

# ETHICS ISSUES FACING TRUST AND ESTATE LAWYERS

## 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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## Unsolicited Communications from a Prospective Client

### Hypothetical 1

The patriarch of your town's wealthiest family died about three months ago. Another law firm in town handled the patriarch's estate planning, which has opened up a very lucrative opportunity for you after his death -- because one of the patriarch's children hired you about two weeks ago to represent her in challenging her father's will. You were flattered (but also alarmed) to receive an unsolicited email this morning from the patriarch's widow/executor -- seeking to employ you in what the widow/executor anticipates will be a lawsuit by the patriarch's daughter challenging the will. The widow/executor's email provides some confidential information about the patriarch that would be useful in the lawsuit you plan to file on the daughter's behalf.

- (a) May you tell your client (the patriarch's daughter) about the email you just received from her mother?

### YES (PROBABLY)

- (b) May you continue to represent the daughter despite having received the email from the widow/executor (whose interests are obviously adverse to the daughter's interests)?

### YES (PROBABLY)

### Analysis

All lawyers know that they must preserve their clients' confidences. ABA Model Rule 1.6(a). The question here is whether lawyers must preserve the confidences they learn from someone who is arguably a prospective client, even if no full attorney-client relationship develops.

This scenario also implicates the conflicts rules, which supply a fairly easy but seemingly harsh answer. Nationwide, bars have repeatedly held that a lawyer who learns confidential information while interviewing a prospective client cannot (absent

consent) later be adverse to the prospective client, even if no attorney-client relationship ever arises.

This well-recognized principle requires lawyers who meet with or otherwise receive information from prospective clients to walk a "tightrope" -- obtaining enough general information from the prospective client to run a conflicts search, while not acquiring so much information that the prospective client will be considered an actual client for conflicts purposes. A number of law firms have learned to their regret that one of their partners or associates crossed the line, and created a disabling conflict by obtaining too much information from a prospective client.

The conflicts principle that governs this situation rests on a duty that the law imposes on the lawyer to keep confidential any information the lawyer acquires from the prospective client. This duty makes sense if the lawyer knowingly acquires information from the prospective client (as in an initial interview) or if the lawyer foolishly fails to run a conflicts search before talking with the prospective client (as in a cocktail party conversation). However, a rule requiring a lawyer to maintain the confidentiality of information received from a prospective client makes much less sense if the prospective client sends unsolicited information to the lawyer. A strict application of the confidentiality and conflicts rules in such a setting might tempt clever litigants to purposely taint their adversary's potential lawyers by sending unsolicited confidential information to them. Still, the confidentiality rules do seem fairly strong even with prospective clients who never become actual clients.

This issue becomes more complicated if the information obtained from the prospective client is of interest to an existing client. In that situation, the possible duty to



keep the prospective client's information secret runs directly contrary to what otherwise would be a clear fiduciary duty to disclose the material information to the existing client.

If a lawyer received information "on the street" that a plaintiff was about to file a lawsuit against the lawyer's client, fiduciary duties probably would require the lawyer to immediately advise the client. Do these fiduciary duties apply with equal force to an unsolicited email from a prospective client? Most bars answer in the negative.

### **State Bars' Approach**

Since the advent of emails, bars across America have dealt with this issue -- with all but one holding that the recipient lawyer does not need to treat the email sender as a client or even as a prospective client.

In 2001, the New York City Bar essentially adopted the approach of ABA Model Rule 1.18 (discussed below).<sup>1</sup> The New York City Bar took a very lawyer-friendly approach.

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<sup>1</sup> N.Y. City LEO 2001-1 (3/1/01) (essentially adopting the approach of ABA Model Rule 1.18; "Information imparted in good faith by a prospective client to a lawyer or law firm in an e-mail generated in response to an internet web site maintained by the lawyer or law firm where such information is adverse to the interests of the prospective client generally would not disqualify the law firm from representing another present or future client in the same matter. Where the web site does not adequately warn that information transmitted to the lawyer or firm will not be treated as confidential, the information should be held in confidence by the attorney receiving the communication and not disclosed to or used for the benefit of the other client even though the attorney declines to represent the potential client."; "The law firm in this case did not request or solicit the transmission to it of any confidential information by the prospective client. The fact that the law firm maintained a web site does not, standing alone, alter our view that the transmitted information was unsolicited. The fact that a law firm's web site has a link to send an e-mail to the firm does not mean that the firm has solicited the transmission of confidential information from a prospective client. The Committee believes that there is a fundamental distinction between a specific request for, or a solicitation of, information about a client by a lawyer and advertising a law firm's general availability to accept clients, which has been traditionally done through legal directories, such as Martindale Hubbell, and now is also routinely done through television, the print media and web sites on the internet. Indeed, Martindale Hubble has put its directory on-line, with links to law firm web sites and e-mail addresses, facilitating unilateral communications from prospective clients."; "We believe . . . that there is a vast difference between the unilateral, unsolicited communication at issue here by a prospective client to a law firm and a communication made by a potential client to a lawyer at a meeting in which the lawyer has elected voluntarily to participate and is able to warn a potential client not to provide any information to the lawyer that the client considers confidential."; "[W]here, as here, a prospective

Information imparted in good faith by a prospective client to a lawyer or law firm in an e-mail generated in response to an internet web site maintained by the lawyer or law firm where such information is adverse to the interests of the prospective client generally would not disqualify the law firm from representing another present or future client in the same matter. Where the web site does not adequately warn that information transmitted to the lawyer or firm will not be treated as confidential, the information should be held in confidence by the attorney receiving the communication and not disclosed to or used for the benefit of the other client even though the attorney declines to represent the potential client.

N.Y. City LEO 2001-1 (3/1/01). In discussing law firms' websites, the New York City Bar indicated that

[t]he fact that the law firm maintained a web site does not, standing alone, alter our view that the transmitted information was unsolicited. The fact that a law firm's web site has a link to send an e-mail to the firm does not mean that the firm has solicited the transmission of confidential information from a prospective client. The Committee believes that there is a fundamental distinction between a specific request for, or a solicitation of, information about a client by a lawyer and advertising a law firm's general availability to accept clients, which has been traditionally done through legal directories, such as Martindale Hubbell, and now is also routinely done through television, the print media and web sites on the internet.

Id. The New York City Bar assured lawyers that a law firm website disclaimer which

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client simply transmits information to a law firm providing no real opportunity to the law firm to avoid its receipt, the Committee concludes that the law firm is not precluded from representing a client adverse to the prospective client in the matter."; quoting Professor Hazard, who explained that a prospective client "who tells a lawyer that he wants to sue XYZ . . . can properly be charged with knowledge that lawyers represent many different clients, and hence that there is a possibility that the immediate lawyer or her law firm already represents XYZ . . ."; explaining that a law firm web site disclaimer that "prominently and specifically warns prospective clients not to send any confidential information in response to the web site because nothing will necessarily be treated as confidential until the prospective client has spoken to an attorney who has completed a conflicts check -- would vitiate any attorney-client privilege claim with respect to information transmitted in the face of such a warning" (footnote omitted); further explaining that a lawyer receiving confidential information in such an email from a prospective client should not disclose its contents to the existing client if the law firm did not have an adequate disclaimer, or if there is some other reason to think that the prospective client sent the confidential information in good faith).

prominently and specifically warns prospective clients not to send any confidential information in response to the web site because nothing will necessarily be treated as confidential until the prospective client has spoken to an attorney who has completed a conflicts check -- would vitiate any attorney-client privilege claim with respect to information transmitted in the face of such a warning.

Id. (footnote omitted).

Several years later, the Nevada Bar took essentially the same approach. In 2005, the Nevada Bar indicated that prospective clients generally cannot create an attorney-client relationship through a "unilateral act" such as "sending an unsolicited letter containing confidential information to the attorney." Nevada LEO 32 (3/25/05).<sup>2</sup> The Nevada Bar explained that a lawyer's website disclaimer should be effective in eliminating any reasonable expectation of confidentiality by someone sending an unsolicited email to the lawyer.

In 2006, the San Diego Bar also took this approach, but in a different factual context. In San Diego County LEO 2006-1,<sup>3</sup> the San Diego Bar addressed a

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<sup>2</sup> Nevada LEO 32 (3/25/05) (holding that a prospective client generally cannot create an attorney-client relationship through a "unilateral act" such as "sending an unsolicited letter containing confidential information to the attorney"; warning that such a relationship might arise if a lawyer solicits such information; explaining that "[a]n attorney who advertises or maintains a web-site may be deemed to have solicited the information from the prospective client, thereby creating a reasonable expectation on the part of the prospective client that the attorney desires to create an attorney-client relationship"; "Most attorneys have addressed this issue by posting disclaimers to the effect that nothing contained on the web-site or communicated through it by the prospective client will create an attorney-client relationship. This should be effective, since no one responding to the web-site could -- in the face of such an express disclaimer -- reasonably believe that an attorney-client relationship had been created."; explaining that "[i]t is presently unclear, however, whether the duty of confidentiality also attaches to communications which are unsolicited where no attorney-client relationship (either express or implied) exists. A recent opinion of the State Bar of Arizona ethics committee states that unsolicited communications to an attorney (not in response to an advertisement or web-site) are not confidential, since the sender could not have a reasonable expectation of privacy in the communication. Arizona State Bar Committee on the Rules of Professional Conduct, Op. No. 02-04. The opinion contains a well-reasoned dissent which argues otherwise, however."; noting that Nevada was considering a new rule based on ABA Model Rule 1.18, which deals with such a situation).

<sup>3</sup> San Diego County LEO 2006-1 (2006) (addressing the ethical duties of a lawyer who receives an unsolicited email from a potential client, which includes harmful facts about the potential client; noting

hypothetical situation in which a lawyer received an unsolicited email. The Bar started its analysis by assuming that the lawyer did not have a website and did not advertise, although the state Bar publicized her email address. The majority indicated that the prospective client's

unsolicited e-mail is not confidential. Private information received from a non-client via an unsolicited e-mail is not required to be held as confidential by a lawyer, if the lawyer has not had an opportunity to warn or stop the flow of non-client information at or before the communication is delivered.

San Diego County LEO 2006-1 (2006). The San Diego Bar held that the lawyer may continue to represent the other injured accident victim and use the information against the email's author. The San Diego Bar indicated that it would be a "closer question" if the lawyer had included her email address at the bottom of an advertisement without any disclaimers. In that situation, there would be an "inference that private information divulged to the attorney would be confidential."

A dissenting opinion argued that

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initially that the hypothetical lawyer did not have a website and did not advertise, although the state bar published her e-mail address; concluding that: (1) "Vicky Victim's [prospective client] unsolicited e-mail is not confidential. Private information received from a non-client via an unsolicited e-mail is not required to be held as confidential by a lawyer, if the lawyer has not had an opportunity to warn or stop the flow of non-client information at or before the communication is delivered." (2) "Lana [lawyer who received the unsolicited e-mail] is not precluded from representing Henry [other client whom the lawyer had already begun to represent when she received the unsolicited e-mail, and who has a claim against the potential client] and may use non-confidential information received from Vicky in that representation." (3) "If Lana cannot represent Henry, she cannot accept representation of Vicki [sic] Victim since Lana had already received confidential information from Henry material to the representation."; explaining that "Vicky's admission that she had had 'a few drinks' prior to the accident which injured Henry is relevant and material to Henry's case and therefore constitute[s] a 'significant' development which must be communicated to Henry"; explaining that it would be a "closer question" if the lawyer "had placed an e-mail address at the bottom of a print advertisement for legal services or in a yellow page telephone listing under an 'attorney' category, without any disclaimers"; noting that in such a circumstance there would be an "inference" that "private information divulged to the attorney would be confidential"; a dissenting opinion argues that "I would err on the side of the consumer and find that there is a reasonable expectation of confidentiality on behalf of the consumer sending an e-mail to an attorney with the information necessary to seek legal advice").

I would err on the side of the consumer and find that there is a reasonable expectation of confidentiality on behalf of the consumer sending an e-mail to an attorney with the information necessary to seek legal advice.

Id. (Dissent).

In 2007, the Massachusetts Bar took a dramatically different approach.<sup>4</sup> In direct contrast to the New York City analysis, the Massachusetts Bar indicated that a lawyer could control the flow of information -- by using a click-through disclaimer.

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

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<sup>4</sup> Massachusetts LEO 07-01 (5/23/07) (addressing a situation in which a company seeking to retain a lawyer to sue another company used a law firm's web site biography link to e-mail one of the firm's lawyers and provide information about its claim; noting that the lawyer who received the e-mail declined to represent the company after determining that the law firm represented the proposed target on unrelated matters; explaining that "[w]hen a visitor to Law Firm's web site uses the link to send an e-mail, there is no warning or disclaimer regarding the confidentiality of the information conveyed"; concluding that the company's e-mail "did not result in the formation of an attorney-client relationship," but nevertheless created a duty of confidentiality -- which arises "when the lawyer agrees to consider whether a client-lawyer relationship shall be established" (quoting Massachusetts Rule 1.6); explaining that "[i]f ABC Corporation had obtained the lawyer's e-mail address from the internet equivalent of a telephone directory, we would have no hesitation in concluding that the lawyer had not 'agreed to consider' whether to form an attorney-client relationship"; ultimately concluding that "[a] prospective client, visiting Law Firm's website, might reasonably conclude that the Firm and its individual lawyers have implicitly 'agreed to consider' whether to form an attorney-client relationship"; explaining that "when an e-mail is sent using a link on a law firm's web site, the firm has an opportunity to set conditions on the flow of information. Using readily available technology, the firm may require a prospective client to review and 'click' his assent to terms of use before using an e-mail link. Such terms of use might include a provision that any information communicated before the firm agrees to represent the prospective client will not be treated as confidential. Or the terms of use could provide that receipt of information from a prospective client will not prevent the firm from representing someone else in the matter."; also concluding that the law firm might be prohibited from representing the target in the action being considered by the company seeking a lawyer, because the law firm's obligations to preserve the confidences of the company which sent the e-mail might "materially limit" the law firm's ability to represent the target -- depending on the substance of the e-mail sent to the Law Firm; "the information that ABC disclosed in the e-mail may have little long-term significance, especially once ABC has made its claim known to XYZ"; explaining that "[o]n the other hand, ABC's e-mail may contain information, such as comments about ABC's motives, tactics, or potential weaknesses in its claim, that has continuing relevance to the prosecution and defense of ABC's claim. In that case, the obligation of the lawyer who received ABC's email to maintain the confidentiality of its contents would materially limit his ability to represent XYZ, with the result that both the lawyer and the Law Firm would be disqualified."; explaining that "the Committee believes that a law firm can avoid disqualification by requiring prospective clients to affirmatively indicate their consent to appropriate terms of use before using an e-mail link provided on the firm's web-site").

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

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

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

Id.

The Virginia Bar adopted a majority approach in 2008 -- indicating that lawyers receiving confidential information in unsolicited emails or voicemails from prospective clients do not have a duty to keep that information confidential. Virginia LEO 1842 (9/30/08).<sup>5</sup>

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<sup>5</sup> Virginia LEO 1842 (9/30/08) (because the duty of confidentiality attaches (according to the Virginia Rules Preamble) "when the lawyer agrees to consider whether a client-lawyer relationship shall be established"; lawyers may use to their client's advantage (and represent the adversary of a prospective client who sent) a prospective client's: (1) unsolicited voicemail message containing confidential information, sent to a lawyer who advertises in the local Yellow Pages and includes his office address and telephone number; (2) unsolicited e-mail containing confidential information, sent to a law firm which "maintains a passive website which does not specifically invite consumers to submit confidential information for evaluation or to contact members of the firm by e-mail"; someone submitting such confidential information does not have a reasonable basis for believing that the lawyer will maintain the confidentiality of the information, simply because the lawyer uses "a public listing in a directory" or a passive website; the lawyer in that situation had "no opportunity to control or prevent the receipt of that information" and "it would be unjust for an individual to foist upon an unsuspecting lawyer a duty of confidentiality, or worse yet, a duty to withdraw from the representation of an existing client"; lawyers might create a reasonable expectation of confidentiality if they include in advertisements or in their website language that implies "that the lawyer is agreeing to accept confidential information" in contrast to lawyers who merely advertise in the Yellow Pages or maintain a passive website; a lawyer would have to

The most recent bar to have dealt with this issue is the Florida Bar -- which also adopted the majority approach.

A person seeking legal services who sends information unilaterally to a lawyer has no reasonable expectation of confidentiality regarding that information. A lawyer who receives information unilaterally from a person seeking legal services who is not a prospective client within Rule 4-1.18, has no conflict of interest if already representing or is later asked to represent an adversary, and may use or disclose the information. If the lawyer agrees to consider representing the person or discussed the possibility of representation with the person, the person is a prospective client under Rule 4.1.18, and the lawyer does owe a duty of confidentiality which may create a conflict of interest for the lawyer. Lawyers should post a statement on their websites that the lawyer does not intend to treat as confidential information sent to the lawyer via the website, and that such information could be used against the person by the lawyer in the future.

Florida LEO 07-3 (1/16/09).

### **ABA Model Rule 1.18**

In trying to deal with all of these issues, the ABA added Model Rule 1.18. That rule (called "Duties to Prospective Client") starts with the bedrock principle that a person will be considered a "prospective client" if the person discusses with a lawyer "the possibility of forming a client-lawyer relationship." ABA Model Rule 1.18(a). The lawyer must treat such a person as a former client for conflicts purposes. ABA Model Rule 1.18(b).

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keep confidential (and would be prohibited from representing a client adverse to a prospective client which supplies) information provided by a prospective client who completes an on-line form on a law firm website which "offers to provide prospective clients a free evaluation of their claims"; law firms "may wish to consider" including appropriate disclaimers on their website or external voicemail greeting, or including a "click-through" disclaimer "clearly worded so as to overcome a reasonable belief on the part of the prospective client that the information will be maintained as confidential").

In a comment, ABA Model Rule 1.18 provides some guidance that could apply to unsolicited emails.

Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a).

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

A lawyer may not represent the adversary in the same or substantially related matter -- if "the lawyer received information from the prospective client that could be significantly harmful to that person in the matter." ABA Model Rule 1.18(c).

This would allow more flexibility to the lawyer than the standard rule, which would have prevented the lawyer's representation of the adversary if the lawyer had received any confidential information from the prospective client -- not just information that "could be significantly harmful" to the prospective client.

Finally, any individual lawyer's disqualification even under that standard is not imputed to the entire law firm if the lawyer had taken "reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client," and if the individually disqualified lawyer is screened from the matter (including financially screened) and provides written notice to the prospective client. ABA Model Rule 1.18(d)(2).

As with all ABA Model Rule changes, it will take time to see if states ultimately follow the same approach.



**Best Answer**

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

N 8/12 [B]

## Identifying the Clients in a Multigenerational Family Setting

### Hypothetical 2

After your firm's senior partner retired, you became responsible for most of his client relationships. As you sort through the files of one family, you discover that your firm is representing, or has represented (at various times): a family patriarch in business matters; a company wholly owned by the patriarch; a company 60 percent owned by the patriarch; the patriarch and his wife in some estate planning (although nothing has been done for several years); the patriarch's daughter in a divorce case that just ended; the patriarch's son; an LLC in which the patriarch's son is the majority member.

Is the following person or entity your client:

- (a) The patriarch (in business matters)?

**MAYBE**

- (b) The company wholly owned by the patriarch?

**MAYBE**

- (c) The company 60 percent owned by the patriarch?

**MAYBE**

- (d) The patriarch and his wife (in estate planning matters)?

**MAYBE**

- (e) The patriarch's daughter?

**MAYBE**

- (f) The patriarch's son?

**MAYBE**

(g) The LLC in which the patriarch's son is the majority member?

**MAYBE**

**Analysis**

Defining a lawyer's "client" is the most elemental of all tasks that a lawyer must undertake, yet a surprisingly large number of lawyers leave the definition ambiguous. Lawyers seem to have special difficulty in defining their client or clients in multigenerational family settings, which often also involve closely held corporations.

The ethics rules explicitly warn trust and estate lawyers about the problems that they may encounter if they do not precisely enough define their attorney-client relationships. For instance, the ABA Model Rule 1.7 cmt. [27] advises lawyers that

conflicts questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. . . . In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

ABA Model Rule 1.7 cmt. [27] (emphasis added).

Lawyers' failure to define the clients in such settings leaves uncertain all of the lawyer's obligations to those with whom the lawyer deals. Of course, this can have disastrous results.

- See, e.g., In re Disciplinary Proceeding Against Botimer, 214 P.3d 133, 139-40, 140, 141 (Wash. 2009) (suspending a lawyer for six months for representing numerous members of a family in tax matters, without complying with the ethics rules' requirements that the lawyer obtain an informed consent in writing when jointly represented clients might have adverse interests; rejecting the lawyer's argument that his disclosure of possible tax violations by one of his clients was proper; "Botimer offers up a defense to the charge of improper disclosure of client information to the IRS on the grounds that he was fulfilling a legal duty to disclose under federal law. His arguments are not

availing. Applicable federal tax code does not create a duty to do more than advise a client of past mistakes. 31 C.F.R. § 10.21. Moreover, the duty to preserve client confidences outweighs whatever marginal benefit gained by reporting past wrongdoings. The crime/fraud exception under former RPC 1.6(b)(1) does not apply to arguably fraudulent tax returns."; "[T]he crime/fraud exception does not permit the revelation of prior unlawful conduct in the form of false information placed on a tax return."; "Botimer's entanglements in the Reinking family's tax and business affairs created the potential for conflict of interest. Because he failed to obtain the necessary waiver, Botimer violated former RPC 1.7. Further, Botimer did not satisfy former RPC 1.6 when he failed to protect his client confidences up to the limit of applicable law. Finally, Botimer violated former RPC 1.6 and 1.9(b) when he divulged client confidences to the IRS by letter." (emphasis added).

Lawyers should always try to avoid ambiguity by carefully defining their "client" or "clients."

### **Best Answer**

The best answer to (a) is **MAYBE**; the best answer to (b) is **MAYBE**; the best answer to (c) is **MAYBE**; the best answer to (d) is **MAYBE**; the best answer to (e) is **MAYBE**; the best answer to (f) is **MAYBE**; the best answer to (g) is **MAYBE**.

N 8/12

## Identifying the Client When Representing a Closely Held Corporation or Its Owners

### Hypothetical 3

For several years, one of your partners has handled labor and employment work for a local company wholly owned by a wealthy investor. Your partner has not obtained any financial information about the company or the investor, and the work has not been very lucrative for your firm. You were just asked by a divorce lawyer representing the investor's wife to assist her in representing the wife in what looks to be a very nasty divorce from the investor. You wonder whether your partner's work for the company will prevent you from representing the wife unless you obtain the investor's consent (which seems unlikely).

May you take a matter adverse to the sole owner of a corporation that your firm represents (without the owner's consent)?

### YES (PROBABLY)

### Analysis

This hypothetical highlights the difficulty of defining the "client" when representing a company wholly or largely owned by individuals. As in every other context, any ambiguity can come back to haunt the lawyer.

One recent case explored this issue. In MacKenzie-Childs LLC v. MacKenzie-Childs, 262 F.R.D. 241 (W.D.N.Y. 2009), the Western District of New York held that a lawyer who had represented a company (whose assets had been sold to successor companies out of bankruptcy) had not also represented the company's two co-owners. The court noted that the lawyer had never spoken with the co-owners, and had been paid by the company rather than by the co-owners. The issue would have been closer if the lawyer had interacted with the individual owners rather than just with the management of the company that they owned.

As in other contexts, confidential information plays a critical role in the analysis. A lawyer obtaining material information in a confidential setting might be precluded from later adversity to a non-client from whom or about whom the lawyer has acquired such information.

For instance, a lawyer representing a bank in dealing with one of the bank's borrowers might learn material confidential information about the borrower's finances. That lawyer probably could not represent another client adverse to the borrower in a collection case unless the borrower consented to such a representation. At first blush, this seems odd, because the lawyer is adverse to the borrower in both matters. However, the lawyer's possible misuse of the material confidential information about the borrower might put the bank in harm's way (because of the bank's duties to keep such confidential information secret). Thus, the lawyer's duty to the bank might prevent the lawyer from taking a matter adverse to the borrower.

Similarly, a lawyer representing a corporation might acquire material information about the corporation's or its executives' finances. This would not make these executives the lawyer's clients, but might prevent the lawyer from taking matters adverse to those executives without their consent -- because the lawyer would have acquired information in a confidential setting that the lawyer could use against them.

This scenario seems less troublesome than the bank scenario, because the corporation does not as clearly have a duty to keep its executives' finances secret. Still, an executive probably will object to a lawyer's representation adverse to the executive if the lawyer obtained private confidential information from the executive while representing the company.

Lawyers should always try to avoid ambiguity by carefully defining their "client" in such a setting.

**Best Answer**

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

N 8/12

## Defining the End of a Relationship

### Hypothetical 4

About six months ago, a doctor asked you to prepare an estate plan for him and his wife. You prepared and sent the doctor and his wife a fairly simple will. You have not heard from him or his wife since you sent the draft estate planning documents. This morning, you received a call from one of your partners, whose largest client has asked your firm to file a trademark infringement action seeking an injunction against the doctor for some phrases that he uses in his marketing.

Without the doctor's consent, can you represent the company in the trademark action against the doctor?

### MAYBE

### Analysis

Every state's ethics rules recognize an enormous dichotomy between a lawyer's freedom to take matters adverse to a current client and a former client.

Absent consent, a lawyer cannot take any matter against a current client -- even if the matter has no relationship whatever to the representation of that client. ABA Model Rule 1.7. In stark contrast, a lawyer may take a matter adverse to a former client unless the matter is the "same or . . . substantially related" to the matter the lawyer handled for the client, or unless the lawyer acquired material confidential information during earlier representation that the lawyer could now use against the former client. ABA Model Rule 1.9.

Given this difference in the conflicts rules governing adversity to current and former clients, lawyers frequently must analyze whether a client is still "current" or can be considered a "former" client for conflicts purposes.



Absent some explicit termination notice from the lawyer, it can be very difficult to determine if a representation has ended for purposes of this conflicts analysis.

### **ABA Model Rules**

Interestingly, the meager guidance offered by the ABA Model Rules appears in the rule governing diligence, not conflicts.

Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so.

ABA Model Rule 1.3 cmt. [4] (emphasis added).

In one legal ethics opinion, the ABA provided an analysis that adds to the confusion rather than clarifies.

[T]he Committee notes that 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, the strict provisions governing conflicts in simultaneous representations, in Rule 1.7, rather than the more permissible former-client provisions, in Rule 1.9, are likely to apply.

ABA LEO 367 (10/16/92). Thus, the ABA did not provide any standard for determining when a representation terminates in the absence of some ongoing matter.

## Restatement

The Restatement takes essentially the same approach, explaining that a lawyer's "actual authority to represent a client ends when"

the representation ends as provided by contract or because the lawyer has completed the contemplated services.

Restatement (Third) of Law Governing Lawyers § 31(2)(e) (2000). A comment provides additional explanation.

A client and lawyer might agree that the representation will end at a given time or on the happening of a stated event . . . . Alternatively, the client and lawyer may contemplate a continuing relationship in which the lawyer will handle legal matters as they arise. Such a contract defines the scope or aims of the representation . . . .

The lawyer's authority ordinarily ends when the lawyer has completed the contemplated services . . . . A lawyer who has been retained to represent a client in a divorce, for example, has no authority to negotiate subsequent modifications of support or custody agreements without new authorization from the client.

The course of dealing might not clearly indicate what services were contemplated in the representation or whether the lawyer has a continuing duty to advise the client. Such uncertainty could lead to clients assuming that they were still being represented. Because contracts with a client are to be construed from the client's viewpoint . . . , the client's reasonable understanding of the scope of the representation controls. The client's relative sophistication in employing lawyers or lack thereof is relevant.

Restatement (Third) of Law Governing Lawyers § 31 cmt. h (2000) (emphasis added).

Thus, the Restatement essentially construes any ambiguity about a continuing relationship in the client's favor.

## ACTEC Commentaries

The ACTEC Commentaries generally follow the same approach in describing how a lawyer can terminate an attorney-client relationship -- but then add a unique new category of attorney-client relationships.

[T]he lawyer may terminate the representation of a competent client by a letter, sometimes called an 'exit' letter, that informs the client that the relationship is terminated. The representation is also terminated if the client informs the lawyer that another lawyer has undertaken to represent the client in trusts and estates matters. Finally, the representation may be terminated by the passage of an extended period of time during which the lawyer is not consulted.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.4, at 57 (4th ed. 2006), [http://www.actec.org/Documents/misc/ACTEC\\_Commentaries\\_4th\\_02\\_14\\_06.pdf](http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf) (emphasis added).

However, the ACTEC Commentaries also describe an odd status not found in the ABA Model Rules, the Restatement or (apparently) anywhere else -- a "dormant representation." The ethics rules do not recognize such a gray area -- under the ABA Model Rules a lawyer either represents a client or does not represent a client.

The ACTEC Commentaries describe this novel relationship, and the "diminished" responsibilities that come with it.

The execution of estate planning documents and the completion of related matters, such as changes in beneficiary designations and the transfer of assets to the trustee of a trust, normally ends the period during which the estate planning lawyer actively represents an estate planning client. At that time, unless the representation is terminated by the lawyer or client, the representation becomes dormant, awaiting activation by the client. At the

client's request, the lawyer may retain the original documents executed by the client. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: Current Clients). Although the lawyer remains bound to the client by some obligations, including the duty of confidentiality, the lawyer's responsibilities are diminished by the completion of the active phase of the representation. As a service the lawyer may communicate periodically with the client regarding the desirability of reviewing his or her estate planning documents. Similarly, the lawyer may send the client an individual letter or a form letter, pamphlet or brochure regarding changes in the law that might affect the client. In the absence of an agreement to the contrary, a lawyer is not obligated to send a reminder to a client whose representation is dormant or to advise the client of the effect that changes in the law or the client's circumstances might have on the client's legal affairs.

Id. (emphases added).

The ACTEC Commentaries provide an illustration of this unique standard.

Example 1.4-1. Lawyer (L) prepared and completed an estate plan for Client (C). At C's request, L retained the original documents executed by C. L performed no other legal work for C in the following two years but has no reason to believe that C has engaged other estate planning counsel. L's representation of C is dormant. L may, but is not obligated to, communicate with C regarding changes in the law. If L communicates with C about changes in the law, but is not asked by C to perform any legal services, L's representation remains dormant. C is properly characterized as a client and not a former client for purposes of MRPCs 1.7 (Conflict of Interest: Current Client) and 1.9 (Duties to Former Clients).

Id. at 58.

No bar or court seems to recognize such a state of limbo. Calling such an attorney-client relationship "dormant" also makes little sense -- because the Commentaries recognize that such a relationship remains active for conflicts of interest

purposes, which is the most important reason to characterize a representation as current or former.

Therefore, the ACTEC Commentaries seem to favor a continued recognition of a current attorney-client relationship in situations where the ABA Model Rules and the Restatement would find the representation to have ended. This approach actually harms trust and estate lawyers, because it recognizes a continued duty of loyalty to what could easily be seen as former clients -- preventing the lawyer from handling unrelated matters adverse to the folks, but without receiving the benefit of any income from them. Perhaps trust and estate lawyers do not worry about this situation because they are so rarely adverse to their former clients. In other words, a continuing duty of loyalty might not trouble trust and estate lawyers.

On the more important aspect of a continuing duty of diligence and communication, the ACTEC Commentaries take a more lawyer-friendly approach -- finding that lawyers generally do not have diligence or communication duties to those in the "dormant" category.<sup>1</sup>

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<sup>1</sup> American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.4, at 57 (4th ed. 2006), [http://www.actec.org/Documents/misc/ACTEC\\_Commentaries\\_4th\\_02\\_14\\_06.pdf](http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf) ("The execution of estate planning documents and the completion of related matters, such as changes in beneficiary designations and the transfer of assets to the trustee of a trust, normally ends the period during which the estate planning lawyer actively represents an estate planning client. At that time, unless the representation is terminated by the lawyer or client, the representation becomes dormant, awaiting activation by the client. At the client's request, the lawyer may retain the original documents executed by the client. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: Current Clients). Although the lawyer remains bound to the client by some obligations, including the duty of confidentiality, the lawyer's responsibilities are diminished by the completion of the active phase of the representation. As a service the lawyer may communicate periodically with the client regarding the desirability of reviewing his or her estate planning documents. Similarly, the lawyer may send the client an individual letter or a form letter, pamphlet or brochure regarding changes in the law that might affect the client. In the absence of an agreement to the contrary, a lawyer is not obligated to send a reminder to a client whose representation is dormant or to advise the client of the effect that changes in the law or the client's circumstances might have on the client's legal affairs." (emphasis added)); American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.8, at 113-14 (4th ed. 2006),

## Case Law

The case law generally follows the ABA Model Rules and Restatement approach -- usually (1) requiring that the lawyer take an affirmative step to end a relationship if a client would reasonably recognize a continuing relationship, and (2) resolving any doubts in favor of the client's position.

- Comstock Lake Pelham, L.C. v. Clore Family, LLC, 74 Va. Cir. 35, 37-38 (Va. Cir. Ct. 2007) (in an opinion by Judge Thacher holding that a law firm which had last performed work for a client in August 2005 should be considered to still represent the client, because the law firm "never communicated to [the client] that [the law firm's] representation had been terminated. Regardless of who initiated the termination or representation, the Rules place the burden of communication squarely upon the lawyer. . . . Because the burden is upon the lawyer to communicate with the client upon the termination of representation, the lack of communication of same from [law firm] could lead one to reasonably conclude that the representation was ongoing. It was [law firm's] burden to clarify the relationship, and they failed to satisfy that burden." (emphasis added)).
- GATX/Airlog Co. v. Evergreen Int'l Airlines, Inc., 8 F. Supp. 2d 1182, 1186, 1187 (N.D. Cal. 1998) (disqualifying the law firm of Mayer, Brown & Platt upon the motion of the Bank of New York; explaining that the law firm's "use of the word 'currently' to describe the MBP/BNY relationship evidences its longstanding and continuous nature. Some affirmative action would be needed to sever that type of relationship, and MBP assumed the relationship had not been severed." (emphasis added); also concluding that the Bank was a current client because "MBP [the firm] assisted BNY [the Bank] on a repeated basis whenever matters arose over a three-year period. Although MBP may or may not still have been working on matters for BNY when the January 30 complaint was filed, it is undisputed that MBP billed BNY through January 12."), vacated as moot, 192 F.3d 1304 (9th Cir. 1999).
- Mindscape, Inc. v. Media Depot, Inc., 973 F. Supp. 1130, 1132-33 (N.D. Cal. 1997) (finding that a law firm's attorney-client relationship with a client was continuing as long as the lawyer had a "power of attorney" in connection with a patent, was listed with the Patent & Trademark Office as the addressee

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[http://www.actec.org/Documents/misc/ACTEC\\_Commentaries\\_4th\\_02\\_14\\_06.pdf](http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf) ("S]ending a client periodic letters encouraging the client to review the sufficiency of the client's estate plan or calling the client's attention to subsequent legal developments does not increase the lawyer's obligations to the client. See ACTEC Commentary on MRPC 1.4 (Communication) for a discussion of the concept of dormant representation." (emphasis added)).

for correspondence with the client, and had not yet corrected a mistake in a patent that had earlier been discovered).

- Research Corp. Techs., Inc. v. Hewlett-Packard Co., 936 F. Supp. 697, 700 (D. Ariz. 1996) ("The relationship is ongoing and gives rise to a continuing duty to the client unless and until the client clearly understands, or reasonably should understand that the relationship is no longer depended on." (emphasis added; citation omitted); denying Hewlett-Packard's motion to disqualify plaintiff's counsel).
- Shearing v. Allergan, Inc., No. CV-S-93-866-DWH (LRL), 1994 U.S. Dist. LEXIS 21680 (D. Nev. Apr. 4, 1994) (noting that the law firm had not performed any work for the client for over one year, but pointing to a letter that the law firm sent to the client indicating that they were a valuable client and that the firm remained ready to respond to the client's needs; granting motion to disqualify plaintiff's counsel).
- Alexander Proudfoot PLC v. Federal Ins. Co., Case No. 93 C 6287, 1994 U.S. Dist. LEXIS 3937, at \*10 (N.D. Ill. Mar. 30, 1994) (holding that the insurance company could "assume" that the firm would continue to act as its lawyer if and when the need arose based on the law firm's prior service to the party and stating that "any perceived disloyalty to even a 'sporadic' client besmirches the reputation of [the] legal profession"), dismissed on other grounds, 860 F. Supp. 541 (N.D. Ill. July 27, 1994).
- Lemelson v. Apple Computer, Inc., Case No. CV-N-92-665-HDM (PHA), 1993 U.S. Dist. LEXIS 20132, at \*12 (D. Nev. June 2, 1993) (quoting an earlier decision holding that "the attorney-client relationship is terminated only by the occurrence of one of a small set of circumstances" and listing those circumstances as one of three occurrences -- first, an express statement that the relationship is over, second, acts inconsistent with the continuation of the relationship, or third, inactivity over a long period of time (citation omitted); concluding that "[n]one of these events occurred in the instant action").
- SWS Fin. Fund A v. Salomon Bros., Inc., 790 F. Supp. 1392, 1398, 1403 (N.D. Ill. 1992) (finding that an attorney-client relationship existed between Salomon Brothers and a law firm which had periodically answered commodity law questions, and had finished its last billable project about two months before attempting to take a representation adverse to Salomon; finding that the law firm had the "responsibility for clearing up any doubt as to whether the client-lawyer relationship persisted" (emphasis added); ultimately concluding disqualification was inappropriate).

Thus, the safest (and in some courts, the only) way to terminate an attorney-client relationship is to send a "termination letter" explicitly ending the relationship.

Some lawyers (especially those who practice in the domestic relations area) routinely send out such letters.

However, most lawyers would find "termination letters" contrary to their marketing instincts. In fact, many lawyers continue to send email alerts to former clients (usually addressed to "Clients and Friends"), inviting former clients to firm events, providing legal updates, etc. All of these steps are designed to bring future business, but of course they also provide evidence of a continuing attorney-client relationship.

Unfortunately, the consent remedy does not provide a very promising avenue either. A former client is not likely to feel any loyalty toward the lawyer who formerly represent him or her -- and therefore might be less inclined than a current client to grant a consent to a lawyer who wishes to be adverse even on an unrelated matter.

### **Best Answer**

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

N 8/12 [G]



## Lawyers' Retention of Documents as Evidence of a Continuing Relationship

### Hypothetical 5

You prepared the estate plan for a wealthy developer about three years ago. His original will is still in your law firm's safe, and you send him period "legal updates" on estate tax changes -- none of which has prompted him to retain you for any work since you finished his estate documents. This morning your largest client asked you to file a lawsuit against the developer over an important zoning matter that arose six months ago.

Without the developer's consent, can you represent your client in the suit against the developer?

### MAYBE

### Analysis

As in other contexts, the key here is to determine whether the developer is a "current" or a "former" client. If the developer is no longer your client, you can freely sue him on this presumably unrelated matter (about which your firm would not have acquired any material confidential information).

The ABA Model Rules would at some point recognize the end of the attorney-client relationship. ABA Model Rule 1.3 cmt. [4]. The Restatement would also take this approach at some point. Restatement (Third) of Law Governing Lawyers § 31(2)(e) (2000).

In contrast, the ACTEC Commentaries recognize an odd middle type of relationship between a lawyer and a client -- called a "dormant representation."

The execution of estate planning documents and the completion of related matters, such as changes in beneficiary designations and the transfer of assets to the trustee of a trust, normally ends the period during which the estate planning lawyer actively represents an estate

planning client. At that time, unless the representation is terminated by the lawyer or client, the representation becomes dormant, awaiting activation by the client. At the client's request, the lawyer may retain the original documents executed by the client. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: Current Clients). Although the lawyer remains bound to the client by some obligations, including the duty of confidentiality, the lawyer's responsibilities are diminished by the completion of the active phase of the representation. As a service the lawyer may communicate periodically with the client regarding the desirability of reviewing his or her estate planning documents. Similarly, the lawyer may send the client an individual letter or a form letter, pamphlet or brochure regarding changes in the law that might affect the client. In the absence of an agreement to the contrary, a lawyer is not obligated to send a reminder to a client whose representation is dormant or to advise the client of the effect that changes in the law or the client's circumstances might have on the client's legal affairs.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.4, at 57 (4th ed. 2006),  
[http://www.actec.org/Documents/misc/ACTEC\\_Commentaries\\_4th\\_02\\_14\\_06.pdf](http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf)  
(emphasis added).

Not surprisingly, the ACTEC Commentaries use this as an example.

The retention of the client's original estate planning documents does not itself make the client an 'active' client or impose any obligation on the lawyer to take steps to remain informed regarding the client's management of property and family status. Similarly, sending a client periodic letters encouraging the client to review the sufficiency of the client's estate plan or calling the client's attention to subsequent legal developments does not increase the lawyer's obligations to the client. See ACTEC Commentary on MRPC 1.4 (Communication) for a discussion of the concept of dormant representation.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.8, at 113-14 (4th ed. 2006),

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

(emphases added).

The ACTEC Commentaries' example of such a "dormant representation" describes a situation in which the ABA Model Rules would probably not recognize as creating a continuing attorney-client relationship. Although the lawyer's continuing communications to the client might create some confusion, one would think that the ABA Model Rules would consider the client a former client when the lawyer has not performed any legal work for three years.

### **Best Answer**

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

N 8/12 [G]

## Joint Representations: Creation

### Hypothetical 6

You have handled most of the legal work for a wealthy businessman and his equally successful long-time girlfriend. Neither one has any children or previous spouses. They show no signs of marrying, although they seem very committed to one another. Both the businessman and his girlfriend have independently mentioned retaining you to prepare estate planning documents. You have not spoken to either one of them about their intent, but you assume that they would probably leave most of their wealth to each other (and perhaps some charities).

If you prepare estate planning documents for the businessman and his girlfriend, will it be a joint representation?

**MAYBE**

### Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

. . . .

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

. . . .

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

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

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

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

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

An earlier district court decision listed ten factors.

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

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

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

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

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

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

Analyzing these factors often requires a fact-intensive examination of the situation. For instance, as discussed more fully below, the Delaware Bankruptcy Court conducted a hearing focusing on such issues in the Teleglobe case. The court took testimony from the clients and the lawyers involved. The court ultimately determined that there was no joint representation between now-bankrupt corporations and their

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

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



former parent. Teleglobe USA Inc. v. BCE Inc. (In re Teleglobe Commc'ns Corp.), 392 B.R. 561, 589, 590 (Bankr. D. Del. 2008).

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

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

Two scenarios seem to frequently involve this issue: (1) one of the arguable joint clients (usually a corporate family member) declares bankruptcy, and non-bankrupt arguable joint clients (usually corporate affiliates) argue that the same lawyer did not jointly represent all of them in the transaction resulting in the bankruptcy -- thus allowing those non-bankrupt companies to withhold documents from the bankruptcy trustee; or (2) a corporation argues that the same lawyer did not jointly represent it and a current or former executive or employee -- thus allowing the company to withhold documents from the now-adverse executive/employee or to exercise sole power to waive the privilege protecting communications with its lawyer. In those situations, one of the arguable joint clients has an interest in arguing that no joint representation ever existed (at least on the pertinent matter).

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

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

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

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

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

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

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

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

On remand, the bankruptcy court for the District of Delaware ultimately found that there had not been a joint representation. In assessing the existence of a joint representation, the bankruptcy court conducted a lengthy hearing, taking evidence and testimony from various business folks and lawyers.<sup>6</sup> Among other things, the bankruptcy court noted that the ultimate parent was a Canadian company while the subsidiaries were American companies; that there was no retainer letter describing the relationship; and that the parent had a separate law department from the subsidiaries.

More recently, another court dealt with the same issue -- but in the context of a corporate parent's sale of a subsidiary in the ordinary course of business, rather than in a bankruptcy setting. In that case, the law firms of Blank Rome and Quarles & Brady represented a parent and its fully owned subsidiary in a transaction involving the subsidiary's sale to a new owner. The subsidiary later sued its former parent, and sought the law firms' files. The court ordered production of the files, despite the law firms' argument that they never represented the subsidiary in the transaction. The court noted that the parent had presented "no evidence indicating that it ever hired separate counsel for [the subsidiary] before the date it was sold to [buyer]," so "the only attorneys who could have been representing [the subsidiary] at the moment the Lease Term

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<sup>6</sup> Teleglobe USA, Inc., 392 B.R. 561 (Bankr. D. Del. 2008).

Sheet was signed were Blank Rome and Quarles & Brady."<sup>7</sup> The court even ordered the production of a post-transaction document -- Blank Rome's invoice which referred to the firm's pre-transaction work.

It is unfortunate that cases dealing with the existence of joint representations seem to arise most frequently in the corporate context.

In some ways, it should be easier to determine if individuals have been jointly represented in the trust and estate context than if corporations had been jointly represented. In the corporate family world, the attorney-client privilege can protect communications between the parent's lawyer and employees of any wholly owned subsidiaries (and perhaps partially owned subsidiaries controlled by the parent). This is because every employee in the corporate family ultimately owes fiduciary duties to the parent. For this reason, in-house lawyers and outside lawyers representing a corporate family do not have to carefully establish an attorney-client relationship with corporate affiliates in order to assure privilege.<sup>8</sup>

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<sup>7</sup> 625 Milwaukee, LLC v. Switch & Data Facilities Co., Case No. 06-C-0727, 2008 U.S. Dist. LEXIS 19943, at \*12 (E.D. Wis. Feb. 29, 2008).

<sup>8</sup> Given the context of in-house lawyers' practice, it can be especially difficult to analyze whether such lawyers jointly represented multiple clients. The Third Circuit explained why.

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

Teleglobe Commc'ns Corp., 493 F.3d at 372-73. Thus, the Third Circuit recognized that

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

Id. at 379.

In contrast, a lawyer representing individuals in the trust and estate setting might be more likely to explain whether the lawyer has an attorney-client relationship with one or more family members.

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

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

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

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Thus, analyzing the existence of a joint representation involving in-house lawyers can be even more challenging, because in-house lawyers can enjoy some benefits of a joint representation (the ability to engage in privileged communications beyond their client/employer's employees) without actually establishing a joint representation with those other entities. In Teleglobe, the Third Circuit warned that

[a] broader rule would wreak havoc because it would essentially mean that in adverse litigation a former subsidiary could access all of its former parent's privileged communications because the subsidiary was, as a matter of law, within the parent entity's community of interest.

Id.

About the only arguable grounds for a third party's attack on the existence of a joint representation is that the joint clients' interests were so divergent that the same lawyer could not possibly have represented them both. Of course, this goes back to an ethics issue. Under ABA Model Rule 1.7(b), the only totally prohibited "concurrent" representation is one in which a lawyer asserts a claim against another client being represented by the same lawyer or her partner "in the same litigation or other proceeding before a tribunal." ABA Model Rule 1.7(b)(3). That is not even a joint representation on the same matter -- so there are very few per se unethical joint representations.

To be sure, several ABA Model Rules comments warn lawyers that there might be limits on their joint representations of multiple clients in what the ABA Model Rules call a "common representation." See, e.g., ABA Model Rule 1.7 cmts. [29]-[33]. But the threshold is very low for such joint representations.<sup>9</sup>

Courts recognize some limits on a lawyer's ability to represent clients with divergent interests. For instance, one court pointed to "the general policy that joint representations of clients with potentially adverse interests should be undertaken only when subject to very narrow limits." Neighborhood Dev. Collaborative v. Murphy, 233 F.R.D. 436, 442 (D. Md. 2005).<sup>10</sup>

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<sup>9</sup> Jointly represented clients and their lawyer may also attempt to resolve any adversity by agreeing to prospective consents allowing the lawyer to keep representing one of the clients even in matters adverse to the other jointly represented clients. See, e.g., ABA Model Rule 1.7 cmt. [22]; Restatement (Third) of Law Governing Lawyers § 31(2)(e) (2000).

<sup>10</sup> Interestingly, even if a lawyer was found to have engaged in some improper conduct by jointly representing multiple clients with adverse interests, that would not necessarily result in loss of the privilege.

In its analysis of a possible joint representation among corporate affiliates, the Third Circuit's decision in Teleglobe explained that even as between the joint clients the privilege can protect

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

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

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communications with a joint lawyer who should not have represented joint clients whose interests are adverse to one another.

The Restatement's conflicts rules provide that when a joint attorney sees the co-clients' interests diverging to an unacceptable degree, the proper course is to end the joint representation. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121 cmts. e(1)-(2). As the Court of Appeals for the D.C. Circuit noted in Eureka Inv. Corp. v. Chicago Title Ins. Co., 240 U.S. App. D.C. 88, 743 F.2d 932 (D.C. Cir. 1984) (per curiam), courts are presented with a difficult problem when a joint attorney fails to do that and instead continues representing both clients when their interests become adverse. Id. at 937-38. In this situation, the black-letter law is that when an attorney (improperly) represents two clients whose interests are adverse, the communications are privileged against each other notwithstanding the lawyer's misconduct. Id.; see also J. WIGMORE, EVIDENCE § 2312 (McNaughton rev. ed. 1961).

Teleglobe Commc'ns Corp., 493 F.3d at 368.

