational group.

Two additional considerations often justify a lawyer's use of confidential client information in self-defense. First, when a client charges a lawyer with wrongdoing in the course of a representation, the client thereby waives the attorney-client privilege by putting the lawyer's services into issue . . . . Second, some charges against a lawyer brought by nonclients involve a course of conduct in which the lawyer's client is implicated in crime or fraud. In such situations, the crime-fraud exception to the attorney-client privilege . . . may independently permit the lawyer to defend based on otherwise confidential client information.

Restatement (Third) of Law Governing Lawyers § 64 cmt. b (2000).

Ironically, a Restatement illustration indicates that lawyers may affirmatively assert claims against the client other than those for fees -- but discusses that scenario

in the context of lawyers' defensive disclosure use or disclosure of protected client information.

Lawyer is discharged by Law Firm and files suit against it, alleging damages for wrongful discharge. Law Firm defends on the ground that Lawyer's work was incompetent. Law Firm may, to the extent reasonably necessary, employ confidential client information to support its defense of incompetence in defending against Lawyer's claim. Lawyer may, to the extent reasonably necessary, also employ confidential client information to respond to Law Firm's charges of incompetence.

Restatement (Third) of Law Governing Lawyers § 64 illus. 4 (2000) (emphasis added).

### **States Rules' Variations**

Some states have explicitly adopted a narrower exception for lawyers' use or disclosure of protected client information.

In 2012, the District of Columbia Bar issued a legal ethics opinion prohibiting lawyers from disclosing protected client information when filing claims against their employers. The District of Columbia Bar emphasized the difference between the D.C. ethics rules and the ABA Model Rules -- noting that the former does not contain the phrase "claim," which is found in the ABA Model Rules.

- District of Columbia Rule 1.6(e)(3) ("A lawyer may use or reveal client confidences or secrets . . . to the extent reasonably necessary to establish a defense to a criminal charge, disciplinary charge, or civil claim, formally instituted against the lawyer, based upon conduct in which the client was involved, or to the extent reasonably necessary to respond to specific allegations by the client concerning the lawyer's representation of the client." (emphasis added)).
- District of Columbia LEO 363 (10/2012) (explaining that in-house lawyers could file employment discrimination or retaliatory discharge claims against an employer against their employers, but may not use any client confidential information except as authorized by the D.C. ethics rules, which differ from the ABA Model Rules -- because the D.C. rules allow the use of such

information only for defensive purposes; "A lawyer may reveal or use client confidences or secrets in some circumstances. Among these is -- to the extent reasonably necessary to establish a defense to a criminal charge, disciplinary charge, or civil claim, formally instituted against the lawyer, based upon conduct in which the client was involved, or to the extent reasonably necessary to respond to specific allegations by the client concerning the lawyer's representation of the client. D.C. Rule 1.6(e)(3) (emphasis added)."; "Read literally, this provision is limited to defensive use of client information. It does not authorize offensive use of client confidences or secrets by the lawyer in the context of a lawyer-client controversy. Another exception in Rule 1.6 permits a lawyer to use or reveal such information offensively, but only 'to the minimum extent necessary in an action instituted by the lawyer to establish or collect the lawyer's fee.' D.C. Rule 1.6(e)(5) (emphasis added)."; "The history of D.C. Rule 1.6(e)(3) further demonstrates its availability solely for defensive purposes."; "In contrast to the D.C. Rules, the Model Rules permit a lawyer, in a controversy with her client, to reveal information relating to representation offensively as well as defensively."; "Unlike the D.C. Rules, see D.C. Rule 1.6(e)(5), the Model Rules do not expressly authorize disclosure in an action for a lawyer's fee. Such an action is subsumed, however, within the first clause of Model Rule 1.6(b)(5)."; "Thus, the legislative and judicial history of the provisions is consistent with their text. Taken together, these guideposts compel the conclusion that an in-house lawyer may not reveal or use employer/client secrets or confidences offensively in making a claim for employment discrimination or retaliatory discharge -- unless, of course, such disclosures are authorized by another exception to D.C. Rule 1.6 (e.g., the crime/fraud exceptions in subsection (d))."; "A D.C. Bar member may not reveal or use the confidences or secrets of her employer/client in connection with the lawyer's offensive lawsuit against that client, other than in an action for the lawyer's fee and then only 'to the minimum extent necessary.' D.C. Rules 1.6(e)(3), 1.6(e)(5). We express no opinion on whether there may be instances where a statute or case law dealing with employment discrimination or retaliatory discharge overcomes the prohibitions of D.C. Rule 1.6(a). The D.C. Rule, however, does not provide for such preemption within its four corners and the District of Columbia courts have yet to rule on the issue. A lawyer may disclose such information defensively, however, 'to the extent reasonably necessary' to respond to specific allegations by the client or to defend against a civil claim. D.C. Rule 1.6(e)(3). The former context could include responding to affirmative defenses to a discrimination or retaliatory discharge action; the latter could include responding to a client counterclaim in such a lawsuit. D.C. Rule 1.6 cmt. [25]. Moreover, other exceptions in Rule 1.6, such as the crime-fraud exceptions of subsection (d), might be available in appropriate instances. Nothing in the D.C. Rules limits an in-house lawyer's right to bring such a claim because the client/employer might perceive a need to reveal its secrets or confidences in order to defend against the claim. We are mindful of the important public policy that encourages redress in cases of



employment discrimination and retaliatory discharge. We note, however, that this committee's jurisdiction is limited to interpreting the D.C. Rules -- which are promulgated by the Court of Appeals -- as we find them. Whether Rule 1.6(e)(3) is overcome in such a case or, if not, should be revised to permit a lawyer to reveal or use employer/client confidences or secrets offensively in such a case, necessarily remains a matter for the courts." (footnotes omitted) (emphasis added)).

In the same year, a California legal ethics opinion noted California's emphasis on confidentiality in prohibiting public disclosure of protected client information in a wrongful discharge case.

- California LEO 2012-183 (2012) ("While an attorney may disclose client confidences to her own attorney to evaluate a potential wrongful discharge claim against her former firm, neither she nor her attorney may publicly disclose those confidences except in the narrowest of circumstances."; "[C]ase law would permit Senior Associate to disclose confidential information both about the Firm and the Firm's client to Attorney to obtain legal advice about her rights against the Firm."; "Thus, Fox Searchlight [Fox Searchlight Pictures, Inc. v, Paladino, 106 Cal. Rptr. 2d 906 (Cal. Ct. App. 2001)] makes clear that lawyers have the right to disclose employer-client confidential information when seeking legal advice from their own lawyers whether for their own protection or in aid of the client's cause."; "While no case directly addresses to what extent Senior Associate may publicly disclose client confidential information to the extent necessary to further her claims in a legal proceeding, in light of the absolute language in Business and Professions Code section 6068(e)(1), amended only to allow permissive disclosure in more dire circumstances, and the case law discussed above, we conclude that Senior Associate may not publicly disclose the Firm's client's confidences in order to pursue her own civil action." (footnote omitted); "Attorney has two sets of duties to Senior Associate. First, Attorney is bound by the attorney-client privilege and Business and Professions Code section 6068(e)(1) to protect what Senior Associate reveals to him in consulting him about her potential claim against the Firm. As a consequence, unless Senior Associate can publicly disclose her former Firm's client's confidences, and only to the extent that she would be permitted to do so, Attorney is equally bound to protect those confidences from public disclosure because of his duty to protect the confidential information Senior Associate disclosed. (See Bus. & Prof. Code, § 6068(e)(1); rule 3-100.)"; "Second, Attorney also owes Senior Associate a duty of competence under rule 3-110, not only to advance her interests but to avoid harming her. He is a Senior Associate's agent and generally his conduct is imputed to her. Thus, if Senior Associate cannot publicly disclose the Firm's client's confidential information, we conclude that Attorney is prohibited from engaging in such conduct." (footnote omitted)).

## **Bars' and Courts' Approach**

In this area of the law, the trend has clearly been in favor of permitting in-house lawyers' discharge claims, but not all states have moved in that direction.

Bars' legal ethics opinions select this more permissive trend.

In 2001, an ABA legal ethics opinion acknowledged that lawyers may pursue wrongful discharge employment actions, but warned them to be careful when disclosing protected client information in that context.

- ABA LEO 424 (9/22/01) (recognizing that an in-house lawyer's wrongful discharge action constitutes a "claim" under the exception permitting lawyers to disclose protected client information in pursuing a claim, if the disclosure is necessary, and limits the disclosure to the minimum required; "We conclude that a retaliatory discharge or similar claim by an in-house lawyer against her employer is a "claim" under Rule 1.6(b)(2). . . . In pursuing a retaliatory discharge claim, however, the lawyer must limit disclosure of confidential client information to the extent reasonably possible. A comment to Rule 1.6 provides that '[a] lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements limiting the risk of disclosure.' The measures necessary to protect information that may be disclosed will be unique to each situation. For example, a lawyer should consider the protections offered by in camera review at a pre-trial evidentiary hearing. To prevent unnecessary disclosure of confidential information, a lawyer should consider requesting that a court seal the record of the proceedings and consider in an appropriate case whether the action should go forward without disclosing even the names of the parties." (footnotes omitted).).

State legal ethics opinions have generally reflected the same trend, as a chronological list demonstrates.

- North Carolina LEO 2000-11 (1/18/2001) (holding that a former in-house lawyer must obtain a court order before disclosing protected information to support a wrongful termination claim; "May Attorney A reveal information and documents of Corporation C to establish a claim for wrongful termination in his own lawsuit against Corporation C? . . . No, unless an exception to the duty of confidentiality applies and a court permits the disclosure of the confidential information."; "Public policy favors a client's right to terminate the client-lawyer relationship for any reason and at any time without adverse

consequence to the client. Rule 1.16, Comment [4]. If confidential information may be revealed whenever an in-house corporate lawyer's employment is terminated, a chilling effect on a corporation's right to terminate its legal counsel at will may ensue. Nevertheless, there is also a public policy, recognized by the courts of North Carolina in a number of recent decisions, against the termination of an employee for refusing to cooperate in the illegal or immoral activity of his or her employer. Because of this public policy, the courts, in a few limited situations, have allowed an employee to go forward with a wrongful termination claim as an exception to the employment-at-will doctrine. The Ethics Committee cannot make a definitive ruling in the light of the competing public policies illustrated in this inquiry—one favoring the protection of client confidences and the right to counsel of choice and the other condemning the termination of an employee for refusing to participate in wrongful activity. The exception in Rule 1.6(d)(6) is broad enough to include a wrongful termination action. Nevertheless, even when there is an exception permitting disclosure of confidential information, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure. Rule 1.6, cmt. [19]. Given the competing public policies described above, a lawyer may reveal no client confidences in a complaint for wrongful termination except as necessary to put the opposing party on notice of the claim. Prior to disclosing any other confidential information of the former employer and client, the lawyer must obtain a ruling from a court of competent jurisdiction authorizing the lawyer to reveal confidential information of the former client, and even then may only reveal such confidential information as is necessary to establish the wrongful termination claim. Requesting in camera review of the confidential information the plaintiff intends to proffer to establish the wrongful termination claim would be an appropriate procedure for obtaining the court's ruling. There may be other similarly appropriate procedures.").

