ETHICS ISSUES FACING CORPORATE COUNSEL: PART II (HIRING FOR THE LAW DEPARTMENT AND PRESERVING CONFIDENCES)

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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Hypothetical 1

As the General Counsel of a growing company, you are always on the look out for good candidates to join your growing law department. You have been very impressed with an in-house lawyer who works at a competitor against whom your company is currently litigating. You would love to offer her a job, but you wonder about the risks.

(a) If you hire the in-house lawyer from the competitor, is there a chance that her individual disqualification on the litigation matter would be imputed to your entire law department?

YES

(b) If you hire the in-house lawyer from the competitor, is there a chance that her individual disqualification on the litigation matter would be imputed to the outside law firm representing your company in the litigation?

YES

Analysis

To some in-house lawyers' surprise, law departments are treated the same way as "law firms" when applying the ethics rules.

ABA Model Rules and Restatement

The ABA Model Rules could not be any clearer:

> With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct.

ABA Model Rule 1.0 cmt. [3].

This definition means that the imputed disqualification principle of ABA Model Rule 1.10 applies to law departments.

> While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be inhibited from doing so by Rules 1.7 or 1.9, unless [one of the stated exceptions apply, the most important of which involve lawyers' personal interests and the hired lawyers being from the potentially disqualifying matter].

ABA Model Rule 1.10(a).

The Restatement takes the same approach, but articulates the principle explicitly rather than through a definitional provision. The Restatement's general imputation rules impute a lawyer's individual disqualification to:

> other affiliated lawyers who . . . are employed with that lawyer by an organization to render legal services either to that organization or to others to advance the interests or objectives of the organization.

Restatement (Third) of Law Governing Lawyers § 123(2) (2000).

Among other things, the Restatement discusses how to determine whether a corporate family's lawyer represents a single "legal office."

> Questions concerning the proper scope of imputation can also arise because of inter-organizational relationship. For example, if one corporation owns all of the stock of another, it is ordinarily appropriate to consider lawyers employed by each corporation as part of a single legal office for purposes of imputed prohibition. Likewise, if one corporation exercises substantial control over the actions of another corporation or if such control is exercised by a group of shareholders of two or more corporations, principles of imputed prohibition similarly should be applied to corporate counsel. However, imputation between the legal offices might be inappropriate where, despite common management in other respects, the legal offices of the affiliated organizations are separately operated.

Restatement (Third) of Law Governing Lawyers § 123 cmt. d(i) (2000).

The Restatement also addresses the potentially complicated scenario in which a corporation's in-house lawyer's current or former representation of a corporate constituent might create a personal disqualification that is imputed to colleagues.

> Lawyers employed by the legal department of a corporation or similar organization commonly represent only the organization as a client. However, such a lawyer might sometimes be asked to represent officers, directors, or employees of the organization. A lawyer so employed might also have continuing obligations to clients formerly represented in previous employment. Furthermore, lawyers in corporate legal offices will often have access to confidential information in the possession of other lawyers in the same office. The possibility of misuse of information in such situations can be as great as in private law firms. The lawyer-employees are to that extent comparable to partners and associates in a private law firm. Thus, as provided in this Section, the principles of imputed prohibition apply.

Restatement (Third) of Law Governing Lawyers § 123 cmt. d(i) (2000). An illustration explains how this principle works.

> Lawyer A and Lawyer B are employed in the corporate legal office of Company. A government agency is conducting an investigation of the activities of Company and is considering whether to initiate criminal charges against Company, some of its employees, or both. The established practice of the agency is not to charge a corporation for offenses committed by corporate employees if the corporation can demonstrate that it actively sought to discourage the offense in question. Such a demonstration would, however, significantly increase the likelihood that an employee would be charged with the offense. Employee is a Company employee upon whose activities the agency has begun to focus. Before Lawyer B's employment by Company, Lawyer B had been in private practice and had advised Employee with respect to conduct that is the subject of the agency investigation. Because Company's position in the investigation might be adverse to that of Employee, Lawyer B could not represent Company in connection with the investigation . . . without the informed

> consent of Employee and Company. . . . Under the rule of imputation described in this Section, neither Lawyer A nor any other member of Company's corporate legal office may represent Company without obtaining the same informed consent.

Restatement (Third) of Law Governing Lawyers § 123 cmt. d(i), illus. 3 (2000).

Case Law

One would expect disqualification motions to frequently arise in the lateral hiring context, because in-house lawyers with expertise in certain industries might be expected to join a competitor in the same industry. But there have been surprisingly few cases addressing the disqualification of law departments which have hired lawyers (either from other law departments or from the outside) individually disqualified from a matter being handled by the hiring law department. Perhaps this lack of case law reflects in-house lawyers' more collegial attitudes compared to outside lawyers'. For whatever reason, litigation parties seem not to have filed many disqualification motions seeking to knock out an adverse party's law department based on its hiring of an individually disqualified lawyer.

In a 2016 decision that has generated some publicity (and thus might spawn similar attempts), Schlumberger successfully disqualified the entire law department of a patent litigation adversary which had hired a former Schlumberger in-house lawyer who had worked on the same patent issues while at Schlumberger.

- Dynamic 3D Geosolutions LLC v. Acacia Research Corp., 837 F.3d 1280, 1282, 1283, 1286, 1288-89, 1289, 1290 (Fed. Cir. 2016) (disqualifying an in-house lawyer representing plaintiff, because she had earlier worked on substantially related patent matters at defendant Schlumberger, before moving to plaintiff's parent; also imputing her disqualification to the entire law department for plaintiff's corporate organization, and also imputing her

disqualification to plaintiff's outside law firm with which she had communicated about the current litigation; "In 2006, Schlumberger hired Charlotte Rutherford in a senior counsel position as Manager of Intellectual Property Enforcement, in licensing and litigation; promoted her to Director of Intellectual Property in 2009; and then promoted her again to Deputy General Counsel for Intellectual Property. Her job duties included 'developing and implementing the worldwide IP strategy,' 'protecting and preserving [Schlumberger's] IP assets including patents, trademarks and trade secrets,' and 'advis[ing] senior [Schlumberger] executives regarding risk issues relating to IP.' . . . She was also responsible for the company's worldwide program for enforcing intellectual property, including litigation, and directed and supervised outside counsel on intellectual property legal matters."; "In mid-2013, after seven years at Schlumberger, Rutherford left Schlumberger and soon thereafter began working as Senior Vice President and Associate General Counsel at Acacia Research Group LLC. Acacia Research Group LLC is a wholly-owned subsidiary of Acacia Research Corporation, the parent company of various patent-holding entities, including Dynamic 3D."; "Shortly after joining Acacia, Rutherford twice met with the inventors of the '319 patent to discuss Acacia's acquisition of the patent and possible future litigation. . . . Schlumberger's Petrel product was discussed as a potential target of patent infringement litigation, at the meetings and in the call."; "The district court in this case first found that Rutherford's work at Schlumberger was substantially related to her current work at Acacia. The court found that because the accused features of Petrel existed in the older versions that Rutherford was exposed to, and because she was involved at Schlumberger in efforts to license Petrel to other companies, the evidence created an irrebuttable presumption that she acquired confidential information requiring her disqualification."; "The district court then determined that the acquired knowledge should be imputed to all Acacia attorneys for purposes of participating in Dynamic 3D's suit against Schulmberger. The court noted that conflict rules for 'firms' also apply to corporate legal departments, and that Dynamic 3D depended entirely on Acacia's legal department for its strategy and litigation conduct."; "The district court lastly extended the disqualification to CEP [outside counsel], interpreting Fifth Circuit case law on disqualifying co-counsel as shifting the evidentiary burden to Dynamic 3D to prove non-disclosure after Schlumberger met its burden to create a rebuttable presumption of disclosure."; "We agree with Schlumberger that the district court did not clearly err in finding that Rutherford's work for Schlumberger, and for Acacia and Dynamic 3D, were substantially related. Rutherford occupied senior counsel, director, and deputy general counsel positions in a large company's intellectual property department. The record documents her involvement at Schlumberger in a project specifically evaluating a product later accused of infringement by Acacia, and the risks of such an infringement suit. Rutherford's representation at Schlumberger included efforts to license Petrel when the later-accused features of the

> product existed in the older versions with which Rutherford was involved. We will therefore not disturb the district court's finding that Rutherford's employment with Schlumberger was more than tangentially related to the issues in the present suit."; "We agree with the district court that regardless whether the presumption was irrebuttable or rebuttable, there was a presumption that was not rebutted. Dynamic 3D and Acacia failed to show that knowledge of Schlumberger's confidential information should not be imputed to Acacia's other in-house counsel. The ethical standards are clear that lawyers similarly associated have had conflicts imputed to them. . . . Acacia admitted at oral argument that there was no ethical screening wall or other objective measures implemented to prevent confidential information from being used, to disadvantage Schlumberger. Here, there was a clear conflict of interest for Rutherford, and the principles underlying the ethical standards mandate extending the disqualification to Acacia's other in-house attorneys."; "Even without imputation, Fischman [Rutherford's subordinate] himself reported solely to Rutherford until after the potential conflict was raised to the court. In fact, all four Acacia employees in the Energy Group of Acacia's Houston office reported to Rutherford. In attending meetings and making decisions such as retaining CEP as outside counsel, Rutherford communicated to the other in-house counsel that she supported the litigation strategy and thereby disclosed confidential information to the other Acacia attorneys."; "We thus agree that the district court did not err in concluding that the disqualification should extend to CEP. Even beyond presumptions, there was sufficient evidence of Rutherford's involvement in the selection of CEP as outside counsel and in the litigation against Schlumberger to support a finding of communication by conduct." (emphasis added)).

Of course, the same disqualification and imputation principles apply in the reciprocal context -- in-house lawyers who are individually disqualified from a matter moving to an outside law firm. In these situations, that scenario can result in the hiring law firms' disqualification.

- Ullrich v. Hearst Corp., 809 F. Supp. 229, 235-36 (S.D.N.Y. 1992) (upholding the disqualification of a former Hearst in-house lawyer from representing plaintiffs suing Hearst in employment and other related cases; noting that the in-house lawyer had represented Hearst in similar cases for many years, and that the lawyer would be in a position to use all of the confidential Hearst information that the lawyer had acquired over the years even if he did not disclose it; "Bernbach [former Hearst in-house lawyer] also exhibits an incorrect perception of the legal standard in suggesting that the matter should be resolved based on his assertion that he will not disclose any confidential fact that was communicated to him. The rule is not designed

> merely to prevent the disclosure of confidences by the lawyer. It concerns itself as much with the lawyer's use of confidential information in a manner adverse to the interests of the former client that trusted the lawyer with its confidences. . . . Adverse use of confidential information is not limited to disclosure. It includes knowing what to ask for in discovery, which witnesses to seek to depose, what questions to ask them, what lines of attack to abandon and what lines to pursue, what settlements to accept and what offers to reject, and innumerable other uses. The rule concerns itself with the unfair advantage that a lawyer can take of his former client in using adversely . . . that client information communicated in confidence in the course of the representation. It concerns itself also with the importance of protecting the confidential relationship between client and attorney; if clients withheld information from their lawyers out of fear that the lawyers might use the information against the client in a subsequent adverse representation, the ability of the legal profession to render valuable advise to its clients would suffer.").

In other situations, courts have declined to disqualify the law firm hiring an individually disqualified former in-house lawyer.

- United States v. White Buck Coal Co., Crim A. No. 2:06-00114, 2007 U.S. Dist. LEXIS 3163, at *29, *39, *41, *42-43 (S.D. W. Va. Jan. 16, 2007) (declining to disqualify a lawyer who formerly represented Massey Energy as an in-house lawyer, and jointly representing Massey's subsidiary White Buck and an individual employee accused of mine safety violations; explaining that the lawyer eventually withdrew from representing the individual employee, but continued to represent White Buck after joining the Spilman Thomas law firm; finding a conflict of interest, but declining to disqualify the lawyer or Spilman; "Heath represented Wine and White Buck during the investigation of the citation, an inquiry that has now blossomed into the criminal prosecution of both Wine and White Buck. Additionally, Wine will be the key witness against White Buck in this criminal action. The two entities have held fast to diametrically opposed positions since the day following the citation. Specifically, Wine has insisted since the morning of June 28, 2002, that his White Buck supervisors instructed him to conduct his pre-shift duties in an unlawful manner. Since that same time, White Buck has engaged in determined efforts to pin all fault upon Wine for the violation. When the case is called for trial, one of the most significant challenges for White Buck will be the utter decimation of Wine's credibility. The architect charged with assembling the strategem designed to achieve that end is none other than the Spilman firm, with which Heath is now associated. The conflict of interest could not be clearer."; "[O]ne can readily discern the two subjects for inquiry under Wheat [Wheat v. United States, 486 U.S. 153 (1988)] when the court is presented, as here, with an actual conflict of interest. First, the court must

> ascertain whether the conflict will interfere with the proper functioning of the adversarial process, namely, whether counsel's ethical dilemma robs the client of a constitutionally effective advocate. Second, the court must ascertain whether allowing conflicted counsel to proceed will cause observers to question the fairness or integrity of the proceeding."; noting that the individual former client could not point to any privileged or confidential information that the lawyer possessed; "White Buck has offered Robert Luskin, counsel of record from a different law firm, to conduct the Wine cross examination. The government has not challenged White Buck's observations concerning this proposal, which provide as follows: 'First, Mr. Luskin has had minimal contact with Mr. Heath, and possesses no knowledge of confidential communications that could be used in the cross-examination of Mr. Wine. Second, Mr. Luskin will not hesitate to conduct a rigorous cross-examination of Mr. Wine, and cannot possibly fear breaching a confidential relationship because none ever existed. Third, Mr. Luskin does not anticipate that Mr. Wine will ever be his client and, thus, is not encumbered by the speculative conflict that might arise from the loss of future business.'"; "Additionally, our courts of appeals has tacitly approved such arrangements. See [United States v.]Williams, 81 F.3d 1321, 1325 (4th Cir. 1996). ('While allowing . . . [auxiliary counsel under similar circumstances] might have been within the court's discretion, declining to use it cannot be held an abuse of that discretion.')"; "[I]t is important to note that Wine has never moved to disqualify Heath. Also, Wine has waived any remaining privilege on the apparent subject matter involved in this action. Finally, his former counsel's present firm will be barred from confronting him on cross examination."; explaining a lawyer from another firm would cross-examine the former client).

Thus, law departments hiring lawyers (and non-lawyers) must assess those new hires' individual disqualification, and take whatever steps the pertinent ethics rules allow if the law department wants to avoid a imputed disqualification.

(b) The stakes can obviously be very high for the law department - the individual lawyers' disqualification might not only infect the hiring law department -- it might spread to the hiring corporations' outside counsel. In Dynamic 3D Geosolutions LLC v. Acacia Research Corp., 837 F.3d 1280, 1282, 1283, 1286, 1288-89, 1290 (Fed. Cir. 2016) (discussed above), the Federal Circuit upheld the law department's imputed disqualification to the company's outside counsel. The court based this imputed

disqualification on evidence that the in-house lawyer who had moved from Schlumberger to the hiring company's law department worked with that company's outside counsel on the same patent issues she had handled for her new company's now adversary Schlumberger.

Fortunately for an inattentive law department which hired an individually disqualified lawyer and did not take available protective measures, imputing a law firm's (or law department's) disqualification to co-counsel normally requires an evidentiary showing that confidential information spread to the co-counsel.

Litigant hoping to avoid their evidentiary showing sometimes rely on what is called a "double imputation." That term describes the normal automatic imputed disqualification of an individual lawyer to a law department or law firm (without a showing of confidential information spreading within that department or firm) -- which is then imputed to co-counsel (again without a similar showing).

The Restatement rejects such a "double imputation" between co-counsel on unrelated matters.

> Two or more lawyers or law firms might associate for purposes of handling a particular case. A common example is a lawyer who appears as local counsel in litigation principally handled by another firm. Each lawyer must comply with the rules concerning conflict of interest, and other lawyers in their respective firms are governed by the rules of imputation. However, a conflict imputed within a firm does not extend by imputation to lawyers in another firm working on another matter.
>
> Similarly, when a lawyer consults with other lawyers in specialized areas of the law, the consultant lawyer may not personally represent clients with conflicting interests. However, the normal consulting relationship is essentially an association for purposes of the matter in question between

> lawyers otherwise practicing separately. Hence, the rule of this Comment applies.

Restatement (Third) of Law Governing Lawyers § 123 cmt. c(iii) (2000). B 5/16

The Restatement provides an example of this approach.

> Firm X is about to file a patent-infringement action on behalf of Client against Opponent. Firm X has no patent lawyers in its office, so it wishes to affiliate with Firm Y, a patent firm, to handle the representation. Firm Y has had no connection with Opponent but Lawyer A in Firm Y represents P against D, another of Firm X's clients, in an unrelated matter. Lawyer A's adverse representation of P is not imputed to Firm X, nor is Firm X's relationship with D imputed to Firm Y. The fact that Firms X and Y represent opposing clients in a different matter would not prevent their affiliation in the patent matter.

Restatement (Third) of Law Governing Lawyers § 123 cmt. c(iii), illus. 2 (2000).

This approach makes sense, because the cooperating law firms are not working on the matter from which one of the law firms is disqualified.

However, most courts also reject a "double imputation" disqualification theory when co-counsel are working on the same matter -- and one of the law firms is imputedly disqualified.

- Derivi Constr. & Architecture, Inc. v. Wong, 118 Cal. App. 4th 1268, 1270, 1277 (Cal. App. 2004) ("Derivi Construction & Architecture, Inc., Linda Derivi, and Steve Castellanos (collectively DCA) appeal from denial of their motion to disqualify attorney Peter Whipple and his law firm on the basis that Whipple is married to an attorney at another law firm that had previously been disqualified in this lawsuit. DCA contends the trial court abused its discretion in denying the motion by failing to consider circumstantial evidence and by following unpersuasive dicta in DCH Health Services Corp. v. Waite (2002) 95 Cal. App.4th 829 [115 Cal. Rptr. 2d 847]. DCA's theory of disqualification goes beyond precedent in two regards. First, it bases the disqualification solely on a marital relationship and, second, it requires double imputation of confidential knowledge for vicarious disqualification. We decline to adopt this expanded theory of disqualification and affirm the judgment."; "We agree with the Frazier [Frazier v. Superior Court, 97 Cal.

App. 4th 23 (Cal. App. 2002)] court that imputing Brown's access to DCA's confidential information to Doherty and then to Whipple carries the concept of vicarious disqualification too far. The trial court did not abuse its discretion in denying the motion to disqualify Whipple and his firm.").

- Frazier v. Superior Court, 97 Cal. App. 4th 23, 26-27 (Cal. App. 2002) (holding that California does not recognize an automatic double imputation, which would disqualify individually disqualified lawyer's co-counsel, absent evidence that co-counsel obtained confidential information from the individually disqualified lawyer; "In this case, we examine the outer boundaries of the application of the substantial relationship test for vicarious disqualification of counsel. The superior court entered an order disqualifying petitioner's Cumis [San Diego Fed. Credit Union v. Cumis Ins. Soc'y, 162 Cal. App. 3d 358 (Cal. App. 1984)] counsel because the insurer's counsel, which had a conflict of interest of which it was the unaware, covered a few depositions for Cumis counsel. Petitioner seeks a writ of mandate directing the superior court to vacate its disqualification order, contending the court overextended the rules of vicarious disqualification. We agree. In this context, the disqualification of Cumus counsel would require a double imputation of knowledge of confidential information – first from one member of the law firm representing the insurer to another member of that firm, and second from the latter attorney to a different law firm entirely. Case law does not support the double imputation. We grant the petition." (footnote omitted)).

In 2011, the Northern District of California took this majority view in declining to impute a law department's disqualification to its company's outside counsel.

- Oracle Am., Inc. v. Innocative Tech. Distribs., LLC, Case No.: 11-CV-01043-LHK, 2011 U.S. Dist. LEXIS 78786, at *16-17 (N.D. Cal. July 20, 2011) (holding that an in-house lawyer's possible disqualification based on moving from one company's law department to an adversary's law department was not imputed to the new company's outside counsel; "There appear to be few cases where courts have imputed confidential knowledge to co-counsel as the basis for disqualification. Indeed, the general rule seems to be the contrary: 'disqualification of one firm does not automatically compel disqualification of the firm's co-counsel . . . . Rather, the particular facts of each case must be considered in order to determine whether disqualification is warranted.' *See* *In Re Airport Car Rental Antitrust Litigation*, 470 F. Supp. 495, 501-502 (N.D. Cal. 1979) (citing Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225, 235 (2d Cir. 1977)).").

On the other hand, in 2012 the Central District of California disqualified the Perkins Coie firm from acting as outside counsel for a company whose law department included an individually disqualified lawyer "seconded" from Crowell & Moring. The court acknowledged the debate about whether such imputed disqualification of co-counsel required evidence that confidential information was shared, but ultimately applied what it called "the Vicarious Presumption Rule" to co-counsel. And the court also acknowledged that Perkins Coie "did not do anything wrong," but concluded that "Perkins' innocence. . . did not prevent its disqualification."

- Advanced Messaging Techs., Inc. v. Easylink Servs. Int'l Corp., 913 F. Supp. 2d 900, 903, 905, 909, 910, 911, 912 (C.D. Cal. 2012) (analyzing a situation in which the law firm of Crowell & Moring assigned one of its lawyers to act as defendant Open Text's "outside in-house counsel"; noting that the lawyer had earlier represented the plaintiff j2 in a related matter at the Kenyon & Kenyon law firm; holding that the individual lawyer's disqualification was imputed to defendant Open Text's outside law firm of Perkins Coie although that firm did not know of the individual lawyer's conflict and therefore did not screen him from the firm's lawyers representing its client defendant Open Text; explaining that "[t]his outcome is unfortunate, because there is not a molecule of evidence that Perkins did anything other than act with integrity and in a manner consistent with the highest traditions of the legal profession."; entering an order prohibiting Perkins from releasing some of its files to replacement counsel, screening the defendant/client's general counsel and possibly other in-house lawyers from participation in the case, and prohibiting successor counsel from communicating with Crowell, Perkins, the defendant-client's general counsel and anyone else who had substantive communications with the individually disqualified lawyer; "Crowell also asserts that the Attorney cleared its conflicts check because he allegedly told Crowell that 'he did not recall having access to any confidential information,' and his representation of j2 'involved primarily the review of publicly available patent documents.'" (internal citation omitted); "The records before that court indicate that from 2004 until 2005 the Attorney represented j2 in patent litigation, and he billed j2 for 234.7 hours of work. . . . Based on the court's knowledge of law firm practices, 234.7 hours probably represents about ten percent of his billing over the roughly fifteen months that he worked on j2 matters."; "The Attorney is now Counsel at Crowell. . . . In 2011, Open Text began searching for an in-house attorney to work on 'intellectual property and patent matters,' but was 'unable to fill the role even as Open Text's

> intellectual property and patent needs grew.'. . . It asked Crowell to provide an attorney who could temporarily assume this position until a permanent candidate was selected. . . . As discussed, Crowell assigned the Attorney to fill this role, even though it knew that he previously represented j2."; "The Attorney, however, does not work at Perkins. Rather, he was outside in-house counsel for Open Text on intellectual property matters. . . . This court is not aware of any case analyzing whether the Vicarious Presumption Rule applies to such a situation. However, some cases have analyzed whether presuming an attorney at one law firm has confidential information requires making the same presumption about another firm that is co-counsel with the tainted attorney. These cases come out different ways, but the cases applying the Vicarious Presumption Rule to co-counsel have the better argument." (emphasis added); "The Attorney served as Open Text's outside in-house counsel for intellectual property matters, and the Three Current Cases are high-stakes, complex patent matters. The importance of in-house counsel effectively cooperating, coordinating, and communicating with their company's attorneys is self-evident." (emphasis added); "In the Three Current Cases, the Attorney was not screened until after Dr. Farber's deposition, approximately eight months after he began serving as Open Text's outside in-house counsel. . . . Since Perkins was unaware of the Attorney's conflict, it did not initiate a timely screen." (emphasis added); "The court finds that none of Perkins' attorneys had knowledge of the Attorney's prior j2 representation. Indeed, during oral argument the argument the court characterized Perkins as a victim of Crowell's inexplicable decision to approve the Attorney to work for Open Text. The court affirms Perkins' innocence in this matter, and appreciate the professionalism its attorneys have exhibited. Perkins' innocence though, does not prevent its disqualification." (emphases added)).

This worrisome case law should spur all law departments to carefully "vet" any lateral hires to avoid an individual lateral hire's disqualification from being imputed to the entire law department, and possibly even to outside counsel.

Best Answer

The best answer to **(a)** is **YES**; and the best answer to **(b)** is **YES**. B 10/14; B 12/16

Imputation of a Lateral Hire's Individual Disqualification

Hypothetical 2

You are interested in hiring a third- or fourth-year associate to bolster your law department's intellectual property practice. One associate who practices elsewhere in your state seems like a good prospect, but you wonder whether her individual disqualification might be imputed to your law department -- potentially disqualifying you and your colleagues from handling a number of matters that you and your outside counsel are currently handling adverse to the associate's current firm's clients. Your state just abandoned its traditional approach to the imputation issue -- and now allows hiring law firms and law departments to avoid imputed disqualification by screening lateral hires under certain circumstances.

(a) Will you be able to avoid imputed disqualification if the associate was actively working as a member of the team at the law firm representing your company's adversary?

NO (PROBABLY)

(b) Will you be able to avoid imputed disqualification if the associate had only taken one deposition in the case in which her law firm represents your company's adversary?

MAYBE

(c) Will you be able to avoid imputed disqualification if the associate had only prepared several abstract legal memoranda in the case in which her current law firm represents your company's adversary?

YES (PROBABLY)

Analysis

(a)-(c) Traditionally, a hiring law firm could not avoid imputation of an individually disqualified lateral hire's taint. In a sense, a lateral hire came to the firm as a "Typhoid Mary" -- and the firm could avoid imputed disqualification only by successfully obtaining the lawyer's consent of former clients to allow its continued representation of the former

clients' adversaries. Former clients asked for such consent inevitably demanded that the individually disqualified lateral hire be screened. However, law firms under this traditional approach could not erect what could be called "self-help" screens and avoid the imputed disqualification without the former clients' consent.

As lawyer mobility increased over the years, more and more states began to allow hiring law firms to erect "self-help" screens, and avoid harsh imputed disqualification. Although many purists resisted such changes, they were supported by some common sense principles and reflected modern realities. Lawyers must protect their clients' confidences every day of their practice. It is difficult to imagine that a lateral hire would risk the ability to practice in the legal profession by violating the duty of confidentiality -- when every lawyer must do so on a daily basis. Applying this basic principle made increasing sense in a world where few lawyers stay at their first firm for their entire careers. Not only is the legal profession changing, but entire generations now seem destined to frequently move from job to job.

ABA

The ABA dealt with this issue three times in less than ten years.

In 2002, the ABA House of Delegates rejected the Ethics 2000 Commission's proposal to allow self-help screening of lateral hires. However, states continued to act on their own in adopting such changes. By the time the ABA House of Delegates addressed the issue six years later, twenty-four states had already adopted such self-help screening. Kuhlman, George A., "Follow the Middle Road," ABA Journal, May 2009.

In 2008, the ABA House of Delegates voted on a change that would have allowed such self-help screening in the case of lateral hires. By a one-vote margin of 192 to 191, the House of Delegates postponed indefinitely its consideration of the proposed amendment.

The issue came back to the ABA House Delegates in February 2009. The ABA Journal Law News reported on the vigorous debate. For instance, the chair of the ABA's Standing Committee on Ethics and Professionalism argued that self-help screens would work -- noting that

> Illinois has had a rule similar to that in Resolution 109, and for the last 15 years, none of the state's 93,000 ethics complaints have alleged a violation of it.

Edward A. Adams, ABA House OKs Lateral Lawyer Ethics Rule Change, ABA Journal Law News, Feb. 16, 2009.

In rebuttal, an opponent of the rules change argued that "no violations were reported because they all take place behind a black curtain." Id.

In response to the argument that lawyers should involve clients in the debate over the rules change, Starbucks' general counsel responded that in a sense clients were participating.

> Paula Boggs, general counsel of Starbucks, effectively made the case there were clients present, speaking in favor of Resolution 109. She noted that ethics rules allow government lawyers to join firms which are litigating against the government, so long as they are screened from the matters and keep the government's confidences.
>
> She has found herself in that situation. "It makes no sense that I can leave the Department of Justice (DOJ) for a firm doing mortal combat with DOJ, but if I move from company A to firm A" screening is not sufficient.

> "If a firm can effectively screen the former government lawyer, why can't it screen the former in-house lawyer?" she asked.

Id.

The House of Delegates ultimately passed the self-help screen provision by a vote of 226 to 191.

Interestingly, the ABA returned to the issue one more time later in 2009, adding language making it clear that the self-help screen avoids imputed disqualification only if the disqualification "arises out of the disqualified lawyer's association with a prior firm." As earlier passed by the House of Delegates, the provision could theoretically have allowed a law firm to avoid imputed disqualification of an individually disqualified lawyer's "taint" in other circumstances.

As ultimately adopted and then quietly revised by the ABA, the self-help screening provision imputes an individually disqualified lawyer's "taint" to the entire law firm or law department unless:

> the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer's association with a prior firm, and
>
> (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;
>
> (ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

> (iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

ABA Model Rule 1.10(a)(2) (emphases added).

A comment to the new rule provides a basic explanation -- including a troublesome warning that courts might disqualify the hiring firm despite its compliance with the ethics rules.

> Rule 1.10(a)(2) similarly removes the imputation otherwise required by Rule 1.10(a), but unlike section (c), it does so without requiring that there be informed consent by the former client. Instead, it requires that the procedures laid out in sections (a)(2)(i)-(iii) be followed. A description of effective screening mechanisms appears in Rule 1.0(k). Lawyers should be aware, however, that, even where screening mechanisms have been adopted, tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation.

ABA Model Rule 1.10 cmt. [7] (emphases added).

Another comment deals with the financial screening.

> Paragraph (a)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

ABA Model Rule 1.10 cmt. [8]. The next comment addresses the notice requirement.

> The notice required by paragraph (a)(2)(ii) generally should include a description of the screened lawyer's prior representation and be given as soon as practicable after the need for screening becomes apparent. It also should include a statement by the screened lawyer and the firm that the client's material confidential information has not been disclosed or used in violation of the Rules. The notice is intended to enable the former client to evaluate and

> comment upon the effectiveness of the screening procedures.

ABA Model Rule 1.10 cmt. [9].

Finally, a new comment explains the "certification" requirement.

> The certifications required by paragraph (a)(2)(iii) give the former client assurance that the client's material confidential information has not been disclosed or used inappropriately, either prior to timely implementation of a screen or thereafter. If compliance cannot be certified, the certificate must describe the failure to comply.

ABA Model Rule 1.10 cmt. [10].

Restatement

The 2000 Restatement acknowledges the difficulty of balancing clients' justifiable worry about their lawyers working at an adversary's law firm and the societal benefit of lawyer mobility.

> Imputation of conflicts of interest to affiliated lawyers reflects three concerns. First, lawyers in a law firm or other affiliation described in this Section ordinarily share each other's interests. A fee for one lawyer in a partnership, for example, normally benefits all lawyers in the partnership. Where a lawyer's relationship with a client creates an incentive to violate an obligation to another client, an affiliated lawyer will often have similar incentive to favor one client over the other. Second, lawyers affiliated as described in this Section ordinarily have access to files and other confidential information about each other's clients. Indeed, clients might assume that their confidential information will be shared among affiliated lawyers. . . . Sharing confidential client information among affiliated lawyers might compromise the representation of one or both clients if the representations conflict. Third, a client would often have difficulty proving that the adverse representation by an affiliated lawyer was wholly isolated. Duties of confidentiality on the part of the affiliated lawyers prevents adequate disclosure of the interactions among them. Moreover, to demonstrate that the lawyer misused confidential information the client often

> would be forced to reveal the very information whose confidentiality the client seeks to protect. However, considerations of free choice of lawyers by clients and the free mobility of lawyers between firms or other employers caution against extending imputation further than necessary.

Restatement (Third) of Law Governing Lawyers § 123 cmt. b (2000).

The Restatement essentially adopts a middle ground that is similar to that found in a number of states. Rather than rejecting per se the concept of screening a lateral hire or allowing a self-help screen regardless of the lateral hire's involvement or knowledge at the old firm, the Restatement allows a self-help screen if any confidential client information the lateral hire brings with him or her "is unlikely to be significant in a subsequent matter [the new firm is handling adverse to the lateral hire's former firm's client]."

> Imputation specified . . . does not restrict an affiliated lawyer with respect to a former-client conflict . . . , when there is no substantial risk that confidential information of the former client will be used with material adverse effect on the former client because:
>
> (a) any confidential client information communicated to the personally prohibited lawyer is unlikely to be significant in the subsequent matter;
>
> (b) the personally prohibited lawyer is subject to screening measures adequate to eliminate participation by that lawyer in the representation; and
>
> (c) timely and adequate notice of the screening has been provided to all affected clients.

