LITIGATION CONFLICTS WITH NON-PARTY CLIENTS

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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Business Adversity

Hypothetical 1

You have developed a statewide reputation for representing retailers. Your largest client is a retailer, which sells clothing. You just received a call from your client's largest competitor. You are flattered that the competitor has called you, but you also worry that representing both retailers might create an inappropriate conflict of interest.

May you represent both retailers?

YES (PROBABLY)

Analysis

As a matter of ethics, nothing automatically prohibits a lawyer from representing business competitors. In fact, lawyers might justifiably believe that the expertise they gain in representing one company makes them better able to skillfully represent companies in the same business sector.

A comment to the ABA Model Rules explains that

> simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

ABA Model Rule 1.7 cmt. [6].

Although representing competing businesses does not trigger a per se conflict, lawyers might find themselves confronting a conflict if business adversity has become legal adversity.

> Direct adversity requires a conflict as to the legal rights and duties of the clients, not merely conflicting economic interests. For example, where a lawyer may have represented two clients in unrelated matters and both clients

> were in competition to sell foods to a third party, the representation of one of those clients in negotiating a sale to a third party would not constitute a violation of Rule 1.7(a). See Rule 1.7 cmt. 6. There may be direct adversity even though there is no overt confrontation between the clients, as, for example, where one client seeks the lawyer's advice as to his legal rights against another client whom the lawyer represents on a wholly unrelated matter. Thus, for example, a lawyer would be precluded by Rule 1.7(a) from advising a client as to his rights under a contract with another client of the lawyer, or as to whether the statute of limitations has run on potential claims against, or by, another client of the lawyer. Such conflict involves the legal rights and duties of the two clients vis-à-vis one another.

ABA LEO 434 (12/8/04) (emphasis added).

This risk dramatically increases in heavily regulated industries, where business competitors need some government approval to operate. For instance, in the healthcare world regulations often require a hospital to seek government approval to expand. A business competitor opposing such an expansion therefore has a legal forum in which the competitor can complain about the expansion. Such a dispute clearly involves legal adversity rather than business adversity.

The Restatement gives an example of this type of adversity.

> Lawyer has been retained by A and B, each a competitor for a single broadcast license, to assist each of them in obtaining the license from Agency. Such work often requires advocacy by the lawyer for an applicant before Agency. Lawyer's representation will have an adverse effect on both A and B as that term is used in this Section. Even though either A or B might obtain the license and thus arguably not have been adversely affected by the joint representation, Lawyer will have duties to A that restrict Lawyer's ability to urge B's application and vice versa. In most instances, informed consent of both A and B would not suffice to allow the dual representation.

Restatement (Third) of Law Governing Lawyers § 121 illus. 1 (2000).

Even in non-regulated industries, economic adversity can morph into legal adversity. A 2013 Philadelphia legal ethics opinion provided an example.

- Philadelphia LEO 2012-11 (1/2013) (concluding that a law firm's letter on behalf of one client to another firm client indicating that the first client's drug does not infringe on the second client's existing patent amounted to direct adversity, so the law firm could not send the letter without the client's consent; explaining the factual situation "The inquirer is a law firm which represents a client, Company A, in existing matters. Company A, a manufacturer of generic pharmaceuticals, has required that inquirer assist it in writing a Notice Letter to Company B, a brand company, that Company A's formulation of a generic version of an existing drug does not infringe on Company B's existing patent for that drug. Inquirer currently represents Company B and its wholly-owned subsidiary, Company C, in an unrelated litigation matter involving another product. Once the lawsuit has settled, the inquirer will terminate its representation of Company B and may continue to represent Company C from time to time on other generic products. The inquirer asks if it may represent Company A in writing the Notice Letter that Company A is required to send under the generic statute to Company B, setting forth the reasons for non-infringement of the existing patent."; "[T]he Committee finds that there is a conflict of interest which, absent consent from both clients and compliance with Rule 1.7(b)(1-3), precludes the inquirer from assisting Company A in preparing the Notice Letter. It should be noted that the inquirer must first ask Company A whether it is permissible to seek a waiver from Company B, as it is possible that seeking a waiver may disclose confidential information of Company A, in which case the inquirer must decline to undertake this representation before even asking for a waiver . . . unless Company A waives such confidentiality based upon informed consent as defined in Rule 1.0e. Furthermore, the inquirer is cautioned that in the event that Client B requests that the inquirer represent it in a suit or other proceeding relating to Client A's attempt to formulate a generic version of Client B's drug, the inquirer is similarly conflicted out of such a representation.").

Representing competing businesses carries other risks too. First, lawyers are taking a business risk if they represent the competitor of a jealous (and lucrative) client. Second, the lawyer's acquisition of confidential information from one of the clients could place the lawyer in a nearly untenable position. For instance, a lawyer learning that a client is about to engage in some important business venture obviously may not tell the client's competitor. But what if the competitor asks the client for advice about that

matter? The lawyer's silence could itself be telling, and possibly even violate the lawyer's confidentiality duties to the first client.

Best Answer

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

N 3/12; B 8/14; B 1/17

Adverse Financial Impact

Hypothetical 2

One of your largest clients has asked you to file an infringement action against a manufacturer which appears to be infringing your client's patent. If you succeed, you will stop that manufacturer from using your client's patent in its manufacturing process. You know that the manufacturer to be targeted by your planned infringement lawsuit sells most of its output to another of your law firm's large clients. That other client will suffer severe financial loss if it cannot purchase components from the defendant manufacturer because your lawsuit has shut down the manufacturer's production.

May you file the patent infringement action without your other client's consent?

YES (PROBABLY)

Analysis

It can be difficult to determine when economic adversity crosses the line into impermissible legal adversity which lawyers may undertake only with the confirmed client's consent.

ABA Model Rule 1.7 cmt. [6] defines the type of legal adversity that triggers the conflicts rules. That Comment states what should seem like an obvious proposition.

> [S]imultaneous representation in unrelated matters of clients whose interest are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respected clients.

ABA Model Rule 1.7 cmt. [6]. Thus, lawyers can represent competing businesses, as long as the representations involve only economic and not legal adversity. For instance, a lawyer might represent competing drug store chains. If one of the clients uses the lawyer's advice to improve labor relations interaction with its workers and thereby gains a competitive price advantage over its competitor, that does not involve

legal adversity -- even if that client gains market share and the other client loses money. In contrast, a lawyer could not represent one of the competing drug store chains in direct litigation or transactional adversity against the other (without both clients' consent). Similarly, a lawyer could not represent one client in objecting to the other client's rezoning application required to expand its store. And even behind the scenes, the lawyer could not (absent consent) give advice to one client about its rights vis-à-vis the other client.

In 2004, the ABA applied this general principle in a slightly different context but with the same result. ABA LEO 434 (12/8/04). In ABA LEO 434, a lawyer representing an insurance company began to represent another client adverse to the insurance company's insured in a matter totally unrelated to the lawyer's work for the insurance company. The ABA explained that such adverse financial impact did not amount to the type of legal adversity requiring consents.

> Direct adverseness requires a conflict as to the legal rights and duties of the clients, not merely conflicting economic interests. . . . There may be direct adverseness even though there is no overt confrontation between the clients, as, for example, where one client seeks the lawyer's advice as to his legal rights against another client whom lawyer represents on a wholly unrelated matter. Thus, for example, a lawyer would be precluded by Rule 1.7(a) from advising a client as to his rights under a contract with another client of the lawyer, or as to whether the statute of limitations has run on potential claims against, or by, another client of the lawyer. Such conflicts involve the legal rights and duties of the two clients vis-à-vis one another.

Id. (emphasis added; footnote omitted). The ABA acknowledged that the lawyer might be prohibited from taking discovery of the insurance company client, depending upon the adverseness involved. The ABA also noted that the lawyer might be unable to

represent the litigation client if the lawyer had protected information from the insurance company client that "would materially help the plaintiff in his claims against the insured defendant."

Although it may be difficult to draw the line, this general approach makes sense. Otherwise, lawyers representing clients would have to conduct an exhaustive and nearly endless Palsgraf-type [Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928)] analysis of a representation's possible implications. A lawyer representing a shopping center suing an anchor client for back rent might cause the anchor client to pull out of the shopping center or go bankrupt – which might cause a smaller shopping center client to lose money or itself go out of business. Can the lawyer undertake that representation without running conflicts checks naming all of the other shopping center tenants, and obtaining consents from any tenants the lawyer represents on unrelated matters? In the transactional world, a lawyer might represent an innovative product manufacturer in negotiating a lucrative and exclusive agreement with one retailer to sell the product. That arrangement would result in competing retailers losing marketing share and therefore suffering financial loss. Can the lawyer undertake that transactional work without checking for conflicts with all other competing retailers? And if it looks like some of those competing retailers might go out of business because of the exclusive arrangement negotiated by the lawyer, does the lawyer have to check for conflicts with shopping centers clients that might lose money or even go bankrupt because one of the competing retailers goes out of business and cannot pay its rent to those shopping centers.

There are endless ways in which a lawyer's representation of one client in litigation or transactional matters might adversely affect the finances of other clients the lawyer represents on unrelated matters. Most bars and courts do not consider such financial adversity to implicate the conflicts rules. Of course, lawyers may consider business and client-relations factors when deciding to undertake representations that might have some financial ripple effect.

A 2016 New York legal ethics opinion adopted this standard approach in the context of adversity to former clients.

- New York LEO 1103 (7/15/16) (analyzing the following situation: "Corporation A and Corporation B are competitors. They are engaged in the same industry, in the same geographic area, providing similar services to the same customer base. The inquirer previously represented Corporation A in a matter that has been concluded ('Matter 1'). The inquirer now proposes to represent Corporation B in litigation with Corporation X ('Matter 2'). The inquirer states, and we assume for purposes of this opinion, that Matter 1 and Matter 2 are not factually related. However, if Corporation B is unsuccessful in this suit, it might be forced to cease operations, which would benefit Corporation A."; finding that such adverse economic interest did not create a conflict; "The mere circumstances that the current representation may involve legal issues that were also involved in the Litigation does not make the matters substantially related. Interpretations of the ethical rules have long distinguished between conflicts involving the same matter and conflicts involving the same legal issue. Such 'issue' (or 'positional') conflicts tend to be more problematic in the case of concurrent representation than in the case of former representation. Even as to concurrent representation, a lawyer may ordinarily 'take inconsistent legal positions in different tribunals at different tribunals at different times on behalf of different client,' although there can be circumstances in which an issue conflict arises because 'there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's representation of another client in a different case.'"; "The fact that the current client and the former client have competing economic interests does not create a conflict of interest under Rule 1.9(a). Even if Corporations A and B were both current clients of the inquirer, their economic competition would not prohibit the inquirer from representing both of them."; "Nevertheless, it is worth noting that Corporation B's interests in Matter 2 would not be materially adverse to the interests of Corporation A under Rule 1.9. Just as competing economic interests do not create 'differing interests'

> within the meaning of Rule 1.7(a)(1), so they do not create a 'materially adverse' interest within the meaning of Rule 1.9(a). Here, the fact that Corporation A will benefit if Corporation B is unsuccessful in Matter 2 (because Corporation B is likely to be forced to go out of business if it loses, thus eliminating a competitor), does not create a materially adverse interest under Rule 1.9(a). That would stretch the meaning of 'materially adverse' too far."; "Where an attorney had previously represented Corporation A, the attorney may undertake the representation of Corporation B in litigation unrelated to the attorney's representation Corporation A, notwithstanding that the two corporations are competitors in the same industry and that Corporation B's failure in the litigation would indirectly benefit Corporation A by eliminating a competitor. Corporation A's bringing suit against Corporation B in a matter unrelated to the attorney's prior representation of Corporation A is similarly not barred by Rule 1.9(a).") (emphasis added).

Two patent-related decisions decided about a year apart addressed the ethics implication of a law firm representing one client in a matter that might financially affect another firm client who is not involved in the legal dispute.

In late 2014, the Federal Circuit surprisingly disqualified Jones Day from handling a patent infringement case against a defendant which sold parts to Apple – another Jones Day client.

- Celgard LLC v. LG Chem, Ltd., 594 F. App'x 669, 671, 672 (Fed. Cir. Dec. 10, 2014) (disqualifying Jones Day from representing a patent infringement plaintiff in seeking a ruling that would damage one of the other Jones Day's clients; "We agree with Apple that Jones Day's conflicting representation here requires disqualification under the applicable legal standard"; "Rule 1.7(a), which governs concurrent conflicts of interest, prohibits representation when such representation 'will be directly adverse to another client[.]' N.C. Rule of Prof'l Conduct 1.7(a). Because Jones Day's representation here is 'directly adverse' to the interests and legal obligations of Apple, and is not merely adverse in an 'economic sense,' the duty of loyalty protects Apple from further representation of Celgard." (emphasis added); "Apple faces not only the possibility of finding a new battery supplier, but also additional targeting by Celgard in an attempt to use the injunction issue as leverage in negotiating a business relationship. Thus, in every relevant sense, Jones Day's representation of Celgard is adverse to Apple's interests." (emphasis added); "This conclusion is not altered by the fact the Apple is not named as a defendant in this action. The rules and cases such as Freedom Wireless [Freedom Wireless, Inc. v. Boston Commc'ns Grp., Inc., Nos. 2006-1020,

> 2006 U.S. App. LEXIS 32797 (Fed. Cir. Mar. 20, 2006)] interpreting them make clear it is the total context, and not whether a party is named in a lawsuit, that controls whether the adversity is sufficient to warrant disqualification." (emphasis added); "As evidenced by Jones Day's attempts to limit the nature of the representation, Jones Day and Celgard clearly knew the potential for conflict here yet elected to continue with the representation. See [opposition brief] at 4 ('Jones Day explained that it could represent Celgard against LG Chem, but not against customers of LG Chem who were also Jones Day clients -- such as Apple.'). Thus, the legal costs and delay in proceedings that may result from a disqualification are attributable in no small way to Celgard and Jones Day themselves.").

Some commentary at the time surmised that Jones Day's client was planning to parlay a victory in this patent infringement case into a direct action against Apple itself. Of course, Jones Day could not have handled that follow-on case. But perhaps the court worried that Jones Day was essentially creating a litigation template that its client could use against Jones Day's other client Apple.

A year later, the Massachusetts Supreme Court dismissed a malpractice action against Finnegan Henderson. The Massachusetts Supreme Court held that Finnegan Henderson had not committed malpractice by assisting a business competitor of another firm client – because the two competitors were not legal adversaries.

- Maling v. Finnegan, Henderson, Farabow, Garrett & Dunner, LLP, 42 N.E.3d 199, 200, 203, 204, 204-05, 205, 205-06, 206, 207 (Mass. 2015) (dismissing a malpractice case against the Finnegan Henderson patent case filed by a client who claimed that the law firm had improperly assisted one of its competitors in prosecuting a patent for a competing product; "In this case we consider whether an actionable conflict of interest arises under Mass. R. Prof. C. 1.7 . . . when attorneys in different offices of the same law firm simultaneously represent business competitors in prosecuting patents on similar inventions, without informing them or obtaining their consent to the simultaneous representation." (emphasis added); "Maling and Masunaga were not adversaries in the traditional sense, as they did not appear on opposite sides of litigation. Rather, they each appeared before the USPTO in separate proceedings to seek patents for their respective screwless eyeglass devices." (emphasis added); "Maling contends, however, that he and Masunaga were directly adverse within the meaning of rule 1.7(a)

(1) because they were competing in the 'same patent space.' We disagree that the meaning of 'directly adverse' stretches so far." (emphasis added); "Finnegan's representation of Maling and Masunaga is analogous to that undertaken by the law firm in Curtis [Curtis v. Radio Representatives, Inc., 696 F. Supp. 729 (D.D.C. 1988)]. Finnegan represented two clients competing in the screwless eyeglass device market in proceedings before the USPTO. As Maling acknowledges, Finnegan was able to successfully to obtain patents from the USPTO for both his device and Masunaga's in the same way that the law firm Curtis was able to obtain radio broadcast licenses for each of its clients from the FCC. Maling and Masunaga were not competing for the same patent, but rather different patents for similar devices."; "If the USPTO had called an interference proceeding to resolve conflicting claims in the Maling and Masunaga patent applications, or if Finnegan, acting as a reasonable patent attorney, believed such a proceeding was likely, the legal rights of the parties would have been in conflict, as only one inventor can prevail in an interference proceeding. In such a case, rule 1.7 would have obliged Finnegan to disclose the conflict and obtain consent from both clients or withdraw from representation."; "Maling's conclusory allegations as to the high degree of similarity between his device and Masunaga device are contradicted by his acknowledgment elsewhere in the complaint that patents issued for both his applications and the Masunaga applications."; "Maling's allegations do not permit any inference as to whether the similarities between the inventions at the time Finnegan was retained to prepare and prosecute Maling's patent applications were of such a degree that Finnegan should have reasonably foreseen the potential for an interference proceeding. Maling's conclusory statement that the inventions were very similar is precisely the type of legal conclusion that we do not credit. . . . Moreover, Maling makes no allegations that an interference proceeding was instituted, nor has he alleged facts supporting the inference that Finnegan took positions adverse to Maling and favorable to Masunaga in the prosecution of their respective patents." (footnote omitted); "We also recognize that subject matter conflicts can give rise to conflicts of interest under rule 1.7 (a)(1) in nonlitigation contexts."; "Here, such a conflict likely arose in 2008 when Maling sought a legal opinion from Finnegan regarding the likelihood that he might be exposed to claims by Masunaga for patent infringement. Finnegan declined to provide the opinion, and Maling alleges that he lost financing as a result. Providing the opinion arguably would have rendered the interests of Maling and Masunaga 'directly adverse' within the meaning of rule 1.7(a)(1), and either declining representation or disclosing the conflict and obtaining consent would have been the proper course of action. But there is no allegation that Finnegan had agreed to provide such opinions in its engagement to prosecute Maling's patents. Without such a claim, we cannot conclude that a conflict based on direct adversity has been adequately alleged." (footnote omitted); "In his complaint, Maling alleges in conclusory terms that Finnegan was unable to protect both his interests and Masunaga's

> and ultimately chose to protect Masunaga at his expense in the patent prosecution process. In Maling's view, Finnegan 'pulled its punches' and got more for Masunaga that for Maling before the USPTO. He has failed, however, to allege sufficient facts to support such a proposition."; "Finnegan's subsequent inability or unwillingness to provide a legal opinion regarding the similarities between the Maling and Masunaga inventions also raises a question whether the simultaneous representation 'foreclose[d] [a] course[] of action' that should have been pursued on Maling's behalf. . . . As previously discussed, rendering such an opinion would likely have created a direct conflict between Maling and Masunaga in violation of rule 1.7(a)(1). To the extent that such a conflict was foreseeable, because, as Maling alleges, the Masunaga and Maling inventions were so similar, it is possible that Finnegan should have declined to represent Maling from the outset of his case so as to also avoid a violation of rule 1.7(a)(2). This, however, depends in large measure on the nature of Finnegan's engagement by Maling in 2003.").

Although the Finnegan decision contains several provisos and potential limitations, its basic theme is consistent with the majority view -- which distinguishes between permissible financial adversity and impermissible legal adversity.

To be sure, at some point, that client-relations impact or some other interest might trigger what is sometimes called a "rheostat" conflict under ABA Model Rule 1.7(a)(2). That provision recognizes that a lawyer faces a conflict of interest if

> there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

ABA Model Rule 1.7(a)(2). But absent such an extreme example, lawyers can represent their clients even if the representation might have an adverse financial impact on clients the lawyer represents on unrelated matters.