- San Diego LEO 2008-1 (2008) (holding that in-house lawyers may sue their former employers, but must be careful when disclosing information they acquired while working at their client/employer; creating a matrix of such information, and describing what disclosures the plaintiff in-house lawyers may ethically make; explaining that such in-house lawyers may disclose "employment information" (such as the terms of the employment, salary, etc.) publicly as part of their lawsuit, but may disclose "Legal Services Information" (subject to the attorney-client privilege or the duty of confidentiality) only to their own lawyer, and not publicly; explaining the difference between the attorney-client privilege and the ethics duty of confidentiality; "Important differences between the two bodies of law support this general rule."; "The duty of confidentiality defines obligations the lawyer owes to the client. It prohibits the lawyer from using or disclosing, without client consent, information the lawyer acquires in the course of her work for the client. The

- privilege is a rule of evidence providing a defense against disclosure that otherwise would be compelled by the rules of some tribunal. It therefore defines the circumstances in which the demands of adjudication trump confidentiality." (footnote omitted); "The duty is broader than the privilege in two ways. The duty applies to more things than the privilege, and it applies in more circumstances than the privilege. The duty applies to information the lawyer acquires in the course of working for the client. Such information includes but is not limited to confidential client communications for the purpose of securing legal services, which is the scope of the privilege. The duty also applies regardless [of] whether there is a matter pending before some tribunal, which is the only circumstance in which the privilege may be asserted." (footnotes omitted); holding that an in-house lawyer suing a former employer may disclose confidences to her own lawyer, but may reveal privileged information to others only if such disclosure is permitted by law or an exception to the confidentiality rules; "Former in-house attorneys and their employment counsel should approach the question of disclosure with great care. Because Section 6068(e) [confidentiality provision] allows for no disclosures in this context, counsel should presume they are subject to discipline for making such disclosure unless the case law creates an unambiguous exception to the statutory duty. At present, the case law creates qualified exceptions for disclosure to employment counsel of both Employment Information and Legal Services Information. Case law also creates exceptions for public disclosure of Employment Information. Public disclosure of Legal Services Information presumptively subjects the former in-house attorney to discipline unless disclosure is allowed by: (i) an exception to Section 6068(e); (ii) an exception to the attorney-client privilege; or (iii) a trial court order protecting client information from public view.").
- Delaware LEO 2008-3 (9/30/08) (explaining that a city attorney who had sued the City in an employment case may still represent the City, as long as the lawyer is not handling cases similar to his or her lawsuit against the City; "[I]f Attorney's duties include representing the City in age discrimination cases or other areas of labor law that raises issues that significantly overlap with the issues raised in his lawsuit, then there may be a 'significant risk that the representation of [the City] will be materially limited by . . . a personal interest of the lawyer.' The Committee, however, has not been informed that such circumstances exist here. Moreover, the City can and should take steps to ensure that such a set of circumstances does not develop in the future. Attorney is subordinate to more senior City lawyers. Those senior lawyers have the authority to delegate assignments to Attorney and should implement appropriate safeguards to avoid implicating Rule 1.7(a)(2). . . . Also, Attorney and the defendants in the Superior Court action are represented by outside counsel, which should help to ensure that both Attorney's and the defendant's confidences and strategy in the lawsuit are protected."; "[T]he Committee assumes that, as suggested, the City will take appropriate measures to minimize the risk of a conflict, such as avoiding the assignment to Attorney of

cases and projects involving the same or similar factual or legal issues raised in his lawsuit.").

Courts are moving in the same direction as the bars, but as with the legal ethics opinions not every state recognizes in-house lawyers' right to file wrongful termination claims.

A well-known older case indicated that in-house lawyers may not file a "retaliatory discharge" claim because it would necessarily involve disclosure of client confidences.

- Balla v. Gambro, Inc., 584 N.E.2d 104, 107, 108, 108-109 (Ill. 1991) (concluding that an in-house lawyer may not pursue a claim against a client/employer for retaliatory discharge; "We agree with the trial court that appellee does not have a cause of action against Gambro for retaliatory discharge under the facts of the case at bar."; "We agree with the conclusion reached in Herbster [Herbster v. N. Am. Co. for Life & Health Ins., 501 N.E.2d 343 (Ill. Ct. App. 1986)] that, generally, in-house counsel do not have a claim under the tort of retaliatory discharge. However, we base our decision as much on the nature and purpose of the tort of retaliatory discharge, as on the effect on the attorney-client relationship that extending the tort would have."; "In this case, the public policy to be protected, that of protecting the lives and property of citizens, is adequately safeguarded without extending the tort of retaliatory discharge to in-house counsel. Appellee was required under the Rules of Professional Conduct to report Gambro's intention to sell the 'misbranded and/or adulterated' dialyzers. . . . Appellee alleges, and the FDA's seizure of the dialyzers indicates, that the use of the dialyzers would cause death or serious bodily injury. Thus, under the above-cited rule, appellee was under the mandate of this court to report the sale of these dialyzers.").

A number of more recent cases also take this approach -- prohibiting or otherwise restricting in-house lawyers from pursuing wrongful termination claims because of the inevitable disclosure of client confidential information.

- Olivo v. City of Vernon, No. B213984, 2010 Cal. App. Unpub. LEXIS 6018, at \*43, \*47-48 (Cal. Ct. App. July 29, 2010) (holding that a county attorney cannot sue a city for retaliatory discharge, because it would necessarily reveal privileged communications; "[W]e must reach the same inescapable conclusion as the trial court that appellant's claims cannot proceed without

breach of the attorney-client privilege."; "Were we to allow appellant to utilize the Report [investigation into the city's finances prepared by plaintiff] to establish his claims, we would effectively be creating an exception to the attorney-client privilege for retaliatory termination claims. That is not our role. . . . Because appellant's statutory retaliatory termination claims cannot be resolved without the use of attorney-client privileged information, the trial court properly determined that those claims were barred as a matter of law.").

- Ausman v. Arthur Anderson, LLP, 810 N.E.2d 566 (Ill. App. Ct.) (prohibiting an in-house lawyer from suing her former client/employer for wrongful discharge), appeal denied, 823 N.E.2d 962 (Ill. 2004).

Although many if not most jurisdictions originally prohibited or discouraged lawyers from suing for wrongful termination, most jurisdictions now permit such lawsuits -- although they frequently warn lawyers not to disclose any more protected client information than necessary.

A chronological view of these cases highlights this trend.

- Gen. Dynamics Corp. v. Superior Court, 876 P.2d 487, 489-90 (Cal. 1994) (holding that in-house lawyers may pursue wrongful termination claims against their client/employer; "We granted review to consider an attorney's status as 'in-house' counsel as it affects the right to pursue claims for damages following an allegedly wrongful termination of employment. Specifically, we are asked to decide whether an attorney's status as an employee bars the pursuit of implied-in-fact contract and retaliatory discharge tort causes of action against the employer that are commonly the subject of suits by non-attorney employees who assert the same claims. We conclude that, because so-called 'just cause' contractual claims are unlikely to implicate values central to the attorney-client relationship, there is no valid reason why an in-house attorney should not be permitted to pursue such a contract claim in the same way as the nonattorney employee. Our conclusion with respect to the tort cause of action is qualified; our holding seeks to accommodate two conflicting values, both of which arise from the nature of an attorney's professional role -- the fiducial nature of the relationship with the client, on the one hand, and the duty to adhere to a handful of defining ethical norms, on the other. As will appear, we conclude that there is no reason inherent in the nature of an attorney's role as in-house counsel to a corporation that in itself precludes the maintenance of a retaliatory discharge claim, provided it can be established without breaching the attorney-client privilege or unduly endangering the values lying at the heart of the professional relationship.").

- GTE Prods. Corp. v. Stewart, 653 N.E.2d 161, 165, 166, 166-67 (Mass. 1995) (holding that in-house lawyers may pursue wrongful termination claims against their client/employer; "Courts in jurisdictions which generally recognize an employee's action for wrongful or retaliatory discharge have, however, differed on the question whether an attorney, employed as in-house counsel, should be permitted the same right to sue for wrongful discharge as that enjoyed by other corporate employees. In Balla v. Gambro, Inc., 145 Ill. 2d 492, 501 (1991), the Supreme Court of Illinois concluded 'that, generally, in-house counsel do not have a claim . . . of retaliatory discharge.'" (footnote omitted); "In contrast, in the case of General Dynamics Corp. v. Rose, 7 Cal. 4th 1164 (1994), decided after the judge in this case ruled on GTE's motion for summary judgment, the Supreme Court of California concluded that there were sound reasons for recognizing the right of in-house counsel to sue for wrongful discharge in certain limited situations."; "We find the latter approach more persuasive. We would be reluctant to conclude that an employee, solely by reason of his or her status as an attorney, must be denied all protection from wrongful discharge arising from the performance of an action compelled by a clearly defined public policy of the Commonwealth."; "We agree with the Supreme Court of California that public interest is better served if in-house counsel's resolve to comply with ethical and statutorily mandated duties is strengthened by providing judicial recourse when an employer's demands are in direct and unequivocal conflict with those duties. . . . We stress, however, that a claim for wrongful discharge brought by in-house counsel will be recognized only in narrow and carefully delineated circumstances. To the extent that in-house counsel's claim depends on an assertion that compliance with the demands of the employer would have required the attorney to violate duties imposed by a statute or the disciplinary rules governing the practice of law in the Commonwealth, that claim will only be recognized if it depends on (1) explicit and unequivocal statutory or ethical norms (2) which embody policies of importance to the public at large in the circumstances of the particular case, and (3) the claim can be proved without any violation of the attorney's obligation to respect client confidences and secrets." (footnote omitted)).
- Kachmar v. Sungard Data Sys. Inc., 109 F.3d 173, 179, 179-80, 181, 182 (3d Cir. 1997) (holding that an in-house lawyer may pursue a retaliatory discharge claim; "Those few federal courts that have been presented with discrimination actions brought by in-house counsel have generally held that once an attorney's employment has terminated, s/he is not barred from bringing suit against the former employer for retaliatory discharge under Title VII."; "SunGard concedes that in-house counsel are not per se precluded from bringing a retaliatory discharge claim but argues that such suits are limited to cases in which confidential information is not implicated, which it contends is not the case here. . . . SunGard notes that while Rule 1.6(c)(3) allows the disclosure of confidential information 'to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client,' the

comments to the Rule only offer two examples of such disputes: where there is a dispute over fees and where an attorney is defending against a claim implicating his conduct. . . . However, the Rules do not address affirmative claims for relief under a federal statute and thus we believe they are at best inconclusive on the issue SunGard raises. SunGard seeks to bolster its contention that suits such as this by former in-house counsel run counter to the policies underlying the attorney-client privilege by citing a few state Supreme Court cases. It is true that some state cases take a restrictive view of the former in-house counsel's ability to file suit for retaliatory discharge."; "We do not suggest that concerns about the disclosure of client confidences in suits by in-house counsel are unfounded, but these concerns alone would not warrant dismissing a plaintiff's case, especially where there are other means to prevent unwarranted disclosure of confidential information."; "In balancing the needed protection of sensitive information with the in-house counsel's right to maintain the suit, the district court may use a number of equitable measures at its disposal 'designed to permit the attorney plaintiff to attempt to make the necessary proof while protecting from disclosure client confidences subject to the privilege.' . . . Among those referred to in General Dynamics [Gen. Dynamics Corp. v. Superior Court, 876 P.2d 487 (Cal. 1994)] were 'the use of sealing and protective orders, limited admissibility of evidence, orders restricting the use of testimony in successive proceedings, and, where appropriate, in camera proceedings.' . . . Admittedly, this may entail more attention by a judicial officer than in most other Title VII actions, but we are not prepared to say that the trial court, after assessing the sensitivity of the information offered at trial, would not be able to draft a procedure that permits vindicating Kachmar's rights while preserving the core values underlying the attorney-client relationship.").

- Fox Searchlight Pictures, Inc. v. Paladino, 106 Cal. Rptr. 2d 906, 920, 919 (Cal. Ct. App. 2001) (holding that under California law, an in-house counsel may sue for wrongful termination, even though the lawyer would have to reveal to his or her lawyer-client confidences; "We conclude in-house counsel may disclose ostensible employer-client confidences to her own attorneys to the extent they may be relevant to the preparation and prosecution of her wrongful termination action against her former client-employer."; noting that "[c]ourts in some jurisdictions have concluded it is impossible to meet this challenge and therefore have refused to permit such suits on the ground they pose too great a threat to the attorney-client relationship").
- Crews v. Buckman Labs Int'l, Inc., 78 S.W. 3d 852, 855 (Tenn. 2002) (holding that in-house lawyers may pursue wrongful termination claims against their client/employer; "The sole issue in this case is whether an in-house lawyer can bring a common-law claim for retaliatory discharge when she was terminated for reporting that her employer's general counsel was engaged in the unauthorized practice of law. The trial court dismissed the plaintiff's complaint for failure to state a claim, and the dismissal was affirmed by the



Court of Appeals. We hold that in-house counsel may bring a common-law action for retaliatory discharge resulting from counsel's compliance with a provision of the Code of Professional Responsibility that represents a clear and definitive statement of public policy.").