Restatement (Third) of Law Governing Lawyers § 124(2) (2000).

A comment explains the justification for allowing such limited self-help screening. In essence, the Restatement justifies self-help screening for private lateral hires by

pointing to the longstanding rule permitting such self-help screening when lawyers hire former government lawyers.

> Lawyer codes generally recognize the screening remedy in cases involving former government lawyers who have returned to private practice. . . . Screening to prevent imputation from former private-client representations has similar justification, giving clients wider choice of counsel and making it easier for lawyers to change employers. The rule in Subsection (2) thus permits screening as a remedy in situations in which the information possessed by a personally prohibited lawyer is not likely to be significant. The lawyer or firm seeking to remove imputation has the burden of persuasion that there is no substantial risk that confidential information of the former client will be used with material adverse effect on the former client.

Restatement (Third) of Law Governing Lawyers § 124 cmt. d(i) (2000) (emphases added).

The traditional self-help remedy when hiring former government lawyers rests on the perceived need to encourage lawyers to enter government service -- by making it easier to find a job when they leave that service. The same societal justification does not exist for private lawyers moving to another firm, although many other ethics rules encourage lawyer mobility (for instance, lawyers cannot have non-competes). Although perhaps the Restatement did not intend to rely on the track record for such former government lawyers (rather than the justification for the rule covering them), there seems to be no record of former government lawyers violating any self-help screens.

In addressing the concept of "significant" client confidential information, the Restatement provides an explanatory comment.

> Significance of the information is determined by its probable utility in the later representation, including such factors as the following:

> (1) whether the value of the information as proof or for tactical purposes is peripheral or tenuous;
>
> (2) whether the information in most material respect is now publicly known;
>
> (3) whether the information was of only temporary significance;
>
> (4) the scope of the second representation; and
>
> (5) the duration and degree of responsibility of the personally prohibited lawyer in the earlier representation.

Restatement (Third) of Law Governing Lawyers § 124 cmt. d(i) (2000).

A comment describes a spectrum of possible scenarios.

> Three situations must be distinguished. First, a lawyer's minor involvement in a matter for a former client might have involved no or so little exposure to confidential information that no conflict should be found . . . . Second, the lawyer's involvement might have been more substantial, rendering the lawyer personally prohibited from the representation by reason of a former-client conflict of interest . . . , but screening may be appropriate under Subsection (2). A common instance in which this may be true is that of a junior lawyer in a law firm who provides minimal assistance on a peripheral element of a transaction, thereby gaining little confidential information that would be relevant in the later matter. Third, in the circumstances the lawyer's involvement and the nature and relevance of confidential information in the lawyer's possession might be such that screening will not remove imputation under Subsection (2). Determining which result is appropriate requires careful analysis of the particular facts.
>
> If the requirements of either Subsection (2) or (3) are met, imputation is removed and consent to the representation by the former client is not required. The required screening measures must be imposed in the subsequent representation at the time the conflict is discovered or reasonably should have been discovered, and they must be of sufficient scope, continuity, and duration to assure that

> there will be no substantial risk to confidential client information.

Restatement (Third) of Law Governing Lawyers § 124 cmt. d(i) (2000).

The Restatement provides three useful illustrations providing more details.

In the first illustration, the lateral hire does not have "significant" client confidential information.

> As can readily be shown from contemporaneous time records, when Lawyer was an associate in Law Firm ABC, Lawyer spent one-half hour in conversation with another associate about research strategies involving a narrow issue of venue in federal court in the case of Developer v. Bank, in which the firm represented Bank. The conversation was based entirely on facts pleaded in the complaint and answer, and Lawyer learned no confidential information about the matter. Lawyer then left Firm ABC and became an associate in Firm DEF. Two years later, Lawyer was asked to represent Developer against Bank in a matter substantially related to the matter in which Firm ABC represented Bank. In the circumstances, due to the proven lack of exposure of Lawyer to confidential information of Bank, Bank should not be regarded as the former client of Lawyer for the purpose of applying § 132 . . . . Alternatively, a tribunal may require that Lawyer be screened from participation in the matter as provided in this Section and, on that basis, permit other lawyers affiliated with Lawyer in Firm DEF to represent the client against Bank.

Restatement (Third) of Law Governing Lawyers § 124 cmt. d(i), illus. 3 (2000) (emphases added).

In the second illustration, the lateral hire has substantial information, but the information is of "little significance" and therefore does not preclude use of a self-help screen.

> The same facts as Illustration 3, except that Lawyer while representing Bank in Firm ABC was principally in charge of developing factual information about the underlying dispute.

> The dispute involved a loan Bank made to Developer on Tract A in the city in which both conduct business. The dispute was resolved after extensive discovery and a full trial before Lawyer left Firm ABC. An affiliated lawyer in Lawyer's new firm, Firm DEF, has been asked to represent Developer in a dispute with Bank over a loan on Tract B. Because of the similarity of facts in the two disputes -- involving both tracts, both loans, and both parties to them -- a tribunal finds the matters are substantially related and accordingly that Lawyer is personally prohibited from representing Developer against Bank with respect to Tract B . . . . However, the tribunal also finds that, despite that factual overlap, the information Lawyer might have acquired about Bank would have little significance in the later dispute because it concerned only an earlier period of time so that any importance it might have had was significantly diminished by the time of the second dispute, because it mainly involves information already a matter of public record in the earlier trial, and because all factual information will be largely irrelevant in view of the fact that the pleadings indicate that the only contested issue in the second dispute involves a matter of contract interpretation. In the circumstances, the tribunal should further find that Firm DEF may represent Developer against Bank if Lawyer has been screened as provided in Subsection (2).

Restatement (Third) of Law Governing Lawyers § 124 illus. 4 (2000) (emphases added).

The third illustration provides the classic example of a lateral hire who has such significant confidential information a firm hiring him or her cannot avoid imputation of the lawyer's "taint" through a self-help screen.

> The same facts as Illustration 4, except that the earlier dispute was settled after Lawyer had conducted extensive examination of Bank's files but without any discovery by Developer's then counsel or trial. Little time has passed since Lawyer acquired the information from Bank, and the information remains highly relevant in the later dispute. The pleadings in the second dispute indicate that a large number of important factual issues similar to those in the earlier dispute remain open. In the circumstances, the likelihood that the information possessed by Lawyer will be significant

> in the second matter renders screening under this Section inappropriate.

Restatement (Third) of Law Governing Lawyers § 124 illus. 5 (2000) (emphasis added).

State Rules

Unfortunately for anyone desiring some nationally uniform approach, the states' independent adoption of self-help screening for lateral hires has resulted in rules that differ from state to state.

Some states allow screening regardless of the lateral hire's level of participation at the former firm (the ABA Model Rule approach). Other states allow such screening only if the lawyer played some peripheral role at the old firm (some of these are discussed below). States also differ in such logistical requirements as the type of screening that will work, referred disclosure to the former clients or tribunals, etc.

And of course some states continue to take the traditional approach, automatically imputing an individually disqualified lateral hire's disqualification to the entire hiring firm -- thus rejecting a self-help screening remedy.

The varying nature of states' approach to this issue can make it very difficult to analyze the efficacy of a self-help screen.

A 2010 California state court case endorsing self-help screens relied as much on experience with other screens as it did on some societal purpose justifying the switch from an automatic imputation rule. Kirk v. First Am. Title Ins. Co., 108 Cal. Rptr. 3d 620, 642 & n.25 (Cal. Ct. App. 2010).

The court explained that the evolving way in which lawyers practice law justifies giving them a chance to rebut the automatic presumption of information-sharing that underlies the tradition strict disqualification imputation rule.

> We do not doubt that vicarious disqualification is the *general* rule, and that we should presume knowledge is imputed to all members of a tainted attorney's law firm. However, we conclude that, in the proper circumstances, the presumption is a rebuttable one, which can be refuted by evidence that ethical screening will effectively prevent the sharing of confidences in a particular case. . . . The instant case illustrates the changing landscape of legal practice -- we are concerned with the tainted attorney working in a different geographical office and in a different practice group from the attorneys with responsibility for the litigation. These are not attorneys discussing their cases regularly, passing each other in the hallways, or at risk of accidentally sharing client confidences at lunch. In a situation where the 'everyday reality' is no longer that all attorneys in the same law firm actually 'work[] together,' there would seem to be no place for a rule of law based on the premise that they do.

Kirk, 108 Cal. Rptr. 3d at 637-39 (citation omitted) (emphases added; emphasis in original indicated by italics).

Thus, the court pointed to the longstanding and universally accepted ethics rule permitting law firms to self-help screen former government lawyers to avoid imputation of their individual disqualification.

> "The law cannot possibly be" that Sonnenschein could have effectively screened the lawyer if he had come directly from the government but could not screen him when he came from another firm; also noting that California law permits the screening of non-lawyers.

Id. at 642 n.25. The court also noted most states' self-help screening mechanism for prospective clients.

> 36 states and the District of Columbia permit ethical screening when the confidential information was conveyed by a former prospective client, although these rules generally apply only when the attorney took reasonable measures to avoid exposure to more information than was reasonably necessary to determine whether to accept the representation -- a circumstance which arguably did not occur in the instant case.

Id. at 639 n.22. The opinion also mentioned many states' self-help screening mechanism for non-lawyer hires.

> There is another context in which a rebuttable presumption of imputed knowledge -- and therefore, the use of ethical screens -- has been adopted, that of the tainted non-attorney employee. When a tainted non-attorney employee of a law firm, possessing confidential case information, moves to an opposing law firm, vicarious disqualification of the opposing law firm is not necessary if the employee is effectively screened.

Id. at 642. Finally, the court pointed to the states that had already adopted the ABA Model Rule approach in one variation or another.

> That nearly half of the states have chosen to permit some level of ethical screening in the non-governmental attorney context demonstrates a growing understanding that law is often practiced in firms in which effective screening is possible.

Id. at 640.

That case described states' differing approaches as of that date.

> Other states are very nearly split evenly as to whether to permit ethical screening of attorneys moving from one private law firm to another. Twelve states have adopted rules of professional conduct permitting such screening with no limitations based on the scope of the disqualified attorney's prior involvement in the representation. . . . An additional twelve states have adopted rules permitting screening when the disqualified attorney was not

> substantially involved in the prior representation, or under other similar limitations on the attorney's prior involvement.

Id. at 639.

That tally is undoubtedly inaccurate or incomplete now, because states are constantly tinkering with their ethics rules.

Ironically, a California federal court decision issued two years later rejected the concept of self-help screening -- thus setting up the possibility of different results between federal and state courts in the same state.

- Beltran v. Avon Prods., Inc., 867 F. Supp. 2d 1068, 1078, 1083, 1083-84, 1084 (C.D. Cal. 2012) (finding that an individual lawyer's disqualification was imputed to his new law firm, despite an ethics screen; explaining that the lawyer spent over 300 hours working on matters for Avon while at Paul Hastings, and then moved to a law firm representing a plaintiff suing Avon; "The instant case presents an unfortunate and awkward set of circumstances in which two former colleagues and long-time friends who previously worked together in representing a major corporate client now find themselves on opposite sides in a case involving that same client."; "Plaintiff claims that disqualification is not warranted because an ethical wall was immediately imposed to cordon off Mr. Frank from the instant case after Mr. Frank spoke with Mr. Ellis on March 12, 2012. . . . As a matter of law, however, an ethical wall is insufficient to overcome the possession of confidential information by the segregated attorney, except in very limited situations involving former government attorneys now in private practice."; noting the individually disqualified lawyer had assisted his new firm in attempting to avoid disqualification; "Even if an ethical wall were legally sufficient, it was untimely because it was not imposed until March 12, 2012, two weeks after Plaintiff filed her complaint against Avon in Estee Lauder on February 28, 2012. Nor did Plaintiff's counsel send written notice to Avon regarding the implementation of an ethical wall as required under the Rules of Professional Conduct. See ABA Model Rules of Prof'l Conduct 1.10(a)(ii)&(iii). The effectiveness of an ethical wall is further compromised by the close proximity of attorneys working together in one office at Eagan Avenatti, which consists of less than ten attorneys, and by Mr. Frank's co-representation of parties with Mr. Avenatti and Mr. Sims in several concurrent class actions. . . . The Court also notes that Mr. Frank has already actively participated in the current litigation by speaking with Mr. Ellis about the case and the instant motion (as early as February 28, 2012), submitting a declaration in support of Plaintiff's opposition to the disqualification motion, reviewing Avon's motion, and even

seeking to participate telephonically at the May 21, 2012 hearing. Mr. Frank's behavior casts doubt as to whether an ethical wall can be successfully implemented and maintained in this case."; "The Court also finds that, although there is no direct California authority regarding vicarious disqualification of an associated law firm, disqualification of the X-Law Group is warranted under the circumstances of this case. The X-Law Group consists of four attorneys, two of whom have already collaborated with Eagan Avenatti in the filing of the complaint against Avon in Estee Lauder and this case. It is also reasonable to assume that the two law firms engaged in fairly extensive discussions about the case and Plaintiff's litigation strategy before filing their complaint and prior to the erection of an [sic] wall ethical[ly] segregating Mr. Frank from the case. Even if the X-Law Group did not, in fact, acquire confidential information, their involvement in the case would taint the appearance of probity and fairness of the proceeding.").

In the same year that a California state court adopted a self-help screen approach, the Western District of Wisconsin endorsed the concept of self-help screening -- pointing to Illinois' long experience with a self-help screen rule, apparently without any allegations of lawyer violations.

- Silicon Graphics, Inc. v. ATI Techs., Inc., 741 F. Supp. 2d 970, 977, 979-80 (W.D. Wis. 2010) (denying a disqualification motion based on a law firm's hiring of an individually disqualified lateral; finding that the hiring law firm's screen was adequate; explaining that "[a]t least 12 states have a rule of imputed disqualification similar to th[e] ABA model rule that allows for screening regardless of the scope of the work conducted by the lawyer for the former client. Kirk, 183 Cal. App. 4th at 802-803. [Kirk v. First Am. Title Ins. Co., 183 Cal. App. 4th 776 (Cal. Ct. App. 2010)] About the same number of states allow for screening under more limited circumstances. Id. In adopting the new rule, the ABA relied on the experience of these states, concluding that history has 'established [that] screens are effective to protect confidentiality' and 'that courts have exhibited no difficulty in reviewing and, where screening was found to have been effective, approving screening mechanisms.' Committee Report at 11. See also Robert A. Creamer, 'Three Myths about Lateral Screening,' Professional Lawyer 20 (Winter 2002) ('[T]he experience of about 70,000 Illinois lawyers over nearly nine years has been no formal cases involving charges that an effort to screen under Rule 1.10 was inadequate to protect confidential information.') (internal quotations omitted)."; "This leaves about half of the states that require automatic disqualification. However, some predict that, '[w]ith the passage of amended Model Rule 1.10, more states will likely follow suit' to allow screening under more circumstances. Kathy L. Yeatter, 'Ethical Considerations of the Mobile

> Lawyer,' American Bankruptcy Institute Journal 22 (May 2009). See, e.g., Mark Fucile, 'Screening: An Idea Whose Time Has Come?' Advocate 21 (Jan. 2010) (arguing that Idaho should adopt model rule)."; "Despite the lack of a clear holding in this circuit, I agree with defendants that federal law is controlling. As a general matter, federal courts apply state law to 'substantive' questions when state law created the underlying cause of action. . . . In addition, federal courts may 'borrow' state law principles when federal law is silent on a particular question. . . . However, the Supreme Court has held that '[t]he state code of professional responsibility does not by its own terms apply to sanctions in the federal courts.' In re Snyder, 472 U.S. 634, 645, 105 S. Ct. 2874, 86 L. Ed. 2d 504 (1985). This is because a federal court's authority to regulate lawyer conduct in its own cases comes from its inherent power, not from a particular state rule. . . . If decisions whether to sanction a lawyer for misconduct are decided under federal law, it follows that '[m]otions to disqualify are . . . decided under federal law' as well." (citation omitted))

States that have adopted what could be called a middle ground usually allow self-help screening of individually disqualified lateral hires unless they played a "substantial role" at their old firm on the matter being handled by the new firm adverse to the lateral hire's former firm's client.

Unfortunately, that is such an elastic concept that it can be difficult, if not impossible, to judge in advance whether a self-help screen will avoid imputed disqualification.

- Martin v. AtlantiCare, Civ. No. 10-6793 (JHR/JS), 2011 U.S. Dist. LEXIS 122987, at *9, *15-17, *19 (D.N.J. Oct. 25, 2011) (disqualifying a lawyer who had worked at Morgan Lewis in defending a case, and then switched to join the plaintiff's law firm; explaining that under New Jersey ethics rules the hiring law firm can avoid imputed disqualification (among other things) if the "matter does not involve a proceeding in which the personally disqualified lawyer had primary responsibility" despite the lawyer's argument to the contrary; "Plaintiff's characterization of LG's [attorney in question] role at Morgan as 'limited' does not comport with the evidence. This is illustrated by the fact that from November 2010 to March 2011 LG worked 108.2 hours on the case, almost twice as many hours as the combined total of the other two members of the Morgan defense team. Further, LG's Certification supports defendants' argument that she played an integral role while at Morgan. LG acknowledges that she prepared all or part of defendants' removal papers and motion to dismiss, reviewed client documents for relevancy, consulted with defendants'

in-house counsel, prepared witness outlines, interviewed defendants' witnesses, prepared witness summaries, and spoke with plaintiffs' counsel. LG's contemporaneous time billing entries also contradict her allegation that she only performed 'limited tasks.'. . . According to her billing entries LG researched relevant legal issues, prepared legal papers, analyzed plaintiffs' complaints, reviewed background investigation materials about plaintiffs by the client, exchanged e-mails with the client, reviewed client documents, prepared representation letters, analyzed plaintiffs' discovery directed to defendants, reviewed and analyzed plaintiffs' personnel files with regard to the defense of their discrimination claims, prepared witness outlines, interviewed witnesses, prepared witness summaries, communicated with her clients about plaintiffs, and identified relevant and responsive documents. These are hardly 'limited' roles. LG's descriptions evidence that she played a substantial and substantive role in AtlantiCare's defense."; "The foregoing evidence demonstrates to the Court that LG's actions fit squarely within the meaning of the term 'primary responsibility' as the term is defined in the RPC's. In order to have primary responsibility it was not necessary for LG to be the supervising attorney on the file or the partner in charge of the file. This is evident by the fact that the applicable definition merely requires 'participation" in the 'management and direction of the matter at the policy-making level.' LG plainly 'participated' in the management of the case as she took the 'laboring oar' in AtlantiCare's defense and she regularly consulted with the Morgan defense team about defense strategy.").

- Roosevelt Irrigation Dist. v. Salt River Proj. Agric. Improvement & Power Dist., 810 F. Supp. 2d 929, 948, 954, 955 (D. Ariz. 2011) (disqualifying the law firm of Gallagher & Kennedy from representing plaintiff in a CERCLA lawsuit against the firm's former clients Honeywell & Corning; noting that Arizona Rule 1.10 "precludes screening when: (1) the disqualified lawyer either switched sides in the current representation or the current representation necessarily requires relitigating a particular aspect of a prior representation; (2) the prior representation was a proceeding before a tribunal; and (3) the disqualified lawyer played a substantial role in that prior proceeding."; finding that one of the law firm lawyers had previously represented Honeywell in a related matter in which he played a "substantial role," so that he could not screen to avoid imputed disqualification; noting that another law firm lawyer had worked in-house at Honeywell, in a substantially related matter, but had not been screened when he joined the law firm; "[A]lthough Hallman became a shareholder at G&K in 1999, and RID engaged G&K in October 2008, G&K did not screen Hallman from the RID matter until June 2010. G&K explains that it did not enter Hallman's prior employment and experience at Honeywell into its conflicts database when Hallman joined the firm."; noting that the screen had not been put in place in a timely fashion; "An untimely screen cannot be cured by the affected attorney's assurances that, in the absence of the screen, he did not reveal any confidential information.").

- Litig. Mgmt., Inc. v. Bourgeois, 915 N.E.2d 342, 349, 348, 349 (Ohio Ct. App. 2009) (affirming disqualification of the Ogletree, Deakins firm from representing a client adverse to a client represented by Baker & Hostetler, because Ogletree hired a first-year associate who had worked for approximately 14.6 hours on the other side of the case; noting that Ogletree had not screened the young lawyer when she joined Ogletree; finding that the young associate had "substantial responsibility" for the matter while at Baker & Hostetler, and therefore could not had been sufficiently screened to avoid imputed disqualification of Ogletree; "Appellants assert . . . that Somich was a young associate, that she only performed 14.6 hours of general research on the matter, that she did not recall any details of the matter concerning LMI, that she did not have any contact with the client, and that Stronczer was the attorney principally responsible for the work."; "Comment 5B to Rule 1.10(c) provides in relevant part as follows: 'Determining whether a lawyer's role in representing the former client was substantial [in these circumstances] involves consideration of such factors as the lawyer's level of responsibility in the matter, the duration of the lawyer's participation, the extent to which the lawyer advised or had personal contact with the former client and the former client's personnel, and the extent to which the lawyer was exposed to confidential information of the former client likely to be material to the matter.'" also finding that the lawyer had not actually been successfully screened, which provided another grounds for disqualifying the law firm; explaining that the lawyer "acknowledged she reviewed the pleadings in this matter and had discussed with attorney Petrulis the content of the LMI billing invoice from the former matter. Furthermore, appellants failed to establish that they took any action to timely and effectively screen Somich from participation in this matter. Therefore, disqualification of the Ogletree firm was also required by Rule 1.10(d).").

- Nevada LEO 39 (4/24/08) (explaining Nevada's Rule allowing the screening of lateral hires; noting that in 2006 Nevada adopted a new version of Rule 1.10 that authorizes "limited screening" to avoid imputed disqualification; "[S]creening is allowed to avoid imputed disqualification without the consent of the former client -- even if the laterally moving lawyer possesses confidential information from the former firm so as to be personally disqualified under Rule 1.9(b) -- but only if the laterally moving lawyer did not have a substantial role in, or primary responsibility for, the matter. When the laterally moving lawyer did have a substantial role in, or primary responsibility for, the matter, the ABA rule prohibiting screening applies."; providing several examples: "For example, suppose the lawyer who was the lead or '2nd chair' counsel for Client A in case A v. B while the lawyer was with former firm, White & Brown, moves to firm Red & Green, which represents Client B in the same or a related case. In that situation, the lawyer's new firm, Red & Green, cannot continue to represent Client B. In that situation, screening could not eliminate the imputed disqualification. However, even if screening did not

remove the imputed disqualification, both the laterally moving lawyer and the new firm, Red & Green, could continue to represent Client B if Client A waives the conflict under Rule 1.7. Rule 1.10(c)."; "On the other hand, suppose the laterally moving lawyer had no direct role in case A v. B while the lawyer was with former firm, White & Brown -- but did possess confidential information from the former firm so as to be personally disqualified under Rule 1.9(b) -- and then moves to firm Red & Green, which represents Client B in the same or a related case. In that situation, the lawyer's new firm, Red & Green, could continue to represent Client B without Client A consent if the personally disqualified lawyer is ethically screened from the case."; "Finally, if the lawyer changing firms had neither a role in the case A v. B, nor the possession of confidential information about the case, then neither screening nor client consent is required for the lawyer and the new firm to represent the opposite party in the case.").

At least one state precludes self-help screening of a lateral hire who either had "substantial involvement" or has "substantial material information relating to the matter" -- which involves an even more vague standard. In 2009, a court in that state held that a lawyer who had spent only 7.2 hours over two days writing a one and a half page memorandum did not have a "substantial involvement" in the matter, but had acquired "substantial material information relating to the matter." The court disqualified the hiring law firm.

- O'Donnell v. Robert Half Int'l, Inc., 641 F. Supp. 2d 84, 86, 89. 88 n.3 (D. Mass. 2009) (disqualifying a plaintiff's law firm which had hired a lawyer from defense counsel Seyfarth Shaw despite being warned that the lawyer had spent some time working with the defense in the same case that the plaintiff's law firm was handling against Seyfarth Shaw's client; explaining that Massachusetts Rule 1.10 allows a hiring law firm to avoid imputed disqualification if it hires a lawyer who "had neither substantial involvement nor substantial material information relating to the matter" and is screened from the matter; explaining that lawyer did not have "substantial involvement" in the matter, because she spent 7.2 hours over two days writing a one and a half page memorandum summarizing research; however, finding that the lawyer did have "substantial material information" about the matter, because she learned about the defendant's legal strategy and "a single fact clearly relevant to the issue being researched"; considering in its analysis only information disclosed to the court in camera; "The Court does not consider any assertions by defendants' counsel that there were other revelations to

> Attorney Getchell which were so sensitive that defendants determined not to include them in the in camera record for fear that the Court, in considering the matter, or the Court hearing an objection to the undersigned's ruling, might order the material disclosed to counsel for the plaintiffs. The Court shall decide the motion to disqualify solely on the record which has been put before it and shall not consider any hints of juicier aspects of Attorney Getchell's involvement in or knowledge of the case while at the Seyfarth firm which defendants choose not to reveal to the Court.").

At least one court has rejected the argument that the hiring law firm could have discovered during the litigation all of the information possessed by a lateral hire.

- Martin v. AtlantiCare, Civ. No. 10-6793 (JHR/JS), 2011 U.S. Dist. LEXIS 122987, at *9, *28-29 (D.N.J. Oct. 25, 2011) (disqualifying a lawyer who had worked at Morgan Lewis in defending a case, and then switched to join the plaintiff's law firm; explaining that under New Jersey ethics rules the hiring law firm can avoid imputed disqualification (among other things) if the "matter does not involve a proceeding in which the personally disqualified lawyer had primary responsibility"; rejecting the lawyer's argument that her knowledge would have been discovered in the normal course of the case anyway; "The Courts discounts plaintiffs' argument that even if CM [plaintiffs' law firm] received information from LG regarding the case, the information would have been discoverable and not subject to any privilege. . . . This argument has been rejected in various decisions. 'Other courts have rejected the notion that the potential disclosure of confidential information in discovery could somehow ameliorate a conflict under Rule 1.9.'" (citation omitted).

And of course hiring law firms relying on self-help screens must meet all of the logistical standards as well, imposing an adequate screen at an appropriately early time. Those requirements complicate the issue even further.

Best Answer

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

B 11/14; B 12/16

Elements of an Effective Screen

Hypothetical 3

Having just been "burned" by hiring a young lawyer for your law department who ended up being "Typhoid Mary," you now take every step to screen lateral hires before they come on board. However, you just received a motion to disqualify your law department in a large matter, based on your hiring of a lateral associate. The motion acknowledges that you imposed a screen before hiring the lateral associate, but claims that the screen was not effective -- because it did not mention that lawyers violating the screen would be punished.

Is your law department likely to be disqualified based on this alleged deficiency of the screen?

MAYBE

Analysis

Although 2009 revisions to ABA Model Rule 1.10 permit self-help screening in some circumstances, hiring law firms will still suffer from an imputed disqualification if they do not meet the screening standards.

A comment to ABA Model Rule 1.10 points to another part of the rule in describing an adequate screen, but adds a chilling warning.

> Rule 1.10(a)(2) similarly removes the imputation otherwise required by Rule 1.10(a), but unlike section (c), it does so without requiring that there be informed consent by the former client. Instead, it requires that the procedures laid out in sections (a)(2)(i)-(iii) be followed. A description of effective screening mechanisms appears in Rule 1.0(k). Lawyers should be aware, however, that, even where screening mechanisms have been adopted, tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation.

ABA Model Rule 1.10 cmt. [7] (emphasis added).

The ABA Model Rules describe a valid screen as follows:

> The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

ABA Model Rule 1.0 cmt. [9].

The Restatement similarly describes the type of screen that will effectively avoid imputation.

> Screening must assure that confidential client information will not pass from the personally prohibited lawyer to any other lawyer in the firm. The screened lawyer should be prohibited from talking to other persons in the firm about the matter as to which the lawyer is prohibited, and from sharing documents about the matter and the like. Further, the screened lawyer should receive no direct financial benefit from the firm's representation, based upon the outcome of the matter, such as a financial bonus or a larger share of firm income directly attributable to the matter. However, it is not impermissible that the lawyer receives compensation and benefits under standing arrangements established prior to the representation. An adequate showing of screening ordinarily requires affidavits by the personally prohibited lawyer and by a lawyer responsible for the screening

> measures. A tribunal can require that other appropriate steps be taken.

Restatement (Third) of Law Governing Lawyers § 124 cmt. d(ii) (2000).

The Restatement also discusses a screen's timing.

> An affected client will usually have difficulty demonstrating whether screening measures have been honored. Timely and adequate notice of the screening must therefore be given to the affected clients, including description of the screening measures reasonably sufficient to inform the affected client of their adequacy. Notice will give opportunity to protest and to allow arrangements to be made for monitoring compliance.
>
> Notice should ordinarily be given as soon as practical after the lawyer or firm realizes or should realize the need for screening. Obligations of confidentiality to a current client, however, might justify reasonable delay. A firm advising about a possible takeover of a former client of a lawyer now in the firm, for example, need not provide notice until the attempt becomes known to the target client.

Restatement (Third) of Law Governing Lawyers § 124 cmt. d(iii) (2000).

Many state rules have their own variations.

To make matters more complicated, courts also add their own thoughts about the elements of an effective screen.

- Ryan's Express Transp. Servs., Inc. v. Amador Stage Lines, Inc., 279 P.3d 166, 168, 172, 171 & nn.4 & 5, 172 (Nev. 2012) (analyzing appropriate steps for an ethics screen; "Although the Nevada Rules of Professional Conduct (RPC) permit the screening of disqualified attorneys to prevent an associated law firm's imputed disqualification in some cases, RPC 1.10(e); 1.11(b); 1.12(c), we have never considered whether screening is appropriate with regard to a settlement judge acting under this court's settlement conference program or how to determine the sufficiency of any screening measures utilized. We take this opportunity to consider the practice of attorney screening to cure imputed disqualification."; "When considering whether the screening measures implemented are adequate, courts are to be guided by the following non-exhaustive list of factors: (1) instructions given to ban the exchange of information between the disqualified attorney and other

members of the firm; (2) restricted access to files and other information about the case; (3) the size of the law firm and its structural divisions; (4) the likelihood of contact between the quarantined lawyer and other members of the firm; and (5) the timing of the screening."; also citing Pappas V. Waggoner's Heating & Air, Inc., 108 P.3d 9, 14 (Okla. Civ. App. 2004)], which stated as follows: "'(1) instructions given to ban the exchange of information between the disqualified attorney and other members of the firm; (2) restricted access to files and other information about the case; (3) prohibited sharing in fees derived from the litigation; (4) the size of the law firm and its structural divisions; and (5) the likelihood of contact between the quarantined lawyer and other members of the firm.'"; also citing Leibowitz v. Eight Judicial Dist. Court of Nev., 78 P.3d 515, 522 (Nev. 2003), which stated as follows: "'To determine whether screening has been or may be effective, the district court should consider: (1) 'the substantiality of the relationship between the former and current matters,' (2) 'the time elapsed between the matters,' (3) 'the size of the firm,' (4) 'the number of individuals presumed to have confidential information,' (5) 'the nature of their involvement in the former matter,' (6) 'the timing and features of any measures taken to reduce the danger of disclosure,' and (7) whether the 'old firm and the new firm represent adverse parties in the same proceeding, rather than in different proceedings' because inadvertent disclosure by the non-lawyer employee is more likely in the former situation.'"; also citing "Marc I. Steinberg & Timothy U. Sharpe, Attorney Conflict of Interest: The Need for a Coherent Framework, 66 Notre Dame L. Rev. 1, 20 (1990)," which stated as follows: "'Chinese Walls are specific institutional mechanisms which prevent contact between the tainted attorney and members of the firm working on the related matter. Such mechanisms may be structural, such as departmentalization, procedural, as in restricting access to files, pecuniary, by denying the tainted attorney any remuneration from fees derived from the representation, or educational, such as providing programs that make firm members aware of the ban on exchange of information. Usually, effective screening procedures involve all of the above components.'"; "Today, we adopt an analysis similar to the approaches taken by the courts discussed above. When presented with a dispute over whether a lawyer has been properly screened, Nevada courts should conduct an evidentiary hearing to determine the adequacy and timeliness of the screening measures on a case-by-case basis. The burden of proof is upon the party seeking to cure an imputed disqualification with screening to demonstrate that the use of screening is appropriate for the situation and that the disqualified attorney is timely and properly screened.").