Best Answer

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

B 1/17

Other Adverse Impact

Hypothetical 3

You are defending a nursing home in a lawsuit brought by a software company. You determine that your best defense might be to blame the software company's recently deceased president for incompetence. You don't intend to counterclaim against the company. However, you just received a call from the president's widow, whom one of your partners is representing in selling her house. The widow claims that your litigation strategy creates a conflict, because it would embarrass her.

Is your litigation strategy "adverse" to the widow for conflicts purposes (thus requiring her consent)?

NO (PROBABLY)

Analysis

In this scenario, the "adverse" impact on your firm's other client is reputational rather than monetary. Very few courts or bars have advised where to draw the line in settings like this, but it would seem that the conflicts rules would be triggered only by more direct adversity.

This situation might also trigger what is called a "rheostat" conflict under ABA Model Rule 1.7(a)(2). That rule recognizes that a lawyer faces a conflict of interest if

> there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

ABA Model Rule 1.7(a)(2).

In 2004, the Washington, D.C., Bar dealt with another common scenario which sometimes perplexes lawyers -- may a lawyer who must turn down a matter because of a conflict recommend another lawyer to handle that matter? The D.C. Bar permitted such a step, undoubtedly to the relief of many lawyers.

- District of Columbia LEO 326 (12/2004) (analyzing the following question: "When a lawyer is approached by a potential client about a representation adverse to an existing client, after declining the case, the lawyer may refer the potential client to another lawyer."; ultimately concluding that the lawyer may provide such references; noting that under Rule 4.3, a lawyer may provide the advice to "secure counsel" to an unrepresented person; explaining that "[r]ecommending that an adverse person retain counsel does not constitute damage or prejudice to a client within the meaning of Rule 1.3(a)."; "First, the person would almost certainly find a lawyer even in the absence of a recommendation. Second, it would be mere speculation to conclude that the lawyer that the person might find on his own would not be as competent as the one recommended by the conflicted lawyer. The lawyer could be as good, better, or not as good as the one that the conflicted lawyer might recommend. Moreover, we cannot assume that it is disadvantageous to the referring lawyer's existing client for its adversary to be represented by competent counsel. Competent opposing counsel is likely in many cases to contribute to reaching a reasonable resolution of the dispute."; also noting the practical consequences that the lawyer might want to consider; "Moreover, a prudent lawyer who elects to make a recommendation might be wiser to suggest more than one name to avoid recriminations from the inquirer, should the recommended lawyer provide unsatisfactory, or from her client, should the recommended lawyer turn out to be vexatious.").

Best Answer

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

B 1/17

Positional Adversity

Hypothetical 4

You have represented a bank for several years. It is not your largest client, but has been a steady source of business. On behalf of that client, you normally argue that a particular state statute does not allow a certain type of claim against banks. One of your partners just received a call from a potentially lucrative new corporate client, which is in the midst of litigation with another bank that you have never represented. In that litigation, the company wants to take the position that the state statute does allow such a claim against banks.

May you represent the corporate client in asserting its position on the meaning of the statute (without your bank client's consent)?

YES (PROBABLY)

Analysis

As a profession, lawyers seem to have no trouble taking internally inconsistent positions -- as when they file alternative pleadings.

Most courts and bars follow this same approach when dealing with what is called "positional adversity." The ABA Model Rules formerly recognized a bright-line rule under which it "is ordinarily not improper to assert such [antagonistic] positions in cases pending in different trial courts, but . . . may be improper to do so in cases pending at the same time in an appellate court." Ethics 2000 changes adopted a more subtle approach.

> Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client

> in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

ABA Model Rule 1.7 cmt. [24].

The Restatement takes the same approach.

- Restatement (Third) of Law Governing Lawyers § 128 cmt. f (2000) (explaining that lawyers "ordinarily may take inconsistent legal positions in different courts at different times," but warning that lawyers may face an ethics issue if this approach will materially and adversely affect another client). In Illustration 5, the Restatement indicates that a lawyer may (without the client's consent) argue in one federal district court case that evidence is admissible, while arguing in another federal district court case that similar evidence is inadmissible, "[e]ven if there is some possibility that one court's ruling might be published and cited as authority in the other proceeding.").

Nationally, bars generally take the same approach.

In 2016, New York issued a legal ethics opinion adopting this majority view earlier espoused by the Massachusetts Supreme Court.

- New York LEO 1103 (7/15/16) (analyzing the following situation: "Corporation A and Corporation B are competitors. They are engaged in the same industry, in the same geographic area, providing similar services to the same customer base. The inquirer previously represented Corporation A in a matter that has been concluded ('Matter 1'). The inquirer now proposes to represent Corporation B in litigation with Corporation X ('Matter 2'). The inquirer states, and we assume for purposes of this opinion, that Matter 1 and Matter 2 are not factually related. However, if Corporation B is unsuccessful in this suit, it might be forced to cease operations, which would benefit Corporation A."; finding that such adverse economic interest did not create a conflict; "The mere circumstances that the current representation may involve

legal issues that were also involved in the Litigation does not make the matters substantially related. Interpretations of the ethical rules have long distinguished between conflicts involving the same matter and conflicts involving the same legal issue. Such 'issue' (or 'positional') conflicts tend to be more problematic in the case of concurrent representation than in the case of former representation. Even as to concurrent representation, a lawyer may ordinarily 'take inconsistent legal positions in different tribunals at different tribunals at different times on behalf of different client,' although there can be circumstances in which an issue conflict arises because 'there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's representation of another client in a different case.'" (emphasis added); "The fact that the current client and the former client have competing economic interests does not create a conflict of interest under Rule 1.9(a). Even if Corporations A and B were both current clients of the inquirer, their economic competition would not prohibit the inquirer from representing both of them."; "Nevertheless, it is worth noting that Corporation B's interests in Matter 2 would not be materially adverse to the interests of Corporation A under Rule 1.9. Just as competing economic interests do not create 'differing interests' within the meaning of Rule 1.7(a)(1), so they do not create a 'materially adverse' interest within the meaning of Rule 1.9(a). Here, the fact that Corporation A will benefit if Corporation B is unsuccessful in Matter 2 (because Corporation B is likely to be forced to go out of business if it loses, thus eliminating a competitor), does not create a materially adverse interest under Rule 1.9(a). That would stretch the meaning of 'materially adverse' too far."; "Where an attorney had previously represented Corporation A, the attorney may undertake the representation of Corporation B in litigation unrelated to the attorney's representation Corporation A, notwithstanding that the two corporations are competitors in the same industry and that Corporation B's failure in the litigation would indirectly benefit Corporation A by eliminating a competitor. Corporation A's bringing suit against Corporation B in a matter unrelated to the attorney's prior representation of Corporation A is similarly not barred by Rule 1.9(a).").

- District of Columbia LEO 265 (4/17/96) (rejecting an analysis based on "formalities," and instead focusing on a number of factors, "such as: (1) the relationship between the two forums in which the two representations will occur; (2) the centrality in each matter of the legal issue as to which the lawyer will be asked to advocate; (3) the directness of the adversity between the positions on the legal issue of the two clients; (4) the extent to which the clients may be in a race to obtain the first ruling on a question of law that is not well settled; and (5) whether a reasonable observer would conclude that the lawyer would be likely to hesitate in either of her representations or to be less aggressive on one client's behalf because of the other representation. In sum, we believe that the focus of the analysis ought not to be on formalities

but should be on the actual harm that may befall one or both clients") (footnote omitted).

- California LEO 1989-108 (explaining that a lawyer may represent two clients in arguing "opposite sides of the same legal question before the same judge," although warning that "prudent" lawyers will make whatever disclosure the confidentiality rules allow, and obtain both clients' consent before doing so).

A 2016 federal court decision cited ABA Model Rule 1.7 cmt. [24] in declining to disqualify Proskauer Rose.

- Steelworkers Pension Tr. v. Renco Grp., Inc., C.A. No. 16-190, 2016 U.S. Dist. LEXIS 88001, at *19-20 (W.D. Pa. July 7, 2016) (declining to disqualify Proskauer Rose based on the indication that the law firm would be taking position in the current representation that could hurt its other clients; "Based on our review of the record and the arguments of counsel, as well as the factors set forth in Comment 24 of the ABA Model Rules of Professional Conduct, SPT has not met its burden and identified any lawsuit that Proskauer is presently handling in which its clients' interests would be adversely affected if Renco prevailed on its argument as to the effect of the filing of a proof of claim or an 'evade or avoid' theory in these particular circumstances. None of the nine lawsuits revealed by Proskauer were filed within the Third Circuit and none involve a contention that defendant has waived its defenses by virtue of having to failed to assert the defenses in a timely fashion after receipt of proof(s) of claim in bankruptcy. None of the lawsuits involves the adequacy of a withdrawal liability notice at all." (footnote omitted)).

As explained above, the ABA Model Rules formerly prohibited lawyers from taking different positions before the same appellate court at the same time. The Restatement similarly indicates that a lawyer may not (even with consent) take different positions on the legal issue if both cases have been accepted for argument in the United States Supreme Court. Restatement (Third) of Law Governing Lawyers § 128 illus. 6.

A 2012 article describes an incident involving this issue.

- Tony Mauro, Roberts takes SG's office to task over shifting positions, Nat'l L. J., Nov. 27, 2012 ("Chief Justice John Roberts Jr. scolded a Justice Department lawyer in open court Tuesday, accusing the solicitor general's

office of being less than candid in a brief describing the government's change in position on an issue before the court."; "The rare episode seemed to be a deliberate effort by Roberts to send a message to the solicitor general's office that it may be giving too-short shrift to the tradition of continuity between administrations that the court is accustomed to seeing. Solicitor General Donald Verrilli Jr. was in the courtroom and saw the unusual exchange."; "During routine arguments in an ERISA health insurance case titled US Airways v. McCutchen, Roberts zeroed in on footnote 9 in the government's brief, which described a position taken in previous ERISA cases by Bush Administration Secretary of Labor Elaine Chao and then stated that 'upon further reflection . . . the Secretary is now of [a different] view.'"; "Roberts said angrily, 'That is not the reason. It wasn't further reflection. We have a new secretary under a new administration, right?' He was referring to Obama administration labor secretary Hilda Solis."; "Joseph Palmore, the assistant to the solicitor general arguing in the case, agreed, and Roberts continued, 'It would be more candid for your office to tell us when there is a change in position that it's not based on further reflection of the secretary. It's not that the secretary is 'now of the view;' there has been a change. We are seeing a lot of that lately.'"; "When Palmore interjected that the law had changed in the last decade, Roberts replied, 'Then tell us the law has changed. Don't say the secretary is now of the view. It's not the same person. You cite the prior secretary by name, and then you say, the secretary is now of the view. I found that a little disingenuous.'"; "Palmore said, 'Well, I apologize for that,' and soon the discussion turned to other aspects of the case.").

Best Answer

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

B 1/17

Discovery of Clients

Hypothetical 5

A new associate is preparing a number of third party subpoenas that you will have to issue in a commercial case. He just called to ask a few questions.

(a) Absent consent, may you issue a subpoena to another firm client (which your firm represents on unrelated matters) when you expect a dispute over the discovery you seek?

NO

(b) Absent consent, may you issue a subpoena to a bank (which your firm represents on unrelated matters), when there is no reason to think that the bank would resist or dispute the subpoena?

NO (PROBABLY)

Analysis

(a) - (b) Bars and courts have addressed the adversarial nature of lawyers' pursuit on behalf of one client of discovery from another client the lawyer represents in unrelated matters.

A comment to the ABA Model Rules explains that

> a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit.

ABA Model Rule 1.7 cmt. [6]. Seeking discovery from a client does not initially involve the type of acute adversity presented by deposition or trial cross-examination, but it similarly invokes legal compulsion against a client – which puts the client at legal risk if

the client does not comply, and which might escalate into acute cross-examination adversity (or perhaps even worse).

The ABA indicated in ABA LEO 367 (10/16/92) that a lawyer generally may not cross-examine or conduct discovery of a firm client, even if the cross-examination is unrelated to the representation of that client. The ABA suggested that co-counsel may conduct such discovery.

- ABA LEO 367 (10/16/92) ("The Committee concludes that a lawyer's examining the lawyer's client as an adverse witness, or conducting third party discovery of a client, will ordinarily present a conflict of interest that is disqualifying absent consent of one or both of the clients involved (depending . . . on the nature and degree of the conflict)."; a witness would be considered a current client for conflicts purposes "if there is a continuing relationship between lawyer and client, even if the lawyer is not on a retainer, and even if no active matters are being handled"; a lawyer in that situation could face a conflict if the lawyer has "specific confidential information relevant to the cross-examination," or even if the lawyer only has general information -- "to the extent a lawyer's general familiarity with how a client's mind works is relevant and useful information, it may also be disqualifying information within the contemplation of Rule 1.8(b), which generally prohibits a lawyer from using information relating to the representation of a client to the disadvantage of the client unless the client consents after consultation"; in a situation where the lawyer is called upon to cross-examine a doctor client who is acting as the adversary's expert witness, "there will almost inescapably be a direct adverseness," thus requiring the doctor's consent to handle the cross-examination; "In some instances, a sufficient solution may be to provide for other counsel, also representing the litigation counsel, to deal with the client-witness: where local counsel as well as principal counsel are involved in a litigation, the disqualification applying to one of these will not ordinarily affect the other. In other circumstances, a satisfactory solution may be the retention of another lawyer solely for the purpose of examining the principal lawyer's client." (footnote omitted)).

One state bar took the same approach.

- California LEO 2011-182 (2011) ("When an attorney discovers at the outset of representation that the attorney must serve a discovery subpoena for production of documents on another current client of the attorney or the attorney's law firm, serving the discovery subpoena is an adverse action such that a concurrent client conflict of interest arises. To represent a client who

seeks to serve such a subpoena, the attorney must seek informed written consent from each client, disclosing the relevant circumstances and the actual and reasonably foreseeable adverse consequences to the client providing consent."; "Having defined 'adverse' as 'potential injury,' we are led to the conclusion that serving any type of third-party discovery on a current client is adverse and would violate an attorney's duty of loyalty. . . . '[D]iscovery *is* coercion' since it entails bringing '[t]he force of law . . . upon a person to turn over certain documents.' . . . Second, propounding discovery on an existing client may affect the quality of an attorney's services to the client seeking the discovery, resulting in a diminution in the vigor of the attorney's discovery demands or enforcement effort. In addition, it is possible the documents sought could expose the client from whom discovery is being sought to claims from the client serving the discovery. Therefore, we conclude that Attorney's service of a document subpoena on Witness Client would be an action adverse to Witness Client's interests, and as a result such service would be prohibited absent proper consent." (emphasis added); explaining that the lawyer may obtain consent to engage in a discovery if both clients provide consent after full disclosure)).

One court took the inexplicable position that arranging for a subpoena to be served on a client did not amount to adversity sufficient to trigger a conflict, but that filing a motion to compel met that standard.

- In re Suard Barge Servs., Inc., Civ. A. No. 96-3185 &-3655, 97-0084 & -1519 SECTION "R" (1), 1997 U.S. Dist. LEXIS 12364, at *4, *11, *12-13 (E.D. La. Aug. 14, 1997) (holding that a lawyer's third party subpoena for documents to another client was "not directly adverse" to that client, but that the lawyer's later motion to compel and for sanctions amount to the kind of adversity that required the client's consent; "Best [lawyer] subpoenaed Gray [other lawyer client] in the instant litigation, seeking records concerning an earlier, similar accident aboard the same barge when it was owned by GIS [defendant's previous owner]. Although Gray initially permitted Best to review all of the subpoenaed records, it later refused to furnish copies of all records. Best then filed a motion to compel against Gray in this Court, in which he argued that Gray was in contempt of court for refusal to comply with the subpoena and he requested sanctions, attorney's fees and costs."; "GIS and Gray moved to disqualify Best from representing Windham [claimant] because Best allegedly represented Gray in an unrelated matter at the same time as he was representing Windham, and therefore has a conflict of interest, which Gray declines to waive."; "I find insufficient evidence to establish that Best's subpoena was 'directly adverse' to Gray."; "I do not find that the subpoena itself was 'directly adverse to Gray's interests. However, I find that

> Windham's motion to compel and for sanctions, filed while Best represented both Windham and Gray, was directly adverse to Gray.").

Given what seems to be the majority logical conclusion that conducting discovery of a client is legal adversity, an obvious question arises: what can a lawyer do in that situation? It is one thing if the lawyer foresees that a matter will involve discovery of important law firm clients – the lawyer might turn down that representation. But the need to discover third parties can arise at any time.

As explained above, ABA LEO 367 (10/16/92) suggested that a lawyer can arrange for another law firm to handle the discovery of one of the lawyer's clients if the lawyer herself could not undertake such a cross-examination.

At least one court has found the use of such co-counsel (often called "conflicts counsel") acceptable in the context of discovery.

- Wal-Mart Stores, Inc. v. Vidalakis, Case No. 07-0039, 2007 U.S. Dist. LEXIS 99356, at *5-6, *12, *13-14, *14-15, *15 (W.D. Ark. Dec. 17, 2007) (analyzing a situation in which defendants served a subpoena on non-party Wal-Mart and some of its employees in an action in which Wal-Mart might ultimately be accused of conspiring with plaintiffs in a property issue; considering Wal-Mart a current client of defendants' law firm even though Wal-Mart admitted firing the law firm before moving to disqualify it from handling the discovery against Wal-Mart; ultimately declining to disqualify the firm, but instead allowing it to arrange for co-counsel to handle a discovery dispute with Wal-Mart; "Wal-Mart contends that the Calfee firm should be disqualified from representing the Defendants due to their long-standing attorney-client relationship with Wal-Mart. It alleges that since 2001, Wal-Mart has retained the Columbus office of the Calfee firm to assist them with regard to at least seventy-eight legal matters, seventy-seven of which are environmental or real estate related cases. Although Wal-Mart is not a party to the present litigation, it contends that the Defendants have insinuated that Wal-Mart might have conspired with the Plaintiff regarding this matter. While Wal-Mart admits that it had severed its relationship with the Calfee firm just prior to filing this motion, it contends that it was a current client of the Calfee firm at the time the discovery requests were served. As such, it is Wal-Mart's position that the Calfee firm is representing clients whose interests are directly adverse to one another and that Rule 1.7 of the Arkansas Model Rules of Professional Conduct applies to

this matter."; "Although we find no present direct adversity, balancing the interest of all parties involved, we believe that the use of outside independent counsel to handle the depositions, discovery exchange, and all trial issues involving Wal-Mart is the most reasonable solution. As pointed out by the Defendants, the American Bar Association has recognized and approved the use of local counsel to cure a conflict that may arise when counsel serves third party discovery on a client." (emphasis added); "Several federal courts have also approved the use of local counsel or co-counsel to cross-examine former clients of primary counsel as an effective and appropriate cure of any potential conflict and/or to safeguard against the misuse of the client's confidential information. See In re Motion to Quash Deposition Subpoena to Lance Wagar, Case No. 1:06-MC-127, 2006 U.S. Dist. LEXIS 90345, 2006 WL 3699544, *9 (N.D.N.Y. 2006) (Having co-counsel conduct the deposition of a subpoenaed third-party witness, who was a former client of the main defense counsel, is an 'efficacious safeguard' against any potential misuse of confidential information acquired in the prior representation); Sykes v. Matter, 316 F. Supp. 2d 630, 633 (M.D. Tenn. 2004) (ruling that it is appropriate to retain another counsel to perform the cross-examination of a former client); Swanson v. Wabash, Inc., 585 F. Supp. 1094, 1097 (N.D. Ill. 1984) (no conflict of interest possible if former client is cross-examined by other counsel)."; "Because both parties are in agreement that a properly erected Chinese wall would protect the interest of all parties in this matter, we believe that a Chinese wall can and should be utilized in order to prevent a conflict of interest from arising. However, a properly erected Chinese wall will require the Arkansas firm have absolutely no exposure to any information of any kind relating to Calfee's prior representation of Wal-Mart, or any information obtained therefrom."; "Although we hold disqualification of the Calfee firm continuing with the representation of Defendants is not mandated at this time, we are mindful that information garnered at deposition may place Defendants and Wal-Mart in adverse positions. In this unlikely event, we simply remind the Calfee firm of their ethical obligations under Rule 1.7. Accordingly, Wal-Mart's motion to disqualify the Calfee firm is hereby DENIED.") (emphasis added).