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

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

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

Joint clients and their lawyer also have power to define the "information flow" within a joint representation -- although there are certainly some limits on this power, just as there are limits on the power to avoid any loyalty issues. ABA Model Rule 1.7 cmt. [31] ("In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential."); Restatement (Third) of Law Governing Lawyers § 60 cmt. 1 (2000) ("Co-clients can also explicitly agree that the lawyer is not to share certain information.").<sup>11</sup>

In the Teleglobe case (discussed in detail above), the Third Circuit indicated that in the corporate family context "a joint representation only arises when common attorneys are affirmatively doing legal work for both entities on a matter of common interest." Teleglobe Commc'ns Corp., 493 F.3d at 379. However, the Third Circuit did not assess what would happen if a lawyer represented multiple corporations (or any other clients, for that matter) on a matter in which the client did not have a "common

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<sup>11</sup> To be sure, there are limits on such agreements, and courts reject obviously contrived arrangements, at least in disputes between former jointly represented clients. See, e.g., In re Mirant Corp., 326 B.R. 646 (Bankr. N.D. Tex. 2005) (rejecting the applicability of a "Protocol" entered into by a parent and a then-subsiary which authorized their joint lawyer Troutman Sanders to keep confidential from one client what it learned from the other; noting that the general counsel of the subsidiary agreed to the Protocol after the subsidiary became an independent company, but also explaining that the general counsel had ties both to the parent and to Troutman).

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



interest." Thus, it is unclear whether the Third Circuit was simply describing the situation before it, or what explains the contours of an acceptable joint representation.

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

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

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

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

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

Oppliger, 2010 U.S. Dist. LEXIS 15251, at \*11-12 (emphasis added). The court rejected the government's argument that it "defies logic to find a common interest existed between two parties who had 'adverse interests' and were on opposite sides of a civil dispute." Id. at \*13.

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

Id. at \*13-14.

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

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

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

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

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This scenario could call for either a joint representation or separate representations, so the lawyer should define the nature of the representation.

### **Best Answer**

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

N 8/12

## Joint Representations: Loyalty Issues

### Hypothetical 7

Although you generally handle transactional work for several family-owned companies and their owners, you also help some of your clients with their estate planning. The president of one of your corporate clients just called to say that he would like you to prepare a new will for him and his fourth wife. You worry that the president's interests are or will become adverse to her interests.

May you jointly represent the president and his fourth wife in preparing their estate plan?

**YES**

### Analysis

Lawyers can (1) separately represent clients on separate matters (which most lawyers generally do on a daily basis); (2) separately represent clients on the same matter; or (3) jointly represent clients on the same matter. This hypothetical deals with the third scenario.

Conflicts of interest can arise in any of these contexts. However, lawyers jointly representing clients on the same matter must be especially careful when undertaking and continuing such a joint representation.

### **ABA Model Rules**

The ABA Model Rules identify two issues that lawyers must address when jointly representing clients on the same matter.

First, lawyers must deal with the issue of loyalty. The loyalty issue itself involves two types of conflicts of interest -- one of which looks at whether the lawyer's representation is directly adverse to another client, and the other of which requires a far

more subtle analysis -- because it examines one representation's effect on the lawyer's judgment.

Every lawyer is familiar with the first 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 representation does not violate this 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" against 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 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).<sup>1</sup>

Second, lawyers must deal with the issue of information flow. Even if there is no conflict between jointly represented clients, lawyers must analyze whether they must, may or cannot share information learned from one jointly represented client with the other clients.

This hypothetical deals with the first issue -- loyalty.

A comment to the ABA Model Rules explains the factors that lawyers must consider when determining whether they can undertake a joint representation.

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<sup>1</sup> The ABA Model Rules require such consent to be "confirmed in writing," but many states do not. ABA Model Rule 1.7(b)(4).

In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

ABA Model Rule 1.7 cmt. [29] (emphases added). Thus, lawyers should consider whether adversity already exists, and the likelihood that it will arise in the future.

Lawyers concluding that they can enter into a joint representation (because adversity is not inevitable) have three basic options.

First, they can say nothing to their clients -- and deal with any adversity if it develops. Because there is no conflict until such adversity develops, there is no need for disclosure and consent. The advantage of this approach is that the lawyer is more likely to obtain the business. The disadvantage is that all of the clients will be disappointed if adversity develops -- and might feel that the lawyer has been deceitful by not advising them of that possibility.

Second, the lawyer can salute the possibility of adversity, and advise the clients that they (and the lawyer) will have to deal with adversity if it ever develops. This has

the advantage of warning the clients that they might have to address adversity, but of course leaves the outcome of any adversity uncertain.

Third, a lawyer can very carefully describe in advance what will happen if adversity develops. In most situations, the lawyer will have to drop all of the clients. ABA Model Rule 1.7 cmt. [29] ("Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails."). In certain limited situations, the clients might agree in advance that the lawyer will continue representing one of the clients and drop the other clients -- although there is rarely absolute certainty about that strategy working. The advantage of this approach is that the clients and the lawyer will know in advance what is likely to happen if adversity develops. The disadvantage of this approach is that the lawyer must describe this "parade of horrors" to the clients in advance -- and therefore may frighten away the potential clients.

### **Restatement**

The Restatement takes the same basic approach to conflicts as the ABA Model Rules. Restatement (Third) of Law Governing Lawyers §§ 121, 128 (2000).

The Restatement contains a separate provision dealing with joint representations in a "nonlitigated matter."

Unless all affected clients consent to the representation under the limitations and conditions provided in § 122, a lawyer may not represent two or more clients in a matter not involving litigation if there is a substantial risk that the lawyer's representation of one or more of the clients would be materially and adversely affected by the lawyer's duties to one or more of the other clients.

Restatement (Third) of Law Governing Lawyers § 130 (2000).

A comment provides some additional guidance.



When multiple clients have generally common interests, the role of the lawyer is to advise on relevant legal considerations, suggest alternative ways of meeting common objectives, and draft instruments necessary to accomplish the desired results. Multiple representations do not always present a conflict of interest requiring client consent . . . . For example, in representing spouses jointly in the purchase of property as co-owners, the lawyer would reasonably assume that such a representation does not involve a conflict of interest. A conflict could be involved, however, if the lawyer knew that one spouse's objectives in the acquisition were materially at variance with those of the other spouse.

Id. cmt. c.

The Restatement then provides several illustrations of how the duty of loyalty plays out in a trust and estate setting in which a lawyer wants to represent a husband and wife.

The first illustration involves a situation in which the lawyer knows both spouses and believes that their interests are aligned.

Husband and Wife consult Lawyer for estate-planning advice about a will for each of them. Lawyer has had professional dealings with the spouses, both separately and together, on several prior occasions. Lawyer knows them to be knowledgeable about their respective rights and interests, competent to make independent decisions if called for, and in accord on their common and individual objectives. Lawyer may represent both clients in the matter without obtaining consent . . . . While each spouse theoretically could make a distribution different from the other's, including a less generous bequest to each other, those possibilities do not create a conflict of interest, and none reasonably appears to exist in the circumstances.

Id. illus. 1 (emphasis added).

The second Restatement illustration explains the lawyer's duty if one of the spouses appears to be overbearing, and the lawyer senses a disagreement about the spouses' estate objectives.

The same facts as in Illustration 1, except that Lawyer has not previously met the spouses. Spouse A does most of the talking in the initial discussions with Lawyer. Spouse A does most of the talking in the initial discussions with Lawyer. Spouse B, who owns significantly more property than Spouse A, appears to disagree with important positions of Spouse A but to be uncomfortable in expressing that disagreement and does not pursue them when Spouse A appears impatient and peremptory. Representation of both spouses would involve a conflict of interest. Lawyer may proceed to provide the requested legal assistance only with consent given under the limitations and conditions provided in § 122.

Id. illus. 2 (emphasis added). Section 122 of the Restatement explains that a lawyer facing this situation must obtain informed consent after providing "reasonably adequate information about the material risks of such [joint] representation." Restatement (Third) of Law Governing Lawyers § 122(1) (2000).

The third illustration in the series involves spouses who might disagree about their estate objectives, but seem to be intelligent and independent enough to provide the lawyer adequate direction.

The same facts as in Illustration 1, except that Lawyer has not previously met the spouses. But in this instance, unlike in Illustration 2, in discussions with the spouses, Lawyer asks questions and suggests options that reveal both Spouse A and Spouse B to be knowledgeable about their respective rights and interests, competent to make independent decisions if called for, and in accord on their common and individual objectives. Lawyer has adequately verified the absence of a conflict of interest and thus may represent both clients in the matter without obtaining consent (see § 122).

Restatement (Third) of Law Governing Lawyers § 130 cmt. c, illus. 3 (2000) (emphasis added). In that situation, the lawyer can proceed to jointly represent the husband and wife, with disclosure and consent.

Thus, the Restatement essentially follows the ABA Model Rules approach, but provides very useful examples that can guide lawyers' analysis of whether they can undertake a joint representation on the same non-litigated matter.

### **ACTEC Commentaries**

Given the frequent joint representation of spouses or other family members in trust and estate planning work, it should come as no surprise that the ACTEC Commentaries extensively deal with a lawyer's responsibility for analyzing the propriety of such a joint representation.

Like the ABA Model Rules and the Restatement, the ACTEC Commentaries warn lawyers that they must assess the likelihood of adversity before undertaking a joint representation.

A lawyer who is asked to represent multiple clients regarding related matters must consider at the outset whether the representation involves or may involve impermissible conflicts, including ones that affect the interests of third parties or the lawyer's own interests.

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

For obvious reasons, a lawyer may not undertake a joint representation if serious adversity exists from the beginning.

Some conflicts of interest are so serious that the informed consent of the parties is insufficient to allow the lawyer to undertake or continue the representation (a "non-waivable" conflict). Thus, a lawyer may not represent clients whose interests actually conflict to such a degree that the lawyer cannot adequately represent their individual interests. A lawyer may never represent opposing parties in the same litigation. A lawyer is almost always precluded from representing both parties to a pre-nuptial agreement or other matter with respect to which their interests directly conflict to a substantial degree. Thus, a lawyer who represents the personal representative of a decedent's estate (or the trustee of a trust) should not also represent a creditor in connection with a claim against the estate (or trust). This prohibition applies whether the creditor is the fiduciary individually or another party. On the other hand, if the actual or potential conflicts between competent, independent parties are not substantial, their common interests predominate, and it otherwise appears appropriate to do so, the lawyer and the parties may agree that the lawyer will represent them jointly subject to MRPC 1.7 or act as an intermediary pursuant to former MRPC 2.2 (Intermediary).

Id. at 93 (emphases added).

The presence of some adversity does not automatically preclude a lawyer from at least beginning a joint representation.

Subject to the requirements of MRPCs 1.6 and 1.7 (Conflict of Interest: Current Clients), a lawyer may represent more than one client with related, but not necessarily identical, interests (e.g., several members of the same family, more than one investor in a business enterprise). The fact that the goals of the clients are not entirely consistent does not necessarily constitute a conflict of interest that precludes the same lawyer from representing them. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: Current Clients). Thus, the same lawyer may represent a husband and wife, or parent and child, whose dispositive plans are not entirely the same.

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

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

(emphasis added).

Not surprisingly, lawyers must monitor possible later adversity.

The lawyer must also bear this concern [possible "impermissible conflicts"] in mind as the representation progresses: What was a tolerable conflict at the outset may develop into one that precludes the lawyer from continuing to represent one or more of the clients.

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

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

Thus, the ACTEC Commentaries recognize both a spectrum of adversity, and the possibility that the adversity might increase or decrease over time.

\* \* \*

In this hypothetical, the lawyer may ethically undertake the joint representation of the husband and his fourth wife. There is no current adversity to prohibit the joint representation. However, given the possibility of adversity developing in the future, it would be wise for the lawyer to address that possibility now, and deal with the effect of such adversity arising in the future. Absent such pre-planning, the lawyer presumably would be required to withdraw from representing the husband and his fourth wife in their estate planning work should adversity develop (it would also be wise to address the information flow issue at the beginning of such a joint representation).

### **Best Answer**

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

N 8/12 [F]

## Prospective Consents

### Hypothetical 8

You and your colleagues enjoyed a secret chuckle when you learned that one of your firm's wealthiest individual clients has just divorced wife number 4 and is about to marry wife number 5. However, the matter became more serious when your senior partner asked you to represent both the wealthy individual and future wife number 5 in their estate planning -- but also told you that he wants the firm to be in a position to represent your long-standing client in a possible future divorce action against wife number 5.

If you jointly represent the husband and wife number 5 in preparing their estate plan, may you obtain the wife's prospective consent to represent the husband in a future divorce action against her?

### NO (PROBABLY)

### Analysis

No ethics rule automatically prohibits a client from granting a prospective consent. However, lawyers arranging or (especially) relying on such prospective consents must be very wary.

### ABA Model Rules

The ABA Model Rules explicitly allow prospective consents, but warn lawyers that they must be careful.

An ABA Model Rule 1.7 comment explains that

[t]he effectiveness of such [prospective] waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be

effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

ABA Model Rule 1.7 cmt. [22] (emphasis added). The ABA added this provision in 2002.

This change in the ABA Model Rules was so dramatic that the ABA took the fairly unusual step of withdrawing an earlier opinion that dealt with prospective consents. ABA LEO 436 (5/11/05) (withdrawing earlier ABA LEO 372 (4/16/93), because recent changes to Model Rule 1.7 and especially Comment [22] allow "effective informed consent to a wider range of future conflicts" than permitted under the older version of the Model Rule; explaining that open-ended prospective consents are likely to be valid if (for instance) the client "has had the opportunity to be represented by independent counsel in relation to such consent and the consent is limited to matters not substantially related to the subject of the prior representation"; continuing to recognize that such prospective consents do not authorize the lawyer to "reveal or use confidential client information" absent an additional explicit consent).

## **Restatement**

The Restatement takes the same basic approach. A comment acknowledges that prospective clients are often appropriate, but warns that they are "subject to special scrutiny."

A client's open-ended agreement to consent to all conflicts normally should be ineffective unless the client possesses sophistication in the matter in question and has had the opportunity to receive independent legal advice about the consent. . . .

On the other hand, particularly in a continuing client-lawyer relationship in which the lawyer is expected to act on behalf of the client without a new engagement for each matter, the gains to both lawyer and client from a system of advance consent to defined future conflicts might be substantial. A client might, for example, give informed consent in advance to types of conflicts that are familiar to the client. Such an agreement could effectively protect the client's interest while assuring that the lawyer did not undertake a potentially disqualifying representation.

Restatement (Third) of Law Governing Lawyers § 31(2)(e) (2000).

## **State Legal Ethics Opinions**

Every bar that has addressed the issue of prospective consents has refused to adopt a per se prohibition of such consents.<sup>1</sup> However, these opinions either provide a general analysis or involve a context rather than the estate planning context. Still, the unanimity of state bar opinions provides useful guidance to estate planning lawyers.

## **Case Law**

Not surprisingly, courts uphold the effectiveness of prospective consents that meet the generally-accepted standard -- providing some specific description of the type

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<sup>1</sup> N.Y. City LEO 2008-2 (9/2008); Pennsylvania LEO 2006-200 (7/26/06); N.Y. City LEO 2006-1 (2/17/06); District of Columbia LEO 309 (9/20/01).



of adversity that might develop. As with state bar opinions, the issue usually comes up in the corporate context.<sup>2</sup>

In contrast, courts reject the effectiveness of prospective consents that tend to be too broad.<sup>3</sup>

Significantly, courts and bars judge prospective consents both at the time that the client grants them, and the time that the lawyer relies upon them.

### **Consent Language**

Lawyers hoping to arrange for an effective prospective consent must undertake an awkward balancing act.

The kind of explicit (often ugly) language that might be required to assure an effective prospective consent could prompt the requested client to turn down the request for consent, or even become angry at being asked. On the other hand, a proposed prospective consent that attempts to "finesse" the issue by not explicitly describing the possible adversity, or not describing litigation as included within the

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<sup>2</sup> McKesson Info. Solutions Inc. v. Duane Morris LLP, Civ. No. 2006CV121110 (Fulton County (Ga.) Super. Ct. Mar. 6, 2007); Visa U.S.A., Inc. v. First Data Corp., 241 F. Supp. 2d 1100, 1102-03 (N.D. Cal. 2003).

<sup>3</sup> All Am. Semiconductor, Inc. v. Hynix Semiconductor, Inc., Nos. C 07-1200, -1207, -1212 & No. 06-2915, 2008 U.S. Dist. LEXIS 106619, at \*10-11, \*11, \*20-21, \*24, \*7-8, \*33-34, \*37-38 (N.D. Cal. Dec. 18, 2008); Celgene Corp. v. KV Pharm. Co., Civ. A. No. 07-4819 (SDW), 2008 U.S. Dist. LEXIS 58735, at \*3-4, \*13-14, \*21-24, \*32, \*41 (D.N.J. July 28, 2008) (unpublished opinion); Wolk v. Flight Options, Inc., No. 03-cv-06840, 2005 U.S. Dist. LEXIS 19891 (E.D. Pa. Sept. 13, 2005); Concat LP v. Unilever, PLC, 350 F. Supp. 2d 796, 801-02, 820, 821 (N.D. Cal. 2004); Goss Graphics Sys., Inc. v. MAN Roland Druckmaschinen Aktiengesellschaft, No. C00-0035 MJM, 2000 U.S. Dist. LEXIS 18100, at \*7 (N.D. Iowa May 25, 2000); Worldspan, L.P. v. Sabre Group Holdings, Inc., 5 F. Supp. 2d 1356, 1359, 1359-60, 1360 (N.D. Ga. 1998); Florida Ins. Guar. Ass'n v. Carey Canada, Inc., 749 F. Supp. 255, 259-60 (S.D. Fla. 1990).

scope of the prospective consent,<sup>4</sup> might ultimately prove to be ineffective if a court must later assess the consent.

Courts and bars have provided some guidance about the type of consent language that will be effective<sup>5</sup> and the type of language that will not be effective because it is too general.<sup>6</sup>

### **Conclusion for Trust and Estate Lawyers**

Although none of the pertinent ethics opinions or cases arose in the trust and estate planning context, they provide guidance to lawyers who practice in that area.

Unfortunately for lawyers hoping to rely on such a prospective consent, they will almost certainly obtain confidential information from clients that they will be able to use against the client in the type of adversity they would like to include in the prospective consent. For example, a lawyer hoping to obtain a valid prospective consent from one of two spouses or future spouses would have to address the type of adversity that they might undertake against that spouse. If the adversity includes a divorce representation, the lawyer presumably would have to include in a prospective consent an acknowledgment that the lawyer will acquire confidential information from that person,

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<sup>4</sup> Worldspan, L.P. v. Sabre Group Holdings, Inc., 5 F. Supp. 2d at 1359-60 (disqualifying defendant's local counsel despite a prospective consent; "It is the opinion of this Court that future directly adverse litigation against one's present client is a matter of such an entirely different quality and exponentially greater magnitude, and so unusual given the position of trust existing between lawyer and client, that any document intended to grant standing consent for the lawyer to litigate against his own client must identify that possibility, if not in plain language, at least by irresistible inference including reference to specific parties, the circumstances under which such adverse representation would be undertaken, and all relevant like information." (emphasis added)).

<sup>5</sup> N.Y. City LEO 2006-1 (2/17/06); District of Columbia LEO 309 (9/20/01); Visa U.S.A., Inc. v. First Data Corp., 241 F. Supp. 2d 1100, 1102-03 (N.D. Cal. 2003).

<sup>6</sup> All Am. Semiconductor, Inc., 2008 U.S. Dist. LEXIS 106619, at \*7-8, \*32-34 ; Celgene Corp. v. KV Pharm. Co., Civ. A. No. 07-4819 (SDW), 2008 U.S. Dist. LEXIS 58735, at \*3-4 (D.N.J. July 28, 2008) (unpublished opinion); Concat LP, 350 F. Supp. 2d at 801-02; Goss Graphics Sys., Inc., 2000 U.S. Dist. LEXIS 18100, at \*7; Worldspan, L.P., 5 F. Supp. 2d at 1359.

that might be useful in a divorce action (at least to the extent that the spouse's financial information would be relevant in the divorce action).

For this reason, prospective consents are not as likely to be effective in an estate planning context as in other contexts, in which the prospective consent covers matters unrelated to the matter in which the lawyer represents the client. The inevitability that trust and estate lawyers will have gained pertinent information usable against a former client makes it much less likely that a court or bar would enforce such a consent.

Another possible factor limiting the use of prospective consents in the trust and estate context involves emotion rather than ethics. A prospective bride and groom might be offended by a lawyer's suggestion that adversity might develop in what then is a blissful romance. The lawyer might even hesitate to raise such a possibility, because it could offend a longstanding client who has fallen madly in love with a young woman half his age, etc. Even if the lawyer raises the issue tactfully, he or she might have even more difficulties suggesting the type of ugly language that must underlie a prospective consent to provide any chance that a court or bar would later enforce the consent.

### **Best Answer**

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

N 8/12

## Joint Representations: Information Flow Duties in the Absence of an Agreement

### Hypothetical 9

For the past six months, you have been representing a husband and wife in preparing their estate plan. You did not explain to either client whether you could (or must) disclose to one spouse what the other spouse told you in connection with their estate planning. Over lunch early this afternoon, the wife told you in confidence that several years before meeting her current husband she had an affair with a coworker and had an illegitimate child. Her husband does not know anything about this, but the wife is considering if she should make arrangements for her illegitimate child to receive some of her estate.

Shell-shocked, you return to the office and discuss this issue with one of your senior partners.

(a) Must you tell the husband about his wife's illegitimate child?

**MAYBE**

(b) May you tell the husband about his wife's illegitimate child?

**MAYBE**

(c) May you continue to jointly represent the client?

**MAYBE**

### Analysis

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

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

The representation by one lawyer of related clients with regard to unrelated matters does not necessarily involve any problems of confidentiality or conflicts. Thus, a lawyer is generally free to represent a parent in connection with the purchase of a condominium and a child

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

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

This hypothetical deals with the first scenario.

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

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

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regarding an employment agreement or an adoption. Unless otherwise agreed, the lawyer must maintain the confidentiality of information obtained from each separate client and be alert to conflicts of interest that may develop. The separate representation of multiple clients with respect to related matters, discussed above, involves different considerations.

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

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

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

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

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

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

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

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

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

(emphasis added).

Before, or within a reasonable time after commencing the representation, a lawyer who is consulted by multiple parties with related interests should discuss with them the

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

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

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

(emphases added).

The ACTEC Commentaries even provide an illustration emphasizing this point.

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

Id. at 92 (emphasis added).

Not surprisingly, bars have provided the same guidance.

- Missouri Informal Advisory Op. 2008-0003 (2008) (assessing the following question: "Can one attorney represent co-defendants in a criminal trial?"; answering as follows: "One attorney may represent two co-defendants, with appropriate disclosure and waivers. In order for this disclosure to be sufficient, the attorney must thoroughly advise co-defendants of the material advantages and disadvantages of joint representation, and discuss options and alternatives. Defendants should also be advised to seek independent advice from independent counsel. Both clients would have to agree there would be no confidentiality as between them. However, for example, if one

co-defendant is considering a plea bargain that would be adverse to the interests of the other client, the conflict would become unwaivable and the attorney would have to withdraw. The informed consent must be confirmed in writing." (emphasis added)).

- North Carolina LEO 2007-7 (7/13/07) (holding that "a lawyer may continue to represent a husband and wife in a Chapter 13 bankruptcy after they divorce provided the conditions on common representation set forth in Rule 1.7 are satisfied."; "To obtain the informed consent of clients to a common representation, a lawyer must 'communicate adequate information and explanation appropriate to the circumstances.' Rule 0.1(f) (definition of 'informed consent.'). In the current situation, Attorney A must explain to Husband and Wife the effect, if any, that the law of privilege and disclosure requirements in a bankruptcy proceeding might have on the common representation. In addition, Attorney A must inform each client of the right to information about the representation. As noted in comment [31] to Rule 1.7, '[t]he lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other.' See 2006 FEO 1." (emphasis added)).
- North Carolina LEO 2006-1 (4/21/06) ("Attorney A represents both the employer and the [insurance] carrier and therefore has a duty to keep each client informed about the status of the matter. As noted in comment [31] to Rule 1.7, ' . . . common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation.'"; "Loyalty to a client is impaired when a lawyer cannot keep the client reasonably informed or promptly comply with reasonable requests for information. Rule 1.4(a); RPC 153; 03 FEO 12. The employer and the carrier are both entitled to Attorney A's full, candid evaluation of all aspects of the claim. See 03 FEO12. If the carrier will not consent to Attorney A providing the same information to employer or the employer will not agree that certain information will be withheld, then Attorney A has a conflict and must withdraw from the representation of the employer and the carrier. If the carrier hires another lawyer to represent only the employer, Attorney A may -- with the employer's consent -- continue to represent the carrier and withhold evaluation and litigation strategy information from the employer." (emphasis added)).
- District of Columbia LEO 327 (2/2005) (addressing a situation in which a law firm which jointly represented several clients withdrew from representing some of the clients and continued to represent other clients; explaining that the law firm which began to represent the clients dropped by the first firm asked that firm to disclose all of the information it learned during the joint representation, which the firm refused to provide; ultimately concluding that



the firm had to disclose to its successor all of the information it had acquired from any of the clients during the joint representation; "Under the terms of the retainer agreement, the prior firm's duty to communicate any relevant information to the other clients included any relevant information learned from other clients in the same matter, and this duty attached at the moment the prior firm learned the information. This underscores how important it is for a lawyer carefully to explain to all clients in a joint representation that, when they agree that any relevant or material information may be shared with one another, they cannot expect that any relevant or material confidential information they may subsequently reveal to the lawyer will be kept from the other co-clients." (emphasis added)).

- District of Columbia LEO 296 (2/15/00) ("A joint representation in and of itself does not alter the lawyer's ethical duties to each client, including the duty to protect each client's confidences."; "The best practice is clearly to advise clients at the outset of a representation of the potential for ethical conflicts ahead. Written disclosure of potential effects of joint representation and written consent can substantially mitigate, if not eliminate, the ethical tensions inherent in common representation."; reiterating that the "mere fact of joint representation, without more, does not provide a basis for implied authorization to disclose one client's confidences to another"; ultimately concluding that a "lawyer who undertakes representation of two clients in the same matter should address in advance and, where possible in writing, the impact of joint representation on the lawyer's duty to maintain client confidences and to keep each client reasonably informed, and obtain each client's informed consent to the arrangement." (emphasis added)). Later changes in the Washington, D.C. ethics rules affect the substantive analysis in this legal ethics opinion, but presumably do not affect the opinion's suggestion that lawyers and clients agree in advance on the information flow.)

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

[A]n attorney, on commencing joint representation of co-clients, should agree explicitly with the clients on the sharing of confidential information. In such a "disclosure agreement," the co-clients can agree that any confidential information concerning one co-client, whether obtained from a co-client himself or herself or from another source, will be shared with the other co-client. Similarly, the co-clients can agree that unilateral confidences or other confidential information will be kept confidential by the attorney. Such a prior agreement will clarify the expectations of the clients and the lawyer and diminish the need for future litigation.

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

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

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

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

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

- Unnamed Attorney v. Ky. Bar Ass'n, 186 S.W.3d 741, 742, 743 (Ky. 2006) (privately reprimanding a lawyer who had jointly represented a husband and wife in connection with a criminal investigation for failing to explain to the jointly represented clients that he would share the investigation results with both of them; explaining that "Movant advised the Does that a conflict of interest could arise in the course of his work on their behalf. He also advised them that if a conflict of interest did arise he might be required to withdraw from the joint employment. However, he did not advise them that any and all information obtained during the joint representation or obtained in any communication to him by them would be available to each client and exchanged freely between the clients in the absence of a conflict of interest. Movant asserts that he did not anticipate the possibility that the interests of the Does would become so materially divergent that there would be a conflict of interest in providing the results of the investigation to each of them. He acknowledges that he did not explain the potential ramifications of joint representation in that regard." (emphasis added); noting that "[t]he investigation produced information that indicated that one of the Does was

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

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

### **Authorities Recognizing a "Keep Secrets" Default Rule**

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

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

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

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

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

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

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

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

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

This is a very odd comment. If a lawyer arranges for the jointly represented clients' consent to an arrangement where "information will be shared," one would think that the lawyer and the client would have to comply with such an arrangement. However, the very next phrase indicates that a lawyer having arranged for such a "no secrets" approach "will have to withdraw" if one of the jointly represented clients asks that some information not be shared.

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

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

Such a step by the lawyer would also seem unfair (and even disloyal) to the other client. After all, the clients presumably have agreed that their joint lawyer will share all

material information with both of them. The lawyer's warning to the disclosing client would seem to favor that client at the expense of the other client.

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

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

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

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

ABA LEO 450 (4/9/08) (emphases added). The ABA then explained that a lawyer in that setting would have to withdraw from representing the clients. Absent a valid consent, a lawyer must withdraw from representing the other client if the lawyer cannot make the disclosure to the client, and cannot fulfill his other obligations without such a disclosure. Id.

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

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

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

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

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<sup>2</sup> ABA LEO 450 (4/9/08) ("When a lawyer represents multiple clients in the same or related matters, the obligation of confidentiality to each sometimes may conflict with the obligation of disclosure to each." Lawyers hired by an insurance company to represent both an insured employer and an employee must explain at the beginning of the representation whom the lawyer represents (which is based on state law). If there is a chance of adversity in this type of joint representation, "[a]n advance waiver from the carrier or employer, permitting the lawyer to continue representing the insured in the event conflicts arise, may well be appropriate." The lawyer faces a dilemma if he learns confidential information from one client that will cause that client damage if disclosed to the other client; "Absent an express agreement among the lawyer and the clients that satisfies the 'informed consent' standard of Rule 1.6(a), the Committee believes that whenever information related to the representation of a client may be harmful to the client in the hands of another client or a third person, . . . the lawyer is prohibited by Rule 1.6 from revealing that information to any person, including the other client and the third person, unless disclosure is permitted under an exception to Rule 1.6." It is "highly doubtful" that consents provided by the jointly represented clients "before the lawyer understands the facts giving rise to the conflict" will satisfy the "informed consent" standards. Absent a valid consent, a lawyer must withdraw from representing the other client if the lawyer cannot make the disclosure to the client, and cannot fulfill his other obligations without such a disclosure. In the case of a lawyer hired by an insurance company to represent an insured, "[t]he lawyer may not reveal the information gained by the lawyer from either the employee or the witness, or use it to the benefit of the insurance company, . . . when the revelation might result in denial of insurance protection to the employee." "Lawyers routinely have multiple clients with unrelated matters, and may not share the information of one client with other clients. The difference when the lawyer represents multiple clients on the same or a related matter is that the lawyer has a duty to communicate with all of the clients about that matter. Each client is entitled to the benefit of Rule 1.6 with respect to information relating to that client's representation, and a lawyer whose representation of multiple clients is not prohibited by Rule 1.7 is bound to protect the information of each client from disclosure, whether to other clients or otherwise." The insured's normal duty to cooperate with the

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

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

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

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

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

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insurance company does not undermine the lawyer's duty to protect the insured's information from disclosure to the insurance company, if disclosure would harm the insured. A lawyer hired by an insurance company to represent both an employer and an employee must obtain the employee's consent to disclose information that might allow the employer to seek to avoid liability for the employee's actions (the employee's failure to consent to the disclosure would bar the lawyer from seeking the employer's consent to forego such a defense). A lawyer facing this dilemma may have to withdraw from representing all of the clients, but "[t]he lawyer may be able to continue representing the insured, the 'primary' client in most jurisdictions, depending in part on whether that topic has been clarified in advance.").



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

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

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

- lawyer to another client, we have already concluded that the lawyer may reveal the confidence or secret. Here we conclude that the lawyer must do so if the information is relevant or material to the lawyer's representation of the other client. Because the disclosing client previously has waived confidentiality, there is nothing to weigh against either the lawyer's duty of loyalty to the non-disclosing client or the lawyer's obligation to keep that client reasonably informed of anything bearing on the representation that might affect that client's interests.").
- Georgia LEO 03-2 (9/11/03) ("The obligation of confidentiality described in Rule 1.6, Confidentiality of Information, applies as between two jointly represented clients. An attorney must honor one client's request that information be kept confidential from the other jointly represented client. Honoring the client's request will, in most circumstances, require the attorney to withdraw from the joint representation." (emphasis added); "Unlike the attorney-client privilege, jointly represented clients do not lose the protection of confidentiality described in Rule 1.6, Confidentiality of Information, as to each other by entering into the joint representation. See, e.g., D.C. Bar Legal Ethics Committee, Opinion No. 296 (2000) and Committee on Professional Ethics, New York State Bar Association, Opinion No. 555 (1984). Nor do jointly represented clients impliedly consent to a sharing of confidences with each other since client consent to the disclosure of confidential information under Rule 1.6 requires consultation." (emphasis added); "When one client in a joint representation requests that some information relevant to the representation be kept confidential from the other client, the attorney must honor the request and then determine if continuing with the representation while honoring the request will: (a) be inconsistent with the lawyer's obligations to keep the other client informed under Rule 1.4, Communication; (b) materially and adversely affect the representation of the other client under Rule 1.7, Conflict of Interest: General Rule; or (c) or both." (emphasis added); "The potential problems that confidentiality can create between jointly represented clients make it especially important that clients understand the requirements of a joint representation prior to entering into one. . . . If it appears to the attorney that either client is uncomfortable with the required sharing of confidential information that joint representation requires, the attorney should reconsider whether joint representation is appropriate in the circumstances. If a putative jointly represented client indicates a need for confidentiality from another putative jointly represented client, then it is very likely that joint representation is inappropriate and the putative clients need individual representation by separate attorneys.").
  - District of Columbia LEO 296 (2/15/00) ("The inquirer, a private law firm ('Firm'), has asked whether it is allowed or obligated to advise an employer, who paid the law firm to obtain a work trainee visa from the Immigration and Naturalization Service ('INS') for its alien employee, of its subsequent discovery that the employee had fabricated the credentials that qualified her

for the visa."; "The Firm desires to advise fully at the least the petitioning Employer of the alien employee's falsification. However, it does not wish to violate any duty under Rule 1.6 to protect client confidences or secrets that may exist between the alien and the Firm."; "In a joint representation, a lawyer owes ethical duties of loyalty and confidentiality, as well as the duty to inform, to each client. A joint representation in and of itself does not alter the lawyer's ethical duties to each client, including the duty to protect each client's confidences." (emphasis added); "The best practice is clearly to advise clients at the outset of a representation of the potential for ethical conflicts ahead. Written disclosure of potential effects of joint representation and written consent can substantially mitigate, if not eliminate, the ethical tensions inherent in common representation."; "Where duties to the two clients conflict, and no advance consent has been obtained, the law firm should make an effort to fulfill its duties to the employer by seeking the employee's informed consent to divulge the information. In the alternative, the Firm should encourage the employee client to divulge the facts to the Employer client. The Firm's fiduciary duty to the Employer requires an affirmative effort to achieve disclosure within the bounds of Rule 1.6 before withdrawing from the representation."; "Without clear authorization, a lawyer may not divulge the secrets of one client to another, even where the discussion involves the subject matter of the joint representation. This is particularly true where disclosure would likely be detrimental to the disclosing client. None of the other exceptions set forth in Rule 1.6 applies. Thus, absent client consent, the Firm may not divulge the secret. This result may seem unpalatable to the extent that the Employer who is also a client is left employing a dishonest worker whose visa has been fraudulently obtained pursuant to a petition signed by the Employer under penalty of perjury. Striking the balance in favor of protecting client confidences and secrets is nonetheless required by our Rules. The guarantee of confidentiality of communication between client and attorney is a cornerstone of legal ethics." (emphases added); ultimately concluding that a "lawyer who undertakes representation of two clients in the same matter should address in advance and, where possible in writing, the impact of joint representation on the lawyer's duty to maintain client confidences and to keep each client reasonably informed, and obtain each client's informed consent to the arrangement. The mere fact of joint representation, without more, does not provide a basis for implied authorization to disclose one client's confidences to another."; "Where express consent to share client confidences has not been obtained and one client shares in confidence relevant information that the lawyer should report to the non-disclosing client in order to keep that client reasonably informed, to satisfy his duty to the non-disclosing client the lawyer should seek consent of the disclosing client to share the information directly to the other client. If the lawyer cannot achieve disclosure, a conflict of interest is created that requires withdrawal."). [Although Washington, D.C. revised its ethics rules in 2007, new comments [14] - [18] to D.C. Rule 1.7 follow the ABA approach, and thus

presumably do not affect the continuing force of this earlier legal ethics opinion.]

- Florida LEO 95-4 (5/30/97) (analyzing a joint representation in an estate-planning setting; analyzing a situation in which the client husband confides in the lawyer that the husband would like to make "substantial beneficial disposition" to another woman with whom the husband had been having an affair; framing the issue as: "We now turn to the central issue presented, which is the application of the confidentiality rule in a situation where confidentiality was not discussed at the outset of the joint representation." (emphasis added); "It has been suggested that, in a joint representation, a lawyer who receives information from the 'communicating client' that is relevant to the interests of the non-communicating client may disclose the information to the latter, even over the communicating client's objections and even where disclosure would be damaging to the communicating client. The committee is of the opinion that disclosure is not permissible and therefore rejects this 'no-confidentiality' position." (emphasis added); "It has been argued in some commentaries that the usual rule of lawyer-client confidentiality does not apply in a joint representation and that the lawyer should have the discretion to determine whether the lawyer should disclose the separate confidence to the non-communicating client. This discretionary approach is advanced in the Restatement, sec. 112, comment 1. [Proposed Final Draft, Mar. 29, 1996]. This result is also favored by the American College of Trusts and Estates in its Commentaries on the Model Rules of Professional Conduct (2d ed. 1995) (hereinafter the 'ACTEC Commentaries'). The Restatement itself acknowledges that no case law supports the discretionary approach. Nor do the ACTEC Commentaries cite any supporting authority for this proposition."; "The committee rejects the concept of discretion in this important area. Florida lawyers must have an unambiguous rule governing their conduct in situations of this nature. We conclude that Lawyer owes duties of confidentiality to both Husband and Wife, regardless of whether they are being represented jointly. Accordingly, under the facts presented Lawyer is ethically precluded from disclosing the separate confidence to Wife without Husband's consent." (emphasis added); "The committee recognizes that a sudden withdrawal by Lawyer almost certainly will raise suspicions on the part of Wife. This may even alert Wife to the substance of the separate confidence. Regardless of whether such surmising by Wife occurs when Lawyer gives notice of withdrawal, Lawyer nevertheless has complied with the Rules of Professional Conduct and has not violated Lawyer's duties to Husband."; ultimately concluding that "in a joint representation between husband and wife in estate planning, an attorney is not required to discuss issues regarding confidentiality at the outset of representation. The attorney may not reveal confidential information to the wife when the husband tells the attorney that he wishes to provide for a beneficiary that is unknown to the wife. The attorney must withdraw from the representation of both husband and wife because of the conflict presented

when the attorney must maintain the husband's separate confidences regarding the joint representation." (emphasis added)).

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

## **Authorities Recognizing a "No Secrets" Default Rule**

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

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

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

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

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

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

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

Elsewhere the Restatement again admits that

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

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

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

The mandatory disclosure language appears in several Restatement provisions.

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

Sharing of information among the co-clients with respect to the matter involved in the representation is normal and typically expected. As between the co-clients, in many such relationships each co-client is under a fiduciary duty to share all information material to the co-clients' joint enterprise. Such is the law, for example, with respect to members of a partnership. Limitation of the attorney-client privilege as applied to communications of co-clients is based on an assumption that each intends that his or her communications with the lawyer will be shared with the other co-clients but otherwise kept in confidence. . . . Moreover, the common lawyer is required to keep each of the co-clients informed of all information reasonably necessary for the co-client to make decisions in connection with the matter. . . . The lawyer's duty extends to communicating information to other co-clients that is adverse to a co-client, whether learned from



the lawyer's own investigation or learned in confidence from that co-client.

Id. (emphases added).

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

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

Id. (emphasis added).

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

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

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

Co-clients may agree that the lawyer will not disclose certain confidential communications of one co-client to other co-clients. . . . In the absence of such an agreement, the lawyer ordinarily is required to convey communications to all interested co-clients.

Id. (emphasis added).

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

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

Id. illus. 1 (emphasis added).

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

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

The discretionary disclosure language appears elsewhere.

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

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

circumstances, has the further discretion to inform the affected co-client of the specific communication if, in the lawyer's reasonable judgment, the immediacy and magnitude of the risk to the affected co-client outweigh the interest of the communicating client in continued secrecy. In making such determinations, the lawyer may take into account superior legal interests of the lawyer or of affected third persons, such as an interest implicated by a threat of physical harm to the lawyer or another person.

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

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

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

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

Interestingly, all of the illustrations involve a client disclosing the confidence to the lawyer -- and then asking the lawyer not to share the confidence with another jointly represented client. As explained above, the ABA Model Rules provisions seem to address a much less likely scenario -- in which the client asks the lawyer not to share information after telling the lawyer that the client has such information but before the client actually shares it with the lawyer.

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

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

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

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

3. Same facts as Illustration 2, except that Husband's proposed inter vivos trust would significantly deplete Husband's estate, to Wife's material detriment and in frustration of the Spouses' intended testamentary arrangements. If Husband refuses to inform Wife or to permit Lawyer to do so, Lawyer must withdraw from representing both Husband and Wife. In the light of all relevant circumstances, Lawyer may exercise discretion whether to inform Wife either that circumstances, which Lawyer has been asked not to reveal, indicate that she should revoke her recent will or to inform Wife of some or all the details of the information that Husband has recently provided so that Wife may protect her interests. Alternatively, Lawyer may inform Wife only that Lawyer is

withdrawing because Husband will not permit disclosure of relevant information.

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

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

Id. illus. 4 (emphases added).

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

However, the Restatement seems to conclude in some sections that in the absence of some agreement the lawyer must disclose such confidences, while in other

sections seems to conclude that the lawyer has discretion whether or not to disclose confidences.

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

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

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

Like the Restatement, the ACTEC Commentaries provide some guidance to a lawyer jointly representing clients who learns confidences from one client that might be of interest to the other client (in the absence of a prior agreement dealing with the information flow).

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

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

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

Id. at 76 (emphases added).

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



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

Id. at 76-77 (emphases added).

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

If the communicating client continues to oppose disclosing the confidence to the other client, the lawyer faces an extremely difficult situation with respect to which there is often no clearly proper course of action. In such cases the lawyer should have a reasonable degree of discretion in determining how to respond to any particular case. In fashioning a response, the lawyer should consider his or her duties of impartiality and loyalty to the clients; any express or implied agreement among the lawyer and the joint clients that information communicated by either client to the lawyer or otherwise obtained by the lawyer regarding the subject of the representation would be shared with the other client; the reasonable expectations of the clients; and the nature of the confidence and the harm that may result if the confidence is, or is not, disclosed. In some instances the lawyer must also consider whether the situation involves such adversity that the lawyer can no longer effectively represent both clients and is required to withdraw from representing one or both of them. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: Current Clients). A letter of withdrawal that is sent to the other client may arouse the other client's suspicions to

the point that the communicating client or the lawyer may ultimately be required to disclose the information.

Id. at 77 (emphases added).

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

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

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

the withdrawal letter simply cannot make the disclosure, regardless of any client's suspicions.

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

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

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

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

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

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

Id. at 929.

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

At least one bar also rejected the "keep secrets" approach in the absence of a previous agreement about information flow -- although in an opinion dealing with a

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

lawyer's duty to disclose all pertinent information to former jointly represented clients.

Although this scenario deals with privilege rather than ethics, it highlights the issue.

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

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

### **Best Answer**

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

N 8/12

## Joint Representations: Information Flow Duties Under an Agreement to Keep Secrets

### Hypothetical 10

About six months ago, a well-known basketball coach asked you to represent him and his wife in preparing their estate plan. The coach had been the subject of tabloid rumors, and you did not want to be surprised by some disclosures that you might have to share with his wife. At the beginning of the representation, you therefore had your clients sign a retainer agreement indicating that you would not share with both clients information that you learn from one of the clients. Just as you feared, your basketball coach client told you this morning that he had been romantically involved (for about 15 minutes) with another woman at a bar, and worries that she will claim paternity if she has a baby.

(a) Must you tell the wife about this incident?

**NO**

(b) May you tell the wife about this incident?

**NO**

(c) May you continue to jointly represent the client?

**NO (PROBABLY)**

### Analysis

**(a)-(c)** It makes sense to analyze the information flow issue in three different scenarios: (1) when the lawyer has not raised the issue with the clients at the start of the representation, so there is no agreement among them about the information flow; (2) when the lawyer has arranged for the jointly represented clients to agree in advance that the lawyer will not share secrets between or among the jointly represented clients; (3) when the lawyer has arranged for the jointly represented clients to agree in advance that the lawyer will share secrets between or among the jointly represented clients.

This hypothetical deals with the second scenario.

In essence, a lawyer arranging for an explicit "keep secrets" arrangement among jointly represented clients has contractually duplicated the ethics rules' principles governing separate representations on the same or unrelated matters.

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

### **ABA Model Rules**

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

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

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

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

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

### **Restatement**

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

Occasionally, some estate-planning lawyers have urged or contemplated "co-representation" of multiple clients in nonlitigation representations, such as husband and wife. . . . The concept is that the lawyer would represent the two or more clients on a matter of common interest on which they otherwise have a conflict of interest only after obtaining informed consent of all affected clients. Its distinguishing feature is that the arrangement would entail, as a matter of specific agreement between the clients and lawyer involved, that the lawyer would provide separate services to each client and would not share confidential information among the clients, except as otherwise agreed or directed by the client providing the information. . . . The concept of simultaneous, separate representation apparently has not yet been the specific subject of litigation, statute, or professional rule. The risks of conflict and subsequent claims for malpractice are obviously substantial, and any lawyer considering this novel form of representation presumably would fully inform clients of its risks. At least at this point, the advice should include informing the clients that the structure is untried and might have adverse consequences unintended by the lawyer or clients.



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

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

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

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

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

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

Even if the co-clients have agreed that the lawyer will keep certain categories of information confidential from one or more other co-clients, in some circumstances it might be evident to the lawyer that the uninformed co-client would not have agreed to nondisclosure had that co-client been aware of the nature of the adverse information. For example, a lawyer's examination of confidential financial information, agreed not to be shown to another co-client to reduce antitrust concerns, could show in fact, contrary to all exterior indications, that the disclosing co-client is insolvent. In view of the co-client's agreement, the lawyer must honor the commitment of confidentiality and not inform the other client, subject to the exceptions described in § 67. The lawyer must, however, withdraw if failure to reveal would mislead the affected client, involve the lawyer in assisting the communicating client in a course of fraud, breach of fiduciary duty, or other unlawful activity, or, as would be true in most such instances, involve the lawyer in representing conflicting interests.

Id. (emphasis added).

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

### **ACTEC Commentaries**

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

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

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.6, at 76 (4th ed. 2006),

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

(emphases added).

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

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

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

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

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

(emphasis added).

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

\* \* \*

As described above, authorities seem to agree that jointly represented clients can consent in advance to their joint lawyer keeping secret from one client what the lawyer has learned from another jointly represented client. However, they also warn

that such an arrangement carries a great risk that the lawyer will face a loyalty conflict of interest.

The type of conflict that such a situation might generate does not necessarily involve a lawyer's representation of one client adverse to another client under ABA Model Rule 1.7(a)(1). Instead, the conflict is likely to arise under the so-called "rheostat" variety of conflicts described in ABA Model Rule 1.7(a)(2) -- because there would be a "significant risk" that the lawyer's representation of the client providing information or of the other client "will be materially limited by the lawyer's responsibilities" to maintain the confidentiality of the information. For example, a lawyer jointly representing a husband and wife in their estate planning under a "keep secrets" approach obviously could not continue representing them if the husband confidentially told the lawyer that he intended to prepare a secret codicil leaving all his money to his mistress, or the wife confidentially told the lawyer that she was lying to her husband about the extent of her assets. Thus, a "keep secrets" approach is likely to trigger the "materially limited" representation type of conflict rather than the "directly adverse" type of conflict.

### **Best Answer**

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

N 8/12

## Joint Representations: Information Flow Duties Under a "No Secrets" Agreement

### Hypothetical 11

You have been representing a husband and wife in their estate planning for about two years. At the beginning of the representation, you had both of your clients sign an explicit "no secrets" retainer agreement. Your goal was to avoid the awkward situation in which one of the clients asks you to keep secret material information from the other client, and the clients have not agreed in advance on how to handle such a conflict.

During your most recent meeting with just the husband, he tells you that he has fallen in love with his neighbor, and plans to divorce his wife. When he asks you to keep this information secret until he is ready to break the news to his wife, you remind him of the agreement that he and his wife signed two years ago that there would be "no secrets" in the estate planning process. You can tell from the horrified look on the husband's face that he has forgotten about that agreement.

(a) Must you tell the wife about the husband's divorce plans?

**MAYBE**

(b) May you tell the wife about the husband's divorce plans?

**MAYBE**

(c) May you continue to jointly represent the client?

**NO**

### Analysis

(a)-(c) It makes sense to analyze the information flow issue in three different scenarios: (1) when the lawyer has not raised the issue with the clients at the start of the representation, so there is no agreement among them about the information flow; (2) when the lawyer has arranged for the jointly represented clients to agree in advance that the lawyer will not share secrets between or among the jointly represented clients;

(3) when the lawyer has arranged for the jointly represented clients to agree in advance that the lawyer will share secrets between or among the jointly represented clients.

This hypothetical deals with the third scenario.

Surprisingly, the authorities disagree about how a lawyer must act in the face of such an agreement.