- Kirk v. First Am. Title Ins. Co., 108 Cal. Rptr. 3d 620, 627, 645 n.29, 645-46, 647, 650 (Cal. Ct. App. 2010) (analyzing in great detail the California rule requiring imputation of an individual lawyer's (Cohen) disqualification, and rejecting a per se imputation approach; explaining that an individual lawyer who had several communications with plaintiff's counsel about a case moved

to the Sonnenschein firm, which was later joined by lawyers from Bryan Cave -- who represented the other side of the case in which the lawyer had spoke to the plaintiff; noting that Sonnenschein screened the individual lawyer immediately upon learning of the individual lawyer's disqualification; "The screening memorandum recites that it was created to 'formalize and memorialize the procedures necessary to assure that no confidences or secrets relating to the [related class actions] will be disclosed, even inadvertently, to [the First American team] or any other Sonnenschein lawyer who may be asked to work on the [related class actions].' The memorandum indicated that the failure to observe the procedures would subject the offender to discipline. The memorandum provided that (1) Cohen could not work on the related class actions; (2) no attorney or paralegal who may work on the related class actions may discuss them with Cohen; (3) Cohen may not be given non-public documents pertaining to the related class actions; (4) Cohen shall not access any documents on Sonnenschein's computer network pertaining to the related class actions; and (5) no fees from any work related to the related class actions would be apportioned to Cohen."; ultimately allowing Sonnenschein to rebut the presumption that the lawyer had disclosed confidences to colleagues at that firm; reiterating that "the presumption is not rebuttable in those cases" in which a lawyer switches sides in the same case; also discussing the elements of a an effective screen; "The specific elements of an effective screen will vary from case to case, although two elements are necessary: First, the screen must be timely imposed; a firm must impose screening measures when the conflict first arises. It is not sufficient to wait until the trial court imposes screening measures as part of its order on the disqualification motion. . . . Second, it is not sufficient to simply produce declarations stating that confidential information was not conveyed or that the disqualified attorney did not work on the case; an effective wall involves the imposition of preventive measures to guarantee that information will not be conveyed." (footnote omitted); "As with the other factors, we do not hold that any particular method of preventing access to confidential information and files is necessary—indeed, a trial court might conclude that a simple directive not to access the information is sufficient. The more steps a firm has taken to prevent any disclosure, however, the more likely it is that a court will find the ethical wall to be sufficient."; noting also that the individual lawyer had left Sonnenschein; "Cohen was present at the Sonnenschein firm for approximately one year. On remand, the trial court must determine whether Cohen's activities at the firm actually resulted in the improper transmission, directly or indirectly, of confidential information from Cohen to the First American team, or any other member of the Sonnenschein firm who may have worked on the related class actions."; reversing the disqualification of the Sonnenschein firm and remanding an analysis on whether the firm had rebutted the presumption that the individual lawyer had disclosed confidences to colleagues).

- In re Columbia Valley Healthcare Sys., L.P., 320 S.W.3d 819, 824-25 (Tex. 2010) (disqualifying a law firm for hiring an individually disqualified non-lawyer but failing to properly screen the non-lawyer; "To determine whether the screening used by a firm is effective, we have said that the following factors may be considered: (1) the substantiality of the relationship between the former and current matters; (2) the time elapsing between the matters; (3) the size of the firm; (4) the number of individuals presumed to have confidential information; (5) the nature of their involvement in the former matter; and (6) the timing and features of any measures taken to reduce the danger of disclosure.").

- Del. River Port Auth. v. Home Ins. Co., Civ. A. No. 92-3384, 1994 U.S. Dist. LEXIS 11427, at *20-21 (E.D. Pa. Aug. 17, 1994) (ordering that a lawyer be screened, and describing the elements of an adequate screen; "The Court finds that a screen would be effective in this case given the following factors: 1) Kopp is not participating in this matter at all; 2) he has had no discussions with any of the attorneys representing Home about this litigation except in connection with the motion to disqualify; 3) Koop has testified that he has not imparted any confidential information regarding DRPA to any attorneys representing Wolf Block; 4) Koop has not seen any documents relating to this litigation, and he does not have any access to files related to this litigation; 5) Wolf Block is a very large firm, and only one of its members (Kopp) needs to be screened; and 6) Kopp has represented through sworn affidavits and under penalty of perjury that he does not have any confidential information of DRPA that might be relevant to this case.").

- LaSalle Nat'l Bank v. Cnty. of Lake, 703 F.2d 252, 259 (7th Cir. 1983) (affirming disqualification of a law firm, and describe the elements of an adequate screen; "The screening arrangements which courts and commentators have approved, however, contain certain common characteristics. The attorney involved in the Armstrong v. McAlphin case [625 F.2d 433 (2d Cir. 1980), vacated on other grounds, 449 U.S. 1106 (1981)], for example, was denied access to relevant files and did not share in the profits or fees derived from the representation in question; discussion of the suit was prohibited in his presence and no members of the firm were permitted to show him any documents relating to the case; and both the disqualified attorney and others in his firm affirmed these facts under oath. . . . The screen approved in the Kesselhaut case [Kesselhaut v. United States, 555 F.2d 791 (1977)] was similarly specific: all other attorneys in the firm were forbidden to discuss the case with the disqualified attorney and instructed to prevent any documents from reaching him; the files were kept in a locked file cabinet, with the keys controlled by two partners and issued to others only on a 'need to know' basis. . . . In both cases, moreover, as well as in Greitzer & Locks [Greitzer & Locks v. Johns-Manville Corp., No. 81-1379, slip op. at 7 (4th Cir. Mar. 5, 1982)], the screening arrangement was set up at the time

when the potentially disqualifying event occurred, either when the attorney first joined the firm or when the firm accepted a case presenting an ethical problem.").

In a potentially troubling approach that deprives hiring law firms of any certainty, some courts have found that screens -- however carefully drafted and implemented -- simply cannot work if the hiring firm is too small, or if the screened lawyers work too closely together.

- Rippon v. Rippon, No. 2012 CV 4412 DV, 2014 Pa. Dist. & Cnty. Dec. LEXIS 1, at *1, *14-15, *16-17, *17, *21-22, *22-23, *23 (C.P. Dauphin Jan. 29, 2014) (acknowledging that Pennsylvania allows screening of lateral hires to avoid imputed disqualification, but relying on the "appearance of impropriety" standard, the inadequacy of the screen, and other factors in disqualifying a law firm from representing the husband in a divorce case after the wife's lawyer joined that firm; "The issue presented is if Wife's lawyer, along with her secretary, leaves Law Firm A to work for Law Firm B, during the parties' hotly contested divorce litigation, may another lawyer in Law Firm B represent Husband in those matters. Legal ethical experts and others may answer with a resounding 'No.' Other legal ethical experts may answer 'Yes,' if Law Firm B establishes a proper screen, or 'Chinese Wall.' In this case, under the facts presented, I held 'no.'"; "[E]ven though a lawyer changes law firms, disqualification can be avoided when a proper screen, or 'Chinese Wall' is established prior to the arrival of the new attorney at the firm and when it is a formal, written screening procedure. . . . The burden of proving compliance with the screening exceptions of Rule 1.10(b) is on the law firm whose disqualification is sought. . . . A law firm whose disqualification is sought may still avoid a disqualifying conflict by demonstrating an adequate screen in compliance with Rule 1.10(b)."; "Wife's concern is not about Levin [Wife's lawyer] accessing information in the files or the cloud she or her secretary have been barred from obtaining through McNees' [Levin's new law firm, also representing Husband] screen. Wife's concern is that her private confidential information, trial strategies and other related matters which Levin and her secretary knew or had access to over the past fifteen years could inadvertently, accidentally and unintentionally be revealed to one of the other attorneys or staff in the small family law group at McNees now representing her Husband in these same legal matters."; "The narrow issue presented was the adequacy of the McNees' screen or if any screen could be deemed adequate in this case, disqualifying all McNees lawyers."; "In this case, the 'new firm' really consists not of the entire McNees law firm but actually the 'Family Law Section.' It is housed together in adjoining offices on the west side of their building's 5th floor, in a separate, 'Family Law suite' . . . where

Levin and her secretary's offices are located, together with five (5) other family law lawyers, two (2) paralegals and secretarial staff. The family law lawyers and support staff at McNees provides coverage and assistance to each other in any matter as needed or requested."; "Although, the McNees attorneys and staff have been advised to insure no discussions of the Rippon case occur in front of Levin or Thomas, and that all discussions of the case must take place behind closed doors, discussions, facial expressions or other unintended unanticipated exchanges will inevitably, however, unintentionally, occur within the small confines and relationships of a small environment among family law lawyers, paralegals and secretaries about this case. There is presumably much more contact between attorneys and support staff that interact in a small setting rather than in a large one." (emphasis added); "Wife points out none of McNees' Screen Memoranda contain any sanctions for violations of the screen, which failure alone is sufficient to warrant disqualification.").

- Beltran v. Avon Prods., Inc., 867 F. Supp. 2d 1068, 1078, 1083, 1083-84, 1084 (C.D. Cal. 2012) (finding that an individual lawyer's disqualification was imputed to his new law firm, despite an ethics screen; explaining that the lawyer spent over 300 hours working on matters for Avon while at Paul Hastings, and then moved to a law firm representing a plaintiff suing Avon; "The instant case presents an unfortunate and awkward set of circumstances in which two former colleagues and long-time friends who previously worked together in representing a major corporate client now find themselves on opposite sides in a case involving that same client."; "Plaintiff claims that disqualification is not warranted because an ethical wall was immediately imposed to cordon off Mr. Frank from the instant case after Mr. Frank spoke with Mr. Ellis on March 12, 2012. . . . As a matter of law, however, an ethical wall is insufficient to overcome the possession of confidential information by the segregated attorney, except in very limited situations involving former government attorneys now in private practice."; noting the individually disqualified lawyer had assisted his new firm in attempting to avoid disqualification; "The effectiveness of an ethical wall is further compromised by the close proximity of attorneys working together in one office at Eagan Avenatti, which consists of less than ten attorneys, and by Mr. Frank's co-representation of parties with Mr. Avenatti and Mr. Sims in several concurrent class actions. . . . The Court also notes that Mr. Frank has already actively participated in the current litigation by speaking with Mr. Ellis about the case and the instant motion (as early as February 28, 2012), submitting a declaration in support of Plaintiff's opposition to the disqualification motion, reviewing Avon's motion, and even seeking to participate telephonically at the May 21, 2012 hearing. Mr. Frank's behavior casts doubt as to whether an ethical wall can be successfully implemented and maintained in this case."; "The Court also finds that, although there is no direct California authority regarding vicarious disqualification of an associated law firm, disqualification

of the X-Law Group is warranted under the circumstances of this case. The X-Law Group consists of four attorneys, two of whom have already collaborated with Eagan Avenatti in the filing of the complaint against Avon in Estee Lauder and this case. It is also reasonable to assume that the two law firms engaged in fairly extensive discussions about the case and Plaintiff's litigation strategy before filing their complaint and prior to the erection of an [sic] wall ethical[ly] segregating Mr. Frank from the case. Even if the X-Law Group did not, in fact, acquire confidential information, their involvement in the case would taint the appearance of probity and fairness of the proceeding.").

- Arista Records LLC v. Lime Grp. LLC, No. 06 CV 5935 (KMW), 2011 U.S. Dist. LEXIS 17434, at *23, *23-24, *27, *27-28 (S.D.N.Y. Feb. 18, 2011) (declining to disqualify a law firm which hired an individually disqualified lawyer, despite the law firm's sloppy positioning of a screen; "Notwithstanding these shortcomings, the Court finds that disqualification is not warranted, because there is no 'real risk that the trial will be tainted.'" (citation omitted); "First, Defendants have submitted a declaration from Korn attesting to the fact that he has never disclosed Plaintiffs' confidential information to anyone. . . . The Court asked Plaintiffs' counsel whether they challenge the truth of any of the statements in Korn's declaration; Plaintiffs' counsel responded no. . . . Plaintiffs have also submitted (1) declarations from every member of Willkie's LimeWire team who has billed 50 hours or more to the LimeWire matter attesting to the fact that Korn has not disclosed confidential information to them; and (2) a declaration from Menton attesting to the fact that he has confirmed with every other member of the LimeWire team that Korn has never disclosed confidential information to them."; "Second, Defendants are not relying solely on attorney affidavits, but are also relying on electronic audits showing that Korn has never accessed any LimeWire documents. Specifically, Defendants have submitted a declaration stating that Willkie has audited all documents ever created in Willkie's document management system under either the Tower/LimeWire matter or the LimeWire matter. . . . The resulting report from the audit shows every user who has ever accessed any version of those documents. Korn is not listed included in that report."; "Third, Willkie is a large firm, with more than 600 lawyers worldwide, more than 200 lawyers in its litigation department, and approximately 136 litigation lawyers in its New York office. . . . Willkie's large size makes the risk of inadvertent disclosures of confidences less likely.").

- Rella v. N. Atl. Marine, Ltd., No. 02 Civ. 8573 (GEL), 2004 U.S. Dist. LEXIS 22309, at *17-18 (S.D.N.Y. Nov. 3, 2004) (disqualifying a two lawyer firm based on the firm's hiring of an individually disqualified lawyer from another firm; "While recent caselaw has questioned whether the total disqualification rule is without exception in an era of large law firms or legal departments, in which firewall procedures to insulate conflicted lawyers from matters in which

> they may not participate may perhaps be effective barriers to the exchange of confidential information . . . no such exception applies here. The Friedrich firm is not a large institution in which a nominal 'partner' of a conflicted lawyer may be one of hundreds of members of a mega-law firm, located in another city and perhaps having only a nodding acquaintance with other members of the firm, and which has regular established procedures for dealing with such conflict situations. Rather, the Friedrich firm is a two-member firm, the partners in which are father and son who evidently share the same offices. Under these circumstances, the inference that the partners cannot effectively avoid sharing information is strong.").

Ironically, one court reached exactly the opposite conclusion -- explaining that screens can rarely if ever work in large firms.

- In re Cendant Corp. Sec. Litig., 124 F. Supp. 2d 235, 243 n.5 (D.N.J. 2000), Furthermore, it is difficult for this Court to believe that the proposed firewall is leak-proof, especially in a firm with over 175 attorneys in the litigation department alone. Presumably, numerous attorneys would be required to assist in trial preparation and discovery for both E&Y and Ms. Lipton. Notwithstanding the good faith efforts of the attorneys to adhere to the firewall, this Court is cognizant that casual conversations in hallways, elevators, and other common areas may take place and may be overheard by the 'screened' attorneys for either E&Y or Ms. Lipton." (emphasis added), vacated and remanded on other grounds, 264 F.3d 201 (3d Cir. 2001), cert. denied, 535 U.S. 929 (2002).).

In another case, a court rejected the possibility of a screen working at a large firm, because the new "firm" should actually be considered a subset of the hiring firm.

- Rippon v. Rippon, No. 2012 CV 4412 DV, 2014 Pa. Dist. & Cnty. Dec. LEXIS 1, at *1, *14-15, *16-17, *21-22, *22-23, *23 (C.P. Dauphin Jan. 29, 2014) (acknowledging that Pennsylvania allows screening of lateral hires to avoid imputed disqualification, but relying on the "appearance of impropriety" standard, the inadequacy of the screen, and other factors in disqualifying a law firm from representing the husband in a divorce case after the wife's lawyer joined that firm; "The issue presented is if Wife's lawyer, along with her secretary, leaves Law Firm A to work for Law Firm B, during the parties' hotly contested divorce litigation, may another lawyer in Law Firm B represent Husband in those matters. Legal ethical experts and others may answer with a resounding 'No.' Other legal ethical experts may answer 'Yes,' if Law Firm B establishes a proper screen, or 'Chinese Wall.' In this case, under the facts presented, I held 'no.'"; "[E]ven though a lawyer changes law firms, disqualification can be avoided when a proper screen, or 'Chinese Wall' is

established prior to the arrival of the new attorney at the firm and when it is a formal, written screening procedure. . . . The burden of proving compliance with the screening exceptions of Rule 1.10(b) is on the law firm whose disqualification is sought. . . . A law firm whose disqualification is sought may still avoid a disqualifying conflict by demonstrating an adequate screen in compliance with Rule 1.10(b)."; "Wife's concern is not about Levin [Wife's lawyer] accessing information in the files or the cloud she or her secretary have been barred from obtaining through McNees' [Levin's new law firm, also representing Husband] screen. Wife's concern is that her private confidential information, trial strategies and other related matters which Levin and her secretary knew or had access to over the past fifteen years could inadvertently, accidentally and unintentionally be revealed to one of the other attorneys or staff in the small family law group at McNees now representing her Husband in these same legal matters. The narrow issue presented was the adequacy of the McNees' screen or if any screen could be deemed adequate in this case, disqualifying all McNees lawyers."; "In this case, the 'new firm' really consists not of the entire McNees law firm but actually the 'Family Law Section.' It is housed together in adjoining offices on the west side of their building's 5th floor, in a separate, 'Family Law suite' . . . where Levin and her secretary's offices are located, together with five (5) other family law lawyers, two (2) paralegals and secretarial staff. The family law lawyers and support staff at McNees provides coverage and assistance to each other in any matter as needed or requested." (emphasis added); "Although, the McNees attorneys and staff have been advised to insure no discussions of the Rippon case occur in front of Levin or Thomas, and that all discussions of the case must take place behind closed doors, discussions, facial expressions or other unintended unanticipated exchanges will inevitably, however, unintentionally, occur within the small confines and relationships of a small environment among family law lawyers, paralegals and secretaries about this case. There is presumably much more contact between attorneys and support staff that interact in a small setting rather than in a large one." (emphasis added); "Wife points out none of McNees' Screen Memoranda contain any sanctions for violations of the screen, which failure alone is sufficient to warrant disqualification.").

In addition to these conceptual disagreements among courts about whether self-help screens are even available, courts often conduct a fact-intensive analysis about whether the screen was effective or not -- often adding to their own standards above and beyond those described in the applicable ethics rules.

Not surprisingly, many courts conclude that the hiring law firm simply did not do a good enough job of imposing a self-help screen -- which meant that a lateral hire's individual disqualification was imputed to the entire firm.

- Martin v. AtlantiCare, Civ. No. 10-6793 (JHR/JS), 2011 U.S. Dist. LEXIS 122987, at *9, *33, *34-35, *37-38 (D.N.J. Oct. 25, 2011) (disqualifying a lawyer who had worked at Morgan Lewis in defending a case, and then switched to join the plaintiff's law firm; explaining that under New Jersey ethics rules the hiring law firm can avoid imputed disqualification (among other things) if the "matter does not involve a proceeding in which the personally disqualified lawyer had primary responsibility"; finding that the new law firm's screen was ineffective, so it would be disqualified even if the lawyer did not have primary responsibility; "RPC 1.10(f) and 1.0(e) indicate in clear and unmistakable terms that to be adequate a screening procedure must be in writing. CM never established a written procedure and for this reason alone its screening was inadequate." (emphasis added); "In addition, even if CM's screening procedure was put in writing, the procedure CM used was inadequate. Although there is no definitive New Jersey guidance on the elements of an effective screen, the Court has no hesitation in finding CM's procedure inadequate. There is no indication that the AtlantiCare file was physically separated from other files. In addition, the file was not specially secured or 'kept under lock and key,' LG and CM's employees did not acknowledge in writing CM's procedures, and LG was not 'locked out' of the AltantiCare file on CM's computer system. These are the sorts of procedures that are put in place in instances where courts have found screens to be adequate." (emphasis added); also finding that the hiring law firm must be disqualified even though the individually disqualified lawyer had left the law firm on the day that the defendant filed the motion to disqualify; "Defendants argue that severing a relationship with a disqualified attorney does not cure imputed disqualification."; agreeing with this contention).

- Norfolk S. Ry. v. Reading Blue Mountain & N. R.R., 397 F. Supp. 2d 551, 555, 554 (M.D. Pa. 2005) (assessing the efficacy of a screen imposed by a ten-lawyer firm which had hired a lawyer who had been working for the adversary in litigation; noting that Pennsylvania allowed a law firm hiring a disqualified lawyer from avoiding imputed disqualification by imposing a screen, but finding the screen ineffective; among other things, noting that "screen does not include the prospect of termination or disciplinary proceedings for violators. This is significant because it is imperative that all Janssen & Keenan [new law firm] employees understand the importance of compliance and that Reading be assured that non-compliance will be severely punished. Additionally, . . . Janssen & Keenan's screen fails to expressly prohibit discussing sensitive matters around, near, or in the

presence of Howard [lawyer moving to the law firm], and merely prohibits discussing them with Howard. This is no small distinction, as Janssen & Keenan has only ten attorneys in a single office, and the close working environment presents the distinct possibility that Howard could be nearby and overhear a sensitive discussion." (emphasis added); also noting that "nowhere in the affidavits opposing disqualification does it assert that Howard will receive no part of the fee from its representation in this case. This failure alone warrants disqualification."; pointing to Pennsylvania rule allowing a law firm to avoid imputed disqualification if the disqualified lawyer "is apportioned no part of the fee therefrom").

A smaller number of cases approve hiring law firms' screening.

- Kirk v. First Am. Title Ins. Co., 108 Cal. Rptr. 3d 620, 627 (Cal. Ct. App. 2010) (analyzing in great detail the California rule requiring imputation of an individual lawyer's (Cohen) disqualification, and rejecting a per se imputation approach; explaining that an individual lawyer who had several communications with plaintiff's counsel about a case moved to the Sonnenschein firm, which was later joined by lawyers from Bryan Cave -- who represented the other side of the case in which the lawyer had spoken to the plaintiff; noting that Sonnenschein screened the individual lawyer immediately upon learning of the individual lawyer's disqualification; "The screening memorandum recites that it was created to 'formalize and memorialize the procedures necessary to assure that no confidences or secrets relating to the [related class actions] will be disclosed, even inadvertently, to [the First American team] or any other Sonnenschein lawyer who may be asked to work on the [related class actions].' The memorandum indicated that the failure to observe the procedures would subject the offender to discipline. The memorandum provided that (1) Cohen could not work on the related class actions; (2) no attorney or paralegal who may work on the related class actions may discuss them with Cohen; (3) Cohen may not be given non-public documents pertaining to the related class actions; (4) Cohen shall not access any documents on Sonnenschein's computer network pertaining to the related class actions; and (5) no fees from any work related to the related class actions would be apportioned to Cohen.").

- Silicon Graphics, Inc. v. ATI Techs., Inc., 791 F. Supp. 2d 970, 983 (W.D. Wis. 2010) (denying a disqualification motion based on a law firm's hiring of an individually disqualified lateral; finding that the hiring law firm's screen was adequate; "Plaintiff does not deny that defendants' screening procedures comply with each of these factors. Three weeks before Leichtman joined Robins Kaplan, the firm sent a memorandum to Leichtman and all the members of the litigation team for this case. The memorandum instructed team members not to discuss the case with Leichtman or in his presence. Under the memorandum, Leichtman is denied access to any records relating

to this case and is prohibited from providing team members any information he knows about the case. All of the electronic records are protected by a computer security protocol that prevents Leichtman from viewing or searching those records. Leichtman and each of the lawyers for Robins Kaplan working on this case have filed declarations in which they aver that Leichtman and the others have not spoken with each other about the case, that none of the lawyers has had a discussion about the case in Lechtman's presence and that Leichtman has not viewed any of the records relevant to this case or attempted to do so. An analysis conducted by Robins Kaplan's computer support group shows that Leichtman has not attempted to view the electronic files. Leichtman will not receive any fees related to this case.").

Very few cases have found law firms violated their self-help screens.

- Decision & Order (Motion Sequence No. 016), Line Trust Corp. Ltd. v. Lichtenstein, Index No. 601951/2009, NYSCEF Doc. 237, slip op. at 4, 5, 6 (N.Y. Sup. Ct. Nov. 17, 2011) (disqualifying Wilkie Farr & Gallagher from representing Bank of America, because other Wilkie Farr lawyers had represented Bank of America's co-defendant in a related matter; explaining that the lawyer representing Bank of America had recently moved from Kaye Scholer, and that Wilkie Farr had set up an ethics screen between the new lawyer and those lawyers at the firm who had previously represented the now-adverse co-defendant, but that the screen apparently had not worked; "Between May 9 and May 13, 2011, Wilkie Farr's Information Technology Department (Department) audited documents stored in the firm's document management system relating to Wilkie Farr's representation of the Lichtenstein Defendants to determine if attorneys or legal assistants working on behalf of Bank of America accessed any of those documents. The Department discovered that in October 2010, Avani Shah, an associate, opened and printed one of the documents, but now improbably claims to have destroyed it before reading it. Belatedly, and perhaps negligently so, Wilkie Farr removed Ms. Shah from the BofA Action, the Line Trust Action, and the Senior Lender Action. She has been removed from all the cases referenced here."; "In February 2009, Alison Ambeault, a legal assistant, cite-checked a memorandum for the Lichtenstein Defendants for one hour and viewed five electronic documents related to Wilkie Farr's representation of the Lichtenstein Defendants for twenty minutes. Ms. Ambeaualt claims she does not remember performing the cite-check and has no memory of the documents themselves."; "Wilkie Farr has had an opportunity to rebut the presumption of disqualification. See Kasis v Teacher's Ins. & Annuity Assn., 93 NY2d 611, 617 (1999). However, Wilkie Farr has submitted insufficient proof that they erected adequate screening measures to prevent attorneys advising Bank of America from having access to (i) other Wilkie Farr attorneys who worked for the Lichtenstein Defendants or documents related to Lichtenstein Defendants."; "If an ethical wall exists here at all, and it may not,

> it is porous and ineffective. Wilkie Farr submits time records to show that breaches of the wall were minimal. The time records are inadequate, as they cannot be expected to reflect the totality of breaches of the ethical wall. In particular, Ms. Shah's recollection of supposed document destruction is crucially not reflected in such records. In short, they afford but a glimpse of a failed procedure." (emphasis added)).

Because a hiring law firm's screen depends largely on the honor system, one might expect that the hiring law firm's and the later hire's affidavits might cure an improperly imposed screen, or perhaps entirely take the place of a screen that the hiring law firm failed to impose. Thus, courts have debated such post-hiring affidavits.

Some courts rely on such affidavits in denying disqualification motions despite some flaws in the hiring law firm's screens.

- Arista Records LLC v. Lime Grp. LLC, No. 06 CV 5935 (KMW), 2011 U.S. Dist. LEXIS 17434, at *7, *11, *22 & n.11, *23, *23-24, *27, *27-28 (S.D.N.Y. Feb. 18, 2011) (declining to disqualify a law firm which hired an individually disqualified lawyer, despite the law firm's sloppy positioning of a screen; noting that the individually disqualified lawyer "Korn testified that, although [lawyers at the new firm] discussed the status of the LimeWire litigation, they did not discuss anything substantive about the case."; explaining that "[o]n June 18, 2010, Willkie submitted a new matter form for the Tower/LimeWire Matter. . . . The form has a box asking whether there are any conflict concerns. Notwithstanding that the firm was aware of a Korn's LimeWire conflict, the box is checked 'no.'"; "On July 1, 2010, one month after being approached by Tower about the Tower/LimeWire matter, Willkie circulated an internal firm-wide email asking attorneys to comment on possible conflicts related to the Tower/LimeWire Matter. . . . Korn responded, stated that, '[a]s [I] mentioned to Tariq Mundya, I previously represented Plaintiffs in the Limewire litigation.' . . . In response, Mundiya wrote, 'we will have to have a wall placed so that Mr. Korn is not involved in the matter.'"; [W]hen finally implemented, Willkie's screening procedures were, to some extent, flawed. First, the screening memo drafted by Mundiya was sent only to those lawyers who had worked on the LimeWire or the Tower/LimeWire matter within the preceding year; it was not sent to the entire firm. . . . Second, Korn was still able to view an electronic LimeWire folder icon on his computer months after the electronic wall was purportedly put in place, although he was not able to view any documents contained within that folder."; "As a result, a lawyer not working on the LimeWire matter who talked to a lawyer working on the LimeWire matter may not have been instructed to refrain from later speaking

to Korn about what he or she learned during that conversation."; "Notwithstanding these shortcomings, the Court finds that disqualification is not warranted, because there is no 'real risk that the trial will be tainted.'"; "First, Defendants have submitted a declaration from Korn attesting to the fact that he has never disclosed Plaintiffs' confidential information to anyone. . . . The Court asked Plaintiffs' counsel whether they challenge the truth of any of the statements in Korn's declaration; Plaintiffs' counsel responded no. . . . Plaintiffs have also submitted (1) declarations from every member of Willkie's LimeWire team who has billed 50 hours or more to the LimeWire matter attesting to the fact that Korn has not disclosed confidential information to them; and (2) a declaration from Menton attesting to the fact that he has confirmed with every other member of the LimeWire team that Korn has never disclosed confidential information to them." (emphasis added); "Second, Defendants are not relying solely on attorney affidavits, but are also relying on electronic audits showing that Korn has never accessed any LimeWire documents. Specifically, Defendants have submitted a declaration stating that Willkie has audited all documents ever created in Willkie's document management system under either the Tower/LimeWire matter or the LimeWire matter. . . . The resulting report from the audit shows every user who has ever accessed any version of those documents. Korn is not listed included in that report." (emphasis added); "Third, Willkie is a large firm, with more than 600 lawyers worldwide, more than 200 lawyers in its litigation department, and approximately 136 litigation lawyers in its New York office. . . . Willkie's large size makes the risk of inadvertent disclosures of confidences less likely.").

- Burgess-Lester v. Ford Motor Co., Civ. A. No. 1:06CV43, 2008 U.S. Dist LEXIS 83268, at *15-16, *16, *22 (W.D. W. Va. Oct. 17, 2008) (finding that a plaintiff's law firm should be disqualified from adversity to Ford, because one of the lawyers in the firm had previously worked on a number of Ford cases while at another firm; noting the debate about the efficacy of screens within a law firm; explaining that "the Fourth Circuit has not adopted a per se rule against screening, and this Court does not adopt such a rule here. Rather, to determine whether the screening measures employed by BG avoid the appearance of impropriety, it will follow the three-part test in Schiessle [Schiessle v. Stephens, 717 F.2d 417 (7th Cir. 1983)] because, in that case, the Seventh Circuit '[took] the most realistic view of the methodology to be followed in resolving competing interests raised by such a disqualification motion.'" (citation omitted); explaining that the three-part test looks at the "'substantial relationship'" between the matters, whether the individual lawyer was privy to confidential information, and whether that lawyer might have passed confidential information to his new colleagues (citation omitted); acknowledging that the plaintiff's law firm put a screen in place, but noting that the individual lawyer admitted in an affidavit that he did "'not know the precise details of this barrier'" (citation omitted); "Thus, the screened attorney is

unsure of the screen's parameters and merely knows that a screen is in place. . . . This aspect of the screen therefore is ineffective because the attorney for whom BG [plaintiff's law firm] implemented the screen should at least know from whom, what, and in what manner he is being screened"; disqualifying the law firm from representing the plaintiff in the case against Ford.).

In contrast, other courts have disqualified hiring law firms despite such affidavits.

- Roosevelt Irrigation Dist. v. Salt River Proj. Agric. Improvement & Power Dist., 810 F. Supp. 2d 929, 955 (D. Ariz. 2011) ("An untimely screen cannot be cured by the affected attorney's assurances that, in the absence of the screen, he did not reveal any confidential information.").

- SK Handtool Corp. v. Dresser Indus., Inc., 619 N.E.2d 1282, 1285, 1290, 1292, 1294 (Ill. App. Ct. 1993) (noting that Illinois ethics rules permit screening of an individually disqualified new hire to avoid imputed disqualification; holding that the law firm of Winston & Strawn had not timely screened a lateral hire; acknowledging that Winston & Strawn put an ethics screen in place the day that it realized that it should have done so, but noting that the lawyer had been at the firm for five weeks; also acknowledging sworn testimony that the new hire had not shared any confidences with the Winston & Strawn lawyers working on the case for the new hire's adversary, and disqualifying Winston & Strawn -- although the litigation had been going on for nine years, Winston & Strawn lawyers had taken eighty-five days of depositions, and had spent 10,000 hours on the case as of that time; explaining that on August 1, 1989, Winston & Strawn hired a former Sidley & Austin lawyer (Durchslag) who had worked on that firm's representation of Corcoran Partners since litigation began between Corcoran and Winston & Strawn's client dresser in May 1984; "According to a legal assistant employed at Winston & Strawn, the firm has devoted over 10,000 hours to the litigation, including over 85 days spent depositing over 44 persons. More than 70,000 pages of documents have been produced in the litigation."; noting that Durchslag's former client notified Winston & Strawn on August 7, 1989, of the conflict, but that Winston & Strawn declined to acknowledge the conflict; "The record indicates that in addition to contemnor, Winston & Strawn attorneys directly representation Dresser in the litigation were Jane McCullough and Kimball Anderson. An affidavit by Ms. McCullough states that she also received a copy of Brace's letter and has not discussed the case with Durchslag. An affidavit by Mr. Anderson states that he has not discussed the case with Durchslag, but does not indicate whether he received a copy of Brace's letter."; noting that on September 7, 1989, Corcoran filed a motion to disqualify Winston & Strawn, the same day that Winston & Strawn proposed an ethics screen between Durchslag and the lawyers representing the Winston & Strawn client; "[I]t appears that the trend of Illinois and federal case

> law, as well as the adoption of the Illinois Rules, is toward allowing the existence of effective screening to rebut the presumption of shared confidences between a newly associated attorney and his new firm. Accordingly, we hold that the presumption of shared confidences at the new firm may be rebutted by effective screening of a newly associated attorney."; "[T]he record indicates that a screening memorandum was not circulated within Winston & Strawn until September 7, 1989 -- five weeks after Durchslag joined the firm."; "[T]his court does not need to determine whether any factual determination in this regard would be an abuse of discretion. Nor does this court need to decide today whether screening must be in place on the day an attorney joins a firm to prevent disqualification as a matter of law. The record indicates that contemnor and other Winston & Strawn personnel had actual knowledge of the problem on August 7 and 8, 1989, when contemnor was informed by Brace of the problem."; "Defendant and contemnor note that it is uncontroverted that Durchslag did not share Corcoran Partners' confidences with Winston & Strawn and will not do so in the future. Defendant and contemnor's reliance on the affidavits of Durchslag and the Winston & Strawn personnel representing Dresser, all of which state that no confidences were or will be disclosed, is misplaced.").