However, as a practical matter, this solution may not work. If a lawyer is prohibited from conducting discovery of a current or former client, the lawyer would not be able to assist co-counsel in preparing for such discovery. Similarly, such a disqualified lawyer presumably would not be able to coordinate with co-counsel, strategize about how the discovery fits into the overall case, etc. It is therefore difficult to see how a lawyer could to anything but hand off the examination to co-counsel and

wait to see what co-counsel comes back with. That may be the only solution in some situations, but it is not very satisfying -- and at some point the lack of coordination might so prejudice the current client that the lawyer would find it impossible to carry on the rest of the representation.

A 2000 District of New Jersey case found such a solution unacceptable.

- In re Cendant Corp. Sec. Litig., 124 F. Supp. 2d 235, 241-42, 243 & n.5 (D.N.J. 2000) (denying defendant Ernst & Young's request for a declaration that Paul Weiss lawyer Theodore Wells may represent it in litigation involving Cendant; explaining that Paul Weiss had represented a former Executive Vice President and Deputy General Counsel of Cendant in connection with claims against Cendant; also explaining that Ernst & Young had been represented by Lowenstein Sandler, but that Wells had moved from that firm to Paul Weiss and wished to continue representing Ernst & Young; explaining that Ernst & Young would arrange for co-counsel rather than Wells to conduct any future discovery of Paul Weiss's client; explaining that "[t]he Committee believes that as a general matter examining one's own client as an adverse witness on behalf of another client, or conducting third party discovery of one client on behalf of another client, is likely (1) to pit the duty of loyalty to each client against the duty of loyalty to the other; (2) to risk breaching the duty of confidentiality to the client-witness; and (3) present a tension between the lawyer's own pecuniary interest in continued employment by the client-witness and the lawyer's ability to effectively represent the litigation client. The first two of these hazards are likely to present a direct adverseness of interest falling within Rule 1.7(a); all three may constitute material limitations on the lawyer's representation, so as to come under Rule 1.7(b)." (emphasis added); rejecting the concept that co-counsel could conduct discovery of the former Cendant executive; "Mr. Wells or his colleagues at Paul Weiss at some point will be required to work with co-counsel to develop trial strategy, organize opening and closing arguments, and prepare other aspects of the case." (emphasis added; also explaining that Paul Weiss's large size meant that the proposed firewall might not work; "Furthermore, it is difficult for this Court to believe that the proposed firewall is leak-proof, especially in a firm with over 175 attorneys in the litigation department alone. Presumably, numerous attorneys would be required to assist in trial preparation and discovery for both E&Y and Ms. Lipton. Notwithstanding the good faith efforts of the attorneys to adhere to the firewall, this Court is cognizant that casual conversations in hallways, elevators, and other common areas may take place and may be overheard by the 'screened' attorneys for either E&Y or Ms. Lipton.").

This type of adversity arising in the discovery context represents a subset of a larger and potentially more troublesome issue – the dilemma lawyers face if they must cross examine a current or former client during the representation of another client in litigation. Discovery might be difficult to hand off to "conflicts counsel" to handle. But handing off cross examination of an important adverse witness might materially limit the conflicted lawyer's ability to represent the current client. Thus, deposition or trial cross examination against a current or former client exacerbates all of the conflicts issues raised by conducting third party discovery of such other current or former clients.

Best Answer

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

B 1/17

Information-Caused Complications in Applying the Normal Conflicts Rules

Hypothetical 6

After nearly five years of intense discovery and pre-trial motions, the largest case you have ever handled is moving toward trial. You received the other side's expert designations this morning. The adversary's main expert is your former client. While representing him years ago in an unrelated matter, you learned confidences that you could use now to destroy his credibility.

What do you do?

(A) File a motion to preclude the other side's reliance on that expert.

(B) Arrange for "conflicts counsel" to cross-examine that expert at his deposition and at trial.

(C) Tell your current client that you have to withdraw as its counsel on the eve of trial.

(B) ARRANGE FOR "CONFLICTS COUNSEL" TO CROSS-EXAMINE THAT EXPERT AT HIS DEPOSITION AND AT TRIAL (PROBABLY)

Analysis

In the litigation context, lawyers sometimes face conflicts dilemmas because the adversary has designated fact witnesses or expert witnesses whom the lawyer currently or formerly represented. These scenarios can result in lawyers having to choose from among a number of unpalatable options.

A comment to the ABA Model Rules explains that

> a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit.

ABA Model Rule 1.7 cmt. [6].

The ABA indicated in ABA LEO 367 (10/16/92) that a lawyer generally may not cross-examine or conduct discovery of a firm client, even if the cross-examination is unrelated to the representation of that client. The ABA suggested that co-counsel may conduct such discovery.

- ABA LEO 367 (10/16/92) ("The Committee concludes that a lawyer's examining the lawyer's client as an adverse witness, or conducting third party discovery of a client, will ordinarily present a conflict of interest that is disqualifying absent consent of one or both of the clients involved (depending . . . on the nature and degree of the conflict)." (emphasis added); a witness would be considered a current client for conflicts purposes "if there is a continuing relationship between lawyer and client, even if the lawyer is not on a retainer, and even if no active matters are being handled"; a lawyer in that situation could face a conflict if the lawyer has "specific confidential information relevant to the cross-examination," or even if the lawyer only has general information -- "to the extent a lawyer's general familiarity with how a client's mind works is relevant and useful information, it may also be disqualifying information within the contemplation of Rule 1.8(b), which generally prohibits a lawyer from using information relating to the representation of a client to the disadvantage of the client unless the client consents after consultation"; in a situation where the lawyer is called upon to cross-examine a doctor client who is acting as the adversary's expert witness, "there will almost inescapably be a direct adverseness," thus requiring the doctor's consent to handle the cross-examination; "In some instances, a sufficient solution may be to provide for other counsel, also representing the litigation counsel, to deal with the client-witness: where local counsel as well as principal counsel are involved in a litigation, the disqualification applying to one of these will not ordinarily affect the other. In other circumstances, a satisfactory solution may be the retention of another lawyer solely for the purpose of examining the principal lawyer's client." (emphasis added; footnote omitted)).

This scenario itself can spawn a number of variations.

First, the conflicts issue can arise at various times. In some situations, lawyers know before they even take a litigation matter that a current or former client is likely to be a material witness for the adversary. This would force the lawyer to immediately confront a conflicts issue. In contrast, the issue might arise later in the litigation when

new issues require the involvement of new witnesses. For obvious reasons, the later the issue arises, the more troublesome for the lawyer.

Second, the pertinent witness whose presence creates the dilemma might be a fact witness or an expert witness. Expert witnesses present the most difficult problems. Adversaries cannot select fact witnesses with material pertinent information, but have that power when hiring testifying experts. This creates an enormous chance of mischief -- because it allows adversaries to deliberately select a lawyer's former client as his or her testifying expert. To make matters worse, the timing of the litigation schedule often results in both sides designing testifying experts very late in the process -- which can exacerbate the dilemma.

Third, the adverse fact or testifying expert witness could be the lawyer's current or former client. Most courts or bars would agree that cross-examining a current client involves adversity that normally requires consent. That is, the very act of cross-examination usually amounts to adversity, even if the lawyer does not possess confidential information that could be used against the adverse witness.

- Illinois LEO 09-02 (1/2009) (analyzing the ability of a lawyer to represent a doctor who has been sued along with the doctor's hospital by a plaintiff alleging wrongful death of a newborn baby patient; noting that "Attorney's law firm already represents the Hospital in at least two other unrelated medical malpractice lawsuits. In addition, Attorney represents another physician (3rd Party Physician) who will most likely be a witness against the first physician in a third unrelated medical malpractice lawsuit."; explaining that "[p]rior to his engagement, Attorney was advised that Physician's position in the lawsuit is directly adverse to the Hospital. Physician believed that she acted within the standard of care and that the death was caused by difficulties, in part, with hospital equipment."; later explaining that "[h]ere, Attorney is advised that Physician's position in the lawsuit is directly adverse to the Hospital's position because Physician believes that the injury was caused by an unforeseen difficulty with equipment provided by the Hospital"; "Although Attorney and the law firm are not representing the Hospital in this litigation, the fact that they

currently represent the Hospital in other unrelated medical malpractice lawsuits leads to the objective conclusion that when Physician's defense places the blame on the Hospital and its equipment, Attorney's relationship with the Hospital will be adversely affected. Thus, the Rule 1.7(a) conflict with the Hospital remains."; also analyzing the possible conflict between the lawyer's representation of the defendant doctor and the lawyer's current representation of another doctor who might be an adverse witness; "[T]he 3rd Party Physician whom the lawyer currently represents in another matter[], while not a named defendant in the present lawsuit, took an adversarial position against Physician in the matter shortly after the alleged negligence by reportedly informing the Hospital staff members that, had he been called earlier, he could have safely undertaken the procedure."; "Attorney's ability to effectively cross-examine the 3rd Party Physician and attack his opinions and credibility may materially limit his responsibilities to Physician because his two clients have polar opposite opinions on what went wrong with the procedure in question."; "As for the conflict with the 3rd Party Physician, any attempt by Attorney to discredit the testimony of the 3rd Party Physician will certainly lead to the objective conclusion that Attorney's relationship with the 3rd Party Physician will be adversely affected. Additionally, a disinterested lawyer would undoubtedly conclude that Physician's defense will be adversely affected if Attorney is unable or unwilling to effectively cross-examine the 3rd Party Physician by challenging his opinion, credibility, motive, and bias when, ultimately, such cross examination could adversely affect the 3rd Party Physician's defense in his own medical malpractice lawsuit."; noting that the lawyer could not undertake the representation even with the hospital's and other doctor's consent).

The participation of former clients as adverse witnesses creates a more subtle issue. Lawyers' ability to be adverse to a former client depends on information that the lawyer learned while representing the client. So there is a chance that a lawyer could ethically cross-examine a former client, depending on the information the lawyer possesses.

- Illinois LEO 05-01 (1/2006) ("A lawyer may represent a client in a matter unrelated to a prior divorce proceeding in which the lawyer represented former client who now may testify against his current client. However, the lawyer may not cross-examine the former client unless it can be done both without using information relating to the prior representation to the disadvantage of the former client and without materially limiting his ability to effectively cross-examine the former client to the detriment of the current litigation client."; "When a lawyer has not clearly terminated the professional

> relationship with a client at the conclusion of a matter, it could be argued that a lawyer-client relation still exists under the circumstances."; "[I]f the divorce client were still a current client, the lawyer would be prohibited by Rule 1.7(a) from accepting the representation in question."; "Under Rule 1.9 (a) (2), it would appear that the lawyer may cross-examine the former client as long as he does not use 'information relating to the representation' of the former client to the 'disadvantage' of that person, unless the information that the lawyer planned to use to attack the testimony of the former client was either subject to permissive disclosure under a specific exception to Rule 1.6, which seems unlikely in this situation, or has become 'generally known.'"; "The rules do not define what information is 'generally known' for this purpose. The concept appears to be borrowed from the law of agency, which also imposes duties of confidentiality upon agents. Comment b to Section 395 of Restatement Second, Agency defines a matter of general knowledge that an agent may use freely without liability to the principal as 'common knowledge in the community.' This definition seems consistent with the purposes of Rules 1.9."; "Finally, if the lawyer is prohibited from conducting the cross-examination of the former client under Rule 1.9, that conflict may not be cured simply by having another lawyer in the same firm conduct it. Under Rule 1.10 on imputed disqualification, if one lawyer in a firm is prohibited from undertaking a representation, so is every lawyer in the firm. See ISBA Opinion No. 90-05 (November 1990). However, the lawyer may consider asking co-counsel (a lawyer from another firm who may be representing a co-party) to conduct the cross-examination. See Swanson v. Wabash, Inc., 585 F. Supp. 1094 (N.D. Ill. 1984). If a co-counsel is not available, the lawyer should seek another, unaffiliated lawyer to conduct the cross-examination.").

Fourth, lawyers finding themselves in this unfortunate scenario might have to deal with one or both of the basic conflicts rules. As mentioned above, lawyers might have to assess the applicability of the pertinent state's parallel to ABA Model Rule 1.7(a)(1) -- which prohibits direct adversity to a client absent consent. A much more difficult dilemma could involve the pertinent state parallel to ABA Model Rule 1.7(a)(2) -- which creates a conflict if there is a "significant risk" that the lawyer's representation of a client will be "materially limited" by the lawyer's other responsibilities or interests. For instance, a lawyer prohibited from, or agreeing to refrain from, using a former client's confidential information in cross-examining the former client might

confront this type of conflict, because the lawyer would find her duty of loyalty and diligence to her client "materially limited." In other words, the lawyer could not adequately serve the current litigation client because the lawyer would essentially have one arm tied behind her back.

All of these variables make this among the most difficult conflicts dilemma lawyers can face.

Lawyers confronting this scenario seem to have six choices.

First, lawyers can obtain former clients' consent to use the former clients' protected client information against their cross-examination. Courts and bars have acknowledged this possibility, but it seems implausible that any rational former client would ever grant such a consent.

Second, lawyers might be able to cross-examine former clients if they do not have any pertinent confidential information that they could use against the client.

- United States v. Cline, Case Nos. 1:12CR00044 & 1:13CR00008, 2013 U.S. Dist. LEXIS 72818, at *9, *10 (W.D. Va. Apr. 19, 2013) (seeking additional facts before deciding whether the same lawyer can represent two criminal codefendants; "Numerous courts in other jurisdictions have ordered or affirmed the disqualification of defense counsel from representing one or more codefendants where joint representation would require counsel to cross-examine counsel's own client."; "Some courts have concluded that defense counsel would inevitably be materially limited in his cross-examination of the codefendant/witness due to his obligations to that client, and thus would be unable to provide fully effective counsel to the client on trial. Other courts have emphasized defense counsel's ethical duty of loyalty to all clients and have concluded that even where no vigorous impeachment is required, an attorney who cross-examines his own client gives the appearance of having split loyalties, which undermines the integrity of the process."; "Nevertheless, at least two courts have found disqualification inappropriate where the codefendant/witness would testify only to background information, was not a key witness for the prosecution, would not directly implicate the defendant on trial, and where no client confidences could be used against the testifying codefendant.").

- Illinois LEO 05-01 (1/2006) ("A lawyer may represent a client in a matter unrelated to a prior divorce proceeding in which the lawyer represented former client who now may testify against his current client. However, the lawyer may not cross-examine the former client unless it can be done both without using information relating to the prior representation to the disadvantage of the former client and without materially limiting his ability to effectively cross-examine the former client to the detriment of the current litigation client."; "When a lawyer has not clearly terminated the professional relationship with a client at the conclusion of a matter, it could be argued that a lawyer-client relation still exists under the circumstances."; "[I]f the divorce client were still a current client, the lawyer would be prohibited by Rule 1.7(a) from accepting the representation in question."; "Under Rule 1.9(a)(2), it would appear that the lawyer may cross-examine the former client as long as he does not use 'information relating to the representation' of the former client to the 'disadvantage' of that person, unless the information that the lawyer planned to use to attack the testimony of the former client was either subject to permissive disclosure under a specific exception to Rule 1.6, which seems unlikely in this situation, or has become 'generally known.'"; "The rules do not define what information is 'generally known' for this purpose. The concept appears to be borrowed from the law of agency, which also imposes duties of confidentiality upon agents. Comment b to Section 395 of Restatement Second, Agency defines a matter of general knowledge that an agent may use freely without liability to the principal as 'common knowledge in the community.' This definition seems consistent with the purposes of Rules 1.9."; "Finally, if the lawyer is prohibited from conducting the cross-examination of the former client under Rule 1.9, that conflict may not be cured simply by having another lawyer in the same firm conduct it. Under Rule 1.10 on imputed disqualification, if one lawyer in a firm is prohibited from undertaking a representation, so is every lawyer in the firm. See ISBA Opinion No. 90-05 (November 1990). However, the lawyer may consider asking co-counsel (a lawyer from another firm who may be representing a co-party) to conduct the cross-examination. See Swanson v. Wabash, Inc., 585 F. Supp. 1094 (N.D. Ill. 1984). If a co-counsel is not available, the lawyer should seek another, unaffiliated lawyer to conduct the cross-examination.").

- People v. Frisco, 119 P.3d 1093, 1098 (Colo. 2005) (refusing to disqualify a criminal lawyer from representing a drug defendant even though the lawyer might be called upon to cross-examine a former client named as a co-conspirator and a possible prosecution witness; explaining that the former client had not established a "substantial risk that confidential factual information as would normally have been obtained by defense counsel in the prior representation would materially advance the position of the defendant in this prosecution").

Alternatively, such lawyers might be able to use harmful information they obtained from the former client to the former client's disadvantage during the cross-examination -- if the information is "generally known." ABA Model Rule 1.9 permits such use. In 2013, the Ohio Bar explained that lawyers may undertake such cross-examinations if the harmful information they would like to use has become generally known.

A 2011 North Carolina legal ethics opinion also analyzed lawyers' ability to use generally known information in cross-examining a former client -- in contrast to a total prohibition on the inherent adversity involved in cross-examining a current client.

- North Carolina LEO 2010-3 (1/21/11) (holding that a criminal defense lawyer may not cross-examine a police officer whom the lawyer represents in an unrelated matter; "If Lawyer must cross-examine Officer in Defendant's criminal matter, Lawyer has a concurrent conflict of interest. Comment [6] to Rule 1.7 specifically provides that a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. Any attempt to discredit Officer's credibility through cross-examination would violate Lawyer's duty of loyalty to Officer. Conversely, the failure to challenge Officer's damaging testimony through rigorous cross-examination would violate Lawyer's duty to competently and diligently represent Defendant. Lawyer cannot cross-examine Officer without the risk of either jeopardizing Defendant's case by foregoing a line of aggressive questioning or breaching a duty of loyalty and/or confidentiality owed to Officer."; "If Lawyer must cross-examine Officer in Defendant's criminal matter, the resultant conflict of interest is nonconsentable."; "In the given fact scenario, Lawyer cannot reasonably conclude that he can protect the interests of each client, or competently and diligently represent each client, if Lawyer must cross-examine Officer in Defendant's criminal matter."; explaining that the lawyer could depose the Officer if he was a former client and any information that the lawyer had acquired from the client was generally known; "An exception to Rule 1.9(c) provides that a lawyer may use confidential information of a former client to the disadvantage of the former client when the information has become 'generally known.' Rule 1.9(c)(1). If certain information as to the internal affairs investigation is generally known, that information may be used to

> cross-examine Officer without obtaining the consent of Officer. See Rule 1.9, cmt. [8].").