- Crews v. Buckman Labs. Int'l, Inc., 78 S.W.3d 852, 859 (Tenn. 2002) (finding that the trend was in favor of allowing lawsuits by in-house counsel for wrongful discharge "under limited circumstances, to pursue a claim of retaliatory discharge based upon termination in violation of public policy").
- Spratley v. State Farm Mut. Auto. Ins. Co., 78 P.3d 603, 609, 610, 611 (Utah 2003) (holding that in-house lawyers may pursue wrongful termination claims; "Despite the countervailing considerations outlined in the opinion of the court in Balla [Balla v. Gambro, Inc., 584 N.E.2d 104 (Ill. 1991)], the plain language of Rule 1.6 and the policy considerations outlined in other cases weigh in favor of allowing disclosure, in a limited fashion, of confidential client information in a suit by former in-house counsel for wrongful discharge. While adopting a literal interpretation of Rule 1.6 that permits revelations of confidential client information, we are careful to note that both former in-house counsel and trial courts must exercise great care in disclosing confidences." (footnote omitted); "The trial court has numerous tools it must employ to prevent unwarranted disclosure of the confidential information, including "the use of sealing and protective orders, limited admissibility of evidence, orders restricting the use of testimony in successive proceedings, and, where appropriate, in camera proceedings." . . . The liberal use of these tools, and others inherent in a trial court's authority to govern the conduct of proceedings, is a prudent and sufficient safeguard against overbroad disclosure. We note, however, that it remains the attorney's duty to minimize disclosures. While trial courts possess broad protective powers, any disclosures made by the attorney that are not reasonably necessary to the claim may still subject that attorney to professional discipline or litigation sanctions; a trial court's failure to prevent improper disclosure will not be a safe harbor for former in-house counsel who carelessly disclose more than is reasonably necessary to the claim."; "Spratley and Pearce represented State Farm and its insureds for many years and owe lawyers' duties of confidentiality to those former clients. Nevertheless, they may disclose State Farm's client confidences as reasonably necessary to make a claim against State Farm. We reverse the trial court's order insofar as it prohibits disclosures that would be reasonably necessary to Spratley and Pearce's claims against State Farm. We affirm the portion of the trial court's order that requires Spratley and Pearce to obtain the permission of any clients other than State Farm if Spratley and Pearce wish to use those clients' confidences in their suit against State Farm."; also holding that lawyers pursuing their wrongful discharge claim could disclose protected client information to their own lawyers; "Spratley and Pearce must be able to seek the advice of counsel to prosecute their claim against State Farm. If chosen counsel could

be disqualified because of disclosures made by the plaintiffs for the purpose of legal advice and representation, the ability to retain counsel in such matters would be illusory. Under the facts of this case we cannot sanction a result that would deprive Spratley and Pearce of the opportunity to employ counsel."; "Representing a former in-house attorney as a client and learning the substance of confidential communications does not disqualify an attorney from representing that client, but it may require disqualification of the attorney from representing other clients. State Farm has opposed other litigants represented by Humpherys and his firm, but those cases are not now before us. The disqualification in this case was inappropriate.").

- O'Brien v. Stolt-Nielson Transp. Grp., Ltd., 838 A.2d 1076, 1084 (Conn. Super. Ct. 2003) (allowing an in-house lawyer to file a wrongful termination or constructive discharge claim after reviewing the history of such claims; finding "that there is no persuasive rationale for per se barring suits by in-house attorneys for wrongful termination or constructive discharge").
- Lewis v. Nationwide Mut. Ins. Co., No. 3:02CV512(RNC), 2003 U.S. Dist. LEXIS 5126 (D. Conn. Mar. 18, 2003) (finding that an insurance company's in-house lawyer whose job was to defend the company's insureds may file a wrongful termination suit claiming that he was improperly fired because he refused to allow the insurance company to interfere with his independent judgment; distinguishing cases involving regular in-house lawyers, because in this situation the insureds rather than the insurance company were the in-house lawyer's clients).
- Meadows v. Kindercare Learning Ctrs., Civ. No. 03-1647-HU, 2004 U.S. Dist. LEXIS 20450, at \*5-7, \*8-9, \*9 (D. Or. Sept. 29, 2004) (reversing a magistrate judge's dismissal of an in-house lawyer's wrongful discharge cause of action; "In recommending that plaintiff's wrongful termination claim be dismissed, Judge Hubel carefully articulated three divergent groups of cases. The first group involves a total ban on wrongful discharge cases that raise attorney-client concerns and allows for no exceptions. . . . The second group permits an action for wrongful discharge if the complaint is based on the in-house lawyer's adherence to obligations imposed by the Code of Professional Responsibility. . . . The third group holds that a retaliatory discharge claim brought by an in-house attorney is prohibited whenever pursuit of the claim would result in disclosure of client confidences or secrets. . . . Defendants concede that Oregon courts would, at a minimum, allow a wrongful discharge claim by in-house counsel if there will be no breach of the attorney-client privilege. Thus, the total ban on such cases, as found in Balla [Balla v. Gambro], 584 N.E.2d 104 (Ill. 1991)]and its progeny, is not applicable here. Judge Hubel determined that the Oregon Supreme Court would not recognize the right of in-house counsel to pursue a claim of wrongful discharge in this specific instance because the client's confidences and secrets are not ancillary to the claim, but rather constitute the claim itself. I find this

conclusion to be erroneous"; citing a California case indicating courts should not or cannot determine at a preliminary stage whether an in-house lawyer's wrongful discharge action would necessarily involve disclosure of privileged communications; acknowledging that the plaintiff had not specified the ethics rules she had refused to violate (which allegedly resulted in her termination), but concluding that "it can reasonably be inferred at this stage of the proceedings" that the plaintiff was referring to two Oregon ethics rules; "The issue of whether plaintiff was terminated for refusing to implement illegal employment practices in accordance with DR 7-102(A)(5) & (7) simply cannot be resolved in a challenge to the factual sufficiency of the Complaint.").

- Tartaglia v. UBS PaineWebber, Inc., 961 A.2d 1167 (N.J. 2008) (holding that a former in-house lawyer may sue her client/employer for wrongful discharge).
- Schaefer v. Gen. Elec. Co., Case No. 3:07-CV-0858 (PCD), 2008 U.S. Dist. LEXIS 5552, at \*25, \*28, \*36, \*44-45, \*50-51 (D. Conn. Jan. 22, 2008) (holding that a former GE in-house lawyer could sue for wrongful termination, and actually act as a class representative; "There is no question that an in-house counsel may reveal client confidences to the extent necessary to bring a wrongful discharge or other employment discrimination claim on her own behalf."; "Nothing in the Model Rules, the Connecticut Rules, or the comments to either set of rules states that the balance struck by Rule 1.6 has anything to do with class actions."; noting that some of the information the former in-house lawyer wanted to disclose might not deserve protection under Rule 1.6; "[G]iven the facts presented in the case thus far, the Court cannot conclude that information obtained either through Ms. Schaefer's participation in the GE Women's Network or through publicly available statistical information falls within Rule 1.6. Information obtained by Ms. Schaefer at the GE Women's Network meetings was not confidential client information obtained in the course of her representation of GE."; "[T]he Court cannot conclude at this time that Ms. Schaefer's serving as class representative for a gender discrimination class action violates any of her ethical duties to GE under the Model Rules. While it is not necessary for the Court to conclude definitively whether Title VII trumps any attorney's ethical obligations under the Rules, there is no question, and it bears repeating, that Ms. Schaefer has the full range of rights of an employee under Title VII. Congress did not exclude in-house attorneys from its definition of an employee under Title VII."; also allowing the former in-house lawyer to retain copies of GE documents; "Schaefer avers that she has retained copies only of documents which reflect her personal performance at GE, and not which reveal confidential client information. . . . Schaefer's right to retain copies of such documents is implicit in her right to make defensive disclosures of protected information in dispute with her client under Model Rule 1.6. See ANN. MODEL R. OF PROF'L CONDUCT at 107 (6th ed. 2007) (citing Conn. Ethics Op. 05-04 (2005) (lawyer may keep copies of client files after termination of representation

even if client asks for all copies)). Accordingly, GE's request that the Court order the return of GE property is denied.").

- Grieco v. Fresenius Med. Care Holdings, Inc., Dkt. No. 2006-00854 BLS2, 2008 Mass. Super. LEXIS 63, at \*3, \*6-7 (Mass. Super. Ct. Feb. 19, 2008) (addressing privilege issues in connection with a lawsuit by in-house lawyers against their former employer; "One preliminary issue in this case is whether FMC [defendant, former employer] may withhold, as privileged, documents which plaintiffs themselves either authored or received while in FMC's employ. That is a different question from whether plaintiffs may use those or other privileged documents at trial, or otherwise disclose them, or the information they contain, in support of their claims against their former employer and client."; pointing to an earlier Massachusetts case that distinguished between the discovery of privileged documents by a former in-house lawyers and the in-house lawyers' use of those documents; "GTE [GTE Prods. Corp. v. Stewart], 610 N.E.2d 892 (Mass. 1993)] apparently made no claim that its former counsel's possession of GTE's privileged documents was somehow prohibited by the attorney-client privilege. Nevertheless, the court's discussion highlights the distinction between (1) disclosure to a former attorney (through discovery or otherwise) of privileged documents which that attorney had previously authored or received, enabling the attorney to 'identify witnesses to depose and to learn additional facts about the case,' . . . and (2) the attorney's use of those or other privileged documents to prove his or her claims in the case, or any other use which would require disclosure of the documents or privileged information therein."; ultimately concluding that an in-house lawyer suing a former employer can show his or her personal lawyer protected documents).
- Nesselrotte v. Allegheny Energy, Inc., Civ. A. No. 06-01390, 2008 U.S. Dist. LEXIS 55730, at \*37-38, \*41, \*45-46, \*47 (W.D. Pa. July 22, 2008) (analyzing a situation in which a former in-house lawyer sued Allegheny Energy after leaving her job with protected documents; criticizing plaintiff for taking protected documents when she left Allegheny Energy; "[T]o the extent Plaintiff asserts that Rule 1.6(c)(4) allows an in-house attorney to copy and remove privileged and/or confidential documents before his or her last day of employment in order to use the same in future litigation against her former employer, the Court finds that such a reading ignores a well-settled aspect of the attorney-client privilege: the privilege belongs to the client, not the attorney. . . . On the contrary, as this Court has stated on numerous occasions, the proper avenue for a former employee (even an attorney) to obtain privileged and/or confidential documents in support of his or her claims is through the discovery process as set forth in the Federal Rules of Civil Procedure, not by self-help."; rejecting the applicability of the self-defense exception; "[T]he Court finds that Kachmar [Kachmar v. Sungard Data Sys., Inc.], 109 F.3d 173 (3d 1997)] does not stand for the proposition espoused by Plaintiff, i.e., Rule 1.6(c)(4) trumps the attorney client privilege in causes of