### **ABA Model Rules**

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

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

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

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

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

A 2008 ABA legal ethics opinion dealing with this issue indicated that the lawyer must maintain the confidence learned from one of the jointly represented clients "[a]bsent an express agreement among the lawyer and clients" to the contrary.<sup>1</sup> This

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<sup>1</sup> ABA LEO 450 (4/9/08) ("When a lawyer represents multiple clients in the same or related matters, the obligation of confidentiality to each sometimes may conflict with the obligation of disclosure

language implies that the lawyer would be obligated to disclose the confidence to the other clients if the clients had agreed in advance that the lawyer would share any secrets.<sup>2</sup>

However, ABA LEO 450 instead inexplicably indicated that such a prior consent might not work. The ABA explained that it was "highly doubtful" that consents provided by the jointly represented clients "before the lawyer understands the facts giving rise to the conflict" will satisfy the "informed consent" standards. ABA LEO 450 (4/9/08). This

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

<sup>2</sup> In fact, that legal ethics opinion warns that such "an express agreement" might not work. The ABA explained that it was "highly doubtful" that a prospective consent provided by jointly represented clients "before the lawyer understands the facts giving rise to the conflict" will satisfy the "informed consent" standards. ABA LEO 450 (4/9/08).

conclusion seems directly contrary to Comment [31] to ABA Model Rule 1.7 -- which advises that lawyers should obtain such an informed consent "at the outset of the common representation."

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

### **Restatement**

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

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

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

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

### **ACTEC Commentaries**

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



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

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

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

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

The ACTEC Commentaries' confusing approach continues in the next paragraph -- which describes a lawyer's responsibility if the client declines to comply

with the explicit agreement that the joint lawyer would share all confidences with all jointly represented clients.

If the communicating client continues to oppose disclosing the confidence to the other client, the lawyer faces an extremely difficult situation with respect to which there is often no clearly proper course of action. In such cases the lawyer should have a reasonable degree of discretion in determining how to respond to any particular case. In fashioning a response, the lawyer should consider his or her duties of impartiality and loyalty to the clients; any express or implied agreement among the lawyer and the joint clients that information communicated by either client to the lawyer or otherwise obtained by the lawyer regarding the subject of the representation would be shared with the other client; the reasonable expectations of the clients; and the nature of the confidence and the harm that may result if the confidence is, or is not, disclosed. In some instances the lawyer must also consider whether the situation involves such adversity that the lawyer can no longer effectively represent both clients and is required to withdraw from representing one or both of them. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: Current Clients). A letter of withdrawal that is sent to the other client may arouse the other client's suspicions to the point that the communicating client or the lawyer may ultimately be required to disclose the information.

Id. at 77 (emphases added).

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

### **State Authorities**

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

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

- District of Columbia LEO 327 (2/2005) ("[I]t was understood that (a) we will not be able to advise you about potential claims you may have against any of the Other Individuals whom we represent and (b) information you provide to use in connection with our representation of you may be shared by us with the Other Individuals whom we represent."; "After apparently learning certain confidential information from one of the jointly represented clients, the prior firm withdrew from representing the other clients and continued to represent only the client from whom the confidential information had been learned. Upon assuming the representation of the other clients, the inquiring law firm requested that the prior firm disclose all information relevant to its prior representation of those clients, including the confidential information that had led to its withdrawal. The prior firm refused. The inquirer seeks an opinion whether, under these circumstances, the prior firm is required to share with the other clients all relevant information learned during its representation, including any relevant confidences and secrets."; "[T]he retainer agreement here expressly provided that information disclosed in connection with the representation 'may be shared' with the other clients in the same matter."; "The retainer agreement presumably reflects a collective determination by all co-clients that the interests in keeping one another informed outweighs their separate interests in confidentiality. Where the disclosing client has expressly or impliedly authorized the disclosure of relevant, confidential information to the lawyer's other clients in the same matter, the duty to keep the non-disclosing clients informed of anything bearing on the representation that might affect their interests requires the lawyer to disclose the confidential information. . . . Where the disclosing client has unambiguously consented to further disclosure, a lawyer's duty of loyalty to and the duty to communicate with the non-disclosing client tips the balance in favor of disclosure. Indeed, in light of the disclosing client's consent, there is nothing left on the other side of the balance." (footnote omitted; emphases added); "It is, of course, possible that a client who has otherwise consented to the disclosure of confidential information may withdraw such consent for a specific disclosure. Where a client informs the lawyer before disclosing certain confidential information that he or she intends to reveal something that may not be shared with the lawyer's other clients (notwithstanding a prior agreement to do so), the lawyer has an obligation at that point to inform the client that no such confidences may be kept. . . . Under the terms of the retainer agreement, the prior firm's duty to communicate any relevant information to the other clients included any relevant information learned from other clients in the same matter, and this duty attached at the moment the prior firm learned the information. This underscores how important it is for a lawyer carefully to explain to all clients in a joint representation that, when they agree that any relevant or material information may be shared with one another, they cannot

expect that any relevant or material confidential information they may subsequently reveal to the lawyer will be kept from the other co-clients." (emphasis added); "If the clients had not all agreed that the prior firm was authorized to share relevant or material information, the 'default' rule in our jurisdiction is that the prior firm would have been prohibited from sharing one client's confidences with the others. . . . But by contracting around this 'default' rule, the clients (and the prior firm) agreed that relevant or material information would be shared. Under these specific circumstance -- where the disclosing client has effectively consented to the disclosure -- an attorney's subsequent refusal to share such information with the other clients violates the D.C. Rules of Professional Conduct." (emphasis added); "[A] lawyer violates the D.C. Rules of Professional Conduct when her [sic] or she withholds from one client relevant or material confidential information obtained from a co-client who has consented to the disclosure."; "Where one client has given consent to the disclosure of confidential information by the lawyer to another client, we have already concluded that the lawyer may reveal the confidence or secret. Here we conclude that the lawyer must do so if the information is relevant or material to the lawyer's representation of the other client. Because the disclosing client previously has waived confidentiality, there is nothing to weigh against either the lawyer's duty of loyalty to the non-disclosing client or the lawyer's obligation to keep that client reasonably informed of anything bearing on the representation that might affect that client's interests.").

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

- New York LEO 555 (1/17/84) (addressing the following situation: "A and B formed a partnership and employed Lawyer L to represent them in connection with the partnership affairs. Subsequently, B, in a conversation with Lawyer L, advised Lawyer L that he was actively breaching the partnership agreement. B preceded this statement to Lawyer L with the statement that he proposed to tell Lawyer L something 'in confidence.' Lawyer L did not respond to that statement and did not understand that B intended to make a statement that would be of importance to A but was to be kept confidential from A. Lawyer L had not, prior thereto, advised A or B that he could not receive from one communications regarding the subject of the joint representation that would be confidential from the other. B has subsequently declined to tell A what he has told Lawyer L. Lawyer L now asks what course he may or must take with respect to disclosure to A of what B has told him and with respect to continued representation of the partners."; ultimately concluding that "It is the opinion of the Committee that (i) Lawyer L may not disclose to A what B has told him, and (ii) Lawyer L must withdraw from

further representation of the partners with respect to the partnership affairs."; "The Committee believes that the question ultimately is whether each of the clients, by virtue of jointly employing the lawyer, impliedly agrees or consents to the lawyer's disclosing to the other all communications of each on the subject of the representation. It is the opinion of the Committee that, at least in dealing with communications to the lawyer directly from one of the joint clients, the mere joint employment is not sufficient, without more, to justify implying such consent where disclosure of the communication to the other joint client would obviously be detrimental to the communicating client. This is not to say that such consent is never to be found. The lawyer may, at the outset of the joint representation or even perhaps at some later stage if otherwise appropriate, condition his acceptance or continuation of the joint representation upon the clients' agreement that all communications from one on the subject of the joint representation shall or may be disclosed to the other. Where one joint client is a long-time client and the other is introduced to the lawyer to be represented solely in the one joint matter, it may be appropriate for the lawyer to obtain clear consent from the new client to disclosure to the long-time client. . . . Whatever is done, the critical point is that the circumstances must clearly demonstrate that it is fair to conclude that the clients have knowingly consented to the limited non-confidentiality." (emphases added); "Both EC 5-16 and Rule 2.2 of the Model Rules emphasize that, before undertaking a joint representation, the lawyer should explain fully to each the implications of the joint representation. Absent circumstances that indicate consent in fact, consent should not be implied."; "Of course, the instant fact situation is a fortiori. Here, the client specifically in advance designated his communication as confidential, and the lawyer did not demur. Under the circumstances, the confidence must be kept.").

In 1999, a New Jersey court found it unnecessary to decide whether a lawyer could, or was obligated to, disclose the client confidences to other jointly represented clients -- when the retainer agreement indicated that the lawyer could share confidences but not that the lawyer necessarily would disclose them.<sup>3</sup> The court was saved from this issue because the lawyer wanted to disclose the information.

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<sup>3</sup> A. v. B., 726 A.2d 924, 928, 929, 929-30, 931, 932 (N.J. 1999) (analyzing a situation in which a lawyer jointly representing a husband and wife in estate planning learns from a third party that the husband fathered a child out of wedlock; "In addition, the husband and wife signed letters captioned 'Waiver of Conflict of Interest.' These letters acknowledge that information provided by one client could become available to the other. The letters, however, stop short of explicitly authorizing the firm to disclose one spouse's confidential information to the other. Even in the absence of any such explicit authorization, the spirit of the letters supports the firm's decision to disclose to the wife the existence of the husband's illegitimate child."; "As the preceding authorities suggest, an attorney, on commencing joint

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

### **Best Answer**

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

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representation of co-clients, should agree explicitly with the clients on the sharing of confidential information. In such a 'disclosure agreement,' the co-clients can agree that any confidential information concerning one co-client, whether obtained from a co-client himself or herself or from another source, will be shared with the other co-client. Similarly, the co-clients can agree that unilateral confidences or other confidential information will be kept confidential by the attorney. Such a prior agreement will clarify the expectations of the clients and the lawyer and diminish the need for future litigation. In the absence of an agreement to share confidential information with co-clients, the Restatement reposes the resolution of the lawyer's competing duties within the lawyer's discretion."; "In authorizing non-disclosure, the Restatement explains that an attorney should refrain from disclosing the existence of the illegitimate child to the wife because the trust 'would not materially affect Wife's own estate plan or her expected receipt of property under Husband's will.'"; noting that the American College of Trust and Estate Counsel agree with this discretionary standard; also acknowledging that "[t]he Professional Ethics Committees of New York and Florida, however, have concluded that disclosure to a co-client is prohibited. New York State Bar Ass'n Comm. on Professional Ethics, Op. 555 (1984); Florida State Bar Ass'n Comm. on Professional Ethics, Op. 95-4 (1997)."; emphasizing that the lawyer learned the information from a third party, not from either of the jointly represented clients; "Because Hill Wallack [lawyer] wishes to make the disclosure, we need not reach the issue whether the lawyer's obligation to disclose is discretionary or mandatory. In conclusion, Hill Wallack may inform the wife of the existence of the husband's illegitimate child."; "The law firm learned of the husband's paternity of the child through the mother's disclosure before the institution of the paternity suit. It does not seek to disclose the identity of the mother or the child. Given the wife's need for the information and law firm's right to disclose it, the disclosure of the child's existence to the wife constitutes an exceptional case with 'compelling reason clearly and convincingly shown.'" (citation omitted)).

## Joint Representations: Privilege Ramifications in a Later Dispute among Jointly Represented Clients

### Hypothetical 12

Last year, you represented a husband and wife in preparing their joint estate plan. You had not addressed the "information flow" aspect of the joint representation, but fortunately that issue did not arise during the course of your work. However, you just learned that the couple is in the midst of a bitter divorce. The husband's lawyer just called to insist that you make available all of your estate planning files to him. In particular, the husband's lawyers wants all of your email communications with his wife, some of which were not copied to him at the time. Given the apparently contentious nature of the divorce, you would not be surprised if the wife's lawyer objects to this "instruction."

If the wife's lawyer objects, must you nevertheless give the husband's lawyer communications that occurred during the joint representation?

### YES (PROBABLY)

#### Analysis

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

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

It is important to recognize that the privilege issue focuses on the ability of the former clients to obtain and then use communications and documents that deserved

privilege protection when created or made.<sup>1</sup> Most importantly, the privilege protection prevents third parties from obtaining access to those communications and documents -- absent a waiver (discussed below). Thus, the privilege generally continues to shield the communications and documents from the world -- the issue is whether one former jointly represented client can shield the communications and documents from the other former jointly represented client. As explained more fully below, however, the issue of one former jointly represented client's access to the other's communication might affect what third parties will also be given access to them.

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

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

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<sup>1</sup> As a matter of ethics, a lawyer in this setting theoretically might have to resist one joint client's request for the communications or documents -- if the other client insists that the lawyer do so. This presumably would generate some dispute in court, with the normal fight over discovery. Even though the lawyer could properly predict that he or she would ultimately be compelled to turn over the communications or documents, doing so unilaterally (without the formal clients' unanimous consent or court order) might put the lawyer at risk.



ends. Thus, it is somewhat odd that the law developed a separate jurisprudence on the effect of former jointly represented clients' disputes with each other.

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

### **ABA Model Rules**

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

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

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

Interestingly, this approach seems inconsistent with the ABA Model Rules' and ABA LEO 450's<sup>2</sup> statement that lawyers must maintain the confidentiality of information obtained from each jointly represented client -- in the absence of an explicit "no secrets" agreement.

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

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

### **Restatement**

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

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

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

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

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<sup>2</sup> ABA LEO 450 (4/9/08).

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

Several Restatement provisions deal with the rights of the joint clients themselves to access, while other provisions deal with the power of the joint clients to waive their own privilege and the privilege covering joint communications.

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

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

Id. cmt. d (emphasis added).

An illustration explains how this principle works.

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

Id. illus. 1 (emphases added).

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

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

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

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

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

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

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

the source of the communication or previously have known about it.

Id. cmt. e. Thus, a joint client generally has the right to defend the privilege even if he or she was not aware of the communications.

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

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

Id. (emphasis added).

The reference to an agreement by co-clients "to the contrary" makes less sense here than in the context discussed below. As explained above, a "keep secrets" approach allows each client to maintain control over (and privilege for) its own confidential communications with the lawyer. Here, the issue is whether the client has the power to waive his or her own communications with the lawyer -- which seems obvious. There is no reason to give the other jointly represented clients any veto power over that client's power to control his or her own communications with the lawyer. However, the reference to a possible agreement "to the contrary" in this provision apparently means that a client may voluntarily give the other jointly represented clients a veto over the client's waiver of such private communications. It is difficult to imagine why a client would ever agree to such a provision.

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

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

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

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

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

Id. (emphasis added).

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

Interestingly, this provision would seem to preclude any type of protective measures that the parties might agree to, or that a court might order in a fight between the clients. For instance, a court might enter orders requiring in camera disclosure, closing the courtroom during a trial, etc. While there might be constitutional limits on such steps, one might think that keeping the privileged information from third parties would allow the former jointly represented clients (now adversaries) to avoid

"evaporation" of the privilege that might harm both of them. It would also prevent one of the parties from seeking some advantage in their dispute by explicitly or implicitly threatening to harm the other party by allowing such evaporation. Still, the Restatement provision seems clear, and would have a dramatic effect in event of such a dispute.

The Restatement does not address another interesting issue -- whether disclosure of privileged communications in this setting triggers a subject matter waiver that might allow third parties to obtain access to additional privileged communications between former jointly represented clients on the same matter. Such an effect would exacerbate the damage caused by the waiver.

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

### **State Bars' Approach**

Not many state bars have dealt with this issue. In most respects, the case law parallels the ABA Model Rules' and the Restatement's analysis.

Many courts have stated the general proposition that all jointly represented clients must join in a waiver absent a dispute among them.

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

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

Accord Interfaith Housing Del., Inc. v. Town of Georgetown, 841 F. Supp. 1393, 1402

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

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

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

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

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

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

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



Id. This power to waive apparently applies at all times, and thus clearly applies when the former jointly represented clients end up in a dispute.

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

- Ft. Myers Historic L.P. v. Economou (In re Economou), 362 B.R. 893, 896 (Bankr. N.D. Ill. 2007) ("When two or more clients consult or retain an attorney on matters of common interest, the communications between each of them and the attorney are privileged against disclosure to third parties. . . . However, those communications are not privileged in a subsequent controversy between the clients."; finding the common interest doctrine inapplicable because the situation did not involve joint clients hiring the same lawyer).
- Teleglobe Commc'ns Corp., 493 F.3d at 366, 368 (assessing efforts by a trustee for bankrupt second-tier subsidiaries to discover communications between the parent and the parent's lawyers; ultimately reversing a district court's finding that the trustee deserved all of the documents, and remanding for determination of whether the parent's lawyers jointly represented the now-bankrupt second-tier subsidiaries in the matter to which the pertinent documents relate; "The great caveat of the joint-client privilege is that it only protects communications from compelled disclosure to parties outside the joint representation. When former co-clients sue one another, the default rule is that all communications made in the course of the joint representation are discoverable."; rejecting the corporate parent's argument that the default rule could be the opposite when the lawyer jointly represents the parent company and its wholly owned subsidiaries; "Simply following the default rule against information shielding creates simpler, and more predictable, ground rules."; "We predict that Delaware courts would apply the adverse litigation exception in all situations, even those in which the joint clients are wholly owned by the same person or entity.").
- In re JDN Real Estate--McKinney L.P., 211 S.W.3d 907, 922 (Tex. App. 2006) ("Where the attorney acts as counsel for two parties, communications made to the attorney for the purpose of facilitating the rendition of legal services to the clients are privileged, except in a controversy between the clients.").
- Heyman, 2006 U.S. Dist. LEXIS 73272, at \*8, \*9-11 (addressing efforts by the official Committee of Asbestos Claimants to seek communication relating to the company's spin-off of a subsidiary; "It bears noting that waiver by one joint client of its communications with an attorney does not enable a third party to

discover each of the other joint clients' communications with the same counsel. Rather, '[o]ne co-client does not have authority to waive the privilege with respect to another co-client's communications to their common lawyer.' Restatement (Third) of The Law Governing Lawyers, § 75 cmt. 3 (2000). In instances where a communication involves 'two or more co-clients, all those co-clients must join in a waiver, unless a nonwaiving co-client's communication can be redacted from the document.' Id."; also analyzing the Committee's claim that what the court called the "joint client exception" applied; "The Committee contends that notwithstanding the above rule, the joint-client doctrine prohibits ISP from maintaining a privilege over materials relating to the 1997 Transactions that G-I also claimed as privileged. In other words, the Committee argues that prior to the spin-off, G-I and ISP were represented by the same attorney on a matter of common interest (the 1997 transactions) and that, as such, ISP and G-I jointly held the privilege. The Committee further contends that because G-I and ISP shared legal representation on a matter, neither can assert the privilege against the other. Under the joint client exception to the attorney-client privilege, 'an attorney who represents two parties with respect to a single matter may not assert the privilege in a later dispute between the clients.' . . . Under the general rule, the joint client exception may be invoked by one former joint client against another only in a subsequent proceeding in which the two parties maintain adverse positions. . . . In the instant case, G-I and ISP do not maintain adverse positions in the underlying litigation. Indeed, it is not G-I that here seeks to invoke the joint client doctrine, but rather the Committee, a third-party, that seeks to do so. The Committee highlights the adversity between G-I and ISP that results from the April 28 Opinion -- namely that G-I's privilege with respect to materials surrounding the 1997 Transactions was eviscerated while ISP's was not. It is concluded that such adversity arising out of the application of the privilege or the production of documents does not warrant invocation of the joint client exception. Because ISP and G-I do not maintain adverse positions vis-A-vis [sic] the plaintiff Committee's claims, it is concluded that the joint client exception is inapplicable in the instant case.").

- Anderson v. Clarksville Montgomery Cnty. Sch. Bd., 229 F.R.D. 546, 548 (M.D. Tenn. 2005) ("[U]ntil such time as a plaintiff withdraws and truly becomes adverse to his former co-plaintiffs, it appears appropriate to maintain the attorney-client privilege absent a waiver by all plaintiffs.").
- Brandon v. W. Bend Mut. Ins. Co., 681 N.W.2d 633, 639 (Iowa 2004) ("[E]xceptions have been carved from the attorney-client privilege. . . . This exception is known as the 'joint-client' exception. Actual consultation by both clients with the attorney is not a prerequisite to the application of the joint-client exception. . . . The attorney is duty-bound to divulge such communications by one joint client to the other joint client. . . . Thus, when the same attorney acts for two parties, the communications are privileged

from third persons in the controversy, but not in a subsequent controversy between the two parties.").

- Koen Book Distribs. v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, P.C., 212 F.R.D. 283 (E.D. Pa. 2002) (holding that a law firm's internal documents about its own possible malpractice must be produced, because the law firm was guilty of a conflict of interest in continuing to represent the client while internally analyzing the possible malpractice; applying the doctrine that the communications to a common lawyer by jointly represented clients are not privileged in a later dispute between the clients).
- Duncan v. Duncan, 56 Va. Cir. 262, 263, 263-64 (Va. Cir. Ct. 2001) (addressing efforts by a lawyer to avoid discovery sought by plaintiff (administrator of a daughter's estate) from the lawyer, who formerly represented both the plaintiff and his former wife (mother of the deceased daughter); "Although no Virginia Court appears to have addressed this issue directly, the clear majority of reviewing courts has held that the attorney-client privilege does not preclude an attorney, who originally represented both parties in a prior matter, from disclosing information in a subsequent action between the parties."; "Plaintiff's exhibits establish that Greenspun's [lawyer] representation of Plaintiff and Defendant was joint in nature. The parties executed a joint agreement engaging Greenspun's services. He represented both parties in an investigation related to the parties' common interest, namely criminal liability for their daughter's death and loss of parental rights. Furthermore, Greenspun freely shared information regarding elements of the case with, and between, both parties. The Defendant recognized that Greenspun was sharing information disclosed by the Defendant with Plaintiff during the parties' prior joint representation. Lastly, the parties did not have an implied or express agreement with Greenspun that he would maintain their respective confidences in this joint representation. Defendant's communications with Greenspun are not privileged in the absence of an agreement between the parties stipulating otherwise."; ordering the lawyer to answer deposition questions and produce documents to plaintiff).
- Kroha v. Lamonica, No. X02CV980160366S, 2001 Conn. Super. LEXIS 81, at \*12 (Conn. Super. Ct. Jan. 3, 2001) ("[T]he privilege applies more broadly to all communications between two or more persons who consult the same attorney on any matter of joint interest between them.").
- FDIC v. Ogden Corp., 202 F.3d 454, 461 (1st Cir. 2000) ("Despite its venerable provenance, the attorney-client privilege is not absolute. One recognized exception renders the privilege inapplicable to disputes between joint clients. . . . Thus, when a lawyer represents multiple clients having a common interest, communications between the lawyer and any one (or more) of the clients are privileged as to outsiders but not inter sese." (citation omitted); "In determining whether parties are 'joint clients,' courts may

consider multiple factors, including but not limited to matters such as payment arrangements, allocation of decisionmaking roles, requests for advice, attendance at meetings, frequency and content of correspondence, and the like"; holding that the FDIC had established that it was a joint client of a law firm and therefore could obtain access to the law firm's documents in a dispute between the FDIC and the other clients).

- Ashcraft & Gerel v. Shaw, 728 A.2d 798, 812 (Md. Ct. Spec. App. 1999) (finding that a law firm which jointly represented clients must disclose privileged information if the clients later become adverse to one another; specifically finding that one of the clients may obtain information about communications between the other client and the joint lawyer even if the party was not present during those communications; "[T]he principles of duty, loyalty, and fairness require that when two or more persons with a common interest engage an attorney to represent them with respect to that interest, the attorney privilege against disclosure of confidential communications does not apply between them, regardless of whether both or all clients were present during the communication. To hold otherwise would be inconsistent with the high level of trust that we expect in an attorney-client relationship.").
- Opus Corp. v. IBM, 956 F. Supp. 1503, 1506 (D. Minn. 1996) ("When an attorney acts for two different clients who each have a common interest, communications of either party to the attorney are not necessarily privileged in subsequent litigation between the two clients." (quoting Bituminous Cas. Corp. v. Tonka Corp., 140 F.R.D. 381, 387 (D. Minn. 1992))).
- Griffith v. Davis, 161 F.R.D. 687, 693 (C.D. Cal. 1995) (noting that the "joint client doctrine" applies "where two clients share the same lawyer. . . . Under this doctrine, communications among joint clients and their counsel are not privileged in disputes between the joint clients, but are protected from disclosure to others." (citation omitted)).
- Arce v. Cotton Club, No. 4:94CV169-S-O, 1995 U.S. Dist. LEXIS 21539 (N.D. Miss. Jan. 13, 1995) (holding that the dispute between jointly represented clients meant that none of the clients could assert the privilege as to communications shared with the joint lawyer).
- Interfaith Housing Del., 841 F. Supp. at 1398 n.4 (holding that a town council can "waive its privilege as well as any protection accorded communications from its councilmembers. Further, should a dispute arise between various members of the town council, the protection of the attorney-client privilege would not apply because the requisite . . . commonality of interest would be lacking.").
- Scrivner v. Hobson, 854 S.W.2d 148, 151 (Tex. Ct. App. 1993) ("With regard to the attorney-client privilege, the general rule is that, as between commonly

represented clients, the privilege does not attach to matters that are of mutual interest. . . . Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.").

- In re Grand Jury Subpoena Dated Nov. 26, 1974, 406 F. Supp. 381, 393-94 (S.D.N.Y. 1975) ("Relevant case law makes it clear that the rule thus described by McCormick . . . squarely applies when former joint clients subsequently face one another as adverse parties in litigation brought by any one of them. . . . The rule may also be invoked in an action brought by or against a successor-in-interest to a former joint client where any one of the other former joint clients stands as an opposing party in such action. . . . On the other hand, it has been ruled that the privilege of one joint client cannot be destroyed at the behest of the other where the two have merely had a 'falling out' in the sense of ill-feeling or divergence of interests.").

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

### **Degree of Adversity**

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

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

The "adverse proceeding" language seems broader than the "litigation" language. For instance, it might include administrative proceedings that do not count as

litigation under some courts' standards. However, both the ABA Model Rules and the Restatement obviously require a high degree of adversity among the former joint clients before finding that the privilege "evaporates."

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

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

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

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

<sup>4</sup> Griffith, 161 F.R.D. at 693.

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

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

In re Grand Jury Subpoena, 406 F. Supp. at 393-94 (emphasis added).

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

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

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

Not many courts or authorities have dealt with this intriguing issue.

- See, e.g., In re Mirant Corp., 326 B.R. 646 (Bankr. N.D. Tex. 2005) (rejecting the applicability of a "Protocol" entered into by a parent and a then-subsiary which authorized their joint lawyer Troutman Sanders to keep confidential from one client what it learned from the other; noting that the general counsel of the subsidiary agreed to the Protocol after the subsidiary became an independent company, but also explaining that the general counsel had ties both to the parent and to Troutman).
- N.Y. City LEO 2004-02 (6/2004) ("Multiple representations of a corporation and one or more of its constituents are ethically complex, and are particularly so in the context of governmental investigations. If the interests of the corporation and its constituent actually or potentially differ, counsel for a corporation will be ethically permitted to undertake such a multiple representation, provided the representation satisfies the requirements of DR 5-105(C) of the New York Code of Professional Responsibility: (i) corporate counsel concludes that in the view of a disinterested lawyer, the representation would serve the interests of both the corporation and the constituent; and (ii) both clients give knowledgeable and informed consent, after full disclosure of the potential conflicts that might arise. In determining

whether these requirements are satisfied, counsel for the corporation must ensure that he or she has sufficient information to apply DR 5-105(C)'s disinterested lawyer test in light of the particular facts and circumstances at hand, and that in obtaining the information necessary to do so, he or she does not prejudice the interests of the current client, the corporation. Even if the lawyer concludes that the requirements of DR 5-105(C) are met at the outset of a multiple representation, the lawyer must be mindful of any changes in circumstances over the course of the representation to ensure that the disinterested lawyer test continues to be met at all times. Finally, the lawyer should consider structuring his or her relationships with both clients by adopting measures to minimize the adverse effects of an actual conflict, should one develop. These may include prospective waivers that would permit the attorney to continue representing the corporation in the event that the attorney must withdraw from the multiple representation, contractual limitations on the scope of the representation, explicit agreements as to the scope of the attorney-client privilege and the permissible use of any privileged information obtained in the course of the representations, and/or the use of co-counsel or shadow counsel to assist in the representation of the constituent client." (emphases added)).

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

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

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

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

The Restatement's conflicts rules provide that when a joint attorney sees the co-clients' interests diverging to an unacceptable degree, the proper course is to end the joint representation. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121 cmts. e(1)-(2). As the Court of Appeals for the D.C. Circuit noted in Eureka Inv. Corp. v. Chicago Title Ins. Co., 240 U.S. App. D.C. 88, 743 F.2d 932 (D.C. Cir. 1984) (per curiam), courts are presented with a difficult problem when a joint attorney fails to do that and instead continues representing both clients when their interests become adverse. Id. at 937-38. In this situation, the black-letter law is that when an attorney (improperly) represents two clients whose interests are adverse, the communications are privileged against each other notwithstanding the lawyer's misconduct. Id.; see also 8 J. WIGMORE, EVIDENCE § 2312 (McNaughton rev. ed. 1961).



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

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

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

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

### **Best Answer**

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

N 8/12

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Teleglobe Commc'ns Corp., 493 F.3d at 368.

## Representation Adverse to a Current Estate Planning Client

### Hypothetical 13

One of your firm's wealthiest individual clients asked you about three months ago to prepare an estate plan for him and his third wife. You had just one meeting with them at that time, and you have been working on what you think will be a fairly complicated estate plan. The wealthy individual just called you this morning to tell you that he and his third wife have already separated, and he wants your firm to represent him in the divorce.

May you represent the wealthy individual in the divorce, without the third wife's consent.

**NO**

### Analysis

Lawyers owe an equal duty of loyalty to all jointly represented clients -- unless the clients have relieved the lawyer of such a loyalty duty after full disclosure. ABA Model Rule 1.7. Lawyers may never be legally adverse to a current client without that client's consent in advance or at the time. Id.

Because every current client has what amounts to a "veto power" over adversity to him or her, a lawyer can only be adverse to a current client with that client's consent.

### **Best Answer**

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

N 8/12

## Estate Planning Representation Involving a Current Client in an Unrelated Matter

### Hypothetical 14

You have represented the patriarch of a wealthy family for many years. You also represent a number of his children in fairly minor matters, such as traffic infractions. The patriarch just called you to say that he has decided to disinherit one of the children whom you are currently representing in a minor traffic matter.

May you represent the patriarch in preparing a will that leaves nothing to one of his children (whom you currently represent in an unrelated matter)?

### YES (PROBABLY)

### Analysis

The issue here is whether the lawyer's representation of one client in disinheriting another client (whom the lawyer represents on an unrelated matter) is "directly adverse" to the disinherited client, or whether the representation creates "a significant risk" that the lawyer's representation of either client "will be materially limited by the lawyer's responsibilities to another client." ABA Model Rule 1.7; Restatement (Third) of Law Governing Lawyers §§ 121, 128 (2000).

This hypothetical comes from an ABA legal ethics opinion, which held that a lawyer generally may assist one client in disinheriting someone the lawyer currently represents in an unrelated matter.

In ABA LEO 434 (12/8/04), the ABA indicated that a lawyer in this situation was not "adverse" to the client being disinherited.

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.

ABA LEO 434 (12/8/04) (emphasis added). Because a beneficiary normally has only an expectancy in receiving money from the testator, the ABA explained that a lawyer representing a potential beneficiary in an unrelated matter may assist the testator in disinheriting the potential beneficiary (although of course the lawyer may decline the assignment).

The ABA LEO then explained the possible limitations on this basic principle. First, the answer might be different if the testator asked the lawyer to prepare an estate plan that violated an overall estate concept that the lawyer had put in place for multiple clients.

Problems also can arise in situations where the lawyer has represented both the testator and other family members in connection with family estate planning. . . . If proceeding as the testator has directed violates previously agreed-upon family estate planning objectives, the lawyer must consider her responsibilities to other family members who have been her clients for family estate planning.

Id.

Second, the ABA warned that the answer might be different if the lawyer was advising the testator on the merits of disinheriting the lawyer's other client.

By advising the testator whether, rather than how, to disinherit the beneficiary, the lawyer has raised the level of the engagement from the purely ministerial to a situation in which the lawyer must exercise judgment and discretion on behalf of the testator. In such circumstances, there is a

heightened risk that the lawyer may, perhaps without consciously intending to do so, seek to influence the testator to change his objectives . . . in favor of her other client, thus permitting her representation of the testator to be materially limited by her responsibilities to the beneficiary or by a personal interest arising out of her relationship with the beneficiary.

Id. As the ABA explained, the conflict in that setting does not come from the lawyer being legally adverse to the other client, but rather from the possibility that the lawyer's representation of either or both clients will be "materially limited" by the lawyer's representation of the testator. ABA Model Rule 1.7(a)(2).

Many lawyers would turn down the type of assignment discussed in this LEO. It is therefore interesting to note that the ABA generally would approve a lawyer's participation in preparing such a document.

### **Best Answer**

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

N 8/12

## Estate Planning Representation Involving a Current Client in a Related Matter

### Hypothetical 15

For almost 30 years, you have handled the trust and estate work for a wealthy local businesswoman and her husband. Their planning has always included a very large bequest to their son. As the son grew older, he began to amass some wealth, but never as much as his parents. About six months ago, the son and his wife hired you to prepare their estate plan. Although you have not finished that work, the son has asked to include a large bequest to his college. The son told you that he feels comfortable leaving most of his wealth to his college, because his wife and child could always count on the bequest that he will receive from his parents. At a routine status meeting with his parents this morning, the wealthy businesswoman and her husband told you in confidence that they want to disinherit their son.

(a) Must you tell the son that his parents have asked you to disinherit him?

**NO**

(b) May you tell the son that his parents have asked you to disinherit him?

**NO**

(c) May you continue to prepare the son's estate plan knowing that he will not receive the bequest from his parents?

**NO (PROBABLY)**

### Analysis

This involves separate representations on related matters. The matters are related because the son's estate plan depends in at least in part on his parents' estate planning.

(a)-(b) As in all separate representations (on unrelated or related matters), a lawyer cannot disclose one client's confidences to another client unless the first client consents. ABA Model Rule 1.6.

(c) Possessing confidential information about one client that affects the representation of another client might implicate the conflicts of interest rules.

In this hypothetical, the parents' estate planning change is not legally adverse to their son. However, their decision might well trigger another portion of the conflicts of interest rule. Under ABA Model Rule 1.7,

a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: . . . (2) 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 . . . .

ABA Model Rule 1.7(a)(2) (emphasis added). In such a circumstance, the lawyer may continue the representation of a client only if

the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; . . . [and] each affected client gives informed consent, confirmed in writing.

ABA Model Rule 1.7(b)(1), (4).

In this hypothetical, it is likely that the lawyer's representation of the son will be materially limited by the lawyer's responsibility to maintain the parents' confidential direction to disinherit their son. Most importantly, the lawyer cannot advise the son of the parents' decision to disinherit him. This problem could be compounded if the parents do not know of the son's decision to leave a large bequest to his college (although the son might well consent to the lawyer's disclosure of that fact to the parents).

The Maryland Bar dealt with a somewhat similar situation in 1985. In Maryland LEO 85-18 (1985), a lawyer represented a young man and his wife in their estate

planning. Both the husband and wife expected to inherit substantial amounts from their respective parents. The lawyer later began to represent an older gentleman -- whom the lawyer soon learned was the young man's father. The father's estate plan was "quite at variance with the anticipation of the son." The lawyer indicated that he had generally "advised the son of the ramifications of inheriting a large estate versus inheritance of a small estate." The lawyer reported that the son "was well aware that he may not inherit all or part of the estate of his father." Based on this information (and the fact that neither the son nor the father had created irrevocable instruments), the Maryland Bar indicated that the lawyer was "not required to reveal to father and son respectively that you are doing work for the other."<sup>1</sup>

The Maryland legal ethics opinion presents a less complicated scenario than this hypothetical. There, the lawyer was able to essentially defuse the conflict by assuring himself or herself that the son understood that he might not inherit from his father.

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<sup>1</sup> Maryland LEO 85-18 (1985) (assessing the following situation: "In the course of working with your clients, typically, husband and wife, on estate tax planning, you routinely ask your clients if either spouse has any expectancy of inheritance from someone other than his or her spouse? In one such instance, you directed your expectancy question to a young couple, both of whom responded that their respective parent's estate were [sic] now large and that they assumed that their inheritance would be considerable. (Each of the clients had one parent living and each parent was remarried.) Subsequently, several weeks later a gentleman came to your office for estate tax planning. It was not until you[] were considerably into your discussion that it became evident to you that in fact, this gentleman was the father of the young man mentioned above. It also became evident that the father's ideas were quite at variance with the anticipation of the son."; ultimately concluding that "[t]he Committee met and discussed your inquiry [i]n October, and concluded that additional information was needed in order to opine regarding your inquiry. Subsequently, I contacted you and additional information was obtained. You further advised telephonically, that you advised the son of the ramifications of inheriting a large estate versus the inheritance of a small estate. (Large estate and small estate is not to be confused in this opinion with the legal definition of large estate and small estate as referred to in the Estates and Trusts Article [sic].) You also clarified that while the son knew his father possessed a large estate and the son was desirous of inheriting same, that the son was well aware that he may not inherit, all or part of the estate of his father. Further, the son's Will had not been signed nor had the Inter Vivos Irrevocable Trust been signed by the father. However, a temporary simple Will had been prepared for the father pending the completion and signing of the Inter Vivos Irrevocable Trust."; "The Committee has considered your inquiry and is of the opinion, based upon all the facts presented, that you are not required to reveal to father and son respectively that you are doing work for the other.").



Unless a lawyer is absolutely certain that a separately represented client understands all of the factual background (especially any risks or prejudice involved), the lawyer must deal with both the information and the loyalty issue. The lawyer cannot disclose one client's confidences to another separately represented client unless the former consents. If the lawyer cannot adequately represent either or both clients in the absence of sharing such information, the lawyer might well have to withdraw from representing one or both of the clients -- often without explaining the reason for the withdrawal.

**Best Answer**

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

N 8/12

## Estate Planning Representation Involving a Former Client: General Rule

### Hypothetical 16

You represented a husband and wife in preparing their fairly simple estate plan, which involved each leaving all of their assets to the other upon death. About two years after you finished working for this couple, you learn that they have divorced. You just received a call from the woman, who says that she will soon be marrying someone else, and wants you to represent her in redoing her estate plan.

May you represent the woman in handling her estate plan without her former husband's consent?

### YES (PROBABLY)

#### Analysis

The basic conflicts rule governing adversity to former clients primarily rests on a duty of confidentiality, rather than on a duty of loyalty.

Unlike the analysis when a lawyer considers adversity to a current client, this assessment therefore must consider the nature of the earlier representation, and the substance of the information the lawyer learned or was likely to have learned in the earlier representation. The bottom-line rule is that lawyers may not (absent consent) be adverse to a former client if:

- the adversity is in the "same" or "substantially related" matter as the earlier representation; or
- the lawyer acquired material confidential information that could now be used to the former client's disadvantage.

ABA Model Rule 1.9(b).<sup>1</sup> Restatement (Third) of Law Governing Lawyers § 132 (2000).

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<sup>1</sup> ABA Model Rule 1.9(a) ("A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's

These principles might apply to a lawyer who has prepared an estate plan for multiple clients who have now become adverse to one another. For instance, a lawyer who represented both a husband and wife in their estate planning normally can continue representing the wife in his estate planning if the husband and wife divorce -- as long as the lawyer is not misusing confidential information the lawyer obtained from the husband while representing the husband, and as long as the lawyer's work does not assist the wife in violating some contractual obligation to which she agreed during the marriage.

The lawyer's work for the wife normally would include directing her assets to someone other than her former husband (the lawyer's former client), but that financial adversity does not violate the ethics rules.

- See, e.g., Maryland LEO 86-62 (1986) (addressing the following situation: "You present the following factual situation. Your law firm previously represented both a husband and wife in an adoption matter and in preparing their Wills, the latter having occurred in 1981. Subsequently, the husband and wife obtained a divorce, each having separate representation by firms other than yours, at your insistence. The husband now requests you to redraft his Will, deleting his former wife as a legatee."; ultimately holding that "[t]he Committee does not believe that there is any inherent conflict in your situation such that you would have to automatically refuse representation of the husband").

Although the ethics rules probably would allow a lawyer to redo an estate plan for one of two jointly represented clients after the clients' divorce, the ACTEC Commentaries explain that

[s]ome experienced estate planners who represented both spouses in connection with estate planning matters prior to the commencement of a dissolution proceeding decline to

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interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.").

represent either of them in estate planning matters during and after the proceeding.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.9, at 124 (4th ed. 2006), [http://www.actec.org/Documents/misc/ACTEC\\_Commentaries\\_4th\\_02\\_14\\_06.pdf](http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf).

The ACTEC Commentaries' recommendation might be based as much on social considerations as ethics considerations.

### **Best Answer**

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

N 8/12 [G]

## Representation Adverse to a Former Estate Planning Client

### Hypothetical 17

You spent quite a bit of time preparing estate planning documents for a wealthy Los Angeles developer, until he fired you six months ago. Folks must have heard that you and the developer had a falling-out, because this morning you received calls from two potential new clients who want you to handle matters adverse to the developer.

- (a) Without the developer's consent, can you represent an architectural firm in a large collection case against the developer?

### NO (PROBABLY)

- (b) Without the developer's consent, can you represent the developer's neighbor in a fairly minor but very contentious dispute about the exact location of the lot line that separates their two backyards?

### YES (PROBABLY)

### Analysis

The basic conflicts rule governing adversity to former clients primarily rests on a duty of confidentiality, rather than on a duty of loyalty.

Unlike the analysis when a lawyer considers adversity to a current client, this assessment therefore must consider the nature of the earlier representation, and the substance of the information the lawyer learned or was likely to have learned in the earlier representation. The bottom-line rule is that lawyers may not (absent consent) be adverse to a former client if:

- the adversity is in the "same" or "substantially related" matter as the earlier representation; or
- the lawyer acquired material confidential information that could now be used to the former client's disadvantage.

ABA Model Rule 1.9(b).<sup>1</sup>

The ABA Model Rules can be somewhat confusing, because the information-based concern does not appear in the black letter rule itself, but rather in a comment that defines as "substantially related" any matter in which the lawyer might have acquired material confidential information that the lawyer could now use against the client.

Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.

ABA Model Rule 1.9 cmt. [3] (emphasis added).

The Restatement takes the same approach. Restatement (Third) of Law Governing Lawyers § 132 (2000). The Restatement also builds the information issue into the "substantially related" definition, by indicating that

[t]he current matter is substantially related to the earlier matter if:

- (1) the current matter involves the work the lawyer performed for the former client; or
- (2) there is a substantial risk that representation of the present client will involve the use of information acquired in the course of representing the former client, unless that information has become generally known.

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

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<sup>1</sup> ABA Model Rule 1.9(a) ("A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.").

Thus, the key to analyzing adversity to a former client is the materiality of any confidential information that the lawyer obtained from the client.

(a) Because a lawyer's estate planning work for a client almost inevitably involves the lawyer acquiring confidential information about the client's finances, estate planning lawyers generally cannot take matters adverse even to former estate planning clients that involve the client's financial status.

In fact, such a situation presents an excellent example of how the "substantial relationship" standard by itself does not adequately describe the limits on a lawyer's ability to take matters adverse to a former client. The estate planning work clearly is not "substantially related" to the collection matter, but the former work almost surely involved confidential information that the lawyer could use in the latter work.

The ACTEC Commentaries provide this example.

[U]nder MRPC 1.9(c), L could not disclose or use W's disadvantage information that L obtained during the former representation of H and W in estate planning matters without W's informed consent, confirmed in writing. For example, L could not use on behalf of one of W's creditors information that L obtained regarding W's financial condition or ownership of property.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.9, at 124 (4th ed. 2006),  
[http://www.actec.org/Documents/misc/ACTEC\\_Commentaries\\_4th\\_02\\_14\\_06.pdf](http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf).

Thus, a lawyer who prepared a husband and wife's estate plan can almost never represent one of them in a later divorce -- because the lawyer has acquired confidential information from both spouses about their finances.

- See, e.g., Missouri Informal Advisory Op. 2008-0044 (2008) (assessing the following question: "Attorney represented Husband and Wife to prepare an

estate plan and assisted Husband and Wife with the purchase and sale of real property. Husband and Wife file for divorce. Attorney represents Husband. Opposing counsel files a Motion to Disqualify alleging conflict of interest. Wife does not waive any conflict of interest. Does Attorney have a conflict of interest that would preclude representation of Husband in the dissolution?"; answering as follows: "Attorney must determine if Attorney obtained information during prior representation of Wife that Attorney could use to Wife's disadvantage by reviewing the files, in addition to Attorney's recollection. If Attorney did not obtain information that could be used to Wife's disadvantage in the dissolution, Attorney is not required to withdraw. However, Attorney has obligation to discuss the issue with Husband and Wife and should advise Husband that there is no guarantee on how the judge will rule. Generally, in this type of situation, Attorney would have obtained information that would create a conflict; however, changes of circumstances may negate the relevance of the information obtained to the current situation.").

Of course, financial information becomes stale over time, so theoretically the prohibition on a lawyer's adversity to a former estate planning client might eventually evaporate. However, it would be difficult to determine exactly when the information becomes irrelevant, thus freeing the lawyer to handle a matter adverse to the former estate-planning client without consent.

**(b)** Absent unusual circumstances, it seems very unlikely that a lawyer preparing a developer's estate planning would acquire confidential information pertinent to a minor lot-line dispute.

If the dispute involves a large amount of money, knowledge about the developer's financial status might preclude a lawyer from handling the matter against the developer. There is also a very small possibility that the developer discussed the lot-line dispute with the lawyer in a confidential setting -- even if the developer did not ask the lawyer to provide any legal advice about the dispute. Although a lawyer in that scenario could argue that such gratuitous information did not deserve protection and



therefore would not preclude the lawyer from handling the lot-line dispute adverse to the former client, most courts would probably find such information disqualifying.

Absent such unusual circumstances, it seems likely that the lawyer could handle the lot-line dispute.

**Best Answer**

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

N 8/12

## Estate Planning Representation Involving a Former Client on a Related Matter

### Hypothetical 18

Several years ago you represented the parents and only child of a very wealthy family in preparing their estate plan. The three clients agreed upon several overall estate planning objectives, which centered on the continuation of the family business established and built by the father. You finished all of this estate planning about five years ago. Although you read in the newspaper that the father died approximately two years ago, neither his widow nor his son called you at that time. However, his widow just called to say that she was very displeased with how her son was running the company, and wanted you to prepare a new estate plan -- which is inconsistent with the overall family estate objectives that you had earlier worked on with all three of your clients.

Without the son's consent, can you prepare the estate plan that his mother describes?

**NO (PROBABLY)**

### Analysis

Lawyers cannot be adverse to a former client in the "same or a substantially related matter" as that in which they represented the former client, or if they acquired confidential information from the former client that they could now use to his or her disadvantage. ABA Model Rule 1.9 (emphasis added).

In addition to this prohibition on such adversity, lawyers must also deal with a conflict if their representation of a client creates a "significant risk" that the representation of any client "will be materially limited by the lawyer's responsibilities to . . . a former client." ABA Model Rule 1.7(a)(2) (emphasis added).

In most situations, a lawyer can handle a trust and estate matter adverse to a former jointly represented trust and estate client. For instance, a lawyer who jointly

represented a husband and wife in their estate plan normally can assist one of them in his or her estate planning after the couple is divorced.

However, this issue can become very complicated if the lawyer's previous work for the client involved creating contractual obligations (or even expectations) that the lawyer has now been asked to violate on behalf of another client.

In an ABA legal ethics opinion that generally permitted lawyers to prepare an estate plan disinheriting clients they represent on an unrelated matter, the ABA described a different scenario in which one client asks the lawyer to prepare estate documents essentially adverse to former clients in a related matter.

Problems also can arise in situations where the lawyer has represented both the testator and other family members in connection with family estate planning. . . . If proceeding as the testator has directed violates previously agreed-upon family estate planning objectives, the lawyer must consider her responsibilities to other family members who have been her clients for family estate planning.

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

Even if not considered adverse to a former client, such responsibility normally triggers the prohibition on a lawyer undertaking a representation that is "materially limited" by the lawyer's responsibility to another client, a former client or even a "third person" such as the beneficiary of an estate plan that the lawyer prepared for a client. ABA Model Rule 1.7(a)(2).

The ACTEC Commentaries provide an example of a lawyer's inability to represent a former husband in preparing an estate plan that involves "an attempt to modify or terminate an irrevocable trust" the lawyer helped create while jointly representing the husband and wife in their estate planning.

Lawyer (L) represented Husband (H) and Wife (W) jointly in connection with estate planning matters. Subsequently H and W were divorced in an action in which each of them was separately represented by counsel other than L. L has continued to represent H in estate planning and other matters. Because W is a former client, MRPC 1.9 imposes limitations upon L's representation of H or others. Thus, unless W gives informed consents, confirmed in writing, MRPC 1.9(a) would prevent L from representing H in a matter substantially related to the prior representation in which H's interest are materially adverse to W's, such as an attempt to modify or terminate an irrevocable trust of which W was a beneficiary.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.9, at 124 (4th ed. 2006),  
[http://www.actec.org/Documents/misc/ACTEC\\_Commentaries\\_4th\\_02\\_14\\_06.pdf](http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf).

It is unclear where the line should be drawn between contractual obligation and a mere "expectation." For instance, a man and woman who are currently married normally have an expectation of providing for each other's financial security -- but that clearly changes when they divorce. The ethics rules cannot flatly prohibit a lawyer from representing one of the divorced spouses in writing the other former spouse out of a will. However, the uncertainty of that issue (as well as social considerations) may have prompted the ACTEC Commentaries to indicate that

[s]ome experienced estate planners who represented both spouses in connection with estate planning matters prior to the commencement of a dissolution proceeding decline to represent either of them in estate planning matters during and after the proceeding.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.9, at 124 (4th ed. 2006),  
[http://www.actec.org/Documents/misc/ACTEC\\_Commentaries\\_4th\\_02\\_14\\_06.pdf](http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf).