In addition to suffering from the imputation of an individual lawyer's disqualification, lawyers violating a screen could face other consequences.

- Spur Prods. Corp. v. Stoel Rives LLP, 122 P.3d 300 (Idaho 2005) (allowing a client to sue its lawyer for malpractice based on a law firm's disclosure of client information to a firm lawyer who was supposed to be screened from the matter).

Best Answer

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

B 11/14; B 12/16

Timing of an Effective Screen

Hypothetical 4

Two weeks ago, your law department hired a young associate from a large Los Angeles-based law firm. This morning, you received a frantic call from one of your colleagues, who said that he just learned that the young associate had worked at his old firm on an ongoing litigation matter adverse to your company. Your colleague wants you to screen the young associate immediately, and asks whether the immediate imposition of a screen will eliminate the risk that your law department might be disqualified from that litigation matter.

(a) Can you avoid the possibility of an imputed disqualification by immediately screening the new hire?

NO

(b) Will you be able to avoid an imputed disqualification if the new hire can establish (under oath) that he did not share any confidences from his old firm with any of your law department lawyers, and that you and your law department colleagues did not acquire any confidential information from the new hire?

NO (PROBABLY)

Analysis

(a)-(b) Although the trend nationally has clearly been in favor of allowing self-help screens, the hiring law firms obviously must comply with the applicable rules' screening requirements.

In most lateral hire situations, the hiring law firm identifies conflicts before bringing on the new lawyer. In states following ABA Model Rule 1.6(b)(7) (adopted in 2012), the hiring law firms and the lateral hire will have exchanged sufficient information to identify conflicts. In states that have not adopted that rule, the law firms do it anyway -- relying on a traditional but unstated exception.

In any event, law firms requiring self-help screens to cure conflicts identified during the hiring process must impose the screen before the lateral hire starts working at the firm.

- Philadelphia Bar LEO 2014-1 (4/2014) ("The Inquirer wrote seeking an opinion from the Committee concerning a potential conflict of interest issue that arose. Over one year ago, Inquirer was appointed by the United States District Court to represent a criminal defendant in a securities fraud case (the 'Client'). Shortly before seeking guidance from the Committee, Inquirer learned that a new member of his law firm ('Attorney A') had previously acted as counsel for the primary government witness against Inquirer's Client."; "[T]he Committee believes that there is a non-waivable conflict of interest that precludes Inquirer from continuing to represent his Client in the criminal matter. Attorney A gained material, confidential information in connection with his former representation, and the interests of Attorney A's Former Client and those of Inquirer's current Client are materially adverse in the same matter. . . . There is no question that the criminal matter involving these representations is the same and that the interests of the Client and Attorney A's Former Client are adverse in the criminal matter. . . . More importantly, once Attorney A joined Inquirer's law firm, any information that Attorney A learned from Attorney A's Client was imputed to Inquirer in the absence of an effective screen and without appropriate notice being provided to the affected clients. . . . From the inquiry itself, it is clear that no screen was established prior to Attorney A joining Inquirer's law firm and, based upon what information was already shared as part of the inquiry, it would be impossible to create an effective screen after the fact. Therefore, any confidential information obtained from Attorney A's Client would be imputed to Inquirer and would prohibit Inquirer from continuing to represent his Client. As such, Inquirer should no longer represent his Client, and Attorney A should not represent Attorney A's Former Client if Attorney A's Former Client sought further representation from Attorney A in this particular criminal matter.").

For conflicts that cannot be identified when the lateral hire joins the firm, the analysis can become much more complicated. For instance, suppose that a lateral hire represented Acme in a case against Baker. If the hiring firm has had no involvement in that case, it will not identify any conflict or require any screening when hiring the lateral. However, what if Baker later hires the law firm to replace its existing law firm? It

obviously is too late to screen the lateral hire at the time the firm hires him or her. In that situation, the firm must act as soon as it learns of the need for the screen.

ABA Model Rules and Restatement

The ABA Model Rules require a timely screen, but implicitly acknowledge that hiring law firms might not need a screen until after the lateral hire started working there.

> In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

ABA Model Rule 1.0 cmt. [10].

The Restatement takes the same approach.

> The required screening measures must be imposed in the subsequent representation at the time the conflict is discovered or reasonably should have been discovered, and they must be of sufficient scope, continuity, and duration to assure that there will be no substantial risk to confidential client information.

Restatement (Third) of Law Governing Lawyers § 124 cmt. d(i) (2000).

A Restatement illustration recognizes the possibility that a hiring law firm will not need a screen until long after the lateral hire begins working there.

> As can readily be shown from contemporaneous time records, when Lawyer was an associate in Law Firm ABC, Lawyer spent one-half hour in conversation with another associate about research strategies involving a narrow issue of venue in federal court in the case of Developer v. Bank, in which the firm represented Bank. The conversation was based entirely on facts pleaded in the complaint and answer, and Lawyer learned no confidential information about the matter. Lawyer then left Firm ABC and became an associate in Firm DEF. Two years later, Lawyer was asked to represent Developer against Bank in a matter substantially related to the matter in which Firm ABC represented Bank. In the circumstances, due to the proven

> lack of exposure of Lawyer to confidential information of Bank, Bank should not be regarded as the former client of Lawyer for the purpose of applying § 132. . . . Alternatively, a tribunal may require that Lawyer be screened from participation in the matter as provided in this Section and, on that basis, permit other lawyers affiliated with Lawyer in Firm DEF to represent the client against Bank.

Restatement (Third) of Law Governing Lawyers § 124 illus. 3 (2000) (emphases added).

Case Law

Numerous courts have disqualified law firms which have not imposed otherwise effective self-help screens in a timely fashion.

- Beltran v. Avon Prods., Inc., 867 F. Supp. 2d 1068, 1078, 1083 (C.D. Cal. 2012) (finding that an individual lawyer's disqualification was imputed to his new law firm, despite an ethics screen; explaining that the lawyer spent over 300 hours working on matters for Avon while at Paul Hastings, and then moved to a law firm representing a plaintiff suing Avon; "The instant case presents an unfortunate and awkward set of circumstances in which two former colleagues and long-time friends who previously worked together in representing a major corporate client now find themselves on opposite sides in a case involving that same client."; "Plaintiff claims that disqualification is not warranted because an ethical wall was immediately imposed to cordon off Mr. Frank from the instant case after Mr. Frank spoke with Mr. Ellis on March 12, 2012. . . . As a matter of law, however, an ethical wall is insufficient to overcome the possession of confidential information by the segregated attorney, except in very limited situations involving former government attorneys now in private practice."; noting the individually disqualified lawyer had assisted his new firm in attempting to avoid disqualification; "Even if an ethical wall were legally sufficient, it was untimely because it was not imposed until March 12, 2012, two weeks after Plaintiff filed her complaint against Avon in Estee Lauder on February 28, 2012. Nor did Plaintiff's counsel send written notice to Avon regarding the implementation of an ethical wall as required under the Rules of Professional Conduct. See ABA Model Rules of Prof'l Conduct 1.10(a)(ii)&(iii)." (emphasis added)).

- Arista Records LLC v. Lime Grp. LLC, No. 06 CV 5935 (KMW), 2011 U.S. Dist. LEXIS 17434, at *7, *11, *21-22 (S.D.N.Y. Feb. 18, 2011) (declining to disqualify a law firm which hired an individually disqualified lawyer, despite the law firm's sloppy positioning of a screen; noting that the individually

disqualified lawyer "Korn testified that, although they [lawyers at the new firm] discussed the status of the LimeWire litigation, they did not discuss anything substantive about the case."; explaining that "[o]n June 18, 2010, Willkie submitted a new matter form for the Tower/LimeWire Matter. . . . The form has a box asking whether there are any conflict concerns. Notwithstanding that the firm was aware of a Korn's LimeWire conflict, the box is checked 'no.'"; "On July 1, 2010, one month after being approached by Tower about the Tower/LimeWire matter, Willkie circulated an internal firm-wide email asking attorneys to comment on possible conflicts related to the Tower/LimeWire Matter. . . . Korn responded, stated that, '[a]s [I] mentioned to Tariq Mundya, I previously represented Plaintiffs in the Limewire litigation.' . . . In response, Mundiya wrote, 'we will have to have a wall placed so that Mr. Korn is not involved in the matter.'"; "As a technical matter, Willkie's screening procedures were imperfect. First, Willkie repeatedly failed to enter Korn's LimeWire conflict into its conflicts database, as the firm says should have happened. . . . Second, after undertaking representation of Tower in LimeWire matter, Willkie waited approximately seven weeks to implement an electronic screen, and approximately three months to circulate an internal screening memorandum. . . . Defendants argue that a screen was in place from 'the get go' because, in early June 2010, Mundiya informed Cosenza that he should not communicate with talk to Jeff Korn.'. . . However, Cosenza testified that four other Willkie lawyers were working on Tower/LimeWire Matter. Cosenza also testified that he told those four lawyers that they should not discuss the case with Korn, but he did not do so with at least one of those lawyers until the end of August." (emphasis added)).

- Nat'l Union Fire Ins. Co. v. Alticor, Inc., 472 F.3d 436 (6th Cir. 2007) (revisiting imputation of an individual lawyer's disqualification to an entire law firm under Michigan Rule 1.10; noting that in November 2006 Michigan amended its Rule 1.10 to allow law firms to avoid imputed disqualification by screening a new lawyer; essentially softening the absolute imputation rule by referring to a pre-existing screening mechanism; nevertheless disqualifying the law firm because it had not complied with the screening mechanism rule by providing written notice to the "appropriate tribunal"; noting that the court was unaware for two weeks that the individually disqualified lawyer had joined the law firm).

- SK Handtool Corp. v. Dresser Indus., Inc., 619 N.E.2d 1282. 1285, 1290, 1292, 1294 (Ill. App. Ct. 1993) (noting that Illinois ethics rules permit screening of an individually disqualified new hire to avoid imputed disqualification; holding that the law firm of Winston & Strawn had not timely screened a lateral hire; acknowledging that Winston & Strawn put an ethics screen in place the day that it realized that it should have done so, but noting that the lawyer had been at the firm for five weeks; also acknowledging sworn testimony that the new hire had not shared any confidences with the Winston

& Strawn lawyers working on the case for the new hire's adversary, and disqualifying Winston & Strawn -- although the litigation had been going on for nine years, Winston & Strawn lawyers had taken eighty-five days of depositions, and had spent 10,000 hours on the case as of that time; explaining that on August 1, 1989, Winston & Strawn hired a former Sidley & Austin lawyer (Durchslag) who had worked on that firm's representation of Corcoran Partners since litigation began between Corcoran and Winston & Strawn's client dresser in May 1984; "According to a legal assistant employed at Winston & Strawn, the firm has devoted over 10,000 hours to the litigation, including over 85 days spent depositing over 44 persons. More than 70,000 pages of documents have been produced in the litigation."; noting that Durchslag's former client notified Winston & Strawn on August 7, 1989, of the conflict, but that Winston & Strawn declined to acknowledge the conflict; "The record indicates that in addition to contemnor, Winston & Strawn attorneys directly representation Dresser in the litigation were Jane McCullough and Kimball Anderson. An affidavit by Ms. McCullough states that she also received a copy of Brace's letter and has not discussed the case with Durchslag. An affidavit by Mr. Anderson states that he has not discussed the case with Durchslag, but does not indicate whether he received a copy of Brace's letter."; noting that on September 7, 1989, Corcoran filed a motion to disqualify Winston & Strawn, the same day that Winston & Strawn proposed an ethics screen between Durchslag and the lawyers representing the Winston & Strawn client; "[I]t appears that the trend of Illinois and federal case law, as well as the adoption of the Illinois Rules, is toward allowing the existence of effective screening to rebut the presumption of shared confidences between a newly associated attorney and his new firm. Accordingly, we hold that the presumption of shared confidences at the new firm may be rebutted by effective screening of a newly associated attorney."; "[T]he record indicates that a screening memorandum was not circulated within Winston & Strawn until September 7, 1989 -- five weeks after Durchslag joined the firm."; "[T]his court does not need to determine whether any factual determination in this regard would be an abuse of discretion. Nor does this court need to decide today whether screening must be in place on the day an attorney joins a firm to prevent disqualification as a matter of law. The record indicates that contemnor and other Winston & Strawn personnel had <u>actual</u> knowledge of the problem on August 7 and 8, 1989, when contemnor was informed by Brace of the problem."; "Defendant and contemnor note that it is uncontroverted that Durchslag did not share Corcoran Partners' confidences with Winston & Strawn and will not do so in the future. Defendant and contemnor's reliance on the affidavits of Durchslag and the Winston & Strawn personnel representing Dresser, all of which state that no confidences were or will be disclosed, is misplaced.").

Of course, other courts have approved hiring law firms' timing of their self-help screens.

- Silicon Graphics, Inc. v. ATI Techs., Inc., 791 F. Supp. 2d 970, 983 (W.D. Wis. 2010) (denying a disqualification motion based on a law firm's hiring of an individually disqualified lateral; finding that the hiring law firm's screen was adequate; "Plaintiff does not deny that defendants' screening procedures comply with each of these factors. Three weeks before Leichtman joined Robins Kaplan, the firm sent a memorandum to Leichtman and all the members of the litigation team for this case. The memorandum instructed team members not to discuss the case with Leichtman or in his presence. Under the memorandum, Leichtman is denied access to any records relating to this case and is prohibited from providing team members any information he knows about the case. All of the electronic records are protected by a computer security protocol that prevents Leichtman from viewing or searching those records. Leichtman and each of the lawyers for Robins Kaplan working on this case have filed declarations in which they aver that Leichtman and the others have not spoken with each other about the case, that none of the lawyers has had a discussion about the case in Lechtman's presence and that Leichtman has not viewed any of the records relevant to this case or attempted to do so. An analysis conducted by Robins Kaplan's computer support group shows that Leichtman has not attempted to view the electronic files. Leichtman will not receive any fees related to this case." (emphasis added)).

And courts have justifiably approved the timing of self-help screens after a lateral hire has joined the hiring law firm, if the conflict arises after the hiring.

- Openwave Sys. Inc. v. Myriad France S.A.S., No. C 10-02805 WHA, 2011 U.S. Dist. LEXIS 35526, at *13, *14 (N.D. Cal. Mar. 31, 2011) (finding that a law firm had acted promptly enough in imposing an ethics screen after learning that a lateral hire was individual disqualified from a matter that the law firm took after the lateral hire arrived at the firm; noting that Morgan Lewis imposed the ethics screen one day after learning of the conflict; relying on Kirk v. First Am. Ins. Co., 108 Cal. Rptr. 3d 620 (Cal. Ct. App. 2010); declining to disqualify Morgan Lewis; "The Court is satisfied that Attorney Edwards has not had and will not have any improper communication with others at the firm concerning the litigation. Myriad has provided no sworn evidence that Attorney Edwards ever transmitted confidential information to the attorneys representing Openwave. The Openwave attorneys have submitted sworn declarations that they have never met or spoken to Attorney Edwards and have never learned any confidential information from him related to this litigation. Attorney Edwards swears that he has never shared any

information."; also noting that "[t]he firm has taken the additional step of ensuring that Attorney Edwards does not directly receive compensation generated by this litigation. This order finds that the ethical wall erected by Morgan Lewis is sufficient to overcome the presumption that confidential information has been or will be shared.").

Some very forgiving courts have declined to disqualify law firms even after they missed a conflict during the hiring process -- as long as they act quickly upon realizing that they should have screened the lateral hire.

- Lutron Elecs. Co. v. Crestron Elecs., Inc., Case No. 2:09-CV-707, 2010 U.S. Dist. LEXIS 120864, at *8, *17-18 (D. Utah Nov. 12, 2010) (denying a motion by Kaye Scholer to disqualify Quinn Emanuel, who had hired a young associate from Kaye Scholer who had worked on the opposite side of litigation; noting that Quinn Emanuel had screened the young associate upon receiving notice from Kay Scholer of the issue; "Mr. Reisberg was advised that an 'ethical wall' had been put in place, and he was instructed not to discuss or share any information or materials with anyone at Quinn Emanuel that related in any way to his prior work at Kaye Scholer on behalf of Lutron. . . . Similarly, Quinn Emanuel personnel were directed not to share with Mr. Reisberg any information or materials relating in any way to Lutron. . . . In addition, Mr. DeFranco personally spoke with each attorney and staff member working on the Crestron case and confirmed that these individuals understood the precautions that had been put in place and would follow them. Mr. DeFranco also confirmed that nothing inconsistent with the ethical wall had occurred since Mr. Reisberg joined Quinn Emanuel."; noting that Utah rules allow the law firm to avoid imputed disqualification if it "timely" screened the individually disqualified lawyer; "In this case, the facts make clear that the Quinn Emanuel lawyers representing Crestron were unaware of any possible imputed conflict resulting from the representation until they received notice from Lutron on August 5, 2010. Although Lutron vigorously asserts that Crestron violated the rule because they 'should have known' of the conflict, the Utah Rules of Professional Conduct expressly states that actual knowledge is what is required. Moreover, because the Rule requires actual knowledge, the court finds that the ethical screen was timely under the circumstances. As soon as counsel for Crestron received notice of the conflict from Lutron's counsel, they immediately established an effective ethical screen in full compliance with the rules. While it certainly would have been preferable for Quinn Emanuel to conduct an effective conflicts check and discover the conflict initially, once it had the requisite knowledge, it acted in accord with the rules. Finally, although Lutron claims that counsel for Crestron failed to give 'notice' as required by the rule, given that counsel for Crestron learned of the conflict from Lutron, there was no opportunity to

> 'notify' Lutron and doing so would have been pointless. Moreover, even though counsel for Crestron was initially unaware and therefore could not 'notify' Lutron of the conflict, it did thereafter notify Lutron of the measures it had taken to screen Mr. Reisberg and to ensure that Lutron's confidential information would be protected. (P1.'s Ex. 7.) Given these facts, the court finds that Quinn Emanuel's conduct was not egregious.").

Most courts are not that flexible.

Ironically, at least one court has declined to disqualify a law firm which had imposed an inadequate screen -- based on the length of time between the lateral hire's joining the firm and the firm's acceptance of a case that would otherwise have resulted in its disqualification.

- Arista Records LLC v. Lime Grp. LLC, No. 06 CV 5935 (KMW), 2011 U.S. Dist. LEXIS 17434, at *29, *31, *32-33 (S.D.N.Y. Feb. 18, 2011) (declining to disqualify a law firm which hired an individually disqualified lawyer, despite the law firm's sloppy positioning of a screen; "Finally, approximately 32 months has elapsed between Korn's last day at Cravath in August 2007, and late May 2010, when Willkie undertook representation of Tower in the Tower/LimeWire matter. During that time, Korn's recollection of any confidential information has naturally diminished."; "[T]hat decision was issued before Hempstead [Hempstead Video, Inc. v. Inc. Vill. of Valley Stream, 409 F.3d 127 (2d Cir. 2005)], and represents the kind of per se rule that the Second Circuit rejected in Hempstead."; "The Willkie firm's screening procedures appear to have been sub-standard. However, when evaluating a motion to disqualify, it is the Court's job to assess whether an attorney's conflict actually 'poses a significant risk of trial taint.'. . . The Court is confident that Korn's conflict has not tainted, and will not taint, the upcoming trial. The conflict has existed for over two years, and Korn states that he has not disclosed any confidential information during those years, testimony that is not challenged. The risk that now -- two years later, and with the heightened awareness of conflict issues going forward -- there will be inadvertent disclosures is unlikely, particularly in view of the instant motion's focus on the issue. Given the 'lack of a meaningful showing that the trial process here will be tainted in any way,' and the significant hardship that disqualifications would place on Defendants, Plaintiffs' motion must be denied." (citation omitted)).

This hypothetical comes from a 2007 case. In Lucent Techs., Inc. v. Dell, Inc., Civ. No. 02CV2060-B(CAB) c/w 03CV-0699-B(CAB) & 03CV1108(CAB), 2007 U.S.

Dist. LEXIS 35502 (S.D. Cal. May 15, 2007), an associate moved from Kirkland & Ellis to Gibson Dunn's New York office. While at Kirkland and Ellis, the associate had worked for about 2,300 hours for Lucent in a patent case against Microsoft.

Approximately ten days after its New York office hired the associate, Gibson Dunn's Washington office was retained by Microsoft to assist in that case. Gibson Dunn entered its appearance for Microsoft on March 12, 2007 -- and learned three days later that its new New York associate had worked on the other side while at Kirkland & Ellis. Gibson Dunn screened the lawyer on March 19.

The Southern District of California nevertheless disqualified Gibson Dunn, although noting that while the associate had never communicated with the Gibson Dunn lawyers in the D.C. office representing Microsoft, he nevertheless "was asked by a few attorneys about his involvement in the case" while at Kirkland & Ellis. Id. at *19. The associate claimed that on those occasions he had, he "changed the topic of conversation and did not disclose any confidential information." Id. The court disqualified Gibson Dunn after noting that:

> "the current screening procedure was not put in place when Koehl began at Gibson Dunn in February" and was not in place when the three Gibson Dunn lawyers entered their appearance; noting that "while the attorneys working on the instant litigation are in a different city and state from Koehl, the prevalence of electronic and phone communication make this factor at best neutral."

Id. at *28-29.[1]

[1] Lucent Techs., Inc. v. Dell, Inc., Civ. No. 02CV2060-B(CAB) c/w 03CV-0699-B(CAB) & 03CV1108(CAB), 2007 U.S. Dist. LEXIS 35502, at *18, *19, *28, *28-29 (S.D. Cal. May 15, 2007) (assessing plaintiff Lucent's motion to disqualify the law firm of Gibson, Dunn & Crutcher from representing defendant Microsoft in what the court labeled a "high profile" patent case; explaining that on February 12, 2007 a lawyer formerly employed by Lucent's law firm Kirkland & Ellis (and who had billed

Best Answer

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

B 11/14; B 12/16

2,300 hours for Lucent in the patent case) moved to Gibson Dunn's New York office; noting that defendant Microsoft retained Gibson Dunn some time after a February 22, 2007 jury verdict on the first set of patents to be tried, and that three lawyers from Gibson Dunn's Washington, D.C. office entered an appearance for Microsoft on March 12, 2007; further explaining that the former Kirkland & Ellis lawyer notified Gibson Dunn of his involvement in the case, but that Gibson Dunn "failed to recognize the conflict until after it had made an appearance in the instant case and Lucent had brought the matter to its attention on March 15, 2007"; acknowledging that Gibson Dunn had screened the lawyer starting on March 19; "Prior to the screen, Koehl [former Kirkland & Ellis lawyer] was asked by a few attorneys about his involvement in the case; according to Koehl he changed the topic of conversation and did not disclose any confidential information. ([Koehl's Declaration at 7].) According to Koehl, he has never communicated with the Gibson Dunn attorneys working on the instant litigation. (Id. at P 8.)"; analyzing Lucent's motion to disqualify Gibson Dunn on the California ethics rules; noting among other things that lawyers in Gibson Dunn's New York office had "asked Koehl about his involvement in the case before any ethical wall was in place," and that "the current screening procedure was not put in place when Koehl began at Gibson Dunn in February" and was not in place when the three Gibson Dunn lawyers entered their appearance; noting that "while the attorneys working on the instant litigation are in a different city and state from Koehl, the prevalence of electronic and phone communication make this factor at best neutral"; disqualifying Gibson Dunn).

Temporary Lawyers

Hypothetical 5

Your law department has several large litigation projects that you expect to last for several years. You want to avoid adding to your permanent roster of lawyers, so you are looking into various categories of lawyers that might be able to assist you in these projects. You have asked your department's ethics "guru" about the conflicts of interest ramifications of hiring such lawyers, many of whom have worked on numerous projects for several law firms.

(a) Will your law department have to worry about the imputation of a lawyer's individual disqualification, if the lawyer will work only on one large case -- conducting research, taking depositions, preparing pleadings, etc.?

YES (PROBABLY)

(b) Will your law department have to worry about the imputation of a lawyer's individual disqualification, if the lawyer will work only on privilege review projects, without access to your company's computer network?

NO (PROBABLY)

Analysis

(a-b) The increasing proliferation of various categories of lawyers within law firms have complicated a conflicts of interest analysis.

ABA Model Rules

Interestingly, the ABA Model Rules do not deal directly with this issue. Instead, the analysis begins with the general imputation rule -- and one word in particular.

> While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9 unless [some exception applies].

ABA Model Rule 1.10(a) (emphasis added). Unfortunately, the ABA Model Rules do not define the term "associated." The term "firm" has a fairly broad meaning.

> "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

ABA Model Rule 1.0(c). See also ABA Model Rule 1.10 cmt. [1].

The ABA provided guidance about this issue in a 1988 legal ethics opinion. In ABA LEO 356 (12/16/88), the ABA indicated that the use of "temporary lawyers" had raised several questions.

> The Committee has received a number of inquiries relating to the increasing use by law firms of temporary lawyers. The temporary lawyer may work on a single matter for the firm or may work generally for the firm for a limited period, typically to meet temporary staffing needs of the firm or to provide special expertise not available in the firm and needed for work on a specific matter. The temporary lawyer may work in the firm's office or may visit the office only occasionally when the work requires. The temporary lawyer may work exclusively for the firm during a period of temporary employment or may work simultaneously on other matters for other firms.

ABA LEO 356 (12/16/88) (footnote omitted).

ABA LEO 346 then turned to some of the terms' definitions.

> For purposes of this opinion, "firm" or "law firm" includes a sole practitioner and a corporate legal department. See ABA Model Rules of Professional Conduct (1983, amended 1987), Terminology, Rule 1.10 Comment. The term "temporary lawyer" means a lawyer engaged by a firm for a limited period, either directly or through a lawyer placement agency. The term does not, however, include a lawyer who works part time for a firm or full time but without contemplation of permanent employment, who is nevertheless engaged by the firm as an employee for an

> extended period and does legal work only for that firm. That person's relationship with the firm, during the period of employment, is more like the relationship of an associate of the firm, and the Model Rules or the predecessor Model Code of Professional Responsibility (1969, amended 1980) will govern the lawyer and the firm and their relationship as with any associate of the firm. Similarly, "temporary lawyer" does not include a lawyer who has an "of counsel" relationship with a law firm or who is retained in a matter as independent associated counsel.

Id.

Not surprisingly, ABA LEO 356 first recognized that temporary lawyers may themselves be disqualified from adversity to their former clients -- just like full-time law firm lawyers.

> It is clear that a temporary lawyer who works on a matter for a client of a firm with whom the temporary lawyer is temporarily associated, "represents" that client for purposes of Rules 1.7 and 1.9. Thus, a temporary lawyer could not, under Rule 1.7, work simultaneously on matters for clients of different firms if the representation of each were directly adverse to the other (in the absence of client consent and subject to the other conditions set forth in the Rule). Similarly, under Rule 1.9, a temporary lawyer who worked on a matter for a client of one firm could not thereafter work for a client of another firm on the same or a substantially related matter in which that client's interests are materially adverse to the interests of the client of the first firm (in the absence of consent of the former client and subject to the other conditions stated in the Rule).

Id. (footnote omitted). This makes sense. A temporary lawyer working for a client can learn just as many material confidences from or about that client as a lawyer working full time.

As ABA LEO 356 then recognized, the key issue is whether the law firm hiring such a temporary lawyer risks imputation of such an individual disqualification.

> The basic question is under what circumstances a temporary lawyer should be treated as "associated in a firm" or "associated with a firm." The question whether a temporary lawyer is associated with a firm at any time must be determined by a functional analysis of the facts and circumstances involved in the relationship between the temporary lawyer and the firm consistent with the purposes for the Rule.

Id. (footnote omitted) (emphasis added). ABA LEO 356 focused on the temp lawyer's access to other client confidences.

> Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in particular circumstances, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussion of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients.
>
> Application of paragraphs (b) and (c) [of Rule 1.10] depends on a situation's particular facts. In any such inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

Id. (emphasis added).

ABA LEO 356 ultimately concluded that the temp lawyer's access to other clients' confidential information determined whether the temp lawyer should be considered "associated" with the firm.

> Ultimately, whether a temporary lawyer is treated as being "associated with a firm" while working on a matter for the firm depends on whether the nature of the relationship is such

> that the temporary lawyer has access to information relating to the representation of firm clients other than the client on whose matters the lawyer is working and the consequent risk of improper disclosure of misuse of information relating to representation of other clients of the firm. For example, a temporary lawyer who works for the firm, in the firm office, on a number of matters for different clients, under circumstances where the temporary lawyer is likely to have access to information relating to the representation of other firm clients, may well be deemed to be "associated with" the firm generally under Rule 1.10 as to all other clients of the firm, unless the firm, through accurate records or otherwise, can demonstrate that the temporary lawyer had access to information relating to the representation only of certain other clients. If such limited access can be demonstrated, then the temporary lawyer should not be deemed to be "associated with" the firm under Rule 1.10. Also, if a temporary lawyer works with a firm only on a single matter under circumstances like the collaboration of two independent firms on a single case, where the temporary lawyer has no access to information relating to the representation of other firm clients, the temporary lawyer should not be deemed "associated with" the firm generally for purposes of application of Rule 1.10. This is particularly true where the temporary lawyer has no ongoing relationship with the firm and does not regularly work in the firm's office under circumstances likely to result in disclosure of information relating to the representation of other firm clients.
>
> As the direct connection between the temporary lawyer and the work on matters involving conflicts of interest between clients of two firms becomes more remote, it becomes more appropriate not to apply Rule 1.10 to disqualify a firm from representation of its clients or to prohibit the employment of the temporary lawyer. Whether Rule 1.10 requires imputed disqualification must be determined case by case on the basis of all relevant facts and circumstances, unless disqualification is clear under the Rules.

Id. (emphases added).

ABA LEO 356 recommended that a law firm hiring such a temp lawyer "screen" the lawyer from other clients' confidences.

> For the reasons discussed above, in order to minimize the risk of disqualification, firms should, to the extent practicable, screen each temporary lawyer from all information relating to the clients for which the temporary lawyer does no work. All law firms employing temporary lawyers also should maintain a complete and accurate record of all matters which each temporary lawyer works. A temporary lawyer working with several firms should make every effort to avoid exposure within those firms to any information relating to clients on whose matters the temporary lawyer is not working. Since a temporary lawyer has a coequal interest in avoiding future imputed disqualification, the temporary lawyer should also maintain a record of clients and matters worked on.

Id. (emphasis added).

Significantly, ABA LEO 356's recommendation of a screening preceded by twenty years the ABA Model Rules' adoption of a self-help screening to avoid imputation of a lawyer's individual disqualification. The screening of temp lawyers would not avoid such imputation. Instead, the screening would effectively prevent the temp lawyer from being "associated" with the law firm. This step presumably would preclude the need for disclosure, consent or screening as part of a required consent.

The ABA also warned law firms that it would be "inadvisable" for a law firm to hire a temp lawyer who had worked on the other side of the case the firm was then handling.

> The distinction drawn between when a temporary lawyer is or is not associated with a firm is only a guideline to the ultimate determination and not a set rule. For example, if a temporary lawyer was directly involved in work on a matter for a client of a firm and had knowledge of material information relating to the representation of that client, it would be inadvisable for a second firm representing other parties in the same matter whose interests are directly adverse to those of the client of the first firm to engage the temporary lawyer during the pendency of the matter, even for work on other matters. The second firm should make appropriate inquiry and should not hire the temporary lawyer or use the temporary lawyer on a matter if doing so would

> disqualify the firm from continuing its representation of a client on a pending matter.

Id. ABA LEO 356 did not explain this warning. Theoretically, a temp lawyer not "associated" with the new firm would not put that firm in harm's way -- even if the temp lawyer had worked on the other side of an active case the firm was handling. However, such a hire would undoubtedly tempt the other side to seek the hiring law firm's disqualification -- thus forcing the hiring firm's fate to ride on the outcome of the "associated in a firm" analysis.

Interestingly, a different analysis determines whether the hiring law firm must disclose the temp lawyer's hiring to the client, as well as the law firm's ability to earn a profit on the temp lawyer's time without the client's consent after disclosure.

In addressing the law firm's disclosure obligations, ABA LEO 356 distinguished between temporary lawyers working under the "direct supervision" of the law firm and temporary lawyers who were not working in that way.