- action by a former in-house counsel against his or her former employer. "; "In summary, the Court does not foreclose the notion of a former in-house counsel revealing information relating to the representation of a client in a proceeding against a client (and former employer). As noted above, courts in California, Tennessee and Montana have held as much. In support of their respective arguments, Plaintiff only focuses on her right to bring suit under Title VII and related statutes and Defendants only focus on their right of protection from disclosure under the attorney client privilege; however, the Court must weigh both considerations."; "[T]he Court declines to hold that Rule 1.6(c)(4) of the Pennsylvania Rules of Professional Conduct trumps the attorney client privilege in the context of this case, where an attorney employed self help by removing without authorization privileged and confidential documents seemingly in breach of her former employer's Ethics Code and Confidentiality Agreement."; ordering the documents returned to defendant Allegheny Energy).
- Sands v. Menard, Inc., 787 N.W.2d 384, 387, 388, 389, 390, 399, 400, 400-01 (Wis. 2010) (in a 4-3 vote, holding that an arbitration panel could award a former in-house lawyer money damages but could not order her reinstatement, because the attorney-client relationship had been hopelessly tainted; explaining how the company had treated Dawn Sands, whose title was "Executive General Counsel"; "On her first day at Menard, Sands learned that she was required to punch a clock and would be paid by the hour at a rate of \$26.92 (\$ 55,993.60 annually, plus overtime). With this hourly rate, Sands could earn up to \$ 40.38 per hour for overtime (at time-and-a-half) and an additional \$ 2.50 per hour for weekend hours worked." (emphasis added); noting the company's reaction after Sands complained of her treatment after working at the company for about six years; "Sands responded, 'I've been sitting here working my butt off and I get nothing. I just get all these promises . . . . [W]hat is that, just a big lie to make me keep working?' Charlie Menard shrugged and said, 'Worked, didn't it?' Sands replied that as a 43-year old woman with no one else to rely on, she needed to be concerned about her retirement. Charlie Menard responded, '[W]hy don't you get married like every other girl?'" (emphasis added); explaining that "John Menard returned and declared, '[Y]ou know what, you're all done right now. Pick your shit up; I want your ass out of here. You've got five minutes." (emphasis added); "At some point during this encounter, Sands turned to her computer in an attempt to log off. John Menard saw this, approached her from the other side of her desk with his hand in a fist, and ordered her to get away from the computer."; "When she entered her former office, she found papers and books strewn everywhere, and furniture upturned." (emphasis added); ultimately concluding that "[i]n this case, it is clear that Sands cannot in good faith represent Menard without violating her ethical obligations as an attorney."; "Leading up to and throughout the arbitration process, all parties agreed that the relationship was irretrievably broken. Sands understood this and unequivocally testified against reinstatement before the arbitration panel,

even going so far as to state that 'no reasonable person would entertain reinstatement as a possibility.' She further made clear her view of the prospective employment conditions at Menard, stating, '[I]t would be impossible to return to such a hostile environment.'; "Let there be no mistake -- the mutual animosity and distrust between Sands and the executive leadership of Menard, the very people to whom her absolute loyalty would be owed, continued throughout the arbitration hearing and shows no signs of abating today. Sands was right. No reasonable person would consider reinstatement a possibility in this situation. No one could have assessed this situation and determined that reinstatement could lead to a productive setting where both Sands and Menard would benefit. Trust has been completely broken; nothing good could possibly come from reinstatement. In view of this especially bitter litigation marked by personal and professional animosity, we see no way Sands could now return to Menard and serve the company in conformity with her ethical obligations."; "Though the panel's decision was otherwise thorough, nowhere did the panel consider the applicability of Sands' ethical obligations as an attorney. It never examined whether Sands could ethically perform her role if it awarded reinstatement. If it had, it would have reached the same conclusion Sands had: no reasonable person would entertain reinstatement as a possibility." (footnote omitted); "We do not conclude that reinstatement is always inappropriate for in-house lawyers or general counsels, or that reinstatement is always inappropriate when the relationship is acrimonious or the employee served in a high-level role. The specific circumstances of each case must be considered. Here, it is our judgment that the panel's reinstatement order would have the practical effect of forcing Sands to violate her ethical obligations. Such a result violates the strong public policy of the State of Wisconsin." (footnote omitted)).

- Keller v. Loews Corp., 894 N.Y.S.2d 376, 377 (N.Y. App. Div. 2010) (reversing summary judgment for a former in-house lawyer in a counterclaim by her employer Loews, which alleged improper disclosure of client confidences in the former in-house lawyer's claim against Loews; "Plaintiff alleges religious discrimination in the termination of his employment as in-house attorney with defendant Loews Corporation. Defendant's counterclaim alleges that plaintiff breached his fiduciary duty to Loews by disclosing confidential information in his complaint. The motion court dismissed the counterclaim on the ground that there is no fiduciary relationship between an employer and an at-will employee. That was error."; "[T]he duty to preserve client confidences and secrets continues even after representation ends. . . . [W]e conclude that an in-house attorney, his status as an at-will employee notwithstanding, owes his employer-client a fiduciary duty. We note that plaintiff also had a contractual duty pursuant to his employment agreement to maintain the confidentiality of confidential materials. Plaintiff failed to establish prima facie that he did not disclose confidential information or communications with Loews. The complaint alleges that plaintiff gave tax

advice that was relied on by Loews in deciding not to spin off a subsidiary. However, plaintiff's testimony creates an issue of fact as to whether the information contained in the complaint was based on plaintiff's legal advice to Loews.").

- Van Asdale v. Int'l Game Tech., No. 3:04-cv-00703-RAM, 2011 U.S. Dist. LEXIS 56709 (D. Nev. May 24, 2011) (upholding a judgment for in-house lawyers against their former employer).

Thus, the trend clearly favors lawyers' ability to disclose protected client information in pursuing affirmative claims against their former employers. However, the case law also predictably indicates that lawyers may only disclose such information to the extent reasonably necessary -- as in their other permitted defensive use or affirmative use in collecting their fees.

Courts naturally try to protect protected client information to the extent possible in such litigation.

- Siedle v. Putnam Invs., Inc., 147 F.3d 7, 12 (1st Cir. 1998) (holding a trial court erred in unsealing documents related to an in-house lawyer's discharge case against a client/employer; "The fact that the allegedly privileged information may be necessary to permit Siedle to plead his claim with the requisite specificity -- a fact alluded to both by Siedle and by the lower court -- is beside any pertinent point. Merely sealing that information would not in any way render Siedle's complaint inadequate. Finally, if the appropriate parts of the record do not remain sealed for the time being, Putnam irretrievably will lose the benefit of a privilege that, on the face of things, appears to attach. When an attorney and a former client embroil themselves in adversarial litigation, the right of public access to judicial records stands in sharp contrast to the lawyer's duty to hold information obtained from the client during the course of representation in the strictest confidence. A delicate balance must be struck between these competing concerns. We hold that the court below misgauged this balance. Putnam has made a sufficient showing that various filings contain privileged information, and without either an adjudication of the privilege question or an appropriate seal order, Putnam will lose the entire benefit of the putative privilege. We cannot countenance such a result. . . . Let us be perfectly clear. We do not hold that the materials which Putnam claims are privileged necessarily must remain under permanent seal. As the record develops and additional facts are adduced, the district court may find that Putnam's claims of privilege are unsupported or that some applicable exception penetrates the attorney-client shield. Until such time, however, we

hold that Putnam's un rebutted prima facie showing that the attorney-client privilege applies entitles it to protection."; remanding the case).

(b) Although one might think that the same principle allowing lawyers to file wrongful discharge actions in most jurisdictions would also permit them to pursue qui tam lawsuits -- but recent case law and ethics opinions have refused to extend the principle that far.

In 2014, the United States Supreme Court included that statute protecting certain whistleblowers extended to lawyers.

- Lawson v. FMR LLC, 134 S. Ct. 1158, 1161, 1162 (2014) (finding that protected whistleblowers include contractors and subcontractors of companies covered by whistleblower acts, including lawyers; "This case concerns the definition of the protected class: Does §1514A shield only those employed by the public company itself, or does it shield as well employees of privately held contractors and subcontractors -- for example, investment advisers, law firms, accounting enterprises -- who perform work for the public company?"; "We hold, based on the text of §1514A, the mischief to which Congress was responding, and earlier legislation Congress drew upon, that the provision shelters employees of private contractors and subcontractors, just as it shelters employees of the public company served by the contractors and subcontractors."; "In the Enron scandal that prompted the Sarbanes-Oxley Act, contractors and subcontractors, including the accounting firm Arthur Andersen, participated in Enron's fraud and its coverup. When employees of those contractors attempted to bring misconduct to light, they encountered retaliation by their employers. The Sarbanes-Oxley Act contains numerous provisions aimed at controlling the conduct of accountants, auditors, and lawyers who work with public companies. . . . Given Congress' concern about contractor conduct of the kind that contributed to Enron's collapse, we regard with suspicion construction of §1514A to protect whistleblowers only when they are employed by a public company, and not when they work for the public company's contractor.").

It certainly makes sense to protect lawyers who find themselves in a defensive posture as a whistleblower, or perhaps are pursuing traditional wrongful discharge actions if their employers fire them for their whistleblower activity.



Some courts have allowed such whistleblower claims under various federal or state statutes or regulations.

- Jordan v. Sprint Nextel Corp., ARB Case No. 06-105, ALJ Case No. 2006-SOX-041, 2009 DOL Ad. Rev. Bd. LEXIS 100, at \*38 (U.S. Dep't of Labor ARB Sept. 30, 2009) (holding that an in-house lawyer may use privileged and confidential communication in pursuing a Sarbanes-Oxley claim; "[W]e affirm the ALJ's holding that Jordan is not precluded from relying on statements or documents covered by the attorney client privilege in pursuit of his SOX whistleblower complaint.").
- Willy v. Admin. Review Bd., 423 F.3d 483, 501 (5th Cir. 2005) (assessing former in-house lawyer's claim against his former employer, alleging that he was subjected to retaliation for trying to stop the company's wrongdoing; rejecting the company's and the Department of Labor's argument "that no rule or case law imposes a per se ban on the offensive use of documents subject to the attorney-client privilege in an in-house counsel's retaliatory discharge claim against his former employer under the federal whistleblower statutes when the action is before an ALJ").
- Alexander v. Tandem Staffing Solutions, Inc., 881 So. 2d 607 (Fla. Dist. Ct. App. 2004) (holding that a former company general counsel suing her former employer under whistleblower claim could properly reveal privileged communications to her personal lawyer without causing the personal lawyer's disqualification).

But courts have been much more hostile to lawyers' disclosure of protected client information in affirmative efforts to seek monetary awards in pursuing qui tam actions, or seeking attorney's fees by representing others pursuing Dodd-Frank whistleblower claims.

- United States v. Quest Diagnostics Inc., 734 F.3d 154, 157-58, 158, 167, 168 & n.21, 168-69 (2nd Cir. 2013) ("We agree that the attorney in question, through his conduct in this qui tam action, violated N.Y. Rule 1.9(c) which, in relevant part, prohibits lawyers from 'us[ing] confidential information of [a] former client protected by Rule 1.6 to the disadvantage of the former client,' N.Y. Rule 1.9(c), except 'to the extent that the lawyer reasonably believes necessary . . . to prevent the client from committing a crime,' id. 1.6(b)(2)." (emphasis added); "In addition, we hold that the District Court did not err by dismissing the complaint as to all defendants, and disqualifying plaintiff, its individual relators, and its outside counsel on the basis that such measures were necessary to avoid prejudicing defendants in any subsequent litigation

on these facts."; "We next consider whether the District Court abused its discretion by sua sponte disqualifying FLPA's counsel, Troutman Sanders and the Michael Law Group, on the basis that such dismissal was 'necessary to protect [d]efendants from the use of their confidential information against them.'" (citation omitted); "Here, the District Court concluded that, by virtue of the confidential information likely revealed to them, counsel for FLPA, 'are in a position to use [defendants' confidential information] to give present or subsequent clients an unfair, and unethical, advantage.' . . . [T]he District Court's decision to disqualify FLPA's counsel was not based on any error of law or fact, and is 'located within the range of permissible decisions.'" (citation omitted); "The suggestion that disqualification of FLPA's counsel is improper because those attorneys did not commit the violation misses the mark. Disqualification is not a sanction but a remedy that seeks to avoid prejudice to the party whose confidences have been revealed and, in so doing, promote the integrity of our justice system."; "'To summarize: '(1) The False Claims Act does not preempt state ethical rules governing the disclosure of client confidences; therefore N.Y. Rule 1.9(c), which generally prohibits disclosure of confidential information of a former client, governs a New York attorney's conduct as relator in a qui tam action under the False Claims Act. (2) N.Y. Rule 1.6(b)(2), which permits a lawyer to reveal or use confidential information to the extent that the lawyer reasonably believes necessary to prevent the client from committing a crime, does not justify Bibi's disclosures in this case: Bibi reasonably could have believed in 2005 that defendants intended to commit a crime. His disclosure of Unilab's confidential information, however, went well beyond what was 'necessary' within the meaning of N.Y. Rule 1.6(b)(2) to prevent Unilab from committing a crime inasmuch as there was ample non-confidential information on which to bring an FCA action. Therefore, Bibi's conduct in this qui tam action violated his ethical obligations under N.Y. Rule 1.9(c). (3) The District of Columbia did not err or 'abuse its discretion' in dismissing the Complaint and disqualifying FLPA, all of its general partners, and its outside counsel from bringing any subsequent related qui tam action, on the basis that such measures were necessary to prevent the use of Bibi's unethical disclosures against defendants.'").