Upon reflection, this type of analysis seems superficial at best. A lawyer cross-examining a former client by using "generally known" adverse information undoubtedly has more detailed information that is not "generally known." As a practical matter, there seems to be no way that a lawyer could only use "generally known" information while adequately serving his or her current client.

Third, lawyers might cross-examine former clients about whom lawyers have adverse information -- but refrain from using that information.

The Restatement provides an illustration of this principle -- but reaching what some might see as an implausible conclusion.

> Lawyer, now a prosecutor, had formerly represented Client in defending against a felony charge. During the course of a confidential interview, Client related to Lawyer a willingness to commit perjury. Lawyer is now prosecuting another person, Defendant, for a matter not substantially related to the former prosecution. In the jurisdiction, a defendant is not required to serve notice of defense witnesses that will be called. During the defense case, Defendant's lawyer calls Client as an alibi witness. Lawyer could not reasonably have known previously that Client would be called. Because of the lack of substantial relationship between the matters, Lawyer was not prohibited from undertaking the prosecution. Because Lawyer's knowledge of Client's statement about willingness to lie is confidential client information under § 59, Lawyer may not use that information in cross-examining Client, but otherwise Lawyer may cross-examine Client vigorously.

Restatement (Third) of Law Governing Lawyers § 132 illus. 6 (2000) (emphases added). It is difficult to imagine that the prosecutor in this illustration could adequately serve the public while foregoing use of such valuable information

In 2009, a Vermont opinion explained that this tactic might work.

- Vermont LEO 2009-4 (2009) (holding that a law firm could represent a client adverse to the principal of a corporation which the law firm had previously represented, although the law firm could not use information obtained from the principal; explaining the situation: "The requesting attorney's firm represents A and has done so for a number of years. One matter handled by the requesting attorney was A's purchase of a parcel of land that adjoins lands owned by a corporation in which B is a principal. The firm has never represented the landowner corporation but has formed an LLC for B and has performed collection work for a different corporation in which B is also a principal. Both files are now closed. There are no open files in which either B or any of his business entities are represented by the firm."; "Recently, on A's behalf, the firm sent a letter to the landowner corporation disputing the landowner corporation's claimed right of access onto A's adjoining property. In response to that letter, B has claimed a conflict of interest and requested that the firm refrain from representing A in connection with the dispute."; "In B's claim of conflict he asserts that the requesting attorney's firm's representation of A 'creates at least the appearance of conflict'. He also expresses a concern that his interest may have been compromised by dual loyalties. He goes on to claim that the firm is privy to financial and legal concerns that would compromise him in his negotiations with A. The firm has no active case files for B, and no retainer arrangement exists."; noting that the principal was never the law firm's client; "In the matter at hand, the firm has never actually represented the corporation which is the landowner. Rather, it has represented one of the principals of the landowner corporation in the formation of an LLC and it has performed collection work for an entirely different corporation. On these facts, we do not believe that the landowner corporation is even a former client. While this may seem an overly technical conclusion, clients should understand that they have separate legal identities from the entities they create so long as those entities have been properly formed and maintained."; warning the law firm that it could not use information obtained from the principal; "Having reached that conclusion, however[,] does not mean that the firm may use information obtained in the course of its work for B and B's other corporation in a manner which is adverse to B's interests. The firm has a continuing duty under Rule 1.9(c) to maintain the confidentiality of information obtained and not to use any information that it may have against B or B's interests."; "<u>It is noted that Rule 1.9(c) does not preclude representation of A. Rather it prohibits the requesting attorney from using or revealing information relating to the former representation of B against B.</u> Even if we (1) assume that the requesting attorney's firm has confidential or secret information obtained during the prior representations of B or B's other corporation; and (2) infer that the requesting attorney has access to all of the firm's files, <u>Rule 1.9(c) does not preclude the requesting attorney from representing A. Rather it precludes the use of confidential or secret information to B's disadvantage.</u>" (emphases added)).

Not surprisingly, other courts and bars reject this as a possible solution to the lawyer's dilemma.

- In re Compact Disc Minimum Advertised Price Antitrust Litig., MDL Dkt. No. 1361, 2001 U.S. Dist. LEXIS 25818, at *11-12, *12-14 (D. Me. Mar. 12, 2001) (disqualifying Milberg Weiss because until just a few days earlier the law firm had been representing other retailers in a class action alleging essentially the same improper conduct; rejecting the law firm's argument that it would not be adverse to its former retail clients; "Milberg Weiss does not plan to name any of its retailer clients as defendants; it does not expect any other plaintiff to name these retailers (a consolidated amended complaint has been filed and does not name them); it does not expect to take any discovery from the retailers; and therefore, its expert says, the consumer class action will not have any adverse effects on the economic interests of the retailers. Simon Report at 8-9. In addition, Professor Simon notes that 'Milberg Weiss has made it clear that it will not use [any confidential retailer] information in consumer actions,'" (second emphasis added; footnote omitted); "These measures may eliminate any adverse effect on Milberg Weiss's prior retailer clients, but unfortunately they carry the distinct potential of reducing Milberg Weiss's effectiveness in representing the putative consumer plaintiff class vigorously here. The prior representation has created an incentive for Milberg Weiss not to name those retailers as defendants or to seek any information from them that may be helpful in prosecuting the consumer case. And it has already agreed not to use certain information it acquired in the earlier case. Milberg Weiss characterizes its former retailer clients as 'mom and pop operations,' thereby suggesting that there would be no reason to name them as defendants here. Given its interest, I cannot rely on the Milberg Weiss statement to make it so. Even if I treat the decision by other law firms not to name these four retailers as defendants in the Consolidated Amended Complaint as confirming the lack of any reason to name them as defendants, I cannot be confident that even 'mom and pop operations' would have no useful information to discover or, indeed, that Milberg Weiss is not already in possession of such information that it has agreed not to use. I conclude that the retailer and consumer representations are inescapably adverse. Therefore, Milberg Weiss must be disqualified." (emphasis added; footnote omitted)).

- Los Angeles County LEO 463 (12/17/90) (analyzing the following situation: "Law Firm advised A to rectify its intentional concealment. A refused and made clear its desire that Law Firm not reveal A's securities fraud to anyone. Law Firm withdrew from further representation of A, having represented it for a total of about six weeks. Corporation B has been a client of Law Firm for many years and has received various legal services. After Law Firm terminated its representation of A, B informed Law Firm that it had received

> from A a proposal for the financing of one of B's ventures and that it wanted Law Firm's advice in responding to A."; holding that the law firm could not disclose the former's security fraud, which would impact the firm's representation of the new client; "[W]ithout A's consent to reveal this information to B, Law Firm would be caught between the rock of protecting A's confidences and the hard place of zealously representing B. Knowing of A's dishonesty, Law Firm might be tempted to recommend that B take special precautions to protect itself, but would be forbidden from using A's confidences to its detriment in this manner. Thus, Law Firm would constantly have to second-guess whether its advice to B was affected by Law Firm's secret knowledge of A's dishonesty." (emphasis added); "[I]f Law Firm were to represent B without revealing its knowledge of A's dishonesty, it would create an impermissible appearance of impropriety. B would quite justifiably become upset if it later learned that Law Firm acted as its lawyer in the transaction without warning B that its proposed borrower lacked integrity. Law Firm's response that it was merely maintaining its obligation of confidentiality to A would be little solace to B, who had its lawyer conceal admittedly relevant information. Even if Law Firm provided exactly the same advice as would another law firm that was ignorant of A's wrongdoing, it would not dispel the appearance of impropriety." (emphasis added); "If A's consent is required and A declines to give consent for Law Firm to represent B, it should be fairly easy for Law Firm to explain without revealing any confidential information why it cannot undertake the representation. Law Firm may simply tell B that it had previously represented A and that a conflict of interest prevents Law Firm from undertaking the representation. If B inquires further, Law Firm may say that it is bound not to say more for fear of revealing client confidences."; "[I]f A's dishonesty is deemed material to the representation, then Law Firm may not represent B without A's consent to disclose that information. On the other hand, if A's dishonesty is deemed not to be material for some reason, then it need not be disclosed for B's consent to be 'informed,' unless for some reason it appears that this information might adversely affect the representation.").

This seems like a completely unworkable option. It is difficult to think that the former client would accept any of the lawyer's assurances that the lawyer would not use confidential information. In fact, the lawyer could not help but be affected by pertinent adverse information -- and would undoubtedly fashion the cross-examination in light of such information. And if the lawyer did not do that, he or she would almost undoubtedly fall short of adequately serving the current litigation client.

Fourth, lawyers might seek a court order precluding the adversary from calling a fact or expert witness whose participation creates this dilemma. This step would appear unavailable in the case of fact witnesses, although it is possible to imagine a court precluding the adversary from calling some redundant fact witness whose participation would create the conflict.

This scenario is more likely to occur in the case of one party hiring the other side's lawyer's former client as a testifying expert. This is the sort of mischief mentioned above.

One bar acknowledged this as a possible solution.

- Los Angeles County LEO 513 (7/18/05) (addressing an adverse party's designation as an expert witness on its behalf of a former client of a lawyer representing a litigant; "If an attorney is asked to accept representation of a client in a matter in which a former client of the attorney has already been designated as an expert witness, the attorney must determine if his or her present employment might require the attorney to use or disclose confidences obtained from the former client and now expert. If so, Rule 3-310(E) mandates that the attorney may accept the representation only with the informed written consent of the former client. Where the attorney's involvement in the matter preceded the former client/expert's designation, or if the former client does not consent to such involvement, the attorney has options other than asking for the consent of the former client. In such a case, the attorney may ethically seek an appropriate order from the court, which could include that the expert be precluded from testifying if another expert is available to the opposing party; that the former client's decision to serve as an expert constitutes a waiver of the privilege; or that the former client may not serve as an expert witness unless the former client agrees to a limited waiver of any duty of confidentiality as it pertains to the pending case." (emphasis added)).

Another bar has acknowledged the possibility of this solution working.

- Vermont LEO 2008-4 (2008) (holding that a lawyer cannot cross-examine a former client if the lawyer could use confidential information against the former client; explaining the following factual situation: A lawyer representing a mother who was seeking to terminate a guardianship, while the guardian sought to terminate the mother's parental rights; explaining that just before

> the third day of a hearing, one of the lawyer's clients (on an unrelated matter) came forward as a fact witness in support of the guardian and adverse to the lawyer's client; explaining that the lawyer had filed a motion seeking to preclude the fact witness' testimony as cumulative, but analyzing the lawyer's responsibility should the court deny that motion; "Law Firm A had acquired information regarding Witness C in the course of its prior and ongoing representation of her that would be extremely valuable for cross-examination (bearing directly upon credibility and truthfulness, among other things), meaning that Law Firm A's duties to Mother require that it be aired. However, this information is adverse to Witness C, meaning that exposing it would violate Law Firm A's duties of loyalty and confidentiality to Witness C, quite aside from the ethical conflict that would be presented by cross examining a current client." (emphasis added); "Law Firm A is correct in its understanding that if the current client/witness is called to testify, Law Firm A must resign from its representation. This conclusion applies not only to Rule 1.6 (governing confidentiality obligations) but also under Rule 1.7."; concluding that "[a] lawyer may not continue to represent a client in trial if another current client will be called as a directly adverse witness by opposing counsel and where the lawyer possesses confidential client information adverse to the client witness that should be used during cross-examination of the client witness"; also holding that "[w]hether the mid-trial disclosure of the client/witness requires preclusion of the witness, a new trial, or some other consequences is a legal question for the court and outside the scope of this Section's authority"; explaining that "we cannot opine on how to resolve the trial dilemma. The suggestion that has been made to use a special counsel for cross examination of the client witness strikes us as problematic [explaining that "[o]n these facts, for example, we note that the Mother is entitled to have her attorney attack the testimony of the client witness in closing argument as well as during cross examination."] At the same time, we are not in a position to weigh, let alone decide, whether the witness is cumulative, what the consequences of mid-trial notice of the witness ought to be, whether her exclusion would be prejudicial, or the host of other possible legal issues presented." (emphasis added); "In conclusion, we would like to reemphasize that there is no dilemma under the Rules. If the current client is permitted to testify as an adverse witness in the circumstances presented, Law Firm A must withdraw." (emphasis added)).

This seems like a logical solution that would preserve a lawyer's ability to continue representing the client. Ironically, however, precluding the adversary from calling a flawed testifying expert might actually harm the lawyer's current client. If another lawyer (unencumbered with a conflict) would ultimately discover the adversary's

testifying expert's weaknesses, the client would be better off by retaining a new lawyer rather than precluding the adversary's designation of a testifying expert vulnerable to being destroyed by cross-examination.

Fifth, lawyers might seek to arrange for another lawyer (usually called "conflicts counsel") to cross-examine the testifying expert.

A surprising number of bars and courts have permitted this solution in the current and former client context.

- Philadelphia LEO 2009-7 (7/2009) (analyzing a situation in which a law firm had "for a long period of time" represented the builder of a proposed office building, but learned two weeks before a scheduled zoning presentation that a neighbor of the building (whom the law firm represented on unrelated matters) opposed the project; explaining the effect of the later-developing conflict; explaining that the law firm had three choices: (1) withdraw from representing the developer in the project; (2) withdraw from representing the developer in litigation or some other administrative matters in which the neighbor might appear (although the law firm might be able to arrange for some other lawyer to cross-examine the neighbor at any hearing); (3) seek a waiver from the neighbor; "[I]t could even reach the point where the Neighbor Client would have to be cross[-]examined by a member of the law firm. That could perhaps be remedied by having any cross[-]examination handled by another law firm brought in for that purpose.").

- 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 stratagem 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.'" (emphasis added; internal citation omitted); "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).

- Corp. Express Office Prods., Inc. v. Gamache (In re Wagar), Civ. No. 1:06-MC-127 (LEK/RFT), 2006 U.S. Dist. LEXIS 90345, at *44-45 (N.D.N.Y. Dec. 13, 2006) (recognizing that co-counsel could handle a deposition if another counsel could not undertake the deposition because of a conflict; "[I]t is represented by the Defendants that Verrill Dana LLP has not been tainted by any proximity to Wagar's confidential information or him personally. Verrill Dana LLP has never represented Wagar, was not involved in the New Jersey Litigation, and avers that they have not received any of Wagar's confidential information. See generally, Dkt. No. 7, the Affidavit & Declarations. To have

them conduct the deposition as opposed to Nixon Peabody and Rider would be efficacious safeguard.").

- United States v. Canty, Case No. 01-80571, 2006 U.S. Dist. LEXIS 86422, at *6 (E.D. Mich. Nov. 30, 2006) (recognizing that co-counsel could undertake a cross-examination if counsel had a conflict, as long as the client consented to the arrangement; "To the extent a conflict does exist, however, the court finds that it is not 'severe' and is remedied by (1) Mr. Lustig's representation that he will not cross-examine or be involved in the cross-examination of Mr. Jones; and (2) Mr. Canty's knowing, intelligent waiver of any such conflict in open court.").

- Illinois LEO 05-01 (1/2006) ("[I]f the lawyer is prohibited from conducting the cross-examination of the former client under Rule 1.9, that conflict may not be cured simply by having another lawyer in the same firm conduct it. Under Rule 1.10 on imputed disqualification, if one lawyer in a firm is prohibited from undertaking a representation, so is every lawyer in the firm. . . . However, the lawyer may consider asking co-counsel (a lawyer from another firm who may be representing a co-party) to conduct the cross-examination. . . . If a co-counsel is not available, the lawyer should seek another, unaffiliated lawyer to conduct the cross-examination.") (emphasis added).

- Sykes v. Matter, 316 F. Supp. 2d 630, 632, 633 & n.4, 636 (M.D. Tenn. 2004) (recommending use of conflicts counsel to depose the defendant's expert, after explaining that the plaintiff's law firm had represented the defendant's expert's employer; "This motion to disqualify must be denied. Boult Cummings is the conflicted party here, and the one to which the ethical rules cited in the motion apply. If anyone is to be disqualified because of an ethical dilemma, it would seem only logical that it should be those members of the profession whose rules present the dilemma. Moreover, the alternative argument that Mr. Kopra's voluntary appearance in this action impliedly waives any privilege held by LBMC is without merit, inasmuch as the rule relating to such use of information obtained during representation of a former client . . . clearly requires that such consent be given after consultation." (footnote omitted); "Lacking consent to reveal client confidences, counsel states that the continued participation of Mr. Kopra in this lawsuit leaves them with a Hobson's choice, between utilizing confidential information during cross-examination in violation of ethical duties on the one hand, and failing to zealously represent Mr. Sykes on the other hand, in violation of ethical duties, if potentially damaging confidential information is not so utilized. However, this argument ignores the third alternative that is always available to counsel laboring under, as the motion papers put it, 'an irreconcilable difficulty under the Rules of Professional Conduct': withdrawal from representation. While counsel argues that 'it is basically unfair to require Mr. Sykes or his counsel' to make this choice, inasmuch as this conflict was not of their making, such is the sometimes unfortunate reality of proper practice within the legal

profession. However, giving due consideration to Mr. Sykes' substantial interest in retaining and proceeding with counsel of his choice, the undersigned concludes that withdrawal is not required here, inasmuch as the potential for conflict can be removed by allowing plaintiff to retain other counsel for purposes of cross-examining Mr. Kopra at his deposition and at trial." (emphasis added); explaining that "[c]ounsel also argued that requiring them to withdraw or disqualifying them would declare an 'open season' on lawyers who could be conflicted out by the deliberate selection of an expert they had represented in the past. This concern is a bit overstated. The circumstance in which counsel would have knowledge of an adversary's prior representation of an expert or his/her firm would seem to be rare."; "In sum, the undersigned finds that the ethical demands of the Tennessee Rules of Professional Conduct, as well as the competing interests of (1) plaintiff in being represented by counsel of his choosing, (2) defendants in going forward with the expert of their choosing, and (3) LBMC/Mr. Kopra in maintaining the confidentiality of information imparted to Boult Cummings during the course of the prior representation, will be adequately complied with and best served by allowing defendants' expert and plaintiff's counsel to remain, but disqualifying Boult Cummings from participating in any manner in the cross-examination of Mr. Kopra at deposition and during the trial of this matter. Plaintiff's counsel is admonished that outside counsel shall have absolutely no exposure to any information of any kind relating to Boult Cummings' prior representation of LBMC and its affiliates, or obtained therefrom.").