> The Committee is of the opinion that where the temporary lawyer is performing independent work for a client without the close supervision of a lawyer associated with the law firm, the client must be advised of the fact that the temporary lawyer will work on the client's matter and the consent of the client must be obtained. This is so because the client, by retaining the firm, cannot reasonably be deemed to have consented to the involvement of an independent lawyer. On the other hand, where the temporary lawyer is working under the direct supervision of a lawyer associated with the firm, the fact that a temporary lawyer will work on the client's matter will not ordinarily have to be disclosed to the client. A client who retains a firm expects that the legal services will be rendered by lawyers and other personnel closely supervised by the firm. Client consent to the involvement of firm personnel and the disclosure to those personnel of confidential information necessary to the representation is inherent in the act of retaining the firm.

Id. (emphasis added).

Thus, under this analysis a temporary lawyer's imputation issues depend on the lawyer's access to confidential information, while the hiring law firm's disclosure obligations to the client will depend on whether a firm lawyer closely supervises the temporary lawyer. So theoretically a temporary lawyer might receive close supervision from a firm lawyer, but not enjoy access to other clients' confidential information.

ABA LEO 356 later introduced yet another standard.

Turning to the issue of fees, ABA LEO 356 concluded that a law firm paying a temporary lawyer was not engaged in a fee-split that required client consent after disclosure.

> Rule 1.5(e), relating to division of a fee between lawyers, does not apply in this instance because the gross fee the client pays the firm is not shared with the temporary lawyer. The payments to the temporary lawyer are like compensation paid to non-lawyer employees for services and could also include a percentage of firm net profits without violation of the Rules or the predecessor Code. See ABA Informal Opinion 1440 (1979).
>
> If, however, the arrangement between the firm and the temporary lawyer involves a direct division of the actual fee paid by the client, such as percentage division of a contingent fee, then Rule 1.5(e)(1) requires the consent of the client and satisfaction of the other requirements of the Rule regardless of the extent of the supervision.

Id. ABA LEO 356 then explained that the fee-split rules do not apply -- because the temporary lawyer is not considered to be "outside the firm" for purposes of that analysis.

> [W]here a temporary lawyer is working under the close firm supervision described above, such employment does not involve "association with a lawyer outside the firm," within the meaning of this Ethical Consideration. The underlying purposes of the Rule and Code provisions and their

> functional analyses are similar. For the reasons set forth above, absent a division with the temporary lawyer of the actual fee paid by the client to the firm, the client need not be informed of the financial arrangement with the temporary lawyer under the Model Code since it does not involve a division of the gross fee between lawyers.

Id. (emphasis added).

Thus, a law firm can add a profit to a temporary lawyer's billing rate without complying with the fee-split rules -- because the temp lawyer is not practicing "outside the firm." ABA LEO 356 therefore analyzed three standards: (1) whether temp lawyers have broad access to client confidences (which determines whether such lawyers are "associated" with the firm for disqualification imputation purposes); (2) whether temp lawyers work under a firm lawyer's close supervision (which determines whether the law firm may earn a profit on temp lawyers' work without advising clients); (3) whether the temp lawyer practices "outside the firm" (which determines the fee-split rules' applicability).

Law firms hoping to avoid the imputed disqualification problem can fairly easily avoid giving temporary lawyers general access to firm clients' confidences. A common practice involves housing temporary lawyers in a remote (generally less expensive) location where they can conduct privilege reviews or other similar tasks. Such temporary lawyers generally do not need, and therefore do not receive, access to the hiring law firm's computer system. This effectively screens those temporary lawyers from any confidential information beyond that required to conduct a privilege review or other task.

This scenario precludes an individual temporary lawyer's disqualification from being imputed to the entire law firm. To be extra careful, law firms might (1) seek individually disqualified temporary lawyers' former clients' consent -- as when law firms hire individually disqualified lateral hires; or (2) pass over a temporary lawyer whose services are offered by a staffing agency, if a quick conflicts check reveals some previous work that might cause a problem for the hiring law firm.

Restatement

Surprisingly, the Restatement does not devote much discussion to temporary lawyers, and generally takes an approach that is different from the ABA Model Rules.

The basic Restatement imputation rule uses the same term as the ABA Model Rules, impute a lawyer's individual disqualification to:

> other affiliated lawyers who . . . are associated with that lawyer in rendering legal services to others through a law partnership, professional corporation, sole proprietorship, or similar association.

Restatement (Third) of Law Governing Lawyers § 123(1) (2000) (emphasis added).

However, the Restatement provides only what could be seen as an off-handed comment about temporary lawyers.

> A form of lawyer-employee is the lawyer temporary -- a lawyer who temporarily works for a firm needing extra professional help. The rules barring representation adverse to a former client . . . and imputing conflicts to all lawyers associated in a firm generally apply to such lawyer temporaries.

Restatement (Third) of Law Governing Lawyers § 123 cmt. c(i) (2000). However, the preceding paragraph emphasizes the role of access to client confidences.

> The rule of imputation applies to both owner-employer and associate-employees of a sole-proprietorship law practice, to partners and associates in a partnership for the practice of law, and to shareholder-principals and non-equity lawyer employees of a professional corporation or similar organization conducting a law practice. The lawyers in all such organizations typically have similar access to confidential client information. Owners, partners, and shareholder-principals have a shared economic interest. Associates and non-equity lawyer employees have both a stake in the continued viability of their employer and an incentive to keep the employer's good will.

Id. Thus, the Restatement presumably would reach the same conclusion as ABA LEO 356 (12/16/88) if it had analyzed the varying degrees of access that temporary lawyers might have to law firm clients.

It is also worth noting the Restatement's provision dealing with office-sharing -- which again emphasizes access to client confidences as the dispositive factor in analyzing imputation of a lawyer's individual disqualification. The Restatement's general imputation rule explains that a lawyer's individual disqualification will be imputed to:

> other affiliated lawyers who . . . share office facilities without reasonably adequate measures to protect confidential client information so that it will not be available to other lawyers in the shared office.

Restatement (Third) of Law Governing Lawyers § 123(3) (2000). To the extent that a temporary lawyer could be seen as "office sharing" with other law firm lawyers, the law firm presumably can avoid imputation of a lawyer's individual disqualification by taking "reasonably adequate measures" to assure that the other firm lawyers' confidential client information is unavailable to the temporary lawyer.

Thus, the Restatement does not on its face parallel the ABA's approach to the temporary lawyer issue, but elsewhere provides the building blocks for the same conclusion.

State Ethics Opinions

State ethics opinions generally follow this approach as well.

In 2010, the District of Columbia Bar dealt with this issue in some detail. In District of Columbia LEO 352 (2/2010).[2] The Bar explained that a temporary lawyer's

[2] District of Columbia LEO 352 (2/2010) ("The imputation of a temporary contract lawyer's individual conflicts to a hiring firm under D.C. Rule 1.10 depends on the nature and extent of the lawyer's relationship with the firm and the extent of the temporary lawyer's access to the firm's confidential client information. A temporary contract lawyer who works with the same firm sporadically on a few different projects, or on a single project for a longer period of time, would not be 'associated with' the hiring firm if the firm does not have or otherwise create the impression that the temporary lawyer has a continuing relationship with the firm, and the firm institutes appropriate safeguards to ensure that the temporary contract lawyer does not have access to the firm's confidential client information except for the specific matter or matters on which he is working."; explaining that the "temporary contract lawyer" at issue was involved in the following activity: "The temporary contract lawyer would work solely on a single matter for Law Firm B, performing tasks such as digesting transcripts and reviewing discovery documents for responsiveness and privilege. The temporary contract lawyer works through a number of temporary service agencies that have an arrangement under which Law Firm B pays for the temporary contract lawyer's services."; explaining that "the temporary contract lawyer does not have a past or ongoing association with Law Firm B. Law Firm B hired him to work on one project of limited duration. He will work in a separate location away from the firm's office space or in a segregated area within the firm. His electronic access to the firm and the confidential information of its clients is confined to the specific project on which he is working. We think that in this circumstance the temporary contract lawyer would not be 'associated with' the hiring firm (Law Firm B), and thus, his conflicts would not be imputed to Law Firm B under D.C. Rule 1.10(b). Accordingly, the hiring firm must conduct a conflict check only for the matters on which the temporary contract lawyer will be working for the firm."; "On the other hand, a temporary contract lawyer who is located in a firm's office space, works simultaneously on multiple projects for the firm, is listed on the firm's website or other directories, and has access to the firm's e-mail system and electronic documents would be 'associated with' the contracting firm."; "In contrast, a temporary contract lawyer who works intermittently with the same firm on a small number of projects or on one long-term assignment would not be 'associated with' the contracting firm so long as the firm does not have an ongoing relationship with the temporary contract lawyer. The contracting firm also must avoid creating the impression that the temporary contract lawyer is 'associated with' the firm by listing him on the firm's letterhead, website or other directories, permitting him to use the firm's business cards, or introducing him to clients and others as long-term member of the firm. In addition, the firm must take all appropriate steps to ensure that the temporary contract lawyer has access only to the confidential client information for the matter on which he is working."; "The law firm must institute safeguards to prevent the improper disclosure or misuse of the firm's confidential client information, including talking with the temporary contract lawyer about his duty to avoid obtaining such information and executing a confidentiality agreement memorializing this understanding.").

individual disqualification's imputation to a hiring firm depended on the temporary lawyer's role in the new firm.

The District of Columbia Bar first described such a temporary lawyer's intimate involvement in firm matters, which would result in such an imputation.

> [A] temporary contract lawyer who is located in a firm's office space, works simultaneously on multiple projects for the firm, is listed on the firm's website or other directories, and has access to the firm's e-mail system and electronic documents would be 'associated with' the contracting firm.

Id. The District of Columbia Bar contrasted that situation with temporary lawyers' physical and electronic isolation from other firm lawyers.

> The temporary contract lawyer would work solely on a single matter for Law Firm B, performing tasks such as digesting transcripts and reviewing discovery documents for responsiveness and privilege. The temporary contract lawyer works through a number of temporary service agencies that have an arrangement under which Law Firm B pays for the temporary contract lawyer's services. . . . [T]he temporary contract lawyer does not have a past or ongoing association with Law Firm B. Law Firm B hired him to work on one project of limited duration. He will work in a separate location away from the firm's office space or in a segregated area within the firm. His electronic access to the firm and the confidential information of its clients is confined to the specific project on which he is working. We think that in this circumstance the temporary contract lawyer would not be 'associated with' the hiring firm (Law Firm B), and thus, his conflicts would not be imputed to Law Firm B under D.C. Rule 1.10(b). Accordingly, the hiring firm must conduct a conflict check only for the matters on which the temporary contract lawyer will be working for the firm.

Id.

In 1999, the Colorado Bar dealt with the issue in more detail. In Colorado LEO 105 (5/22/99), the Colorado Bar followed the ABA in confirming that a temporary lawyer

will be individually disqualified based on client confidences that the temporary lawyer obtains during a representation -- just like a permanent firm employee.

The Colorado Bar then recognized that:

> The more difficult conflict question involves other clients of the engaging firm or lawyer for whom the temporary lawyer provides no services. Colo. RPC 1.10(a) provides: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2." The key question is whether a temporary lawyer is "associated in a firm." If yes, then the rule of imputation set forth in Colo. RPC 1.10(a) applies, and all of the clients (and conflicts) of the lawyer or firm employing the temporary lawyer are deemed to be the temporary lawyer's clients (and conflicts), and vice versa. If the temporary lawyer is not associated in a firm under Colo. RPC 1.10(a), then the firm's other present or former clients for whom the temporary lawyer has not performed work are not deemed to be present or former clients of the temporary lawyer, and conflicts are not imputed one to the other.

Colorado LEO 105 (5/22/99).

The Colorado Bar agreed with ABA LEO 356's approach, which focused on the temporary lawyer's access to the hiring law firms' other clients.

> This Committee concurs with the ABA opinion's "functional analysis." . . . The Committee agrees with the ABA opinion that the temporary lawyer's access to information regarding the firm's other clients is the key factor in determining whether the temporary lawyer is associated with the firm under Colo. RPC 1.10(a).
>
> Temporary lawyer and firms that wish to avoid imputation of conflicts, and minimize the risk of disqualification, should screen temporary lawyers from all information relating to other firm clients for whom the temporary lawyer is not working. In particular, the temporary lawyer should not have access to the firm's files for other clients, should not have access to the firm's computer network unless documents related to other clients are password-protected, and should

> not be exposed to meetings, discussions or other communications where matters or other clients are discussed. To position themselves to defend claims of imputed disqualification, temporary lawyers and firms should maintain accurate records of all clients for whom the temporary lawyer has performed work, and of the measures taken to ensure that the temporary lawyer has not had access to information relating to other clients of the firm.

Id.

The Colorado Bar added another factor ABA LEO 356 did not address -- the hiring law firm's characterization of the temporary lawyer in marketing and other "holding out" contexts.

> Beyond the question of access to information regarding other clients of the firm, this Committee believes that the manner in which the temporary lawyer is presented to and perceived by clients, courts and third-parties is another important factor in determining whether the temporary lawyer is associated with the firm under Colo. RPC 1.10(a). Specifically, if a temporary lawyer is expressly or implicitly identified as "an associate" or "employee" of the firm -- whether in correspondence to the client or third-parties, in pleadings, during depositions or hearings, or otherwise -- that designation will tend to indicate that the temporary lawyer is associated with the firm, even if the firm has adequately screened the temporary lawyer from information regarding its other clients. . . . By contrast, where the firm discloses that the temporary lawyer is an independent contractor working for the firm on a limited basis, that disclosure will further help avoid imputation.

Id. (footnote omitted).

In 2012, another bar took the same approach.

- Virginia LEO 1866 (7/26/12) (a lawyer will not be deemed "associated" with the firm for imputation or conflicts purposes "if the lawyer's access to information is restricted solely to those matters on which he or she is working on a temporary or occasional basis.").

In contrast, at least one bar's legal ethics opinion applied the standard imputed disqualification rules to temporary lawyers.

- Georgia LEO 05-9 (4/13/06) (analyzing a lawyer's retention of a temporary lawyer; "One of the most difficult issues involving conflict of interest in the employment of temporary lawyers is imputed disqualification issues. In other words, when would the firm or legal department be vicariously disqualified due to conflict of interest with respect to the temporary lawyer? Since a temporary attorney is considered to be an associate of the particular firm or corporate law department for which he or she is temporarily working, the normal rules governing imputed disqualification apply." (emphasis added); "If a temporary attorney is directly supervised by an attorney in a law firm, that arrangement is analogous to fee splitting with an associate in a law firm, which is allowed by Rule 1.5(e). Thus, in that situation there is no requirement of consent by the client regarding the fee. Nevertheless, the ethically proper and prudent course is to seek consent of a client under all circumstances in which the temporary lawyer's assistance will be a material component of the representation. The fee division with a temporary attorney is also allowed even if there is no direct supervision if three criteria are met: (1) the fee is in proportion to the services performed by each lawyer; (2) the client is advised of the fee splitting situation and consents; and (3) the total fee is reasonable."; "In that the agency providing the temporary lawyer is not authorized to practice law, any sharing of fees with such an agency would be in violation of Rule 5.4(a). Therefore, while it is perfectly permissible to compensate an agency for providing a temporary lawyer, such compensation must not be based on a portion of client fees collected by the firm or the temporary lawyer."; "[E]mployment as a temporary lawyer and use of temporary lawyers are proper when adequate measures, consistent with the guidance offered in this opinion, are employed by the temporary lawyer and the employing firm or corporate law department. These measures respond to the unique problems created by the use of temporary lawyers, including conflicts of interest, imputed disqualification, confidentiality, fee arrangements, use of placement agencies, and client participation. Generally, firms employing temporary lawyers should: (1) carefully evaluate each proposed employment for conflicting interests and potentially conflicting interests; (2) if conflicting or potentially conflicting interests exist, then determine if imputed disqualification rules will impute the conflict to the firm; (3) screen each temporary lawyer from all information relating to clients for which a temporary lawyer does not work, to the extent practicable; (4) make sure the client is fully informed as to all matters relating to the temporary lawyer's representation; and (5) maintain complete records on all matters upon which each temporary lawyer works.").

(a) Even if a temporary lawyer works on only one project, his or her intimate involvement with other law firm lawyers and access to the firm's network and client confidences could mean that the temporary lawyer is "associated" with the firm for imputation purposes.

(b) A temporary lawyer's work (especially off-site) and lack of access to the firm's computer network and client confidences normally means that such a temporary lawyer normally will not be construed to be "associated" with the firm. However, the firm presumably would have to assure that such a temporary lawyer does not gain client confidences in some other way -- such as chatting with supervising lawyers about their work for other clients, receiving internal client newsletters, attending client lunches at which lawyers discuss other clients, etc.

Best Answer

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

B 11/14 B 12/16;

"Secondments"

Hypothetical 6

Your law department has had trouble hiring qualified lawyers with expertise in a specific patent area, and you were delighted to convince your largest outside law firm to "second" a bright young associate to your law department for two years. The associate will continue to be paid by her former (and future) law firm, and will have an understanding with the law firm that she will return there after her "secondment."

(a) Could your law department be disqualified from representing your corporation in a matter based on the "secondment" of a lawyer from its outside law firm?

YES

(b) Must the "seconded" lawyer check for conflicts before assisting law department colleagues in a matter adverse to a company who might be represented by the lawyer's once and future law firm?

NO (PROBABLY)

(c) Could the outside law firm be disqualified in a matter based on the "seconded" lawyer's return to the law firm?

YES

Analysis

The odd word "secondment" comes from Britain, and involves a client essentially borrowing an outside lawyer (usually a young associate) who will be paid by the law firm rather than by the client.

Both the monetary arrangements and the seconded lawyer's links to the law firm are infinitely variable. In some situations, a law firm supplies the seconded lawyer to an important client without charging anything for the lawyer's time or presence there. In other situations, the outside law firm bills either a set amount or an hourly amount for

the seconded lawyer's efforts during the secondment. In most "secondment" arrangements, the seconded lawyers intend to return to the law firm, and sometimes maintain certain ties with the law firm (healthcare coverage, attending social events, etc.). Some law firms seconding their lawyers to a client guarantee the lawyer's return to the firm, and some even give credit for the years spent at the clients' law department toward the lawyer's partnership track.

Although secondments have become popular lately, very few ethics opinions have dealt with their conflicts implications. There are three possible conflicts risks -- one for the client's law department and two for the outside law firm whose lawyer is seconded to the client.

(a) The ABA Model Rules and every state rule defines "law firms" to include law departments.

> With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct.

ABA Model Rule 1.0 cmt. [3].

This definition means that the imputed disqualification principle of ABA Model Rule 1.10 applies to law departments.

> While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be inhibited from doing so by Rules 1.7 or 1.9, unless [one of the stated exceptions apply, the most important of which involve lawyers' personal interests and the hired lawyers being from the potentially disqualifying matter].

ABA Model Rule 1.10(a).

Because the seconded lawyer will work among the clients law department lawyers, that lawyer presumably will be treated like a lateral hire for conflicts purposes. ABA Model Rule 1.10 addresses the imputed disqualification effects of an individual lawyer's disqualification. Several years ago, the ABA adopted revisions that allow law firms or law departments to avoid the imputation of an individual lateral hire's disqualification -- but only about half of the states have adopted that approach. And of those, some states have adopted the variation of the ABA Model Rules provision.

When a seconded lawyer's close association and work with the client's law department, all of these principles presumably apply to such seconded lawyers too.

States taking the previous ABA Model Rules approach do not allow what could be called "self-help screening," thus automatically imputing an individually disqualified hire's screening to the entire law firm or law department. The absence of self-help screening requires the hiring law firm or law department to seek the new hire's former client's consent for the law firm or a law department to continue its adversity to that former client. Of course, the former client can refuse to consent. Most former clients do not refuse to provide such a consent, but they insist that the new hire be screened. Under the new ABA Model Rules approach, the hiring law firm or law department can screen the new hire and continue their adversity to the new hire's former client without its consent.

One might think that the law department to whom an outside lawyer is seconded would not face any conflict risk by bringing on board a lawyer from a firm that already represents that corporate client. But the seconded lawyer might have worked at a previous firm or law department on a matter adverse to the corporation to which the

lawyer will be seconded. Once on board in the corporation's law department, that lawyer could not individually represent the corporation against her former client in any matter substantially related to what the lawyer handled adverse to that corporation in her previous job.

To make matters more risky, her individual disqualification could be imputed to the entire law department to which she is seconded -- either because the applicable state's ethics rules do not allow self-help screening, or because the law department does not put in place a timely and adequate screen to avoid such imputation.

The 2007 New York ethics opinion discussed more fully below saluted this risk.

> It also bears reminding that if the seconded lawyer is associated with the legal department of the host organization, no lawyer in that legal department may act adversely to the interests of the seconded lawyer's former clients on substantially related matters, without the former clients' consent.

New York City LEO 2007-2 (2007).

To increase the risk even more, a new hire's individual disqualification may not only be imputed to the entire law department (which happens by operation of the ethics rules) disqualification may be imputed to the hiring corporation's outside law firm.

In 2012, the Central District of California dealt with Crowell & Moring's assignment of one of its lawyers to a client -- to be what the court called "outside in-house counsel." The court found that the lawyer's individual disqualification would be imputed to the client's law department (absent screening, which the court permitted). But the court surprisingly found that the lawyer's individual disqualification was imputed to the client's outside lawyers at Perkins Coie.

- Advanced Messaging Techs., Inc. v. Easylink Servs. Int'l Corp., 913 F. Supp. 2d 900, 903, 905, 909, 910, 911, 912 (C.D. Cal. 2012) (analyzing a situation in which the law firm of Crowell & Moring assigned one of its lawyers to act as defendant Open Text's "outside in-house counsel"; noting that the lawyer had earlier represented the plaintiff j2 in a related matter at the Kenyon & Kenyon law firm; holding that the individual lawyer's disqualification was imputed to defendant Open Text's outside law firm of Perkins Coie although that firm did not know of the individual lawyer's conflict and therefore did not screen him from the firm's lawyers representing its client defendant Open Text; explaining that "[t]his outcome is unfortunate, because there is not a molecule of evidence that Perkins did anything other than act with integrity and in a manner consistent with the highest traditions of the legal profession."; entering an order prohibiting Perkins from releasing some of its files to replacement counsel, screening the defendant/client's general counsel and possibly other in-house lawyers from participation in the case, and prohibiting successor counsel from communicating with Crowell, Perkins, the defendant-client's general counsel and anyone else who had substantive communications with the individually disqualified lawyer; "Crowell also asserts that the Attorney cleared its conflicts check because he allegedly told Crowell that 'he did not recall having access to any confidential information,' and his representation of j2 'involved primarily the review of publicly available patent documents.'" (internal citation omitted); "The records before that court indicate that from 2004 until 2005 the Attorney represented j2 in patent litigation, and he billed j2 for 234.7 hours of work. . . . Based on the court's knowledge of law firm practices, 234.7 hours probably represents about ten percent of his billing over the roughly fifteen months that he worked on j2 matters."; "The Attorney is now Counsel at Crowell. . . . In 2011, Open Text began searching for an in-house attorney to work on 'intellectual property and patent matters,' but was 'unable to fill the role even as Open Text's intellectual property and patent needs grew.'. . . It asked Crowell to provide an attorney who could temporarily assume this position until a permanent candidate was selected. . . . As discussed, Crowell assigned the Attorney to fill this role, even though it knew that he previously represented j2."; "The Attorney, however, does not work at Perkins. Rather, he was outside in-house counsel for Open Text on intellectual property matters. . . . This court is not aware of any case analyzing whether the Vicarious Presumption Rule applies to such a situation. However, some cases have analyzed whether presuming an attorney at one law firm has confidential information requires making the same presumption about another firm that is co-counsel with the tainted attorney. These cases come out different ways, but the cases applying the Vicarious Presumption Rule to co-counsel have the better argument." (emphasis added); "The Attorney served as Open Text's outside in-house counsel for intellectual property matters, and the Three Current Cases are high-stakes, complex patent matters. The importance of in-house counsel effectively cooperating, coordinating, and communicating with their

> company's attorneys is self-evident." (emphasis added); "In the Three Current Cases, the Attorney was not screened until after Dr. Farber's deposition, approximately eight months after he began serving as Open Text's outside in-house counsel. . . . Since Perkins was unaware of the Attorney's conflict, it did not initiate a timely screen." (emphasis added); "The court finds that none of Perkins' attorneys had knowledge of the Attorney's prior j2 representation. Indeed, during oral argument the argument the court characterized Perkins as a victim of Crowell's inexplicable decision to approve the Attorney to work for Open Text. The court affirms Perkins' innocence in this matter, and appreciate the professionalism its attorneys have exhibited. Perkins' innocence though, does not prevent its disqualification." (emphases added)).

So law departments arranging for a seconded lawyer must "vet" that lawyer's background, to avoid what could be called a "Typhoid Mary" scenario.

(b) Once the seconded lawyer begins to work in the client's law department, she obviously will be asked to assist that client in various matters. Among other things, she might be asked to advise the client in a matter adverse to a client represented by her once and future law firm.

If she was treated for conflicts purposes as if she were still at the law firm, she obviously could not handle such work without running a conflict check to identify such conflicts, and then attempting to cure them with consents if necessary. But in the fast-paced in-house world of law departments, such a cumbersome process would dramatically reduce her usefulness to the law department. In contrast, if she were actually hired by the law department (and cut all ties with the law firm), she would only have to worry about conflicts based on her own previous personal work. She could therefore be adverse to any of her now former law firm's clients unless she faced a personal conflict based on her own personal representation or knowledge.

For these reasons, the key issue is whether a seconded lawyer is still "associated" with her once and future law firm. If so, she would have to run conflicts checks before answering any client questions during her secondment. If not, she does not have to take that step.

Two bars have dealt with this scenario. Both have concluded that some remaining ties to the once and future law firm do not generally mean that a seconded lawyer is "associated" with the firm for the conflicts analyses.

In 2007, the New York City Bar provided extensive guidance about the conflicts (and other) implications of law firm "seconding" lawyers to their clients. In New York City LEO 2007-2 (2007), the law firm confirmed that:

> A law firm may second a lawyer to a host organization without subjecting the law firm to the imputation of conflicts under DR 5-105(D) if, during the secondment, the lawyer does not remain 'associated' with the firm. The seconded lawyer will not remain associated with the firm if any ongoing relationship between them is narrowly limited, and if the lawyer is securely and effectively screened from the confidences and secrets of the firm's clients.

New York City LEO 2007-2 (2007).[3] The New York City Bar explained that as long as the seconded lawyer is "securely and effectively screened from the confidences and secrets of the law firm's clients" while away from the firm:

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[3] N.Y. City LEO 2007-2 (2007) (assessing the conflicts implications of a law firm loaning ("seconding") a law firm to client or other organization; "A law firm may second a lawyer to a host organization without subjecting the law firm to the imputation of conflicts under DR 5-105(D) if, during the secondment, the lawyer does not remain 'associated' with the firm. The seconded lawyer will not remain associated with the firm if any ongoing relationship between them is narrowly limited, and if the lawyer is securely and effectively screened from the confidences and secrets of the firm's clients."; "We therefore conclude that when (i) any ongoing relationship between the seconded lawyer and the law firm is narrowly limited, including that the seconded lawyer works solely under the direction of the host organization, and (ii) the seconded lawyer is securely and effectively screened from the confidences and secrets of the law firm's clients, the seconded lawyer should not be considered associated with the law firm, and conflicts should not be imputed to the law firm. Our conclusion is not altered by the mere fact,

> [o]ur conclusion is not altered by the mere fact, for example, that the seconded lawyer (a) is expected to return to the firm at the end of the secondment, (b) retains the lawyer's 'class rank' at the firm, (c) retains the lawyer's benefits under the firm's pension plan, or (d) can send and receive e-mails through the firm's e-mail servers (but without access to confidences and secrets of the firm's clients).

Id.

Moreover:

> [i]f the law firm pays the seconded lawyer during the secondment, this alone does not result in the imputation of conflicts to the firm, or make the lawyer associated with the firm, so long as the seconded lawyer's professional judgment is not directed by the firm and the lawyer lacks access to the confidences and secrets of the firm's clients.

Id.

Thus, New York explained that the key for outside law firms seconding lawyers to a corporate client is to end the seconded lawyer's access to the law firm's information about all of its clients other than the client to whom the lawyer has been seconded. All

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for example, that the seconded lawyer (a) is expected to return to the firm at the end of the secondment, (b) retains the lawyer's 'class rank' at the firm, (c) retains the lawyer's benefits under the firm's pension plan, or (d) can send and receive e-mails through the firm's e-mail servers (but without access to confidences and secrets of the firm's clients)."; "If the law firm pays the seconded lawyer during the secondment, this alone does not result in the imputation of conflicts to the firm, or make the lawyer associated with the firm, so long as the seconded lawyer's professional judgment is not directed by the firm and the lawyer lacks access to the confidences and secrets of the firm's clients."; "It is advisable in this situation to record in writing that the firm will not be directing the professional judgment of the seconded lawyer."; "[T]he lawyer must recommend that the client consult with independent counsel in connection with the arrangement, and the client must consent in writing. In all these cases, a written contract clearly explaining the terms of the secondment is essential."; "It also bears reminding that if the seconded lawyer is associated with the legal department of the host organization, no lawyer in that legal department may act adversely to the interests of the seconded lawyer's former clients on substantially related matters, without the former clients' consent."; "But conflicts may arise even when the host organization is a current client because of the returning lawyer's access to confidential information while seconded. In the example discussed above, the seconded lawyer learned that the host organization had been approached to extend critical financing to an acquisition target of Client Z. Even if the seconded lawyer was not associated with the firm during the secondment, when the seconded lawyer returns to the firm, if that information is still material to Client Z, the provisions of DR 5-105(D) will nonetheless apply, and the firm may then be disqualified from representing Client Z unless informed consent can be obtained.").

of the other financial ties and the law firm's guarantee to allow the seconded lawyer to return to the law firm does not mean that the seconded lawyer is still associated with the law firm.

More recently, the Ohio bar[4] reached the same conclusion.

Interestingly, the Ohio Bar described an awkward situation in which the "seconded" lawyer learned from her law department work that the corporate client was about to terminate its relationship with the lawyer's once and future firm. The Ohio Bar correctly concluded that the lawyer may not disclose that fact to the law firm.

> There is some risk that during the secondment the seconded lawyer could learn information from the host-client that would be adverse to the lawyer's firm. For instance, the seconded lawyer might learn that the host-client is preparing to terminate its relationship with the firm, or even that it is contemplating legal action against the firm. Returning to the firm at the end of the secondment with information of the host-client that is adverse to the lawyer's firm raises

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[4] Ohio Bar Informal LEO 2015-01 (1/16/15) (dealing with secondments; "In a 'secondment,' a law firm sends a firm lawyer to work temporarily as inside counsel for one of the firm's organizational clients. Firms may identify several advantages to these arrangements: they can help cement the firm's relationship with the client; if a firm has excess lawyer personnel, a secondment can address the over-capacity issue in a flexible way; and secondments broaden the range of experiences that firms can offer their lawyers." (footnote omitted); "One key fact in determining whether lawyers are 'associated in a firm' for purposes of conflict analysis is whether they have 'mutual access to information regarding the clients they serve.' Adv. Opinion 2008-1 at 5 (Ohio Bd. of Comm'rs on Griev. & Discip. Feb. 8, 2008). See also Op. 853, 5 (N.Y. St. Bar Ass'n Comm. on Prof'l Ethics Mar. 1, 2011) (when a law firm partner becomes inside counsel to a corporation while continuing to be 'associated' with the law firm, conflicts of the firm and the corporation's legal department 'will generally be shared and must become part of both of their conflict-checking systems' under analogous Rule 1.10(e) of the New York Rules of Professional Conduct). 'Mutual access' to client information is available to lawyers 'associated' in a firm even when they are in geographically-separate offices. On the other hand, the absence of such 'mutual access' is an important factor signifying that lawyers should not be deemed to be 'associated' with each other for purposes of conflict analysis."; "The Committee concludes that there is a limited safe harbor for avoiding imputed conflicts when a lawyer, during the term of the secondment: (a) works exclusively for and under the direction of the host-client without supervision of members of the firm; (b) is securely screened from access to the firm's clients, client files and document system; and (c) does not participate in the firm's consideration of client matters. If these requirements are met, conflicts will not be imputed, even though the seconded lawyer and the firm may intend that the lawyer will return to the firm, the firm continues to pay the seconded lawyer salary and benefits, and the seconded lawyer retains her firm seniority." (emphases added)).

> perplexing problem for the seconded lawyer: she owes duties of loyalty to the firm that would otherwise suggest the need to disclose to the firm the information obtained from the host-client. . . . [T]he seconded lawyer would be barred from revealing the host-client's information, notwithstanding the duty of loyalty owed to her 'home' firm.").

Ohio Bar Informal LEO 2015-01 (2015).

The New York and Ohio Legal Ethics Opinions should offer comfort to law firms and to clients to whom the law firms second lawyers. If the seconded lawyers are denied access to the once and future law firms' other client information, the seconded lawyers do not have to run conflicts checks each time the corporation asks for their legal advice -- and the law firms do not have to worry about the seconded lawyer's individual disqualification caused by their work in the law department being imputed back to the once and future law firm. However, law departments and law firms must be careful to sufficiently separate the "seconded" lawyer from the once and future law firm.