- New York Cnty. LEO 746 (10/7/13) ("It is the Committee's opinion that New York lawyers who are acting as attorneys on behalf of clients presumptively may not ethically serve as whistleblowers for a bounty against their clients under the Dodd-Frank Wall Street Reform and Consumer Protection Act, because doing so generally gives rise to a conflict between the lawyers' interest and those of their clients. New York lawyers, in matters governed by the New York RPC, may not disclose confidential information under the Dodd-Frank whistleblower regulations, except to the extent permissible under the Rules of Professional Conduct. This conclusion is the same for current and former lawyers, whether in-house or outside counsel. However, this Opinion is limited to New York lawyers who are acting as attorneys on behalf of

clients." (emphasis added); "[I]n those circumstances in which the New York Rules apply, this Committee opines that disclosure of confidential information in order to collect a whistleblower bounty is unlikely, in most instances, to be ethically justifiable. This is because, under most circumstances, such disclosure is not reasonably necessary, and does not fit within the enumerated exceptions of RPC 1.6(b). RPC 1.6, by its terms, is limited to 'information gained during or relating to the representation of a client . . . .' Accordingly, this opinion applies only when a lawyer is acting as a legal representative of a client. Thus, a lawyer functioning in a non-legal capacity would not be within the scope of this opinion." (emphasis added); "Accordingly, New York RPC 1.6 does not permit disclosure of confidential information in order to collect a Dodd-Frank whistleblower bounty, even in compliance with the SEC rules, if that disclosure does not fit within an exception under New York RPC 1.6 or is not necessary to correct a fraud, crime or false evidence within the meaning of RPC 3.3.").

- Kidwell v. Sybaritic, Inc., 749 N.W.2d 855, 863-64 (Minn. Ct. App. 2008) (holding that a company's former general counsel can file a wrongful termination claim, but cannot pursue a claim under Minnesota's whistle-blower protection statute; noting that "[t]he majority view . . . appears to reject the attorney-client defense and to permit such claims, though sometimes with the proviso that in-house attorneys may pursue such claims so long as they do not run afoul of the duty of confidentiality (a proviso that potentially could be applied as a bar).").
- North Carolina LEO 2000-11 (1/18/2001) (posing the following question: "May Attorney A reveal information and documents of Corporation C to establish a claim under the False Claims Act in his own lawsuit against Corporation C?"; answering as follows: "No, unless a court rules that the information may be revealed to pursue the claim. Rule 1.6(d)(3) permits a lawyer to reveal confidential information when required by a court order. This would appear to be the only exception to the duty of confidentiality that permits a lawyer to disclose confidential information in order to make a third party or "qui tam" claim under the False Claims Act. In this inquiry, there are also competing public policies favoring disclosure on the one hand and confidentiality on the other. The Ethics Committee again defers to the ruling of a court of competent jurisdiction to determine the extent to which Attorney A may reveal confidential client information in order to establish a claim under the False Claims Act. Attorney A may reveal no client confidences in a complaint asserting a claim under the False Claims Act except as necessary to put the opposing party on notice of the claim. Thereafter, Attorney A may only reveal confidential client information as permitted by a court order.").

Some courts are similarly hostile to lawyers assisting anyone suing their former clients.

- Housler v. First Nat'l Bank of East Islip, 484 F. Supp. 1321, 1323 (E.D.N.Y. 1980) (assessing a situation in which the defendant's general counsel had helped a law firm assisting plaintiff in a law suit against the company; explaining that the general counsel's actions were improper; distinguishing Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190 (2d Cir. 1974), because in this situation the general counsel had assisted the plaintiffs before the lawsuit was filed against the company; explaining that in the future the general counsel may disclose confidences only "in the narrow context of [his] own defense").

### **Best Answer**

The best answer to (a) is **(A) YES (IN MOST STATES)**; the best answer to (b) is **(B) PROBABLY NO.**

B 1/15

## Clients with Newsworthy Representations

### Hypothetical 33

You have spent the last year representing a very high-profile client in a fairly ugly divorce. The client can no longer pay you, and you are trying to determine how you can proceed without suffering a huge financial loss yourself. One of your partners suggested that perhaps the client could agree to let you write a book about the case after the divorce becomes final. You think such an arrangement would make sense financially, but you wonder whether the ethics rules permit it. Your partner says that you could always arrange for the client to receive independent advice about whether to enter into such a contract.

If your client receives independent advice, may you enter into a contract with the client giving you the literary rights to publish a book about the case you are handling?

**(B) NO**

### Analysis

Not surprisingly, the 1969 ABA Model Code of Professional Responsibility, the ABA Model Rules of Professional Conduct and the Restatement all permit lawyers to disclose protected client information if the client consents to the disclosure. ABA Model Code of Professional Responsibility, DR 4-101(C)(1); ABA Model Rules of Professional Conduct 1.6(a); Restatement (Third) of Law Governing Lawyers § 62 (2000).

Of course, the client must provide informed consent, following the lawyer's full disclosure and explanation. ABA Model Code of Professional Responsibility, DR 4-101(C)(1); ABA Model Rules of Professional Conduct 1.6(a), 1.0 cmt. [6]; Restatement (Third) of Law Governing Lawyers § 62 cmt. c (2000).

However, in some circumstances even the client's informed consent does not permit lawyers to take actions arguably adverse to their clients' interests. Both of the ABA Model Rules' main conflicts provisions describe certain nonconsentable conflicts.

First, ABA Model Rule 1.7 contains a flat prohibition on lawyers representing one client in "the assertion of a claim by [that] client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal." ABA Model Rule 1.7(b)(3). A comment confirms that such a conflict is "nonconsentable."

Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

ABA Model Rule 1.7 cmt. [14].

Second, ABA Model Rule 1.8 contains a mixture of consentable and nonconsentable conflicts between clients' interests and lawyers' interests.

One of the nonconsentable conflicts involves lawyers' agreements to gain literary or media rights about the representation before it ends.

Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

ABA Model Rule 1.8(d). A comment provides additional guidance.

An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraphs (a) and (i).

ABA Model Rule 1.8 cmt. [9].

The Restatement contains the same flat prohibition.

A lawyer may not, before the lawyer ceases to represent a client, make an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

Restatement (Third) of Law Governing Lawyers § 36(3) (2000).

A comment follows the same approach as the ABA Model Rules.

Client-lawyer contracts in which the lawyer acquires the right to sell or share in future profits from descriptions of events covered by the representation are likely to harm clients. Such interests could be created directly, such as by assigning the lawyer all or a part interest in such rights, or indirectly, by giving the lawyer a lien on any income received by the client from such a description. Such contracts, however, give the lawyer a financial incentive to conduct the representation so as to increase the entertainment value of the resulting book or show. For example, a criminal-defense lawyer's book about a case might be more valuable if the trial is suspenseful. That might not help the client. Publication also requires the disclosure of information that the lawyer has acquired through the representation, which is prohibited without client consent . . . . Often, especially in criminal cases, disclosure could harm the client. The client is in a poor position to predict the harm when the publication contract is made at the outset of the case.

This Section does not prohibit a publication, with the client's consent, that is for the client's benefit and does not result in profit for the lawyer. . . .

The prohibition does not prevent an informed client from signing a publication contract after the lawyer's services have been performed . . . . As a transaction between a former client and lawyer arising out of the representation, such a contract is subject to § 126.

Restatement (Third) of Law Governing Lawyers § 36 cmt. d (2000).

**Best Answer**

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

B 1/15



## Deceased Clients: The Testamentary Exception

### Hypothetical 34

You represented a wealthy heiress in preparing her estate plan. She recently died, and you expect several attacks on her estate.

- (a) Will the attorney-client privilege protect your communications with your client from discovery by her son, who was named as a beneficiary under the will but who disputes the executor's interpretation of the provision under which he takes?

**(B) NO**

- (b) Will the attorney-client privilege protect your communications with your client from discovery by her estranged daughter, who claims that she should have been included as a beneficiary in the mother's will?

**(A) YES (PROBABLY)**

- (c) Will the attorney-client privilege protect your communications with your client from discovery by a creditor, who claims that the estate owes it \$500,000?

**(A) YES**

### Analysis

Both the ethics duty of confidentiality and the attorney-client privilege contain an exception for communications between a client and a lawyer -- if disclosure of the communications after the client's death would help further the client's testamentary intent.

In most states, statutes convey the power to waive a decedent's confidentiality to an executor or other personal representative. However, in the absence of a personal representative or even in the face of a personal representative's refusal to allow disclosure, a lawyer who has represented a client might be free to, or compelled to, disclose communications.

The ethics rule frees the lawyer to disclose the communications without risk of an ethics violation. Still, cautious lawyers might well seek the executor's or even a court's permission to make such disclosure, especially if there are competing claimants or someone might complain about the disclosure. The attorney-client privilege rule has the same effect on the lawyer's freedom, and also permits a third party to seek access to the communications if that third party needs them to discern the decedent's intent.

**(a)** Courts recognizing the narrow exception permit (and normally require) the decedent's lawyer to disclose privileged communications to clear up any issue about who should take under a will or other instrument which the decedent's lawyer prepared.

This exception certainly makes sense -- because a decedent presumably would want his or her lawyer to clear up any ambiguity about the will or other instrument to assure that the decedent's intent is carried out.

The ABA Model Rules do not explicitly deal with this issue. However, several legal ethics opinions (discussed below) point to the implied authorization provision of ABA Model Rule 1.6.

A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

ABA Model Rule 1.6(a). And of course a lawyer seeking some court's guidance in this context could disclose protected client information pursuant to the court order.

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

ABA Model Rule 1.6(b)(6).

The Restatement deals with this basic principle in two sections. The first mentions both the privilege and the ethics implications.

The attorney-client privilege does not apply to communications relevant to an issue between parties who claim an interest through the same decedent . . . . As a corollary, the lawyer may reveal confidential client information to contending heirs or other claimants to an interest through a deceased client, in advance of testifying, if there is a reasonable prospect that doing so would advance the interests of the client-decedent.

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

The other Restatement section deals exclusively with the privilege issue, although it provides additional guidance that presumably would also apply in the ethics setting.

The attorney-client privilege does not apply to a communication from or to a decedent relevant to an issue between parties who claim an interest through the same deceased client, either by testate or intestate succession or by an inter vivos transaction.

Restatement (Third) of Law Governing Lawyers § 81 (2000). A comment provides an explanation.

The exception in the Section is sometimes justified on the ground that the decedent would have wished full disclosure to facilitate carrying out the client's intentions. The dispute might involve either testate or intestate succession or claims arising from inter vivos transactions to which the decedent was a party. The witness will most often be the decedent's lawyer, who is in a position to know the client's intentions and whose testimony ordinarily will not be tainted by personal interest. Suppressing such testimony would hamper the fair resolution of questions of testator intent in will-contest and similar types of cases. It is therefore probable that the exception does little to lessen the inclination to communicate freely with lawyers . . . . The

exception applies even if the personal representative of the decedent client's estate refuses to waive the privilege.

Id. cmt. b (emphases added).

The ACTEC Commentaries also recognize this principle.

In general, the lawyer's duty of confidentiality continues after the death of a client. Accordingly, a lawyer ordinarily should not disclose confidential information following a client's death. However, if consent is given by the client's personal representative, or if the decedent had expressly or impliedly authorized disclosure, the lawyer who represented the deceased client may provide an interested party, including a potential litigant, with information regarding a deceased client's dispositive instruments and intent, including prior instruments and communications relevant thereto. A lawyer may be impliedly authorized to make appropriate disclosure of client confidential information that would promote the client's estate plan, forestall litigation, preserve assets, and further family understanding of the decedent's intention. Disclosures should ordinarily be limited to information that the lawyer would be required to reveal as a witness.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of

Professional Conduct, Commentary on MRPC 1.6, at 73 (4th ed. 2006),

[http://www.actec.org/Documents/misc/ACTEC\\_Commentaries\\_4th\\_02\\_14\\_06.pdf](http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf)

(emphasis added).

Bars analyzing the ethics rules follow this approach.