Significantly, a lawyer's undertaking of a clearly adverse representation can result in liability, not just an ethics charge.

- See, e.g., Tensfeldt v. Haberman, 768 N.W.2d 641, 644, 659 (Wis. 2009) (analyzing a situation in which a lawyer at Michael Best prepared a client's will which violated the terms of the client's early divorce settlement and judgment; ultimately finding that the lawyer had engaged in intentional wrongdoing, but not negligence; "We determine that the circuit court properly concluded that LaBudde [Michael Best lawyer] is liable as a matter of law for intentionally aiding and abetting his client's unlawful act. The divorce judgment was enforceable at the time it was entered and at the time Robert [Michael Best's client] asked LaBudde to draft an estate plan that violated the judgment. Under these facts, LaBudde is not entitled to either qualified immunity or the good faith advice privilege." (emphasis added); "Additionally, on the children's third-party negligence claim, LaBudde argues that the circuit court improperly denied his motion for summary judgment. We determine that the circuit court erred in denying LaBudde's motion for summary judgment because the children cannot establish the LaBudde's negligence thwarted Robert's clear intent."; "Being named in the instrument is a necessary but not a sufficient condition for overcoming the general rule that attorneys are immune from liability for negligence to third parties. The third party beneficiary must be able to establish that the attorney's failure thwarted the decedent's clear intent."; "It is undisputed that LaBudde carried out Robert's explicit instructions when he crafted an estate plan that did not leave two-thirds of Robert's net estate outright to his children. To this end, we determine that the children's third party negligence claim cannot be maintained because they cannot establish that LaBudde's negligence thwarted Robert's clear intent. We conclude that the circuit court erred in denying LaBudde's motion for summary judgment on the negligence claim."; also finding that another Michael Best lawyer had not acted negligently in failing to advise the same client about a new case that affected his estate plan).

In this situation, the Michael Best lawyer improperly took steps on behalf of a client violating an agreement that the client had made earlier. This essentially facilitated the client's wrongdoing.

### **Best Answer**

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

## Fees Paid by a Non-Client

### Hypothetical 19

You just received a call from a longstanding trust and estate client, who would like you to prepare his daughter's estate planning documents. Your client tells you that he will pay whatever fees you incur in preparing his daughter's estate planning documents.

(a) May you represent the daughter under this arrangement?

**YES**

(b) Does the fact that the father will pay your bill affect your representation of the daughter in any way?

**NO**

### Analysis

Although it can raise ethics issues and requires very carefully monitoring, lawyers can represent a client while being paid to do so by a non-client. In fact, some lawyers spend essentially their entire career doing that -- insurance defense lawyers hired by an insurance company to represent insureds (in states where the latter are not considered clients). In other situations, in-house or outside corporate lawyers sometimes represent executives or employees at the company's expense.

### ABA Model Rules

The ABA Model Rules deal with this situation in three separate places. This is somewhat unusual, because the ABA Model Rules normally try to deal with a fact pattern in just one place.

First, the most extensive discussion appears in the rule governing conflicts between lawyers and their clients.

A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client gives informed consent; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (3) information relating to representation of a client is protected as required by Rule 1.6.

ABA Model Rule 1.8(f). A comment provides an additional explanation.

Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

ABA Model Rule 1.8 cmt. [11].

The next comment focuses on possible conflicts arising from such a situation.

Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict

is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.

ABA Model Rule 1.8 cmt. [12].

Second, the main conflicts of interest provision contains a comment addressing the special considerations when a non-client pays a lawyer to represent a client.

A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

ABA Model Rule 1.7 cmt. [13].

Third, the ABA Model Rules address this situation in the rule dealing with lawyer's professional independence.

A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

ABA Model Rule 5.4(c). A comment provides some additional guidance.

Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.



ABA Model Rule 5.4 cmt. [1]. Thus, the ABA Model Rules acknowledge that lawyers can represent clients while being paid by someone else, but must carefully consider a number of issues.

### **Restatement**

The Restatement takes a somewhat different approach from the ABA Model Rules.

(1) A lawyer may not represent a client if someone other than the client will wholly or partly compensate the lawyer for the representation, unless the client consents under the limitations and conditions provided in § 122 and knows of the circumstances and conditions of the payment.

(2) A lawyer's professional conduct on behalf of a client may be directed by someone other than the client if: (a) the direction does not interfere with the lawyer's independence of professional judgment; (b) the direction is reasonable in scope and character, such as by reflecting obligations borne by the person directing the lawyer; and (c) the client consents to the direction under the limitations and conditions provided in § 122.

Restatement (Third) of Law Governing Lawyers § 134 (2000). Thus, the Restatement starts with the basic principle found in the ABA Model Rules, but permits a third party paying a lawyer's bills to have some influence over the representation.

A comment explains some of the scenarios in which the issues might arise.

The third person might be interested as a relative or friend or have obligations to the client because of indemnification or similar arrangements, or be interested directly in the matter because of a co-client, such as a corporation sued along with one or more of its employees (see § 131, Comment e). The risk of adverse effect on representation of the client is inherent in any such payment or direction. Accordingly, this Section, following the standard rule of the lawyer codes, requires informed consent of the client and imposes limitations on the control that a third person may exercise over the lawyer's work.

Restatement (Third) of Law Governing Lawyers § 134 cmt. a (2000).

Interestingly, the Restatement also explains the benefits of such an arrangement in some circumstances.

This Section accommodates two values implicated by third-person payment of legal fees. First, it requires that a lawyer's loyalty to the client not be compromised by the third-person source of payment. The lawyer's duty of loyalty is to the client alone, although it may also extend to any co-client when that relationship is either consistent with the duty owing to each co-client or is consented to in accordance with § 122. Second, however, the Section acknowledges that it is often in the client's interest to have legal representation paid for by another. Most liability-insurance contracts, for example, provide that the insurer will provide legal representation for an insured who is charged with responsibility for harm to another (see also Comment f hereto). Lawyers paid by civil-rights organizations have helped citizens pursue their individual rights and establish legal principles of general importance. Similarly, lawyers in private practice or in a legal-services organization may be appointed or otherwise come to represent indigent persons pursuant to arrangements under which their fees will be paid by a governmental body . . . .

Restatement (Third) of Law Governing Lawyers § 134 cmt. c (2000).

Unlike the ABA Model Rules,<sup>1</sup> the Restatement does allow the non-client paying the lawyer's bills to have some direction over the lawyer's conduct -- if the client consents.

Consistent with that requirement, a third person may, with the client's consent and otherwise in the circumstances and to the extent stated in Subsection (2), direct the lawyer's representation of the client. When the conditions of the Subsection are satisfied, the client has, in effect, transferred to the designated third person the client's prerogatives of directing the lawyer's activities . . . . The third person's directions must allow for effective representation of the

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<sup>1</sup> ABA Model Rule 5.4(c) prohibits lawyers from allowing the non-client paying the bill to "direct or regulate" the lawyer's judgment.

client, and the client must give informed consent to the exercise of the power of direction by the third person. The direction must be reasonable in scope and character, such as by reflecting obligations borne by the person directing the lawyer. Such directions are responsible in scope and character if, for example, the third party will pay any judgment rendered against the client and makes a decision that defense costs beyond those designated by the third party would not significantly change the likely outcome. Informed client consent may be effective with respect to many forms of direction, ranging from informed consent to particular instances of direction, such as in a representation in which the client otherwise directs the lawyer, to informed consent to general direction of the lawyer by another, such as an insurer or indemnitor on whom the client has contractually conferred the power of direction . . . .

Restatement (Third) of Law Governing Lawyers § 134 cmt. d (2000) (emphases added).

Much like the ABA Model Rules, the Restatement deals with this scenario in other places too.

A provision in the Restatement section dealing with client-lawyer conflict addresses this situation.

This Section concerns contracts between a client and lawyer. It also applies in situations where a lawyer renders services to two clients and one of them agrees to pay fees for both. Whether rules similar to those of this Section apply when a nonclient, such as a parent or spouse of a client, agrees with a lawyer to pay the fee of the lawyer's client depends on general principles of law. To the extent the nonclient is subject to the same pressures as a client, application of rules similar to those of this Section may be warranted.

Restatement (Third) of Law Governing Lawyers § 18 cmt. g (2000).

A reference to fee payment by a third party also appears in a comment in the Restatement section dealing with confidentiality.

When a fee for a client is paid by a third person . . .  
and in the absence of different client agreement or

instructions, the client and not the third person directs the lawyer with respect to such matters as the treatment of files or other confidential client information.

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

### **ACTEC Commentaries**

The ACTEC Commentaries' approach parallels those in the ABA Model Rules and the Restatement. Like the ABA Model Rules, the ACTEC Commentaries deal with this issue in several spots.

First, the ACTEC Commentaries address the issue in the fee section.

One person, perhaps an employer, insurer, relative or friend, may pay the cost of providing legal services to another person. Notwithstanding the source of payment of the fee, the person for whom the services are performed is the client, whose confidences must be safeguarded and whose directions must prevail. Under MRPC 1.8(f) (Conflict of Interest: Current Clients: Specific Rules), the lawyer may accept compensation from a person other than a client only if the client consents after consultation, there is no interference with the lawyer's independence of judgment or with the lawyer-client relationship, and the client's confidences are maintained.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of

Professional Conduct, Commentary on MRPC 1.5, at 63 (4th ed. 2006),

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

(emphasis added).

Second, the ACTEC Commentaries deal with this issue in the discussion of Rule 1.8 -- providing several useful examples.

It is relatively common for a person other than the client to pay for the client's estate planning services. Examples include payment by a parent or other relative or by an employer. A lawyer asked to provide legal services on such terms may do so provided the requirements of MRPCs 1.5

(Fees), 1.7 (Conflict of Interest: Current Clients), and 1.8(f) are satisfied.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.8, at 113 (4th ed. 2006),  
[http://www.actec.org/Documents/misc/ACTEC\\_Commentaries\\_4th\\_02\\_14\\_06.pdf](http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf).

The first scenario involves a lawyer's retention by a father on behalf of a daughter who "will soon attain her majority." The example warns the lawyer that he or she must be able to fully represent the daughter, and should meet with her personally before undertaking the work that her father asks the lawyer to undertake.

Example 1.8-1. Father (E), a client of Lawyer (L) has asked L to prepare an irrevocable trust for E's daughter (D), who will soon attain her majority. E wants D to transfer property to the trust that D will be entitled to receive from a custodianship that was established for D under the Uniform Transfers to Minors Act. E has indicated that he would pay the cost of L's services in connection with the preparation of the trust. Before undertaking to represent D, L should inform E regarding the requirements of MRPC 1.8 -- particularly that L must be free to exercise independent judgment in advising D in the matter. L must also obtain D's informed consent to L being compensated by E. Since E is a client, L must be satisfied that representing both E and D is permissible. If there is significant risk that the L's representation of D will be materially limited by the lawyer's own interests in the fee arrangement or by L's responsibilities to E, then the consent must be confirmed in writing. See ACTEC Commentary to MRPC 1.7 (Conflict of Interest: Current Clients). If L cannot represent both E and D consistent with the provisions of MRPC 1.7 (Conflict of Interest: Current Clients), L should decline to represent D. L should not prepare the trust at E's request without meeting with D personally -- just as L should not draw D's will without meeting with her personally.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.8, at 113 (4th ed. 2006),  
[http://www.actec.org/Documents/misc/ACTEC\\_Commentaries\\_4th\\_02\\_14\\_06.pdf](http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf).

The second example involves a lawyer hired by an employer to assist employees in their estate planning -- which does not present as many worrisome issues as a father hiring a lawyer to represent his minor daughter.

Example 1.8-2. After review of various forms of fringe benefit programs, Employer (E) is introduced to Lawyer (L) for the purpose of having L provide estate planning services for those of E's employees who desire such services. E agrees to pay L for providing the contemplated professional services "that will benefit E's employees." Provided each employee gives an informed consent to L's representation of the employee under the circumstances, and provided L exercises independent judgment on behalf of each employee-client, L may render the services requested by each employee.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.8, at 113 (4th ed. 2006),  
[http://www.actec.org/Documents/misc/ACTEC\\_Commentaries\\_4th\\_02\\_14\\_06.pdf](http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf).

It is easy to envision a situation where an overbearing parent who is paying a lawyer's bills insists on knowing what his or her child has told a lawyer.<sup>2</sup> A parent might also try to dictate what he or she thinks is best for the child. This type of scenario might arise if a twenty-something daughter of a wealthy family plans to marry or has married someone not of her wealthy parents' liking. In any situation like this, the lawyer must resist such demands by the non-client paying the bills.

It would seem that situations in which non-clients pay trust and estate lawyers are likely to involve greater risks than in other settings. In the trust and estate setting, a typical example would involve a wealthy spouse paying a lawyer to prepare the estate plan for the other spouse, or a parent paying a lawyer to prepare an estate plan for a

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<sup>2</sup> If the child is a minor, different considerations apply. A lawyer in that situation might need to have a guardian appointed.

child. In that setting, it seems likelier than in other contexts that the person paying the bills might try to intrude into the attorney-client relationship, and try to influence the lawyer's work. Thus, trust and estate lawyers must be especially wary of such arrangements.

**Best Answer**

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

N 8/12

## Clients' Gifts to Lawyers: General Rule

### Hypothetical 20

You have been a very successful lawyer, in large part because you develop such a close personal relationship with your clients. However, this very trait has led you to pose some questions to your firm's "ethics guru."

- (a) May you solicit substantial gifts from your clients to fund a scholarship named in your parents' honor at a local law school?

### NO (PROBABLY)

- (b) May you accept your client's offer to name you as a beneficiary in her estate (the bequest is \$250,000)?

### MAYBE

- (c) May you prepare a will for a client who has asked you to include a provision under which your daughter (for whom your client has been a "second mother" for her whole life) will receive enough money for a college education?

### NO (PROBABLY)

### Analysis

Because of the obvious possibility of a lawyer's exercise of undue influence in such situations, as well as the inherent conflict between the lawyer's and the client's interests in connection with client gifts to lawyers or their families, bars have always imposed limitations on such arrangements.

The limitations vary from rule to rule and from bar to bar.

### ABA Model Rules

The ABA Model Rules impose two specific but related prohibitions.

A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client



an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

ABA Model Rule 1.8(c) (emphasis added).

A comment to this Model Rule explains that these prohibitions relate to solicitation and document preparation, not acceptance.

A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

ABA Model Rule 1.8 cmt. [6].

Thus, lawyers may not solicit substantial gifts from clients (and may not prepare documents consummating those gifts), but lawyers may accept such gifts -- subject to general rules under which fiduciaries are presumed to have defrauded their clients in such circumstances.

As a practical matter, this latter principle might deter lawyers from ever accepting such gifts absent independent representation of the client in the arrangement, but the Rule does not require such separate representation.

## Restatement

Unlike the ABA Model Rules, the Restatement articulates the obvious rationale for the rule.

A client's valuable gift to a lawyer invites suspicion that the lawyer overreached or used undue influence. It would be difficult to reach any other conclusion when a lawyer has solicited the gifts. Testamentary gifts are a subject of particular concern, both because the client is often of advanced age at the time the will is written and because it will often be difficult to establish the client's true intentions after the client's death. At the same time, the client-lawyer relationship in which a gift is made is often extended and personal. A genuine feeling of gratitude and admiration can motivate a client to confer a gift on the lawyer. The rule of this Section respects such genuine wishes while guarding against overreaching by lawyers.

Restatement (Third) of Law Governing Lawyers § 127 cmt. b (2000).

In contrast to the ABA Model Rules, the Restatement does not prohibit solicitation (although a comment mentions it) -- but rather deals only with document preparation and acceptance.

Unlike the ABA Model Rules, the Restatement discusses the proportionality of gifts.

A lawyer may not prepare any instrument effecting any gift from a client to the lawyer, including a testamentary gift, unless the lawyer is a relative or other natural object of the client's generosity and the gift is not significantly disproportionate to those given other donees similarly related to the donor. . . . A lawyer may not accept a gift from a client, including a testamentary gift, unless: (a) the lawyer is a relative or other natural object of the client's generosity; (b) the value conferred by the client and the benefit to the lawyer are insubstantial in amount; or (c) the client, before making the gift, has received independent advice or has been encouraged, and given a reasonable opportunity, to seek such advice.

Restatement (Third) of Law Governing Lawyers § 127 (2000) (emphasis added).

A Restatement illustration explains how this proportionality principle works in a family setting.

Lawyer is one of Mother's five children. At Mother's instruction, Lawyer prepares her will leaving one-fifth of the estate to each of the children, including Lawyer. Lawyer's preparation of such an instrument is within the exceptions in § 127(2). However, if Lawyer received one-third of the estate, and the other four children each received one-sixth, in the event of a challenge, Lawyer would be required to persuade the tribunal that Lawyer did not overreach Mother.

Restatement (Third) of Law Governing Lawyers § 127 cmt. e, illus. 1 (2000).

The Restatement also provides an explanation of the "substantial gift" element, as well as an illustration.

In determining whether a gift to a lawyer is substantial within the meaning of Subsection (2)(b), the means of both the lawyer and the client must be considered. To a poor client, a gift of \$100 might be substantial, suggesting that such an extraordinary act was the result of the lawyer's overreaching. To a wealthy client, a gift of \$1,000 might seem insubstantial in relation to the client's assets, but if substantial in relation to the lawyer's assets, it suggests a motivation on the part of the lawyer to overreach the client-donor, or at least not to have fully advised the client of the client's rights and interests. Under either set of circumstances, the lawyer violates the client's rights by accepting such a gift.

Restatement (Third) of Law Governing Lawyers § 127 cmt. f (2000). The illustration provides an obviously permissible situation.

Client, who has a longstanding professional relationship with Lawyer, presents Lawyer with an antique locket, with a market value of under \$50, that had belonged to Client's deceased sister. 'My sister always wanted to be a lawyer,' Client says to Lawyer, 'but that was difficult in her generation. I like to think she would have been as good a lawyer as you now are, and I think she would like you to have this.' Lawyer may accept the Client's gift.

Restatement (Third) of Law Governing Lawyers § 127 cmt. f, illus. 2 (2000).

The Restatement provides several other useful illustrations.

Client has come to Lawyer for preparation of Client's will. 'I do not have living relatives and you have been my trusted friend and adviser for most of my adult life,' Client tells Lawyer. 'I want you to have a bequest of \$50,000 from my estate.' Lawyer urges Client to ask another lawyer to advise Client about such a gift and prepare any will effecting it. Client refuses, saying 'I do not want anyone else to know my business.' Lawyer may not draft Client's will containing the proposed gift to Lawyer.

Restatement (Third) of Law Governing Lawyers § 127 cmt. g, illus. 3 (2000).

The same fact as in Illustration 3, except that Client, professing the same wish to benefit Lawyer, tells Lawyer that Client is going to make a \$50,000 cash gift to Lawyer. Lawyer encourages and gives Client a reasonable opportunity to seek independent advice about making a gift to Lawyer. Client does not do so. Lawyer may accept the inter vivos gift of \$50,000 from Client, so long as Lawyer did not solicit the gift or prepare an instrument effecting the gift from Client.

Restatement (Third) of Law Governing Lawyers § 127 cmt. g, illus. 4 (2000).

**ACTEC Commentaries**

The ACTEC Commentaries essentially follow the ABA Model Rules and the Restatement approach.

MRPC 1.8 generally prohibits a lawyer from soliciting a substantial gift from a client, including a testamentary gift, or preparing for a client an instrument that gives the lawyer or a person related to the lawyer a substantial gift. A lawyer may properly prepare a will or other document that includes a substantial benefit for the lawyer or a person related to the lawyer if the lawyer or other recipient is related to the client. The term "related person" is defined in MRPC 1.8 (c) and may include a person who is not related by blood or marriage but has a close familial relationship. However, the lawyer should exercise special care if the proposed gift to the lawyer or a related person is disproportionately large in

relation to the gift the client proposes to make to others who are equally related. Neither the lawyer nor a person associated with the lawyer can assist an unrelated client in making a substantial gift to the lawyer or to a person related to the lawyer. . . . For purposes of this Commentary, the substantiality of a gift is determined by reference both to the size of the client's estate and to the size of the estate of the designated recipient. The provisions of this rule extend to all methods by which gratuitous transfers might be made by a client including life insurance, joint tenancy with right of survivorship, and pay-on-death and trust accounts.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.8, at 112 (4th ed. 2006),

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

Thus, the ACTEC Commentaries contain the same concept of "proportionality" that appears in the Restatement. This is a subtlety that does not appear in the ABA Model Rules, but which assures that lawyers cannot take advantage of other family members.

### **State Case Law**

Throughout the country, courts often take a harsh approach toward lawyers who have arranged for gifts from their clients.

Several cases highlight this unforgiving approach.

- In re Colman, 885 N.E.2d 1238 (Ind. 2008) (suspending for three years an Indiana lawyer who, among other things, arranged for one of his friends to prepare a will for one of the lawyer's clients who wanted to make the lawyer a beneficiary of his estate; noting that the friend who prepared the will never spoke directly with the client and did not charge the client for his services; also noting that the friend sent a paralegal to the hospital to go over the will with the hospitalized client before the client signed the will).
- Attorney Grievance Comm'n v. Stein, 819 A.2d 372, 375, 374, 376, 379 (Md. 2003) (suspending indefinitely a lawyer who had prepared a will under which he received a bequeath; explaining that the lawyer (Stein) (a) had practiced

as a lawyer since 1961, and had never been sanctioned as a lawyer or received any warnings about any alleged misconduct during his entire practice, (b) represented a couple who had been clients and friends of Stein's father since the 1950s, and (c) prepared a will under which he was to receive a substantial gift; noting that Stein acknowledged that the gift was his suggestion; explaining that the lower court found that the testator was competent and that "there was no indication that any improper influence or duress was brought to bear upon the client" by Stein; noting that Stein suggested to the testator that she speak with one of Stein's partners, but did not explain to the testator "the necessity of seeing an independent attorney outside of the firm."; and that Stein claimed that he was unaware of Maryland Rule 1.8(c)(2), which requires that the client be separately represented by independent counsel in connection with a gift to a lawyer who is not a relative; explaining that the requirement of independent counsel was "express and mandatory," and that "the independent counsel required by the Rule must be truly independent -- the requirement of the Rule may not be satisfied by consultation with an attorney who is a partner of, shares space with, or is a close associate of the attorney-drafter."; acknowledging that Stein was 69 years old and semi-retired, and had never violated any other ethical rule since 1961, but harshly warning that "we consider a violation of Rule 1.8(c) to be most serious. Respondent's conduct undermines the public confidence in the legal profession in a particularly egregious manner.").

- In re Grevemberg, 838 So. 2d 1283, 1285, 1286 (La. 2003) (suspending for one year a lawyer who drafted a will under which the lawyer and his wife received most of the client's property; acknowledging that the testator was mentally competent when preparing the will, and that the lawyer "had not exercised any undue influence on her."; also recognizing that the lawyer had a "well-respected reputation and good character in the community," had exhibited a "cooperative attitude toward the proceedings" and had enjoyed an "unblemished record in the practice of law for over 56 years."; nevertheless noting that Louisiana's Rule 1.8 prohibits a lawyer from preparing any instrument of this sort).
- Toledo Bar Ass'n v. Cook, 778 N.E.2d 40 (Ohio 2002) (suspending for one year a lawyer who followed a client's suggestion that his will provide a benefit to a nursing home owned by the lawyer; noting that the lawyer resigned from her positions at the nursing home -- although her siblings continued to control the nursing home -- and prepared the will that the client suggested; explaining that when the testator died and his children questioned the bequest, the nursing home disclaimed any interest in the client's estate, and the lawyer apologized; citing Ohio's Rule that completely prohibits a lawyer from preparing any instrument under which the lawyer receives a benefit from a non-relative client; suspending the lawyer for one year (although reducing the suspension to six months if the lawyer took ethics CLE courses)).

Some bars seem to be more forgiving.

- See, e.g., Attorney Grievance Comm'n v. Saridakis, 936 A.2d 886, 894 (Md. 2007) (providing a warning but not otherwise sanctioning a Maryland lawyer who arranged for a client insisting on naming the lawyer as one of her beneficiaries to have the arrangement reviewed by another lawyer with whom the lawyer shared offices; noting that the hearing judge concluded that the second lawyer "acted as independent counsel" to the testator; finding that the second lawyer was not sufficiently independent to comply with Maryland's Rule 1.8(c), but that the respondent lawyer had attempted in good faith to comply with that Rule).

Interestingly, there seems to be no case law on the enforceability of estate planning documents that clearly violate the lawyer's ethics rules -- but for which the lawyer would happily forfeit a law license (or accept a punishment) in order to keep the money.

Such a scenario would arise where ethics rules and fiduciary duty principles intersect. The former generally only governs the bar's discipline of lawyers, and does not provide the governing principles in situations arising outside the disciplinary context. Thus, the enforceability of an unethical testamentary or other document probably would involve common law fiduciary duty principles rather than ethics rules provisions.

(a) Under most approaches, you could not solicit such a gift, because it would be seen as benefiting you.

(b) The ABA Model Rules would normally permit accepting such a gift, but the Restatement would permit such acceptance only under certain circumstances.

(c) Most bar rules would prohibit a lawyer from preparing this instrument.

### **Best Answer**

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

N 8/12 [H]



## Clients' Gifts to Lawyers: Imputation of Disqualification

### Hypothetical 21

You recently attended an ethics seminar, and learned that lawyers cannot prepare documents under which they receive some benefit from a non-family member client. You were startled by the harshness of the new rule, but recall that lawyers might be able to accept the money if someone else advises the client on the wisdom of making the bequest or gift. Now you wonder how such an arrangement would work.

- (a) May you accept money from a non-family member client if one of your partners prepares the documents under which you receive that money?

**NO**

- (b) May you accept money from a non-family member client if the client is being advised by a financial advisor?

**MAYBE**

### Analysis

Although lawyers may theoretically accept money from a client who is not a family member, the ethics rules match the harshness of the prohibition with the narrowness of the circumstances in which they may do so.

(a) ABA Model Rule 1.8(c)'s ban on a lawyer's solicitation of a substantial gift or a preparation of documents applies on its face to any other lawyers who are "associated in the firm" with the lawyer subject to the prohibition. ABA Model Rule 1.8(k).

The Restatement takes essentially the same approach, but with an explanation of how the involvement of an independent lawyer avoids the problems.

When a competent and independent person other than the lawyer-donee acts as the client's adviser with respect to a particular gift, there is less reason to be concerned with

overreaching by the lawyer. A lawyer's encouragement to a client to seek independent advice also evidences concern for fairness on the lawyer's part. Whether the lawyer may prepare an instrument effecting the gift from the client to the lawyer is determined by Subsection (1), under which independent advice is irrelevant. If the lawyer does not prepare such an instrument, the lawyer is not precluded from receiving a gift subject to the limitations of Subsection (2)(c), including that of independent advice. Such a gift also remains subject to invalidation if the circumstances warrant under the law of fraud, duress, undue influence, or mistake.

Restatement (Third) of Law Governing Lawyers § 127 cmt. g (2000).

The Restatement provides several useful illustrations explaining the imputation principle.

Client has come to Lawyer for preparation of Client's will. 'I do not have living relatives and you have been my trusted friend and adviser for most of my adult life,' Client tells Lawyer. 'I want you to have a bequest of \$50,000 from my estate.' Lawyer urges Client to ask another lawyer to advise Client about such a gift and prepare any will effecting it. Client refuses, saying 'I do not want anyone else to know my business.' Lawyer may not draft Client's will containing the proposed gift to Lawyer.

Id. illus. 3.

The same fact as in Illustration 3, except that Client, professing the same wish to benefit Lawyer, tells Lawyer that Client is going to make a \$50,000 cash gift to Lawyer. Lawyer encourages and gives Client a reasonable opportunity to seek independent advice about making a gift to Lawyer. Client does not do so. Lawyer may accept the inter vivos gift of \$50,000 from Client, so long as Lawyer did not solicit the gift or prepare an instrument effecting the gift from Client.

Id. illus. 4.

On behalf of Client, a corporation assisted in the matter by Inside Legal Counsel, Lawyer has obtained satisfaction of a judgment in an amount significantly surpassing what Client and Inside Legal Counsel thought possible. Lawyer receives

payment of Lawyer's final statement with a covering letter from Inside Legal Counsel stating that Client, on the recommendation of Inside Legal Counsel, was also enclosing an additional check in the substantial amount in gratitude for the outstanding result obtained by Lawyer. Lawyer may accept the gift of the additional check, reasonably assuming that Client has been appropriately advised in the matter by Inside Legal Counsel.

Id. illus. 5.

(b) Unlike the ABA Model Rules, the Restatement provides guidance on what type of independent advice will immunize a lawyer's acceptance of money from a non-family member client -- and also explains that the independent advice does not have to come from a lawyer.

The recommendation of independent advice must be more than perfunctory. The independent adviser may not be affiliated with the lawyer-donee. It is not necessary that the person consulted as adviser be a lawyer. Any person qualifies who is mature and appropriately experienced in personal financial matters, trusted by the client, not a beneficiary of the gift, and not selected by or affiliated with the lawyer. A lawyer-donee bears the burden of showing that reasonable effort was made to persuade the client to obtain independent advice and that the lawyer did not otherwise unduly influence or overreach the client. If the lawyer-donee has tried but failed to persuade the client to seek such help, or if the client reflects the independent adviser's counsel, the presumption of overreaching can be overcome and the gift upheld.

Restatement (Third) of Law Governing Lawyers § 127 cmt. g (2000) (emphasis added).

Any lawyer finding himself or herself in this situation would be wise to check on the applicable state bar's attitude toward this issue.

**Best Answer**

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

N 8/12 [H]

## Lawyers Preparing Documents in Which They Are Named as Executor or Trustee

### Hypothetical 22

You have represented a local dentist for several years, and consider yourself to be her close friend as well as her lawyer. The dentist called you this morning to discuss her estate planning.

- (a) If the dentist suggests it, may you act as executor under a will that you draft for the dentist?

YES

- (b) May you raise the issue first, and suggest that you draft a will that names you as executor?

YES (PROBABLY)

### Analysis

At first blush, this scenario sounds like it should be governed by the rules applicable to lawyers accepting bequests or gifts from a client. However, this scenario instead involves a lawyer accepting employment, rather than a gift. Still, the same basic considerations apply, because the employment represents a financial opportunity for the lawyer to earn money.

- (a) Perhaps because the normal context in which the client chooses an executor (as part of the estate planning process) is susceptible to lawyer overreaching, most bars have added a special level of requirements when lawyers agree to provide this particular type of law-related services to their clients.

In ABA LEO 426 (5/31/02),<sup>1</sup> the ABA explained that lawyers may act as personal representatives or trustees under documents the lawyer prepares, but must: (1) obtain a written consent if the lawyer's judgment would be significantly affected and (2) advise the client about how the lawyer's compensation will be calculated and whether it is subject to some limits or court approval.

The ACTEC Commentaries recognize that a lawyer's service as a fiduciary does not amount to a "gift" to the lawyer, but rather as a role in which the lawyer will receive payment.

As noted in ABA Formal Opinion 02-426 (2002), the client's appointment of the lawyer as a fiduciary is not a gift to the

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<sup>1</sup> ABA LEO 426 (5/31/02) ("When exploring the options with his client, the lawyer may disclose his own availability to serve as a fiduciary. The lawyer must not, however, allow his potential self-interest to interfere with his exercise of independent professional judgment in recommending to the client the best choices for fiduciaries. When there is a significant risk that the lawyer's independent professional judgment in advising the client in the selection of a fiduciary will be materially limited because of the potential amount of the fiduciary compensation or other factors, the lawyer must obtain the client's informed consent and confirm it in writing." (footnotes omitted; emphasis added); "When the client is considering appointment of the lawyer as a fiduciary, the lawyer must inform the client that the lawyer will receive compensation for serving as fiduciary, whether the amount is subject to statutory limits or court approval, and how the compensation will be calculated and approved. The lawyer also should inform the client what skills the lawyer will bring to the job as well as what skills and services the lawyer expects to pay others to provide, including management of investments, custody of assets, bookkeeping, and accounting. The lawyer should learn from the client what she expects of him as fiduciary and explain any limitations imposed by law on a fiduciary to help the client make an informed decision." (footnote omitted; emphasis added); "[T]he Model Rules do not prohibit the fiduciary from appointing himself or his firm as counsel to perform legal work during the administration of the estate or trust because the dual roles do not involve a conflict of interest. The obligations of the lawyer or his firm as counsel to the fiduciary do not differ materially from the obligations of the lawyer as fiduciary. The principal responsibility of the lawyer for a fiduciary is to give advice to assist the fiduciary in properly performing his fiduciary duties. The lawyer for a personal representative or trustee may owe a limited duty of care to the legatees and creditors of the estate or to the beneficiaries of the trust the fiduciary serves. This duty, however, is no greater than the duty that the personal representative or trustee himself owes beneficiaries of the estate or trust." (footnote omitted); "When a lawyer serves as a fiduciary and concurrently represents a beneficiary or creditor of the estate or trust, he must, in accordance with Rule 1.7, resolve any conflicts of interest that may arise. For example, were a lawyer serving as a fiduciary to recognize, while also attempting to represent a beneficiary or creditor in a claim against the estate, that he would be obligated as fiduciary to oppose the beneficiary or creditor's claim, his representation thereby would be materially limited under Rule 1.7(a). Moreover, the representation of the beneficiary or creditor would not be permissible even with the consent of the client, because it would be unreasonable for the lawyer to conclude that he could provide competent and diligent representation when opposing the interests of an estate or trust for which he is a fiduciary." (footnote omitted); finding that a lawyer's representation of a beneficiary or creditor in an unrelated matter would be less likely to cause conflicts).

lawyer and is not a business transaction that would subject the appointment to MRPC 1.8. Nevertheless, such an appointment is subject to the general conflict of interest provisions of MRPC 1.7 (Conflict of Interest: Current Clients).

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.8, at 112 (4th ed. 2006),  
[http://www.actec.org/Documents/misc/ACTEC\\_Commentaries\\_4th\\_02\\_14\\_06.pdf](http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf).

The ACTEC Commentaries take the same basic approach as the ABA Model Rules.

Some states permit a lawyer who serves as a fiduciary to serve also as lawyer for the fiduciary. Such dual service may be appropriate where the lawyer previously represented the decedent or is a primary beneficiary of the fiduciary estate. It may also be appropriate where there has been a long-standing relationship between the lawyer and the client. Generally, a lawyer should serve in both capacities only if the client insists and is aware of the alternatives, and the lawyer is competent to do so. A lawyer who is asked to serve in both capacities should inform the client regarding the costs of such dual service and the alternatives to it. A lawyer undertaking to serve in both capacities should attempt to ameliorate any disadvantages that may come from dual service, including the potential loss of the benefits that are obtained by having a separate fiduciary and lawyer, such as the checks and balances that a separate fiduciary might provide upon the amount of fees sought by the lawyer and vice versa.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.2, at 36-37 (4th ed. 2006),  
[http://www.actec.org/Documents/misc/ACTEC\\_Commentaries\\_4th\\_02\\_14\\_06.pdf](http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf).

States follow the same basic approach, but some have imposed additional specific requirements.

- New Hampshire LEO 2008-09/1 (5/13/09) ("When drafting various estate planning documents, New Hampshire attorneys are frequently requested by their clients to act in one or more fiduciary roles. The drafting attorney may, at the request of the client, be inserted as a fiduciary in the document or documents being drafted by that attorney, provided that: (1) there has been adequate disclosure of information to the client, as required under Rule 1.4; and (2) the attorney makes a determination as to whether the personal interest of the attorney in being a fiduciary would require compliance with Rule 1.7(b) and that the attorney may continue to exercise independent professional judgment in recommending to the client the best choices for fiduciaries under Rule 2.1. In order to document compliance with these Rules, it would be the best practice for the attorney to confirm in writing the 'informed consent' of the client to the selection of the drafting attorney as the named fiduciary.").
- Virginia LEO 1515 (approved by the Supreme Court 2/1/94) (outlining the principle governing a lawyer acting as executor or trustee, explaining that: a pre-existing attorney-client relationship is not necessary, but is one factor showing the propriety of the lawyer's selection; the lawyer must fully disclose the fees that will be charged (preferably in writing) and "has a duty to suggest that the client investigate potential fees of others who might otherwise provide such services"; a lawyer acting as executor or trustee may hire the lawyer's own law firm to represent him or her as long as there is full disclosure (including "the general compensation to be paid to the law firm") and consent (if the client is already dead, the beneficiaries can consent); a lawyer acting as a fiduciary is governed by the Code; a lawyer may solicit designation as a fiduciary as long as there is no overreaching or fraud).
- Georgia LEO 91-1 (9/13/91) ("It is not ethically improper for a lawyer to be named executor or trustee in a will or trust he or she has prepared when the lawyer does not consciously influence the client in the decision to name him or her executor or trustee, so long as he or she obtains the client's written consent in some form or gives the client written notice in some form after a full disclosure of all the possible conflicts of interest. In addition, the total combined attorney's fee and executor or trustee fee or commission must be reasonable and procedures used in obtaining this fee should be in accord with Georgia law.").
- Virginia LEO 1358 (10/1/90) (explaining that lawyers drafting a will or trust agreement must be very careful in naming themselves as executors or trustees; concluding that it is likely to be improper if the lawyer has not previously represented the client; noting that at a minimum, the lawyer has a duty to advise the client of fees that would be charged by other executors or trustees; explaining that if the instrument requires that the estate or trust hire the lawyer's firm for legal services, the client must consent after full disclosure).



This issue becomes even more complicated if a lawyer acting as executor wants to hire the lawyer's own law firm to represent the estate.

As explained above, in ABA LEO 426 (5/31/02), the ABA acknowledged that lawyers may hire their own law firms to perform legal work in the administration of the trust or estate. The ABA explained that in such circumstances the lawyers generally represent themselves -- and not the beneficiaries, or the trust or estate as an entity.

The ACTEC Commentaries reach the same conclusion.

Some states permit a lawyer who serves as a fiduciary to serve also as lawyer for the fiduciary. Such dual service may be appropriate where the lawyer previously represented the decedent or is a primary beneficiary of the fiduciary estate. It may also be appropriate where there has been a long-standing relationship between the lawyer and the client. Generally, a lawyer should serve in both capacities only if the client insists and is aware of the alternatives, and the lawyer is competent to do so. A lawyer who is asked to serve in both capacities should inform the client regarding the costs of such dual service and the alternatives to it. A lawyer undertaking to serve in both capacities should attempt to ameliorate any disadvantages that may come from dual service, including the potential loss of the benefits that are obtained by having a separate fiduciary and lawyer, such as the checks and balances that a separate fiduciary might provide upon the amount of fees sought by the lawyer and vice versa.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.2, at 36-37 (4th ed. 2006),

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

(emphases added).

**(b)** As long as lawyers comply with the specific requirements adopted by the pertinent bar, they may solicit designation as a fiduciary.

**Best Answer**

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

N 8/12 [H]

## Lawyers Maintaining Control Over Clients' Estate Planning Changes

### Hypothetical 23

You have practiced as a trust and estate lawyer for over thirty years. During your long career, you have seen several situations in which your former clients' greedy children, unscrupulous "friends," or unprofessional lawyers have convinced your former clients to alter the estate planning documents you prepared -- nearly always to your former clients' detriment. Starting last year, you inserted in your standard estate planning documents (with your clients' consent) a provision requiring that any changes to your clients' estate planning documents be approved by court order or by you. Two of your former clients just hired another lawyer to change their estate planning documents, and contend that this provision (to which they previously agreed) was unenforceable. In fact, they seek court sanctions against you for having suggested the inclusion of that provision.

Are you likely to be sanctioned for having included that provision in your clients' estate planning documents?

### NO (PROBABLY)

### Analysis

This hypothetical comes from a 2009 Illinois case. In Dunn v. Patterson, 919 N.E.2d 404 (Ill. App. Ct. 2009)<sup>1</sup> the court recited the substance of the provision at issue.

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<sup>1</sup> Dunn v. Patterson, 919 N.E.2d 404, 406, 410, 411 (Ill. App. Ct. 2009) (reversing a trial court's sanction of a lawyer [Patterson] whose clients had signed a estate planning documents requiring Patterson to approve any changes, but who sought to change their documents without Patterson's consent and then successfully recovered attorney's fees from Patterson when they had to litigate the right to change the documents without Patterson's consent; explaining the context of the estate planning documents; "Each of these documents contained a qualified amendment and revocation provision, which provided that any amendment or revocation of the documents may only be executed with the written consent of Patterson or by order of the court."; explaining that the clients later hired another lawyer, but refused to meet with Patterson or otherwise obtain his consent to changes in their estate documents; explaining that Patterson often added such language in estate planning documents to protect clients; noting that "[o]ut here in the cornfields of Illinois and, we suspect, sometimes in the large metropolitan areas of Illinois, one's lawyer is often his or her most trusted friend and advisor with respect to major life decisions."; ultimately finding Patterson's behavior reasonable; "[T]here is no evidence or even suggestion that Patterson personally benefitted from or had any financial interest in the estate plan. Patterson testified that he did not have any relationship with possible beneficiaries of the trust and, therefore, unlike a family member, had no reason to favor or disfavor certain changes based on who, other than the plaintiffs, may benefit from them."; "[W]e do not believe that the trust documents authored by Patterson violate public policy or the Rules of Professional Conduct."; noting that the clients could

Each of these documents contained a qualified amendment and revocation provision, which provided that any amendment or revocation of the documents may only be executed with the written consent of Patterson [lawyer] or by order of the court.

Id. at 406. The court explained that the former clients later hired another lawyer, but refused to meet with their former lawyer Patterson, or otherwise obtain his consent to the changes in their estate planning documents.

The trial court sanctioned Patterson, but the appellate court reversed. The court quoted Patterson's reasoning for including such a provision in the estate planning documents.

Out here in the cornfields of Illinois and, we suspect, sometimes in the large metropolitan areas of Illinois, one's lawyer is often his or her most trusted friend and advisor with respect to major life decisions.

Id. at 410.

The court ultimately concluded that

there is no evidence or even suggestion that Patterson personally benefitted from or had any financial interest in the estate plan. Patterson testified that he did not have any relationship with possible beneficiaries of the trust and, therefore, unlike a family member, had no reason to favor or disfavor certain changes based on who, other than the plaintiffs, may benefit from them.

Id. at 411.

The appellate court also noted that the clients could have gone directly to court to seek changes in their estate planning documents.

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have gone directly to court to seek changes in their estate planning document, pursuant to the language in the documents themselves).

**Best Answer**

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

N 8/12

## Dealing with Clients Who Have Diminished Capacity

### Hypothetical 24

For several years, you have represented a local farmer and his wife. They have become quite wealthy by selling parcels of land, and have become a good source of business for you. Two years ago, you also began to represent their daughter. Last year, the farmer died, leaving his widow as executrix and the main beneficiary of his estate. You have noticed that his widow (whom you still represent) is "slipping," and now you have become very concerned that she might not be able to care for herself. Her condition has grown worse recently (although she denies any problems, and insists on living independently), and you are considering what steps you should (or must) take. Not coincidentally, you received a call this morning from the daughter (your other client) about her mother's condition.

May you undertake the following steps (without the widow's consent)?

- (a) Reveal confidential information about the widow's behavior to her regular physician (in an effort to see whether you are overreacting to what appears to be a worsening problem)?

**YES**

- (b) Reveal confidential information about the widow's behavior to an independent physician?

**YES**

- (c) Represent the daughter in seeking a guardian for the widow (her mother) if the doctors confirm your suspicion about her prognosis?

**NO**

- (d) Seek the appointment of a guardian for the widow on your own?

**YES**

## Analysis

The dilemma facing lawyers representing clients whose decision-making has become impaired highlights the need to balance the lawyer's: (1) duty of loyalty to the client (which might cause the lawyer to follow the client's direction regardless of its wisdom) and (2) the duty to act in what the lawyer sees as the client's true best interests.

### ABA Model Rules

The ABA Model Rules attempt to strike a good balance, but ultimately allow the lawyer to act in what the lawyer believes is the client's best interests -- even over the client's objection.

When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

ABA Model Rule 1.14(b).

In 1996, the ABA issued a legal ethics opinion providing additional guidance to lawyers struggling through this issue. ABA LEO 404 (8/2/96).<sup>1</sup>

Together, ABA Model Rule 1.14 and the LEO provide much more guidance than earlier ethics rules for lawyers whose clients are suffering from such a diminished capacity.

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<sup>1</sup> ABA LEO 404 (8/2/96) (a lawyer whose client has become incompetent may take protective action, including petitioning for the appointment of a guardian (although the lawyer may not represent a third party in seeking a guardian); the appointment of a guardian should be a last resort, and the lawyer may withdraw only if it will not prejudice the client).

First, ABA Model Rule 1.14 recognizes that clients might face a diminished capacity to "make adequately considered decisions" for a variety of reasons, including "mental impairment" or minority status. ABA Model Rule 1.14(a). This recognizes a spectrum of capacity (which is one reason the ABA changed the Rule's name in 2002 from "Client Under a Disability").

Even if the client's capacity is diminished, the lawyer must maintain a normal attorney-client relationship "as far as reasonably possible." Id. ABA LEO 404 (8/2/96) explained that this provision essentially trumps principles of agency law that might "operate to suspend or terminate the lawyer's authority to act when a client becomes incompetent."

Interestingly, ABA LEO 404 recognized that a lawyer might want to withdraw from representing such a client (because lawyers are "uncomfortable" with the prospect of having to act under ABA Model Rule 1.14), but may do so under ABA Model Rule 1.16(b) only if he can withdraw "without material adverse effect on the interests of the client." This limitation might essentially force a lawyer to act under ABA Model Rule 1.14 -- rather than withdraw.

Second, lawyers are free to take "reasonably necessary protective action" when the lawyer reasonably believes that a client with diminished capacity (who "cannot adequately act in [her] own interest") "is at risk of substantial, physical, financial or other harm" unless some action is taken. ABA Model Rule 1.14(b).

ABA LEO 404 noted that this provision allows a lawyer to act "whether or not immediately necessary to the lawyer's effective representation of the client." As that LEO explained, "a lawyer who has a longstanding existing relationship with a client, but



no specific present work, is not, for lack of such assignment, barred from taking appropriate action to protect a client where 1.14(b) applies."

Significantly, the lawyer may take such action only if the client faces the risk of "substantial" harm. For example, comment [1] explains that "it is recognized that persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions." ABA Model Rule 1.14 cmt. [1].

ABA LEO 404 noted that a lawyer may act only when the client cannot adequately act in the client's "own" interest. That LEO explained that a client "who is making decisions that the lawyer considers to be ill-considered is not necessarily unable to act in his own interest," so that a lawyer "should not seek protective action merely to protect the client from what the lawyer believes are errors in judgment."

Third, a lawyer facing this scenario may consult with "individuals or entities that have the ability to take action to protect the client." ABA Model Rule 1.14(b). The Rule's next section reminds lawyers that they must comply with their ABA Model Rule 1.6 confidentiality duty, but also notes that a lawyer taking appropriate protective action is "impliedly authorized" under ABA Model Rule 1.6 to reveal client confidences -- "to the extent reasonably necessary to protect the client's interests." ABA Model Rule 1.14(c).

Comment [3] explains that lawyers might consult with family members, but must always "look to the client" rather than the family member in making decisions. ABA Model Rule 1.14 cmt. [3]. Comment [6] further explains that lawyers may "seek

guidance from an appropriate diagnostician" in "determining the extent of the client's diminished capacity." ABA Model Rule 1.14 cmt. [6].

Fourth, ABA Model Rule 1.14(b) indicates that the lawyer's responsive action can even include "seeking the appointment of a guardian ad litem, conservator or guardian." ABA Model Rule 1.14(b).

Comment [7] states the obvious axiom that lawyers must "advocate the least restrictive action on behalf of the client." ABA Model Rule 1.14 cmt. [7]. Thus, the Rule reminds lawyers that "appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require." Id. On the other hand, comment [8] clearly states that a lawyer properly taking protective action is impliedly authorized to make necessary disclosures, "even when the client directs the lawyer to the contrary." ABA Model Rule 1.14 cmt. [8]. Presumably the same is true of a lawyer's request for a guardian.

Interestingly, ABA LEO 404 concluded that a lawyer in this circumstance (1) "should not attempt to represent a third party petitioning for a guardianship over the lawyer's client", and (2) "should not act or seek to have himself appointed guardian" (except in those extraordinary circumstances where "immediate and irreparable harm will result from the slightest delay"). In essence, a lawyer may seek the appointment of a guardian on the client's behalf, but not on some other client's behalf or on the lawyer's own behalf.<sup>2</sup>

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<sup>2</sup> In one interesting case, the Washington State Supreme Court found that a lawyer had acted improperly in seeking the appointment of guardian for a client who had just fired the lawyer. In re Eugster, 209 P.3d 435, 441 (Wash. 2009) (suspending for eighteen months a lawyer who filed a petition for appointment of a guardian for one of his clients after the client fired him; "Eugster [lawyer] filed the petition based upon his personal judgment without conducting any formal investigation into Mrs. Stead's [client] medical or psychological state. There is no evidence Eugster consulted Mrs. Stead's healthcare

Fifth, Comment [9] deals with emergency situations in which a client is "threatened with imminent and irreparable harm" if the lawyer does not take some legal action on the client's behalf -- even though the client cannot make "considered judgments about the matter." ABA Model Rule 1.14 cmt. [9].