In 2015, the District of New Jersey held that a lawyer Blank Rome had "seconded" to a client would still be considered "associated" with that law firm for conflicts purposes. Among other things, the court noted that Blank Rome continued to include the "seconded" lawyer on its website as one of the firm's "associates," and also reported the lawyer as "associated" with the firm when boasting of its diversity statistics.

- United States ex rel. Bahsen v. Boston Sci. Neuromodulation Corp., 147 F. Supp. 3d 239, 242, 245, 246, 256-47, 247 & n2 (D.N.J. 2015) (holding that a lawyer should be considered "associated" with a law firm for imputed disqualification purposes even though the lawyer had been seconded to a client's law department; explaining that the lawyer Ritu Hasan was employed as an in-house lawyer with Boston Scientific, but moved to the Blank Rome law firm; "Blank Rome hired Ms. Hasan and immediately 'seconded' her back to the client. . . . Blank Rome and the Client executed a Secondment Agreement, which provided that Ms. Hasan 'shall not continue to work on behalf of the Firm during the Term' of the secondment."; explaining that

Boston Scientific sought to disqualify Blank Rome representing a plaintiff suing the company, based on Ms. Hasan's individual disqualification, which had argued that it was imputed to the entire Blank Rome law firm; "The Court does so now, and finds that Ms. Hasan is not a temporary attorney. Blank Rome repeatedly held out Ms. Hasan as a lawyer with a general and continuing relationship with the firm; it cannot now avoid that implication for conflicts purposes."; "[A] firm cannot hold out a lawyer as one of its own and then later hide behind a functional analysis of that lawyer's duties to avoid ethical conflicts. Where a firm holds out an attorney as having a general and continuing relationship with it, that attorney is 'associated with' the firm."; "Blank Rome also argues that it did not describe Ms. Hasan as 'Of Counsel,' but rather as an 'Associate,' so these decisions do not apply. The Court is not persuaded. The term 'associate' conveys 'a junior non-partner lawyer, regularly employed by the firm.' . . . It also conveys a continuing relationship, unless it is cabined by meaningful language. . . . [A] firm's public characterizations may bind it. Here, Blank Rome publicly characterized Ms. Hasan as having a general and continuing relationship with the firm."; "Blank Rome repeatedly held out Ms. Hasan as an associate of the firm, with no caveats or provisos concerning her secondment or transient status. She was listed as an 'Associate' on the Blank Rome website. . . . The listing recites that 'Ritu Hasan is a member of the Consumer Finance Litigation group.'"; "These characterizations were not accidental. Blank Rome's Client insisted that Ms. Hasan be publicly marketed as a firm associate on the firm's website, and Blank Rome complied. . . . Blank Rome benefited from this arrangement; the Client agreed to refer additional business to the firm."; "The firm also reported Ms. Hasan as an associate to NALP, enhancing diversity numbers for marketing and recruiting purposes . . . and included Ms. Hasan's firm biography when pitching a potential client on additional work in the Consumer Finance Litigation."; "The public esteem and trust in the integrity of the legal system remain important. Where a firm holds out an attorney as having a general and continuing relationship with it, that attorney is 'associated with' the firm for conflicts purposes as well."; "Blank Rome did not include any provisos or caveats to Ms. Hasan's associateship when it held her out as one of its lawyers. It cannot now conveniently eschew that relationship for the purposes of conflicts analysis. Ms. Hasan is associated with Blank Rome. The appearance of impropriety standard -- where an attorney's creation of the appearance of a conflict alone was sufficient to constitute an ethical violation -- as been removed from the New Jersey ethics rules. . . . The Court does not revive it. . . . The appearance of impropriety standard rendered ethical violations occasionally impossible to discern until after a court or ethical commission had ruled. . . . The Court is sensitive to those concerns. However, holding a firm to its public representations as to a lawyer's status, as the Court does here, does not raise concerns of unpredictability. It simply means that a firm cannot have it both ways. It

> cannot hold out an associate as its own for diversity and client recruitment purposes, while insisting there is no association for conflict purposes.").

(c) When the seconded lawyer returns to the law firm, she will of course bring with her potentially disabling information she gained while working at the client -- which could result in her disqualification from matters the firm is handling when she rejoins it.

In the legal ethics opinions discussed above, the New York City Bar reminded the law firm that the seconded lawyer might return to the law firm with confidences that would preclude the law firm from handling certain representations.

> Conflicts may arise even when the host organization is a current client because of the returning lawyer's access to confidential information while seconded. In the example discussed above, the seconded lawyer learned that the host organization had been approached to extend critical financing to an acquisition target of Client Z. Even if the seconded lawyer was not associated with the firm during the secondment, when the seconded lawyer returns to the firm, if that information is still material to Client Z, the provisions of DR 5-105(D) will nonetheless apply, and the firm may then be disqualified from representing Client Z unless informed consent can be obtained."

New York City LEO 2007-2 (2007).

This is not a surprising result. The seconded lawyer might have worked on many matters adverse to the law firm's current clients. She might have acquired information from the client's fellow "common interest" agreement participants, which would prevent her from handling matters adverse to one of those participants after she returns to the law firm. Thus, law firm firms should "vet" returning lawyers to assure that they have no individual disabling conflicts that might be imputed to the entire firm, or use whatever applicable state ethics rule processes might allow them to avoid such imputation.

Best Answer

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

B 11/14; B 12/16

Imputation Rules When Hiring Non-Lawyers

Hypothetical 7

You work in-house in a state that does not allow screening of lawyers to avoid imputed disqualification of an individually disqualified lawyer. Your law department is considering hiring several paralegals who previously worked at a law firm that is frequently adverse to your company.

(a) Do you risk imputed disqualification of your law department by hiring a paralegal who has been working on the other side of a large case that goes to trial next year?

YES

(b) Will you be able to avoid any risk of imputed disqualification by screening any individually disqualified paralegal from your side of the case?

MAYBE

Analysis

(a)-(b) Although the imputed disqualification rules governing lateral lawyer hires can be complicated, hiring non-lawyers can involve even more subtle issues -- many of which are unfortunately addressed only in legal ethics opinions rather than black letter rules or in comments.

Introduction

The authorities (such as the ABA Model Rules) generally reflect a counterintuitive approach to the "Typhoid Mary" effect of hiring non-lawyers with material confidential information that the hiring firm could use against its adversaries.

At first blush, one would think that firms would face greater risks when hiring non-lawyers than when hiring lawyers. After all, non-lawyers at law firms clearly have as

much (if not more) material confidential information about clients than lawyers possess. Perhaps more importantly non-lawyers (1) might not understand the remarkably stringent rules prohibiting disclosure of such information to anyone outside the law firm where they were working at the time they acquired the information, and (2) do not risk losing their ability to work if they violate such stringent rules (although they might face civil or even criminal sanctions, they do not risk loss of a bar license and their livelihood). Thus, the factors would seem to weigh in favor of a greater application of the "Typhoid Mary" imputation effect when hiring non-lawyers.

ABA Model Rules and Restatement

However, the ABA Model Rules take exactly the opposite approach.

A comment to the ABA Model Rules explicitly indicates that a non-lawyer's individual disqualification is not imputed to the entire law firm.

> The [automatic imputed disqualification] rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a non-lawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did as a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the non-lawyers and the firm have a legal duty to protect.

ABA Model Rule 1.10 cmt. [4] (emphases added). The comment's reference to paralegals and legal secretaries makes it clear that this general principle applies even to folks who have as much (if not more) confidential information about clients than lawyers

possess. In other words, this approach does not apply just to mail clerks, accounts receivable folks, etc. -- who might not possess material client confidences.

Significantly, the ABA comment also does not condition the non-imputation on any type of screening. Instead, the comment merely indicates that hiring law firms "ordinarily" must screen individually disqualified non-lawyers.

The Restatement takes the same basic approach. Restatement § 123 describes the general imputation principle as applying only to lawyers.

A comment bluntly states that the imputation principle simply does not apply to non-lawyers.

> Non-lawyer employees of a law office owe duties of confidentiality by reason of their employment. . . . However, their duty of confidentiality is not imputed to others so as to prohibit representation of other clients at a subsequent employer. Even if the person learned the information in circumstances that would disqualify a lawyer and the person has become a lawyer, the person should not be regarded as a lawyer for purposes of the imputation rules of this Section.

Restatement (Third) of Law Governing Lawyers § 123 cmt. f (2000) (emphasis added).

A Reporter's Note applies this approach to law firm subsidiaries' non-lawyer employees, but also warning that one might expect challenges to its logic.

> One would expect a less sharp line to be drawn between lawyers and non-lawyers for purposes of imputed prohibition if the law firm in question has one or more non-law-firm subsidiaries as part of its overall organizations. Because of the significant incentive to make improper use of the information, one would expect to see efforts to disqualify law firms, for example, if their affiliated consulting organization earlier acquired confidential information from the current opponent in litigation. Pending such development of the law, however, the legal rule is as described.

The Restatement (Third) of Law Governing Lawyers § 123 reporter's note cmt. f (2000).

A comment next provides a lengthy explanation of this difference.

> Some risk is involved in a rule that does not impute confidential information known by non-lawyers to lawyers in the firm. For example, law students might work in several law offices during their law-school careers and thereby learn client information at Firm A that could be used improperly by Firm B. Experienced legal secretaries and paralegal personnel similarly often understand the significance and value of confidential material with which they work. Incentives exist in many such cases for improper disclosure or use of the information in the new employment.
>
> On the other hand, non-lawyers ordinarily understand less about the legal significance of information they learn in a law firm than lawyers do, and they are often not in a position to articulate to a new employer the nature of the information gained in the previous employment. If strict imputation were applied, employers could protect themselves against unanticipated disqualification risks only by refusing to hire experienced people. Further, non-lawyers have an independent duty as agents to protect confidential information, and firms have a duty to take steps designed to assure that the non-lawyers do so. . . . Adequate protection can be given to clients, consistent with the interest in job mobility for non-lawyers, by prohibiting the non-lawyer from using or disclosing the confidential information . . . but not extending the prohibition on representation to lawyers in the new firm or organization. If a non-lawyer employee in fact conveys confidential information learned about a client in one firm to lawyers in another, a prohibition on representation by the second firm would be warranted.

Id. (emphasis added).

This analysis does not make much sense. Many non-lawyers possess just as much protected client information as lawyers. And they are not as likely to understand the critical importance of confidentiality. Perhaps even more importantly, they do not risk losing their professional license if they violate their confidentiality duty.

State Approaches

Unfortunately for anyone seeking certainty in the hiring process, states have taken widely varying approaches to lawyers' risks when hiring non-lawyers.

> Some courts hold that paralegals are subject to the same rules governing imputed disqualification as are lawyers. In jurisdictions that do not recognize screening devices as adequate protection against a lawyer's potential conflict in a new law firm, neither a 'cone of silence' nor any other screening device will be recognized as a proper or effective remedy where a paralegal who has switched firms possesses material and confidential information.

ABA Model Guidelines for Paralegals, cmt. to Guideline 7. And to make matters more complicated and difficult to assess, states' guidance normally appears in legal ethics opinions rather than in ethics rules.

Interestingly, no state seems to follow the ABA Model Rules or Restatement approach, which suggests but does not require hiring firms to screen non-lawyers with material confidential information -- or else risk disqualification based on their imputed disqualification to the firm.

Instead, most states focus on one or both of two factors -- (1) non-lawyers' acquisition of material protected client information while working at the old firm (with presumptions about whether that has occurred or not), and (2) lateral non-lawyer hires' disclosure of material protected client information to his or her new colleagues at the hiring law firm (including various presumptions that such disclosure has occurred or not). The ABA Model Guidelines for Paralegals addresses these two settings.

> Disqualification is mandatory where the paralegal gained information relating to the representation of an adverse party while employed at another law firm and has revealed it to lawyers in the new law firm, where screening of the

> paralegal would be ineffective, or where the paralegal would be required to work on the other side of the same or substantially related matter on which the paralegal had worked while employed at another firm. When a paralegal moves to an opposing firm during ongoing litigation, courts have held that a rebuttable presumption exists that the paralegal will share client confidences.

ABA Model Guidelines for Paralegals, cmt. to Guideline 7.

Despite this uncertainty, the stakes can be high.

In one interesting case (reported in a newspaper but not in any case law), a large law firm threatened to disqualify another firm that was planning to hire one of its paralegals.

- Nathan Carlile, Holland & Knight Sued for Tortious Interference, Legal Times, Jan. 4, 2008 (reporting that a paralegal who had committed to leave Holland & Knight and join Hughes, Hubbard & Reed had filed a lawsuit against her former firm Holland & Knight after Hughes Hubbard withdrew its employment offer after Holland & Knight had raised the possibility of a conflict caused by her move; explaining that Hughes Hubbard was representing a plaintiff in a lawsuit against a Spanish government involved in an oil spill off the Spanish coast, and that the paralegal had billed approximately 15 hours while at Holland & Knight working for its client (Spain) in that litigation; quoting the paralegal as arguing that she "did not participate in legal strategy, had no direct contact or communications with the client, and had no involvement with the preparation of court filings, case chronologies or deposition outlines"; also quoting Holland & Knight as arguing that the paralegal "worked on a matter in which both firms were engaged as counsel," and that "because of knowledge she gained there was the possibility of a breach in client confidentiality"; also noting that a Holland & Knight partner told a Hughes Hubbard lawyer during a deposition in the case that Holland might try to disqualify Hughes Hubbard if the paralegal began working there).

It is worth addressing some of these various state permutations -- in order of increasing risk for the hiring law firm.

First, some states permit self-help screening of non-lawyer lateral hires despite prohibiting such self-help screening in the case of lawyer lateral hires.

- Texas Rule 1.06 cmt [19] ("A law firm is not prohibited from representing a client under paragraph (f) merely because a non-lawyer employee of the firm, such as a paralegal or legal secretary, has a conflict of interest arising from prior employment or some other source. Nor is a firm prohibited from representing a client merely because a lawyer of the firm has a conflict of interest arising from events that occurred before the person became a lawyer, such as work that the person did as a law clerk or intern. But the firm must ordinarily screen the person with the conflict from any personal participation in the matter to prevent the person's communicating to others in the firm confidential information that the person and the firm have a legal duty to protect. See Rule 5.03; see also MODEL RULES PROF'L CONDUCT r. 1.10 cmt. 4 (AM. BAR. ASS'N 1983); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 123 cmt. f (AM. LAW INST. 2000).").

- USA Recycling Inc. v. Baldwin Endico Realty, No. 305816-2013, slip op. at 2-3, 12, 13, 15, 15-16 (N.Y. Sup. Ct. July 2, 2015) (disqualifying a lawyer based on his hiring of a paralegal who had previously worked for the adversary; "This motion was brought on by [an] order to show cause by Baldwin on November 3, 2014 seeking a stay of this proceeding, including a stay of the stipulation of settlement, and consolidation of this proceeding with three other proceedings pending in the Supreme Courts of Bronx County and Westchester County. Defendants also seek disqualification of the plaintiff's counsel Rocco F. D'Agostino Esq. upon the grounds that he had access to confidential information from a newly-hired paralegal, one James Monteleon, who had formerly been employed by, or concerned in the affairs of, attorneys representing Baldwin, its principals, and related entities controlled by the late Michael Endico. Defendant contends that Mr. Monteleon's familiarity with the affairs of the late Mr. Endico, and his attorneys, was subject to being improperly utilized in Mr. D'Agostino's prosecution and settlement of this action."; "Where the employer firm takes appropriate measures to isolate the new employee from the case in issue, disqualification will not lie. For example, the retention of a legal secretary/paralegal by plaintiff's counsel, who had worked on 'scores' of cases while employed by the defendant's firm including the case at bar, did not provide grounds for disqualification where plaintiff's counsel demonstrated that it did a satisfactory job of ensuring that its employee was and continued to be isolated from the former employer's case."; "A law firm which hires a secretary, paralegal or other non-lawyer employee who has previously worked at another firm must adequately supervise the non-lawyer not to disclose protected information obtained at the former law firm. This supervision may include instructing the non-lawyer not to disclose protected information or not to exploit such information. It is advisable that the firm conduct an inquiry, or comprehensive conflict check based on the non-lawyer's prior employment."; "There is simply no excuse for the failure of Mr. D'Agostino to make inquiry of his new employee and

ascertain whether he should be shielded from participation in this suit, or whether, in the alternative, the consent of his adversary could be obtained to Mr. Monteleon's participation."; "The Court finds that Mr. Monteleon's extensive and unusual involvement in the affairs of the defendants, and his employment by attorneys representing the defendants, their corporations, and Mr. Endico's Estate necessitates disqualification. Although the distinction between a law school graduate awaiting admission and an attorney admitted to practice is not without significance, under the unusual circumstances of this case, given the extraordinary nature and extent of Mr. Monteleon's involvement, the impact on the defendant's expectation of confidentiality is real and substantial. Due to this appearance of impropriety, the disqualification of Mr. D'Agostino as the counsel for plaintiff USA Recycling Inc. is mandated." (emphases added)).

- Texas LEO 650 (05/2015) (analyzing the following situation: "Firm A is a law firm representing the plaintiff, and Firm B is a law firm representing the defendant in a lawsuit. While the lawsuit is pending, Firm A hires a marketing assistant who had been previously employed as a marketing assistant at Firm B. Firm A seeks to determine whether it must withdraw from representing the plaintiff in the lawsuit, and if not, whether it must utilize screening procedures to prevent the new employee from being involved in the representation of the plaintiff and from sharing confidential information concerning the defendant with anyone in Firm A."; "Under the Texas Disciplinary Rules of Professional Conduct, a law firm representing a party in a lawsuit that hires an employee who is not a lawyer, paralegal or secretary but who was previously employed by the law firm that represents the opposing party in the lawsuit may in some circumstances be required to withdraw from the representation. The hiring law firm will be required to withdraw from the representation if the employee in question had in the prior employment worked on the lawsuit or otherwise had access to information concerning the prior employer's representation of the opposing party in the lawsuit and the hiring law firm fails to take effective steps, which normally would include screening the newly hired employee, to prevent the employee from disclosing or using in the hiring law firm confidential information related to the lawsuit. In all other circumstances, the hiring law firm will not be required to withdraw from the representation unless, regardless of the hiring law firm's attempts to prevent improper disclosure or use of any confidential information relating to the lawsuit acquired by the employee in the prior law firm, the employee actually discloses or uses such confidential information in the hiring law firm. Because issues of disqualification are determined by the courts based on standards that are not necessarily identical with the requirements of the Texas Disciplinary Rules of Professional Conduct, in some circumstances a law firm may be held to be disqualified from a representation even if there has been full compliance by the law firm with the

requirements of the Texas Disciplinary Rules concerning successive employment of non-lawyer employees.").

- Ullman v. Denco, Inc., Case No. 2:14-cv-843 SMV/GBW, 2015 U.S. Dist. LEXIS 179860, at *17-18, *19, *19-21, *22 (D.N.M. Apr. 22, 2015) (disqualifying a law firm which hired a paralegal who had worked on the other side of the case the law firm was handling; acknowledging that non-lawyers can be screened to avoid imputations of their individual disqualification, but finding that the hiring law firm did not impose timely and effective screens; "Certain relevant factors have been identified by other courts to determine the effectiveness of a screen, including: '(1) the substantiality of the relationship between the former and current matters, (2) the time elapsed between the matters, (3) the size of the firm, (4) the number of individuals presumed to have confidential information, (5) the nature of their involvement in the former matters, (6) the timing and features of any measures taken to reduce the danger of disclosure, and (7) whether the old firm and the new firm represent adverse parties in the same proceedings, rather than in different proceeding because inadvertent disclosure by the non-lawyer employee is more likely in the former situation.' [Liebowitz v. Eighth Judicial Dist. Court, 78 P.3d 515, 521 (Nev. 2003)]."; "The first factor weighs heavily against a finding of effectiveness. The matter on which HMM [Holt Mynatt Martinez] (with Gonzales as their screened employee) seeks to represent Defendants is the same matter on which Gonzales worked while with Plaintiffs' counsel. Similarly, the second factor weighs heavily against effectiveness. No time has elapsed between the matters because they are identical. In fact, less than a week transpired between the end of Gonzales' employment with Plaintiffs' counsel and her first day with HMM. The third factor also weighs against a finding of effectiveness. HMM is a relatively small firm comprised of nine attorneys, three of which are in a 'senior' status. . . . Three of the non-senior attorneys have entered their appearance in the instant case. Moreover, all attorneys and support staff for HMM work in the same building. . . . HMM's small size is highlighted by the fact that it needed Gonzales to start as soon as possible rather than being able to wait just over three weeks until after the scheduled mediation."; "The fourth factor weighs in favor of an effectiveness finding. Only one person -- Gonzales -- possesses the confidential information and needs to be screened. The fifth factor weighs strongly against an effectiveness finding. It is undisputed that Gonzales was heavily involved in the matter, both quantitatively and qualitatively, when she was employed by Plaintiffs' counsel. She worked extensively on the case, was involved in interviews of Plaintiffs, participated in litigation and settlement strategy meetings with Furth [plaintiff's lead lawyer], and knows Plaintiffs' 'bottom line' settlement numbers. The sixth factor is evenly balanced. The proposed screening rules are comprehensive. Indeed they mirror and, sometimes exceed, screens approved in other cases. . . . On the other hand, the confidential information possessed by

Gonzales is particularly sensitive and susceptible to disclosure given how easily and quickly it could be revealed. Moreover, the Court notes the gap, albeit short, between the implementation of the screening procedures and HMM's contact with Gonzales. The seventh factor weighs heavily against a finding of effectiveness. Plaintiffs' counsel and HMM represent adverse parties in the same proceeding, rather than in different proceedings, making inadvertent disclosure by Gonzales significantly more likely." (footnote omitted); "Considering the factors as a whole, and the balance of interests the factors represent, I conclude that Defendants have failed to meet the burden of proving that the screen will be effective." (emphases added)).

- In re Johnston, 872 N.W.2d 300, 302, 303 (N.D. 2015) (reprimanding a lawyer for hiring a paralegal from an opposing law firm but not screening him; "In January 2011, the Johnston Law Office hired Chrzanowski as a paralegal. Johnston made no effort to screen Chrzanowski from the West [Johnston's client] matter, despite his prior work on the Hansons' [Farroh's client] behalf as attorney Farroh's paralegal. Rather, Chrzanowski worked directly on West's case against Hanson, serving as a primary contact with West, meeting and exchanging emails with West, discussing litigation strategy, and drafting pleadings that were subsequently signed by Johnston."; "The hearing panel found Johnston violated N.D.R. Prof. Conduct 5.3(a), (b), and (c) by failing to adequately supervise paralegal Chrzanowski when Johnston failed to screen Chrzanowski from Johnston's litigation on behalf of West involving the same or a substantially related matter in violation of N.D.R. Prof. Conduct 1.7(a) and (c), and 1.9; and when Johnston purportedly held Chrzanowski out as a lawyer and turned West's legal matter over to Chrzanowski in violation of N.D.R. Prof. Conduct 5.5(a) and (d). The hearing panel also found Johnston violated N.D.R. Prof. Conduct 1.5(a) by charging an unreasonable fee in the unsuccessful attempt to recover the client's investment from an insolvent individual. Johnston objected and raises three main issues to this Court in response to the Board's recommendations.").

- Hodge v. Urfa-Sexton, LP, 758 S.E.2d 314, 317, 319, 321-22, 322, 323 (Ga. 2014) (holding that a law firm hiring a non-lawyer can avoid disqualification by screening the non-lawyer, but remanding for determination whether the law firm followed the proper procedures; "We granted certiorari in this case to determine whether the Court of Appeals correctly held that a conflict of interest involving a non-lawyer can be remedied by implementing proper screening measures in order to avoid disqualification of the entire law firm. For the reasons set forth below, we hold that a non-lawyer's conflict of interest can be remedied by implementing proper screening measures so as to avoid disqualification of an entire law firm. In this particular case, we find that the screening measures implemented by the non-lawyer's new law firm were effective and appropriate to protect against the non-lawyer's disclosure of confidential information. However, we remand this case to the trial court for a

hearing to determine whether the new law firm promptly disclosed the conflict." (emphasis added) (footnote omitted); "There is a split of authority among the courts on this issue. The minority approach, which is what Hodge argues we should apply here, is to treat non-lawyers the same way we treat lawyers. Under this approach, when a non-lawyer moves to another firm to work for opposing counsel, the non-lawyer's conflict of interest is imputed to the rest of the firm, thereby disqualifying opposing counsel. . . . URFA-Sexton argues that we should adopt the majority approach and treat non-lawyers differently from lawyers. Under this approach, rather than automatic imputation and disqualification of the new firm, lawyers hiring the non-lawyer can implement screening measures to protect any client confidences that the non-lawyer gained from prior employment. . . . After reviewing both approaches, we join today with 'the majority of professional legal ethics commentators, ethics tribunals, and courts[, which] have concluded that non-lawyer screening is a permissible method to protect confidences held by non-lawyer employees who change employment.'" (emphasis added) (citation omitted); "Accordingly, as a matter of first impression, we set forth the following guidance for disqualification of a law firm based on a non-lawyer's conflict of interest. Once the new firm knows of the non-lawyer's conflict of interest, the new firm must give prompt written notice to any affected adversarial party or their counsel, stating the conflict and the screening measures utilized. . . . The adversarial party may give written consent to the new firm's continued representation of its client with screening measures in place." (emphasis added); "Absent written consent, the adversarial party may move to disqualify the new firm. The adversarial party must show that the non-lawyer actually worked on a same or substantially related matter involving the adversarial party while the non-lawyer was employed at the former firm. If the moving party can show this, it will be presumed that the non-lawyer learned confidential information about the matter. . . . This prevents the non-lawyer from having to disclose the very information that should be protected." (footnote omitted); "Once this showing has been made, a rebuttable presumption arises that the non-lawyer has used or disclosed, or will use or disclose, the confidential information to the new firm. . . . The new firm may rebut this by showing that it has properly taken effective screening measures to protect against the non-lawyer's disclosure of the former client's confidential information. . . . If the new firm can sufficiently rebut the presumption and show that it promptly gave written notice of the non-lawyer's conflict, then disqualification is not required." (emphasis added); "The firm administrator immediately implemented and confirmed electronic screening measures with Bussey, including taking steps to restrict Bussey's access to any information about the Williams case, implementing security measures to prevent Bussey from accessing any computerized information maintained by Insley & Race regarding the Williams case, and testing the security measures he implemented to ensure their success. Since October 5, Bussey has been unable to access the case management system used by Insley & Race for the

Williams matter, including any calendar events, contact information, documents, and billing information for the Williams case. Additionally, the physical file was removed from the general file room and securely placed in the office of an associate.").

- In re Guar. Ins. Servs., Inc., 343 S.W.3d 130, 134 (Tex. 2011) (reversing disqualification of a law firm based on its hiring of a paralegal, and failure to properly screen the paralegal; explaining the Texas approach: "If the lawyer works on a matter, there is an irrebuttable presumption that the lawyer obtained confidential information during the representation. . . . When the lawyer moves to another firm and the second firm represents an opposing party to the lawyer's former client, a second irrebuttable presumption arises -- that the lawyer has shared the client's confidences with members of the second firm. . . . The effect of this second presumption is the mandatory disqualification of the second firm."; "But the rule is different for non-lawyers. A *non-lawyer* who worked on a matter at a prior firm is also subject to a *conclusive* presumption that confidences were *obtained*. . . . However, the second presumption [--] that confidences were *shared* with members of the second firm [--] may be rebutted where non-lawyers are concerned." (emphasis added; emphasis in original indicated by italics); explaining that the law firm did not properly screen the paralegal at first, but took remedial steps on finding the issue; explaining that the firm overcame the presumption that the paralegal had shared confidences with the new firm).

- Mississippi LEO 258 (12/1/11) (allowing screening of a paralegal hiree to avoid imputed disqualification; "The Ethics Committee of the Mississippi Bar has been asked to render an opinion on the following question: A paralegal worked for approximately six years at Firm 1. Corporation A was one of numerous Defendants in a lawsuit in which Firm 1 represented Corporation A as local counsel. The paralegal's involvement in the lawsuit was minimal with the total time spent being approximately fifteen (15) hours and consisting primarily of filing documents with the Court for Corporation A's national counsel. The paralegal never met with representatives of Corporation A. Corporation A settled the lawsuit with the Plaintiff approximately two years ago. Firm 2 and other firms represent the Plaintiff in the lawsuit against the remaining Defendants. The paralegal has now joined Firm 2. Under the Mississippi Rules of Professional Conduct, does the paralegal's employment at Firm 2, wherein she would assist counsel for the Plaintiff in the lawsuit against the remaining Defendants, constitute an ethical violation due to her involvement with Firm 1, who defended Corporation A in the same lawsuit."; "It is the opinion of the Ethics Committee that disqualification of a paralegal is not imputed to the firm so long as the non-lawyer is screened to protect confidential information. The screening process of a non-lawyer should involve the supervisory lawyer cautioning the non-lawyer (1) not to disclose any information relating to the representation of a client of the former

employer; and (2) that the employee should not work on any matter in which the employee worked for the prior employer or respecting which the employee has information relating to the representation of the client of the former employer. When the new firm becomes aware of such matters, the employing firm must also take reasonable steps to ensure that the employee takes no action and does no work in relation to matters on which the non-lawyer worked in the prior employment absent written consent from the prior client." (emphasis added); "Sometimes a firm may be disqualified from representing a client when the firm employs a non-lawyer who formerly was employed by another firm. These circumstances are present either (1) where information relating to the representation of an adverse party gained by the non-lawyer while employed in another firm has been revealed to lawyers or other personnel in the new firm; or (2) where screening would be ineffective or the non-lawyer necessarily would be required to work on the other side of the same or a substantially related matter on which the non-lawyer or respecting which the non-lawyer has gained information relating to the representation of the opponent while in the former employment.").

- In re Columbia Valley Healthcare Sys., L.P., 320 S.W.3d 819, 822, 823, 824, 826, 827, 828, 829 (Tex. 2010) (analyzing the ethics implications of a paralegal joining a law firm representing the opposite side of the paralegal's former firm; ultimately disqualifying the law firm; "In this original mandamus proceeding, we must determine whether a law firm should be disqualified from the underlying suit on the basis of a legal assistant's work on the matter after previously having worked on the same matter while employed by opposing counsel. We have previously held that a firm can usually avoid disqualification when hiring an assistant who previously worked on a matter for opposing counsel if the firm (1) instructs the assistant not to work on the matter, and (2) takes other reasonable steps to shield the assistant from working in connection with the matter. In re Am. Home Prods. Corp., 985 S.W.2d 68, 75 (Tex. 1998). We have not, however, set forth the types of 'other reasonable steps' that are required, nor have we addressed whether disqualification is required when an assistant actually works on the matter for the second firm."; "Because the legal assistant's employer did not take effective reasonable steps to shield the assistant from working on the case, and the assistant actually worked on the case at her employer's directive, we hold that disqualification is required and direct the trial court to grant the defendant's motion to disqualify and recuse plaintiffs' counsel."; "Despite the oral instructions from Magallanes, Rodriquez had contact with the Leal file on a few occasions while working at Magallanes & Hinojosa. According to Rodriquez, her contact consisted of the following: (1) filing correspondence related to the Leal case; (2) rescheduling a docket control conference; (3) preparing an order and sending correspondence to counsel concerning a docket control conference; (4) calling Gault's legal assistant regarding the docket control conference; (5) calendaring dates regarding the case on

Magallanes' calendar; and (6) making a copy of a birth certificate and social security card in the case at Magallanes' directive on one occasion. When Magallanes learned that Rodriguez had scheduled the docket control conference, he again orally instructed her not to work on the case, and held a meeting where he informed both Rodriguez and Castro that they would be dismissed if this happened again."; "[U]nlike with attorneys, a non-lawyer is not generally subject to an irrebuttable presumption of having shared confidential information with members of the new firm. . . . Instead, this second presumption can be overcome, but only by a showing that: (1) the assistant was instructed not to perform work on any matter on which she worked during her prior employment, or regarding which the assistant has information related to her former employer's representation, and (2) the firm took 'other reasonable steps to ensure that the [assistant] does not work in connection with matters on which the [assistant] worked during the prior employment, absent client consent.'" (emphasis added); "With these principles in mind, we conclude that a simple informal admonition to a non-lawyer employee not to work on a matter on which the employee previously worked for opposing counsel, even if repeated twice and with threat of termination, does not satisfy the 'other reasonable measures' a firm must take to properly shield an employee from the litigation. Instead, the other reasonable measures must include, at a minimum, formal, institutionalized screening measures that render the possibility of the non-lawyer having contact with the file less likely." (emphasis added); "Despite the screening measures used, if the employee actually works on the case at her employer's directive, as happened here, and the employer reasonably should know about the conflict of interest, then the presumption of shared confidences must become conclusive."; "In summary, when considering a motion to disqualify on the basis of a firm's employment of a non-legal employee who previously worked on the same or a substantially related matter for opposing counsel, the trial court must consider whether the hiring firm has rebutted the presumption of shared confidences. To rebut this presumption, the hiring firm must demonstrate that (1) the employee was instructed not to work on any matter which she worked on during her prior employment, or regarding which the employee has information related to her former employer's representation, and (2) the firm took other reasonable steps to ensure that the employee does no work in connection with matters on which the employee worked during the prior employment, absent client consent. These other reasonable steps must include, at a minimum, formal, institutional measures to screen the employee from the case." (emphasis added); "We finally note that these requirements apply only to non-lawyer employees who have access to material information relating to the representation of clients, as well as agents who technically may be independent contractors, such as investigators." (emphasis added); "Magallanes asked Rodriguez to make copies for the Leal case on one occasion. Making copies is perhaps a simple, clerical matter, yet the message sent not only to Rodriguez but other employees at the firm was

that Magallanes & Hinojosa was not serious about guarding against conflicts of interest.").