- Philadelphia LEO 2008-10 (9/2008) (explaining that an executor of an estate controls the privilege, and has the decedent's implied consent to disclose privileged communications to advance the decedent's intent; "In addition, the Committee finds that there is implied consent under Rule 1.6b for the inquirer to disclose whatever may help further the 1996 testamentary intent of B since the inquirer was hired to draft a will to effectuate B's desire as to how her estate was to be distributed." (emphasis added); "In general, the lawyer's duty of confidentiality continues after the death of a client. Accordingly, a lawyer ordinarily should not disclose confidential information following a client's death. However, if consent is given by the client's personal representative, or if the decedent had expressly or impliedly authorized disclosure, the lawyer who represented the deceased client may provide an

interested party, including a potential litigant, with information regarding a deceased client's dispositive instruments and intent, including prior instruments and communications relevant thereto. A lawyer may be impliedly authorized to make appropriate disclosure of client confidential information that would promote the client's estate plan, forestall litigation, preserve assets, and further family understanding of the decedent's intention. Disclosures should ordinarily be limited to information that the lawyer would be required to reveal as a witness." (quoting ACTEC Commentaries, Commentary on MRPC 1.6, at 73) (emphasis added)).

- North Carolina LEO 2002-7 (1/24/03) (proposing the following question: "May the lawyer for a deceased client testify in such litigation ["will contest proceeding"]?"; the answer as follows: "Yes, if the personal representative calls the lawyer as a witness in the will contest, the lawyer may testify because the personal representative consents to the disclosure. See Rule 1.6(d)(2). Rule 1.6(d)(3) also permits a lawyer to disclose client confidences if required by law or court order. If someone other than the personal representative calls the lawyer as a witness, the lawyer may testify to relevant confidential information of the deceased client if the lawyer determines that the attorney/client privilege does not apply as a matter of law or the court orders the lawyer to testify on this basis.").
- Hawaii LEO 38 (5/27/99) ("Obtaining client consent is, of course, not possible if the client is deceased. Under HRPC 1.6, however, attorneys may reveal confidential information when disclosure has been impliedly authorized in order to carry out the representation. In determining what disclosures are necessary to carry out the representation of a deceased client, the attorney may consider the intentions of the client. For example, if an attorney reasonably and in good faith determines that confidentiality should be waived in order to effectuate the deceased clients' intended estate plan, the attorney would be permitted and obligated to make such disclosure.").

In dealing with the attorney-client privilege issue, courts generally take the same approach.

- Zook v. Pesce, 91 A.3d 1114, 1120, 1127 (Md. 2014) (holding that the court erred in not applying the testamentary exception in a dispute among three beneficiaries, but that admitting the testimony would not have changed the outcome of the case; "[S]ome states have elected to allow this exception to the attorney-client privilege based on the idea that 'the deceased client would presumably want his communications disclosed in litigation between such claimants so that his desires in regard to the disposition of his estate might be correctly ascertained and carried out.'" (citation omitted); "Happily for both parties in this case, Maryland recognized the wisdom of the testamentary exception about a century ago."; "The Maryland rule is consistent with that

adopted in a majority of states."; "[T]he testamentary exception to the attorney-client privilege is alive and well in Maryland. With its refusal to recognize that exception, the trial court erred by failing to require that Downs produce the 2007 Living Trust. Yet, Petitioner has the burden to demonstrate that the trial court's error was prejudicial. . . . We have carefully considered the test for mental competency, and the seven-factor Moore test for undue influence, to determine whether, had the trial judge considered the terms of the 2007 Living Trust, it might have changed its ruling on either competency or undue influence. After due consideration, we conclude that admission into evidence of the 2007 Living Trust, or evidence relating to its execution, would not have persuaded the trial court to rule any differently. Accordingly, we hold that Petitioner is not entitled to a new trial.").

- Hicks v. Bush, 452 F. Supp. 2d 88, 100 & n.8 (D.D.C. 2006) (analyzing a privilege claim related to materials found in the cells of prisoners held at Guantanamo who had committed suicide; "Moreover, the privilege is subject to exceptions. The privilege does not apply to communications made in furtherance of committing a crime. . . . It is also subject to a testamentary exception, under which disclosure of otherwise privileged communications may be permitted after the client's death in order to settle disputes about the client's intent for his estate. . . . At least three other exceptions have been recognized. The privilege is inapplicable to communications relevant to a breach of duty between an attorney and client, to communications regarding an attested document to which the attorney is an attesting witness, and to communications relevant to a matter of common interest between joint clients, when offered in an action between the clients." (emphasis added)).
- Gast v. Hall, 858 N.E.2d 154, 163, 164 (Ind. Ct. App. 2006) ("The privilege generally excludes testimony of communications between a client and her attorney regarding the preparation of a will. . . . However, an exception to the posthumous survival of the privilege exists when 'a controversy arises concerning the validity of the will or between the claimants under the will.'" . . . Stated succinctly, the 'testamentary exception' is as follows: '[C]ommunications by a client to the attorney who drafted his or her will, concerning the will and transactions leading to its execution, generally are not, after the client's death, protected as privileged communications in a suit between the testator's heirs, devisees, or other parties who claim under him or her[.]' . . . Plaintiffs ask that we extend this narrow exception to the testimony of an attorney who had contact with the client during the time leading up to the execution of the will, even if that attorney was not involved in the preparation of the will, in this case, Attorney Douglas. Plaintiffs claim that '[t]he logic and reasoning behind the exception to the attorney-client privilege for claimants claiming through the same testator apply to this case[.]' . . . We are not persuaded." (emphasis added); "Here, the evidence Attorney Douglas seeks to disclose does not pertain to the preparation of either of Uncle Joe's

wills, and therefore it does not fall within the testamentary exception to the attorney-client privilege.").

- Gendal v. Billotti, No. 019926/2004, 2006 NY Slip Op. 51501U, at 3 (N.Y. Sup. Ct. July 31, 2006) (unpublished opinion) ("There are, however, cases in which a civil litigant may invade the attorney/client privilege held by another. First, the attorney/client privilege existing between an attorney and a testator or testatrix may be invaded in cases within the purview of CPLR 4503 (b) which involve the probate, validity or construction of a will. Second, a civil litigant, upon showing of good cause, may successfully invade the attorney/client privilege of one who owes that litigant a fiduciary duty . . . . Third, a civil litigant may, under limited circumstances, invade the attorney/client privilege of another where the subject communication was made for the purpose of furthering a future crime, fraud or other wrongdoing . . . . Finally, a civil litigant may invade the attorney/client privilege of another where such invasion is justified by strong public policy considerations." (emphasis added)).
- Gould, Larson, Bennet, Wells & McDonnell, P.C. v. Panico, 869 A.2d 653, 658, 659, 660 n.9 (Conn. 2005) (assessing the rule permitting a decedent's lawyer to disclose otherwise privileged communications with the decedent in a later dispute among those taken under the will or trust; noting that "[t]his rule is well settled law in many jurisdictions"; noting that "recent case law clearly underscores that mere need and relevance are not a sufficient basis to waive the privilege"; holding that the exception applies only if the decedent had executed a document that is being questioned; "[T]he exception to the privilege, like the privilege itself, is designed for the benefit of the decedent. When a decedent executes his will, he knows that it will be made public and established as his will in court before it can become effective. If the will does not reflect the testator's will, but rather that of another who induced him by undue influence to make it, we impute to the decedent an interest that he would not want such a will to be accepted as his own. If we were to protect his otherwise privileged communications under such circumstances, we would be helping to perpetuate the deceit and fraud, contrary to the decedent's interest. Therefore, we allow the attorney who prepared the executed will to disclose all that he knows concerning the testator's state of mind. When the communications do not, however, result in an executed will, the decedent does not assume the attorney's file, notes or memory will become part of any court proceedings and therefore we cannot assume that the decedent expected his communications to be made public." (emphasis added); "About one half of the states have codified the testamentary exception by providing that a personal representative of the deceased can waive the privilege when heirs or devisees claim through the deceased client, as opposed to parties claiming against the estate, for whom the privilege is not waived.").

- In re Will of Bronner, No. 318627, 2005 NY Slip Op. 50705U, at 3, 4 (N.Y. Sup. Ct. May 13, 2005) ("There is, however, a statutory exception to the attorney-client privilege which excludes from protection communication otherwise privileged between the attorney and the decedent concerning a Will's preparation, execution, and revocation in proceedings involving the probate, validity or construction of a Will, except as to matters that would tend to disgrace the memory of the decedent . . . . The exception, however, is a narrow one and does not apply to an attorney who did not prepare the Will." (emphasis added); "Furthermore, in controversies between heirs at law, devisees, legatees or next of kin of the client, such communication as in the instant case should not be held privileged because the proceedings are not adverse to the estate. Indeed, the decedent would expect the confidentiality of such communications to be lifted in the interests of resolving disputes over her Will. . . . Further, it is generally agreed that in testamentary contests, the privilege is divisible and may be waived by the executor, the next of kin or the legatee . . . . The court therefore determines that the objectant may waive the attorney-client privilege on behalf of the decedent in the interests of the estate in the truth-finding process.").
- In re Texas A&M-Corpus Christie Found., Inc., 84 S.W.3d 358, 361 (Tex. App. 2002) (granting a petition for writ of mandamus ordering discovery of a decedent's lawyers relating to the decedent's mental capacity at the time she transferred property; enforcing a statutory exception to the attorney-client privilege covering communications between a decedent and a decedent's lawyer if the communications were relevant in litigation among "parties who claim through the same deceased client" (emphasis added)).
- Hebbeler v. Young (In re Estate of Hebbeler), 875 S.W.2d 163 (Mo. Ct. App. 1994) (holding that, since the decedent's relatives were seeking an inheritance under the same documents, the privilege did not prevent the decedent's lawyer from testifying).
- United States v. Osborn, 561 F.2d 1334, 1340 & n.11 (9th Cir. 1977) ("[T]he general rule with respect to confidential communications between attorney and client for the purpose of preparing the client's will is that such communications are privileged during the testator's lifetime and also after the testator's death unless sought to be disclosed in litigation between the testator's heirs, legatees, devisees, or other parties, all of whom claim under the deceased client. . . . The rationale behind the exception to the general rule is that the privilege itself is designed for the protection of the client, and it cannot be said to be in the interests of the testator, in a controversy between parties all of whom claim under the testator, to have those confidential communications of the testator and attorney excluded which are necessary to a proper fulfillment of the testator's intent" (emphasis added); finding that the exception did not apply because the case did not involve a contest over the "validity or construction" of the decedent's will).



- Stegman v. Miller, 515 S.W.2d 244, 246 (Ky. Ct. App. 1974) ("As stated in Wigmore, . . . after a testator's death the attorney who drew the will 'is at liberty to disclose all that affects the execution and tenor of the will,' for the reason that 'it seems hardly open to dispute that they are the very facts which the testator expected and intended to be disclosed after his death.'" (emphasis added)).
- Doherty v. Fairall, 413 F.2d 381, 382 (D.C. Cir. 1969) ("[C]arbon copies of prior wills are also subject to the discovery process; the initial intent of the testator was to have those documents made public at some time. While decedent presumably intended the will to be confidential during his lifetime, there is no warrant for assuming he wanted the document held confidential after his death, when it might help reveal the proper legal effect to be given to the last will and testament published in his name." (emphasis added)).
- Clark v. Turner, 183 F.2d 141, 142 (D.C. Cir. 1950) ("If decedent had executed a will, to exclude such testimony would defeat the carrying out of her intent, and certainly would in no way advance the purpose for which the privilege is granted.").
- Hugo v. Clark, 99 S.E. 521, 522, 524 (Va. 1919) ("It is generally considered that the rule of privilege does not apply in litigation, after the client's death, between parties, all of whom claim under the client; and so, where the question before the court is as to the validity or genuineness of an alleged will, the attorney of the testator may, according to the weight of authority, testify as to all matters relevant to the issue, although his testimony involves a disclosure of confidential communications between himself and his client, at least when such attorney is one of the subscribing witnesses to the will, as in such case the testator must be considered as having waived the privilege by requesting the attorney to sign as a witness. A decedent's attorney has also been held competent to prove the existence and contents of a lost will; and, in an action involving the construction of a will, the attorney who drew the will may testify as to relevant communications of the testator.' . . . 'It may be laid down as a general rule of law, gathered from all the authorities, that unless provided otherwise by statute, communications by a client to the attorney who drafted his will, in respect to that document, and all transactions occurring between them leading up to its execution, are not, after the client's death, within the protection of the rule as to privileged communications, in a suit between the testator's devisees and heirs at law, or other parties who all claim under him. The reason for such an exception to the general rule excluding confidential professional communications is that the rule is designed for the protection of the client, and it cannot be said to be for the interest of a testator, in a controversy between parties all of whom claim under him, to have those declarations and transactions excluded which are necessary to the proper fulfillment of his will.' The reason for excluding such communications, stated succinctly, is that it is essential to the administration

of justice that clients should feel free to consult their legal advisers without any fear that their disclosures will be thereafter revealed to their detriment. As a matter of public policy, this rule should be rigidly enforced in order that men may secure legal advice, after frank disclosures to their counsel without which they would be unable to defend themselves from threatened wrong. After the death of the client, however, it has been held that the privilege may be waived when the character and reputation of the deceased are not involved, by his executor or administrator, or in will contests by his heirs or legatees. The deceased has no longer any interest in the matter." (citation omitted; emphasis added); noting that because "this is a testamentary contest between the heirs at law on the one side, claiming that the decedent died intestate, and the devisee, claiming that the paper offered is the true last will and testament of the decedent, we conclude that the privilege does not exist").