The comment explains that taking such an extraordinary action would normally be limited to maintaining the status quo. ABA LEO 404 provided an example -- a lawyer whose client is about to be evicted could "take action on behalf of the client to forestall or prevent the eviction." Comment [10] indicates that lawyers acting in such extreme situations normally "would not seek compensation" for their work. ABA Model Rule 1.14 cmt. [10].

### **Restatement**

The Restatement generally takes the same approach as the ABA Model Rules. Restatement (Third) of Law Governing Lawyers § 24 (2000).

In one comment, the Restatement warns lawyers not to act too quickly.

Disabilities in making decisions vary from mild to totally incapacitating; they may impair a client's ability to decide matters generally or only with respect to some decisions at some times; and they may be caused by childhood, old age, physical illness, retardation, chemical dependency, mental illness, or other factors. Clients should not be unnecessarily deprived of their right to control their own affairs on account of such disabilities. Lawyers, moreover, should be careful not to construe as proof of disability a client's insistence on a

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providers or talked with people in the Parkview community. Eugster testified that Mrs. Stead had told him she had seen a doctor in the last six months for a 'sanity test' and was aware that she had been examined by Dr. Green before his representation began. Three months before he filed the petition for appointment of a guardian for Mrs. Stead, Eugster had Mrs. Stead sign a new trust, powers of attorney, and a will he had prepared, indicating he had no concerns about her testamentary capacity at that point. The last date that either Eugster or Roger personally talked to Mrs. Stead was on August 3, 2004, nearly two months before filing the petition." (footnote omitted), modified, No. 200,568-3, 2009 Wash. LEXIS 969 (Wash. Sept. 23, 2009).

view of the client's welfare that a lawyer considers unwise or otherwise at variance with the lawyer's own views.

Restatement (Third) of Law Governing Lawyers § 24 cmt. c (2000) (emphasis added).

Similarly, the Restatement warns lawyers not to substitute their own judgment for the client's best interests.

A client with diminished capacity is entitled to make decisions normally made by clients to the extent that the client is able to do so. The lawyer should adhere, to the extent reasonably possible, to the lawyer's usual function as advocate and agent of the client, not judge or guardian, unless the lawyer's role in the situation is modified by other law. The lawyer should, for example, help the client oppose confinement as a juvenile delinquent even though the lawyer believes that confinement would be in the long-term interests of the client and has unsuccessfully urged the client to accept confinement. Advancing the latter position should be left to opposing counsel.

Id. The Restatement also explains that "a lawyer may properly withhold from a disabled client information that would harm the client, for example, when showing a psychiatric report to a mentally-ill client would be likely to cause the client to attempt suicide, harm another person, or otherwise act unlawfully." Id.

### **ACTEC Commentaries**

The ACTEC Commentaries also address the duties of lawyers representing clients with diminished capacity.

Among other things, the ACTEC Commentaries allow lawyers to disclose confidential information when necessary to assess their clients' capacity.

[T]he lawyer may consult with individuals or entities that may be able to assist the client, including family members, trusted friends and other advisors. However, in deciding whether others should be consulted, the lawyer should also consider the client's wishes, the impact of the lawyer's actions on potential challenges to the client's estate plan, and the

impact on the lawyer's ability to maintain the client's confidential information.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.14, at 131 (4th ed. 2006), [http://www.actec.org/Documents/misc/ACTEC\\_Commentaries\\_4th\\_02\\_14\\_06.pdf](http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf).

### **States' Approach**

State bars generally follow the consensus approach of the ABA Model Rules, the Restatement, and the ACTEC Commentaries.

- District of Columbia LEO 353 (2/2010) (analyzing D.C. Rule 1.14); "A lawyer representing an incapacitated person with a surrogate decision-maker should ordinarily look to the client's chosen surrogate decision-maker for decisions on behalf on the client and accord the surrogate decision-maker's choices the same weight as those of a client when the client is unable to express, or does not express, a contrary view. A lawyer may not substitute her judgment for the judgment of the surrogate decision-maker when the surrogate decision-maker is acting within the scope of the power afforded to her by law, was selected by the incapacitated person before becoming incapacitated, and is not engaged in conduct creating a risk of substantial harm or acting in a manner that would otherwise require a lawyer to withdraw from representation of a client acting in the same manner. If the surprise decision-maker is engaged in conduct creating a risk of substantial harm or acting in a manner that would otherwise require a lawyer to withdraw from representation of a client acting in the same manner, then the lawyer may take protective action including seeking a substitute decision-maker. The lawyer may not withdraw because a withdrawal will substantially harm the client and no grounds for a prejudicial withdrawal under Rule 1.16(b) exist.").
- South Carolina LEO 93-04 (1993) (holding that a lawyer who represented an elderly female client had to maintain the confidentiality of the client if she was competent, and had to follow the direction of a legal representative if she was incompetent).

Some states take different approaches.

- See, e.g., Pennsylvania LEO 98-97 (9/16/98) (analyzing the confidentiality duties of a lawyer who prepared a will and power of attorney for a client, and then represented two other people in filing a guardianship action; inexplicably failing to deal with the general rule that a lawyer cannot represent a third party in seeking a guardianship for the lawyer's client; ultimately concluding that the

lawyer owed duties of confidentiality to both of the clients, and therefore could not disclose the protected confidential communication absent a court order).

**(a)-(b)** The ABA Model Rules, the Restatement, and the ACTEC Commentaries explicitly permit disclosure such as this if it is in the client's best interests. ABA Model Rule 1.14 cmt. [7]; Restatement (Third) of Law Governing Lawyers § 24(4); American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.14, at 131 (4th ed. 2006), [http://www.actec.org/Documents/misc/ACTEC\\_Commentaries\\_4th\\_02\\_14\\_06.pdf](http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf).

**(c)-(d)** The ABA Model Rules, the Restatement, and the ACTEC Commentaries allow a lawyer representing an impaired client to seek the appointment of a guardian if the step would be in the client's best interests.

Interestingly, the ABA has explained that lawyers may seek the appointment of a guardian only when acting on their own, and not in representing another client.<sup>3</sup>

### **Best Answer**

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

N 8/12 [H]

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<sup>3</sup> ABA LEO 404 (8/2/96) (a lawyer whose client has become incompetent may take protective action, including petitioning for the appointment of a guardian (although the lawyer may not represent a third party in seeking a guardian); the appointment of a guardian should be a last resort, and the lawyer may withdraw only if it will not prejudice the client).

## Ability to Refrain from Providing Material Facts to a Client with Diminished Capacity

### Hypothetical 25

You are handling the trust and estate planning for an elderly client. She is still generally capable of handling her own affairs, but you fear that she will soon be incapable of making her own decisions. Relying on your state's parallel to ABA Model Rule 1.14(b), you sought a report from a psychiatrist about your client's condition (based on your observations). Unfortunately, the report shows that your client might be suffering from the early signs of Alzheimer's disease. She has repeatedly told you that she would rather kill herself than face years in an Alzheimer's unit. Now you wonder what to do with the report.

May you refrain from providing your client with the psychiatrist's report, even if you do not immediately seek the appointment of a guardian?

**YES**

### Analysis

Under ABA Model Rule 1.4,

A lawyer shall . . . keep the client reasonably informed about the status of the matter.

ABA Model Rule 1.4(a)(3). A comment explains a narrow exception.

In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client.

ABA Model Rule 1.4 cmt. [7] (emphasis added).

The Restatement contains a slightly different exception.

A lawyer may properly withhold from a disabled client information that would harm the client, for example when showing a psychiatric report to a mentally-ill client would be likely to cause the client to attempt suicide, harm another person, or otherwise act unlawfully . . . .

Restatement (Third) of Law Governing Lawyers § 24 cmt. c (2000) (emphasis added).

Unlike the ABA Model Rule comment (which explains that lawyers may be justified in "delaying" transmission of the information, the Restatement on its face indicates that lawyers may "withhold" the information -- without implying that the lawyer would ultimately have to disclose the information to the client.

Whatever the exact contours of the exception, it applies only in very unusual circumstances.

### **Best Answer**

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

N 8/12



## Preparing Trust and Estate Documents for a Client with Borderline Testamentary Capacity

### Hypothetical 26

You have seen one of your elderly clients slip more and more over the past several years, although you do not yet feel that he has lost such capacity as to trigger the obligations under your state's version of ABA Model Rule 1.14. However, you now think that your client has what you would call "borderline testamentary capacity." Your client called this morning to ask that you change a portion of his will.

May you prepare trust and estate documents for a client with "borderline testamentary capacity"?

### YES (PROBABLY)

#### Analysis

As with its recognition of a "dormant" attorney-client relationship, the ACTEC Commentaries recognize a status of client impairment that does not appear in the ABA Model Rules or the Restatement.

Under ABA Model Rule 1.14 and the parallel Restatement provisions, a client is either impaired or not impaired. The client's status on either side of this fairly bright line governs what the lawyer may or must do.

The ACTEC Commentaries recognize what could be seen as a middle ground -- clients having "borderline" testamentary capacity.

If the testamentary capacity of a client is uncertain, the lawyer should exercise particular caution in assisting the client to modify his or her estate plan. The lawyer generally should not prepare a will, trust agreement or other dispositive instrument for a client who the lawyer reasonably believes lacks the requisite capacity. On the other hand, because of the importance of testamentary freedom, the lawyer may properly assist clients whose testamentary capacity appears to be borderline. In any such case the

lawyer should take steps to preserve evidence regarding the client's testamentary capacity.

In cases involving clients of doubtful testamentary capacity, the lawyer should consider, if available, procedures for obtaining court supervision of the proposed estate plan, including substituted judgment proceedings.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of

Professional Conduct, Commentary on MRPC 1.14, at 132 (4th ed. 2006),

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

(emphases added).

Lawyers looking to the ACTEC Commentaries for guidance should check the pertinent ethics rules in the applicable states -- which might recognize a brighter line than the Commentaries.

### **Best Answer**

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

N 8/12

## Taking Directions from an Impaired Client's Fiduciary

### Hypothetical 27

You represented your fraternity brother for nearly 50 years -- until he suffered a stroke about six months ago. You eventually had to arrange for the appointment of a fiduciary to act as your fraternity brother's guardian. However, in the last several weeks your fraternity brother has seemed much more lucid. You wonder whether you must still take orders solely from the fiduciary -- or whether you can now also take directions from your fraternity brother.

In providing legal services for the benefit of an impaired client who has a court-appointed guardian, may a lawyer continue to meet with and counsel the impaired client?

### MAYBE

### Analysis

Interestingly, neither the ABA Model Rules nor the Restatement provide explicit guidance to lawyers who have arranged for the appointment of a fiduciary to act for a client with diminished capacity.

State bars and courts generally indicate that once a guardian or other surrogate decision-maker begins to act on the client's behalf, the lawyer must essentially treat that surrogate decision-maker as the client.

- Disciplinary Bd. v. Kuhn, 785 N.W.2d 195 (N.D. 2010) (upholding a 90-day suspension for a lawyer who worked with a client (suffering from Parkinson's disease) to change a document, without involving the client's guardian/conservator).
- South Carolina LEO 93-04 (1993) (holding that a lawyer who represented an elderly female client had to maintain the confidentiality of the client if she was competent, and had to follow the direction of a legal representative if she was incompetent).

One bar showed a bit more flexibility.

- District of Columbia LEO 353 (2/2010) (analyzing D.C. Rule 1.14); "A lawyer representing an incapacitated person with a surrogate decision-maker should ordinarily look to the client's chosen surrogate decision-maker for decisions on behalf on the client and accord the surrogate decision-maker's choices the same weight as those of a client when the client is unable to express, or does not express, a contrary view. A lawyer may not substitute her judgment for the judgment of the surrogate decision-maker when the surrogate decision-maker is acting within the scope of the power afforded to her by law, was selected by the incapacitated person before becoming incapacitated, and is not engaged in conduct creating a risk of substantial harm or acting in a manner that would otherwise require a lawyer to withdraw from representation of a client acting in the same manner. If the surrogate decision-maker is engaged in conduct creating a risk of substantial harm or acting in a manner that would otherwise require a lawyer to withdraw from representation of a client acting in the same manner, then the lawyer may take protective action including seeking a substitute decision-maker. The lawyer may not withdraw because a withdrawal will substantially harm the client and no grounds for a prejudicial withdrawal under Rule 1.16(b) exist.").

Significantly, a lawyer who attempts to represent both the surrogate decision-maker and the client must deal with the almost inevitable conflicts, and can face punishment for favoring one client's interests over the other.

- See, e.g., Wyatt's Case, 982 A.2d 396, 408 (N.H. 2009) (disbarring for two years a lawyer who represented both a conservator and a ward who had diminished capacity; rejecting the lawyer's argument that "no conflict could exist in view of the doctrine of primary and derivative clients. . . . Pursuant to that doctrine, a lawyer representing a fiduciary 'must be deemed employed to further' the fiduciary's legally required service to the beneficiary; must ensure that truthful and complete information is passed along to the client by the fiduciary; and must 'disobey instructions that would wrongfully harm the beneficiary.'"; holding that "we have not adopted the primary-derivative client doctrine. We further note that the doctrine appears to rest largely upon cases imposing legal duties upon a lawyer as a basis for civil liability."; "[A]lthough the doctrine extends to beneficiaries some of the duties owed by the lawyer to the fiduciary-client, including some limited form of loyalty, . . . this does not create a direct attorney-client relationship with the beneficiary, . . . and does not address competing loyalties where a lawyer represents both fiduciary and beneficiary."; concluding that the lawyer had violated the ethics rules "because there is no evidence that he considered and reasonably concluded that the concurrent representation [of the conservatory and the ward] would not adversely affect either client . . . or that the client consented 'after consultation and with knowledge of the consequences'" (citation omitted); noting that New Hampshire's Rule 1.14 does not allow a lawyer to represent a

client in seeking a guardianship for another client, which the lawyer had done here).

The ACTEC Commentaries take a different approach. Just as it introduces the strange concept of the "dormant" attorney-client relationship (which appears nowhere in the ethics rules or the Restatement), the ACTEC Commentaries also recognize a strange lingering attorney-client relationship between a lawyer and a now-impaired client whom the lawyer had earlier represented.

A lawyer who represented a client before the client suffered diminished capacity may be considered to continue to represent the client after a fiduciary has been appointed for the person. Although incapacity may prevent a person with diminished capacity from entering into a contract or other legal relationship, the lawyer who represented the person with diminished capacity at a time when the person was competent may appropriately continue to meet with and counsel him or her. Whether the person with diminished capacity is characterized as a client or a former client, the client's lawyer acting as counsel for the fiduciary owes some continuing duties to him or her. . . . If the lawyer represents the person with diminished capacity and not the fiduciary, and is aware that the fiduciary is improperly acting adversely to the person's interests, the lawyer has an obligation to disclose, to prevent or to rectify the fiduciary's misconduct.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.14, at 133 (4th ed. 2006),

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

In fact, the ACTEC Commentaries allow a lawyer in that circumstance to consider the impaired client's wishes even if they conflict with the fiduciary's decision.

A conflict of interest may arise if the lawyer for a fiduciary is asked by the fiduciary to take action that is contrary either to the previously expressed wishes of the person with diminished capacity or to the best interests of such person,

as the lawyer believes those interests to be. The lawyer should give appropriate consideration to the currently or previously expressed wishes of a person with diminished capacity.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.14, at 133 (4th ed. 2006),  
[http://www.actec.org/Documents/misc/ACTEC\\_Commentaries\\_4th\\_02\\_14\\_06.pdf](http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf).

Thus, the ACTEC Commentaries recognize a lawyer's continuing obligation to protect the client's interests even after the client has become impaired. This contrasts with the ABA Model Rules and the Restatement, which tend to provide sole power to the fiduciary appointed by a court to act for the impaired client.

### **Best Answer**

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

N 8/12

## Limiting Liability to Trust and Estate Clients

### Hypothetical 28

Although you have earned many hundreds of thousands of dollars in fees from one particularly troublesome client, you have always been very wary that the client might one day turn on you. You have also found her family to be equally difficult. Your client has just asked you to prepare what almost certainly will be her final estate planning documents (she is quite frail), and also wants you to act as her executor. You frankly worry that your client or her family will question your work in both capacities.

- (a) May you enter into a retainer agreement that limits your liability to your estate planning client to return of the fees that she has paid?

**MAYBE**

- (b) May the estate planning documents limit your liability as executor to return of the fees that you earn in that role?

**MAYBE**

### Analysis

As fiduciaries, lawyers may only occasionally (and under certain restrictions) limit their liability to their clients.

- (a) The ABA and many state bars have retreated from what was once a strict prohibition on limiting liability to clients in advance of the work.

Under the current ABA Model Rules,

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

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

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

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

Restatement (Third) of Law Governing Lawyers § 54(4) (2000).

To emphasize the point, the Restatement elsewhere indicates that

[a]n agreement prospectively limiting a lawyer's liability to a client for malpractice is unenforceable.

Id. § 54(2). Comment b explains the Restatement's approach.

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

Id. § 54 cmt. b.

Given this stark contrast between the ABA Model Rules and the Restatement, it should come as no surprise that not every state follows the liberal ABA Model Rule approach. For instance, Virginia follows a more traditional approach, which prohibits all outside lawyers from limiting their liability in any fashion. See, e.g., Va. Rule 1.8(h) ("[a] lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice, except that a lawyer may make such an agreement with a client of which the lawyer is an employee as long as the client is independently represented in making the agreement").

The Texas Bar dealt with a related issue.

- Texas LEO 581 (4/2008) ("Under the Texas Disciplinary Rules of Professional Conduct, a lawyer-client engagement letter may include a provision under which the client agrees to pay the defense expenses incurred by the lawyer in



the event of a joinder of the lawyer as a defendant in the client's litigation provided that (1) the agreement does not prospectively limit in any way the lawyer's liability to the client for malpractice and (2) the obligation for payment of the lawyer's legal defense fees and the obligation to pay the fees billed by the lawyer for his work do not taken together constitute a compensation arrangement that would be unconscionable within the meaning of Rule 1.04(a).").

A Texas state court also dealt with a number of interesting issues involving claims against the former law firm of Keck, Mahin & Cate. In National Union Fire Insurance Co. v. Keck, Mahin & Cate, No. 14-03-00747-CV, 2004 Tex. App. LEXIS 11163 (Tex. App. Dec. 14, 2004), the court analyzed a release of Keck's liability. Among other things, the court analyzed a prospective limitation on liability while covering only past conduct.

While it is true the release covers past conduct, the disciplinary rule does not speak in terms of conduct. Rather, it speaks in terms of liability. We find the release between KMC [the law firm] and Grenada is an agreement to prospectively limit KMC's malpractice liability because it seeks to limit liability that had not yet accrued.

Id. at \*19.

Because the client was not independently represented, the prospective limitation violated the Texas Ethics Rules. The court then addressed whether the ethics violation invalidated the release -- finding that it did not.

However, a violation of Rule 1.08(g) does not automatically render the release invalid . . . because violating Rule 1.08(g) does not invalidate the release as a matter of law, we overrule National Union's first issue.

Id. at \*21-22. The court therefore enforced the release despite the ethics violation.

Thus, the ABA Model Rules allow lawyers to limit in advance their liability to their clients, but only under certain very limited circumstances. The Restatement takes even a narrower view. Restatement (Third) of Law Governing Lawyers § 54(4) (2000).

**(b)** The situation becomes more complicated if the lawyer does not act in a representational capacity.

Some ethics rules (such as those in ABA Model Rule 8.4) apply to a lawyer acting in any capacity. On the other hand, other rules apply to lawyers only when they represent clients. The reference in ABA Model Rule 1.8(h) to a "client" seems to indicate that the restrictions on limiting liability apply only in a lawyer-client relationship, not when the lawyer is providing other nonlawyer services.

The ACTEC Commentaries address this issue.

Under some circumstances and at the client's request, a lawyer may properly include an exculpatory provision in a document drafted by the lawyer for the client that appoints the lawyer to a fiduciary office. (An exculpatory provision is one that exonerates a fiduciary from liability for certain acts and omissions affecting the fiduciary estate.) The lawyer ordinarily should not include an exculpatory clause without the informed consent of an unrelated client. An exculpatory clause is often desired by a client who wishes to appoint an individual nonprofessional or family member as fiduciary.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.8, at 112-13 (4th ed. 2006),

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

(emphasis added).

Because the ABA Model Rules and the Restatement do not explicitly analyze this situation, lawyers would be wise to research the applicable ethics rules in the pertinent state.

**Best Answer**

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

N 8/12

## Selling Law-Related Services

### Hypothetical 29

You attended law school after a decade-long career as a financial planner. Now that you are starting your law practice, you wonder if you can provide financial planning advice to clients retaining you to prepare their estate planning documents.

May you provide financial planning advice to your estate planning clients?

**YES**

### Analysis

Determining whether a lawyer may ethically sell non-legal services to clients involves a number of issues.

### General Principles

Lawyers wishing to sell non-legal services to their clients must confront at least three potentially difficult situations.

First, lawyers face an inherent conflict in recommending themselves rather than a competitor -- a lawyer's fiduciary duty may require the lawyer to recommend that the client use another service provider better suited to the client's need.

Second, in some situations, the lawyer's duty as an advocate might conflict with the lawyer's parallel duty that arises in the lawyer's other role. For instance, a lawyer/accountant might face internally inconsistent duties when dealing with some accounting issue.

Third, communications between a client and a lawyer providing non-legal services might not be (and probably would not be) protected by the attorney-client privilege -- which only covers communications when the lawyer acts as a legal advisor.

## ABA Model Rules

Several years ago, the ABA engaged in a vigorous debate about lawyers selling non-legal services.<sup>1</sup>

In what amounted to a precursor to the even more contentious debate about multidisciplinary practice,<sup>2</sup> the ABA finally settled on a fairly bland rule governing lawyers' sale of non-legal services.<sup>3</sup>

In essence, lawyers providing nonlegal services to clients will be governed by all of the ethics rules applicable to the lawyers' provision of legal services unless the

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<sup>1</sup> Historically, the ABA has permitted lawyers to sell non-legal services to their clients. ABA Informal Op. 1497 (3/1/83) (a lawyer/doctor may practice law and medicine from the same office and serve the same person as both lawyer and doctor).

<sup>2</sup> Undoubtedly prompted by the practice of accounting firms gobbling up European law firms (and worries that ultimately all American lawyers would end up working for accountants), the ABA established a Commission on Multidisciplinary Practice to study possible changes in the ethics rules so that lawyers would partner with (and share their fees with) non-lawyers under certain circumstances.

After many months of hearings, careful deliberations, intense analysis and a wide-ranging effort to obtain a consensus, the Commission presented its MDP proposal to the ABA House of Delegates on August 10, 1999. The House of Delegates sent the Commission back to the drawing board -- by a vote of 304 to 98.

After nearly a year of re-work and re-analysis, the Commission presented a softened MDP proposal to the House of Delegates on July 11, 2000. By a vote of 314 to 106, the ABA not only rejected the Commission's recommendations, it officially disbanded the Commission.

Nearly every state engaged in its own debate about MDPs, with many states (including Virginia) following essentially the same pattern as the ABA -- state bar elected bodies rejecting recommendations by special task forces that almost always favored some form of MDPs.

For instance, the Joint Virginia State Bar and Virginia Bar Association Commission on Multidisciplinary Practice met nearly every month for two years before sending its proposed MDP changes to the Virginia State Bar Council (the elected body that decides such issues). On June 14, 2002, the Virginia State Bar Council rejected the recommendation of the Joint Commission by a vote of 60 to 4.

The demise of Arthur Andersen and other Enron-related events seem to have ended the MDP debate for now.

<sup>3</sup> A comment to ABA Model Rule 5.7 provides examples of the non-legal services that lawyers might provide.

Title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.

ABA Model Rule 5.7 cmt. [9].

nonlegal services are "distinct from" the legal services, or the lawyer warns the clients that they will not receive all of those protections that normally accompany a lawyer-client relationship.

A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services...if the law-related services are provided: (1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or (2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist;

The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

ABA Model Rule 5.7.

A comment to ABA Model Rule 5.7 confirms that the rule

applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed and whether the law-related services are performed through a law firm or a separate entity.

ABA Model Rule 5.7 cmt. [2].

Comment [8] requires that lawyers providing such non-legal services through a separate entity assure that "nonlawyer employees in the distinct entity that the lawyer controls compl[y] in all respects with the Rules of Professional Conduct." ABA Model Rule 5.7 cmt. [8].

Thus, lawyers cannot avoid the ethics rules if they sell non-legal services to their clients in connection with legal services, or if the lawyer has not carefully explained the inapplicability of the conflicts rules.

Elsewhere, the ABA Model Rules warn that

a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest.

ABA Model Rule 1.7 cmt. [10].

In a 2004 legal ethics opinion, the ABA dealt with lawyers posting bail bond for their clients -- declining to adopt a per se prohibition, but warning lawyers to be careful when doing so.

- ABA LEO 432 (1/14/04) (although some states totally prohibit lawyers from posting bail bonds for their clients, such conduct is sometimes permissible as long as clients consent after full disclosure; lawyer should recognize that: (1) there is a possibility of conflicts because someone posting a bail bond has a financial incentive to apprehend a fugitive client or otherwise assure that the client appears in court; (2) some states consider the posting of bail bonds a form of impermissible financial assistance to a client; and (3) obtaining the necessary consent from a client would be extremely difficult if the client is incarcerated; posting such bail bonds is more likely to be permissible if there is an immaterial amount of money at stake, or if there is a family or friendship relationship between the lawyer and client).

## **Restatement**

The Restatement acknowledges that lawyers can conduct ancillary businesses.

Ancillary business activities of lawyers can be conducted consistent with the Section and with other applicable requirements. A lawyer may, for example, operate a real-estate agency, insurance agency, title-insurance company, consulting enterprise, or similar business, along with a law practice. So long as each enterprise bills separately and so long as the ancillary enterprise does not engage in the practice of law, involvement of both the lawyer's law practice and the lawyer's ancillary business enterprise in the same

matter does not constitute impermissible fee-splitting with a nonlawyer, even if nonlawyers have ownership interests or exercise management powers in the ancillary enterprise.

Restatement (Third) of Law Governing Lawyers § 10 cmt. g (2000).

Not surprisingly, the Restatement then warns lawyers that they must be very careful when doing so, and also mandates various disclosures.

However, a lawyer's dual practice of law and the ancillary enterprise must be conducted in accordance with applicable legal restrictions, including those of the lawyer codes. Among other things, the lawyer's self-interest in promoting the enterprise must not distort the lawyer's judgment in the provision of legal services to a client, including in making recommendations of the lawyer's own ancillary service. To avoid misleading the client, a lawyer must reveal the lawyer's interest in the ancillary enterprise when it should be reasonably apparent that the client would wish to or should assess that information in determining whether to engage the services of the other business. The lawyer must also, of course, avoid representing a client (or do so only with informed client consent) in a matter in which the ancillary enterprise has an adverse interest of such a kind that it would materially and adversely affect the lawyers' representation of the client . . . . The lawyer must also disclose to the client, unless the client is already sufficiently aware, that the client will not have a client-lawyer relationship with the ancillary business and the significance of that fact. Other disclosures may be required in the course of the matter. For example, when circumstances indicate the need to do so to protect an important interest of the client, the lawyer must disclose to the client that the client's communications with personnel of the ancillary enterprise -- unlike communications with personnel in the lawyer's law office . . . -- are not protected under the attorney-client privilege. If relevant, the lawyer should also disclose to the client that the ancillary business is not subject to conflict-of-interest rules . . . similar to those applicable to law practice.

Id.



Finally, the Restatement mirrors ABA Model Rule 5.7 in advising lawyers that they might well be governed by all of the ethics rules applicable to the provision of legal services.

A lawyer's provision of services to a client through an ancillary business may in some circumstances constitute the rendition of legal services under an applicable lawyer code. As a consequence, the possibly more stringent requirements of the code may control the provision of the ancillary services, such as with respect to the reasonableness of fee charges . . . or confidentiality obligations . . . . When those services are distinct and the client understands the significance of the distinction, the ancillary service should not be considered as the rendition of legal services. When those conditions are not met, the lawyer is subject to the lawyer code with respect to all services provided. Whether the services are distinct depends on the client's reasonably apparent understanding concerning such considerations as the nature of the respective ancillary-business and legal services, the physical location at which the services are provided, and the identities and affiliations of lawyer and nonlawyer personnel working on the matter.

Id.

Thus, the Restatement takes the same essentially liberal approach as the ABA Model Rules.

### **State Bars' Approach**

Despite these inherent difficulties, state bars generally have accepted the notion of lawyers selling non-legal services to their clients.

For instance, the Virginia Bar has repeatedly dealt with this issue. In a surprisingly large number of legal ethics opinions, the Virginia Bar has allowed lawyers to act in the following roles in providing non-legal services to their law clients:

consultant;<sup>4</sup> certified public accountant;<sup>5</sup> stockbroker;<sup>6</sup> insurance salesperson;<sup>7</sup> real estate salesperson;<sup>8</sup> title insurance seller;<sup>9</sup> mediator;<sup>10</sup> registered agent<sup>11</sup> escheater;<sup>12</sup> escrow agent;<sup>13</sup> financial planner.<sup>14</sup>

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<sup>4</sup> Virginia LEO 1658 (12/6/95) (a law firm may establish a non-legal consulting firm (to provide human resource advice) and share common directors, use similar logos and letterheads, share overhead expenses (such as secretarial support, library resources and lobby space), engage in joint marketing and refer clients to each other, as long as: the public would not be confused by any advertising; the joint marketing does not result in any misperceptions; the firms avoid sharing any confidential client information; the firms do not split fees or pay one another a referral fee; the firms advise their clients of other available referral options; the firms adopt "adequate conflicts screening procedures"; any lawyers involved in the consulting firm "comply at all times with applicable rules of the Code of Professional Responsibility, whether or not the attorney is acting in a professional capacity as a lawyer"); Virginia LEO 1318 (2/1/90) (a lawyer may practice law and operate a consulting firm out of the same office as long as the activities are kept separate and clients consent after full disclosure; the lawyer may send out one bill for both services as long as the bill fully discloses the separate services).

<sup>5</sup> Virginia LEO 1163 (11/16/88) (a lawyer who is also a CPA may perform both legal and accounting services as long as the client consents after full disclosure).

<sup>6</sup> Virginia LEO 430 (10/16/81) (a lawyer/stockbroker may send out announcements describing both roles, but must advise clients that the attorney-client privilege would not cover communications if the lawyer is acting as a stockbroker).

<sup>7</sup> Virginia LEO 1754 (5/17/01) (a lawyer who also sells insurance may recommend that a legal client purchase insurance from the lawyer, with the lawyer receiving part of the commission on the sale of the insurance policy, as long as there is full disclosure and consent (under Rule 1.8) and the lawyer's judgment is not affected by the conflict); Virginia LEO 1612 (9/21/94) (a lawyer who also sells insurance may represent plaintiffs against insurance companies or their insureds for which the lawyer has written insurance policies, as long as the client consents; in fact, the lawyer may pursue such cases even if the lawyer wrote the policy for the defendant insured; [the Bar did not discuss the possibility that as an insurance agent the lawyer might have acquired confidential information about the defendant]); Virginia LEO 1311 (11/21/89) (a lawyer wishes to sell insurance to other law firms representing a client's adversaries; the clients must consent to this arrangement); Virginia LEO 869 (12/19/86) (a lawyer employed by a law firm may also be employed as a part-time life insurance agent).

<sup>8</sup> Virginia LEO 1131 (9/1988) (a law firm may invest in a realty corporation and continue to represent clients of the corporation if the clients consent after full disclosure); Virginia LEO 627 (11/13/84) (a lawyer who is a full time real estate broker may represent the broker but may not represent other parties to the transaction).

<sup>9</sup> Virginia LEO 1152 (11/16/88) (a lawyer may arrange for title insurance for a client through a company of which the lawyer is part owner, as long as the client consents). [This LEO was further explained in LEO 1564.]; Virginia LEO 1097 (7/11/88) (a lawyer may issue title binders on behalf of a client as long as the client consents after full disclosure); Virginia LEO 1072 (5/31/88) (a lawyer may obtain title insurance for clients through a company in which the lawyer has an interest as long as the client consents after full disclosure. [This LEO was further explained in LEO 1564.]).

<sup>10</sup> Virginia LEO 1759 (2/4/02) (a lawyer who owns a mediation company is "of counsel" to a law firm in which his/her spouse is a partner; after mediation of a domestic dispute, one of the parties asks an associate in the law firm to file for divorce on behalf of that party; the Bar holds that lawyers/mediators may not represent either party after they handle a mediation, even with the clients' consent (overruling earlier LEOs 1684, 590, 544 and 511); because this specific disqualification applies only to the

Other states take a similarly broad approach.

- North Carolina LEO 2001-9 (10/19/01) (holding that a lawyer may recommend the purchase of financial products from a client of the lawyer, but may not receive a commission for the sale of such products; "Rule 1.8(b), however, does not prevent an attorney from providing law-related services to a legal client, so long as the attorney fully discloses his self-interest in the referral and the referral is in the best interest of the client. 2000 Formal Ethics Opinion 9 was not intended and does not create an exception to Rule 1.8(b). That opinion allows an attorney to provide accounting services to his legal clients. Nothing in the opinion specifically permits an attorney/CPA, who holds an appropriate license, to sell securities or other products to a client and profit from the sale. An attorney may, however, provide accounting, financial planning, or other law-related services to a client and charge a fee for rendering those services. An attorney may also provide financial products to the client, but may not profit from the sale of those products by charging either an additional fee or a commission.").
- North Carolina LEO 2000-9 (1/18/01) (analyzing the following question about a lawyer who also acts as a CPA: "Attorney may decide to join an existing accounting practice as a CPA. If so, may Attorney operate a separate legal practice within his office in the accounting firm?"; answering as follows: "Yes,

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lawyer/mediator, an associate in the firm would not be disqualified based on the mediator's disqualification; however, the lawyer/mediator's duty of confidentiality arising from the mediation also disqualifies that lawyer, and is imputed to the firm to which the lawyer/mediator is "of counsel" (although client consent can cure this conflict); if there were no connection between the lawyer/mediator and the law firm, lawyers practicing in the firm would not be disqualified from representing the party in the divorce as a result of the spousal relationship to the mediator); Virginia LEO 1368 (12/12/90) (lawyers may be shareholders of a corporation providing mediation and arbitration services, but the lawyers must comply with the ethics code).

<sup>11</sup> Virginia LEO 961 (9/3/87) (a lawyer representing a client sued by a construction company for which the lawyer formerly did legal work and for which the lawyer continues to serve as registered agent may continue the representation but must first resign as registered agent (citing "an appearance of impropriety").

<sup>12</sup> Virginia LEO 863 (4/1/87) (a lawyer who has acted as an escheator may not later represent a party in litigation over property sold in the estate sale, because there is a "strong possibility" that the lawyer would be a witness).

<sup>13</sup> Virginia LEO 1482 (10/19/92) (acting as a lawyer and escrow agent is not per se unethical); Virginia LEO 466 (9/20/82) (a lawyer serving as escrow agent may receive the income from investments made as payment for services as escrow agent, as long as the client consents); Virginia LEO 372 (5/15/80) (a lawyer representing a purchaser in a real estate transaction may act as joint escrow agent if the purchaser and seller consent).

<sup>14</sup> Virginia LEO 563 (4/10/84) (as long as the client consents, a lawyer acting as a financial adviser may receive a fee from the third party who markets the investments); Virginia LEO 473 (9/20/82) (a lawyer having a relationship with a finance company may refer a client to the company, but only after full disclosure; the lawyer may not refer the debtor to the company if the lawyer represented the creditor).

this arrangement is not distinct from the arrangement allowed in RPC 201 in which a lawyer/real estate agent operated a separate law practice within the offices of a real estate brokerage. Nevertheless, such an arrangement presents serious obstacles to the fulfillment of a lawyer's professional responsibility. Preserving the confidentiality of client information and records is virtually impossible in such a setting. Client information must be isolated and concealed from all of the employees of the CPA firm. See Rule 1.6. In addition, Attorney must avoid conflicts of interest between the interests of his legal clients and the interests of the clients of the CPA firm. See Rules 1.7 and 1.9. There may be no sharing of legal fees with the CPA firm in violation of Rule 5.4(a) which prohibits a lawyer from sharing legal fees with a non-lawyer. Finally, Attorney must maintain a separate trust account for the funds of his law clients pursuant to Rule 1.15 et seq."; also analyzing the question of whether the lawyer may "offer legal services to his accounting clients and vice versa"; answering as follows: "Yes, if there is full disclosure of the lawyer's self-interest in making the referral and Attorney reasonably believes that he is exercising independent professional judgment on behalf of his legal clients in making such a referral. However, direct solicitation of legal clients is prohibited under Rule 7.3 although it may be permitted by the regulations for certified public accountants. Rule 7.3(a) does permit a lawyer to engage in in-person or telephone solicitation of professional employment if the lawyer has a 'prior professional relationship' with a prospective client. If a prior professional relationship was established with a client of the accounting firm, Attorney may call or visit that person to solicit legal business."; also holding that the lawyer may share a telephone number with the accounting firm with whom the lawyer also works).

- New York LEO 731 (7/27/00) (allowing lawyers to engage in businesses other than the practice of law, as long as they do not violate any ethical or legal rules; concluding, however, that a lawyer may not compensate employees for soliciting clients to engage the services of a title insurance agency in which the lawyer has an ownership interest).
- Maryland LEO 98-15 (1998) (allowing lawyers to own ancillary businesses, as long as the lawyers comply with their ethical obligations, and there is full disclosure to and consent by the client).
- Philadelphia LEO 97-11 (10/1997) (allowing lawyers to own businesses providing non-legal services, as long as there is disclosure to clients and informed consent).
- Florida LEO 94-6 (4/30/95) (allowing a law firm to operate an ancillary business within the firm, as long as it conforms with all of the ethics Rules, does not give non-lawyers any ownership interest in the law firm, follows all of the advertising rules governing lawyers and does not use a trade name that is different from the name under which the law firm practices).

- Florida LEO 94-6 (4/30/95) ("A law firm may operate a mediation department within the firm. The mediation practice must be conducted in conformity with the Rules of Professional Conduct. Consequently, nonlawyers employed by the firm's mediation department may not have an ownership interest in the firm or its mediation department, the attorney advertising rules will apply to any advertising by the mediation department, and the mediation department may not use a proposed trade name because that trade name is not the name under which the firm practices.").
- Illinois LEO 92-5 (10/23/92) (permitting a lawyer to affiliate with a non-lawyer mediator in a mediation business, as long as the lawyer complies with applicable ethics rules; "There is no prohibition against lawyer engaging in divorce mediation business with a non-lawyer and operating the business from the law office where lawyer does not represent either party in the underlying divorce.").
- Florida LEO 88-15 (10/1/88) (allowing lawyers to practice law and engage in another profession from the same office, as long as the lawyer preserves client confidences, refrains from prohibited solicitation and does not impermissibly share legal fees).
- Florida LEO 79-3 (1979) (recognizing that in 1979 Florida eliminated an earlier prohibition on a lawyer practicing law and engaging in another profession from the same office).

Other legal ethics opinions take a more stringent approach.

Among other things, some courts and bars have expressed concern about lawyers' preservation of client confidences, sharing fees with nonlawyers or violating the prohibition on providing a benefit to a third party in return for that third party's recommendation of the lawyer.

- Florida Bar v. Glueck, 985 So. 2d 1052 (Fla. 2008) (disbarring a lawyer for creating a joint business with an immigration consulting firm, which involved sharing offices and an employee; noting that the lawyer had not kept separate track of money paid to him and to the consulting firm).
- New Jersey LEO 688 (3/13/00) (holding that the ethics rules prohibited a law firm from establishing a separate limited liability company to provide title reports for the firm's foreclosure clients; citing a number of its earlier decisions prohibiting lawyers "who owned controlling interests in title companies, or title abstract companies which act as agents for title companies, from referring clients to those companies."; explaining that earlier decisions "are grounded

- in the premise that there is an inherent conflict between the title insurer and the real estate purchaser. On the one hand, the title insurer seeks to limit its liability, while on the other, the purchaser would want to expand it."; finding that general prohibition inapplicable because the proposed arrangement did not involve the purchase of title insurance; nevertheless barring the proposed arrangement -- relying on more general principles; citing an earlier opinion in which it labeled "inherently coercive" any arrangement in which a lawyer refers clients to another service provider owned by the client; noting that in an earlier opinion, the Bar imposed several disclosure consent requirements, and warned that lawyers must keep their law practice totally separate from such other service-providing subsidiaries; analyzing how these principles applied to the proposed ownership of a title abstract company by the lawyers making the inquiry, indicating that it had "serious doubt" that the arrangement would satisfy the "requirement of a physically distinct location" for the subsidiary (the inquiry indicated that the title abstract company "would have office space within the law firm's offices, although it would have a separate sign to identify it"; raising what the Bar called the "more serious concern" that the title abstract company intended to limit its liability to \$1,000 for each report; noting that there apparently would be no title insurance in the proposed arrangement, explaining that "by interposing a separate entity and expressed disclaimer, the attorney swill [sic] have facially limited the liability they might have otherwise had to their clients, if they had performed the same services as part of their law practice."; refusing to allow the arrangement because of the "confusion in the minds of their clients" caused by the "similarity of the services performed and proximity of their offices" -- compounded by the limitation on liability).
- New York LEO 711 (1/7/98) ("[W]e conclude that a lawyer is categorically forbidden from selling long-term care insurance to clients whom the lawyer represents in estate planning. For purposes of our analysis, long-term care insurance has many of the same characteristics as life insurance (e.g., a wide array of insurance products sold by various companies at different prices, and threshold questions of whether long-term care insurance products are the most appropriate or economical way to satisfy the client's needs). Furthermore, when a lawyer advises a client in estate-planning matters, central objects of the representation include how best to satisfy the financial needs of the client and of those for whom the client wishes to or is obliged to provide; how to conserve the client's assets in the event of various contingencies; and how to provide for various health-related contingencies (such as by means of a health care proxy or living will). Thus, advice about the purchase of long-term care insurance is not likely to be 'merely tangential' to the representation, but central to it. This conflict cannot be cured by disclosure and client consent.").

- Utah LEO 146A1 (4/28/95) ("A lawyer who is employed for an insurance firm or who works as an insurance agent is restricted from soliciting legal services from insurance customers under Rule 7.3.").
- South Carolina LEO 93-05 (1993) ("A law firm that provides legal services to retirement plans may own interest in and refer clients to an ancillary business that provides services to retirement plans if the services provided do not constitute the unauthorized practice of law and the law firm complies with the provisions of Rules 1.7 and 1.8. If the services rendered by the business entity constitute the unauthorized practice of law, the attorneys or law firm may not assist that unauthorized law practice by referring clients to the entity. A lawyer may not give anything of value in return for a referral for legal services. Therefore, a law firm that provides value to an ancillary business entity and its employees in the form of capital, management, advice, employee compensation and client referrals may not enter into an agreement providing referrals for legal services from the ancillary business. . . . In the present situation, a law firm proposes to help organize and participate in an ancillary business that will provide referrals to the law firm for legal services. The law firm's role in providing capital for the ancillary business, management advice, compensation to the business' employees, and referrals to the business constitute value to the ancillary business in return, in part, for referrals to the law firm. The proposed relationship therefore violates Rule 7.2(c).").

The trend clearly has been in favor of allowing lawyers to provide law-related services, as long as the lawyers comply with basic ethics rules and the more specific rules governing such a scenario.

### **Best Answer**

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

N 8/12

## Agreement to Maintain the Confidentiality of Certain Trust and Estate Techniques

### Hypothetical 30

As one of your city's best-known estate planning lawyers, you frequently receive visits, emails or telephone calls from accountants offering their services. You just received a call from an accountant who claims to have developed an estate planning strategy that she indicates could save your clients large amounts of money -- but which the accountant says she will not share with you unless you agree to keep it confidential.

May you agree to keep confidential an estate planning strategy that you learn from an accountant?

**MAYBE**

### Analysis

Although the decline in the number of secret "tax shelter" plans (some of which proved to be illegal) probably has diminished the number of times this scenario presents itself, lawyers sometimes confront this issue.

This issue raises tricky confidentiality and liability issues for lawyers. Because lawyers must maintain the confidentiality of any information belonging to the client (which includes virtually all information the lawyer acquires while representing the client), there would seem to be nothing wrong with a lawyer simply confirming by contract that the client owns such confidential information about estate planning ideas.

On the other hand, a lawyer may not contractually bind himself or herself not to use legal knowledge acquired while representing a client. Similarly, a client cannot insist that a lawyer not use (on behalf of other clients) some ideas that a lawyer has developed while representing the client -- or else a lawyer could only represent one client in the course of a career.



Of course, in the case of a non-client such as an accountant, lawyers must weigh the fiduciary and ethical duties to the client against the contractual duties (if agreed to) to the non-client.

In addition to these confidentiality issues, lawyers should be very wary of such confidentiality agreements. Accountants and other financial advisors hoping to keep their ideas secret and proprietary might be engaging in some questionable tactics, and might be using the contractual confidentiality agreement to prevent IRS or other scrutiny.

The ACTEC Commentaries indicate that lawyers "generally" should not agree to keep such strategies confidential.

A lawyer generally should not sign a confidentiality agreement that bars the lawyer from disclosing to the lawyer's other current and future clients the details of an estate planning strategy developed by a third party for the benefit of a lawyer's client. As stated in Ill. Op. 00-01, a lawyer who signs such a confidentiality agreement creates an impermissible conflict with the lawyer's other clients who might benefit from the information learned in the course of representing this client. "In the case at hand, the Lawyer's own interests in honoring the Confidentiality Agreement would 'materially limit' [the Lawyer's] responsibilities to Clients B, C and D because Lawyer would be prohibited from providing beneficial tax information to Clients B, C and D."

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct Commentary on MRPC 1.7, at 96 (4th ed. 2006), [http://www.actec.org/Documents/misc/ACTEC\\_Commentaries\\_4th\\_02\\_14\\_06.pdf](http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf) (emphasis added).

**Best Answer**

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

N 8/12

## File Ownership

### Hypothetical 31

You represented a local car dealer in all of her estate planning work until she fired you. The client fully paid all of your bills, but hinted that she might sue your firm for malpractice. Your former client has now demanded a copy of your entire file. Your partners are urging you to at least bill the former client for making a copy of the materials if you are obligated to send them to her.

- (a) Must you give your former client the file?

### YES PROBABLY

- (b) May you bill the former client for copying the file?

### YES

- (c) May you retain a copy of the file over your former client's objections?

### YES

### Analysis

Lawyers face a number of ethics issues involving the file they create while representing clients.

### Introduction

State bars generally permit lawyers to essentially retain all of their files in electronic form -- as long as that way of maintaining the files does not prevent lawyers from complying with all of the applicable ethics rules.

- N.Y. City LEO 2008-1 (7/2008) ("With respect to the electronic documents that the lawyer retains, the lawyer is not under an ethical obligation to organize those documents in any particular manner, or to store those documents in any particular storage medium, so long as the lawyer ensures that the manner of organization and storage does not (a) detract from the competence of the representation or (b) result in the loss of documents that

the client may later need and may reasonably expect the lawyer to preserve. To those ends, electronic documents other than e-mails present less difficulty because they are frequently stored in document management systems in which they are typically coded with several identifying characteristics, making it easier to locate and assemble them later. E-mails raise more difficult organizational and storage issues. Some e-mail systems automatically delete e-mails after a period of time, so the lawyer must take affirmative steps to preserve those e-mails that the lawyer decides to save. In addition, e-mails generally are not coded, or otherwise organized, to facilitate their later retrieval. Thus, a practice with much to commend it is to organize saved e-mails to facilitate their later retrieval, for example, by coding them or saving them to dedicated electronic files. Otherwise, it may be exceedingly difficult and expensive for the lawyer to retrieve those e-mails, and, as discussed in the Opinion, the lawyer must charge the client for retrieval costs that could reasonably have been avoided. In New York, a client has a presumptive right to the lawyer's entire file in connection with a representation, subject to narrow exceptions. The lawyer may charge the client a reasonable fee, based on the lawyer's customary schedule, for gathering and producing electronic documents. That fee may reflect the reasonable costs of retrieving electronic documents from their storage media and reviewing those documents to determine the client's right of access. It is prudent for lawyer and client to discuss the retention, storage, and retrieval of electronic documents at the outset of the engagement and to consider memorializing their agreement in a retention letter.").