- United States v. Fawell, No. 02 CR 310, 2002 U.S. Dist. LEXIS 10415, at *24-25, *25, *28, *29-30 (N.D. Ill. June 11, 2002) (recognizing that counsel unable to cross-examine government witnesses can hire another lawyer to do so; "Yet another argument for disqualification of Altheimer & Gray relates to the Firm's representation of dozens of witnesses before the grand jury. Some five to ten of these individuals will, according to the government, be trial witnesses as well. The government asserts that their interests will be materially adverse to those of Defendant CFR, creating a conflict too significant to be subject to waiver."; "Defendant CFR has made a substantial effort to address this issue. First, as CFR notes, an attorney's prior representation of government witnesses does not always require disqualification, so long as appropriate waivers are obtained and appropriate safeguards are established. Since the filing of the motion to disqualify the Firm, CFR has hired Thomas M. Breen, an experienced former prosecutor and criminal defense attorney, to conduct cross-examinations of the ten persons identified by the government as potential trial witnesses. . . . This procedure -- of 'screening off' a conflicted attorney for purposes of cross-examination -- was approved by the Seventh Circuit only last month in United States v. Britton, 289 F.3d 976 . . . (7th Cir. 2002)."; "More troublesome is CFR's own waiver of the conflict created by its attorneys' inability to cross-examine, or even to argue the weight of, this damaging testimony."; "The

court is concerned for protecting the integrity of the process and the rights of each Defendant and witness. Under some circumstances, it might also be concerned about the wisdom of a defendant's decision to waive the right to have its own attorneys cross-examine critical government witnesses. In the circumstances presented here, however, the court believes CFR has made a competent and counseled decision concerning the issue and is not inclined to second-guess a determination made by a responsible official with full access to relevant information.").

- United States v. Britton, 289 F.3d 976, 979, 979-80, 982, 983 (7th Cir. 2002) (affirming criminal defendant's mail fraud conviction; rejecting defendant's argument that the trial court erred in denying her second-chair defense counsel's motion to withdraw because of a conflict; agreeing with the trial court that co-counsel could cross-examine a government witness that the second-chair defense counsel could not cross-examine because of the conflict; "On November 17, 2000, approximately two and one-half weeks before the scheduled start of the trial, Britton filed a motion to continue the trial date in order to allow second-chair defense counsel Christopher A. DeRango to withdraw. The motion stated that DeRango had a conflict of interest in that he had previously represented a government witness named Bruce Swanson."; "[T]he court initially ruled that because the potential impeachment material related to a billing record, it was not covered by the attorney-client privilege. The court noted that defendant's lead counsel, Daniel Cain, could obtain this record with a trial subpoena. Additionally, in order to avoid the 'appearance of impropriety' presented by an attorney cross-examining his former client, the court held that DeRango would not be allowed to participate in the cross-examination of Swanson or to disclose any information related to the billing record."; "Britton next contends that the district court erred by denying DeRango's motion to withdraw due to his conflict of interest. In the alternative, Britton contends that the district court erred by prohibiting DeRango from questioning Swanson."; "[W]e see no err [sic] in the district court's actions as the testimony that DeRango sought to give was easily available through another source, and we conclude that neither 'extraordinary circumstances' nor 'compelling reasons' existed to find otherwise. We also see no problem with the district court's screening off of DeRango as we have previously approved the use of such measures in order to avoid potential ethical violations." (footnote omitted)).

- Swanson v. Wabash, Inc., 585 F. Supp. 1094, 1097 (N.D. Ill. 1984) (recognizing that co-counsel could cross-examine a witness whom counsel could not undertake to cross-examine because of a conflict; "Assuming that the CUHS lawyers who dealt with Crawford have refrained from disclosing Crawford's confidences, no conflict of interest is possible in this case if Crawford is cross-examined at trial only by non-CUHS attorneys. Coffield and Flynn have indicated that such an arrangement could easily be made.

> Their present clients are aware of Crawford's concerns, yet they all desire Coffield and Flynn to continue as their counsel. Moreover, several attorneys from firms other than CUHS represent other defendants in this action; these lawyers might conduct any cross-examination of Crawford if he is called as a witness. Thus, disqualification of Coffield and Flynn (and other partners and associates of CUHS) is unnecessary if the following conditions are met: (1) attorneys Coffield, Carden, Slavin and Pope file affidavits with his Court stating that they have not revealed any of Crawford's confidences; and (2) the four defendants represented by Coffield and Flynn file written waivers of any right they may possess to have Coffield and Flynn cross-examine Crawford should he testify at trial. In addition, this Court hereby enters a protective order prohibiting the CUHS attorneys who dealt with Crawford from revealing to any of the other defendants' attorneys herein or to any other individual whomsoever any of Crawford's confidences in the future. Fulfillment of these conditions, coupled with the cross-examination of Crawford by non-CUHS lawyers, obviates the need for disqualifying any attorneys from this case." (footnote omitted)).

In 2002, a court blocked a conflicts lawyer from taking a deposition, but held out hope that he could conduct the trial examination.

- Advanced Mfg. Techs., Inc. v. Motorola, Inc., No. CIV 99-01219 PHX-MHM (LOA), 2002 U.S. Dist. LEXIS 12055, at *23 (D. Ariz. July 2, 2002) (prohibiting a lawyer from deposing a nonparty witness because it had a conflict, but putting off until later whether the lawyer could examine the witness at trial; "**IT IS ORDERED** that Non-Party M. Dean Corley's Rule 26(c) Motion For Protective Order (doc. #164) is **GRANTED**. Attorney Douglas L. Irish and the law firm of Lewis & Roca, LLP, are hereby precluded from taking or otherwise participating in M. Dean Corley's future deposition, if any, due to their impermissible conflict of interest between dual clients, Motorola and Corley, whose interests at this time appear to be materially adverse. Whether Irish may be permitted to examine or cross examine Corley at time of trial will abide by further order of the trial judge.").

Arranging for conflicts counsel presents a tempting solution, but it might not always work. Presumably, the lawyer handling the case would have to brief conflicts counsel on the issues. During that briefing session, the lawyer possessing damaging confidential client communication about the adversary's expert would have to resist (through language or even body language) pointing conflicts counsel in the direction of the damaging information that the lawyer's existing client would want to use -- but which

the lawyer's continuing confidentiality duty to the former client would prohibit the lawyer from using.

- Vermont LEO 2008-4 (2008) (holding that a lawyer cannot cross-examine a former client if the lawyer could use confidential information against the former client; explaining the following factual situation: A lawyer representing a mother who was seeking to terminate a guardianship, while the guardian sought to terminate the mother's parental rights; explaining that just before the third day of a hearing, one of the lawyer's clients (on an unrelated matter) came forward as a fact witness in support of the guardian and adverse to the lawyer's client; explaining that the lawyer had filed a motion seeking to preclude the fact witness' testimony as cumulative, but analyzing the lawyer's responsibility should the court deny that motion; "Law Firm A had acquired information regarding Witness C in the course of its prior and ongoing representation of her that would be extremely valuable for cross-examination (bearing directly upon credibility and truthfulness, among other things), meaning that Law Firm A's duties to Mother require that it be aired. However, this information is adverse to Witness C, meaning that exposing it would violate Law Firm A's duties of loyalty and confidentiality to Witness C, quite aside from the ethical conflict that would be presented by cross examining a current client." (emphasis added); "Law Firm A is correct in its understanding that if the current client/witness is called to testify, Law Firm A must resign from its representation. This conclusion applies not only to Rule 1.6 (governing confidentiality obligations) but also under Rule 1.7."; concluding that "[a] lawyer may not continue to represent a client in trial if another current client will be called as a directly adverse witness by opposing counsel and where the lawyer possesses confidential client information adverse to the client witness that should be used during cross-examination of the client witness"; also holding that "[w]hether the mid-trial disclosure of the client/witness requires preclusion of the witness, a new trial, or some other consequences is a legal question for the court and outside the scope of this Section's authority"; explaining that "we cannot opine on how to resolve the trial dilemma. The suggestion that has been made to use a special counsel for cross examination of the client witness strikes us as problematic [explaining that "[o]n these facts, for example, we note that the Mother is entitled to have her attorney attack the testimony of the client witness in closing argument as well as during cross examination."] At the same time, we are not in a position to weigh, let alone decide, whether the witness is cumulative, what the consequences of mid-trial notice of the witness ought to be, whether her exclusion would be prejudicial, or the host of other possible legal issues presented." (emphasis added); "In conclusion, we would like to reemphasize that there is no dilemma under the Rules. If the current client is permitted to testify as an adverse witness in the circumstances presented, Law Firm A must withdraw." (emphasis added)).

Sixth, lawyers finding themselves in this awkward position might have no choice but to withdraw.

Some courts and bars seem to consider such lawyers' dilemma insoluble.

> United States v. Bikundi, 80 F. Supp. 3d 9, 20-21 (D.D.C. 2015) (holding that a lawyer cannot represent criminal co-defendants against a former client, and that the lawyer could not solve the conflict by using conflicts counsel; "Ms. Wood [lawyer who had represented two alleged conspirators, and wished to be adverse to one of her former clients] also argues that independent co-counsel could cross-examine Mr. Igwacho should he elect to testify. This same argument was considered and rejected in United States v. Davis, 780 F. Supp. [21, 23-24 (D.D.C. 1991)], where two law partners attempted to erect a wall to permit one to cross-examine the former client of the other. See also United States v. Miranda, 936 F. Supp. 945, 951 (S.D. Fla. 1996) (rejecting proposal for independent counsel to 'handle any and all aspect[s] of the trial' relating to a former client, including investigation, cross-examination, closing argument, and all legal issues). Although Davis concerned the ability of two law partners to maintain confidentiality, the Court has similar concerns regarding the ability of any co-counsel to stay fully independent from Ms. Wood. Furthermore, as discussed above, the present conflict extends beyond just the cross-examination of Mr. Igwacho and infects every aspect of the trial presentation. The only way to cure such a conflict is to disqualify Ms. Wood from representing Mr. Bikundi and to permit him to retain alternative counsel.").

- North Carolina LEO 2010-3 (1/21/11) (holding that a criminal defense lawyer may not cross-examine a police officer whom the lawyer represents in an unrelated matter; "If Lawyer must cross-examine Officer in Defendant's criminal matter, Lawyer has a concurrent conflict of interest. Comment [6] to Rule 1.7 specifically provides that a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. Any attempt to discredit Officer's credibility through cross-examination would violate Lawyer's duty of loyalty to Officer. Conversely, the failure to challenge Officer's damaging testimony through rigorous cross-examination would violate Lawyer's duty to competently and diligently represent Defendant. Lawyer cannot cross-examine Officer without the risk of either jeopardizing Defendant's case by foregoing a line of aggressive questioning or breaching a duty of loyalty and/or confidentiality owed to Officer." (emphasis added); "If Lawyer must cross-examine Officer in Defendant's criminal matter, the resultant conflict of interest is nonconsentable."; "In the given fact scenario, Lawyer cannot reasonably conclude that he can protect the interests of each client, or

competently and diligently represent each client, if Lawyer must cross-examine Officer in Defendant's criminal matter."; explaining that the lawyer could depose the Officer if he was a former client and any information that the lawyer had acquired from the client was not generally known; "An exception to Rule 1.9(c) provides that a lawyer may use confidential information of a former client to the disadvantage of the former client when the information has become 'generally known.' Rule 1.9(c)(1). If certain information as to the internal affairs investigation is generally known, that information may be used to cross-examine Officer without obtaining the consent of Officer. See Rule 1.9, cmt. [8].").

- Illinois LEO 09-02 (1/2009) (analyzing the ability of a lawyer to represent a doctor who has been sued along with the doctor's hospital by a plaintiff alleging wrongful death of a newborn baby patient; noting that "Attorney's law firm already represents the Hospital in at least two other unrelated medical malpractice lawsuits. In addition, Attorney represents another physician (3rd Party Physician) who will most likely be a witness against the first physician in a third unrelated medical malpractice lawsuit."; explaining that "[p]rior to his engagement, Attorney was advised that Physician's position in the lawsuit is directly adverse to the Hospital. Physician believed that she acted within the standard of care and that the death was caused by difficulties, in part, with hospital equipment."; later explaining that "[h]ere, Attorney is advised that Physician's position in the lawsuit is directly adverse to the Hospital's position because Physician believes that the injury was caused by an unforeseen difficulty with equipment provided by the Hospital"; "Although Attorney and the law firm are not representing the Hospital in this litigation, the fact that they currently represent the Hospital in other unrelated medical malpractice lawsuits leads to the objective conclusion that when Physician's defense places the blame on the Hospital and its equipment, Attorney's relationship with the Hospital will be adversely affected. Thus, the Rule 1.7(a) conflict with the Hospital remains."; also analyzing the possible conflict between the lawyer's representation of the defendant doctor and the lawyer's current representation of another doctor who might be an adverse witness; "[T]he 3rd Party Physician whom the lawyer currently represents in another matter3 [sic], while not a named defendant in the present lawsuit, took an adversarial position against Physician in the matter shortly after the alleged negligence by reportedly informing the Hospital staff members that, had he been called earlier, he could have safely undertaken the procedure."; "Attorney's ability to effectively cross-examine the 3rd Party Physician and attack his opinions and credibility may materially limit his responsibilities to Physician because his two clients have polar opposite opinions on what went wrong with the procedure in question." (emphasis added); "As for the conflict with the 3rd Party Physician, any attempt by Attorney to discredit the testimony of the 3rd Party Physician will certainly lead to the objective conclusion that Attorney's relationship with the 3rd Party Physician will be adversely affected.

Additionally, a disinterested lawyer would undoubtedly conclude that Physician's defense will be adversely affected if Attorney is unable or unwilling to effectively cross-examine the 3rd Party Physician by challenging his opinion, credibility, motive, and bias when, ultimately, such cross examination could adversely affect the 3rd Party Physician's defense in his own medical malpractice lawsuit." (emphasis added); noting that the lawyer could not undertake the representation even with the hospital's and other doctor's consent).

- Connecticut LEO 99-14 (7/28/99) ("We believe that a lawyer cannot reasonably conclude that cross-examination of another witness-client will not be limited by the duty of loyalty to that other client. The lawyer could not use any information the lawyer knew about the client or the client's interests or biases as part of the cross-examination. Use of just such information is the touchstone of effective cross-examination."; "Because the duty of loyalty would be compromised in relation to the witness-client and the quality of the representation is compromised in relation to the mother-client, neither should be asked to waive the conflict.").

- Michigan LEO RI-218 (8/16/94) ("A lawyer may not undertake or continue representation which requires cross-examination of one of the lawyer's own clients as an adverse witness on behalf of another client.").

- Comm. on Legal Ethics v. Frame, 433 S.E.2d 579 (W. Va. 1993) (publicly reprimanding a lawyer who cross-examined one of his clients in another matter).

- Virginia LEO 1407 (3/12/91) (analyzing a situation in which a law firm represented a doctor in two malpractice cases; explaining that the doctor later appeared as an expert witness for plaintiff in a case defended by another of the firm's lawyers; further explaining that the doctor denied ever having been a defendant in a malpractice action, but the defense lawyer learned from a partner that the firm had earlier represented the doctor on two occasions; holding that this information was a "secret" (although it could be obtained from public records) because it was gained in a professional relationship; prohibiting the lawyer's continued representation of the client, because the lawyer could not effectively cross-examine the plaintiff's expert doctor (unless the doctor consented to disclosure of the confidential information).).

- North Carolina LEO RPC 72 (10/20/89) (explaining that a town attorney could not cross-examine an arresting officer on behalf of a criminal defendant, because the town attorney "represents the town police department and its employees").

A 2007 Philadelphia legal ethics opinion was not quite as blunt, but recognized this as the probable outcome.

- Philadelphia LEO 2007-11 (07/07) (declining to decide whether a law firm must be disqualified; explaining that the law firm was representing a plaintiff suing a medical professional who had previously been represented by one of the firm's lateral hires; noting that during the lateral hire's previous representation of the same medical professional, the lawyer concluded that the medical professional had provided incorrect testimony, and therefore had dismissed the medical professional's lawsuit with prejudice; "Significant concerns are however raised by the provisions of Rule 1.9c. The inquirer has confidential information about the defendant. First, that the defendant has lied under oath, not once but at least twice, the second time after he had been specifically directed to tell the truth. This could lead a reasonable attorney to conclude that the defendant might have a propensity to lie when giving sworn testimony. Second, the inquirer possesses at least some economic information about the defendant's earnings at the time of the first litigation. It is quite possible, depending on the outcome of the present matter[,] that there could be issues regarding the defendant's financial ability to pay an excess judgment. As such, the economic information gleaned from the first representation could in fact be material to the firm's representation of its present client."; "[E]ven assuming it can not [sic] be admitted at trial, there are a number of subtle, even unconscious ways in which awareness of this information could be used to the detriment of the inquirer's former client. The attorney handling the case, aware that the defendant has lied under oath in the past, might use a different form of cross examination knowing that the defendant is not truthful all the time. On the other hand, the lawyer might avoid certain issues in discovery that he normally might pursue because of the firm's obligation to protect the former client's confidentiality. If learned by a different attorney without the confidentiality constraint, it could be used in settlement negotiations on behalf of the current client, i.e.[,] an attempt could be made to admit it, resulting in a greater willingness on the part of the defendant to settle the matter. Should the inquirer believe that absent its confidential nature, is [sic] constrained from even considering its use, and this impacts the representation of the firm's current client, posing a conflict under Rule 1.7a2. Because of confidentiality, the firm's present client can not [sic] be told of the conflict, and thus the present client can not [sic] waive it based on informed consent."; "<u>In conclusion, while the Committee is not prepared to conclude based on the limited facts as they are presently understood that the inquirer's firm must withdraw from the present matter, it is advising that the inquirer must go beyond simply positing that the firm could not and would not use the information. The inquirer must address whether the constraints imposed on him by his Rule 1.6 obligations to his former client potentially</u>

place his present firm at odds with its ethical obligations to its present client.") (emphasis added).

Several state legal ethics opinions explained that lawyers must withdraw if the bars' less severe suggested alternatives did not succeed.