- Glover v. Patten, 165 U.S. 394, 406 (1897) ("[W]e are of the opinion that, in a suit between devisees under a will, statements made by the deceased to counsel respecting the execution of the will, or other similar document, are not privileged. While such communications might be privileged if offered by third persons to establish claims against an estate, they are not within the reason of the rule requiring their exclusion, when the contest is between the heirs or next of kin." (emphases added)).

Not surprisingly, this principle generally does not cover a lawyer who did not draft the will, or if the work did not result in an executed will.

- Gast v. Hall, 858 N.E.2d 154, 163, 164 (Ind. Ct. App. 2006) ("The privilege generally excludes testimony of communications between a client and her attorney regarding the preparation of a will. . . . However, an exception to the posthumous survival of the privilege exists when 'a controversy arises concerning the validity of the will or between the claimants under the will[.]' . . . Stated succinctly, the 'testamentary exception' is as follows: '[C]ommunications by a client to the attorney who drafted his or her will, concerning the will and transactions leading to its execution, generally are not, after the client's death, protected as privileged communications in a suit between the testator's heirs, devisees, or other parties who claim under him or her[.]' . . . Plaintiffs ask that we extend this narrow exception to the testimony of an attorney who had contact with the client during the time leading up to the execution of the will, even if that attorney was not involved in the preparation of the will, in this case, Attorney Douglas. Plaintiffs claim that '[t]he logic and reasoning behind the exception to the attorney-client privilege for claimants claiming through the same testator apply to this case[.]' . . . We are not persuaded." (emphasis added); "Here, the evidence Attorney Douglas seeks to disclose does not pertain to the preparation of either of Uncle Joe's

wills, and therefore it does not fall within the testamentary exception to the attorney-client privilege." (emphases added)).

- Gould, Larson, Bennet, Wells & McDonnell, P.C. v. Panico, 869 A.2d 653, 659 (Conn. 2005) (holding that the exception applies only if the decedent had executed a document that is being questioned; "[T]he exception to the privilege, like the privilege itself, is designed for the benefit of the decedent. When a decedent executes his will, he knows that it will be made public and established as his will in court before it can become effective. If the will does not reflect the testator's will, but rather that of another who induced him by undue influence to make it, we impute to the decedent an interest that he would not want such a will to be accepted as his own. If we were to protect his otherwise privileged communications under such circumstances, we would be helping to perpetuate the deceit and fraud, contrary to the decedent's interest. Therefore, we allow the attorney who prepared the executed will to disclose all that he knows concerning the testator's state of mind. When the communications do not, however, result in an executed will, the decedent does not assume the attorney's file, notes or memory will become part of any court proceedings and therefore we cannot assume that the decedent expected his communications to be made public." (emphasis added)).
- In re Will of Bronner, No. 318627, 2005 NY Slip Op. 50705U, at 3 (N.Y. Sup. Ct. May 13, 2005) ("There is, however, a statutory exception to the attorney-client privilege which excludes from protection communication otherwise privileged between the attorney and the decedent concerning a Will's preparation, execution, and revocation in proceedings involving the probate, validity or construction of a Will, except as to matters that would tend to disgrace the memory of the decedent . . . . The exception, however, is a narrow one and does not apply to an attorney who did not prepare the Will." (emphasis added)).

Although courts characterize the general "testamentary exception" principle as a limited exception to the attorney-client privilege, it is not self-executing. In other words, someone normally must seek disclosure of the otherwise privileged communications between decedents and their lawyers. One would think that a disgruntled beneficiary would seek such disclosure to support his or her claim for an inheritance. A lawyer besieged by calls or complaints from beneficiaries might offer to disclose the communications. Therefore, it seems logical to treat this issue as a waiver matter

because someone must take an affirmative step to disclose the communications rather than simply as an evaporation of the privilege protection.

Although courts appear not to have analyzed the process very closely, it seems that lawyers disclosing privileged communications under this principle can reveal them only to the extent necessary. For instance, the decedent's attorney could offer joint access to the quarreling beneficiaries and their lawyers -- but not make the privileged communications generally available to the public. If the beneficiaries cannot agree among themselves on the effect of the privileged communications, they might engage in a public fight, perhaps even including a trial about the document's meaning.

Courts seem not to have addressed the effect of these various degrees of disclosure. This issue could become very important if a creditor or other third party seeks access to documents or communications that have already been shared with the quarreling beneficiaries. A court might find that a limited sharing with the beneficiaries and their lawyers has not caused a general waiver, therefore denying the third party's efforts to see the same documents. However, a court might rule the other way if the otherwise privileged communications have been introduced at a public trial.

Another important issue that courts seem not to have addressed is whether disclosure of these privileged communications causes a subject matter waiver, thus allowing a creditor or other third party to learn the substance of other privileged communications between the decedent and the decedent's lawyer that have not been revealed. In that situation, the effect could depend on characterizing the disclosure either as an automatic evaporation of the privilege (meaning that no privileged

communications were actually disclosed) or as a waiver of the privilege. The former might not create a subject matter waiver, whereas the latter probably would.

The danger of a subject matter waiver almost surely has diminished since the adoption of Federal Rule of Evidence 502. Before Rule 502, the "voluntary" disclosure of protected communications or documents sometimes triggered a "subject matter waiver" -- requiring the client to disclose even more protected communications or documents on the same subject.

The subject matter waiver doctrine rests on a common sense refusal to allow clients to use protected communications or documents as a "sword" in litigation while simultaneously using the applicable privilege or work product protection as a "shield" to withhold related documents or connections. But the subject waiver doctrine never made any sense unless the client intended to use protected communications or documents as a "sword." In other words, a client disclosing such protected information or documents should always have been able to avoid a subject matter waiver by simply disclaiming any intent to use them to gain some advantage in litigation. Yet, some jurisdictions inexplicably applied the subject matter waiver doctrine to any voluntary disclosure. The District of Columbia even applied the subject matter waiver doctrine to inadvertent disclosure.

Federal Rule of Evidence 502 limits the reach of the subject matter waiver doctrine, returning it to the limited circumstances it should always have been -- requiring clients to produce related privileged or work product-protected communications or documents only if they unintentionally disclose and then rely on such protected communications or information to gain an advantage in litigation.

Although Rule 502 applies only in limited circumstances, courts seem to be applying the same principle in other circumstances involving disclosures. In most courts, this trend allows lawyers to avoid extraordinary resistance to a court order requiring disclosure -- to eliminate the risk that some later court will find that they voluntarily disclosed protected communications or information, and thus triggered a subject matter waiver. Thomas E. Spahn, The Attorney-Client Privilege and the Work Product Doctrine: A Practitioner's Guide, Ch. 30.404 (3d. ed. 2013), published by Virginia CLE Publications.

**(b)** Courts generally recognize the limited exception only when someone taking under the will or other instrument raises an issue about the instrument's meaning.

This means that the limited exception usually does not apply to someone not named in the decedent's will or other instrument.

- Wesp v. Everson, 33 P.3d 191, 201 (Colo. 2001) (finding that the "testamentary exception" did not apply to communications between a mother and stepfather and their lawyer in a sexual abuse lawsuit brought by the daughter against the stepfather, because the case was not a will contest and the daughter "does not attempt to claim by succession").
- Curato v. Brain, 715 A.2d 631, 636 (R.I. 1998) ("The attorney-client privilege generally will survive the death of the client except in very limited circumstances where the information sought concerns conversations that relate to the drafting of a will. . . . Even then, these communications are discoverable only in the context of a will contest and to the extent that they evince the testator's intentions. . . . In this case, even though the communications between Breslin and John and Margaret were for the purpose of seeking professional advice in planning their estates and drafting their wills, Cathie is not seeking this testimony for the purpose of challenging the validity of the will. Rather she is seeking this disclosure for the purpose of challenging the conveyance of the property. Accordingly, these communications are privileged and are not subject to disclosure."; finding that the limited exception did not apply and that attorney-client privilege protected communications between decedent's second wife and his lawyer).

- Duggan v. Keto, 554 A.2d 1126,1141 (D.C. 1989) ("The Supreme Court held in Glover v. Patten, 165 U.S. 394, 17 S. Ct. 411, 41 L. Ed.760 (1897), that the attorney-client privilege does not apply in disputes between beneficiaries claiming under a will or heirs claiming through the decedent. However, when an heir or legatee makes a claim adverse to the estate, the estate may defend itself by invoking the privilege. See id. at 406. Appellants do not dispute their bequests among themselves in this action, nor do they claim under Mary's will. Rather, they allege that Mary breached a contract not to revoke an earlier will and seek damages for that breach. Their claim, under Glover v. Patten, is clearly adverse to the estate, and thus the estate may invoke the attorney-client privilege on behalf of Mary in defending against that claim.").
- United States v. Osborn, 561 F.2d 1334, 1340 & n.11 (9th Cir. 1977) ("[T]he general rule with respect to confidential communications between attorney and client for the purpose of preparing the client's will is that such communications are privileged during the testator's lifetime and also after the testator's death unless sought to be disclosed in litigation between the testator's heirs, legatees, devisees, or other parties, all of whom claim under the deceased client. . . . The rationale behind the exception to the general rule is that the privilege itself is designed for the protection of the client, and it cannot be said to be in the interests of the testator, in a controversy between parties all of whom claim under the testator, to have those confidential communications of the testator and attorney excluded which are necessary to a proper fulfillment of the testator's intent"; finding that the exception did not apply because the case did not involve a contest over the "validity or construction" of the decedent's will.).

(c) No court applies this narrow exception if some third party (such as a creditor) seeks access to privileged communications between a decedent and a decedent's lawyer.

- Gould, Larson, Bennet, Wells & McDonnell, P.C. v. Panico, 869 A.2d 653, 660 n.9 (Conn. 2005) ("About one half of the states have codified the testamentary exception by providing that a personal representative of the deceased can waive the privilege when heirs or devisees claim through the deceased client, as opposed to parties claiming against the estate, for whom the privilege is not waived.").

**Best Answer**

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

B 1/15



## Impaired Clients

### Hypothetical 35

For the past few years, you have represented one of your neighbors, a lively but somewhat eccentric artist. Among other things, you have prepared her estate plan and handled some contracts with various local galleries. Your client has been acting more strangely than ever lately, and you frankly wonder whether she is slipping into a mental illness such as borderline personality disorder or even schizophrenia. Some of the things that she has said to you during private meetings have you worried that she might be losing touch with reality. You have gently suggested that she see a therapist, but she always denies having any problems. Now you wonder what you can or should do to help your client.

- (a) Without your client's consent, may you disclose to a psychiatrist (whom you have selected) some of your private conversations with her to a psychiatrist?

### (A) YES (PROBABLY)

- (b) Without your client's consent, may you disclose to her parents some of your private conversations with your client?