- Hamilton v. Dowson Holding Co., Civ. No. 2008/02 & 2008/10, 2009 U.S. Dist. LEXIS 57715, at *14-15 (D. V.I. July 2, 2009) ("In this jurisdiction, where a non-lawyer employee has learned the confidences of an adversary, a rebuttable presumption arises that the non-lawyer employee will disclose the confidential information to the new employer. . . . Once the presumption arises, it must be rebutted by competent evidence that the non-lawyer employee has not shared any confidential evidence with the new firm.").

- Virginia LEO 1832 (5/10/07) (explaining that although not bound by lawyers' ethics rules, law firms' secretaries must maintain the confidentiality of information they learn; warning that a secretary who receives confidential information from a prospective client whom the law firm does not represent (because it wishes to or already does represent the prospective client's adversary) must maintain the confidentiality of that information; explaining that lawyers in that firm can avoid disqualification from representing the adversary if the lawyers screen the secretary from the matters, instruct the secretary "that she cannot reveal to the lawyer any confidential information obtained from Ms. X [the prospective client]," and use another staff person to work on the matter; also noting that the law firm "should send a written communication to Ms. X or her lawyer that these measures have been taken."; ultimately such screens do not prevent imputed disqualification involving an individually disqualified lawyer, but can successfully avoid imputation of a non-lawyer's individual disqualification; warning that the firm may have to withdraw from representing the adversary if the screen is breached; recommending that "the firm train non-lawyer support staff to minimize confidential information obtained from prospective clients before they can perform the necessary conflicts analysis."

- New York LEO 774 (3/23/04) ("When a law firm hires a secretary, paralegal, or other non-lawyer who has previously worked at another law firm, the law firm must adequately supervise the conduct of the non-lawyer. Supervisory measures may include i) instructing the non-lawyer not to disclose protected information acquired at the former law firm and ii) instructing lawyers not to exploit such information if proffered. In some circumstances, it is advisable that the law firm inquire whether the non-lawyer acquired confidential information from the former law firm about a current representation of the new firm or conduct a more comprehensive conflict check based on the non-lawyer's prior work. The results of such an inquiry will help determine whether the new firm should take further steps, such as seeking the opposing party's consent and/or screening the non-lawyer."; "Occasionally, however, a law firm will conclude that screening the non-lawyer will not adequately protect an opposing party's confidences and secrets. For example, if the non-

lawyer had substantial exposure to relevant confidential information at the old firm and will now be working closely with the lawyers who are handling the opposite side of the same matter, or where the structure and practices of the firm make it difficult to isolate a non-lawyer from confidential conversations or documents pertaining to a given matter, a law firm may be obliged to adopt measures more radical than screening" such as "[o]btaining consent from the opposing law firm's client," "[t]erminating the non-lawyer," or "[w]ithdrawing from the matter in question. Concluding that ("[w]hen a New York law firm hires a non-lawyer who has previously worked at another law firm, the hiring firm must, as part of its supervisory responsibilities under DR 1-104(C) and DR 4-101(D), exercise adequate supervision to ensure that the non-lawyer does not reveal any confidences or secrets that the non-lawyer acquired while working at the other law firm. . . . If a law firm learns that a non-lawyer did acquire information protected by DR 4-101(B) that is material to a matter in which the adversary is represented by the non-lawyer's former employer, the law firm should adopt appropriate measures to guard against improper disclosure of protected information.").New York LEO 774 (3/23/04) ("When a New York law firm hires a non-lawyer who has previously worked at another law firm, the hiring firm must, as part of its supervisory responsibilities under DR 1-104(C) and DR 4-101(D), exercise adequate supervision to ensure that the non-lawyer does not reveal any confidences or secrets that the non-lawyer acquired while working at the other law firm. . . . If a law firm learns that a non-lawyer did acquire information protected by DR 4-101(B) that is material to a matter in which the adversary is represented by the non-lawyer's former employer, the law firm should adopt appropriate measures to guard against improper disclosure of protected information."; explaining that the appropriate steps the law firm might take include screening of the non-lawyer or "measures more radical than screening" such as: "[o]btaining consent from the opposing law firm's client," "[t]erminating the non-lawyer," or "[w]ithdrawing from the matter in question").

- In re Mitcham, 133 S.W.3d 274, 276 (Tex. 2004) (assessing the imputed disqualification impact of a paralegal (who later obtained a law degree) moving from firm to firm; "[W]e have recognized different standards for attorneys and their assistants. For attorneys, there is an irrebut[t]able presumption they gained confidential information on every case at the firm where they work (whether they work on them or not), . . . and an irrebuttable presumption they share that information with the members of a new firm . . . . For legal assistants, there is an irrebut[t]able presumption they gain confidential information only on cases on which they work, and a rebuttable presumption they share that information with a new employer. . . . The last presumption is rebutted not by denials of disclosure, but by prophylactic measures assuring that legal assistants do not work on matters related to their prior employment."; holding that a law firm's contractual agreement not to bring certain lawsuits because of the paralegal's employment had no time

limit and required the new firm's disqualification even after the paralegal/lawyer had left that firm).

- Virginia LEO 1800 (10/8/04) (explaining that a two-member law firm hiring a secretary who until the previous week was the only secretary at another two-member law firm representing a litigation adversary will not be disqualified from the case, as long as the new firm: warns the secretary not to reveal or use any client confidences acquired at the old firm; advises all lawyers and staff not to discuss the matter with the new secretary; screens the new secretary from the litigation matter (including the new firm's files on the matter); recommending that the new firm "develop a written policy statement" regarding such situations, and note the need for confidentiality "on the cover of the file in question.").

- In re TXU US Holdings Co., 110 S.W.3d 62, 65 (Tex. App. 2002) (explaining that "[a] different rule applies to a firm which hires a non-lawyer who previously worked for opposing counsel. . . . If the former client establishes that the non-lawyer worked on its case, a conclusive presumption exists that the client's confidences were imparted to the non-lawyer. . . . Unlike the irrebuttable presumption which exists for a disqualified attorney however, a rebuttable presumption exists that a non-lawyer has shared the confidences of a former client with his new employer. . . . The presumption may be rebutted 'only by establishing that "sufficient precautions have been taken to guard against any disclosure of confidences."'" (citation omitted); explaining that "non-lawyers are treated differently because of 'a concern that the mobility of a non-lawyer could be unduly restricted'" (citation omitted); applying the irrebuttable presumption because the person who moved from firm to firm had been a non-lawyer at one firm but gained her law degree and moved to another firm as a lawyer; conditionally granting a writ of mandamus and disqualifying the law firm she joined from representing plaintiffs in asbestos actions).

Second, some states allow the screening of non-lawyer lateral hires to avoid imputed disqualification -- essentially paralleling the rule that those states also follow when hiring lawyers.

- Fedora v. Werber, 84 A.3d 812, 814 (R.I. 2013) (treating a paralegal who moved to another law firm in the same way as a lawyer; declining to disqualify the law firm to which the paralegal moved, because she was screened when she joined the other law firm, but concluding that the new law firm had not adequately provided notice to the former client; "Here, Ms. Jardon began her employment with D&W [DeLuca & Weizenbaum] on September 14, 2009, and D&W did not provide notice of its screening measures to GSM until

December 7, 2009, nearly three months later. Furthermore, as the trial justice noted, notice was not independently provided; rather, it was incorporated into plaintiff's objection to defendant's motion to disqualify D&W. Ms. Jardon was employed by D&W for roughly six weeks while Dr. Moulton's case was pending. We are satisfied, therefore, that the trial justice did not abuse her discretion when she determined that D&W's actions failed to constitute prompt notice under Rule 1.10(c)(2).").

- Pennsylvania LEO 98-75 (12/4/98) ("Lawyers are forbidden to represent a client if that representation will be adverse to another client. Rule 1.7. Rule 1.10 imputes the disqualification of a lawyer in a law firm to the other lawyers when any one of them has a prohibited conflict of interest. The principles of these sections have been extended to non-lawyer assistants. Their conflicts of interest can be charged to their employing lawyer or law firm. But a non-lawyer assistant who arrives with a disqualifying conflict of interest may be employed if the sanitizing procedure of Rule 1.10(b) is followed: She must be screened and the client must be notified.").

- North Carolina RPC 176 (7/21/94) ("The imputed disqualification rules contained in Rule 5.11 of the Rules of Professional Conduct do not apply to non-lawyers. However, Attorney B must take extreme care to ensure that Paralegal is totally screened from participation in the case even if Paralegal's involvement in the case while employed by Attorney A was negligible. See RPC 74. This requirement is consistent with a lawyer's duty, pursuant to Rule 3.3(b), to make reasonable efforts to ensure that the conduct of a non-lawyer over whom the lawyer has direct supervisory authority is compatible with the professional obligations of the lawyer including the obligation to avoid conflicts of interest and to preserve the confidentiality of client information.").

Third, some courts have not allowed screening of non-lawyer lateral hires, thus imputing such a lateral hire's individual disqualification to the entire hiring firm -- as those states do with lawyers.

- In re Complex Asbestos Litig., 283 Cal. Rptr. 732 (Cal. Ct. App. 1991) (disqualifying a plaintiff's asbestos law firm which hired a paralegal who had been involved in defending asbestos case at another firm).

Fourth, at least one bar indicated that paralegals should be treated like lawyers under that state's imputed disqualification rules, while non-lawyers other than paralegals

should be treated differently (implicitly allowing their screening to avoid any imputed disqualification).

- Los Angeles County LEO 524 (5/16/11) (explaining the imputed disqualification rules for non-lawyer employees; not including paralegals "as paralegals are subject to the same confidentiality requirements as attorneys under the provisions of Business & Professions Code Section 6453."; "The Committee believes that it is the obligation of the hiring firm, before hiring a non-lawyer employee who has worked on matters at another firm, to conduct a reasonable investigation into whether the proposed employee has been exposed to or acquired confidential information during prior employment relevant to legal matters which may arise in the course of the new employment. The hiring firm should in particular ascertain whether the proposed employee's former firm is or has been opposing counsel to the hiring firm on any current cases, to determine whether the proposed employee has been exposed to confidential information of an adverse party or witness regarding those cases. However, the hiring firm must not attempt to delve into the substance of any information the non-lawyer may have acquired. It is the obligation of the hiring firm to instruct the non-lawyer employee, once hired, as to his or her confidentiality obligations, and, absent first obtaining the consent of the former employer or the affected client of the former employer, to promptly screen the non-lawyer employee from involvement in particular matters if the non-lawyer is in possession of confidential information which is materially related to matters in which the hiring firm represents an adversary party."; "Elements of an adequate screen include written notification to all legal staff to isolate the screened employee from communication regarding the matter, prevention of the screened employee's access to the relevant files, admonishment of the employee not to discuss the prior matter with the new firm, and a search of the firm's records to ensure that all cases on which the new employee's former firm is opposing counsel are identified. . . . The Committee believes that electronic security is also an important element of an effective screen. Electronic files should be password-protected and the password withheld from screen employees. Effective practices may also include documenting the continued existence and impermeability of the screen, for example by periodic electronic or written reminders to all staff or by requiring periodic certification by screened staff that they have not breached the screen.").

Some of these cases and ethics opinions focus on the timing and elements of an effective screen, which of course arises in the lawyer context as well.

- Hodge v. Urfa-Sexton, LP, 758 S.E.2d 314, 317, 319, 321-22, 322, 323 (Ga. 2014) (holding that a law firm hiring a non-lawyer can avoid disqualification by

screening the non-lawyer, but remanding for determination whether the law firm followed the proper procedures; "We granted certiorari in this case to determine whether the Court of Appeals correctly held that a conflict of interest involving a non-lawyer can be remedied by implementing proper screening measures in order to avoid disqualification of the entire law firm. For the reasons set forth below, we hold that a non-lawyer's conflict of interest can be remedied by implementing proper screening measures so as to avoid disqualification of an entire law firm. In this particular case, we find that the screening measures implemented by the non-lawyer's new law firm were effective and appropriate to protect against the non-lawyer's disclosure of confidential information. However, we remand this case to the trial court for a hearing to determine whether the new law firm promptly disclosed the conflict." (footnote omitted); "There is a split of authority among the courts on this issue. The minority approach, which is what Hodge argues we should apply here, is to treat non-lawyers the same way we treat lawyers. Under this approach, when a non-lawyer moves to another firm to work for opposing counsel, the non-lawyer's conflict of interest is imputed to the rest of the firm, thereby disqualifying opposing counsel. . . . URFA-Sexton argues that we should adopt the majority approach and treat non-lawyers differently from lawyers. Under this approach, rather than automatic imputation and disqualification of the new firm, lawyers hiring the non-lawyer can implement screening measures to protect any client confidences that the non-lawyer gained from prior employment. . . . After reviewing both approaches, we join today with 'the majority of professional legal ethics commentators, ethics tribunals, and courts[, which] have concluded that non-lawyer screening is a permissible method to protect confidences held by non-lawyer employees who change employment.'" (citation omitted); "Accordingly, as a matter of first impression, we set forth the following guidance for disqualification of a law firm based on a non-lawyer's conflict of interest. Once the new firm knows of the non-lawyer's conflict of interest, the new firm must give prompt written notice to any affected adversarial party or their counsel, stating the conflict and the screening measures utilized. . . . The adversarial party may give written consent to the new firm's continued representation of its client with screening measures in place." (emphasis added); "Absent written consent, the adversarial party may move to disqualify the new firm. The adversarial party must show that the non-lawyer actually worked on a same or substantially related matter involving the adversarial party while the non-lawyer was employed at the former firm. If the moving party can show this, it will be presumed that the non-lawyer learned confidential information about the matter. . . . This prevents the non-lawyer from having to disclose the very information that should be protected."; "Once this showing has been made, a rebuttable presumption arises that the non-lawyer has used or disclosed, or will use or disclose, the confidential information to the new firm. . . . The new firm may rebut this by showing that it has properly taken effective screening measures to protect against the non-lawyer's disclosure of the former client's

confidential information. . . . If the new firm can sufficiently rebut the presumption and show that it promptly gave written notice of the non-lawyer's conflict, then disqualification is not required."; "The firm administrator immediately implemented and confirmed electronic screening measures with Bussey, including taking steps to restrict Bussey's access to any information about the Williams case, implementing security measures to prevent Bussey from accessing any computerized information maintained by Insley & Race regarding the Williams case, and testing the security measures he implemented to ensure their success. Since October 5, Bussey has been unable to access the case management system used by Insley & Race for the Williams matter, including any calendar events, contact information, documents, and billing information for the Williams case. Additionally, the physical file was removed from the general file room and securely placed in the office of an associate.").

- Fedora v. Werber, 84 A.3d 812, 814 (R.I. 2013) (treating a paralegal who moved to another law firm in the same way as a lawyer; declining to disqualify the law firm to which the paralegal moved, because she was screened when she joined the other law firm, but concluding that the new law firm had not adequately provided notice to the former client; "Here, Ms. Jardon began her employment with D&W [DeLuca & Weizenbaum] on September 14, 2009, and D&W did not provide notice of its screening measures to GSM until December 7, 2009, nearly three months later. Furthermore, as the trial justice noted, notice was not independently provided; rather, it was incorporated into plaintiff's objection to defendant's motion to disqualify D&W. Ms. Jardon was employed by D&W for roughly six weeks while Dr. Moulton's case was pending. We are satisfied, therefore, that the trial justice did not abuse her discretion when she determined that D&W's actions failed to constitute prompt notice under Rule 1.10(c)(2)." (emphasis added)).

- Los Angeles County LEO 524 (5/16/11) (explaining the imputed disqualification rules for non-lawyer employees; not including paralegals "as paralegals are subject to the same confidentiality requirements as attorneys under the provisions of Business & Professions Code Section 6453."; "The Committee believes that it is the obligation of the hiring firm, before hiring a non-lawyer employee who has worked on matters at another firm, to conduct a reasonable investigation into whether the proposed employee has been exposed to or acquired confidential information during prior employment relevant to legal matters which may arise in the course of the new employment. The hiring firm should in particular ascertain whether the proposed employee's former firm is or has been opposing counsel to the hiring firm on any current cases, to determine whether the proposed employee has been exposed to confidential information of an adverse party or witness regarding those cases. However, the hiring firm must not attempt to delve into the substance of any information the non-lawyer may have

acquired. It is the obligation of the hiring firm to instruct the non-lawyer employee, once hired, as to his or her confidentiality obligations, and, absent first obtaining the consent of the former employer or the affected client of the former employer, to promptly screen the non-lawyer employee from involvement in particular matters if the non-lawyer is in possession of confidential information which is materially related to matters in which the hiring firm represents an adversary party."; "Elements of an adequate screen include written notification to all legal staff to isolate the screened employee from communication regarding the matter, prevention of the screened employee's access to the relevant files, admonishment of the employee not to discuss the prior matter with the new firm, and a search of the firm's records to ensure that all cases on which the new employee's former firm is opposing counsel are identified. . . . The Committee believes that electronic security is also an important element of an effective screen. Electronic files should be password-protected and the password withheld from screen employees. Effective practices may also include documenting the continued existence and impermeability of the screen, for example by periodic electronic or written reminders to all staff or by requiring periodic certification by screened staff that they have not breached the screen." (emphasis added)).

Best Answer

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

B 11/14; B 12/16

Duty to Supervise Lawyers and Non-Lawyers

Hypothetical 8

Your law department just hired two new lawyers and one new assistant. The lawyers recently graduated from law school, and the assistant had previously worked only for doctors. You wonder about the ethical and professional implications of bringing on new folks like this.

(a) Do you have any responsibility for assuring that lawyers and non-lawyers you supervise comply with the ethics rules?

YES

(b) Can you be held responsible for any ethics violations by lawyers and non-lawyers you supervise?

YES

Analysis

The ethics rules contain provisions that deal with lawyers supervising other lawyers and non-lawyers.

(a) Not surprisingly, the ethics rules deal with a supervising lawyer's responsibilities.

> A partner in a law firm, or a lawyer who individually or together with other lawyers possesses managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

ABA Model Rule 5.1(a).

Thus, lawyers who manage other lawyers must take reasonable steps to put in place "measures" that provide at least reasonable assurance that lawyers in the firm

comply with the ethics rules. Comment [2] to that rule mentions such "internal policies and procedures" as those designed to identify conflicts, assure that filing and other deadlines are met, provide for proper trust account processes, etc. ABA Model Rule 5.1 cmt. [2]. Comment [3] explains that the measures lawyers may take to comply with this managerial responsibility can vary according to the size of the law firm.

> In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. . . . Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members, and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

ABA Model Rule 5.1 cmt. [3].

ABA Model Rule 5.1(b) applies to lawyers who have "direct supervisory authority" over another lawyer, and predictably require more immediate steps to assure that other lawyer's compliance with the ethics rules.

> A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

ABA Model Rule 5.1(b).

A different rule applies essentially the same standard to managers and direct supervisors of non-lawyers.

> With respect to a non-lawyer employed or retained by or associated with a lawyer:

> (a) a partner or a lawyer who individually or together with other lawyers possesses managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer; [and]
>
> (b) a lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.

ABA Model Rule 5.3. It is not clear how far away from lawyer ethics rules a non-lawyer can stray and still be considered to have acted in a way "compatible" with the lawyer ethics rules.

(b) The ethics rules explain the standard for holding a supervising lawyer responsible for a subordinate lawyer's ethics breach.

> A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
>
> (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
>
> (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

ABA Model Rule 5.1(c).

Not surprisingly, the same basic rules apply to a supervising lawyer's responsibility for a non-lawyer's ethics breach.

> [A] lawyer shall be responsible for conduct of such a person [non-lawyer employed or retained by or associated with a lawyer] that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

> (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
>
> (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows or should have known of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

ABA Model Rule 5.3(c).

Thus, lawyers can face bar discipline for ethical violations by their subordinates. In most situations, lawyers will face such punishment only if they have some complicity, either before or after the wrongdoing. However, the "should have known" standard could trigger a lawyer's discipline under what amounts to a negligence standard.

Best Answer

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

b 12/10; 10/14

Limiting Liability

Hypothetical 9

You joined your client's law department about six weeks ago. At one recent conference of all corporate officers, it dawned on you for the first time that you are not covered by your client-employer's standard indemnification provision that covers all other officers.

May you arrange for an indemnification provision in your client-employer's bylaws that covers all in-house lawyers?

MAYBE

Analysis

Indemnification provisions represent a limitation on liability, and therefore must comply with the applicable jurisdiction's particular approach.

The ABA Model Rules and most state ethics rules allow all lawyers to limit their liability in advance, as long as the client is separately represented. ABA Model Rule 1.8(h)(1).

Under the ABA Model Rules:

> A lawyer shall not . . . make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement.

ABA Model Rule 1.8(h)(1) (emphasis added).

Interestingly, the Restatement still takes a very strict approach prohibiting such prospective limitations of liability.

> An agreement prospectively limiting a lawyer's liability to a client for malpractice is unenforceable.

Restatement (Third) of Law Governing Lawyers § 54(2) (2000). To emphasize the point, the Restatement also explains that:

> [f]or purposes of professional discipline, a lawyer may not: (a) make an agreement prospectively limiting the lawyer's liability to a client for malpractice.

Id. § 54(4). Comment b explains the Restatement's approach.

> An agreement prospectively limiting a lawyer's liability to a client . . . is unenforceable and renders the lawyer subject to professional discipline. The rule derives from the lawyer codes, but has broader application. Such an agreement is against public policy because it tends to undermine competent and diligent legal representation. Also, many clients are unable to evaluate the desirability of such an agreement before a dispute has arisen or while they are represented by the lawyer seeking the agreement.

Id. § 54 cmt. b.

Given this stark contrast between the ABA Model Rules and the Restatement, it should come as no surprise that not every state follows the liberal ABA Model Rule approach.

For instance, the Virginia Bar has repeatedly indicated that in-house lawyers may not ask for or accept an indemnity commitment from their client-employers. Virginia LEO 1364 (6/28/90) (corporate counsel may not accept an indemnity commitment from their employer); Virginia LEO 1211 (4/19/89) (in-house lawyers do have attorney-client relationships with employers, and therefore may not ask for an indemnity agreement); Virginia LEO 877 (4/1/87) (an in-house lawyer may not obtain an indemnification agreement).

When Virginia revised its ethics rules as of January 1, 2000, in-house lawyers were singled out for special favorable treatment. Under Virginia Rule 1.8(h), only

in-house lawyers are permitted to limit their liability to their clients in advance -- if the clients are separately represented.

Best Answer

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

B 10/14

Non-Competition Clauses

Hypothetical 10

You have been very successful in your tenure at a high-tech company's in-house law department. You recently received an offer from another company to join its law department, at a substantial pay increase. That company sends you a proposed employment agreement that would: (1) prevent you from serving in the in-house law department of any of the company's competition for a period of one year after you leave the company; and (2) preclude your representation of any clients adverse to the company for a period of five years after you leave the company.

(a) May you sign an employment agreement under which you agree not to serve in a competitor's in-house law department for one year after you leave the company?

NO

(b) May you sign an employment agreement under which you agree not to take any representations adverse to the company for a period of five years after you leave the company?

NO

Analysis

Not surprisingly, in-house lawyers must sometimes deal with their employer's requests that they sign non-competition clauses, or agree contractually to more restrictions than required in the ethics rules.

(a) The ethics rules flatly prohibit stark non-competition clauses.

Under ABA Model Rule 5.6(a):

> [a] lawyer shall not participate in offering or making:
>
> (a) 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.

Not surprisingly, most court and bar analyses of this provision deal with law firms' partnership and employment agreements. However, the ethics rule on its face covers in-house lawyers -- and some bars have also applied the provision to corporate law departments.

The New Jersey Supreme Court condemned a non-compete agreement that BASF's general counsel reportedly required all of that chemical company's in-house lawyers to sign.

- New Jersey LEO 708 (7/3/06) (analyzing and ultimately finding unethical an employment agreement required by a company [identified in the press as BASF] of all of its in-house lawyers, under which the lawyers agreed that for a period of one year after the in-house lawyer left the company "'I will not become employed by, provide services to or assist, whether as a consultant, employee, officer, director, proprietor, partner or other capacity, any person, firm business or corporation which (i) is a Competitor of [Employer] (as defined in paragraph 9 below) or (ii) is seeking to become a Competitor of [Employer]; provided however, that the provisions of this subparagraph (a) shall not apply if my employment is terminated by [Employer] without cause'"; noting that the ABA and several other states have found that the ethics rules generally prohibiting non-competes apply with equal force to in-house lawyers; holding that the "fact that the restrictive covenant agreement in question arises in the corporate context, rather than within a law firm, is of no moment"; also explaining that "[n]ot all duties of an in-house lawyer may involve the practice of law. It is conceivable that an in-house lawyer could obtain confidential information and/or trade secrets which would not be protected by RPC 1.6 or the attorney-client privilege. Therefore, it may be reasonable for a corporation to request its lawyers to sign a non-disclosure or confidentiality agreement, provided that it does not restrict in any way the lawyer's ability to practice law or seek to expand the confidential nature of information obtained by the in-house lawyer in the course of performing legal functions beyond the scope of the RPCs. Because the terms of the agreement presented by the inquirer make no reference either to the latter's functions and duties as a lawyer or to the RPCs, the requirements of Section 3 of the agreement in question are impermissible."; also finding that the ethics rules prohibited a "anti-raiding provision" in the retainer agreement required of the company's in-house lawyers).

Other states have also taken this approach.

- Virginia LEO 1615 (2/7/95) (a lawyer hired as a company's inside general counsel may not enter into a non-competition agreement with the company (under which the lawyer could not serve as any competitor's in-house counsel for a period of one year); noting that the lawyer must protect the former client's confidences and secrets if the lawyer begins to represent a competitor).

Some companies ask their in-house lawyers to sign agreements pledging to retain the confidentiality of information that the in-house lawyers have learned. Such restrictions probably pass muster.

An old ABA LEO did not condemn such a provision.

- ABA Informal Op. 1301 (3/25/75) (explaining that a company's employment agreement provision restricting in-house lawyers from representing a competitor for two years in connection with any products about which the in-house lawyer acquired confidential information did not violate the ethics rules, but amounted to "undesirable surplusage").

A more recent state legal ethics opinion specifically approved such a restriction.

- Arizona LEO 95-04 (4/18/95) (upholding a termination agreement between a corporation and an in-house lawyer which had strict confidentiality agreements; explaining that the provision essentially matched the lawyer's preexisting ethics duty of confidentiality, and was designed to give the corporation contractual remedies for the in-house lawyer's ethics breach).

To be sure, the harsh New Jersey LEO 708 (7/3/06) (described above) condemned such a confidentiality provision in what otherwise was an improper non-compete -- because it did not refer to the ethics rules.

The safest way for an employer-client to obtain a confidentiality pledge from in-house lawyers is to acknowledge its inability to restrict in-house lawyers' future employment. A 2011 New York legal ethics opinion found such a provision ethically permissible.

- New York LEO 858 (3/17/11) (addressing the following provision in an employment agreement a client asked in-house lawyers to sign: "'If I am a

licensed attorney, this confidentiality provision is not meant to restrict my right to practice law, after I cease to be an employee, in violation of the applicable rules of professional conduct (such as Rule 5.6 or its equivalent), and the confidentiality provision shall be interpreted to be consistent with all such rules. The confidentiality provision shall not expand the scope of my duty to maintain privileged or confidential information under Rule 1.6, Rule 1.9, or other applicable rules of professional conduct."; ultimately concluding that "[a] general counsel licensed in New York may ethically require staff attorneys to sign a confidentiality agreement that arguably extends staff attorney confidentiality obligations, after their employment ends, to information not otherwise protected as confidential information under the New York Rules of Professional Conduct, if the agreement makes plain that such confidentiality obligations do not restrict the staff attorney's right to practice law after termination and do not expand the scope of the staff attorney's duty of confidentiality under the Rules."; explaining that "[i]f the proposed confidentiality agreement protects more information than Rules 1.6(a) and 1.9(c), a New York who enforces the agreement after an in-house legal employee terminates employment may be violating Rule 5.6(a)(1) by restricting the former in-house lawyer's practice of law. However, as a practical matter, because the definition of confidential information in Rule 1.6 is so broad, most contractual confidentiality provisions are not likely to exceed the scope of a New York lawyer's confidentiality obligations under the Rules."; "The effect of this 'savings clause' is to make plain that, to the extent the limitations imposed by the proposed agreement appear to be more stringent than the Rules, the limitations in the agreement apply only to an attorney's use and disclosure of information with respect to the practice of law. Thus, even if the contractual confidentiality provision on its face might be construed to expand the scope of an attorney's confidentiality obligations beyond those provided by the Rules, the savings clause keeps the agreement within the confines of the Rules and renders further analysis under Rule 5.6 unnecessary.").

(b) Given the bars' condemnation of in-house lawyers' non-competes generally, it would be safe to assume that bars would also condemn any restrictions that extend beyond the ethics rules.

In ABA LEO 381 (5/9/94), the ABA indicated that a corporation may not demand that an outside lawyer accept a retainer agreement in which the outside lawyer pledged never to represent anyone against the corporation in the future. Presumably, bars would have the same trouble with a provision covering in-house lawyers.

Best Answer

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

B 10/14

Communications With Former Employees

Hypothetical 11

You just spent an hour interviewing one of your corporate client's former employees.

Are your communications protected by the attorney-client privilege?

YES (PROBABLY)

Analysis

Most if not all states traditionally followed the "control group" privilege standard, which extended privilege protection only to communications between a company lawyer and those in the company's upper hierarchy -- who acted on the lawyer's advice. The United States Supreme Court reject this concept in the Upjohn case -- correctly extending privilege protection to a company lawyer's communication with any employee possessing facts the lawyer needs before giving advice to the company. Upjohn Co. v. United States, 449 U.S. 383 (1981). Starting with federal question cases, the Upjohn standard now applies in nearly every state but Illinois.

Once most courts abandoned what used to be the hierarchical "control group" privilege approach in favor of the functionality privilege approach, it was easy for them to extend privilege protection to companies' former employees. Most courts now protect such communications, as long as they deal with the former employees' experience at the company. Peralta v. Cendant, 190 F.R.D. 38 (D. Conn. 1999). A few courts take a different approach. Newman v. Highland School Dist., No. 90194-5, 2016 Wash. LEXIS 1135 (Wash. Sup. Ct. Oct. 20, 2016).

But this majority approach does not extend privilege protection to communication about what happened after the employee left. In 2014, a North Carolina federal court applied the general rule, and denied privilege protection to communications that clearly would have deserved privilege protection with a current employee. Winthrop Resources Corp. v. CommScope, Inc., Civ. A. No. 5:11-CV-172, 2014 U.S. Dist. LEXIS 158413 (W.D.N.C. Nov. 7, 2014).

Best Answer

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

Thomas E. Spahn, *Attorney Client Privilege and Work Product Doctrine: A Practitioner's Guide*, § 6.12 (3rd ed. 2013).

B 12/16

"Functional Equivalent" Doctrine

Hypothetical 12

As your corporate client has downsized, it increasingly relies on temporary agency employees who are not on your client's payroll -- but who spend every day at the client's headquarters building handling clerical tasks.

Will the attorney-client privilege protect communications with or in the presence of these non-employees?

YES

Analysis

Courts applying the Upjohn standard focus on employees' function within the corporation and possession of knowledge the lawyer needs before giving advice to the corporation. Starting in 1994, courts began to extend protection to independent contractors who are the "functional equivalent" of corporate employees. In re Bieter Co., 16 F.3d 929 (8th Cir. 1994). This is an obvious and almost necessary doctrine, given corporations' increasing use of outsourced employees.

Courts adopting this "functional equivalent" standard often follow a multi-factor test articulated by the Southern District of New York in 2011. Steinfeld v. IMS Health Inc., No. 10 Civ. 3301 (CS)(PED), 2011 U.S. Dist. LEXIS 142288 (S.D.N.Y. Dec. 9, 2011).

However, not all courts endorse the "functional equivalent" doctrine. In July 2013, the Northern District of Illinois questioned the "functional equivalent" doctrine. BSP Software, LLC v. Motio, Inc., No. 12 C 2100, 2013 U.S. Dist. LEXIS 95511, at *2 (N.D. Ill. July 9, 2013). In December 2014, a Southern District of New York decision predicted that the Second Circuit would not recognize the doctrine. Church & Dwight

Co. v. SPD Swiss Precision Diagnostics, GmbH, No. 14-cv-585, 2014 U.S. Dist. LEXIS 175552 (S.D.N.Y. Dec. 19, 2014). These courts did not reject the doctrine, but their comments were disturbing.