- Ohio LEO 2013-4 (10/11/13) (explaining that a public defender would have to withdraw if he possessed client confidential information not generally known, which could be used against his former client; "When a lawyer learns that a current representation may require a cross-examination of an adverse witness who is a former client, the lawyer must analyze the potential conflict under Prof.Cond.R. 1.7 and 1.9. Prof.Cond.R. 1.7(a)(2) indicates that a conflict of interest is created in the current representation if there is a substantial risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for the client will be materially limited by the lawyer's responsibilities to the former client. The lawyer's responsibilities to the former client are articulated in Prof.Cond.R. 1.9. If a current representation involves the same or a substantially related matter and the current client's interests in the matter are materially adverse to the former client, Prof.Cond.R. 1.9(a) dictates that the lawyer may not continue the current representation without the former client's informed consent, confirmed in writing."; "If the current matter and the matter involving the former client are unrelated, the former client does not have to consent to the current representation, but the lawyer must comply with Prof.Cond.R. 1.9(c). That provision prohibits the lawyer from using information relating to the representation of the former client to the disadvantage of the former client unless the information has become generally known or the Rules of Professional Conduct permit or require such use. Prof.Cond.R. 1.9(c) also prohibits the lawyer from revealing information relating to the representation of the former client except as permitted or required by the Rules."; "In this opinion, the Board was asked whether a public defender may present evidence of a prior conviction to impeach a former client. The public defender represented the former client in the case that led to the conviction and did not learn of the former client's potential adverse testimony until the current representation was underway. Impeachment of the former client violates Prof.Cond.R. 1.9(c) because the public defender would be using information relating to the prior representation to attack the credibility of the former client, which would disadvantage the former client. However, the public defender may proceed with the current representation if the former client's criminal conviction is generally known, the use of former-client information is permitted or required by the Rules of Professional Conduct, or the former client provides informed consent. Absent these conditions, the public defender must seek permission from the court to withdraw from the current representation." (emphases added); "For purposes of this opinion, the Board

is asked to assume that the public defender no longer represents the prosecution witness, that the witness was convicted in the prior case, and that the underlying crime is an impeachable offense under Evid.R. 609. As part of the current representation, the public defender may have to cross-examine the prosecution witness/former client regarding the prior offense in an effort to attack their credibility. Because the requester of this opinion is a public defender, we will address the issue presented in that context, but our analysis is also applicable in both private criminal and civil representations where a lawyer must cross-examine a former client."; "Neither Prof.Cond.R. 1.7 nor Prof.Cond.R. 1.9 automatically ban a lawyer from representing a client when an adverse trial witness is a former client and the current matter is unrelated to the representation of the former client. Accord Ill. State Bar Assn., Op. 05-01 (Jan. 2006); Md. State Bar Assn., Commt. On Ethics, Op. 2004-24 (May 14, 2004); Utah State Bar, Ethics Advisory Op. Commt. Op. 02-06 (June 12, 2002)."; "[T]he starting point for any conflict of interest analysis, the public defender must determine whether his or her ability to carry out an appropriate course of action for the current client will be materially limited by the public defender's responsibilities to the former client . . . . If the public defender concludes that the cross-examination does not required him or her to use information relating to the representation of the former client to the disadvantage of the former client or to reveal such information, the public defender does not run afoul of Prof. Cond. R. 1.9(c) and the current representation may continue absent other conflict of interest issues."; "The requester, though, indicates that the public defender may be required to use evidence of the former client's criminal conviction for impeachment purposes at trial. Because the public defender represented the former client in the criminal case providing the basis for impeachment, evidence of the conviction would be 'information relating to the representation' under Prof.Cond.R. 1.9(c)(1). Unlike the 'confidences and secrets' approach to confidentiality in the now-repealed Code of Professional Responsibility, information relating to the representation of a client includes both 'matters communicated in confidence by the client' and 'all information relating to the representation, whatever its source.' Prof.Cond.R. 1.6, Comment [3]."; "The phrase 'generally known,' however, is not defined in the Rules, Model Rules, or any of the accompanying comments. As a result, the following Restatement definition has been referenced when determining whether information relating to a representation is generally known: 'Whether information is generally known depends on all circumstances relevant in obtaining the information. Information contained in books or records in public libraries, public-record depositaries such as government offices, or in publicly accessible electronic-data storage is generally known if the particular information is obtainable through publicly available indexes and similar methods of access. Information is not generally known when a person interested in knowing the information could obtain it only by means of special knowledge or substantial difficulty or expense. Special knowledge includes information about the

whereabouts or identity of a person or other source from which the information can be acquired, if those facts are not themselves generally known.' Restatement of the Law 3d, The Law Governing Lawyers, Section 59, Comment d (2001)."; "Upon review of motions for withdrawal or disqualification of counsel in criminal cases that are based upon former-client conflicts, courts have taken the view that a former client's criminal conviction is generally known because it is a matter of public record."; "In general, criminal convictions are matters of public record and are usually accessible through public databases not requiring any particular expertise to obtain the conviction information. Standard practice for prosecutors would be to obtain the criminal records of their witnesses, possibly from the witnesses themselves, and this information must be supplied to the public defender during discovery."; "Based upon the Restatement definition, the fact that criminal histories of witnesses are exchanged during discovery, and the case law on former-client conflict allegations, the Board's view is that as long as the public defender's cross-examination of the former client is limited to the existence of the prior conviction for impeachment, the public defender can satisfy the 'generally known' exception in Prof.Cond.R. 1.9(c)(1). If competent representation of the current client requires the public defender to use additional information relating to the representation of the former client to their disadvantage, the public defender must make an individual determination as to whether this additional information is also generally known."; "Outside the context of the record of a criminal conviction in the scenario before the Board, lawyers are cautioned that the presence of information 'in the public record does not necessarily mean that the information is generally known within the meaning of Rule 1.9(c).' See Bennett, Cohen & Whittaker, Annotated Model Rules of Professional Conduct, 175 (7th Ed. 2011), citing Pallon v. Roggio, D.N.J. Nos. 04-3625 (JAP) and 06-1068 (FLW), 2006 WL 2466854 (Aug. 24 2006); Steel v. Gen. Motors Corp., 912 F. Supp. 724 (D.N.J. 1995); In re Anonymous, 932 N.E. 2d 671 (Ind. 2010). '[T]he fact that information has become known to some others does not deprive it of protection if it has not become generally known in the relevant sector of the public.' 1 Restatement, Section 59, Comment d. The following cases provide additional instruction on this issue: Disciplinary Counsel v. Cicero, 134 Ohio St. 3d 311, 2012-Ohio-5457, 982 N.E. 2d 650 (drug raid in which federal agents seized college football memorabilia was generally known, information learned during a meeting with a prospective client was not); In re Gordon Properties, L.L.C., U.S. Bankr. Ct., E.D. Va., Nos. 09-18086-RGM and 12-1562-RGM, 2013 WL 681430, f.n. 6 (Feb. 25, 2013), quoting Va. State Bar, Legal Ethics Commt., Op. 1609 (Sept. 4, 1995) ('information regarding a judgment obtained by a law firm on behalf of a client, 'even though available in the public record, is a secret, learned within the attorney-client relationship'); Emmanouil v. Roggio, D.N.J. No. 06-1068, 2008 WL 1790449 (Apr. 18, 2008) (information regarding civil defendant's testimony in a prior case was generally known when defendant disclosed the information to the plaintiff and the prior case was a

matter of public record); Sealed Party v. Sealed Party, S.D. Tex. No. Civ. A. H-04-2229, 2006 WL 1207732 (May 4, 2006) (information in press release announcing a civil settlement that was in the public record was generally known, the fact that the case settled and the lawyer's impressions about the case were not); In re Adelphia Communications, supra, (list of properties owned by particular parties was not generally known information; information was publicly available, but would require substantial difficulty or expense to produce a list of the properties owned by the parties and related entities); Cohen v. Woglin, E.D. Pa. No. 87-2007, 1993 WL 232206 (June 24, 1993) (magazine and newspaper articles, published court decisions, court pleadings, and public records in a government office are generally known; pleadings filed under seal and records of an international court are not). As evidenced by these cases, particularly in civil matters, whether information in a public record is generally known may require a review of the applicable facts and circumstances."; "When faced with the cross-examination of a former client that requires the use of information relating to the prior representation to the detriment of the former client, a public defender may conclude that he or she cannot satisfy either of the exceptions in Prof. Cond. R. 1.9(c)(1). That is, the information is not generally known and the use of the information is not permitted or required by the Rules. In this situation, the public defender may either obtain the former client's informed consent or seek permission to withdraw from the current representation." (emphasis added); "The public defender may not be able to obtain the former client's informed consent to the use of disadvantageous information about the former client's representation. Given that the former client is an adverse witness, competent and diligent representation of the current client probably requires the cross-examination and potential impeachment of the former client. If the public defender is unable to fulfill this obligation to the current client, cannot satisfy one of the exceptions in Prof.Cond.R. 1.9(c)(1), or secure the former client's informed consent, the public defender must withdraw from the current representation."; "[E]ven when a different public defender in the same office represented the former client/adverse witness, if that public defender would be prohibited by Prof.Cond.R. 1.7 or 1.9 from representing the current client, all of the public defenders in the office are disqualified under Prof. Cond. R. 1.10." (emphases added)).

- Vermont LEO 2008-4 (2008) (holding that a lawyer could not cross examine a former client if the lawyer possessed client confidential information that the lawyer could use to the current client's advantage during the cross-examination; concluding that the lawyer would have to withdraw from the representation if the lawyer was unsuccessful in seeking a court order precluding the former client's testimony as an adverse witness; "A lawyer representing a mother who was seeking to terminate a guardianship, while the guardian sought to terminate the mother's parental rights; explaining that just before the third day of a hearing, one of the lawyer's clients (on an

> unrelated matter) came forward as a fact witness in support of the guardian and adverse to the lawyer's client; explaining that the lawyer had filed a motion seeking to preclude the fact witness' testimony as cumulative, but analyzing the lawyer's responsibility should the court deny that motion; "Law Firm A had acquired information regarding Witness C in the course of its prior and ongoing representation of her that would be extremely valuable for cross-examination (bearing directly upon credibility and truthfulness, among other things), meaning that Law Firm A's duties to Mother require that it be aired. However, this information is adverse to Witness C, meaning that exposing it would violate Law Firm A's duties of loyalty and confidentiality to Witness C, quite aside from the ethical conflict that would be presented by cross examining a current client." (emphasis added); "Law Firm A is correct in its understanding that if the current client/witness is called to testify, Law Firm A must resign from its representation. This conclusion applies not only to Rule 1.6 (governing confidentiality obligations) but also under Rule 1.7."; concluding that "[a] lawyer may not continue to represent a client in trial if another current client will be called as a directly adverse witness by opposing counsel and where the lawyer possesses confidential client information adverse to the client witness that should be used during cross-examination of the client witness"; also holding that "[w]hether the mid-trial disclosure of the client/witness requires preclusion of the witness, a new trial, or some other consequences is a legal question for the court and outside the scope of this Section's authority"; explaiing that "we cannot opine on how to resolve the trial dilemma. The suggestion that has been made to use a special counsel for cross examination of the client witness strikes us as problematic [explaining that "[o]n these facts, for example, we note that the Mother is entitled to have her attorney attack the testimony of the client witness in closing argument as well as during cross examination."] At the same time, we are not in a position to weigh, let alone decide, whether the witness is cumulative, what the consequences of mid-trial notice of the witness ought to be, whether her exclusion would be prejudicial, or the host of other possible legal issues presented." (emphasis added); "In conclusion, we would like to reemphasize that there is no dilemma under the Rules. If the current client is permitted to testify as an adverse witness in the circumstances presented, Law Firm A must withdraw." (emphasis added)).

The 2013 Ohio legal ethics opinion discussed above concluded that the lawyer would have to withdraw if the lawyer possessed protected client confidential information not generally known, which could be used against the witness. Ohio LEO 2013-4 (10/11/13).

The Vermont legal ethics opinion mentioned above indicated that a lawyer would have to withdraw if unsuccessful in precluding the adversary from designating the lawyer's former client as a testifying expert. Vermont LEO 2008-4 (2008).

Best Answer

The best answer to this hypothetical is **(B) ARRANGE FOR "CONFLICTS COUNSEL" TO CROSS-EXAMINE THAT EXPERT AT HIS DEPOSITION AND AT TRIAL (PROBABLY)**.

B 1/17

Information-Caused Conflicts Not Involving Direct Adversity to Current or Former Clients

Hypothetical 7

You represent two national drugstore chains – handling their litigation work and arranging for your partners to handle their real estate work.

This morning you met with the regional manager of one of your clients, who told you that she just arranged for the purchase of real estate in a fast-growing area of Houston. She said that her company planned to rush its development there, and open a new drugstore within six months. The regional manager told you the good news that the land the client just purchased is properly zoned and would allow quick development of the drug store.

You are now in the middle of an afternoon meeting with your other client's regional manager and general counsel. They just told you that they are considering purchasing some land to build a drug store in the same area of Houston that you and your other client talked about this morning. This client's general counsel told you that she will need your regulatory and litigation skills to seek the land's rezoning so they can build a drug store there – which will take at least a year. The regional manager says that the land purchase and rezoning effort would be a waste of money if some other drug store chain built a drug store in that area in the near future – but that she not aware of any other company's plans to do that.

What do you do?

(A) Remain silent.

(B) Speak up, and tell the regional manager and general counsel that it would be a waste of money for their company to purchase the land and start the rezoning effort.

(C) Something else.

(A) REMAIN SILENT

Analysis

Lawyers possessing information from one client can be put in an awkward position if another client would find that information useful.

Outside lawyers nearly always represent more than one client, and therefore must constantly maintain each client's confidentiality -- unless the ethics rules permit or require disclosure. On a daily basis, such lawyers may learn information from one client that another client would love to know. However, the rules nearly always require lawyers to maintain the confidentiality of that information. This might prejudice the client who could use the information, but that fact is almost beside the point. If the information deserves protection under the applicable ethics rules, the lawyer may not disclose that information to another client -- even if the silence results in that other client's harm or a forfeited opportunity to benefit.

At the extreme, the lawyer's possession of such information might cause an insoluble conflict that requires the lawyer's withdrawal.

Under ABA Model Rule 1.7(a)(2), lawyers face a conflict if

> there is a <u>significant risk</u> that the representation of one or more clients will be <u>materially limited</u> by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

ABA Model Rule 1.7(a)(2) (emphasis added). This type of conflict can arise if the lawyer finds himself or herself incapable of providing neutral advice to a client without constantly second-guessing whether the lawyer would have given different advice absent information the lawyer possesses from another client.

A 2005 New York City legal ethics opinion focused on conflicts triggered by lawyers' acquisition of information from other clients and from non-clients.

The New York City Bar listed a number factors that must guide this determination: (1) the materiality of the information the lawyer has learned during the

representation; (2) whether the information is already generally known or would inevitably be discovered by any lawyer representing the other client -- including the importance of the lawyer possessing the information sooner rather than later; (3) whether the information learned in the earlier representation can easily be segregated from the file in the second matter; and (4) whether the lawyer can be effectively screened from a colleague who can undertake the later representation of the other client.

> In the course of representing clients, lawyers frequently come into possession of information that would be of use to other clients but that they cannot use for the latter clients' benefit. The possession of that information does not, without more, create a conflict of interest under the Code. The critical question is whether the representation of either client would be impaired. In particular, the lawyer has a conflict if the lawyer cannot avoid using the embargoed information in the representation of the second client or the possession of the embargoed information might reasonably affect the lawyer's independent professional judgment in the representation of that client. Whether that is the case will often depend on the materiality of the information to the second representation and the extent to which the information can be effectively segregated from the work on the second representation. Even if the lawyer has a conflict, it may be possible in certain circumstances for the clients to waive the conflict without revealing the information in question. If the lawyer must withdraw, the lawyer should not reveal the embargoed information.

New York City LEO 2005-02 (3/2005) (emphases added).

The legal ethics opinion rejected the concept that a lawyer's acquisition of client information always requires the lawyer's withdrawal from another representation where that information is material.

> We are aware that there is language and reasoning in ethics opinions and some court cases that treat the mere

> possession of information that might be of use to one client, but that is protected as a confidence or secret, as creating a conflict requiring withdrawal. . . . [T]he implications of such an analysis are boundless, because the duty to use information for the benefit of a client is very broad. It makes little sense to disqualify a lawyer because he or she has information that might be useful to the second client, regardless of materiality or significance. A more sensible result, at least where the interests of the clients are not adverse, and one more faithful to the language of the Code, (1) recognizes that lawyers regularly have information that they cannot use for the benefit of a client, and (2) focuses on the effect that possession of the information has on the representations in question.

Id. (emphasis added). Thus, the New York City legal ethics opinion takes a more optimistic view than some commentators on whether lawyers may continue representations in such circumstances.

Unfortunately, if a lawyer faces such a conflict, the lawyer often cannot continue the representation of the other client -- because the lawyer may not be able to disclose sufficient information to obtain that client's consent to the continued representation.

In such a situation, lawyers must sometimes withdraw without even explaining why they must withdraw. The New York City ethics opinion discusses that possibility.

> [T]he Code does not contemplate an exception to the duty of confidentiality simply because the information may be highly relevant to another client. Rather, as we have said, the duty to use all available information for the benefit of the client is qualified by obligations of confidentiality to others. We conclude that where a lawyer is forced to withdraw from a representation because the lawyer cannot disclose or use material information of another client's, the lawyer is not at liberty to disclose the information. The lawyer should simply state that a conflict has arisen that requires withdrawal for professional reasons. As long as doing so does not effectively disclose the information, the lawyer may state that he or she has acquired information that raises a conflict that requires the lawyer to withdraw. Where identifying the client

> that 'created' the conflict is not tantamount to disclosing the information, that client may be revealed.

Id. (emphasis added).

Conflicts can arise in an almost unlimited number of situations. For instance, in 2013, Greenberg Traurig attempted (albeit unsuccessfully) to disqualify Epstein Becker from representing a client in a malpractice case against Greenberg -- arguing that Epstein Becker improperly gained information it could later use in the malpractice case while acting as co-counsel with Greenberg in representing the client.

- Roberts v. Corwin, No. 115370/2009, 2013 NY Slip Op 51637(U), at 2, 3, 6 (N.Y. Sup. Ct. Oct. 3, 2013) (analyzing an alleged information-based conflict; declining to disqualify Epstein Becker, despite Greenberg Traurig's assertion; Epstein Becker acted as co-counsel with Greenberg Traurig in representing plaintiff Roberts, while simultaneously coordinating with Roberts to represent him in a malpractice case against Greenberg Traurig; "Greenberg Traurig contends that Epstein Becker misused its position as co-counsel 'to build a record against [Greenberg Traurig] to support a purported malpractice claim.'. . . In support, Greenberg Traurig cites Mr. Corwin's testimony that he 'disclosed to [Epstein Becker] and Cozier, without reservation of any kind, as I would to any of my own colleagues at [Greenberg Traurig], or to any other qualified lawyer selected by Roberts to be my co-counsel, all information that would be helpful to them in understanding the background of the case and, in particular, all aspects of the underlying arbitration.'" (internal citation omitted); "Significantly, Greenberg Traurig does not allege that Epstein Becker, through its position as co-counsel, gained any information, confidential or privileged, which it could not have obtained from Mr. Roberts himself."; "[A]lthough Mr. Roberts was Greenberg Traurig's client, he was free to disclose to Epstein Becker whatever communications he had with Mr. Corwin or whatever documents he received from Mr. Corwin, including strategy discussions and drafts."; "Epstein Becker's simultaneous representation of Mr. Roberts for purposes of both mitigating damages in the arbitration proceeding and preparing for a possible malpractice action raises ethical concerns. . . . However, this case does not involve the egregious conduct in obtaining confidential information through deceptive means, or an inherent conflict of interest, which has been held to require the severe remedy of disqualification."; "Epstein Becker further claims that a formal written litigation hold was not necessary as Mr. Roberts acted to preserve his documents and the attorneys at Epstein Becker were under an independent ethical obligation to maintain and preserve client files."; "Greenberg Traurig submits no

authority that the litigation hold must always be written and that the form of the litigation hold may not vary with circumstances. Moreover, Greenberg Traurig makes no showing that an automatic email deletion protocol was in place at Epstein Becker or, as held above, that Mr. Roberts or Epstein Becker deleted any emails or otherwise destroyed any documents. Under these circumstances, a spoliation sanction is not appropriate.").

Best Answer

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

B 1/17

Conflicts Caused by Information from Non-Clients

Hypothetical 8

You represent a company that is planning and will build a commuter rail line. During this representation, you have learned incriminating information about a subcontractor that your client recently terminated. You also have seen the still-secret map of the likeliest routes.

(a) May you represent another contractor in an unrelated lawsuit against the subcontractor about whom you learned the incriminating information?

MAYBE

(b) May you represent a developer interested in acquiring parcels of land along the possible rail line routes?

(B) NO (PROBABLY)

Analysis

(a)-(b) Although it seems counterintuitive, lawyers' confidentiality duty can extend to information about non-clients and even about adversaries. The lawyers' inability to disclose or use such information might preclude other representations, even if they are not adverse to any client's interests.