- California LEO 2007-174 (2007) ("An attorney is ethically obligated, upon termination of employment, promptly to release to a client, at the client's request: (1) an electronic version of e-mail correspondence, because such items come within a category subject to release; (2) an electronic version of the pleadings, because such items . . . come within a category subject to release; (3) an electronic version of discovery requests and responses, because such items are subject to release as reasonably necessary to the client's representation; (4) an electronic deposition and exhibit database, because such an item itself contains items that come within categories subject to release; and (5) an electronic version of transactional documents, because such items are subject to release as reasonably necessary to the client's representation. The attorney's ethical obligation to release any electronic items, however, does not require the attorney to create such items if they do not exist or to change the application (e.g., from Word (.doc) to WordPerfect (.wpd)) if they do exist. Prior to release, the attorney is ethically obligated to take reasonable steps to strip from each of these electronic items any metadata reflecting confidential information belonging to any other client.").
- Arizona LEO 07-02 (6/2007) ("In appropriate cases, a lawyer may keep current and closed client files as electronic images in an attempt to maintain a

- paperless law practice or to more economically store files. After digitizing paper documents, a lawyer may not, without client consent, destroy original paper documents that belong to or were obtained from the client. After digitizing paper documents, a lawyer may destroy copies of paper documents that were obtained from the client unless the lawyer has reason to know that the client wants the lawyer to retain them. A lawyer has the discretion to decide whether to maintain the balance of the file solely as electronic images and destroy the paper documents.").
- Florida LEO 06-1 (4/10/06) ("Lawyers may, but are not required to, store files electronically unless: a statute or rule requires retention of an original document, the original document is the property of the client, or destruction of a paper document adversely affects the client's interests. Files stored electronically must be readily reproducible and protected from inadvertent modification, degradation or destruction.").
  - New Hampshire LEO 2005-06/3 (1/2006) ("Therefore, if a client requests a copy of her file, the firm has an obligation to provide all files pertinent to representation of that client, regardless of the burden that it might impose upon the firm to do so. . . . That burden can be managed, in any event, through computer word search functions or other means that are routinely used for discovery or other purposes. As in discovery-related matters, it is incumbent upon the firm to manage its electronic and other files in a way that will allow for release of a file to a client without releasing other information that might harm a third party.").
  - North Carolina LEO 2002-5 (10/18/02) ("If a lawyer determines that an e-mail communication (whether in electronic format or hard copy) should be retained as a part of a client's file, at the time of the termination of the representation, the lawyer should provide the client with a copy of the retained e-mail communication, together with the other documents in the client's file, subject to the limitations set forth in CPR 3."; "Rule 1.16(d) requires the lawyer to take 'reasonably practicable' steps to protect the interests of the client upon termination. In light of the widespread availability of computers, this standard is met if Attorney provides Client with a computer disk containing the retained e-mail communications or otherwise transmits them to Client in an electronic format.").
  - North Carolina RPC 234 (10/18/96) (holding that a lawyer can store clients files in electronic form; also noting that an earlier opinion required a lawyer to retain inactive client files for six years).
  - New York LEO 680 (1/10/96) ("[A]ny lawyer who chooses to transfer existing paper records to computer images must insure that all required copies are in fact transferred before any paper records are disposed of; the lawyer who fails to do so acts at the peril of engaging in spoliation, and will be at risk to

suffer the severe consequences of such conduct. DR 9-102(I) (failure to maintain and produce records as specified by disciplinary rules subjects lawyer to discipline)."; "Records required to be maintained by the Code in the form of 'copies' may be stored by reliable electronic means, as noted above, and records that are initially created by electronic means may be retained in that form, but other records that are specifically described by the Code must be retained in their original format.").

Some bars have also wrestled with the length of time that a lawyer should keep a file after a matter has closed.

- Cruz v. Dollar Tree Stores, Inc., Case No. 07-04012-SC, 2012 U.S. Dist. LEXIS 68685, at \*3, \*6 (N.D. Cal. May 16, 2012) ("Rule 4-100(B)(3) requires an attorney to retain a complete record of all client funds and other properties coming into the possession of the attorney for at least five years after the conclusion of a litigation." (emphasis added); "Rule 4-100 deals primarily with preserving the identity of funds and other property held in trust for a client. While the scope of a client's property under Rule 4-100 may have been expanded to include attorney work product, . . . the Court is aware of no authority which has further broadened the rule so as to encompass the confidential information disclosed by an opposing party through discovery. Indeed, it strains credulity to suggest that another party's confidential materials become the property of a client when they are produced in discovery pursuant to a protective order. Further, reading Rule 4-100 so broadly would hamper the private resolution of discovery disputes. Parties might be unwilling to stipulate to protective orders or otherwise disclose confidential documents if they know that those documents could be retained by opposing counsel indefinitely.").
- Illinois LEO 12-06 (1/2012) ("A lawyer must maintain records that identify the name and last known address of each client, and reflect whether the client's representation is active or concluded, for an indefinite period of time. A lawyer must keep complete records of trust account funds and other property of clients or third parties held by the lawyer and must preserve such records for at least seven years after termination of the representation. A lawyer must also maintain all financial records related to the lawyer's practice for not less than seven years. For other materials, if appropriate steps are taken to return or preserve actual client property or items with intrinsic value, then it is generally permissible for a legal services program to dispose of routine case file materials five years after case closing. Other considerations, such as administrative expense and the six-year Illinois statute of repose, suggest a general retention period of most lawyers of at least seven years. Any method of disposal must protect the confidentiality of client information." (emphases added); "There appears to be no consensus on the minimum period for retention of lawyer file materials no longer needed for a client's

- representation, but at least two other state bar opinions agree that five years after the conclusion of a matter is a reasonable option. See Arizona Opinion 08-02 (December 2008) and West Virginia 2002-01 (March 2002)."; "Given that the statute of repose for professional liability claims against lawyers, 735 ILCS 5/13-214.3(c), is six years, retaining files for some reasonable period beyond six years seems prudent. A general retention period of at least seven years after termination of the representation would comply with two of the Supreme Court's three record-keeping rules and keep a lawyer's file available in the event of a claim." (emphasis added)).
- Missouri LEO 127 (5/19/09) ("Rule 4-1.15(j) requires attorneys to maintain the file for a period of ten years, or for such other period as agreed upon with the client. However, no rule or previous opinion addresses the issue of whether the file may be maintained in electronic form." (emphasis added)).
  - Arizona LEO 08-02 (12/2008) (holding that a lawyer's file belonged to the clients and not to the lawyer; indicating that a lawyer determining how long to maintain a client's files "should consider the general purposes of file retention stated above along with specific factors articulated in Op. 98-07: the client's foreseeable interests; the applicable statutes of limitations; the length of the client's sentence or probation in criminal cases; and the uses of the material in question to the former client"; noting an earlier Arizona opinion that recommended indefinite file retention for "probate or estate matters, homicide cases, life sentence cases and lifetime probation case."; "File retention can be costly due to the volume of cases to be stored and the sheer quantity of documents comprising each individual file. In an effort to minimize file-storage costs, lawyers have asked whether they can purge client files of nonessential or irrelevant documents prior to storage. Because the client is entitled to the file in its entirety, and not just those portions that the lawyer deems to be essential or relevant, lawyers should not conduct such a purge without first consulting the client. The file is for the benefit of the client and any decisions about which documents to keep and which documents to purge should focus on the client's future need for the documents and the possibility of future litigation to protect the interests of the client, not the lawyer's possible future use for the documents."; noting that lawyers may intend to give the entire file to the client upon termination of the representation; holding that "lawyers should not purge files of documents prior to storage without notice to the client and permission from the client"; "In the absence of a file-retention policy, a lawyer must make reasonable efforts to notify the client prior to destroying the file. If the lawyer is unsuccessful, the lawyer must then determine whether applicable law requires preserving the file. If the law does not require further preservation, the lawyer should safeguard the client file for a period of time equal to that under Arizona law for the abandonment of personal property. . . . After the file may be regarded as abandoned, then the lawyer must carefully review the file to confirm that no procedural or statutory requirements obligate the lawyer to retain the file further, that there will be no

further litigation, and that there is no longer any substantial purpose served in retaining the file. Given these obligations, creating and implementing a policy for the retention and destruction may actually decrease the amount of time a file must otherwise be preserved." (emphasis added)).

- Iowa LEO 08-02 (3/4/08) ("Unless the lawyer's insurance carrier requires a longer period of retention: (a) a lawyer's written file destruction policy should be no shorter than six years after the last legal service was rendered as evidence by date of the file closing letter; or (b) in the event the lawyer does not have a written file destruction policy in place or it was not applicable to the matter in question, the file may be destroyed ten years after the date the last legal service was rendered in compliance with the protocol described in paragraph 5." (footnote omitted) (emphasis added); also advising lawyers to explain in their initial written fee arrangement how they will handle closed clients files).
- Colorado LEO 104 (4/17/99) "The Committee notes that there are certain circumstances in which the lawyer is required to maintain copies of certain documents for a period of time regardless of production to the client. See, e.g., C.R.C.P., Chapter 23.3, Rules Governing Contingent Fees, Rule 4(b) (retention of a copy of each contingent fee agreement for a period of six years); Colo. RPC 1.15(a), (complete records of [trust] account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation)." (emphasis added); "Preservation of drafts of documents in the ordinary course of the attorney's business is not a matter addressed by this opinion. However, if a lawyer does retain such drafts, they generally are papers to which the client is entitled.").
- North Carolina RPC 234 (10/18/96) (holding that a lawyer can store clients files in electronic form; also noting that an earlier opinion required a lawyer to retain inactive client files for six years).

Bars have explained that clients and lawyers can agree in a retainer letter how long the lawyer will retain the file.

- N.Y. City LEO 2010-1 (2010) ("Retainer agreements and engagement letters may authorize a lawyer at the conclusion of a matter or engagement to return all client documents to the client or to discard some or all such documents, subject to certain exceptions."; offering the following sample provision: "Once our engagement in this matter ends, we will send you a written notice advising you that this engagement has concluded. You may thereafter direct us to return, retain or discard some or all of the documents pertaining to the engagement. If you do not respond to the notice within (60) days, you agree and understand that any materials left with us after the engagement ends may be retained or destroyed at our discretion. Notwithstanding the



foregoing, and unless you instruct us otherwise, we will return and/or preserve any original wills, deeds, contracts, promissory notes or other similar documents, and any documents we know or believe you will need to retain to enforce your rights or to bring or defend claims. You should understand that 'materials' include paper files as well as information in other mediums of storage including voicemail, email, printer files, copier files, facsimiles, dictation recordings, video files, and other formats. We reserve the right to make, at our expense, certain copies of all documents generated or received by us in the course of our representation. When you request copies of documents from us, copies that we generate will be made at your expense. We will maintain the confidentiality of all documents throughout this process."; "Our own files pertaining to the matter will be retained by the firm (as opposed to being sent to you) or destroyed. These firm files include, for example, firm administrative records, time and expense reports, personnel and staffing materials, and credit and account records. For various reasons, including the minimization of unnecessary storage expenses, we reserve the right to destroy or otherwise dispose of any documents or other materials retained by us within a reasonable time after the termination of the engagement.").

- Iowa LEO 08-02 (3/4/08) ("Unless the lawyer's insurance carrier requires a longer period of retention: (a) a lawyer's written file destruction policy should be no shorter than six years after the last legal service was rendered as evidence by date of the file closing letter; or (b) in the event the lawyer does not have a written file destruction policy in place or it was not applicable to the matter in question, the file may be destroyed ten years after the date the last legal service was rendered in compliance with the protocol described in paragraph 5." (footnote omitted) (emphasis added); also advising lawyers to explain in their initial written fee arrangement how they will handle closed clients files).

**(a)** Ethics and property law considerations affect states' approach to clients' ownership of files generated by their lawyers.

It is important to recognize the distinction between a lawyer's ethics duty to turn over all or part of a file to a former client (either with or without the former client's request) and a lawyer's obligation to produce documents in response to a discovery request in a dispute between the lawyer and the former client. The normal discovery rules generally define the latter duty.

## **ABA Model Rules**

In dealing with the ethics side of this issue, the ABA Model Rules takes a surprisingly neutral and state-specific approach.

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . surrendering papers and property to which the client is entitled . . . . The lawyer may retain papers relating to the client to the extent permitted by other law.

ABA Model Rule 1.16(d) (emphasis added).

## **Restatement**

The Restatement deals with a lawyer's file in two sections -- articulating a general rule and also explaining a lawyer's right to retain the file under certain conditions.

As a general matter, the Restatement explains that

[o]n request, a lawyer must allow a client or former client to inspect and copy any document possessed by the lawyer relating to the representation, unless substantial grounds exist to refuse.

. . . Unless a client or former consents to non-delivery or substantial grounds exist for refusing to make delivery, a lawyer must deliver to the client or former client, at an appropriate time and in any event promptly after the representation ends, such originals and copies of other documents possessed by the lawyer relating to the representation as the client or former client reasonably needs.

Restatement (Third) of Law Governing Lawyers § 46(2), (3) (2000).

A comment describes the type of documents that a lawyer must furnish the client even without the client asking.

Even without a client's request or the discovery order of a tribunal, a lawyer must voluntarily furnish originals or copies of such documents as a client reasonably needs in the

circumstances. In complying with that standard, the lawyer should consider such matters as the client's expressed concerns, the client's possible needs, customary practice, the number of documents, the client's storage facilities, and whether the documents originally came from the client. The client should have an original of documents such as contracts, while a copy will suffice for such documents as legal memoranda and court opinions. Except under extraordinary circumstances -- for example, when a client retained a lawyer to recover and destroy a confidential letter -- a lawyer may keep copies of documents when furnished to a client.

If not made before, delivery must be made promptly after the representation ends. The lawyer may withhold documents to induce the client to pay a bill only as stated in § 43. During the representation, the lawyer should deliver documents when the client needs or requests them. The lawyer need not deliver documents when the client agrees that the lawyer may keep them or where there is a genuine dispute about who is entitled to receive them . . . .

Restatement (Third) of Law Governing Lawyers § 46 cmt. d (2000).

Another comment describes three situations in which a lawyer may refuse to provide the client access to the file.

First,

[a] lawyer may deny a client's request to retrieve, inspect, or copy documents when compliance would violate the lawyer's duty to another . . . . That would occur, for example, if a court's protective order had forbidden copying of a document obtained during discovery from another party, or if the lawyer reasonably believed that the client would use the document to commit a crime . . . . Justification would also exist if the document contained confidences of another client that the lawyer was required to protect.

Restatement (Third) of Law Governing Lawyers § 46 cmt. c (2000).

Second,

[u]nder conditions of extreme necessity, a lawyer may properly refuse for a client's own benefit to disclose

documents to the client unless a tribunal has required disclosure. Thus, a lawyer who reasonably concludes that showing a psychiatric report to a mentally ill client is likely to cause serious harm may deny the client access to the report . . . . Ordinarily, however, what will be useful to the client is for the client to decide.

Id.

Third,

[a] lawyer may refuse to disclose to the client certain law-firm documents reasonably intended only for internal review, such as a memorandum discussing which lawyers in the firm should be assigned to a case, whether a lawyer must withdraw because of the client's misconduct, or the firm's possible malpractice liability to the client. The need for lawyers to be able to set down their thoughts privately in order to assure effective and appropriate representation warrants keeping such documents secret from the client involved. Even in such circumstances, however, a tribunal may properly order discovery of the document when discovery rules so provide. The lawyer's duty to inform the client . . . can require the lawyer to disclose matters discussed in a document even when the document itself need not be disclosed.

Id.

### **State Courts and Bars**

The debate over a lawyer's obligation to provide the file to a former client involves several aspects.

**First**, states disagree about what portions of the file a lawyer must turn over to a former client.

- Travis v. Supreme Court Comm. on Prof'l Conduct, 306 S.W.3d 3, 7 (Ark. 2009) (noting the debate between the states about whether a lawyer must disclose to the client the lawyer's "entire file" or just the "end product" of the lawyer's services; finding it unnecessary to decide which one Arkansas would follow).

- Jones v. Comm'r, 129 T.C. 146, 157 (T.C. 2007) (noting the debate among the states about ownership of a lawyer's file; finding it unnecessary to decide how Oklahoma would address the issue, because the material at issue did not amount to work product and therefore belonged to the client; "Because the materials are not work product, it is not necessary for us to determine in this case whether Oklahoma would follow the majority or minority view with regard to ownership of case files. We are aware of no court that has held that clients have no ownership interests in their respective case files. Rather, as we have summarized above, all jurisdictions that have considered explicitly the issue of ownership of case files have held that clients have superior property rights in at least those items in the case file that are not the attorney's self-created work product. Those courts that have served a property right to the attorney have done so only with regard to the attorney's personal notes, working drafts and papers, and internal memoranda. The materials in issue in this case fall outside of this work product exception. Thus, under either approach, the documents in issue in this case belong property to petitioner's client, McVeigh [Oklahoma City bomber], and not to petitioner.").
- District of Columbia LEO 333 (12/20/05) ("Upon the termination of representation, an attorney is required to surrender to a client, to the client's legal representative, or to a successor in interest the entire 'file' containing the papers and property to which the client is entitled. This includes copies of internal notes and memoranda reflecting the views, thoughts and strategies of the lawyer."; "The Committee has recognized that the surrender of all files to the client at the termination of a representation is the general rule and that the work-product exception applicable to liens for unpaid fees or expenses should be construed narrowly."; "Indeed, the Committee has explicitly recognized that the District of Columbia has rejected the 'end-product' approach of some jurisdictions -- where the client only owns the pleadings, contracts, and reports that reflect the final result of the attorney's work -- in favor of the majority, 'entire file' approach, 'which does not permit a lawyer to acquire a lien on any of the contents of the client file except that portion of work product within the file that has not been paid for.' D.C. Ethics Op. 283 n.3 (1988)." (footnote omitted); "A minority of courts and state bar legal ethics authorities distinguish between the 'end product' of an attorney's services -- e.g., filed pleadings, final versions of documents prepared for the client's use, and correspondence with the client, opposing counsel and witnesses -- and the attorney's 'work product' leading to the creation of those end product documents, which remains the property of the attorney (see, e.g., Federal Land Bank v. Federal Intermediate Credit Bank, 127 F.R.D. 473, aff'd in part and rev'd in part on other grounds, 128 F.R.D. 182 (S.D. Miss. 1989); Corrigan v. Armstrong, Teasdale, Schlafly, Davis & Dicus, 824 S.W. 2d 92 (Mo. Ct. App.); Alabama State Bar, Formal Ethics Op. RO 86-02; Arizona State Bar Comm. on Rules of Prof'l Conduct, Op. No. 92-1; Illinois State Bar Assn., Op. No. 94-13; North Carolina State Bar Ethics Comm., RPC 178

(1994); Rhode Island Supreme Ct. Ethics Advisory Panel, Op. No. 92-88 (1993); Wisconsin Ethics Opinion E-82-7 (1998)).").

Most states follow the majority rule, which requires lawyers to turn over essentially their entire substantive file.

- Virginia Rule 1.16(e) ("All original, client-furnished documents and any originals of legal instruments or official documents which are in the lawyer's possession (wills, corporate minutes, etc.) are the property of the client and, therefore, upon termination of the representation, those items shall be returned within a reasonable time to the client or the client's new counsel upon request, whether or not the client has paid the fees and costs owed the lawyer. If the lawyer wants to keep a copy of such original documents, the lawyer must incur the cost of duplication. Also upon termination, the client, upon request, must also be provided within a reasonable time copies of the following documents from the lawyer's file, whether or not the client has paid the fees and costs owed the lawyer: lawyer/client and lawyer/third-party communications; the lawyer's copies of client-furnished documents (unless the originals have been returned to the client pursuant to this paragraph); transcripts, pleadings and discovery responses; working and final drafts of legal instruments, official documents, investigative reports, legal memoranda, and other attorney work product documents prepared or collected for the client in the course of the representation; research materials; and bills previously submitted to the client. Although the lawyer may bill and seek to collect from the client the costs associated with making a copy of these materials, the lawyer may not use the client's refusal to pay for such materials as a basis to refuse the client's request. The lawyer, however, is not required under this Rule to provide the client copies of billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts of interest, staffing considerations, or difficulties arising from the lawyer-client relationship. The lawyer has met his or her obligation under this paragraph by furnishing these items one time at client request upon termination; provision of multiple copies is not required. The lawyer has not met his or her obligation under this paragraph by the mere provision of copies of documents on an item-by-item basis during the course of the representation.").
- Arizona LEO 08-02 (12/2008) (holding that a lawyer's file belonged to the clients and not to the lawyer; indicating that a lawyer determining how long to maintain a client's files "should consider the general purposes of file retention stated above along with specific factors articulated in Op. 98-07: the client's foreseeable interests; the applicable statutes of limitations; the length of the client's sentence or probation in criminal cases; and the uses of the material in question to the former client"; noting an earlier Arizona opinion that recommended indefinite file retention for "probate or estate matters, homicide

cases, life sentence cases and lifetime probation case.""; "File retention can be costly due to the volume of cases to be stored and the sheer quantity of documents comprising each individual file. In an effort to minimize file-storage costs, lawyers have asked whether they can purge client files of nonessential or irrelevant documents prior to storage. Because the client is entitled to the file in its entirety, and not just those portions that the lawyer deems to be essential or relevant, lawyers should not conduct such a purge without first consulting the client. The file is for the benefit of the client and any decisions about which documents to keep and which documents to purge should focus on the client's future need for the documents and the possibility of future litigation to protect the interests of the client, not the lawyer's possible future use for the documents."; noting that lawyers may intend to give the entire file to the client upon termination of the representation; holding that "lawyers should not purge files of documents prior to storage without notice to the client and permission from the client"; "In the absence of a file-retention policy, a lawyer must make reasonable efforts to notify the client prior to destroying the file. If the lawyer is unsuccessful, the lawyer must then determine whether applicable law requires preserving the file. If the law does not require further preservation, the lawyer should safeguard the client file for a period of time equal to that under Arizona law for the abandonment of personal property. . . . After the file may be regarded as abandoned, then the lawyer must carefully review the file to confirm that no procedural or statutory requirements obligate the lawyer to retain the file further, that there will be no further litigation, and that there is no longer any substantial purpose served in retaining the file. Given these obligations, creating and implementing a policy for the retention and destruction may actually decrease the amount of time a file must otherwise be preserved." (emphasis added)).

- N.Y. City LEO 2008-1 (7/2008) ("With respect to the electronic documents that the lawyer retains, the lawyer is not under an ethical obligation to organize those documents in any particular manner, or to store those documents in any particular storage medium, so long as the lawyer ensures that the manner of organization and storage does not (a) detract from the competence of the representation or (b) result in the loss of documents that the client may later need and may reasonably expect the lawyer to preserve. To those ends, electronic documents other than e-mails present less difficulty because they are frequently stored in document management systems in which they are typically coded with several identifying characteristics, making it easier to locate and assemble them later. E-mails raise more difficult organizational and storage issues. Some e-mail systems automatically delete e-mails after a period of time, so the lawyer must take affirmative steps to preserve those e-mails that the lawyer decides to save. In addition, e-mails generally are not coded, or otherwise organized, to facilitate their later retrieval. Thus, a practice with much to commend it is to organize saved e-mails to facilitate their later retrieval, for example, by coding them or saving them to dedicated electronic files. Otherwise, it may be exceedingly difficult

- and expensive for the lawyer to retrieve those e-mails, and, as discussed in the Opinion, the lawyer must charge the client for retrieval costs that could reasonably have been avoided. In New York, a client has a presumptive right to the lawyer's entire file in connection with a representation, subject to narrow exceptions. The lawyer may charge the client a reasonable fee, based on the lawyer's customary schedule, for gathering and producing electronic documents. That fee may reflect the reasonable costs of retrieving electronic documents from their storage media and reviewing those documents to determine the client's right of access. It is prudent for lawyer and client to discuss the retention, storage, and retrieval of electronic documents at the outset of the engagement and to consider memorializing their agreement in a retention letter." (emphasis added)).
- California LEO 2007-174 (2007) ("An attorney is ethically obligated, upon termination of employment, promptly to release to a client, at the client's request: (1) an electronic version of e-mail correspondence, because such items come within a category subject to release; (2) an electronic version of the pleadings, because such items . . . come within a category subject to release; (3) an electronic version of discovery requests and responses, because such items are subject to release as reasonably necessary to the client's representation; (4) an electronic deposition and exhibit database, because such an item itself contains items that come within categories subject to release; and (5) an electronic version of transactional documents, because such items are subject to release as reasonably necessary to the client's representation. The attorney's ethical obligation to release any electronic items, however, does not require the attorney to create such items if they do not exist or to change the application (e.g., from Word (.doc) to WordPerfect (.wpd)) if they do exist. Prior to release, the attorney is ethically obligated to take reasonable steps to strip from each of these electronic items any metadata reflecting confidential information belonging to any other client.").
  - Supreme Court Attorney Disciplinary Bd. v. Gottschalk, 729 N.W.2d 812, 819 (Iowa 2007) ("In general, there are two approaches for determining who owns the documents within a client's file -- the 'entire file' approach and the 'end product' approach. . . . The majority of jurisdictions that have addressed this issue conclude that a client owns his or her entire file, including attorney work product, subject to narrow exceptions. . . . We agree with the majority of jurisdictions and adopt the 'entire file' approach to this issue." (emphasis added)).
  - Hiatt v. Clark, 194 S.W.3d 324, 329, 330 (Ky. 2006) (holding that a criminal defendant can obtain his lawyer's files; acknowledging that the files deserve work product protection, but holding that the lawyer could not withhold them from his client; "It is meant to protect an attorney, but not from his own former client, and it does not override questions of ownership."; "For the reasons set



forth herein, we hold that a writ of mandamus is the most appropriate form of remedy available to Appellant and find that he is entitled to the entirety of his client file from Mr. Eardley [staff attorney for Fayette County Legal Aid who represented defendant], including work product materials, and therefore we hereby grant the relief sought.").

- New Hampshire LEO 2005-06/3 (1/2006) ("Therefore, if a client requests a copy of her file, the firm has an obligation to provide all files pertinent to representation of that client, regardless of the burden that it might impose upon the firm to do so. . . . That burden can be managed, in any event, through computer word search functions or other means that are routinely used for discovery or other purposes. As in discovery-related matters, it is incumbent upon the firm to manage its electronic and other files in a way that will allow for release of a file to a client without releasing other information that might harm a third party." (emphasis added)).
- District of Columbia LEO 333 (12/20/05) ("Upon the termination of representation, an attorney is required to surrender to a client, to the client's legal representative, or to a successor in interest the entire 'file' containing the papers and property to which the client is entitled. This includes copies of internal notes and memoranda reflecting the views, thoughts and strategies of the lawyer."; "The Committee has recognized that the surrender of all files to the client at the termination of a representation is the general rule and that the work-product exception applicable to liens for unpaid fees or expenses should be construed narrowly."; "Indeed, the Committee has explicitly recognized that the District of Columbia has rejected the 'end-product' approach of some jurisdictions -- where the client only owns the pleadings, contracts, and reports that reflect the final result of the attorney's work -- in favor of the majority, 'entire file' approach, 'which does not permit a lawyer to acquire a lien on any of the contents of the client file except that portion of work product within the file that has not been paid for.' D.C. Ethics Op. 283 n.3 (1988)."; "A minority of courts and state bar legal ethics authorities distinguish between the 'end product' of an attorney's services -- e.g., filed pleadings, final versions of documents prepared for the client's use, and correspondence with the client, opposing counsel and witnesses -- and the attorney's 'work product' leading to the creation of those end product documents, which remains the property of the attorney (see, e.g., Federal Land Bank v. Federal Intermediate Credit Bank, 127 F.R.D. 473, aff'd in part and rev'd in part on other grounds, 128 F.R.D. 182 (S.D. Miss. 1989); Corrigan v. Armstrong, Teasdale, Schlafly, Davis & Dicus, 824 S.W. 2d 92 (Mo. Ct. App.); Alabama State Bar, Formal Ethics Op. RO 86-02; Arizona State Bar Comm. on Rules of Prof'l Conduct, Op. No. 92-1; Illinois State Bar Assn., Op. No. 94-13; North Carolina State Bar Ethics Comm., RPC 178 (1994); Rhode Island Supreme Ct. Ethics Advisory Panel, Op. No. 92-88 (1993); Wisconsin Ethics Opinion E-82-7 (1998))." (emphasis added)).

- Loeffler v. Lanser (In re ANR Advance Transp. Co.), 302 B.R. 607, 614 (E.D. Wis. 2003) (assessing different states' approach to ownership of a lawyer's file upon termination of the attorney-client relationship; contrasting the majority rule (permitting the client access to all of the files) and the minority, which indicates that the client is only entitled to "end product" documents; finding that the bankruptcy trustee was entitled to files in the possession of the lawyer; acknowledging that lawyers may assert work product protection, but refusing to allow a lawyer to withhold documents from the client's successor).
- Swift, Currie, McGhee & Hiers v. Henry, 581 S.E.2d 37, 39 (Ga. 2003) ("A minority of courts have ruled that a document belongs to the attorney who prepared it, unless the document is sought by the client in connection with a lawsuit against the attorney. . . . A majority of courts have ruled that a document created by an attorney belongs to the client who retained him." (emphasis added); adopting the majority view).
- North Carolina LEO 2002-5 (10/18/02) ("If a lawyer determines that an e-mail communication (whether in electronic format or hard copy) should be retained as a part of a client's file, at the time of the termination of the representation, the lawyer should provide the client with a copy of the retained e-mail communication, together with the other documents in the client's file, subject to the limitations set forth in CPR 3."; "Rule 1.16(d) requires the lawyer to take 'reasonably practicable' steps to protect the interests of the client upon termination. In light of the widespread availability of computers, this standard is met if Attorney provides Client with a computer disk containing the retained e-mail communications or otherwise transmits them to Client in an electronic format.").
- Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn LLP, 689 N.E.2d 879, 882, 883 (N.Y. 1997) (rejecting the minority view under which a lawyer must only provide the "end product" of the lawyer's work to the client upon request; holding that "[b]arring a substantial showing by the Proskauer firm of good cause to refuse client access, petitioners should be entitled to inspect and copy work product materials, for the creation of which they paid during the course of the firm's representation" (emphasis added)).

Other authorities indicate that lawyers may withhold from clients non-final documents such as drafts, legal memoranda, etc.

- 625 Milwaukee, LLC v. Switch & Data Facilities Co., Case No. 06-C-0727, 2008 U.S. Dist. LEXIS 19943, at \*4 n.2, \*5 (E.D. Wis. Feb. 29, 2008) (analyzing implications of a joint representation by the law firms of Blank Rome and Quarles & Brady and a parent and its wholly owned subsidiary, which the parent sold to another company; noting that the change in the

- subsidiary's "ownership does not alter its existence"; explaining that the former subsidiary had now sued its former parent; "The parties agree that Wisconsin law governs the issues of document ownership and attorney-client privilege inasmuch as this is a diversity case. In Wisconsin, 'end product' documents such as filed pleadings, final versions of documents prepared for the client's use, and correspondence with the client or opposing counsel belong to the client." (emphasis added); ultimately concluding that the two law firms jointly represented the parent and the wholly owned subsidiary in the sales transaction, and therefore had to produce pre-transaction documents and some post-transaction documents that referred to the law firm's service before the transaction).
- Pennsylvania LEO 2007-100 (2007) (holding that the client owns the files created by a lawyer while representing the client; explaining that the client might not be entitled to some internal documents; "Examples of items that might fall outside the scope of the formal 'file' are internal memoranda and notes generated primarily for a lawyer's own purposes in working on the client's problem. Particularly in the context of complex litigation involving numerous lawyers, it is nearly impossible to define on an a priori basis what must be part of the client's file." (footnote omitted); noting the debate between states following the "entire file" approach and the "limited file" approach; following the latter, but with a proviso: "A substantial subset of the 'entire file' group of jurisdictions allow other 'non-substantive' items, generally those associated with law practice management, to be excluded from the 'file' that belongs to the client. Under this approach, the client would not ordinarily be entitled to internal assignment documents, internal billing records, or purely private impressions of counsel."; noting that clients and lawyers can address file ownership in a retainer agreement, although "it is likely that any such agreement will undergo close scrutiny if a dispute arises between the client and the lawyer"; adopting the following guidelines: "A client is entitled to receive all materials in the lawyer's possession that relate to the representation and that have potential utility to the client and the protection of the client's interests. Items to which the client has a presumed right of access and possession include: (1) all filed or served briefs, pleadings, discovery requests and responses; (2) all transcripts of any type; (3) all affidavits and witness statements of any type; (4) all memoranda of law, case evaluations, or strategy memoranda; (5) all substantive correspondence of any type (including email), including correspondence with other parties or their counsel, all correspondence with the client, and correspondence with third parties; (6) all original documents with legal significance, such as wills, deeds and contracts; (7) all documents or other things delivered to the lawyer by or on behalf of the client; and (8) all invoices or statements sent to the client. The Committee's expectation is that the client would not normally need or want, and therefore would not typically be given, in response to a generalized request for access to or possession of the 'file', the following types of documents: (a) drafts of any of the items described above, unless they have

some independent significance (such as draft chains relating to contract negotiations); (b) attorney notes from the lawyer's personal files, unless those notes have been placed by the attorney in the case file because they are significant to the representation; (c) copies of electronic mail messages, unless they have been placed by the attorney in the file because they are significant to the representation; (d) memoranda that relate to staffing or law office administration; (e) items that the lawyer is restricted from sharing with the client due to other legal obligations (such as 'restricted confidential' documents of a litigation adversary that are limited to counsel's eyes only). A client is entitled, however, to make a more specific request for items that are not generally put in the file, and the client is entitled to such items unless there are substantial grounds to decline the request. So long as the relevant considerations are fully discussed with the client, the lawyer and client may enter into a reasonable agreement that attempts to define the types or limit the scope of documents that will be retained in the client's file and defines the client's and lawyer's right to such contents, and the cost for providing access or possession.").

- Utah LEO 06-02 (6/2/06) ("An unexecuted legal instrument such as a trust or will, or an unfiled pleading, such as an extraordinary writ, is not part of the 'client's file' within the meaning of Rule 1.16(d). The lawyer is not required by Rule 1.16 to deliver these documents to the client at the termination of the representation."; "Comment 9 of Rule 1.16 states: 'It is impossible to set forth one all encompassing definition of what constitutes the client's file. However, the client file generally would include the following: all papers and property the client provides to the lawyer; litigation material such as pleadings, motions, discovery, and legal memoranda; all correspondence; depositions; expert opinions; business records; exhibits or potential evidence; and witness statements. The client file generally would not include the following: the lawyer's work product such as recorded mental impressions; research notes; legal theories; internal memoranda; and unfiled pleadings.'"; "[D]epriving the client of unexecuted legal instruments (such as agreements, trusts and wills) will not normally prejudice the client's interests. The same is true of withholding from the client unfiled legal pleadings. The client is entitled to the client's own papers and property and the 'client's file,' and the client may deliver these to new counsel for the purpose of preparing the legal instruments and the legal pleadings in accordance with the instructions of the client."; "Our interpretation of Comment 9 also is consistent with public policy on two fronts: (i) lawyers should not be exposed to liabilities arising from a requirement that the lawyer deliver to the client upon termination of the representation legal instruments that are neither executed nor filed as such instruments may be incomplete drafts or unchecked final documents not appropriate for execution of filing by the client or the client's new counsel; and (ii) the Utah Rules of Professional Conduct should not be interpreted in a manner to encourage and facilitate unscrupulous clients in defrauding lawyers by requesting the preparation of legal instruments, then terminating the

attorney-client relationship after the legal instruments are prepared, for the purpose of obtaining the lawyer's services without payment.").

- Pennsylvania LEO 1996-157 (11/20/96) ("There is a recognized exception to asserting a lien if the retention of the file would cause 'substantial prejudice' to your client. Under these circumstances, the requirement of Rule 1.16(d) would take precedence and you would be required to surrender the file to your client. 'Substantial prejudice' as contemplated by Opinion No. 94-35 means that prejudice to the client that is not permitted by the Rules. Rules 1.15(b) and 1.16(d) (first sentence); On the other hand, if retention of the file would merely result in 'prejudice' as that term is defined in Opinion No. 94-35, which would be prejudice which is tolerated by the Rules, the file would not have to be surrendered. Whether retaining a file would result in mere 'prejudice' or 'substantial prejudice' must be determined on a case by case basis."; "I should caution that there appears to be a trend in the law to favor a client's access to his file over an attorney's lien in certain circumstances. . . . Therefore, where a right to a retaining lien is arguable, and there is a doubt as to whether withholding the file would cause 'substantial prejudice' to a client, any doubt should be resolved in favor of relinquishment and the lawyer should consider returning the file without asserting a lien and subsequently bringing a civil action for recovery of the costs."; "However, the lawyer need not deliver his internal memos and notes which had been generated primarily for his own purposes in working on the client's problem."; "Consistent with the concept that the client is entitled to receive what he has paid for, it is my opinion that whatever documents you conclude are 'papers and property to which the client is entitled,' that those original documents are your client's property and should be provided. I do not believe it would be appropriate to provide a 'copy' of the file at the client's expense. To the extent you wish to retain any portion of the file, the associated duplicating expense should be treated by you as 'a cost of doing business' and should not be billed to the client.").
- Kansas LEO 92-5 (7/30/92) ("When counsel has been paid in full and discharged by client and no action is pending on the case file, we opine 'client's property' under MRPC 1.16(d) includes (1) documents brought to the attorney by the client or client's agents, (2) deposition or other discovery documents pertinent to the case for which client was billed and has paid for (expert witness opinions, etc.) and (3) pleadings and other court papers and such other documents as are necessary to understand [sic] and interpret documents highlighted above. Such documents, being 'client property' must be returned unconditionally and additional photocopy fees as part of an unconditional return of such documents are inconsistent with MRPC 1.16(d). Other documents requested by client not amounting to this definition of 'client property' may be copied at a reasonable expense to the [sic] client, such 'expense' to represent actual costs, not a profit. Work product, as defined elsewhere in case law, is not client property under this rule.").

Most states permit lawyers to withhold from their former clients purely administrative internal law firm documents.

- Ohio LEO 2010-2 (4/9/10) ("Internal office management memoranda such as personnel assignments or conflicts of interest checks will probably not be items reasonably necessary to a client's representation. But, a lawyer's notes regarding facts about the case will most likely be an item reasonably necessary to a client's representation. If a lawyer's note includes both items reasonably necessary to a client's representation and items not reasonably necessary, a lawyer may ethically redact from the note those items not reasonably necessary, or if more practical, a lawyer may prepare a note for the client that includes only the items reasonably necessary to the client's representation. Any expense, such as copying costs, incurred by a lawyer in turning over a client's file to a client upon request must be borne by the lawyer." (emphasis added); relying on a unique Ohio Rule 1.16(d): "As part of the termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to protect a client's interest. The steps include giving due notice to the client, allowing reasonable time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules. Client papers and property shall be promptly delivered to the client. 'Client papers and property' may include correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert reports, and other items reasonably necessary to the client's representation."; explaining that "[i]n Ohio there is no common law lien on a client's files in a contingent fee case. . . . And, in Ohio there is no statutory lien on the client files. The legality of a lien is a question of law outside this Board's advisory authority."; noting that "[i]n Ohio, lawyers have violated Prof. Cond. Rule 1.16(d) (and other rules) by refusing to turnover [sic] client files to the client.").
- Saroff v. Cohen, No. E2008-00612-COA-R3-CV, 2009 Tenn. App. LEXIS 84, at \*19 (Tenn. Ct. App. Feb. 25, 2009) (holding that a lawyer did not have to make invoices available to the client; "We agree that the invoices are property of the law firm. . . . The invoices were accounts receivable records generated for the purpose of memorializing the cost to the client of legal services rendered and were maintained in the general course of business. The invoices did not become part of the client file simply because they were placed in the client's file. In addition, the invoices are not considered work product because they were not prepared for the benefit of Mr. Saroff; rather the invoices were generated for the benefit of Mr. Cohen and the firm to ensure payment of legal services rendered." (emphasis added)).
- Arizona LEO 04-01 (1/2004) ("While an attorney may withhold internal practice management memoranda that does not reflect work done on the client's behalf, the burden is on the attorney claiming the lien to identify with

specificity any other documents or materials in the file which the attorney asserts are subject to the retaining lien, and which would not prejudice the client's interests, if withheld from the client.").

- Wisconsin LEO E-00-03 (2003) ("It has generally been recognized that each client file is the client's property even though that file is maintained by the lawyer in the lawyer's office. . . . However, certain papers maintained by the lawyer in client files may be the work product of the lawyer and need not be produced to the client on demand. Where this line of demarcation is drawn has never been precisely defined. The Professional Ethics Committee finds the following definition of which papers the lawyer is not required to produce at the client's demand to be sound and instructive. There are two primary areas in which the lawyer properly retains papers and documents that do not constitute papers and property to which the client is entitled. One includes documents used by the attorney to prepare initial documents for the client, in which a third party, for example, another client, has a right to nondisclosure. A lawyer has the right to withhold pleadings or other documents related to the lawyer's representation of other clients that the lawyer used as a model on which to draft documents for the current client. However, the product drafted by the lawyer may not be withheld. A second area involves those documents that would be considered personal attorney work product and not papers and property to which the client is entitled. Certain materials may be withheld such as, for example, internal memoranda concerning the client file, conflict checks, personnel assignments, and lawyers' notes reflecting personal impressions and comments relating to the business of representing the client. This information is personal attorney work product that is not needed to protect the client's interests, and does not constitute papers or property to which the client is entitled."; also explaining that lawyers may charge the client for the cost of copying files that the client requests, and can also charge for "staff and professional time necessarily incurred to search databases to identify files that contain documents that may fall within the client's request" (emphasis added)).
- Colorado LEO 104 (4/17/99) ("There are two primary areas in which the lawyer properly retains papers and documents which do not constitute papers and property to which the client is entitled. One includes documents, used by the attorney to prepare initial documents for the client, in which a third party, e.g., another client, has a right to non-disclosure. A lawyer has the right to withhold pleadings or other documents related to the lawyer's representation of other clients that the lawyer used as a model on which to draft documents for the present client. However, the product drafted by the lawyer may not be withheld."; "A second area involves those documents that would be considered personal attorney-work product, and not papers and property to which the client is entitled. Certain documents may be withheld: for example, internal memoranda concerning the client file, conflicts checks, personnel assignments, and lawyer notes reflecting personal impressions and

comments relating to the business of representing the client. This information is personal attorney-work product that is not needed to protect the client's interests, and does not constitute papers and property to which the client is entitled."; "While there is some authority to the contrary, the majority of authority asserts that preliminary drafts, legal research, and legal research memoranda are not properly retained by the attorney as personal attorney-work product and must be surrendered. The Committee agrees with this view."; "Internal firm administration documents, such as conflicts checks and personnel assignments, properly are retained as personal attorney-work product. The lawyer may withhold certain firm documents that were intended for law office management or use. Production would not be needed to protect the client's interests in the matter."; "It is much more difficult to address personal lawyer notes, especially those notes containing personal impressions and comments. While recognizing that clear direction in this area depends on the specific facts encountered by a lawyer, the Committee reminds lawyers that the client's interests must be protected by the extent reasonably practicable. For example, if certain lawyer notes contain factual information, such as the content of client interviews, the information in those notes should be delivered to the client. In the event that certain personal impressions are intertwined with such factual information, those notes could be redacted or summarized to protect the interests of both the client and the lawyer."; "The Committee notes that there are certain circumstances in which the lawyer is required to maintain copies of certain documents for a period of time regardless of production to the client. See, e.g., C.R.C.P., Chapter 23.3, Rules Governing Contingent Fees, Rule 4(b) (retention of a copy of each contingent fee agreement for a period of six years); Colo. RPC 1.15(a)[] (complete records of [trust] account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation)."; "Preservation of drafts of documents in the ordinary course of the attorney's business is not a matter addressed by this opinion. However, if a lawyer does retain such drafts, they generally are papers to which the client is entitled.").

- Illinois LEO 94-13 (1/1995) (explaining what materials a lawyer must provide to a former client; "With respect to the sixth category, internal administrative materials, the Committee does not believe that a client is entitled to copies of or access to such materials under either Rule 1.4(a) or Rule 1.15(b). These materials are not relevant to the status of the client's matter and are usually prepared only for the lawyer's internal use. Nor are these materials property of the client that a lawyer must deliver upon request. Thus the failure of the lawyer to deliver or provide access to such materials will not prejudice the client." (emphasis added); "A lawyer may refuse to disclose to the client certain law firm documents reasonably intended only for internal review, such as a memorandum discussing which lawyers in the firm should be assigned to a case, whether a lawyer must withdraw because of the client's misconduct, or the firm's possible malpractice liability to the client. The need for lawyers to



be able to set down their thoughts privately in order to assure effective and appropriate representation warrants keeping such documents secret from the client involved."; "With respect to the seventh category, which comprises the lawyer' notes and factual or legal research material, including the type of investigative materials involved in the present inquiry, the Committee is aware that various courts and ethics committees have taken differing positions on the nature of such materials. In the absence of controlling Illinois authority or a clear majority in the other states, the Committee concludes that the better rule is that these materials are the property of the lawyer. As such, the materials generally need not be delivered to the client."; "In summary, the Committee concludes under the facts presented that the lawyer may properly refuse to provide or disclose the lawyer's materials to the client because the materials in question are the lawyer's property and disclosure to the client could lead to harm to the client and his former wife. The Committee also notes that the lawyer could, in the exercise of the lawyer's professional judgment, release the materials to the client, but the lawyer is not required to do so by the Rules of Professional Conduct.").

Not surprisingly, lawyers normally can withhold other clients' documents that have been placed in the file.

- Wisconsin LEO E-00-03 (2003) ("It has generally been recognized that each client file is the client's property even though that file is maintained by the lawyer in the lawyer's office. . . . However, certain papers maintained by the lawyer in client files may be the work product of the lawyer and need not be produced to the client on demand. Where this line of demarcation is drawn has never been precisely defined. The Professional Ethics Committee finds the following definition of which papers the lawyer is not required to produce at the client's demand to be sound and instructive. There are two primary areas in which the lawyer properly retains papers and documents that do not constitute papers and property to which the client is entitled. One includes documents used by the attorney to prepare initial documents for the client, in which a third party, for example, another client, has a right to nondisclosure. A lawyer has the right to withhold pleadings or other documents related to the lawyer's representation of other clients that the lawyer used as a model on which to draft documents for the current client. However, the product drafted by the lawyer may not be withheld. A second area involves those documents that would be considered personal attorney work product and not papers and property to which the client is entitled. Certain materials may be withheld such as, for example, internal memoranda concerning the client file, conflict checks, personnel assignments, and lawyers' notes reflecting personal impressions and comments relating to the business of representing the client. This information is personal attorney work product that is not needed to protect the client's interests, and does not constitute papers or property to which the client is entitled." (emphasis added); also explaining that lawyers

may charge the client for the cost of copying files that the client requests, and can also charge for "staff and professional time necessarily incurred to search databases to identify files that contain documents that may fall within the client's request").

- Colorado LEO 104 (4/17/99) ("There are two primary areas in which the lawyer properly retains papers and documents which do not constitute papers and property to which the client is entitled. One includes documents, used by the attorney to prepare initial documents for the client, in which a third party, e.g., another client, has a right to non-disclosure. A lawyer has the right to withhold pleadings or other documents related to the lawyer's representation of other clients that the lawyer used as a model on which to draft documents for the present client. However, the product drafted by the lawyer may not be withheld." (emphasis added); "A second area involves those documents that would be considered personal attorney-work product, and not papers and property to which the client is entitled. Certain documents may be withheld: for example, internal memoranda concerning the client file, conflicts checks, personnel assignments, and lawyer notes reflecting personal impressions and comments relating to the business of representing the client. This information is personal attorney-work product that is not needed to protect the client's interests, and does not constitute papers and property to which the client is entitled."; "While there is some authority to the contrary, the majority of authority asserts that preliminary drafts, legal research, and legal research memoranda are not properly retained by the attorney as personal attorney-work product and must be surrendered. The Committee agrees with this view."; "Internal firm administration documents, such as conflicts checks and personnel assignments, properly are retained as personal attorney-work product. The lawyer may withhold certain firm documents that were intended for law office management or use. Production would not be needed to protect the client's interests in the matter."; "It is much more difficult to address personal lawyer notes, especially those notes containing personal impressions and comments. While recognizing that clear direction in this area depends on the specific facts encountered by a lawyer, the Committee reminds lawyers that the client's interests must be protected by the extent reasonably practicable. For example, if certain lawyer notes contain factual information, such as the content of client interviews, the information in those notes should be delivered to the client. In the event that certain personal impressions are intertwined with such factual information, those notes could be redacted or summarized to protect the interests of both the client and the lawyer."; "The Committee notes that there are certain circumstances in which the lawyer is required to maintain copies of certain documents for a period of time regardless of production to the client. See, e.g., C.R.C.P., Chapter 23.3, Rules Governing Contingent Fees, Rule 4(b) (retention of a copy of each contingent fee agreement for a period of six years); Colo. RPC 1.15(a), (complete records of [trust] account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after

termination of the representation)."; "Preservation of drafts of documents in the ordinary course of the attorney's business is not a matter addressed by this opinion. However, if a lawyer does retain such drafts, they generally are papers to which the client is entitled.").

- Delaware LEO 1997-5 (11/25/97) ("In the Committee's view, the Inquiring Attorney's obligations to his former client under Rule 1.16(d) do not, under the circumstances presented, include surrendering information which Inquiring Attorney received pursuant to the Joint Defense Agreement. First, it does not appear that the information is 'papers and property to which the client is entitled.' The information was provided to the Inquiring Attorney by counsel for B pursuant to express limitations set forth in the Joint Defense Agreement. Moreover, to the extent that the information includes the Inquiring Attorney's impressions and work product, it is not property to which A is automatically entitled."; "Second, Rule 1.16(d) requires an attorney whose engagement is terminated to take steps that are 'reasonably practicable' to protect the former client's interest. In the Committee's view, it would be 'reasonably practicable' for the Inquiring Attorney to breach the Joint Defense Agreement by providing the information to a person who is outside the scope of the Agreement. Doing so could be extremely prejudicial to B, who while not the client of the Inquiring Attorney, is still owed a duty of fairness. See Rule 3.4 (addressing fairness to opposing party in litigation setting) and Rule 4.4 (prohibiting a lawyer from using methods of obtaining evidence that would violate the rights of third parties including adverse parties in litigation). Indeed, if the Inquiring Attorney revealed the information to A's new attorney, the Inquiring Attorney would violate B's right under the Joint Defense Agreement."; "Third, A's new attorney presumably can gain access to the information by becoming a party to the Joint Defense Agreement. Thus, to the extent the new attorney needs the information, there appears to be a readily available way for him to get it without prejudicing B."; "Finally, the Committee does not believe that Inquiry Attorney's refusal to surrender the information constitutes a violation of Rule 1.9. The failure to turn over the information does not constitute using the information to the former client's disadvantage as contemplated by Rule 1.9.").

Some states allow lawyers to withhold other material.