Despite these worrisome decisions, it is difficult to imagine that courts will abandon this logical and necessary doctrine. Still, corporations must carefully assess any independent contractor's status. If independent contractors fall short of meeting the "functional equivalent" standard, their involvement in, or later receipt of, privileged communications can destroy or waive the privilege protection.

Best Answer

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

Thomas E. Spahn, *Attorney Client Privilege and Work Product Doctrine: A Practitioner's Guide*, § 6.13 (3rd ed. 2013).

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Vioxx And The "Need to Know" Standard

Hypothetical 13

One of your client's executives has the annoying habit of sending her fellow employees copies of your emails answering legal questions the executive posed to you -- to keep these employees "in the loop" even though they are not directly involved in the issues the emails discuss.

Does such a practice jeopardize privilege protection?

YES

Analysis

One of the greatest threats to privilege protection within corporations comes from the circulation of privileged communications within the corporation. Unfortunately, this judicial hostility seems unrealistic, given the ease of mail transmission. The hostility also seems inappropriate, because depriving corporation of privilege protection for widespread internal communications hands over to corporations' adversaries' communications that were always kept within the corporation -- circulated only among those with a fiduciary or contractual duty to keep them secret.

Nevertheless, courts have recognized two separate but related risks to corporations' privilege protection.

First, in an approach epitomized by the Vioxx case again Merck, courts sometimes point to widespread intra-corporate circulation as proof that the communications related primarily to business rather than legal matters. In re Vioxx Prods. Liab. Litig., 501 F. Supp. 2d 789 (E.D. La. 2007).

Some courts essentially take a per se approach that any communication sent simultaneously to a lawyer and to a non-lawyer necessarily was primarily business-

related rather than legal-related, and therefore does not deserve privilege protection. Baklid-Kunz v. Halifax Hospital Medical Center, Case No. 6:09-cv-1002-Orl-31 TBS, 2012 U.S. Dist. LEXIS 158944, at *11-12 (M.D. Fla. Nov. 6, 2012) (citation omitted).

Second, some courts find that corporations waive their privilege by intra-corporate circulation to employees without a "need to know" the communication. EEOC v. Texas Roadhouse, Inc., Civ. A. No. 11-cv-11732-DJC, 2015 U.S. Dist. LEXIS 161929, (D. Mass. Dec. 2, 2015); Int'l Cards Co., Ltd. v. MasterCard Int'l Inc., No. 13-CV-02576 (LGS) (SN), 2014 US. Dist. LEXIS 125370, (S.D.N.Y. Aug. 27, 2014).

The "need to know" standard differs from the Upjohn standard. For example, a lobby receptionist might see a slip and fall on a rainy day, and therefore stands within the Upjohn protection if the company's lawyer interviews the receptionist about what happened (because the receptionist has facts the lawyer needs). But the receptionist does not have a "need to know" the lawyer's analysis of the company's possible liability in order to do his or her job.

Best Answer

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

Thomas E. Spahn, *Attorney Client Privilege and Work Product Doctrine: A Practitioner's Guide*, §§ 6.11, 15.4, 19.8, 26.9 (3rd ed. 2013).

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Client and Lawyer Agents/Consultants

Hypothetical 14

One of your corporate client's senior executives likes to establish what she calls "tiger teams" to deal with the client's thorniest problems. You wonder about the privilege impact of involving outsiders as "tiger team" members.

(a) Does the privilege protect communications with, in the presence of, or shared with an environmental consultant that your client considers a key participant in such a "tiger team?"

NO

(b) Would the privilege analysis be any different if you retained the environmental consultant?

NO (PROBABLY)

Analysis

(a) Perhaps the most dangerous privilege concept shared by many business executives is their incorrect equating of contractual confidentiality and privilege protection. This misunderstanding becomes most acute in connection with independent contractors assisting the client. In most courts, the only client agent/consultants within privilege protection are those necessary for the communication between a lawyer and the client.[5]

[5] Cardinal Aluminum Co. v. Cont'l Cas. Co., Case No. 3:14-CV-857-TBR-LLK, 2015 U.S. Dist. LEXIS 95361, at *8 (W.D. Ky. July 22, 2015) (holding that plaintiff's insurance broker was outside privilege protection -- despite the plaintiff's CFO's affidavit that the plaintiff relied on the broker to submit an insurance claim, negotiate with the insurance company, and advise the plaintiff about the claims process; noting that "Plaintiff did to argue that its broker acted to effectuate legal representation for Plaintiff.").

These include translators, interpreters, etc. Corporations generally lose privilege protection if they involve other client agent/consultants in otherwise privileged communications, or share preexisting privileged communications with such agent/consultants -- such as environmental consultants, investment bankers, etc.

As a practical matter, this risk to privilege protection is magnified because such outsiders must be listed on privilege logs -- which can alert adversaries.

(b) Lawyer agent/consultants present a different analysis from client agent/consultants. For obvious reasons, having the lawyer retain who is really a client agent/consultant is not dispositive. Courts look at their bona fides of the arrangement, not who retained the agent/consultant. In fact, some courts have been extremely critical of lawyers who have tried to "launder" an agent/consultant's advice through the lawyer back to the client. Lawyers' assistants such as secretaries, paralegals, file clerks, etc. are clearly within the privilege -- because their assistance is required for the communication with clients.

Beyond that, many courts unfortunately start with the client agent/consultant analysis when considering privilege protection for lawyer agent/consultants. Although some courts are more protective, many courts protect only lawyers' agent/consultants who essentially act as translators or interpreters.[6] This does not make much sense, but is a widely applied approach. Lawyers' retainer letters with their agent/consultants should try to support this standard.

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[6] Fine v. ESPN, Inc., No. 5:12-CV-0836 (LEK/DEP), 2015 U.S. Dist. LEXIS 6870, at *324 (N.D.N.Y. May 28, 2015) (holding that a public relations firm hired by a law firm was outside privilege protection; noting that the privilege did not apply "[i]f public relations support is merely helpful, but not necessary to the provision of legal advice.").

Best Answer

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

Thomas E. Spahn, *Attorney Client Privilege and Work Product Doctrine: A Practitioner's Guide*, Chs. 8, 10, §§ 19.9, 19.11, 26.10, 26.11 (3rd ed. 2013).

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Privilege's Emphasis On Content

Hypothetical 15

You just sent an email to your client recounting verbatim your telephone conversation with the Assistant U.S. Attorney who is pursuing criminal charges against your client for selling defective products.

(a) Is your email protected by the attorney-client privilege?

NO

(b) Is your email protected by the work product doctrine?

YES

Analysis

(a) Because it is based on content, attorney-client privilege protection normally does not extend to a lawyer's relaying of third party's (especially an adversary's) communication. In those situations, lawyers act essentially as "conduits." Of course, the privilege might protect the lawyer's thoughts, impressions, accompanying advice, etc. about such a communication the lawyer relays to the client.

The privilege might also protect the entire communication to the extent that it implicitly reflects the lawyer's strategy, opinion about what was important enough to convey, etc. For instance, if a lawyer had an hour-long conversation with a government official but selected the most important points to convey, the lawyer's entire memorandum could arguably deserve privilege protection.

(b) Because it is based on context rather than content, the work product doctrine can plainly protect a document motivated by anticipated or ongoing litigation.

The key question often involves whether the document deserves fact work product protection or the higher level of protection given opinion work product. This issue can come up even if the lawyer communicates with a non-client third party, such as a stranger who just witnessed an auto accident. Those communications would never be privileged, but documents the lawyer generates after the communications might deserve fact or opinion work product. In courts protecting intangible work product, even the conversation itself can be protected.[7]

Some courts erroneously hold that a verbatim transcript of such a witness interview can never deserve opinion work product protection. However, this seems incorrect -- because such a verbatim transcript might reflect the lawyer's pointed and specific questions that would shed light on the lawyer's strategies, opinions, etc.

Best Answer

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

Thomas E. Spahn, *Attorney Client Privilege and Work Product Doctrine: A Practitioner's Guide*, §§ 15.3, 17.7, 40.6, 40.8 (3rd ed. 2013).

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[7] Lake Shore Radiator, Inc. v. Radiator Express Warehouse, Case No. 3:05-cv-1232-J-12MCR, 2007 U.S. Dist. LEXIS 19028, at *16 (M.D. Fla. Mar. 19, 2007) ("[d]iscovery seeking the specific questions asked by a party's agent during an investigation fall within the opinion work product doctrine and are thus, absolutely immune from discovery.").

Courts' Focus On Documents' "Four Corners"

Hypothetical 16

One of your client's vice presidents routinely copies you on her emails. To save time, the vice president does not explicitly ask for your advice about the emails' subject, but you know that by copying you she is seeking your legal advice.

Is a court likely to find that the privilege protects such emails?

NO (PROBABLY)

Analysis

Unfortunately, some overworked judges handling an increasing volume of withheld documents use a short cut in analyzing communications' "primary" purpose. These courts look for clients' explicit requests for legal advice in communications to lawyers. And many also look for explicit legal advice in lawyers' responses. This troublesome trend highlights the importance of training corporate employees to include in the body of their communications the reason for their reaching out to lawyers for legal advice.

And some courts take an apparently unrealistic view of lawyers' advice to clients -- so lawyers should emphasize the legal nature of their advice. For instance, in 2013 and early 2014 a magistrate judge and then the district court judge found that a Duane Morris lawyers' advice to a corporate client's HR employee was actually not legal advice -- because it did not include any case citations or references to law. Koumoulis v. Indep. Fin. Mktg. Grp., Inc., 29 F. Supp. 3d 142 (E.D.N.Y. 2014

Best Answer

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

Work Product "Litigation" Element

Hypothetical 17

Your client has asked you to help it prepare for a rate-making administrative hearing?

Will the work product doctrine protect materials your client prepares in connection with the hearing?

MAYBE

Analysis

The work product rule refers to "litigation" and "trial." However, courts examine administrative hearings determining whether they also amount to "litigation" for work product purposes.[8] The analysis normally examines the adversarial nature of the proceeding.

Of course, the attorney-client privilege might protect communications between lawyers and their clients about such proceedings.

Best Answer

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

Thomas E. Spahn, *Attorney Client Privilege and Work Product Doctrine: A Practitioner's Guide*, § 36.5 (3rd ed. 2013).

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[8] Pac. Gas & Elec. Co. v. United States, 69 Fed. Cl. 784 (Fed. Cl. 2006).

Work Product "Anticipation" Element

Hypothetical 18

You are working on a document production in a court where you were admitted pro hac, but had never appeared before. You are now reviewing documents your client's accountant prepared when the client thought litigation was likely, but not imminent.

Will the work product doctrine protect such documents?

MAYBE

Analysis

Ironically, there is more variation among federal courts applying the single work product rule sentence in the federal rules than there is attorney-client privilege. One of the greatest variations among courts applying the work product doctrine is the degree of anticipation required to assure the protection. The standard ranges from "imminent" to "some possibility" -- depending on the federal court.[9]

For companies contemporaneously documenting why they anticipate litigation, this can be troublesome -- the company probably will not know where the litigation might arise, and might therefore contemporaneously memorialize a sufficient standard. There is no excuse for making that mistake if a company is already in litigation. For instance, in 2009 GE submitted an affidavit supporting its work product claim -- but used an insufficient standard and lost its work product claim. Resurrection Healthcare v. GE

[9] U.S. Nutraceuticals LLC v. Cyanotech Corp., Case No. 5:12-cv-366-Oc-10PRL, 2014 U.S. Dist. LEXIS 22739, at *6 (M.D. Fla. Feb. 19, 2014) (noting that federal courts defining the required 'anticipation' element hold "that litigation need not be imminent, but rather a 'real possibility' at the time the documents in question are prepared." (citation omitted); Black & Veatch Corp. v. Aspen Ins. (UK) Ltd., 297 F.R.D. 611, 617-18 (D. Kan. 2014) (articulating two different and internally inconsistent standards in the same paragraph; (1) "there was real and substantial probability that litigation will occur at the time of the document's creation," and (2) "the threat of litigation must be 'real' and 'imminent.'" (citation omitted)).

Health Care, No. 07 C 5980, 2009 U.S. Dist. LEXIS 20562, at *5, *4 (N.D. Ill. Mar. 16, 2009).

Best Answer

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

Thomas E. Spahn, *Attorney Client Privilege and Work Product Doctrine: A Practitioner's Guide*, § 37.6 (3rd ed. 2013).

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Spoliation Risk

Hypothetical 19

You are considering withholding a document based on a work product claim, but your client just told you that it did not start preserving pertinent documents until about 18 months after it created that document.

Will claiming work product protection for that document risk a spoliation claim against your client?

YES

Analysis

In a logical but frightening development, some courts have equated the mental state justifying work product protection and the mental state requiring preservation of pertinent documents. This predictable correlation began in 2005 -- with a Southern District of New York case involving Sotheby's. Although the court ultimately did not find spoliation, it focused on the defendant Sotheby's privilege log to determine the earliest date on which Sotheby's anticipated litigation.

In 2014, the Federal Circuit looked at the defendant company's privilege log in upholding an adverse inference instruction against defendant (as well as a $16,000,000 verdict). Sanofi-Aventis Deutschland GMBH v. Glenmark Pharms, Inc., 748 F.3d 1354 (Fed. Cir. 2014). In early 2015, the Eastern District of Virginia also made this connection. Kettler Int'l, Inc. v. Starbucks Corp., Civ. A. No. 2:14cv189, 2015 U.S. Dist. LEXIS 45465 (E.D. Va. Apr. 7, 2015).

Best Answer

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

Thomas E. Spahn, *Attorney Client Privilege and Work Product Doctrine: A Practitioner's Guide*, § 37.9 (3rd ed. 2013).

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Work Product "Motivation" Element (External Requirement)

Hypothetical 20

Your client prepared some documents to comply with a government mandate to record each product failure.

Will the work product doctrine protect those documents?

NO (PROBABLY

Analysis

In addition to the "litigation" and "anticipation" work product element, litigants withholding work product must meet the equally important "motivation" element. Even in the midst of litigation, litigants (especially corporations) generate documents that do not deserve work product protection -- because they were not motivated by the litigation.

Circuit courts disagree about whether the work product doctrine protects only those documents that a litigant will use to "aid" or "assist" in litigation, or instead whether the protection extends to documents prepared "because of" the litigation even if they will not be used in the litigation. A good example of the distinction involves documents a company might generate while considering how it might pay for a possible large adverse judgment. Such documents will not be used in the litigation, but are clearly created "because of" the litigation.

Lawyers often remember the "ordinary course of business" standard. This helps the analysis, but is both under-inclusive and over-inclusive. Litigators' "ordinary course of business" is litigation, but the work product doctrine obviously can protect many of

their documents. And even documents prepared during extraordinary events might not deserve protection, although out of the ordinary.

A better test simply analyzes whether the litigants would have created the documents even if they had not anticipated litigation.[10] Documents a company would have prepared in the "ordinary course" of its business fail this test. Equally importantly, the work product doctrine generally does not protect documents created because of some external requirement. A company withholding such documents cannot establish that the documents would not have been prepared but for anticipated litigation.

In such situations, corporations claiming work product protection must show that the withheld documents are somehow different from what would normally be prepared in meeting the external requirement. This sometimes requires a parallel or successive investigation or assessment -- an expensive but sometimes necessary step to maximize possible work product protection.

Best Answer

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

Thomas E. Spahn, *Attorney Client Privilege and Work Product Doctrine: A Practitioner's Guide*, § 38.7 (3rd ed. 2013).

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[10] Wultz v. Bank of China Ltd., 304 F.R.D. 384 (S.D.N.Y. 2015) (in an opinion by Magistrate Judge Gorenstein, finding that a compliance-initiated investigation into a defendant's possible ties to terrorists did not deserve privilege or work product protection).

Work Product "Motivation" Element (Internal Requirement or Ordinary Course of Business)

Hypothetical 21

Working closely with you and your colleagues in the law department, your corporate client adopted an internal requirement that employees prepare an "incident report" after each industrial accident.

Will the work product doctrine protect these "incident reports"?

NO (PROBABLY)

Analysis

Just as documents required by an external mandate generally fail the work product "motivation" test, so do documents prepared because of some internal requirement. This is ironic, because it means that companies who are the most careful in requiring investigations of every accident, etc. are actually less likely to successfully withhold documents under the work product doctrine.

In many situations, companies undercut their own work product doctrine protection by issuing laudatory internal or external statements about their focus on safety, their desire to improve processes, etc. These types of statements tend to show that a company would have created the withheld documents even if the company had not anticipated litigation.[11]

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[11] Fine v. ESPN, Inc., No. 5:12-CV-0836 (LEK/DEP), 2015 U.S. Dist. LEXIS 68704, at *16, *19 (N.D.N.Y. May 28, 2015) (analyzing privilege and work product protection for non-party Syracuse University's investigation into possible child molestation by one of the University's coaches; explaining that the coach's wife had sued ESPN, then sought discovery from the University; concluding that the work product doctrine did not apply; "Even where a party clearly anticipated litigation at the time a document was created, the party asserting privilege still bears the burden of showing that the document would not have been produced in a similar form absent anticipated litigation."; "[W]hile the Jones Affidavit states that the University anticipated litigation at the time of the 2005 investigation . . ., it offers no evidence, nor

To obtain work product protection, corporations generally have to show that the withheld documents are somehow special, or different from the types of documents the corporations prepare when satisfying their internal requirements.

Best Answer

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

Thomas E. Spahn, *Attorney Client Privilege and Work Product Doctrine: A Practitioner's Guide*, § 38.8 (3rd ed. 2013).

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does the University claim now, that the documents produced during the investigation would not have been prepared in the same form absent the prospect of litigation . . . . The Jones Affidavit states that BSK frequently handled investigations into employee conduct for the University . . ., and that this particular investigation dealt with a sensitive matter . . ., but provides no indication that this investigation was conducted differently from other investigations into potential employee misconduct because of the prospect of litigation . . . . Therefore, Judge Peebles did not err in concluding that 'documents generated during the course of that investigation would have been prepared in the ordinary course of business irrespective of whether there was the potential for litigation.'" (internal citation omitted)).

"Sporck" Doctrine

Hypothetical 22

As you plan to prepare your corporate client's key witness for her deposition, you select a handful of the most important documents that you would like to review with her during your preparation session.

(a) If your adversary asks during the deposition, will you have to disclose the identity of those documents if you selected them from documents produced to the adversary?

NO (PROBABLY)

(b) If your adversary asks during the deposition, will you have to disclose the identity of those documents if you justifiably withheld the documents from production as privileged or protected work product?

MAYBE

Analysis

In some situations, the opinion work product doctrine can protect the identity of intrinsically unprotected documents, witnesses, facts, etc. This is frequently called the Sporck doctrine. Sporck v. Peil, 759 F.2d 312, 315 (3d Cir. 1985).

(a) There are two important elements to the Sporck doctrine.

First, intrinsically unprotected documents, witnesses, etc. must be equally available to the other side. For instance, a lawyer taking originals of pertinent documents (or even copies of those documents) from a third party's collection cannot claim opinion work product for the selection unless the adversary has equal access to those third party's documents.

Second, the selection must reflect the lawyer's or other client representative's opinion. For instance, a lawyer's selection of 80,000 documents out of a third party's 100,000 document collection normally would not deserve work product protection -- because such a wide selection does not really reflect any meaningful opinion. In contrast, a lawyer's selection of twenty-five documents out of 100,000 documents equally available to the other side probably would reflect opinion and therefore deserve Sporck doctrine protection.

Although courts disagree about this issue, most courts protect the identity of a handful of documents a lawyer shows a deposition witness in preparation for testimony. Some courts apply other imaginative approaches -- such as allowing a deposition witness to withhold a list of the documents she reviewed, but compelling the witness to indicate if she reviewed a document the adversary shows her during the deposition.

(b) Federal Rule of Evidence 612 can sometimes require disclosure of documents a witness reviews before testimony -- even if those documents intrinsically deserve privilege or work product protection. Not all states have adopted a parallel to Federal Rule of Evidence 612. Rule 612 requires disclosure of documents that a witness reviewed while testifying, if the documents have refreshed the witness's recollection.

The issues is more subtle if the witness reviews the documents before testifying. If such documents have refreshed the witness's recollection, courts can order disclosure of those documents if justice requires. Some courts essentially apply the same standard as they use for overcoming work product protection -- requiring disclosure if the adversary has substantial need to review the documents and cannot obtain a

substantial equivalent without undue hardship. Federal Rule of Evidence 612 amounts to a kind of implied waiver, because it does not involve the actual disclosure of privileged communications to an outsider.

Best Answer

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

Intangible Work Product

Hypothetical 23

After a fatal industrial accident on its offshore oil platform, your client appointed one of its senior engineers to investigate the accident's root cause. Acting on your advice, the engineer did not keep copies of her witness interview notes or even her report. You successfully asserted work product protection for those documents, but now the plaintiff has noticed the engineer's deposition -- intending to ask her about what the witnesses told her during her investigation.

Does the work product doctrine protect the engineer's oral communications with witnesses?

MAYBE

Analysis

On its face, the federal work product rule (and state parallels) protect only "documents and tangible things."

However, most courts recognize a parallel federal common law work product doctrine protection, arising from Hickman v. Taylor, 329 U.S. 495 (1947). This standard can protect intangible work product, such as oral communications.

In those courts that do not protect intangible work product, the results can be surprising and frightening.[12] For instance, a corporation's adversary might be permitted to depose a company investigator who has taken all of the necessary steps to protect her written reports. The adversary could simply ask an investigator what she found, what she concluded, what witnesses told her, etc.

And because corporations may not know where they will be sued, they may not know whether their intangible work product will be protected.

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[12] Ellis v. United States, Case No. 3:14-MC-00521-CWR-LRA, 2015 U.S. Dist. LEXIS 154464, at *21 (S.D. Miss. Nov. 16, 2015).

Best Answer

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

Thomas E. Spahn, *Attorney Client Privilege and Work Product Doctrine: A Practitioner's Guide*, § 39.2 (3rd ed. 2013).

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Privilege's Fragility

Hypothetical 24

Your client is trying to cooperate with a government investigation into possible defects with your client's best-selling product. You would like to cooperate, but worry about the waiver effect.

May you share privileged documents with the government without making them available to private plaintiffs?

NO

Analysis

Only a handful of courts have ever allowed companies to disclose privileged communications to the government without losing the privilege -- thus making the same documents available to private plaintiffs. Some special and specific statutes allow financial institutions to do that.

Several proposed rules and statutes would have allowed companies to selectively waive their privilege, but none of those have been successful. Federal Rule of Evidence 502 was originally designed to allow such selective waiver, but that proposal disappeared early in the drafting process.

However, corporations should recognize that they can share facts with the government without waiving any privilege protection -- because facts do not deserve privilege protection. In 2013, Southern District of New York Judge James Francis issued two opinions explaining how that principle works. In re Weatherford International Securities Litigation, No. 11 Civ. 1646 (LAK) (JCF), 2013 U.S. Dist. LEXIS 176278

(S.D.N.Y. Dec. 16, 2013]. In re Weatherford International Securities Litigation, No. 11 Civ. 1646 (LAK) (JCF), 2013 U.S. Dist. LEXIS 170559 (S.D.N.Y. Nov. 5, 2013],

Best Answer

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

Thomas E. Spahn, *Attorney Client Privilege and Work Product Doctrine: A Practitioner's Guide*, § 26.5 (3rd ed. 2013).

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Different Waiver Rules for the Attorney-Client Privilege and the Work Product Doctrine

Hypothetical 25

You prepared a memorandum describing the likely outcome of ongoing litigation, which to your dismay your client forwarded to her investment banker.

(a) Did your client waive the attorney-client privilege?

YES

(b) Did your client waive the work product doctrine?

NO

Analysis

(a) Disclosing privileged communications to an outsider like an investment banker waives that protection in nearly every court. Only a handful of states (such as Delaware) take a more forgiving view.

(b) Because the work product doctrine does not depend on confidentiality, it is much more robust than privilege protection. Among other things, this means that disclosing friendly work product to a third party does not automatically waive that protection. Work product's owners waive that protection only if they disclose work product to an adversary, or to a third party who might let the work product "fall into enemy hands."

In one instructive 1999 case, the Southern District of New York held that an investment banker's presence at a board meeting during otherwise privileged communications made the privilege unavailable. National Educ. Training Group, Inc. v.

Skillsoft Corp., No. M8-85 (WHP), 1999 U.S. Dist. LEXIS (S.D.N.Y. June 9, 1999). However, because the investment banker was nevertheless the corporation's "representative," the investment banker could actually create protected work product during the board meeting -- despite destroying any chance of privilege protection.

Because some communications can deserve both privilege and work product protection, it is always important to consider both. For instance, Martha Stewart lost her privilege protection when she disclosed to her own daughter a privileged email that she had earlier sent to her lawyer. But because the email also deserved work product protection (she created it in the midst of newspaper articles about her possible indictment, which came a year later), she did not waive that separate protection by disclosing the email to her daughter. United States v. Stewart, 287 F.Supp. 2d 461 (S.D.N.Y. 2003).

Other cases have reached the same conclusion when corporations have disclosed protected communications to friendly third parties. For instance, companies normally waive that privilege protection by disclosing privileged communications to their auditors, but do not waive work product protection.

Best Answer

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

Thomas E. Spahn, *Attorney Client Privilege and Work Product Doctrine: A Practitioner's Guide*, §§ 26.10, 47.5, 48.4 (3rd ed. 2013).

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Role of Confidentiality Agreements

Hypothetical 26

Your client asked you whether she can share one of your litigation analyses with her public relations firm -- as long as she insists that the public relations agency sign a strict confidentiality agreement.

(a) Will such a confidentiality agreement affect the privilege waiver analysis?

NO

(b) Will such a confidentiality agreement affect the work product waiver analysis?

YES

Analysis

(a) Given its fragility, confidentiality agreements are irrelevant when analyzing privilege waiver.[13]

(b) Confidentiality agreements or understandings are critical in analyzing work product waiver.[14]

Best Answers

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

Thomas E. Spahn, *Attorney Client Privilege and Work Product Doctrine: A Practitioner's Guide*, §§ 25.11, 48.4 (3rd ed. 2013).

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[13] Navajo Nation v. Peabody Holding Co., 209 F. Supp. 2d 269 (D.D.C. 2002); Adhesive Specialist Inc. v. Concept Scis. Inc., 59 Pa. D, & C.4th 244, 262 (C.P. Lehigh 2002) ("Under traditional waiver doctrine a voluntary disclosure to a third party waives the attorney-client privilege even if the third party agrees not to disclose the communications to anyone else.").

[14] United States v. Deloitte LLP, 610 F.3d 129, 141 (D.C. Cir. 2010).

Subject Matter Waiver Risk

Hypothetical 27

Although you worry about waiving your clients' attorney-client privilege and work product protections, you worry even more about a subject matter waiver -- which might require your client to disclose additional otherwise protected documents or communications.

(a) Will your client waive the subject matter waiver by relying on a privileged document in supporting a summary judgment motion?

YES

(b) Will your client waive the subject matter waiver by sharing your privileged (but not work product protected) email with its investment advisor?

NO

(c) Will your client waive the subject matter waiver by inadvertently producing a privileged or work product protected document during a hasty document production?

NO

(d) Will your client waive the subject matter waiver by designating as a trial exhibit one of ten accident scene pictures an investigator took after an industrial accident?

NO

Analysis

Introduction

The subject matter waiver doctrine rests on fairness -- requiring the privilege's owner to disclose all privileged communications on the same matter if the owner expressly or impliedly waives privilege protection by seeking some advantage.

Some courts traditionally misinterpreted the subject matter waiver doctrine, extending it far beyond its logical conclusion. For instance, D.C. courts traditionally applied the subject matter waiver doctrine even if a litigant accidentally produced a document in litigation -- requiring that litigant to disclose all other privileged communications on the same subject matter.

Courts eventually developed a common law doctrine that limited subject matter waiver to a litigant's disclosure of privileged communications to gain an advantage in a judicial setting. This is called a von Bulow doctrine, after a Second Circuit decision finding that Harvard Law School law professor Alan Dershowitz had not triggered a subject matter by disclosing in his book Reversal of Fortune his privileged communications with his socialite client Claus von Bulow. In re von Bulow, 828 F.2d 94 (2d Cir. 1987).

Federal Rule of Evidence 502 is has now codified that same approach. Under Rule 502, a litigant triggers a subject matter waiver only by disclosing privileged communications to paint a misleading picture in litigation. These developments have dramatically reduced the risk of subject matter waivers.

(a) Testimonial use of privileged communications presents the classic situation where a court normally will find a subject matter waiver.

(b) Disclosing privileged communications to a friendly third party generally will not trigger a subject matter waiver -- because it does not constitute the owner's effort to gain some advantage in litigation. Such use might cause a subject matter waiver if it is part of some implied waiver -- such as touting an investment bankers' approval in trying to avoid liability, etc.

(c) Rule 502 explicitly indicates that only the intentional disclosure of privileged communication can trigger a subject matter waiver -- thus eliminating that risk if there has been an inadvertent waiver. The common law von Bulow doctrine would take the same approach. If there is some question about whether a litigant has intentionally or inadvertently disclosed a privileged document in discovery, presumably the litigant can avoid a subject matter waiver by disclaiming any intent to rely on the document in the litigation.

(d) The subject matter waiver doctrine does not apply the same way to work product as it does to privileged communications. Litigants often prepare work product with the intention of using some or all of it in connection with discovery or at trial.

Thus, disclosure of work product and any resulting subject matter waiver usually involves a question of timing. Thus, litigants generally cannot be compelled to disclose their list of trial exhibits or witnesses at the very beginning of discovery, but must at some point disclose their intentions.

Although courts disagree about the exact contours of a subject matter waiver risk in the work product context, they all agree that the risk is much narrower than with privileged communications.

Best Answers

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

Thomas E. Spahn, *Attorney Client Privilege and Work Product Doctrine: A Practitioner's Guide*, Chs. 30, 50 (3rd ed. 2013).

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"At Issue" Doctrine

Hypothetical 28

Your corporate client sued its accounting firm for malpractice, alleging that its reliance on the accounting firm's advice about some transaction resulted in financial loss. The accounting firm has now discovered that your client also received advice about the same transaction from a law firm.

Will the court order your client to produce its privileged communications with the law firm about the transaction?

YES (PROBABLY)

Analysis

There are two kinds of waiver -- express and implied. An express waiver (either intentional or inadvertent) occurs with the actual disclosure of privileged communications. An implied waiver occurs without disclosure of a communications, but instead involves reliance on the communications.

An implied waiver can occur when a litigant explicitly mentions legal advice, lawyers, etc. For instance, clients impliedly waive their privilege when they sue lawyers for malpractice, or when they refuse to pay a lawyer's bill (thus allowing the lawyer to disclose privileged communications necessary to collect their fee). Another classic implied waiver occurs when a litigant relies on "advice of counsel" as a defense.

The most frightening kind of implied waiver is called the "at issue" doctrine. Such a waiver can occur without a client disclosing a privileged communication or explicitly relying on it.

For instance, under what is a Faragher-Ellerth doctrine, a litigant can impliedly waive the privilege by filing an affirmative defense to a hostile work environment work

case. The Faragher-Ellerth affirmative defense examines the company's reasonable investigation of a complaint about the work environment, and the company's reasonable remedial steps. A company filing such an affirmative defense cannot withhold documents generated during the investigation, even if a lawyer conducted the investigation. Court disagree about the exact nature of the "at issue" waiver in this setting, but they agree on the basic concept.

In an even more frightening scenario, a litigant can cause an "at issue" waiver simply by filing a claim or an affirmative defense. That step can trigger an "at issue" doctrine if the litigant affirmatively raises the issue, the issue is a central part of the case, the issue cannot be thoroughly explored without access to privileged communications.

This is sometimes called the Hearn doctrine, and can apply in several settings. For instance, litigants can cause an "at issue" waiver by affirmatively relying on their knowledge, their ignorance, their action or their inaction.

For instance, in 2008, the Southern District of New York held that a corporation caused an "at issue" doctrine by claiming that it relied on its accounting firm's advice in undertaking some transaction that resulted in a financial loss. Chin v. Rogoff & Co., P.C., No. 05 Civ. 8360 (NRB), 2008 U.S. Dist. LEXIS 38735 (S.D.N.Y. May 6, 2008). The court found the company had to disclose its otherwise privileged communications with the Akin Gump firm, because the company was also receiving advice about the transaction from those lawyers. The company had not explicitly disclosed any Akin Gump communications, relied on such communications in its complaint or even

mentioned Akin Gump in any of its pleadings. "At issue" waivers can be very troublesome, because they can be difficult to see coming.

Best Answer

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

Thomas E. Spahn, *Attorney Client Privilege and Work Product Doctrine: A Practitioner's Guide*, Ch. 29, § 48.11 (3rd ed. 2013).

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