ABA Model Rules

Although it is not an easy fit, these lawyers' ethical dilemmas arise under the lesser-known type of ABA Model Rule 1.7 conflict of interest.

Every lawyer is familiar with the chief type of conflict of interest -- which exists if "the representation of one client will be directly adverse to another client." ABA Model Rule 1.7(a)(1). At the extreme, this type of direct conflict involves a representation that the ABA Model Rules flatly prohibit. Lawyers can never undertake a representation that

involves "the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal." ABA Model Rule 1.7(b)(3). Even if a representation does not violate that flat prohibition, adversity might nevertheless create a conflict of interest if a lawyer represents one client "directly adverse" to another client. For instance, a lawyer jointly representing two co-defendants in a lawsuit obviously cannot "point the finger" at one of the clients (without consent), even if such an argument does not amount to "the assertion of a claim."

Some folks describe this first variety of conflict as a "light switch" conflict, because a representation either meets this standard or it does not. This is not to say that it can be easy to analyze such conflicts. But a lawyer concluding that a representation will be "directly adverse to another client" must address the conflict.

The other type of conflict involves a much more subtle analysis. As the ABA Model Rules explain it, this type of conflict exists if

> there is a <u>significant risk</u> that the representation of one or more clients will be <u>materially limited</u> by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

ABA Model Rule 1.7(a)(2) (emphasis added).

This has been called a "rheostat" conflict. Unlike making a "yes" or "no" determination as required in analyzing the first type of conflict, a lawyer dealing with a "rheostat" conflict has a more difficult task. The lawyer must determine if some other duty, loyalty, or interest creates a "significant risk" of "materially" limiting the lawyer's representation of a client. This often involves a matter of degree rather than kind. For example, a lawyer with mixed feelings about abortion might feel awkward representing

an abortion clinic, but would be able to adequately represent such a client. However, a vehemently pro-life lawyer might well find her representation of such a client "materially limited" by her personal beliefs. Thus, this second type of conflict requires a far more subtle analysis than a "light switch" type of conflict arising from direct adversity to another client.

As with the first of type of conflict, a lawyer dealing with a "rheostat" conflict may represent a client only if (1) the lawyer "reasonably believes" that she can "provide competent and diligent representation," (2) the representation does not violate the law, and (3) each client provide "informed consent." ABA Model Rule 1.7(b)(1), (4).

Although the ABA Model Rules do not deal with it, this type of "rheostat" conflict can arise if the lawyer obtains information about a non-client during the lawyer's representation of a client. Of course, even that information (about a non-client) can be within the definition of the client's protected "information."

And from a conflicts standpoint, lawyers might find themselves confronting a "rheostat" conflict even if they will not be adverse to a current or former client. Under ABA Model Rule 1.7(a)(2), such lawyers might find that there is a "significant risk" that their representation of a client will be "materially limited" by their responsibilities to "another client, a former client or a third person." This might occur if their disclosure or use of the information about a non-client might violate their client's contractual duties to such a non-client. For instance, a lawyer representing a bank might put the bank at risk by disclosing or using information about one of the bank's clients, which the lawyer obtained while representing the bank.

Unfortunately, the ABA Model Rules do not really address this subtle but potentially disabling type of conflict.

Restatement

The Restatement deals more extensively with this issue. As the Restatement explains, the lawyer's disclosure or use of clients' information can put the client in jeopardy.

> A lawyer might have obligations to persons who were not the lawyer's clients but about whom information was revealed to the lawyer under circumstances obligating the lawyer not to use or disclose the information. Those obligations arise under other law, particularly under the law of agency. For example, a lawyer might incur obligations of confidentiality as the subagent of a principal whom the lawyer's client serves as an agent.

Restatement (Third) of Law Governing Lawyers § 132 cmt. g(ii) (2000) (emphasis added). The Restatement provides several illustrations that illuminate the issue.

In the first illustration, a lawyer representing a hospital has learned that a patient in the hospital has been convicted of a drug offense. That patient is now a witness in an unrelated case in which the lawyer is representing another client. Somewhat surprisingly, the Restatement suggests that the lawyer may continue to represent the client in that other case if the client consents after the lawyer discloses the nature of the conflict and its effect on limiting the lawyer's cross-examination of the patient.

> Lawyer has represented Hospital in several medical-malpractice cases. In the course of preparing to defend one such case, Lawyer reviewed the confidential medical file of Patient who was not a party in the action. From the file, Lawyer learned that Patient had been convicted of a narcotics offense in another jurisdiction. Patient is now a material witness for the defense in an unrelated case that Lawyer has filed on behalf of Plaintiff. Adequate

> representation of Plaintiff would require Lawyer to cross-examine Patient about the narcotics conviction in an effort to undermine Patient's credibility. Lawyer may not reveal information about Patient that Hospital has an obligation to keep confidential. That limitation in turn may preclude effective representation of Plaintiff in the pending case. However if, without violating the obligation to Patient, Lawyer can adequately reveal to Plaintiff the nature of the conflict of interest and the likely effect of restricted cross-examination, Lawyer may represent Plaintiff with Plaintiff's informed consent.

Restatement (Third) of Law Governing Lawyers § 132 illus. 7 (2000) (emphases added). This seems like an unrealistic remedy. How could such a lawyer adequately disclose the dilemma to the current client without disclosing protected information, or providing such obvious hints that the current client can easily surmise the protected information? In fact, the lawyer's effort to explain the conflict to the current client might make the protected information sound even more important than it really is.

The other illustration involves a lawyer's acquisition of confidential information about a company while representing an underwriter assisting the company in selling its bonds. The Restatement concludes that the lawyer cannot represent another client in a breach of contract action against the company, unless the information has become generally know.

> Lawyer represents Underwriter in preparing to sell an issue of Company's bonds; Lawyer does not represent Company. Several questions concerning facts have arisen in drafting disclosure documents pertaining to the issue. Under applicable law, Underwriter must be satisfied that the facts are not material. Lawyer obtains confidential information from Company in the course of preparing Lawyer's opinion for Underwriter. Among the information learned is that Company might be liable to A for breach of contract. Unless the information has become generally known . . . , Lawyer may not represent A in a breach of contract action against

> Company because the information was learned from Company in confidence.

Restatement (Third) of Law Governing Lawyers § 132 illus. 8 (2000) (emphases added). This conclusion makes more sense than the Restatement's conclusion about the other scenario.

Although the ABA Model Rules presumably would impute an individual lawyer's disqualification under this standard to the lawyer's entire firm, the Restatement looks to agency law in finding such imputation inappropriate.

> An important difference between general agency law and the law governing lawyers is that general agency law does not normally impute a restriction to other persons. Thus, when a lawyer's relationship to a nonclient is not that of lawyer-client but that, for example, of subagent-principal, imputation might not be required under the law governing subagents.

Restatement (Third) of Law Governing Lawyers § 132 cmt. g(ii) (2000) (emphasis added). In describing this situation, the Restatement indicates that perhaps another lawyer at the firm could represent the client suing the company.

> In the circumstances described in Illustration 8, standards of agency law or other law might permit the underwriter to provide services to another customer in a subsequent transaction so long as the underwriter takes appropriate steps to screen its employees. A lawyer affiliated with the disqualified lawyer could represent the underwriter in the second transaction after appropriate screening of the disqualified lawyer.

Id.

New York City Legal Ethics Opinion

A 2005 New York City legal ethics opinion analyzed conflicts triggered by lawyers' acquisition of information about non-clients.

The New York City Bar listed a number factors that must guide this determination: (1) the materiality of the information the lawyer has learned during the representation; (2) whether the information is already generally known or would inevitably be discovered by any lawyer representing the other client -- including the importance of the lawyer possessing the information sooner rather than later; (3) whether the information learned in the earlier representation can easily be segregated from the file in the second matter; and (4) whether the lawyer can be effectively screened from a colleague who can undertake the later representation of the other client.

In addition to focusing on information lawyers obtain from clients about other clients, the legal ethics opinion also addressed the implications of information lawyers obtain from clients about non-clients.

The first of the New York City legal ethics opinion's scenarios paralleled the Restatement illustration 8. The legal ethics opinion held out a slight hope that the lawyer could represent the other client in a transactional matter adverse to the company about which the lawyer acquired information about representing the underwriter.

- New York City LEO 2005-02 (3/2005) (analyzing, among other things, the following situation: "Scenario 1: A lawyer represents the underwriters in a securities issuance and in the course of due diligence learns confidential information about the issuer. The lawyer owes a duty to the lawyer's clients, the underwriters, arising out of the underwriters' duties to the issuer, to keep the information learned about the issuer in due diligence confidential. After the securities issuance is completed, a long-time client requests the lawyer's assistance in seeking to acquire or enter into a transaction with the issuer. May the lawyer undertake the representation of the acquirer?" (emphasis added); addressing the conflict implications: "In the first [scenario], the lawyer represented the underwriters in the first representation and is adverse to the issuer in the second. The lawyer is not adverse to his former clients, because at the time of the second representation, the underwriters (unless they are

> involved in the second matter as well) are indifferent to whether the acquirer or counterparty succeeds or not. But the lawyer has confidential information about the issuer that may be used against the issuer in representing the acquirer or counterparty. For example, the lawyer may have reviewed and kept copies of projections of financial results that would be useful to an acquirer or counterparty in deciding what price to bid or offer. Or the lawyer may have learned very damaging information -- such as the prospect of indictment -- that caused the earlier securities issuance not to go forward. While the acquirer or counterparty might eventually learn that information in the course of due diligence in the second transaction, having it earlier in the sales process might be useful. That information cannot, however, be disclosed because of the underwriters' demand (derived from undertakings to the issuer and from the securities laws) that their lawyer not disclose due diligence information not otherwise disclosed in the prospectus." (footnote omitted) (emphasis added); also analyzing the materiality of the information; "Under either test, whether the possession of the information will create a conflict will depend on the totality of the circumstances. A critical factor is the materiality of the information to the second representation. The more material the information, the more likely that a lawyer cannot avoid using it or, at least, that the lawyer's professional judgment on behalf of the client may be affected by knowledge of it. One element of materiality is whether the information in question would be uncovered in the ordinary course of the other matter. If so, then the information would be material only if it was important to have the information earlier than it would have been obtained in the ordinary course. In Scenario[] 1 . . ., it may be that the information possessed by the lawyer from the prior due diligence and from the insurance company representation would inevitably be sought in conducting due diligence for the first transaction (either because there are standard questions that would uncover the information or because publicly available information about the target would signal the need to make such inquiry). In that case, unless when the information is known is important, the possession of the information would not likely affect the representation." (emphases added; footnote omitted) "The existence of financial projections in due diligence files that were not focused on in the earlier matter and are not recalled is unlikely to have any effect on the lawyer's judgment as long as the lawyer does not look at the files and the files are effectively sealed." (footnote omitted)).

The second scenario involved a lawyer representing an insurer in analyzing one of its insured's claims for legal fees incurred during a regulatory investigation. Another client then asks the lawyer to represent it in forming a joint venture with the insured. Although acknowledging that the insurance company "may be indifferent to whether the

business is transferred to the joint venture," the lawyer might not be able to obtain the necessary consent from the insurer client to represent the other client in forming the joint venture -- because that client's business plans might be confidential.

- New York City LEO 2005-02 (3/2005) (analyzing, among other things, the following situation: "Scenario 2: A law firm represents an insurer in determining whether a claim by Company A for legal fees incurred in connection with an ongoing regulatory investigation is covered by Company A's 'directors and officers' insurance policy. In that connection Company A supplies information about the investigation to the insurer's law firm under an understanding that the lawyers and the insurer will keep the information confidential. The law firm is then approached by regular Client B for assistance in forming a potential joint venture with Company A to which Company A will contribute the business being investigated by the regulators. May the law firm undertake the representation of Client B?"; analyzing the ethics implications of the lawyer's information; "[I]n the second scenario, the insurance company may acquire relatively detailed information about the insured that might be useful to the acquirer (e.g., the significance of the investigation, the insurance company's position on coverage). The insurance company may be indifferent to whether the business is transferred to the joint venture."; also analyzing the materiality element "Under either test, whether the possession of the information will create a conflict will depend on the totality of the circumstances. A critical factor is the materiality of the information to the second representation. The more material the information, the more likely that a lawyer cannot avoid using it or, at least, that the lawyer's professional judgment on behalf of the client may be affected by knowledge of it. One element of materiality is whether the information in question would be uncovered in the ordinary course of the other matter. If so, then the information would be material only if it was important to have the information earlier than it would have been obtained in the ordinary course. In Scenario[] . . . 2, it may be that the information possessed by the lawyer from the prior due diligence and from the insurance company representation would inevitably be sought in conducting due diligence for the first transaction (either because there are standard questions that would uncover the information or because publicly available information about the target would signal the need to make such inquiry). In that case, unless when the information is known is important, the possession of the information would not likely affect the representation." (footnote omitted); "[T]he ability to obtain consent may be hampered by the inability to disclose the information in question. In Scenario 2, for example, if the fact that the joint venture is being considered is itself confidential, the lawyer could not approach the insurance company for permission to use the information derived from the earlier representation." (emphasis added)).

The third scenario involved a materially different situation, in which the lawyer's knowledge would not be used against a non-client about which the lawyer has acquired information while representing a client. In that scenario, a lawyer representing a state agency learns about the possible route of a new rail line. The New York City legal ethics opinion concluded that this lawyer was probably unable to undertake the representation of another client interested in purchasing land in the "general direction of the rail line."

- New York City LEO 2005-02 (3/2005) (analyzing, among other things, the following situation: "Scenario 3: A lawyer represents a state transportation agency in connection with planning a new rail line. To avoid land speculation, the agency insists that its deliberations about the route of the rail line be kept confidential. Another client asks the lawyer to assist it in acquiring one of several parcels of land in the general direction of the rail line. May the lawyer undertake the representation of the land purchaser?"; "In the third scenario, the lawyer is likely to know in advance of the general public the precise route of the rail line, information that would be very valuable if known to the land purchaser." (emphasis added); discussing the conflicts implications of a lawyer's possession of information in simultaneous representations; "Scenario 3 illustrates this problem. If the lawyer learns the precise routing of the rail route in advance of the public but at a time when it would be useful to the prospective land purchasing client, the lawyer could not pretend not to know that information in advising the client on which parcel to buy." (emphasis added); also analyzing the materiality element; "Under either test, whether the possession of the information will create a conflict will depend on the totality of the circumstances. A critical factor is the materiality of the information to the second representation. The more material the information, the more likely that a lawyer cannot avoid using it or, at least, that the lawyer's professional judgment on behalf of the client may be affected by knowledge of it. One element of materiality is whether the information in question would be uncovered in the ordinary course of the other matter. If so, then the information would be material only if it was important to have the information earlier than it would have been obtained in the ordinary course. . . . In Scenario 3 . . . , the value of the information about the rail routing is in its early possession, so the fact that the routing will eventually be public would not mitigate the conflict presented." (footnote omitted) (emphasis added); "A second factor is the ease with which the information can be segregated from the work on the second matter to ensure that the information is not used. Here a significant consideration is the specificity of the information and

> whether it is of a kind that the lawyer will likely recall. The rail routing in Scenario 3 . . . [is an] example[] of information that, once learned, cannot be pushed from the mind." (emphases added)).

This New York City legal ethics opinion presents one of the only analyses of this subtle issue. Its approach seems well ground in basic conflicts rules, which probably do not vary much from state to state.

Case Law

Several cases have articulated the same principle – disqualifying lawyers from representing clients because the lawyers had acquired confidential information from non-clients that they could use against the intended target.

- Acacia Patent Acquisition, LLC v. Superior Court, 184 Cal. Rptr. 3d 583, 592, 593 (Cal. Ct. App. 2015) (disqualifying a lawyer from representing a client against a company about whom the law firm learned confidential information when it represented another law firm against the company in a fee dispute involving the same underlying facts; "California case law does not discuss the precise issue before us -- whether a law firm's representation of a lawyer in a fee dispute results in a disqualifying conflict of interest when the law firm opposes the fee dispute defendant in another matter. This fact pattern includes elements of cases like Morrison [Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft, 81 Cal. Rptr. 2d 425 (Cal. Ct. App. 1999)] and Burkes [Burkes v. Hales, 478 N.W. 2d 37 (Wis. Ct. App. 1991] (i.e., the assumption of a client's duties of confidentiality to a nonclient may provide grounds for disqualification in a subsequent matter against the nonclient). But a wild card is added to the mix: the supposed duty of confidentiality here would be owed to a party that was adverse to AlvardoSmith's clients in both the prior and subsequent litigation."; "A limited universe of out-of-state cases has addressed the prospect of a duty of confidentiality to a litigation adversary arising by way of representing a law firm against that adversary in a different action. Several courts have disqualified attorneys for simultaneously representing a nonclient's litigation opponent and the nonclient's former law firm in a malpractice action arising out of the same litigation."; "We find these out-of-state authorities persuasive for the general principle of law that a disqualifying conflict can arise, with regard to an adverse nonclient, by way of a law firm representing another law firm.").

- United States ex rel. Holmes v. Northrop Grumman Corp., Civ. No. 1:13cv85-HSO-RHW, 2015 U.S. Dist. LEXIS 71804, at *18-19, *23-24, *26 (S.D. Miss.

June 3, 2015) (disqualifying a relator/lawyer in dismissing his qui tam suit against Northrop Grumman for alleged post-Katrina fraud against the U.S. Navy, because the lawyer had acquired and then used confidential information about Northrop while employed by Northrop's insurer Munich Re; holding that while representing in arbitration, the lawyer had taken different positions than advanced in the qui tam case; "In the UK Arbitration, Holmes and Fisher, on Munch Re's behalf, took the position that Munich Re did not owe compensation to NGC for certain losses related to Hurricane Katrina because the Navy had previously paid Defendants to compensate for those losses. . . . However, at the same time he was representing Munich Re in the UK Arbitration Holmes filed a Complaint [1] and First Amended Complaint [43], in which he alleged that the Navy should have never paid funds to Defendants and that it was Defendants' fraudulent conduct which duped the Navy into paying the funds. . . . Holmes has not sufficiently disputed this characterization of the conflicting positions he took as counsel for Munch Re, on the one hand, and as relator in this case seeking over 2.5 billion dollars, on the other. These positions reflect a conflict between Holmes' personal interest as a relator, arguing that the Navy's payments to Northrop Grumman were invalid, and Holmes' interest as counsel to Munich Re, advocating the validity of those same payments to alleviate Munich Re's responsibilities to Northrop Grumman. Consequently, the record supports a finding that there was at least 'a significant risk' that Holmes' representation of Munich Re was 'materially limited by' Holmes' 'personal interest' in pursuing this qui tam case, such that Holmes' conduct created a concurrent conflict of interest jeopardizing his obligation of loyalty to Munich Re. See ABA Model Rule 1.7(a)." (footnote omitted); also holding that the lawyer had improperly used confidential information belonging to Munich Re in its qui tam case; "Holmes has revealed and attempted to make personal use of information relating directly to his representation of Munich Re in the form of documents he obtained on Munich Re's behalf from the Navy and Northrop Grumman for use in the UK Arbitration. . . . These documents were subject to various confidentiality obligations existing between Munich Re, Northrop Grumman, and the Navy, and a Stipulated Protective Order imposed by the United States District Court for the District of Columbia. . . . There is no indication that Holmes would have otherwise come into possession of these documents but for his representation of Munich Re. Holmes acknowledged using these documents to pursue this qui tam action in which he seeks over 2.5 billion dollars, a portion of which would be available to him by virtue of his serving as relator. . . . Absent Munich Re's informed consent, Holmes violated the duty to keep information related to his representation of Munich Re confidential when he revealed and made use of the documents he obtained during his representation of Munich Re."; "Similar to his actions surrounding the concurrent conflict of interest which jeopardized his duty of loyalty to Munich Re, Holmes has not sufficiently established that he obtained Munich Re's informed consent prior to revealing Munich Re's confidential information.