- Ohio LEO 2010-2 (4/9/10) ("Whether a lawyer's notes of an interview with a current or former client are considered client papers to which the current or former client is entitled upon request pursuant to Prof. Cond. Rule 1.16(d) depends upon whether the notes are items reasonably necessary to the client's representation. This determination requires the exercise of a lawyer's professional judgment. When a client makes a file request to a lawyer, the lawyer's decision as to whether to relinquish the lawyer's notes will require examination of the lawyer's notes in the file to determine whether the notes are items reasonably necessary to the client's representation pursuant to

Prof. Cond. Rule 1.16(d). A lawyer's notes to himself or herself regarding passing thoughts, ideas, impression[s], or questions will probably not be items reasonably necessary to a client's representation. Internal office management memoranda such as personnel assignments or conflicts of interest checks will probably not be items reasonably necessary to a client's representation. But, a lawyer's notes regarding facts about the case will most likely be an item reasonably necessary to a client's representation. If a lawyer's note includes both items reasonably necessary to a client's representation and items not reasonably necessary, a lawyer may ethically redact from the note those items not reasonably necessary, or if more practical, a lawyer may prepare a note for the client that includes only the items reasonably necessary to the client's representation. Any expense, such as copying costs, incurred by a lawyer in turning over a client's file to a client upon request must be borne by the lawyer."; relying on a unique Ohio Rule 1.16(d); "As part of the termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to protect a client's interest. The steps include giving due notice to the client, allowing reasonable time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules. Client papers and property shall be promptly delivered to the client. 'Client papers and property' may include correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert reports, and other items reasonably necessary to the client's representation."; explaining that "[i]n Ohio there is no common law lien on a client's files in a contingent fee case. . . . And, in Ohio there is no statutory lien on the client files. The legality of a lien is a question of law outside this Board's advisory authority."; noting that "[i]n Ohio, lawyers have violated Prof. Cond. Rule 1.16(d) (and other rules) by refusing to turnover [sic] client files to the client.").

- California LEO 2007-174 (2007) ("An attorney is ethically obligated, upon termination of employment, promptly to release to a client, at the client's request: (1) an electronic version of e-mail correspondence, because such items come within a category subject to release; (2) an electronic version of the pleadings, because such items . . . come within a category subject to release; (3) an electronic version of discovery requests and responses, because such items are subject to release as reasonably necessary to the client's representation; (4) an electronic deposition and exhibit database, because such an item itself contains items that come within categories subject to release; and (5) an electronic version of transactional documents, because such items are subject to release as reasonably necessary to the client's representation. The attorney's ethical obligation to release any electronic items, however, does not require the attorney to create such items if they do not exist or to change the application (e.g., from Word (.doc) to WordPerfect (.wpd)) if they do exist. Prior to release, the attorney is ethically obligated to take reasonable steps to strip from each of these electronic items

any metadata reflecting confidential information belonging to any other client.").

- North Carolina RPC 227 (7/18/97) (holding that under North Carolina ethics rules a lawyer does not have to supply the lawyer's personal notes to a client who asks for a copy of the file).
- North Carolina RPC 178 (10/21/94) (holding that a lawyer must provide the lawyer's files to multiple clients, although the lawyer can withhold personal notes before providing a copy to the clients).
- North Carolina RPC 169 (1/14/94) (explaining North Carolina's unique provision allowing a lawyer to withhold the lawyer's "personal notes" when providing a file to a former client (citation omitted)).
- Mississippi LEO 144 (3/11/88) ("The right of a lawyer to withhold or retain a client's file to secure payment of the fee is a matter of law. However, ethically, a lawyer may not retain a client's file in a pending matter if it would harm the client or the client's cause. The ownership of specific items in a client's file is a matter of law. However, ethically, the lawyer should turn over to a client all papers and property of the client which were delivered to the lawyer, the end product of the lawyer's work, and any investigative reports paid for by the client. The lawyer is under no ethical obligations to turn over his work product to the client."; "This committee concludes that the better-reasoned opinions generally recognize that to the extent the client has a right to his file, then his file consists of the papers and property delivered by him to the lawyer, the pleadings or other end product developed by the lawyer, the correspondence engaged in by the lawyer for the benefit of the client, and the investigative reports which have been paid for by the client. . . . However, the lawyer's work product is generally not considered the property of the client, and the lawyer has no ethical obligation to deliver his work product.").
- San Diego County LEO 1984-3 (1984) ("Upon withdrawal, an attorney is obligated to deliver to the client all papers and property to which the client is entitled. Accordingly, the attorney must provide the client with the original of all pleadings, correspondence, deposition transcripts, and similar papers and property contained in the client's file. Even with a consensually created possessory lien over the client's file, an attorney may not withhold the file if to do so would prejudice the client. Should the attorney desire to retain copies of such papers or property, any expenses incurred in producing those copies must be borne by the attorney."; "However, pursuant to statutory and decisional law, the client is not 'entitled' to any papers or property which constitute or reflect an attorney's impressions, opinions, legal research or theories as defined by the 'absolute' work product privilege of the Code of Civil Procedure section 2016, subdivision (b). Although disclosure of the

attorney's work product is not obligated, such disclosure is recommended as a matter of professional ethics and courtesy.").

(b) States differ in their approach to a lawyer's right to charge the former client for copying the file that the lawyer turns over to the former client.

The Restatement addresses a lawyer's right to charge the client for copying the file.

Because a lawyer's normal duties include collection and delivery of documents that came from the client or that the client should have, a lawyer paid by the hour should be compensated for time devoted to that task. Copying expenses may be separately billed when allowed under the principles stated in § 38(3)(a) and Comment e thereto. When the client seeks copies that the lawyer was not obliged to furnish in the absence of such a request, the lawyer may require the client to pay the copying costs.

Restatement (Third) of Law Governing Lawyers § 46 cmt. e (2000).

Courts also disagree about the lawyer's ability to bill the client for copies of the files that the client requests.

Some bars have explained that a lawyer can charge the client for such copies.

- Illinois LEO 94-14 (1/1995) ("All original papers delivered to the lawyer by the client must be returned to the client. The lawyer may make copies of such material, if desired, at the lawyer's expense. With respect to other parts of the lawyer's file to which the client is entitled to access, including copies of documents that the client has already received, the originals may be retained by the lawyer and the client should be permitted to have copies at the client's expense. Consistent with Opinion No. 94-13, the Committee does not believe that a lawyer is required to act as a storage facility for clients, and therefore the lawyer is entitled to compensation for the reasonable expense involved in retrieving the files in question and providing copies of materials that the client has already received. The lawyer is also entitled to compensation for the reasonable expense of providing copies of any materials, such as routine administrative correspondence with third parties, that the client may not have received because the lawyer had no duty to provide the client with copies of such materials in the normal course of the representation, but to which the client is entitled to access upon reasonable request.").

- Illinois LEO 94-13 (1/1995) (addressing the obligation of a lawyer to provide files to a former client; holding that the lawyer must provide "reasonable access" to correspondence between the lawyer and the client, but does not have to "recreate or provide new copies of correspondence previously provided the client unless the client is willing to compensate the lawyer for the reasonable expense involved"; also holding that the "Committee does not believe that Rule 1.4(a) requires a lawyer to provide clients with copies of routine administrative correspondence with third parties, such as correspondence with court reporters or other service providers. A client is entitled under Rule 1.4(a) to reasonable access to copies of correspondence that the client has already received as well as copies of routine administrative correspondence with third parties. However, the lawyer is not required to provide copies of such materials unless the client is willing to compensate the lawyer for the reasonable expense involved."; adopting the same approach to pleadings that have been filed in court or with administrative agencies; also holding that the "client is entitled under Rule 1.4(a) to reasonable access to copies of the final version (as distinguished from the lawyer's drafts or working copies) of such documents in the lawyer's files, but the Committee believes that a lawyer is not required to furnish a client with additional copies unless the client is willing to compensate the lawyer for the reasonable expense involved"; explaining that clients are not entitled to copies of "internal administrative materials" even for the lawyer's internal use; "A lawyer may refuse to disclose to the client certain law firm documents reasonably intended only for internal review, such as a memorandum discussing which lawyers in the firm should be assigned to a case, whether a lawyer must withdraw because of the client's misconduct, or the firm's possible malpractice liability to the client. The need for lawyers to be able to set down their thoughts privately in order to assure effective and appropriate representation warrants keeping such documents secret from the client involved." (quoting Restatement (Third) of the Law Governing Lawyers § 58 cmt. d); "[T]he Committee concludes that the better rule is that these materials are the property of the lawyer. As such, the materials generally need not be delivered to the client"; reaching essentially the same conclusion about a lawyer's research materials).
- Kansas LEO 92-5 (7/30/92) ("When counsel has been paid in full and discharged by client and no action is pending on the case file, we opine 'client's property' under MRPC 1.16(d) includes (1) documents brought to the attorney by the client or client's agents, (2) deposition or other discovery documents pertinent to the case for which client was billed and has paid for (expert witness opinions, etc.) and (3) pleadings and other court papers and such other documents as are necessary to understand [sic] and interpret documents highlighted above. Such documents, being 'client property' must be returned unconditionally and additional photocopy fees as part of an unconditional return of such documents are inconsistent with MRPC 1.16(d). Other documents requested by client not amounting to this definition of 'client

property' may be copied at a reasonable expense to the [sic] client, such 'expense' to represent actual costs, not a profit. Work product, as defined elsewhere in case law, is not client property under this rule.").

Other bars hold that lawyers must pay for such copies themselves.

- Ohio LEO 2010-2 (4/9/10) ("Any expense, such as copying costs, incurred by a lawyer in turning over a client's file to a client upon request must be borne by the lawyer."; relying on a unique Ohio Rule 1.16(d); "As part of the termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to protect a client's interest. The steps include giving due notice to the client, allowing reasonable time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules. Client papers and property shall be promptly delivered to the client. 'Client papers and property' may include correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert reports, and other items reasonably necessary to the client's representation."; explaining that "[i]n Ohio there is no common law lien on a client's files in a contingent fee case. . . . And, in Ohio there is no statutory lien on the client files. The legality of a lien is a question of law outside this Board's advisory authority."; noting that "[i]n Ohio, lawyers have violated Prof. Cond. Rule 1.16(d) (and other rules) by refusing to turnover [sic] client files to the client.").
- Pennsylvania LEO 1996-157 (11/20/96) ("There is a recognized exception to asserting a lien if the retention of the file would cause 'substantial prejudice' to your client. Under these circumstances, the requirement of Rule 1.16(d) would take precedence and you would be required to surrender the file to your client. 'Substantial prejudice' as contemplated by Opinion No. 94-35 means that prejudice to the client that is not permitted by the Rules. Rules 1.15(b) and 1.16(d) (first sentence); On the other hand, if retention of the file would merely result in 'prejudice' as that term is defined in Opinion No. 94-35, which would be prejudice which is tolerated by the Rules, the file would not have to be surrendered. Whether retaining a file would result in mere 'prejudice' or 'substantial prejudice' must be determined on a case by case basis."; "I should caution that there appears to be a trend in the law to favor a client's access to his file over an attorney's lien in certain circumstances. . . . Therefore, where a right to a retaining lien is arguable, and there is a doubt as to whether withholding the file would cause 'substantial prejudice' to a client, any doubt should be resolved in favor of relinquishment and the lawyer should consider returning the file without asserting a lien and subsequently bringing a civil action for recovery of the costs."; "However, the lawyer need not deliver his internal memos and notes which had been generated primarily for his own purposes in working on the client's problem."; "Consistent with the concept that the client is entitled to receive what he has paid for, it is my opinion that whatever documents you conclude are 'papers and property to



which the client is entitled,' that those original documents are your client's property and should be provided. I do not believe it would be appropriate to provide a 'copy' of the file at the client's expense. To the extent you wish to retain any portion of the file, the associated duplicating expense should be treated by you as 'a cost of doing business' and should not be billed to the client.").

- San Diego County LEO 1984-3 (1984) ("Upon withdrawal, an attorney is obligated to deliver to the client all papers and property to which the client is entitled. Accordingly, the attorney must provide the client with the original of all pleadings, correspondence, deposition transcripts, and similar papers and property contained in the client's file. Even with a consensually created possessory lien over the client's file, an attorney may not withhold the file if to do so would prejudice the client. Should the attorney desire to retain copies of such papers or property, any expenses incurred in producing those copies must be borne by the attorney."; "However, pursuant to statutory and decisional law, the client is not 'entitled' to any papers or property which constitute or reflect an attorney's impressions, opinions, legal research or theories as defined by the 'absolute' work product privilege of the Code of Civil Procedure section 2016, subdivision (b). Although disclosure of the attorney's work product is not obligated, such disclosure is recommended as a matter of professional ethics and courtesy.").

(c) One bar has indicated that lawyers may retain a copy of the client's file at the lawyer's expense -- even over the client's objection.

- New York LEO 780 (12/8/04) (assessing a lawyer's right to retain a copy of the client's file after termination of the attorney-client relationship; "Although the Code does not explicitly address the issue of whether the lawyer has an interest in the file that would permit the lawyer to retain copies of file documents, there can be little doubt that the lawyer has such an interest."; "In summary, we agree with the several ethics opinions from other jurisdictions that a lawyer may retain copies of the file at the lawyer's expense. This general rule may be subject to exceptions that we are not required to elaborate on in this opinion, such as where the client has a legal right to prevent others from copying its documents and wishes for legitimate reasons to ensure that no copies of a particular document be available under any circumstances." (footnote omitted); also holding that "[a] lawyer may generally retain copies of documents in the client's file at the lawyer's own expense, even over the client's objection. As a condition of foregoing this right, a lawyer may seek to have the client release the lawyer from malpractice liability.").

This principle could become important if the lawyer suspects that the client has used the lawyer's services to engage in some wrongdoing, and wants to retain a copy in case anyone challenges the lawyer's actions.

**Best Answer**

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

N 8/12 [I]

## **File Ownership if Clients Have Not Paid Lawyers ("Retaining Liens")**

### **Hypothetical 32**

You represented a local car dealer in a landlord-tenant dispute until she fired you. You probably should have seen this coming, because she did not pay the retainer she agreed to pay -- and actually has never paid any of her bills. Amazingly, the car dealer now wants the file that you created while representing her.

Must you give your former client the file you generated while representing her?

### **YES (PROBABLY)**

#### **Analysis**

Lawyers must sometimes determine what part of their files they must turn over to a client who has fully paid the lawyers' fees.

The issue becomes more complicated, and certainly more acute, if lawyers want to assert a lien over clients' files because the lawyers have not been paid. This is frequently called a "retaining lien." It differs from what many call a "charging lien," which lawyers may sometimes assert over a judgment or other client property other than clients' files.

#### **ABA Model Rules**

In dealing with the ethics side of this issue, the ABA Model Rules takes a surprisingly neutral and state-specific approach.

Upon termination of representative, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . surrendering papers and property to which the client is entitled . . . . The lawyer may retain papers relating to the client to the extent permitted by other law.

ABA Model Rule 1.16(d) (emphasis added).

## **Restatement**

The Restatement also deals with this issue -- in much more detail than the ABA Model Rules.

The Restatement requirement that the lawyer provides documents in the lawyer's possession is subject to the lawyer's right to

decline to deliver to a client or former client an original or copy of any document under circumstance permitted by § 43(1) [which deals with the lawyer's ability to retain documents until the lawyer is paid].

Restatement (Third) of Law Governing Lawyers § 46(4) (2000).

Another Restatement section discusses a lawyer's general right to obtain a security interest in any property that the client owns or might acquire (not just a file).

Unless otherwise provided by statute or rule, client and lawyer may agree that the lawyer shall have a security interest in property of the client recovered for the client through the lawyer's efforts, as follows: (a) the lawyer may contract in writing with the client for a lien on the proceeds of the representation to secure payment for the lawyer's services and disbursements in that matter; (b) the lien becomes binding on a third party when the party has notice of the lien; (c) the lien applies only to the amount of fees and disbursements claimed reasonably and in good faith for the lawyer's services performed in the representation; and (d) the lawyer may not unreasonably impede the speedy and inexpensive resolution of any dispute concerning those fees and disbursements or the lien.

Restatement (Third) of Law Governing Lawyers § 43(2) (2000).

A comment provides more explanation.

Retaining liens are therefore not recognized under this Section except as authorized by statute or rule and to the extent provided under Subsection (4). Under this Section, lawyers may secure fee payment through a consensual

charging lien on the proceeds of a representation . . . and through contractual security interests in other assets of the client . . . and other contractual arrangements such as a prepaid deposit. The lawyer may also withhold from the client documents prepared by the lawyer or at the lawyer's expense that have not been paid for . . . .

Restatement (Third) of Law Governing Lawyers § 43 cmt. b (2000).

Not surprisingly, the Restatement acknowledges tribunals' ability to deal with such liens.

A tribunal where an action is pending may in its discretion adjudicate any fee or other dispute concerning a lien asserted by a lawyer on property of a party to the action, provide for custody of the property, release all or part of the property to the client or lawyer, and grant such other relief as justice may require.

Restatement (Third) of Law Governing Lawyers § 43(3) (2000).

Another Restatement section deals with such a retaining lien covering the file.

Except as provided in Subsection (2) or by statute or rule, a lawyer does not acquire a lien entitling the lawyer to retain the client's property in the lawyer's possession in order to secure payment of the lawyer's fees and disbursements. A lawyer may decline to deliver to a client or former client an original or copy of document prepared by the lawyer or at the lawyer's expense if the client or former client has not paid all fees and disbursements due for the lawyer's work in preparing the document and nondelivery would not unreasonably harm the client or former client.

Restatement (Third) of Law Governing Lawyers § 43(1) (2000).

A comment explains how a lawyer's "retaining" lien applies to the file.

A lawyer ordinarily may not retain a client's property or documents against the client's wishes . . . . Nevertheless, under the decisional law of all but a few jurisdictions, a lawyer may refuse to return to a client all papers and other property of the client in the lawyer's possession until the lawyer's fee has been paid . . . . That law is not followed in

the Section; instead it adopts the law in what is currently the minority of jurisdictions.

While a broad retaining lien might protect the lawyer's legitimate interest in receiving compensation, drawbacks outweigh that advantage. The lawyer obtains payment by keeping from the client papers and property that the client entrusted to the lawyer in order to gain help. The use of the client's papers against the client is in tension with the fiduciary responsibilities of lawyers. A broad retaining lien could impose pressure on a client disproportionate to the size or validity of the lawyer's fee claim. The lawyer also can arrange other ways of securing the fee, such as payment in advance or a specific contract with the client providing security for the fee under Subsection (4). Because it is normally unpredictable at the start of a representation what client property will be in the lawyer's hands if a fee dispute arises, a retaining lien would give little advance assurance of payment. Thus, recognizing such a lien would not significantly help financially unreliable clients secure counsel. Moreover, the leverage of such a lien exacerbates the difficulties that clients often have in suing over fee charges . . . . Efforts in some jurisdictions to prevent abuse of retaining liens demonstrate their undesirability. Some authorities prohibit a lien on papers needed to defend against a criminal prosecution, for example. However[,] the very point of a retaining lien, if accepted at all, is to coerce payment by withholding papers the client needs.

Retaining liens are therefore not recognized under this Section except as authorized by statute or rule and to the extent provided under Subsection (4). Under this Section, lawyers may secure fee payment through a consensual charging lien on the proceeds of a representation . . . and through contractual security interests in other assets of the client . . . and other contractual arrangements such as a prepaid deposit. The lawyer may also withhold from the client documents prepared by the lawyer or at the lawyer's expense that have not been paid for.

Restatement (Third) of Law Governing Lawyers § 43 cmt. b (2000).

The next comment deals with a lawyer's right to retain particular documents that the client has not specifically paid for.

A client who fails to pay for the lawyer's work in preparing particular documents (or in having them prepared at the lawyer's expense, for example by a retained expert) ordinarily is not entitled to receive those documents. Whether a payment was due and whether it was for such a document depend on the contract between the client and the lawyer, as construed from the standpoint of a reasonable client . . . .

Restatement (Third) of Law Governing Lawyers § 43 cmt. c (2000).

The Restatement provides two useful illustrations of how this principle works.

Client retains Lawyer to prepare a series of memoranda for an agreed compensation of \$100 per hour. Lawyer is to send bills every month. Client pays the first two bills and then stops paying. After five months, Client requests copies of all memoranda. Lawyer must deliver all memoranda prepared during the first two months, but need not deliver those thereafter prepared until Client makes the payments.

Restatement (Third) of Law Governing Lawyers § 43 cmt. c, illus. 1 (2000).

The same facts as in Illustration 1, except that Client and Lawyer have agreed that Lawyer is to send bills every six months. After five months, Client requests copies of all the memoranda. Lawyer must deliver them all, because Client has not failed to pay any due bill. Had Client stated in advance that it would not pay the bill, the doctrine of anticipatory breach might allow Lawyer not to deliver.

Restatement (Third) of Law Governing Lawyers § 43 cmt. c, illus. 2 (2000).

The Restatement explains that lawyers may not enforce this right if it would "unreasonably harm the client."

A lawyer may not retain unpaid-for documents when doing so will unreasonably harm the client. During a representation, nonpayment of a fee might justify the lawyer in withdrawing . . . , but a lawyer who does not withdraw must continue to represent the client diligently . . . . A lawyer who has not been paid a fee due may normally retain those documents embodying the lawyer's work . . . . Even then, a tribunal is empowered to order production when the client has urgent need. A lawyer must record or deliver to a client

for recording an executed operative document, such as a decree or deed, even though the client has not paid for it, when the operative effect of the document would be seriously compromised by the lawyer's retention of it.

Restatement (Third) of Law Governing Lawyers § 43 cmt. c (2000).

### **State Courts and Bars**

Some courts and bars cling to the traditional approach -- essentially allowing lawyers to retain documents until the client fully pays the lawyers' bills.

- Grimes v. Crockrom, 947 N.E.2d 452, 454-55 (Ind. Ct. App. 2011) (holding that a lawyer could assert a retaining lien even if the lawyer did not provide a detailed record of the lawyer's work to the client; "A common law retaining lien on records in the possession of an attorney arises on rendition of services by the attorney. . . . Crockrom does not direct us in any legal authority tying the validity of a retaining lien to the provision of an itemized bill to the client. Indeed, a retaining lien is complete and effective without notice to anyone. . . . And the reasonableness of a fee, as reflected by an attorney's lien, is irrelevant to the determination of whether the lien has been established. . . . We hold that Grimes has a valid retaining lien over the medical records.") (emphasis added).
- SEC v. Ryan, 747 F. Supp. 2d 355, 361, 369 (N.D.N.Y. 2010) (analyzing a situation in which a law firm represented an individual and an LLC; concluding that the LLC's receiver became a client when the LLC declared bankruptcy; concluding that the law firm jointly represented the individual and the LLC; "On the other hand, every attorney has a common-law retaining lien upon the books and records in his possession and such lien exists independently of the rights created by statute."; "As a general proposition, before a lawyer is required to surrender the files, which are subject to this lien, to either the client or a substituted attorney, the outstanding legal fees must be paid or adequate security for the payment must be posted.") (emphasis added).
- Brickell Place Condo Ass'n v. Joseph H. Ganguzza & Assocs., P.A., 31 So. 3d 287, 289, 290 (Fla. Dist. Ct. App. 2010) (holding that a lawyer who had arranged to charge an condominium association a flat fee for collection and foreclosure matters was bound by the ethics rules governing contingent fees, because the law firm was not paid until collection; ultimately holding that the law firm could not refuse to turn over its files until the contingency had occurred; "[T]he law firm filed a retaining lien and refused to provide the Associations with a copy of their files unless the Associations paid the law firm for its services on the pending collection and foreclosure cases even though the delinquent unit owners had not brought their accounts current.");



- "The Associations, therefore, claimed that the law firm[] could only recover the reasonable value for its services, limited by the maximum contract fee, upon the successful occurrence of the contingency. Because the contingency upon which the services were based has not yet occurred (the collection of the delinquent unit owners' fees), the law firm is not yet entitled to be paid for its services and the retaining lien filed by the law firm cannot be legally or ethically maintained. We agree."; "It is well recognized, and the Associations do not dispute, that an attorney may file and maintain a retaining lien against a client or former client's legal files until the lawyer's fees have been paid or an adequate security for payment has been posted." (emphasis added); "American courts, with few exceptions, have held that in cases where the client, not the attorney, terminates the relationship, the client cannot compel his former attorney to deliver up papers or documents in the attorney's possession that are secured by a retaining lien. Wintter, 618 So. 2d at 377 [Wintter v. Fabber, 618 So. 2d 375 (Fla. Dist. Ct. App. 1993)]. The exceptions are where the client pays the fees due; the client furnishes adequate security for the payment which may be due or which is subsequently found to be due; there is a clear necessity in a criminal case and a defendant cannot post security; or a lawyer's misconduct caused his withdrawal. . . . An additional exception is in contingency fee cases where the contingency has not occurred."; "An attorney or law firm may not assert a retaining lien for fees allegedly owed in a contingent fee case unless and until the contingency has occurred. Because the contingency has not occurred, the law firm could not assert a retaining lien for fees it contends it is owed on collection matters that were still pending when it was discharged. If the law firm believes it is owed money for services it rendered in the collection of delinquent unit owner fees, it may file a charging lien and is entitled to the reasonable value of its services on the basis of quantum meruit, limited by the contract flat fee the parties agreed to." (emphasis added).
- Johnson v. Cherry, 256 F. App'x 1, 4-5, 5 (7th Cir. 2007) (unpublished opinion) (holding that a lawyer had not forfeited her right to a quantum meruit recovery, although the lawyer had asserted a retaining lien and failed to turn over the files to the client or her replacement lawyer; noting that the client had not pointed to any particular documents in the file that were necessary or unavailable from other sources; "But there is no actual evidence in the record before us that supports these assertions. Green [client's new lawyer] has never identified, for example, what documents he needed from the file in Clinite's [discharged lawyer] custody that were not available from other sources: e.g., from the public court file, from the court reporter(s) who recorded the depositions that were taken in this case, or from the defendants' attorneys. In that regard, Clinite made two noteworthy representations at the fees hearing below that have never been contradicted. First, Clinite stated that Johnson [client] and her counsel had obtained copies of all of the discovery from defendants' counsel, and that Johnson herself retained the original copies of any documentary evidence she had provided to Clinite.";

concluding that there was no showing that the withheld documents "were essential to Green's ability to resolve the case on terms favorable to Johnson"; reversing and remanding directions to award the discharged lawyer "fees in the amount of \$3,333 and costs in the amount of \$786.93").

Although courts and bars taking this traditional approach might provide some comfort to lawyers who want to withhold the file, those lawyers must also bear in mind the possible liability issues. A client claiming some prejudice due to the lawyer's withholding the file might file a malpractice claim against the lawyer, or file a malpractice counterclaim if the lawyer sues the former client for payment of the lawyer's bills. Withholding of the file might not violate the ethics rules, but it could support a malpractice claim or counterclaim, and at the least affect the "atmospherics" of the dispute over the lawyer's fees. In fact, those other issues normally "trump" the ethics consideration, and prompt lawyers to turn over the file even if the ethics rules do not require it.

Those courts and bars which have moved away from the traditional "auto mechanic" approach to a retaining lien sometimes articulate standards under which the client can obtain the file without paying for it. These standards represent a spectrum of the type of prejudice the client must claim before the lawyer becomes ethically obligated to turn over the file even if the client has not paid his bills.

Bars and courts have articulated the following standards.

### **Substantial Prejudice**

- Pennsylvania LEO 1996-157 (11/20/96) ("There is a recognized exception to asserting a lien if the retention of the file would cause 'substantial prejudice' to your client. Under these circumstances, the requirement of Rule 1.16(d) would take precedence and you would be required to surrender the file to your client. 'Substantial prejudice' as contemplated by Opinion No. 94-35 means that prejudice to the client that is not permitted by the Rules. Rules 1.15(b) and 1.16(d) (first sentence); On the other hand, if retention of the file

would merely result in 'prejudice' as that term is defined in Opinion No. 94-35, which would be prejudice which is tolerated by the Rules, the file would not have to be surrendered. Whether retaining a file would result in mere 'prejudice' or 'substantial prejudice' must be determined on a case by case basis."; "I should caution that there appears to be a trend in the law to favor a client's access to his file over an attorney's lien in certain circumstances. . . . Therefore, where a right to a retaining lien is arguable, and there is a doubt as to whether withholding the file would cause 'substantial prejudice' to a client, any doubt should be resolved in favor of relinquishment and the lawyer should consider returning the file without asserting a lien and subsequently bringing a civil action for recovery of the costs."; "However, the lawyer need not deliver his internal memos and notes which had been generated primarily for his own purposes in working on the client's problem."; "Consistent with the concept that the client is entitled to receive what he has paid for, it is my opinion that whatever documents you conclude are 'papers and property to which the client is entitled,' that those original documents are your client's property and should be provided. I do not believe it would be appropriate to provide a 'copy' of the file at the client's expense. To the extent you wish to retain any portion of the file, the associated duplicating expense should be treated by you as 'a cost of doing business' and should not be billed to the client.") (emphasis added).

- Pennsylvania LEO 94-35 (5/12/94) ("Except as provided herein, the Committee concludes that where the client has not paid for services rendered, the lawyer may retain papers and other things of the client relating to the unpaid services. No law prohibits the retention of such papers and things. Except as provided herein, it is the opinion of the Committee that a client is not entitled to papers and things in a pending matter where all fees have not been paid to the lawyer. The exception to the rule is that where retention of such papers and things would cause substantial prejudice to the client, then the lawyer must return the papers and things to the client. The Committee further concludes that where the lawyer has retained papers or other property for the convenience of the client and where the client has paid for the services relating to those papers or property, then the lawyer is obligated to return such property to the client promptly upon demand. For example, where a lawyer prepares a will and is paid for that service and, subsequently, a dispute arises regarding another matter, the lawyer cannot withhold the will from the client. The client is entitled to papers and property for which he or she has paid and such papers and property must be surrendered promptly to the client. In contingency matters, the lien may not be asserted until after the happening of the contingency. If the contingency has not occurred, then the attorney may not assert the lien and must return to the client anything in the lawyer's possession that is the property of the client. Additionally, in contingency matters, if retention of certain things that are not necessarily property of the client, such as exhibits or evidence, would cause substantial prejudice to the client (as in the case where a matter is ready to

go to trial or where a facet of the litigation requires the use of those things), then the lawyer must make such things available to the client. In certain circumstances, where a lawyer's right to a lien is arguable, a lawyer should not withhold client papers or other property, even though the lawyer, arguably, has a right to retain such property. Rule 1.16(d) makes it clear that, where withholding such property would cause substantial prejudice [sic] the client, then the lawyer may not assert a lien against that property and papers. In these circumstances, it is recommended that even where fees are owed to a lawyer, the lawyer consider returning to clients papers and other property and subsequently to bring suit for the recovery of such fees. The lawyer may contemplate the possibility of such an action in a retainer letter. Actions on a contract or in quantum meruit against the former client to recover the value of the services should be considered as an alternative to assertion of the lien."); Minnesota LEO 13 (6/15/89) ("A lawyer may not condition the return of client files, papers and property on payment of copying costs. Nor may the lawyer condition return of client files, papers or property upon payment of the lawyer's fee. . . . A lawyer may withhold documents not constituting client files, papers and property until the outstanding fee is paid unless the client's interests will be substantially prejudiced without the documents. Such circumstances shall include, but not necessarily be limited to, expiration of a statute of limitations or some other litigation imposed deadline. A lawyer who withholds documents not constituting client files, papers or property for nonpayment of fees may not assert a claim against the client for the fees incurred in preparing or creating the withheld document(s).") (emphasis added) (emphasis added).

### **Prejudice**

- Arizona LEO 04-01 (1/2004) ("The inquiring attorney's assertion of a retaining lien on the entire file is improper. Because the inquiring attorney's asserted retaining lien does not extend to materials given to inquiring attorney for use at trial, it is unethical to assert a lien as to such materials. As to the remaining items in the file against which the inquiring attorney desires to assert a lien, the inquiring attorney bears the burden of establishing that his lien attaches to identified items in the file based on a particularized inquiry into the circumstances, and the requirements of Arizona law. No lien can attach to documents when the attachment would prejudice the client's rights. The limited facts provided by the inquiring attorney do not establish that he is entitled to a lien on the documents in the file. Therefore, he should assert no lien on the documents, and should promptly return or provide to the client the documents on which he has no lien claim. Not only do the plain terms of ER 1.16 compel the documents' return upon the client's request, so do the requirements of ER 1.15(d), which states '[A] lawyer shall promptly deliver to the client or third person any . . . other property that the client . . . is entitled to receive and, upon request by the client . . ., shall promptly render a full accounting regarding such property." (emphasis added).

- San Diego County LEO 1984-3 (1984) ("Upon withdrawal, an attorney is obligated to deliver to the client all papers and property to which the client is entitled. Accordingly, the attorney must provide the client with the original of all pleadings, correspondence, deposition transcripts, and similar papers and property contained in the client's file. Even with a consensually created possessory lien over the client's file, an attorney may not withhold the file if to do so would prejudice the client. Should the attorney desire to retain copies of such papers or property, any expenses incurred in producing those copies must be borne by the attorney."; "However, pursuant to statutory and decisional law, the client is not 'entitled' to any papers or property which constitute or reflect an attorney's impressions, opinions, legal research or theories as defined by the 'absolute' work product privilege of the Code of Civil Procedure section 2016, subdivision (b). Although disclosure of the attorney's work product is not obligated, such disclosure is recommended as a matter of professional ethics and courtesy.") (emphasis added).

### Harm

- Mississippi LEO 144 (3/11/88) ("The right of a lawyer to withhold or retain a client's file to secure payment of the fee is a matter of law. However, ethically, a lawyer may not retain a client's file in a pending matter if it would harm the client or the client's cause. The ownership of specific items in a client's file is a matter of law. However, ethically, the lawyer should turn over to a client all papers and property of the client which were delivered to the lawyer, the end product of the lawyer's work, and any investigative reports paid for by the client. The lawyer is under no ethical obligations to turn over his work product to the client."; "This committee concludes that the better-reasoned opinions generally recognize that to the extent the client has a right to his file, then his file consists of the papers and property delivered by him to the lawyer, the pleadings or other end product developed by the lawyer, the correspondence engaged in by the lawyer for the benefit of the client, and the investigative reports which have been paid for by the client. . . . However, the lawyer's work product is generally not considered the property of the client, and the lawyer has no ethical obligation to deliver his work product.") (emphasis added).

At least one bar has defined the standard in a different way -- requiring a lawyer to turn over the file if withholding it would deprive the client of "essential" documents.

- Alaska LEO 2004-1 (1/15/04) ("In summary, an expert or investigator's report is part of the client's file. . . . A lawyer may not withhold such reports to serve the lawyer's own interest in getting paid or reimbursed for the cost of the report if it will prejudice the client. Whether or not the client has paid for the report, the client's interests must be paramount. The lawyer's right to

reimbursement for the expert's fee must give way to the client's needs if the material is essential to the client's case." (footnote omitted).

At the other extreme, some states explicitly indicate that lawyers may not retain files until the lawyer has been paid.

- Virginia Rule 1.16(e) (requiring Virginia lawyers to turn over certain portions of their file to clients "whether or not the client has paid the fees and costs owed the lawyer").
- District of Columbia Rule 1.8(i) ("A lawyer may acquire and enforce a lien granted by law to secure the lawyer's fees or expenses, but a lawyer shall not impose a lien upon any part of a client's files, except upon the lawyer's own work product, and then only to the extent that the work product has not been paid for. This work product exception shall not apply when the client has become unable to pay, or when withholding the lawyer's work product would present a significant risk to the client of irreparable harm.").
- **[e2 547 b 6/13]** Mary Pat Gallagher, New Jersey Erects Ethical Bar to Common-Law Liens on Client Files, N.J. L.J., Mar. 26, 2013 ("As of April 1, lawyers no longer will be able to hold onto client files and papers to collect fees. An amendment to Rule of Professional Conduct (RPC) 1.16(d), effective that date, states flatly, 'No lawyer shall assert the common law retaining lien.'").
- North Carolina LEO 2006-18 (1/19/07).

Some states have adopted specific proceedings for asserting such retaining liens.

- **[e1 178 n 10/12]** Alaska LEO 2012-1 (1/27/12) (holding that Alaska law did not allow a lawyer's recording of a lien for attorney's fee; "Recording a lien for attorneys' fees pursuant to AS 34.35.430 violates Alaska Rules of Professional Conduct 1.5, 1.8 and 1.16."; "Alaska Statute 34.35.430 sets out the procedure for asserting an attorney lien for fees against client papers or money in possession of the lawyer or an adverse party. Unlike other lien statutes of Chapter 35, AS 34.35.430 does not reference recording. One court has specifically held that AS 34.35.430 does not authorize the recording of an attorney lien."; "If an attorney wishes the security of a recordable lien on real property, the attorney has the ability to do so notwithstanding this opinion. The attorney can reduce the fees claimed in the lien to judgment with the final judgment being recorded. Because this procedure requires that the client be advised of the fee arbitration procedure and accords the client a

full opportunity to respond to the fee claim, this is the appropriate procedure to accomplish this goal.").

**Best Answer**

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

N 8/12 [I], B 10/15

## Nonlawyers (Such as Bank Employees)

### Hypothetical 33

Although you are not a lawyer, you help your employer bank wrestle with thorny fiduciary issues.

- (a) May you prepare a form book of legal documents that the bank can use?

YES

- (b) May you prepare a power of attorney for one of the bank's customers?

MAYBE

### Analysis

Because anyone can represent himself or herself (even in court), it can be difficult to determine what nonlawyer company employees can do when assisting their employer.

To the extent that a company is essentially representing itself, there should be no limits. However, a nonlawyer company employee assisting a company in handling legal matters is not actually representing himself or herself -- but instead representing a third party (the company).

(a) Most states' UPL statutes and regulations permit nonlawyers to prepare legal documents for their corporate employers.

In a sense, these states consider the corporations to simply be representing themselves. The Restatement explains this widespread (and acceptable) practice.

A limitation on pro se representation . . . found in many jurisdictions is that a corporation cannot represent itself in litigation and must accordingly always be represented by counsel. The rule applies, apparently, only to appearances



in litigated matters. Thus a nonlawyer officer of a corporation may permissibly draft legal documents, negotiate complex transactions, and perform other tasks for the employing organization, even if the task is typically performed by lawyers for organizations.

Restatement (Third) of Law Governing Lawyers § 4 cmt. e (2000) (emphasis added).<sup>1</sup>

In these situations, the corporation is essentially representing itself in preparing documents, analyzing issues, etc. However, that fiction is fairly transparent. The employee preparing a legal document for her corporate employer is not acting on her own behalf. In fact, the employee performing the same services for her neighbor would be committing the unauthorized practice of law -- a crime in most states.

However, public policy reasons underlie courts' and bars' forgiving approach to this situation. A corporate employee providing legal services to her own employer does not generally harm the public. The employer usually can take care of itself if the employee does a bad job, and can discipline employees for misconduct or sloppiness.

The much more difficult situation involves corporate employees' similar activities on behalf of companies or individuals other than their employers.

**(b)** Most, if not all, states prohibit nonlawyer company employees from preparing documents for third parties. However, some company employees clearly assist customers.

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<sup>1</sup> See, e.g., Va. UPR 6-103(A)(2) ("A regular employee may prepare legal instruments for use by his employer for which no separate charge shall be made. However, such employee may not assist his employer in the unauthorized practice of law."); see also Va. UPC 6-5 ("An individual, if he chooses to do so, may draw or attempt to draw legal instruments for himself or affecting his property. A corporation acting through its employees may do the same with respect to its own property."); Va. UPR 6-101(A) ("A non-lawyer shall not undertake for compensation, direct or indirect, to advise another in any matter involving the application of legal principles to the ownership, use, disposition or encumbrance of real estate, except that, incident to his investigation of factual matters, he may give advice to his regular employer, other than in aid of his employer's unauthorized practice of law, or to a lawyer upon request by the lawyer therefor.").

Controversy has surrounded many out-of-court activities such as advising on estate planning by bank trust officers, advising on estate planning by insurance agents, stock brokers, or benefit-plan and similar consultants, filling out or providing guidance on forms for property transactions by real-estate agents, title companies, and closing-service companies, and selling books or individual forms containing instructions on self-help legal services or accompanied by personal, nonlawyer assistance on filling them out in connection with legal procedures such as obtaining a marriage dissolution. The position of bar associations has traditionally been that nonlawyer provision of such services denies the person served the benefit of such legal measures as the attorney-client privilege, the benefits of such extraordinary duties as that of confidentiality of client information and the protection against conflicts of interest, and the protection of such measures as those regulating lawyer trust accounts and requiring lawyers to supervise nonlawyer personnel. Several jurisdiction recognize that many such services can be provided by nonlawyers without significant risk of incompetent service, that actual experience in several states with extensive nonlawyer provision of traditional legal services indicates no significant risk of harm to consumers of such services, that persons in need of legal services may be significantly aided in obtaining assistance at a much lower price than would be entailed by segregating out a portion of a transaction to be handled by a lawyer for a fee, and that many persons can ill afford, and most persons are at least inconvenienced by, the typically higher cost of lawyer services. In addition, traditional common-law and statutory consumer-protection measures offer significant protection to consumers of such nonlawyer services.

Restatement (Third) of Law Governing Lawyers § 4 cmt. c (2000) (emphasis added).<sup>2</sup>

The reporter's note explains the trend in favor of allowing such practices.

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<sup>2</sup> In re Dissolving Comm'n on Unauthorized Practice of Law, 242 P.3d 1282, 1283 (Mont. 2010) (dissolving the state bar's commission on the unauthorized practice of law, and explaining that the Attorney General will now handle any UPL matters; "[W]e conclude that the array of persons and institutions that provide legal or legally-related services to members of the public are, literally, too numerous to list. To name but a very few, by way of example, these include bankers, realtors, vehicle sales and finance persons, mortgage companies, stock brokers, financial planners, insurance agents, health care providers, and accountants. Within the broad definition of § 37-61-201, MCA, it may be that some of these professions and businesses 'practice law' in one fashion or another in, for example, filling out legal forms, giving advice about 'what this or that means' in a form or contract, in estate and

Courts are often divided over whether a particular area of nonlawyer practice is unauthorized, for example in the situation of banks, real estate agents, or similar nonlawyers filling in blanks in standard contract forms as a part of transactions in which they are otherwise involved, although in recent years courts have shown a pronounced inclination to hold that a particular activity by nonlawyers is in public interest and thus justified.

Restatement (Third) of Law Governing Lawyers § 4 reporter's note cmt. c (2000).

However, there are limits to this approach.

Under traditional concepts of unauthorized practice, a lawyer employed by an organization may provide legal services only to the organization as an entity with respect to its own interests and not, for example, to customers of the entity with respect to their own legal matters.

Restatement (Third) of Law Governing Lawyers § 4 cmt. e (2000).

### **Best Answer**

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

N 8/12 [S,T]

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retirement planning, in obtaining informed consent, in buying and selling property, and in giving tax advice. Federal and state administrative agencies regulate many of these professions and businesses via rules and regulations; federal and state consumer protection laws and other statutory schemes may be implicated in the activities of these professions and fields; and individuals and non-human entities may be liable in actions in law and in equity for their conduct. Furthermore, what constitutes the practice of law, not to mention what practice is authorized and what is unauthorized is, by no means, clearly defined. Finally, we are also mindful of the movement towards nationalization and globalization of the practice of law, and with the action taken by federal authorities against state attempts to localize, monopolize, regulate, or restrict the interstate and international provision of legal services.").

## Assisting UPL Violations

### Hypothetical 34

As a recent law school graduate, you have had quite a bit of trouble finding work. You just received an offer to earn a fairly good salary from a company that assists people in their trust and estate planning. The company employs nonlawyer sales representatives to meet with customers and discuss their estate planning needs. These sales representatives fill out forms, which you then use to communicate with the company's main office in California -- which prepares the estate planning documents that the customers require. You also send the customers a letter describing your role, and sometimes communicate by telephone with the customers if they have any questions. You review the estate planning documents prepared by the California home office before giving them to the company sales representatives who present them to the customers for signature.

Does your prospective employer's process violate any UPL laws?

**YES (PROBABLY)**

### Analysis

Lawyers who are not licensed in a state cannot practice law in that state, because doing so would violate the unauthorized practice of law statutes and regulations in that state.

In addition to such a primary violation of the UPL laws, lawyers can also face liability (or worse) for assisting nonlawyers in the unauthorized practice of law.

This hypothetical deals with this secondary type of exposure -- facing lawyers who assist those without a law degree in practicing law.

Licensed lawyers can run afoul of a state's unauthorized practice of law principles in three ways.

First, lawyers can improperly assist a nonlawyer in committing the unauthorized practice of law.<sup>1</sup> The Restatement articulates this principle.

A person not admitted to practice as a lawyer . . . may not engage in the unauthorized practice of law, and a lawyer may not assist a person to do so.

Restatement (Third) of Law Governing Lawyers § 4 (2000).<sup>2</sup> A comment provides some guidance.

The lawyer codes have traditionally prohibited lawyers from assisting nonlawyers in activities that constitute the unauthorized practice of law. That prohibition is stated in the Section. The limitation supplements requirements that lawyers provide adequate supervision to nonlawyer employees and agents . . . . By the same token, it has prevented lawyers from sponsoring non-law-firm enterprises in which legal services are provided mainly or entirely by nonlawyers and in which the lawyer gains the profits.

Restatement (Third) of Law Governing Lawyers § 4 cmt. f (2000).

Second, lawyers can engage in activities constituting the practice of law in states where they are not licensed or otherwise permitted to practice law. This involves what

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<sup>1</sup> In re Panel Case No. 23236, 728 N.W.2d 254 (Minn. 2007) (issuing a private reprimand of a lawyer who discovered that a lawyer under his supervision had not been authorized to practice law due to a failure to comply with CLE requirements; noting that the lawyer immediately changed the law firm's website information about the suspended lawyer, and restricted the suspended lawyer to work that could be performed by a non-lawyer; explaining that a law firm client (a governmental entity) inquired about the website change, but that the lawyer did not inform the client that the suspended lawyer had performed work for that client for over two years; explaining that the law firm eliminated the suspended lawyer's time from pending bills sent to the government client, and refunded all fees paid to the law firm based on the suspended lawyer's work during the time he should not have been practicing law; noting that the government client nevertheless filed an ethics charge; holding that the lawyer had violated the ethics rules by not advising clients of all material facts).

<sup>2</sup> Restatement (Third) of Law Governing Lawyers § 5 (2000) ("(1) A lawyer is subject to professional discipline for violating any provision of an applicable lawyer code. (2) A lawyer is also subject to professional discipline under Subsection (1) for attempting to commit a violation, knowingly assisting or inducing another to do so, or knowingly doing so through the acts of another.").

is called "multijurisdictional practice" -- lawyers engaging in activities outside the states where they are licensed.<sup>3</sup>

Third, a lawyer can improperly assist out-of-state lawyers in committing the unauthorized practice of law in states where those lawyers are not licensed.<sup>4</sup>

This hypothetical deals with the first type of violation -- assisting nonlawyers in practicing law.

This hypothetical comes from a 2009 Ohio case, in which a court imposed over \$6 million in penalties against two companies engaged in the described process.

- Columbus Bar Ass'n v. Am. Family Prepaid Legal Corp., 916 N.E.2d 784, 786, 796, 796-97, 797 (Ohio 2009) (imposing over \$6,000,000 in penalties against two companies who advertised in Ohio for customers seeking wills, trusts and other estate planning tools, despite the involvement of lawyers in preparing the documents; "[W]e have repeatedly held that these enterprises, in which the laypersons associated with licensed practitioners in various minimally distinguishable ways as a means to superficially legitimize sales of living-trust packages, are engaged in the unauthorized practice of law. We have also repeatedly held that by facilitating such sales, licensed lawyers violate professional standards of competence and ethics, including the prohibition against aiding others in the unauthorized practice of law. Today, we reaffirm these holdings and admonish those tempted to profit by such schemes that these enterprises are unacceptable in any configuration." (emphasis added); "Here, American Family's sales agents, in the guise of

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<sup>3</sup> The ABA Model Rules contain a fairly basic prohibition:

A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

ABA Model Rule 5.5(a). A comment provides an explanation.

A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person.

ABA Model Rule 5.5 cmt. [1].

<sup>4</sup> Id.

selling prepaid legal plans, advised prospects on the benefits of its estate-planning tools. After signing up the prospect, the agents obtained sensitive financial information from the customer and delivered the agreement and the information to the Ohio office. The resident attorney (a virtual captive of American Family) sent a letter to the customer and the customer's information to the California home office for document preparation. The resident attorney rarely, if ever, communicated with the customer; if he did, he communicated by telephone. (emphasis added); "The California office prepared the documents and returned them to the Ohio office for delivery to the customers. The resident attorney spent little time reviewing the documents. Without any personal contact with the customer, the attorney could not possibly have given the customer the individualized legal advice that it was his professional and ethical duty to give. He could not determine whether the estate-planning products suited the customers, and he could not determine whether the customer was competent to enter into the estate-planning arrangements." (emphasis added); "The attorney left it to Heritage's insurance agents to explain the documents as they secured the signatures of the customers. These agents had no incentive to deliver the documents other than to solicit additional insurance business from the customer, which provided the agent with the only compensation he would receive in the transaction. The agent's objective was to obtain the signatures through whatever means he could, including pressure tactics, so he could then sell annuities."; "All of the foregoing establishes by a preponderance of the evidence that respondents engaged in the unauthorized practice of law.").

Other courts have reached the same conclusion about similar arrangements.