### MAYBE

### Analysis

Lawyers representing clients who seem to be suffering from diminished capacity face an awkward and complicated situation.

The dilemma facing lawyers representing clients whose decision-making has become impaired highlights the need to balance the lawyer's: (1) duty of loyalty to the client (which might cause the lawyer to follow the client's direction regardless of its wisdom) and (2) the duty to act in what the lawyer sees as the client's true best interests.

## **ABA Model Rules**

The 1969 ABA Model Code of Professional Responsibility did not provide any guidance for lawyers facing this very difficult situation. The 1983 ABA Model Rules of Professional Conduct were also silent on this issue. As public perception about mental illness, Alzheimer's, etc. increased, the bar took notice. In 2002, the ABA finally added a provision providing guidance.

ABA Model Rule 1.14 attempts to strike a good balance, but ultimately allows the lawyer to act in what the lawyer believes is the client's best interests -- even over the client's objection.

When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

ABA Model Rule 1.14(b) (emphasis added).

In 1996, the ABA issued a legal ethics opinion providing additional guidance to lawyers struggling through this issue. ABA LEO 404 (8/2/96).<sup>1</sup>

Together, ABA Model Rule 1.14 and the LEO provide much more guidance than earlier ethics rules for lawyers whose clients are suffering from such a diminished capacity.

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<sup>1</sup> ABA LEO 404 (8/2/96) (a lawyer whose client has become incompetent may take protective action, including petitioning for the appointment of a guardian (although the lawyer may not represent a third party in seeking a guardian); the appointment of a guardian should be a last resort, and the lawyer may withdraw only if it will not prejudice the client).

Among other things, ABA Model Rule 1.14 deals specifically with the confidentiality issue.

Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

ABA Model Rule 1.14(c) (emphasis added). A comment provides additional guidance.

Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

ABA Model Rule 1.14 cmt. [8] (emphasis added).

ABA Model Rule 1.14 permits lawyers facing extremely rare circumstances to take immediate protective action to assist the client.

In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer.

Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

ABA Model Rule 1.14 cmt. [9]. The final comment emphasizes the limited confidentiality exception even in these circumstance.

A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

ABA Model Rule 1.14 cmt. [10] (emphasis added).

The Restatement generally takes the same approach as the ABA Model Rules. Restatement (Third) of Law Governing Lawyers § 24 (2000).

In addressing the confidentiality issue, the Restatement addresses the effect of lawyers jointly representing a person with diminished capacity and someone else.

A lawyer for a client with diminished capacity may be retained by a parent, spouse, or other relative of the client. Even when that person is not also a co-client, the lawyer may provide confidential client information to the person to the extent appropriate in providing representation to the client . . . . If the disclosure is to be made to a nonclient and there is a significant risk that the information may be used adversely to the client, the lawyer should consult with the client concerning such disclosure.

Restatement (Third) of Law Governing Lawyers § 24 cmt. c (2000) (emphasis added).

A later comment implicitly acknowledges that lawyers may be able to disclose protected client information to a tribunal.

A lawyer may bring the client's diminished capacity before a tribunal when doing so is reasonably calculated to advance the client's objectives or interests as the client would define them if able to do so rationally. A proceeding seeking appointment of a guardian for the client is one example (see Comment e). A lawyer may also raise the issue of the client's incompetence to stand trial in a criminal prosecution or, when a client is incompetent to stand trial, interpose the insanity defense. In such situations, the court and the adversary process provide some check on the lawyer's decision.

In some jurisdictions, if a criminal defendant's competence to stand trial is reasonably arguable, the defendant's lawyer must bring the issue to the court's attention, whether or not the lawyer reasonably believes this to be for the client's benefit. That should not be considered a duty to the client flowing from the representation and is not provided for by this Section.

Restatement (Third) of Law Governing Lawyers § 24 cmt. d (2000).

Like the ABA Model Rules, the Restatement mentions the possibility of lawyers seeking the appointment of guardians for such clients -- which would also necessarily involve disclosure of protected client information. Restatement (Third) of Law Governing Lawyers § 24 cmt. e (2000).

The ACTEC Commentaries also address the duties of lawyers representing clients with diminished capacity.

Among other things, the ACTEC Commentaries allow lawyers to disclose confidential information when necessary to assess their clients' capacity.

[T]he lawyer may consult with individuals or entities that may be able to assist the client, including family members, trusted

friends and other advisors. However, in deciding whether others should be consulted, the lawyer should also consider the client's wishes, the impact of the lawyer's actions on potential challenges to the client's estate plan, and the impact on the lawyer's ability to maintain the client's confidential information.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.14, at 131 (4th ed. 2006),

[http://www.actec.org/Documents/misc/ACTEC\\_Commentaries\\_4th\\_02\\_14\\_06.pdf](http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf).

Most states follow this consensus approach, including the provisions dealing with confidentiality.

- Pennsylvania LEO 98-97 (9/16/98) (analyzing the confidentiality duties of a lawyer who prepared a will and power of attorney for a client, and then represented two other people in filing a guardianship action; inexplicably failing to deal with the general rule that a lawyer cannot represent a third party in seeking a guardianship for the lawyer's client; ultimately concluding that the lawyer owed duties of confidentiality to both of the clients, and therefore could not disclose the protected confidential communication absent a court order).

**(a)** If a lawyer may legitimately rely on the pertinent state's version of ABA Model Rule 1.14, disclosing protected client information to medical professionals (who themselves must keep the information confidential) would be exactly the type of step explicitly authorized in the ABA Model Rules and the ACTEC approach, and explicitly envisioned in the Restatement.

**(b)** Disclosing protected client information to family members might also constitute an appropriate step under ABA Model Rule 1.14, but seems less likely to meet the standard for permissible disclosure. First, family members are not as likely to provide useful guidance to the lawyer as are medical professionals. Second, they are not independently required to maintain the confidentiality of information they receive

from a lawyer. Still, in certain circumstances disclosure to such third parties would be ethically permissible.

**Best Answer**

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

B 1/15

## Withholding Material Information from a Client

### Hypothetical 36

You have been representing a young man with some psychological problems, although so far he has not become impaired enough to trigger the ethics rules governing such extreme circumstances. Still, your client is quite fragile, and you have to be very careful when you report any "bad news" to him. You just learned this morning that your client's parents have disinherited him. This will come as quite a shock to your client, and will clearly have a material effect on both his lifestyle and on some of the work that you are handling for him.

Must you immediately tell your client that his parents have disinherited him?

### (B) NO (PROBABLY)

### Analysis

Not surprisingly, lawyers generally must communicate material facts to their clients.

Neither the 1908 ABA Canons of Professional Ethics, the 1937 supplemental Canons nor the 1969 ABA Model Code of Professional Responsibility contain an explicit rule requiring such communication. Perhaps the drafters felt that it was unnecessary to explicitly articulate such an obvious duty.

The 1983 ABA Model Rules of Professional Conduct are not so reticent.

A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;



(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

ABA Model Rule 1.4(a).

However, a comment to ABA Model Rule 1.4 describes a type of client to whom lawyers do not have as strong a communication duty.

Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity.

ABA Model Rule 1.4 cmt. [6] (emphasis added). Interestingly, the rule addressing lawyers' representation of clients with diminished capacity (ABA Model Rule 1.14) does not explicitly address lawyers' discretion to withhold information from such clients.

Another comment deals explicitly with lawyers' occasional (but rare) discretion to delay communicating a material fact to a client.

In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

ABA Model Rule 1.4 cmt. [7] (emphasis added). Thus, this ABA Model Rule comment only permits lawyers to delay disclosing such information to a client, unless a court

order or some other law prohibits lawyers from disclosing material information to their clients.

A Restatement section parallels this ABA Model Rule requiring lawyers' communication to their clients.

A lawyer must keep a client reasonably informed about the matter and must consult with a client to a reasonable extent concerning decisions to be made by the lawyer . . . .

A lawyer must promptly comply with a client's reasonable requests for information. . . .

A Lawyer must notify a client of decisions to be made by the client . . . and must explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Restatement (Third) of Law Governing Lawyers § 20.

Like the ABA Model Rules, the Restatement contains a limited exception.

To the extent that the parties have not otherwise agreed, a standard of reasonableness under all the circumstances determines the appropriate measure of consultation. Reasonableness depends upon such factors as the importance of the information or decision, the extent to which disclosure or consultation has already occurred, the client's sophistication and interest, and the time and money that reporting or consulting will consume. So far as consultation about specific decisions is concerned, the lawyer should also consider the room for choice, the ability of the client to shape the decision, and the time available. When disclosure to the client -- for example, of a psychiatric report -- might harm the client or others, the lawyer may take that into consideration.

Restatement (Third) of Law Governing Lawyers § 20 cmt. c (emphasis added). The next comment contains a parallel provision that occasionally allows lawyers to decline clients' requests for information or documents.

The lawyer may refuse to comply with unreasonable client requests for information. Sometimes a lawyer may have a

duty not to disclose information, for example because it has been obtained in confidence from another client or because a court order limits its dissemination. Under extreme circumstances a lawyer may keep information from a client for that client's benefit, as in the case of a mentally incapacitated client.

Restatement (Third) of Law Governing Lawyers § 20 cmt. d (emphasis added). This provision seems to allow lawyers to permanently withhold information from certain clients. This contrasts with ABA Model Rule 1.4 cmt. [7], which seems to only permit lawyers to delay such disclosure.

The separate Restatement section addressing clients with "diminished capacity" contains essentially the same principle.

When a client with diminished capacity is capable of understanding and communicating, the lawyer should maintain the flow of information and consultation as much as circumstances allow . . . . The lawyer should take reasonable steps to elicit the client's own views on decisions necessary to the representation. Sometimes the use of a relative, therapist, or other intermediary may facilitate communication . . . . Even when the lawyer is empowered to make decisions for the client . . . , the lawyer should, if practical, communicate the proposed decision to the client so that the client will have a chance to comment, remonstrate, or seek help elsewhere. A lawyer may properly withhold from a disabled client information that would harm the client, for example when showing a psychiatric report to a mentally-ill client would be likely to cause the client to attempt suicide, harm another person, or otherwise act unlawfully.

Restatement (Third) of Law Governing Lawyers § 24 cmt. c (emphasis added).

The Restatement deals with this issue again in its provision addressing documents generated during a representation. That section requires lawyers to safeguard documents relating to the representation, and normally requires lawyers to supply most of those documents to clients upon their request. However, the section

also contains an exception recognizing the same principles as in the other Restatement sections.

Under conditions of extreme necessity, a lawyer may properly refuse for a client's own benefit to disclose documents to the client unless a tribunal has required disclosure. Thus, a lawyer who reasonably concludes that showing a psychiatric report to a mentally ill client is likely to cause serious harm may deny the client access to the report . . . . Ordinarily, however, what will be useful to the client is for the client to decide.

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

The Restatement also describes another situation in which lawyers must keep important information away from their clients. This provision does not depend on the client's condition, but rather on the source of the information being withheld.

Where deceitful or illegal means were used to obtain the information, the receiving lawyer and that lawyer's client may be liable, among other remedies, for damages for harm caused or for injunctive relief against use or disclosure. The receiving lawyer must take steps to return such confidential client information and to keep it confidential from the lawyer's own client in the interim.

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

Some legal ethics opinions have dealt with the rare circumstances in which lawyers may withhold material information from their clients.

- Virginia LEO 1789 (2/20/04) (explaining that a lawyer representing a client seeking Social Security disability benefits for "disabling mental impairments affecting both personality and judgment" who has obtained a report on the client prepared by the client's treating psychologist at the request of and at the expense of the client's long-term disability insurance carrier: is bound by Rule 1.4's duty to communicate material facts to the client, if there is an existing attorney-client relationship; must comply with Rule 1.16 if the attorney-client relationship has ended; may not follow the carrier's direction about the report, if following the direction would violate the lawyer's ethical duties to the client; may be guided by Rule 1.14 if the client is suffering from an impairment (for instance, "while an attorney may never withhold a medical

report from a client merely at the request of some other party, in rare instances, an attorney may appropriately consider whether the client is able to act in his own interest with respect to requesting the information"); may be governed by other substantive law covering medical records).

**Best Answer**

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

B 1/15