Consequently, Holmes breached his duty to protect his client's confidential information.").

- Frye v. Ironstone Bank, 69 So. 3d 1046, 1050, 1052 (Fla. Dist. Ct. App. 2011) (disqualifying a lawyer from representing a bank in a lawsuit against a borrower who sought to enforce a loan guarantee, because the lawyer was simultaneously defending in a malpractice action the lawyer who had originally represented the borrower in defending against a bank's action; explaining that the lawyer simultaneously represented the bank and the malpractice defendant would learn confidences about the borrower from his malpractice defendant lawyer client that he could use on behalf of his bank client in the loan guarantee action; "Mr. Frye's argument for disqualification is based upon Henderson Franklin's receipt in the context of the Bank's action against Mr. Frye of privileged information from Mr. Frye's former counsel as a result of Henderson Franklin's simultaneous representation of the Bank and of Mr. Trupp and the Arnstein firm. The legal malpractice action concerns, in part, Mr. Trupp's representation of Mr. Frye in the same action in which Henderson Franklin is currently representing the Bank. The allegations of the malpractice complaint also concern Mr. Trupp's representation of Mr. Frye on estate and asset planning matters, during which Mr. Frye alleges that Mr. Trupp gained detailed knowledge of his financial circumstances. Such knowledge could be invaluable to the Bank in collecting a judgment against Mr. Frye."; "[B]ecause Mr. Frye has sued Mr. Trupp in connection with that representation, Mr. Trupp may lawfully reveal those privileged communications to the extent necessary for the defense of the malpractice action."; "In accordance with the applicable ethical rules, Mr. Frye's privileged attorney-client communications with Mr. Trupp may now be disclosed to his opponent's counsel in the Bank's action on the guaranty, Henderson Franklin. It follows that Henderson Franklin must be disqualified from representing the Bank in its action against Mr. Frye because of the unfair informational advantage Henderson Franklin has gained by virtue of its representation of Mr. Trupp and the Arnstein firm in the defense of Mr. Frye's malpractice action.").

Best Answer

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

B 1/17

Lawyer Working with an Adversary's Lawyer on an Unrelated Matter

Hypothetical 9

You practice in a 20-lawyer firm in a medium-sized city. An out-of-state company just hired you to defend it in a commercial litigation lawsuit. The plaintiff is represented by a lawyer with whom you are working in a co-counsel relationship on a large case that takes up approximately 30 percent of your time each day.

Does this working relationship with the plaintiff's lawyer create a conflict of interest that requires disclosure and consent?

MAYBE

Analysis

The ethics rules describe two types of conflicts of interest. Lawyers are most familiar with the first type -- in which "the representation of one client will be directly adverse to another client." ABA Model Rule 1.7(a)(1). Some folks describe this as a "light switch" conflict, because a representation either meets this standard or it does not. This is not to say that it can be easy to analyze such conflicts. But a lawyer concluding that a representation will be "directly adverse to another client" must deal with the conflict.

The second type of conflict involves a much more subtle analysis. As the ABA Model Rules explain it, this type of conflict exists if

> there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

ABA Model Rule 1.7(a)(2) (emphasis added).

This has been called a "rheostat" conflict. Unlike making a "yes" or "no" determination as required in analyzing the first type of conflict, a lawyer dealing with a "rheostat" conflict has a more difficult task. The lawyer must determine if some other duty, loyalty or interest has a "significant risk" of "materially" limiting the lawyer's representation of a client. This often involves a matter of degree rather than kind. For example, a lawyer with mixed feelings about abortion might feel awkward representing an abortion clinic, but would be able to adequately represent such a client. However, a vehemently pro-life lawyer might well find her representation of such a client "materially limited" by her personal beliefs. Thus, this second type of conflict requires a far more subtle analysis than a "light switch" type of conflict arising from direct adversity to another client.

As with the first of type of conflict, a lawyer dealing with a "rheostat" conflict may represent a client only if the lawyer "reasonably believes" that she can "provide competent and diligent representation," the representation does not violate the law, and each client provide "informed consent." ABA Model Rule 1.7(b).[1]

Depending on the frequency and scope of co-counsel relationships, working with an adversary's lawyer as allies in unrelated matters might create a conflict that requires disclosure and consent.

It is not difficult to envision situations in which such a working relationship could create conflicts. For instance, a young lawyer receiving 95% of his or her income from cases referred by another lawyer might have a conflict (requiring disclosure and

[1] The ABA Model Rules require such consent to be "confirmed in writing," but many states do not.

consent) if asked by a client to oppose that lawyer in some other matter. The client might justifiably worry that a young lawyer so dependent on the other lawyer's goodwill would not risk such a high percentage of his or her income by antagonizing the other lawyer.

In 2016, a New York state court denied a disqualification motion based on such a co-counsel relationship.

- Dietrich v. Dietrich, 25 N.Y.S.3d 148, 149, 150(N.Y. Sup. Ct. 2016) (reversing a lower court's disqualification of a lawyer from representing a husband in a divorce action against his wife; holding that the lawyer was not disqualified because he had earlier acted as co-counsel with the wife's lawyer on an unrelated matter; "Because disqualification can affect a party's federal and state constitutional rights to counsel of his or her own choosing, the burden is on the party seeking disqualification to show that it is warranted . . . . The court must carefully scrutinize such requests, balancing the right to counsel of one's choice 'against a potential client's right to have confidential disclosures made to a prospective attorney subject to the protections afforded by an attorney's fiduciary obligation to keep confidential information secret."; "Kothari [lawyer] has never represented or consulted with the wife. His status as cocounsel on an unrelated matter with the firm of attorneys that represents the wife while representing the husband in this action does not violate any ethical or disciplinary rule. Rule 1.7 of the Rules of Professional Conduct . . . is not violated, because Kothari is not concurrently representing anyone adverse to the interests of his client, the husband, who executed a conflict waiver. There is no risk that Kothari will be representing different interests and no risk that his professional judgment will be adversely affected by his own interests."; "While Rule 1.10 prohibits lawyers associated in a firm from taking on representation when any lawyer in the firm practicing alone would be prohibited from doing so, to impute such a conflict of interest to Kothari by virtue of his being cocounsel on one unrelated matter with the firm of attorneys representing the wife would be too broad a reading of the rule. It would mean that attorneys from different firms could never work together -- even on a single case -- without having the conflicts of interest of each firm imputed to the other; it would impair clients' ability to retain the lawyers of their choice. Moreover, Kothari's relationship with the wife's attorneys was 'non-regular,' and not the 'close, regular and personal' type of relationship that could become an association for purposes of imputing conflicts of interest under Rule 1.10."; "Nor is there an appearance of impropriety sufficient to warrant disqualification. The wife has not shown that there is a reasonable probability that her confidential information will be disclosed to Kothari during

the course of this litigation. Furthermore, the wife's concerns can be easily addressed. Her attorneys could ensure that she and Kothari are never scheduled to be in Cohen Clair's offices at the same time and could create an appropriate wall to ensure that her confidential information is not leaked. Her attorneys could also discuss these concerns with the office assistant who works on this matter and the matter in which Kothari serves as cocounsel to ensure that no confidences are breached, or they could prohibit the assistant from working on both cases.").

Best Answer

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

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Lawyers Representing an Adversary's Lawyer in an Unrelated Matter

Hypothetical 10

You just received a call from your firm's largest client -- which has been sued by a plaintiff represented by another firm in town that is approximately the same size as your firm. Coincidently, last week your managing partner retained that other law firm to represent your firm in a malpractice case that arose from your alleged mistakes.

Must you disclose to your largest client that the plaintiff's law firm in that case is also representing your law firm in an unrelated matter?

MAYBE

Analysis

The ethics rules describe two types of conflicts of interest. Lawyers are most familiar with the first type -- in which "the representation of one client will be directly adverse to another client." ABA Model Rule 1.7(a)(1). Some folks describe this as a "light switch" conflict, because a representation either meets this standard or it does not. This is not to say that it can be easy to analyze such conflicts. But a lawyer concluding that a representation will be "directly adverse to another client" must deal with the conflict.

The second type of conflict involves a much more subtle analysis. As the ABA Model Rules explain it, this type of conflict exists if

> there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

ABA Model Rule 1.7(a)(2) (emphases added).

This has been called a "rheostat" conflict. Unlike making a "yes" or "no" determination as required in analyzing the first type of conflict, a lawyer dealing with a "rheostat" conflict has a more difficult task. The lawyer must determine if some other duty, loyalty or interest has a "significant risk" of "materially" limiting the lawyer's representation of a client. This often involves a matter of degree rather than kind. For example, a lawyer with mixed feelings about abortion might feel awkward representing an abortion clinic, but would be able to adequately represent such a client. However, a vehemently pro-life lawyer might well find her representation of such a client "materially limited" by her personal beliefs. Thus, this second type of conflict requires a far more subtle analysis than a "light switch" type of conflict arising from direct adversity to another client.

As with the first of type of conflict, a lawyer dealing with a "rheostat" conflict may represent a client only if the lawyer "reasonably believes" that she can "provide competent and diligent representation," the representation does not violate the law, and each client provide "informed consent." ABA Model Rule 1.7(b).[2]

In most situations, this situation probably would not create a conflict requiring disclosure and consent.

However, at least two scenarios come to mind that might create a conflict.

First, the attorney-client relationship with the adversary's lawyer might be so material to you or the other lawyer that it could conceivably affect your loyalty to the client, and thus trigger the conflicts rules. For instance, if the other law firm was

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[2] The ABA Model Rules require such consent to be "confirmed in writing," but many states do not.

defending you in a case involving the bulk of your assets and your license, the client might worry that you would not be aggressive enough on its behalf when dealing with the other lawyer.

The ABA addressed this situation in one legal ethics opinion. In ABA LEO 406 (4/19/97), the ABA explained that a lawyer representing another lawyer may also represent a client adverse to the other lawyer's client unless the representation of the client may be "materially limited" by the relationship between the lawyers. The ABA explained that determining whether such a material limit exists depends on such factors as: the importance and sensitivity of the matters; the size of the fee; any similarity between the representations; whether the representations will "cause either or both of [the lawyers] to temper advocacy on behalf of their opposing third-party clients." If the representation meets this standard, the lawyer may proceed (if at all) only with consent, although even curative consent would be unavailable if the lawyer could not make full disclosure because of other client confidences. The ABA explained that even if not required, it might be prudent to disclose the lawyers' relationship.

In discussing the <u>imputation</u> of such a disqualification, the ABA indicated that any non-curable conflict would disqualify the representing lawyer's entire firm, but that the representation of a lawyer in a purely personal matter would <u>not</u> result in disqualification of the represented lawyer's entire firm.

Second, the attorney-client relationship might generate confidentiality problems. For instance, if a plaintiff's lawyer hires one of your partners to prepare her estate plan, your partner might learn what the plaintiff's lawyer expects to receive in certain cases that the lawyer is handling against your clients.

Under the approach of ABA LEO 406 (4/19/97), a partner's individual disqualification would apparently not be imputed to the entire law firm. However, it might still be wise to make disclosure and obtain consent.

The Restatement's Reporter's Note predictably recommends a fact-intensive approach.

- The Restatement (Third) of Law Governing Lawyers § 125 reporter's note cmt. d (2000) ("Not discussed in the Comment is the set of issues that may arise when a lawyer represents a lawyer or law firm in an unrelated matter. Most of the relevant authority is found in ethics-committee opinions, some of which assert broad rules, such as that representations of that kind create conflicts to which all affected clients must consent, apparently without regard to the nature of the representation. E.g., N.Y. St. B. Ass'n Ethics Comm'n Opin. 579 (1987) (citing opinions from several jurisdictions); cf. ABA Formal Opin. 97-406 (1997); Ass'n Bar City N.Y. Formal Opin. 1996-3; see generally Garwin, When Lawyers Need Lawyers, ABA J. 97 (March, 1994); but cf. Phil. B. Ass'n Ethics Comm. Opin. 86-45 (1986) (no conflict, but representing lawyer may wish to disclose situation to lawyer's client to avoid embarrassment). A preferable approach is to examine each of the various types of lawyer-lawyer relationships that might be involved and assess questions of conflict based on a consideration of all relevant factors, including the nature of the representations and the relationship between the lawyers. See Krane, When Lawyers Represent Their Adversaries: Conflicts of Interest Arising Out of the Lawyer-Lawyer Relationship, 23 Hofstra L. Rev. 791 (1995).").

Several states' courts and bars have dealt with this issue. Most either require or recommend disclosure and consent.

- Pennsylvania LEO 2007-027 (1/2/08) (assessing the following situation: "Inquirer asks if X may represent inquirer's child when Inquirer and X represent opposing parties (the 'Pending Case') in an unrelated matter."; holding that the "best practice here" would be to obtain informed consent).

- N.Y. City LEO 1996-3 (4/2/96) ("Whether a lawyer may undertake the representation of, or whether a lawyer may retain, an adversary attorney, with or without the consent of the clients being represented by the respective attorneys, depends upon an analysis of the particular facts and circumstances, including: (a) the intensity and duration of the relationship between the adversaries; (b) the intensity and duration of the adversaries'

relationships with their respective clients; (c) the nature of the lawyer-lawyer representation; (d) the nature of the work currently being performed by the lawyers for their respective clients; (e) the relationship, if any, between the lawyer-lawyer representation and the representation of either client; and (f) the relative importance of the representations to the respective lawyers or firms.").

- New Jersey LEO 678 (11/21/94) ("This Committee has not previously addressed the inquirer's question, i.e., whether an attorney may represent an opposing attorney in a matter unrelated to the matter in which the attorneys are adversaries."; "[W]e find that the inquirer's proposed representation of his adversary in an unrelated matter would create an appearance of impropriety. In so holding, we recognize that the only other ethics tribunal to have considered this question under the appearance of impropriety doctrine reached a different result from ours. See Illinois Opinion 822 (April 4, 1983), ABA/BNA Lawyers' Manual on Professional Conduct: Ethics Opinions 1980-1985 at 801:3015. Nevertheless, we find the proposed conduct to be impermissible.").

- Iowa LEO 92-28 (2/18/93) ("You state that in your community of 8000 you and lawyer A frequently are adversaries in litigation. A personal injury action has been brought against him in his personal, non-lawyer, part-ownership of an apartment building. His insurance carrier has requested you to defend him."; "In actual practice lawyers are entitled to be defended by counsel even as non-professionals are. The mere fact that the lawyers involved have been adversaries in other, non-related litigation should not affect their professional responsibilities or conduct.").

- New York LEO 579 (3/20/87) (explaining that "[t]his Committee has not previously addressed the question whether Attorney A, who is engaged in litigation as opposing counsel to Attorney B, may represent Attorney B in a personal and unrelated matter"; "It is the view of this Committee that the Code does not mandate a per se disqualification. In the first instance, both Attorney A and Attorney B must satisfy themselves that the creation of an attorney-client relationship between them will not compromise in any way the representation of their existing clients in the pending litigation in which they represent adverse parties. If there is doubt in the mind of either attorney that the dual representation by Attorney A might affect any settlement recommendation, litigation strategy or other professional judgments either attorney might be called upon to make on behalf of those existing clients, then Attorney A should decline the proffered employment. If, on the other hand, both attorneys are confident that representation of their existing clients will not be compromised in any manner by Attorney A's acceptance of Attorney B as a client in an unrelated matter and if the existing clients in the pending litigation both give their informed consent to the dual representation following full disclosure, then Attorney A may properly accept employment by Attorney

B. In addition, it must be apparent that representation of Attorney B will not call upon either attorney to reveal or use any confidences or secrets of the existing clients under circumstances proscribed by DR 4-101. Should either client decline to give consent, then the multiple representation is, of course, impermissible." (footnote omitted); ultimately concluding that "provided both clients consent and the other standards set forth in this opinion are met, an attorney for a client in a pending lawsuit may simultaneously represent counsel for the adverse party in a personal and unrelated litigation.").

- Illinois LEO 822 (4/1983) ("It is not improper for Lawyer B to represent Lawyer A when each frequently represent [sic] clients adverse to each other provided Lawyer B makes full disclosure to such clients and obtains consents therefrom.").

- Maryland LEO 82-4 (12/3/81) ("You state that a partner in your law firm is defending Attorney X in a legal malpractice action. Attorney X represents a client in an unrelated personal injury claim against a party who is being defended by a member of your firm."; "You ask whether there is a conflict or other ethical consideration which precludes your law firm from defending one or both of the above matters. You further ask whether there is a conflict or other ethical consideration which applies to Attorney X."; "A majority of the Committee believes that, at the very least, full disclosure should be made to the personal injury clients of Attorney X and your law firm and that the consent of Attorney X, his client and your client are necessary before you undertake the defense of the claim. A majority of the Committee believes that the full disclosure requirement of DR 5-105(C) is met by informing the respective clients that the representation involves a separate, independent personal matter, without specifying the nature of the representation.").

- Michigan LEO CI-649 (6/15/81) ("Where a lawyer represents a second lawyer in said second lawyer's divorce action the second lawyer's views as to appropriate litigation tactics, negotiating techniques, property division, support levels, and other aspects of divorce practice, are secrets of the lawyer-client and may not thereafter be used by the first lawyer to the disadvantage of the lawyer-client, whether in the latter's personal or professional capacity."; "Where a lawyer represents a second lawyer in said second lawyer's divorce action, the first lawyer may not then or thereafter represent a party to another divorce action in which the opposing party is represented by said second lawyer, as such representation must necessarily involve use of the second lawyer's secrets to his or her disadvantage, or representation less zealous than is ethically required, or both, and creates the appearance of impropriety."; "Where a lawyer represents a second lawyer in said second lawyers divorce action, the first lawyer may not during such representation represent a party to another divorce action in which the opposing party is represented by said second lawyer, as the first lawyer's independent professional judgment with respect to each client must necessarily be

adversely affected, the consent of all persons involved, if given, is of no consequence as it is not obvious that the first lawyer can adequately represent the interest of each, and the dual representation would create the clear appearance of impropriety."; "If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or her firm may accept or continue such employment.").

In 1996, the Rhode Island Bar took the same basic approach in a reciprocal situation -- in which a lawyer handling a divorce found that the lawyer representing the other side in that divorce case was simultaneously representing the lawyer's wife in his own divorce case.

- Rhode Island LEO 96-23 (9/12/96) ("The inquiring attorney is a party in a divorce action. The attorney was recently retained by a client to prosecute the client's divorce. Upon receiving a copy of the entry of appearance of opposing counsel, the inquiring attorney learned that the opposing counsel in the client's divorce is the same attorney who represents the inquiring attorney's spouse in the attorney's own divorce action."; "As long as the inquiring attorney reasonably believes that his/her representation of the client will not be adversely affected by the circumstances presented, communicates that belief to the client after full disclosure and obtains the consent of his/her client, he/she may continue to represent the client in the divorce action.").

Best Answer

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

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