- State ex rel. Indiana State Bar Ass'n v. United Fin. Sys. Corp., 926 N.E.2d 8, 12, 13, 14 (Ind. 2010) (finding that an insurance marketing agency had engaged in the unauthorized practice of law because its marketing process did not sufficiently involve a lawyer in a preparation of documents; explaining the insurance marketing agency's way of doing business; "Once a sale was made, the Estate Planning Assistant or Health Planning Assistant secured full or partial payment from the client on the spot. The forms containing the client's personal and financial information were routed to UFSC's in-house counsel, David McInerney, who then provided the information to one of the panel attorneys with whom UFSC has contracted. The estate plans sold by UFSC throughout the country were all processed in Indianapolis and routed to panel attorneys in Indiana and other states to draft documents for the plans." (footnote omitted); "Upon receiving a client's information, the panel attorney called the client, knowing the client had already paid for a certain estate plan. . . . UFSC insists that the panel attorneys had the freedom to exercise their own independent judgment in ensuring that the client had an estate plan suitable for his or her interests. Notably though, of the 1,306 estate plans sold in Indiana from October 2006 to May 2009, only nine of these clients downgraded to a less expensive plan following consultation with

a panel attorney. Further, because a panel attorney was paid a flat fee of only \$225 for drafting the estate planning documents, any consultation between the panel attorney and the client above and beyond the initial phone call generally was not financially feasible. (emphasis added); "The documents prepared by the panel attorney were then sent back to UFSC and bound. A Financial Planning Assistant was paid \$75 to deliver the documents and assist the client in executing them."; explaining the minimal involvement of a lawyer in the process; "Several panel attorneys utilized standardized estate planning documents and forms that had been prepared and provided by UFSC, and the letters sent by the panel attorneys to the Financial Planning Assistants regarding the execution of the estate planning instruments also were prepared by UFSC. . . . Explanation to the client of the relevance and purposes of the documents being executed typically was delegated to the Financial Planning Assistants." (footnote omitted; emphasis added); holding that "[a]lthough it is the province of this Court to determine what acts constitute the practice of law, we have not attempted to provide a comprehensive definition because of the infinite variety of fact situations. . . . Nor do we attempt to do so today."; but enjoining the respondents from engaging in the practice described above, and also ordering them to pay attorneys' fees).

- New Jersey LEO 716 (and UPL Op. 45) (6/26/09) (generally condemning New Jersey lawyers' involvement with loan modification companies; "The inquiries presented to the hotline generally involve three scenarios. In the first scenario, a for-profit loan modification company approaches homeowners directly and indicates that it is working with an attorney. The homeowner either: (1) pays one fee to the company, a portion of which the company pays over to the attorney; (2) pays one fee to the attorney named by the company, a portion of which the attorney pays over to the company; or (3) pays separate fees to the company and to the attorney."; finding the first scenario improper; "[A] New Jersey attorney is prohibited from paying monies to a for-profit loan modification company that farms legal work to the attorney or recommends the attorney's services."; explaining in more detail the second scenario; "In the second scenario, the attorney works as in-house counsel to the for-profit loan modification company and provides legal services to the company's customers. A variation of this scenario is an attorney formally affiliating or partnering with the [loan modification] company or being separately retained by the company to re-negotiate loans with its customers' lenders. In each of these situations, the loan modification company approaches homeowners directly and solicits the work."; finding this scenario improper; "A New Jersey attorney may not provide legal advice to customers of a for-profit loan modification company, whether the attorney be considered in-house counsel to the company, formally affiliated or in partnership with the company, or separately retained by the company."; providing more detail about the third scenario; "In the third scenario, the attorney or law firm brings a financial or mortgage analyst in-house or



contracts with an analyst, who processes the homeowner's paperwork and may take initial steps in renegotiating the loan under the supervision of the attorney. The attorney or law firm solicits the work in accordance with the attorney advertising rules and the homeowners approach and retain the attorney directly."; finding this scenario acceptable under certain circumstances; "A New Jersey attorney may use an in-firm financial or mortgage analyst or contract with an analyst in the course of providing loan or mortgage modification services for homeowners who have directly retained the law firm. Just as an attorney may contract with a certified public accountant or other person with specialized knowledge to assist the attorney in the provision of legal services, an attorney may use, either within the firm or as a contractor, a financial or mortgage analyst to assist in mortgage modification work. The attorney is responsible for and must supervise the work performed by the analyst employee or contractor. The client homeowner must retain the attorney directly and the solicitation of the homeowner for mortgage modification services must be done by the law firm in accordance with the attorney advertising rules. The compensation paid for services by an analyst must, however, not be improper fee-sharing."; "[W]hile an attorney may hire a financial or mortgage analyst as employee or contract consultant, payments for the work cannot directly or indirectly be based on the number of clients the analyst brings to the firm.").

- Missouri LEO 930172 (1993) (posing the following question: "Attorney accepts referrals for estate planning from insurance agents. Attorney is available in person or by telephone to answer legal questions. The agent is not obligated to recommend Attorney. The agent obtains basic estate planning information using a form and sends it to Attorney. Attorney is paid directly by the client and pays no part of the fee to the agent. Attorney reviews the information and contacts the client. Attorney prepares estate planning documents. Attorney gives the documents to the agent for delivery to the client. The agent assists the client with execution and transfer of assets. Clients are told to contact Attorney with questions."; answering as follows: "It appears the agent is engaging in in[-]person solicitation on Attorney's behalf in violation of Rule 4-7.3(b). Based on a review of the forms, it appears legal advice would be needed to fill them out. Since they are filled out by the agent and the client, it appears the agent is engaged in the unauthorized practice of law and Attorney is violating Rule 4-5.5 by assisting the unauthorized practice. Because the agent does not have a relationship with Attorney and is not supervised by Attorney, giving the documents to the agent for delivery would create problems with confidentiality under Rule 4-1.6 and would further involve the unauthorized practice of law.").

Not every state would be this harsh, but lawyers worried about committing UPL violations must avoid essentially forfeiting the attorney-client relationship to nonlawyers.

**Best Answer**

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

N 8/12 [S,T]

## Nonlawyer Staff (Such as Paralegals)

### Hypothetical 35

In your effort to reduce costs, you have increasingly relied on your firm's paralegals to handle trust and estate tasks. However, you do not want to violate any unauthorized practice of law rules.

- (a) May one of your firm's paralegals prepare estate planning documents for your review and approval?

**YES**

- (b) May one of your firm's paralegals use your firm's "form book" to prepare simple documents that the paralegal will present to your client without your specific review or involvement?

**NO (PROBABLY)**

- (c) May one of your firm's paralegals oversee a will-signing without any of your firm's lawyers present?

**MAYBE**

### Analysis

Lawyers' reliance on paralegals implicates unauthorized practice of law and other ethics rules -- as well as statutes, regulations, and common law principles.

Lawyers obviously can -- and do -- rely on nonlawyer subordinates.

The ABA Model Rules acknowledge that lawyers may rely on paralegals when they practice law.

The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer

supervises the delegated work and retains responsibility for their work.

ABA Model Rule 5.5 cmt. [2] (emphasis added).

However, the ABA Model Rules also explicitly indicate that:

A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

ABA Model Rule 5.5(a) (emphasis added).

The Restatement also acknowledges that lawyers can rely on nonlawyers to help them practice law.

For obvious reasons of convenience and better service to clients, lawyers and law firms are empowered to retain nonlawyer personnel to assist firm lawyers in providing legal services to clients. In the course of that work, a nonlawyer may conduct activities that, if conducted by that person alone in representing a client, would constitute unauthorized practice. Those activities are permissible and do not constitute unauthorized practice, so long as the responsible lawyer or law firm provides appropriate supervision . . . and so long as the nonlawyer is not permitted to own an interest in the law firm, split fees, or exercise management powers with respect to a law-practice aspect of the firm.

Restatement (Third) of Law Governing Lawyers § 4 cmt. g (2000) (emphases added).

However, it can be difficult to precisely define the line between such nonlawyers' permissible and impermissible activities.

### **Source of Paralegals' Ethics Guidance**

As with lawyers, each state takes a different approach to handling paralegals. In doing so, states rely on laws, ethics rules, legal ethics opinions and other regulations.

No state requires paralegals to be licensed. New Jersey rejected a license requirement in 1999, and Wisconsin rejected a mandatory regulation plan in 2008.

On the other hand, various states have enacted regulations defining the type of training and experience paralegals must possess before holding themselves out to the public as having some special recognition or skill.

For instance, in 2004 California enacted a law that defines the term "paralegal," describes the activities that paralegals can and cannot engage in, and sets educational qualifications for paralegals. Cal. [Bus. & Prof.] Code §§ 6450 et seq. (2004).

More recently, Florida has adopted amendments to its supreme court rules, establishing a Florida Registered Paralegal Program. The new program became effective March 1, 2008.<sup>1</sup>

Other states have taken the same approach. For instance, Texas, Ohio, and North Carolina have adopted voluntary certification programs.

Unlike mandatory licensing plans, this approach requires those wishing to call themselves "registered" (or "certified") paralegals to comply with certain minimum standards. This approach does not prohibit others from engaging in what amounts to paralegal activities, as long as they do not call themselves "registered" or "certified" paralegals.

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<sup>1</sup> Under this voluntary program, Florida paralegals may refer to themselves as "Florida Registered Paralegals" if they voluntarily register with the state bar, satisfy "certain minimum educational, certification, or work experience criteria" and "agree to abide by an established code of ethics."

To become an eligible Florida Registered Paralegal, paralegals must successfully complete the Paralegal Advanced Competency Exam offered by the National Federation of Paralegal Associations, complete the Certified Legal Assistant/Certified Paralegal examination offered by the National Association of Legal Assistants, or provide proof from a supervising lawyer that the paralegal had met the other work experience requirements for 5 out of the last 8 years.

To maintain status as a Florida Registered Paralegal, paralegals must complete a minimum of 30 hours of CLE every 3 years, 5 hours of which must be in ethics or professionalism. Paralegals may attend courses approved by the Florida Bar, the National Association of Legal Assistants or the National Federation of Paralegal Associations.

The Florida program also includes an elaborate process for punishing or suspending paralegals who fail to meet the requirements.

The ABA has issued ethics guidelines for paralegals.<sup>2</sup> Paralegals may also look to ethics guidelines issued by several national voluntary associations.<sup>3</sup>

### **Paralegals' UPL Issues**

Paralegals may not engage in the practice of law<sup>4</sup> -- an axiom that is easier to state than to apply.

Paralegals' duty to avoid unauthorized practice of law violations focuses on three issues: (1) how paralegals "hold themselves out"; (2) prohibited activities; and (3) permitted activities.

**"Holding Out" Issues.** Because paralegals work so closely with lawyers, they must be careful to avoid "holding themselves out" as lawyers -- either intentionally or unintentionally.

- ABA Model Guidelines for Paralegals, Guideline 4 ("A lawyer is responsible for taking reasonable measures to ensure that clients, courts, and other

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<sup>2</sup> Am. Bar Ass'n Standing Committee on Paralegals, ABA Model Guidelines for the Utilization of Paralegal Services (2004) ("ABA Model Guidelines for Paralegals").

<sup>3</sup> National Association of Legal Assistants, Model Standards and Guidelines for Utilization of Paralegals (2005) ("NALA Model Standards"); National Federation of Paralegal Associations, Model Code of Ethics and Prof'l Responsibility and Guidelines for Enforcement (1997) ("NFPA Model Code"); American Alliance of Paralegals, Inc., Code of Ethics ("AAPI Code").

<sup>4</sup> ABA Model Guidelines for Paralegals, cmt. to Guideline 2 ("[I]t is important to note that although the attorney has the primary obligation to not permit a nonlawyer to engage in the unauthorized practice of law, some states have concluded that a paralegal is not relieved from an independent obligation to refrain from illegal conduct and to work directly under an attorney's supervision. See In re Opinion No. 24 of the Committee on the Unauthorized Practice of Law, 607 A.2d 962, 969 (N.J. 1992) (a 'paralegal who recognizes that the attorney is not directly supervising his or her work or that such supervision is illusory because the attorney knows nothing about the field in which the paralegal is working must understand that he or she is engaged in the unauthorized practice of law'); Kentucky Supreme Court Rule 3.7 (stating that 'the paralegal does have an independent obligation to refrain from illegal conduct'). Additionally, paralegals must also familiarize themselves with the specific statutes governing the particular area of law with which they might come into contact while providing paralegal services. See, e.g., 11 U.S.C. § 110 (provisions governing nonlawyer preparers of bankruptcy petitions); In Re Moffett, 263 B.R. 805 (W.D. Ky. 2001) (nonlawyer bankruptcy petition preparer fined for advertising herself as 'paralegal' because that is prohibited by 11 U.S.C. § 110(f)(1)). Again, the lawyer must remember that any independent obligation a paralegal might have under state law to refrain from the unauthorized practice of law does not in any way diminish or vitiate the lawyer's obligation to properly delegate tasks and supervise the paralegal working for the lawyer.").

lawyers are aware that a paralegal, whose services are utilized by the lawyer in performing legal services, is not licensed to practice law.").

- ABA Model Guidelines for Paralegals, cmt. to Guideline 4 ("Since in most instances, a paralegal is not licensed as a lawyer, it is important that those with whom the paralegal communicates are aware of that fact. The National Federation of Paralegal Associations, Inc. ('NFPA'), Model Code of Professional Ethics and Responsibility and Guidelines for Enforcement, EC 1.7(a)-(c) requires paralegals to disclose their status. Likewise, NALA Canon 5 requires a paralegal to disclose his or her status at the outset of any professional relationship. While requiring the paralegal to make such disclosure is one way in which the lawyer's responsibility to third parties may be discharged, the Standing Committee is of the view that it is desirable to emphasize the lawyer's responsibility for the disclosure under Model Rule 5.3 (b) and (c). Lawyers may discharge that responsibility by direct communication with the client and third parties, or by requiring the paralegal to make the disclosure, by a written memorandum, or by some other means. Several state guidelines impose on the lawyer responsibility for instructing a paralegal whose services are utilized by the lawyer to disclose the paralegal's status in any dealings with a third party.").
- ABA Model Guidelines for Paralegals, cmt. to Guideline 4 ("The most common titles are 'paralegal' and 'legal assistant' although other titles may fulfill the dual purposes noted above. The titles 'paralegal' and 'legal assistant' are sometimes coupled with a descriptor of the paralegal's status, e.g., 'senior paralegal' or 'paralegal coordinator,' or of the area of practice in which the paralegal works, e.g., 'litigation paralegal' or 'probate paralegal.' Titles that are commonly used to identify lawyers, such as 'associate' or 'counsel,' are misleading and inappropriate.").
- ABA Model Guidelines for Paralegals, cmt. to Guideline 4 ("Most state guidelines specifically endorse paralegals signing correspondence so long as their status as a paralegal is clearly indicated by an appropriate title. See ABA Informal Opinion 1367 (1976).").
- Rule Regulating the Florida Bar 20-7.1(a) ("A Florida Registered Paralegal shall disclose his or her status as a Florida Registered Paralegal at the outset of any professional relationship with a client, attorneys, a court or administrative agency or personnel thereof, and members of the general public.").
- NALA Model Standards, Guideline 1; NFPA Model Code, EC 1.7(b), (c); AAPL Code ¶ 4.

**Prohibited Activities.** States' analyses of prohibited activities by paralegals tend to focus on certain key prohibited activities, and specific types of interaction with a lawyer's clients that involve the greatest risk of engaging in the unauthorized practice of law.<sup>5</sup>

Paralegals should not engage in the following activities:

- **Providing legal advice**

ABA Model Guidelines for Paralegals, Guideline 3 ("A lawyer may not delegate to a paralegal: (A) responsibility for establishing an attorney-client relationship[;] (B) responsibility for establishing the amount of a fee to be charged for a legal service[;] (C) responsibility for a legal opinion rendered to a client.").

ABA Model Guidelines for Paralegals, cmt. to Guideline 3 ("Clients are entitled to their lawyers' professional judgment and opinion. Paralegals may, however, be authorized to communicate a lawyer's legal advice to a client so long as they do not interpret or expand on that advice. Typically, state guidelines phrase this prohibition in terms of paralegals being forbidden from 'giving legal advice' or 'counseling clients about legal matters.'").

NALA Model Standards, Guideline 2 ("Legal assistants should not . . . give legal opinions or advice; or represent a client before a court, unless authorized to do so by said court; nor engage in, encourage, or contribute to any act which could constitute the unauthorized practice [of] law.").

Rule Regulating the Florida Bar 20-7.1(d)(1) & (5) ("A Florida Registered Paralegal should not . . . give legal opinions or advice, or . . . act in matters involving professional legal judgment.").

- **Establishing a lawyer-client relationship**

ABA Model Guidelines for Paralegals, Guideline 3 ("A lawyer may not delegate to a paralegal: (A) responsibility for establishing an attorney-client relationship[;] (B) responsibility for establishing the amount of a fee to be charged for a legal service[;] (C) responsibility for a legal opinion rendered to a client.").

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<sup>5</sup> See ABA Model Guidelines for Paralegals, Guideline 3; NALA Model Standards, Guideline 2; NFPA Model Code, EC-1.2(a), (b).



NALA Model Standards, Guideline 2 ("Legal assistants should not . . . [e]stablish attorney-client relationships . . . nor engage in, encourage, or contribute to any act which could constitute the unauthorized practice [of] law.").

Rule Regulating the Florida Bar 20-7.1(d)(1) ("A Florida Registered Paralegal should not . . . establish attorney-client relationships" or "accept cases.").

- **Making fee arrangements**

ABA Model Guidelines for Paralegals, Guideline 3 ("A lawyer may not delegate to a paralegal: (A) responsibility for establishing an attorney-client relationship[;] (B) responsibility for establishing the amount of a fee to be charged for a legal service[;] (C) responsibility for a legal opinion rendered to a client.").

ABA Model Guidelines for Paralegals, cmt. to Guideline 3 ("Fundamental to the lawyer-client relationship is the lawyer's agreement to undertake representation and the related fee arrangement. The Model Rules and most states require lawyers to make fee arrangements with their clients and to clearly communicate with their clients concerning the scope of the representation and the basis for the fees for which the client will be responsible. Model Rule 1.5 and Comments. Many state guidelines prohibit paralegals from 'setting fees' or 'accepting cases.' See, e.g., Pennsylvania Eth. Op. 98-75, 1994 Utah Eth. Op. 139. NALA Canon 3 states that a paralegal must not establish attorney-client relationships or set fees.").

NALA Model Standards, Guideline 2 ("Legal assistants should not . . . set legal fees . . .").

Rule Regulating the Florida Bar 20-7.1(d)(1) ("A Florida Registered Paralegal should not . . . set legal fees . . .").

- **Maintaining a direct client relationship**

ABA Model Guidelines for Paralegals, cmt. to Guideline 3 ("Model Rule 1.4 and most state codes require lawyers to communicate directly with their clients and to provide their clients information reasonably necessary to make informed decisions and to effectively participate in the representation. While delegation of legal tasks to nonlawyers may benefit clients by enabling their lawyers to render legal services more economically and efficiently, Model Rule 1.4 and Ethical Consideration 3-6 under the Model Code emphasize that delegation is proper only if the lawyer 'maintains a direct relationship with his client, supervises the delegated work and has complete professional responsibility for the work product.'").

- **Appearing before tribunals**

ABA Model Guidelines for Paralegals, cmt. to Guideline 2 ("As a general matter, most state guidelines specify that paralegals may not appear before courts, administrative tribunals, or other adjudicatory bodies unless the procedural rules of the adjudicatory body authorize such appearances.").

Rule Regulating the Florida Bar 20-7.1(d)(1) ("A Florida Registered Paralegal should not . . . represent a client before a court or other tribunal, unless authorized to do so by the court or tribunal.").

**Permitted Activities.** Defining the type of permitted activities in which

paralegals may engage presents the same line-drawing difficulties.

The basic theme is the need for paralegals to act under the direct supervision of a lawyer.

- ABA Model Guidelines for Paralegals, Guideline 2 ("Provided the lawyer maintains responsibility for the work product, a lawyer may delegate to a paralegal any task normally performed by the lawyer except those tasks proscribed to a nonlawyer by statute, court rule, administrative rule or regulation, controlling authority, the applicable rule of professional conduct of the jurisdiction in which the lawyer practices, or these guidelines.").

National organizations have defined some permitted activities.

- See, e.g., NALA Model Standards, Guideline 5 ("Except as otherwise provided by statute, court rule or decision, administrative rule or regulation, or the attorney's rules of professional responsibility, and within the preceding parameters and proscriptions, a legal assistant may perform function delegated by an attorney, including, but not limited to the following: Conduct client interviews and maintain general contact with the client after the establishment of the attorney-client relationship, so long as the client is aware of the status and function of the legal assistant, and the client contact is under the supervision of the attorney[; l]ocate and interview witnesses, so long as the witnesses are aware of the status and function of the legal assistant[; c]onduct investigations and statistical and documentary research for review by the attorney[; c]onduct legal research for review by the attorney[; d]raft legal documents for review by the attorney[; d]raft correspondence and pleadings for review by and signature of the attorney[; s]ummarize depositions, interrogatories and testimony for review by the attorney[; a]ttend executions of wills, real estate closings, depositions, court or administrative hearings and trials with the attorney[; a]uthor and sign letters providing the legal assistant's status is clearly indicated and the

correspondence does not contain independent legal opinions or legal advice.").

State bars take the same approach.

- North Carolina LEO 2006-13 (10/20/06) ("[I]f exigent circumstances require the signing of a pleading in the lawyer's absence, a lawyer may delegate this task to a paralegal or other nonlawyer staff only if 1) the signing of a lawyer's signature by an agent of the lawyer does not violate any law, court order, local rule, or rule of civil procedure, 2) the responsible lawyer has provided the appropriate level of supervision under the circumstances, and 3) the signature clearly discloses that another has signed on the lawyer's behalf."; "A paralegal or paraprofessional may never sign and file court documents in her own name. To do so violates the statutes prohibiting the unauthorized practice of law.").
- North Carolina LEO 2002-9 (1/24/03) (superseding several older legal ethics opinions, and taking a fact-intensive approach to whether a lawyer must be present at a real estate closing, or whether the lawyer can allow a paralegal to conduct the closing; "When and how to communicate with clients in connection with the execution of the closing documents and the disbursement of the proceeds are decisions that should be within the sound legal discretion of the individual lawyer. Therefore, the requirement of the physical presence of the lawyer at the execution of the documents, as promulgated in Formal Ethics Opinions 99-13, 2001-4, and 2001-8, is hereby withdrawn. A nonlawyer supervised by the lawyer may oversee the execution of the closing documents and the disbursement of the proceeds even though the lawyer is not physically present. Moreover, the execution of the documents and the disbursement of the proceeds may be accomplished by mail, by e-mail, by other electronic means, or by some other procedure that would not require the lawyer and the parties to be physically present at one place and time. Whatever procedure is chosen for the execution of the documents, the lawyer must provide competent representation and adequate supervision of any nonlawyer providing assistance. Rule 1.1, Rule 5.3, and Rule 5.5." (footnote omitted); "In considering this matter, the State Bar received strong evidence that it is in the best interest of the consumer (the borrower) for the lawyer to be physically present at the execution of the documents. This ethics opinion should not be interpreted as implying that the State Bar disagrees with that evidence." (footnote omitted)).
- North Carolina LEO 2000-10 (7/27/01) ("[W]hen a lawyer has a conflicting commitment to appear in another court or when another legitimate conflict prohibits a lawyer's appearance in court for a client, the lawyer may send a nonlawyer employee to the court to inform the court of the situation. This is not assisting in the unauthorized practice of law. In response to information about a lawyer's availability, the court may, on its own motion, determine that

a continuance or other action is appropriate." (footnote omitted); "A lawyer should rely on a nonlawyer to notify the court of a scheduling conflict only when necessary. Moreover, Rule 5.3 requires a lawyer who supervises a non-lawyer assistant to make reasonable efforts to ensure that the non-lawyer's conduct is compatible with the professional obligations of the lawyer. If a nonlawyer is present in court to provide information about the lawyer's scheduling conflict, the duty of supervision includes insuring that the assistant complies with court rules on decorum and attire.").

- Virginia UPL Op. 191 (10/28/96; revised and reissued 4/15/98; approved by Supreme Court 9/29/98) (describing the permitted activities as follows: "[A] non-lawyer employee working under the direct supervision of a Virginia attorney may participate in gathering information from a client during an initial interview . . . provided that this involves nothing more than the gathering of factual data and the non-lawyer renders no legal advice.")
- Virginia UPL Op. 147 (4/19/91) (indicating that a "paralegal company" may gather necessary real estate documents, complete non-legal documents, and arrange for the necessary signatures and relaying of documents required for real estate closings).
- Virginia UPL Op. 129 (2/22/89) (indicating that paralegals employed by a non-profit organization may provide "services to and under the supervision of attorneys on behalf of the organization").

Some laws, rules or regulations specifically allow paralegals to engage in what otherwise would be the unauthorized practice of law: "jailhouse" legal advisors, in-house legal advice, etc.<sup>6</sup>

### **Sanctions for Paralegals**

Paralegals who engage in the unauthorized practice of law are theoretically subject to criminal charges in most states.

Most sanctions involve injunctive or monetary relief -- rather than criminal punishment.

- Mont. Supreme Court Comm'n on Unauthorized Practice of Law v. O'Neil, 147 P.3d 200 (Mont. 2006) (holding that a paralegal violated Montana's UPL

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<sup>6</sup> ABA Model Guidelines for Paralegals, Guideline 2; NALA Model Standards, Guideline 3; NALA Code of Ethics and Prof'l Responsibility, Canon 2 (2007) ("NALA Ethics Code").

statutes by drafting pleadings, providing legal advice and appearing in court with customers), cert. denied, 549 U.S. 1282 (2007).

- State ex rel. Ind. State Bar Ass'n v. Diaz, 838 N.E.2d 433 (Ind. 2005) (enjoining a notary from assisting immigration clients, but allowing her to offer translations and other routine services).
- Dayton Bar Ass'n v. Addison, 837 N.E.2d 367 (Ohio 2005) (enjoining a paralegal from preparing wills or other documents, and fining him \$10,000; noting that he had never been a lawyer and was engaged in the unauthorized practice of law).
- United States v. Johnson, 327 F.3d 554 (7th Cir. 2003) (recognizing a court's inherent power to punish UPL activities by an organization of paralegals called the National Legal Professional Associates, which improperly advertised for and provided legal services to prisoners).
- Sussman v. Grado, 746 N.Y.S.2d 548, 549, 552-53 (N.Y. Dist. Ct. 2002) (holding that an "independent paralegal" who was the president and sole shareholder of a "Consulting Group" had engaged in the unauthorized practice of law by preparing an order involving two bank accounts; finding that the legal assistant "crossed the line between filling out forms [which would have been acceptable] and engaging in the practice of law by rendering legal services" because she "tried to create a legal document without the required knowledge, skill or training"; awarding plaintiff \$135.00 in damages, but referring the matter to the New York State Attorney General's Office for possible action against the paralegal).

Not surprisingly, most of these cases involve what could be called "storefront" paralegals -- those who have set up an operation without a lawyer's involvement.

### **Conclusion**

(a) Paralegals can clearly conduct legal research and draft documents, as long as they are assisting the lawyer -- who takes the ultimate responsibility for the research and the document after reviewing the paralegal's work.

(b) States would not allow a paralegal to directly discuss legal options with a client if the paralegal had not first spoken with a lawyer about those legal options -- and thus was essentially acting as the lawyer's spokesperson.

(c) The issue of attending client meetings without a lawyer typifies states' differing approaches to permissible paralegal activities.

The ABA Model Guidelines provide this as an example.

Thus, some tasks that have been specifically prohibited in some states are expressly delegable in others. Compare[] Guideline 2, Connecticut Guidelines (permitting paralegal to attend real estate closings even though no supervising lawyer is present provided that the paralegal does not render opinion or judgment about execution of documents, changes in adjustments or price or other matters involving documents or funds) and The Florida Bar, Opinion 89-5 (November 1989) (permitting paralegal to handle real estate closing at which no supervising lawyer is present provided, among other things, that the paralegal will not give legal advice or make impromptu decisions that should be made by a lawyer) with Supreme Court of Georgia, Formal Advisory Opinion No. 86-5 (May 1989) (closing of real estate transactions constitutes the practice of law and it is ethically improper for a lawyer to permit a paralegal to close the transaction). It is thus incumbent on the lawyer to determine whether a particular task is properly delegable in the jurisdiction at issue.

ABA Model Guidelines for Paralegals, cmt. to Guideline 2 (emphases added).

To make matters more confusing, states' position can change from time to time.

- See, e.g., North Carolina LEO 2002-9 (1/24/03) (superseding several older legal ethics opinions, and taking a fact-intensive approach to whether a lawyer must be present at a real estate closing, or whether the lawyer can allow a paralegal to conduct the closing; "When and how to communicate with clients in connection with the execution of the closing documents and the disbursement of the proceeds are decisions that should be within the sound legal discretion of the individual lawyer. Therefore, the requirement of the physical presence of the lawyer at the execution of the documents, as promulgated in Formal Ethics Opinions 99-13, 2001-4, and 2001-8, is hereby withdrawn. A nonlawyer supervised by the lawyer may oversee the execution of the closing documents and the disbursement of the proceeds even though the lawyer is not physically present. Moreover, the execution of the documents and the disbursement of the proceeds may be accomplished by mail, by e-mail, by other electronic means, or by some other procedure that would not require the lawyer and the parties to be physically present at one place and time. Whatever procedure is chosen for the execution of the

documents, the lawyer must provide competent representation and adequate supervision of any nonlawyer providing assistance. Rule 1.1, Rule 5.3, and Rule 5.5." (emphasis added) (footnote omitted); "In considering this matter, the State Bar received strong evidence that it is in the best interest of the consumer (the borrower) for the lawyer to be physically present at the execution of the documents. This ethics opinion should not be interpreted as implying that the State Bar disagrees with that evidence." (footnote omitted)).

### **Best Answer**

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

N 8/12 [S,T]

## Paralegals: Attorney-Client Privilege Issues

### Hypothetical 36

You are representing a client in contentious estate litigation, which has increasingly focused on your withholding of documents you claim to be protected by the attorney-client privilege. Your adversary just filed a motion arguing that the attorney-client privilege does not protect direct communications between your client and one of your paralegals -- because no lawyer participated in the communications.

Does the attorney-client privilege protect communications between your client and your paralegal?

**YES**

### Analysis

In most situations, the attorney-client privilege will cover direct communications between a client and a paralegal assisting a lawyer in providing legal advice to a client.<sup>1</sup>

Numerous courts have recognized that the attorney-client privilege can protect direct communications with paralegals in these circumstances.

- Olkowski v. PT Inatai Golden Furniture Indus., Case No. 4:06-cv-4083 WDS, 2008 U.S. Dist. LEXIS 75230, at \*5 (S.D. Ill. Sept. 29, 2008) ("Confidential communications made to representatives of the attorney such as paralegals, secretaries, file clerks, or investigators employed by the attorney are also covered by the privilege.").
- Payless Shoesource Worldwide, Inc. v. Target Corp., Civ. A. No. 05-4023-JAR, 2008 U.S. Dist. LEXIS 28878 (D. Kan. Apr. 8, 2008) (holding that a paralegal is treated like a lawyer for privilege and work product purposes).
- Wagoner v. Pfizer, Inc., Case No. 07-1229-JTM, 2008 U.S. Dist. LEXIS 24262, at \*11-12 (D. Kan. Mar. 26, 2008) (finding that the privilege protected communications to and from a nonlawyer assisting a lawyer in conducting an

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<sup>1</sup> See, e.g., Restatement (Third) of Law Governing Lawyers § 70 cmt. g (2000) ("A lawyer may disclose privileged communications to other office lawyers and with appropriate nonlawyer staff -- secretaries, file clerks, computer operators, investigators, office managers, paralegal assistants, telecommunications personnel, and similar law-office assistants.").



investigation; noting that her "role was not unlike that of a paralegal, assisting in the gathering and organizing of information for an attorney").

- Barton v. Zimmer Inc., Cause No. 1:06-CV-208, 2008 U.S. Dist. LEXIS 1296, at \*25 (N.D. Ind. Jan. 7, 2008) (holding that the privilege protected communications to and from an outside lawyer's paralegal and secretary "with respect to the seeking of legal advice").
- Southeastern Pa. Transp. Auth. v. CaremarkPCS Health, L.P., 254 F.R.D. 253, 257 (E.D. Pa. 2008) ("Communications with the subordinate of an attorney, such as a paralegal, are also protected by the attorney-client privilege so long as the subordinate is 'acting as the agent of a duly qualified attorney under circumstances that would otherwise be sufficient to invoke the privilege.'" (citation omitted)).
- Steele v. Lincoln Fin. Group, No. 05 C 7163, 2007 U.S. Dist. LEXIS 25587, at \*8 (N.D. Ill. Apr. 3, 2007) (protecting as privileged emails to and from a paralegal in a corporate law department).
- Jenkins v. Bartlett, 487 F.3d 482, 491 (7th Cir. 2007) (applying the privilege to communications to and from a lawyer's agent; finding that the protection "applies both to agents of the attorney, such as paralegals, investigators, secretaries and members of the office staff responsible for transmitting messages between the attorney and client, and to outside experts engaged 'to assist the attorney in providing legal services to the client,' such as accountants, interpreters or polygraph examiners." (citation omitted)), cert. denied, 552 U.S. 1039 (2007).
- Equity Residential v. Kendall Risk Mgmt., Inc., 246 F.R.D. 557, 566-67 (N.D. Ill. 2007) ("Several of the documents listed in Connecticut Specialty's [defendant] log contain communications from a paralegal relaying legal advice to a Connecticut Specialty employee. In addition, several documents include communications from an employee to a paralegal seeking legal advice, or discussing the legal advice sought. As a representative of the attorney, the attorney client privilege extends to a paralegal acting as a subordinate to the attorney. . . . Thus, these documents are also privileged, and the motion to compel this category of documents is denied.").
- Executive Risk Indem., Inc. v. Cigna Corp., 81 Pa. D. & C.4th 410, 423-24 (Pa. C.P. Phila. 2006) ("The protection of privilege has been provided to confidential communications by a client to investigators, paralegals, secretaries or other employees of the attorney when necessary to secure proper legal advice." (footnotes omitted)).
- Wal Mart Stores, Inc. v. Dickinson, 29 S.W.3d 796, 804-05 (Ky. 2000) (finding that the attorney-client privilege and work product doctrine applied

with equal force to a lawyer's paralegal; "We believe that the privilege should apply with equal force to paralegals, and so hold. A reality of the practice of law today is that attorneys make extensive use of nonattorney personnel, such as paralegals, to assist them in rendering legal services. Obviously, in order for paralegals, investigators, secretaries and the like to effectively assist their attorney employers, they must have access to client confidences. If privileged information provided by a client to an attorney lost its privileged status solely on the ground that the attorney's support staff was privy to it, then the free flow of information between attorney and client would dry up, the cost of legal services would rise, and the quality of those same services would fall. . . . Likewise, and for the same reasons, we hold that attorney work product prepared by a paralegal is protected with equal force by CR 26.02(3) as is any trial preparation material prepared by an attorney in anticipation of litigation.").

If a paralegal assists a lawyer in providing legal advice, even documents created by the paralegal can deserve privilege protection.

- See, e.g., Southeastern Pa. Transp. Auth. v. CaremarkPCS Health, L.P., 254 F.R.D. 253, 259-60 (E.D. Pa. 2008) (finding that the attorney-client privilege protected draft contract language prepared by a paralegal at a lawyer's direction, and circulated to company executives for their review and comment; "Ms. Hankins [Caremark's Senior Legal Counsel] asserts that she directed Ms. Kershaw [paralegal who acted as Ms. Hankins' subordinate] to 'convey legal advice by way of setting forth revised proposed contract language for consideration by the Caremark [] employees directly involved in the SEPTA contract negotiations, and to seek feedback from both business people and legal personnel regarding the proposed legal contract language.' . . . The fact that Ms. Kershaw authored the e-mail does not destroy the privilege because she was acting as the agent of Ms. Hankins under circumstances where the attorney-client privilege applies.").

On the other hand, one New Jersey case provided a frightening example of what can happen when lawyers and paralegals are sloppy in their treatment of the attorney-client privilege (especially in a corporate law department setting). HPD Laboratories, Inc. v. Clorox Co., 202 F.R.D. 410 (D.N.J. 2001) (holding that the attorney-client privilege did not protect from disclosure communications between a long-time Clorox in-house paralegal and Clorox employees, because the employees were seeking the paralegal's own advice rather than working with the paralegal to obtain a lawyer's

advice; noting that the paralegal did not copy in-house lawyers on her communications, and did not involve in-house lawyers in her meetings with Clorox employees; ordering the production of documents reflecting communications between the paralegal and Clorox employees).

No court seems to have followed this approach since 2001. Still, corporate law departments would be wise to assure that their paralegals involve in-house lawyers to a degree sufficient to avoid this horrible result.

Not surprisingly, paralegals deserve privilege protection as a lawyer's agent only if they are assisting the lawyer in providing legal advice.

- Willard v. Hobbs, No. 2:08CV00024 WRW/HDY, 2009 U.S. Dist. LEXIS 6134 (E.D. Ark. Jan. 26, 2009) (finding that the attorney-client privilege did not protect communications between a prisoner and a "paralegal" who was also the prisoner's spiritual advisor).
- State v. Ingraham, 966 P.2d 103, 121 (Mont. 1998) ("Windham testified in chambers that, although she worked for Gregory Ingraham as an independent contractor, she performed no paralegal services for Lloyd Ingraham. She also testified that she had done nothing to assist Gregory Ingraham in defending this case, and that to her knowledge, there was no file on this case at the Ingraham Law Firm. Our review of the pertinent testimony indicates that Ingraham's conversations with Windham were purely personal and not in the course of a professional relationship.").
- Volrie v. State, No. 13-05-667-CR, 2007 Tex. App. LEXIS 6574 (Tex. App. Aug. 16, 2007) (unpublished opinion); finding that a criminal defendant's conversations with a friend who acted as a paralegal did not deserve attorney-client privilege protection).

### **Best Answer**

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

N 8/12 [S,T]

## In-House Lawyers Representing the Client/Employer's Executives

### Hypothetical 37

You serve as one of three in-house lawyers for a large closely held family company. You are fully licensed to practice law in your state. One of your client's owners needs some fine-tuning of her estate plan documents.

- (a) May you represent one of your client's co-owners in preparing estate planning documents?

**MAYBE**

- (b) May one of your in-house colleagues (who is registered but not fully licensed in your state) prepare one of your client's co-owners in preparing estate planning documents?

**NO (PROBABLY)**

### Analysis

In-house lawyer's representation of their client/employer's owners or employees can implicate a number of ethics principles.

(a) The most basic issue is whether an in-house lawyer may do so without violating the applicable unauthorized practice of law rules. If such a lawyer is not fully licensed in the state where he or she practices, such a representation might also implicate multijurisdictional practice principles.

Although not limited to (or even discussing) in-house lawyers, ABA Model Rule 1.13 specifically acknowledges such representations.

A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be

given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

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

Interestingly, at least one state has adopted a statute explicitly permitting such joint representations by in-house lawyers.

Nothing in this section shall prohibit an attorney retained by a corporation, whether or not the attorney is also a salaried employee of the corporation, from representing the corporation or an affiliate, or from representing an officer, director, or employee of the corporation or an affiliate in any matter arising in connection with the course and scope of the employment of the officer, director, or employee.

N.C. Gen. Stat. § 84-5(b) (emphasis added).

There appear to have been only a handful of legal ethics opinions on this issue.

- Missouri Informal Op. 950016 (1995) (in-house lawyers may defend both "the corporation and individual employees"; the corporation may indemnify the in-house lawyer for malpractice related to the representations).
- Wisconsin LEO E-89-8 (1989) (although in-house counsel would be "well-advised" to represent only the corporate employer, as long as in-house counsel avoid conflict, they "may represent other persons or entities, whether they or the legal matters in question are related to the employer-business").
- Philadelphia LEO 87-25 (11/1987) (holding that an in-house lawyer for a school district may represent the school district and a school principal, as long as the lawyer is not later adverse to the previously represented principal).

One state permitted in-house counsel to provide a limited representation of corporate officers and employees.

- Alabama LEO 1986-52 (5/26/86) (an in-house lawyer "may advise other employees of the corporation if the advice involves legal problems of the corporation, but may not practice individually for the employees").

Thus, the few states to have dealt with the issue generally have permitted in-house lawyers to represent their client/employer's employees.

States that take a more narrow view might require in-house lawyers to essentially establish a separate law practice (although perhaps not requiring a separate physical location) to undertake representations of employees. For instance, an old Virginia UPL opinion seemed to require an in-house lawyer wishing to represent a company employee to establish an entirely separate practice.<sup>1</sup> Since then, the Virginia Bar has dramatically softened the requirement for a separate practice (in the context of handling pro bono work, but presumably also applicable in the case of an in-house lawyer's representation of company employees).<sup>2</sup>

Of course, undertaking such representations implicates all of the other ethics rules that apply to any representation (especially those specific rules dealing with joint

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<sup>1</sup> Virginia UPL Op. 167 (3/5/93) (holding that an in-house lawyer may not provide legal services to the president/owner/CEO of the corporation employing the in-house lawyer, and that "the attorney may only render legal services to the CEO if the attorney is a bar member who maintains a practice separate from his employment with the corporation" (emphasis added)).

<sup>2</sup> Virginia UPL Op. 211 (12/5/06) ("In UPL Opinion 167 the Committee concluded that 'the attorney may only render legal service to the CEO if the attorney is a bar member who maintains a practice separate from this employment with the corporation.' . . . The issue raised in this request is whether a Virginia licensed corporate counsel providing pro bono legal services through an independent entity satisfies the 'practice separate from' his employment requirement. The requirement in UPL [O]pinion 167 of a separate law practice was similarly expressed in Richmond Assoc. of Credit Men, [189 S.E.2d 153 (Va. 1937)] to ensure that the lay corporate entity was not holding out to provide, or was not providing, legal services and that the attorney would maintain his/her independence in representing a client, free from any influence or control by the corporate entity. In the inquiry presented, the Virginia-licensed corporate counsel would provide pro bono legal representation through a community-based legal services entity. As described, the entity and the work would be completely separate from the corporate employer, the corporate employer would not be offering the legal services nor would the corporate employer have any control over the entity or the legal representation. The corporate employer would, however, allow the attorney access to administrative support and time off to work with this service. This scenario is distinguishable from those presented in UPL Opinions 57 and 167 in both of which opinions the situation involved a corporate counsel providing representation to clients other than the corporate entity directly from his position as corporate counsel and under the auspices of the corporate entity. As described, this scenario provides that the attorney would be offering his/her legal services through 'a practice separate from [his/her] employment with the corporation.' This satisfies the 'separate practice' requirement of UPL opinion 167 and the attorney participating in this program would not be engaged in the unauthorized practice of law." (emphases added)).

representations or separate representations on the same matter). In-house lawyers in such a scenario might also worry about malpractice coverage, because presumably their client/employer's malpractice coverage (or indemnity provisions) would not cover such work.

In-house lawyers (or outside lawyers, for that matter) representing a corporate employee must always remember that the employee obtains a "veto power" over the lawyer's adversity to the employee, on any matter -- unless the lawyer obtains a prospective consent from the employee. For instance, any lawyer preparing an estate plan for a company's president may not represent the company adverse to the president unless the president consents at the time or in advance. In some situations, this can create a tremendously awkward conflict. A lawyer who has just begun to prepare such an estate plan might be confidentially asked by the board of directors to advise it on whether the board can terminate the president. Absent a prospective consent, the lawyer cannot handle such work for the board, and obviously cannot obtain a consent from the president to do so (because the board would not want the lawyer to disclose its interest in firing the president).

These and other conflict issues normally deter in-house and outside lawyers from representing corporate employees.<sup>3</sup> Although an in-house lawyer's representation of a

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<sup>3</sup> A large body of law deals with the standard by which a court will determine if a lawyer jointly represented a company and a company employee on the same matter. Company employees sometimes have the incentive to contend that the lawyer had engaged in such a joint representation, so they have some power over the company's control of the attorney-client privilege. Most courts set a fairly high burden for corporate employees alleging such a joint representation on the same matter. The main case articulating this standard is *In re Beville, Bresler & Schulman Asset Management Corp.*, 805 F.2d 120 (3d Cir. 1986). Among other things, such corporate employees generally lose their argument if the alleged joint representation dealt with any company matter. Corporate employees for whom an in-house or outside lawyer is preparing trust or estate documents would not fall short of this part of the standard, but might still be able to establish the existence of an attorney-client relationship that would give it veto power

company employee in a trust and estate matter implicates all these ethics and privilege issues, in-house lawyers still frequently undertake such representations.

**(b)** If an in-house lawyer is not fully licensed in the state where he or she practices, the lawyer's representation of a client/employer executive or other employee implicates the other branch of the unauthorized practice of law issue -- the multijurisdictional practice concept.

ABA Model Rule 5.5 allows in-house lawyers to establish a "systematic and continuous presence" in a jurisdiction in which they are not licensed -- but limits the clients to whom such in-house lawyers can provide services. ABA Model Rule 5.5(d)(1).

Thus, that provision explicitly indicates that the general freedom of in-house lawyers to practice in a state where they are not licensed

does not authorize the provision of personal legal services to the employer's officers or employees.

ABA Model Rule 5.5 cmt. [16] (emphasis added).

Similarly, the ABA's 2008 Model Rule for Registration of In-House Counsel explained that such in-house lawyers can represent the client/employer and its organizational affiliates, and also provide legal services to corporate directors, officers and employees -- "but only on matters directly related to their work for the entity and only to the extent consistent with" the conflicts rules. ABA Section of Legal Educ. & Admissions to the Bar, Model Rule for Registration of In-House Counsel § B.1 (adopted Aug. 2008) (emphasis added).

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over the lawyer's representation adverse to the employee (if not joint control over the privilege on some company-related matter).



Thus, in-house lawyers practicing in a state where they are not licensed generally may not represent company employees in personal matters. States naturally disagree about defining the exact contours of that limitation. It is unclear whether a state would consider an executive's estate plan to be "personal legal services" or somehow "directly related to [the lawyer's] work for the entity."

To be safe, an in-house lawyer not fully licensed in a state should arrange for some licensed lawyer to assist executives or other individuals in their estate planning.

### **Best Answer**

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

N 8/12 [S,T]

## **In-House Lawyers Representing Their Client/Employer's Customers**

### **Hypothetical 38**

About ten years ago, you left private practice and became a local bank's sole in-house lawyer. The bank's president just asked whether you could assist in a new business initiative.

May you prepare estate planning documents for bank customers?

**NO (PROBABLY)**

### **Analysis**

Because a lawyer can act both as an in-house lawyer for a client/employer and maintain a separate independent practice, lawyers obviously can represent a bank and the bank's customers. Of course, such a lawyer would have to deal with issues such as conflicts of interest, confidentiality, etc.

The issue becomes much more difficult if the in-house lawyer does not maintain a separate practice. At the extreme, an in-house lawyer handling legal work for the client/employer's customers seems to be assisting the clearly impermissible "practice of law" by a lay corporation -- such as an in-house lawyer employed by a grocery store setting up a desk in the fruit aisle and preparing wills for customers who wander by.

### **General Rules**

The ABA discussed the generic issue of in-house lawyers providing legal services to "third persons" in ABA LEO 392 (4/25/95).

Although not specifically discussing in-house lawyers working for their corporate employer's customers, the ABA indicated that it "has been asked whether it is proper for

such a corporation to 'rent' its in-house lawyers to perform legal works for other clients" and earn a profit when doing so. The ABA concluded that the corporation may not earn a profit, but that "[i]t is permissible for the in-house lawyers, rather than the corporation, to receive a reasonable fee beyond the amount the lawyers cost the corporation" as long as the lawyers avoid conflicts and interference by the corporation with their independent professional judgment. ABA LEO 392 (4/25/95).

Despite the ABA Model Rules' silence on this issue, the Restatement contains a fairly strict prohibition on in-house lawyers representing their client/employer's customers.

Under traditional concepts of unauthorized practice, a lawyer employed by an organization may provide legal services only to the organization as an entity with respect to its own interests and not, for example, to customers of the entity with respect to their own legal matters.

Restatement (Third) of Law Governing Lawyers § 4 cmt. e (2000) (emphasis added).

Interestingly, one particular type of extraneous representation has received special attention -- an insurance company's in-house lawyers' representation of that company's insureds.<sup>1</sup> Perhaps because of the political power of the insurance industry, this type of representation seems to have been more widely accepted than the analogous representations described above.<sup>2</sup>

States take varying approaches to the permissibility of in-house lawyers representing their client/employer's customers. Most states prohibit such activity.

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<sup>1</sup> See, e.g., Gafcon, Inc. v. Ponsor & Assocs., 120 Cal. Rptr. 2d 392 (Cal. Ct. App. 2002), petition for review denied, No. S108378, 2002 Cal. LEXIS 6604 (Cal. Sept. 11, 2002).

<sup>2</sup> See, e.g., Virginia LEO 598 (6/1/85) (an in-house lawyer for an insurance company may represent an insured, but must remember that the insured is the client; among other things, the insured's lawyer may not reveal information acquired from the insured that would allow the carrier to deny coverage; [approved by the Supreme Court 3/8/85, effective 6/1/85]).

- Washington LEO 2169 (2008) (holding that an in-house lawyer could not represent customers of the lawyer's employer/client; ultimately reaching this conclusion based on a fee-split rule, and therefore implying that the practice would not violate the UPL rules; explaining the factual background: "The inquirer is general counsel to a duly licensed real estate brokerage that syndicates houses for sale in Washington on the internet. The inquirer wants to provide limited-scope legal representation services to the customers of the brokerage. The services would be limited to answering miscellaneous legal questions relevant to the home selling process. The customer would receive a disclosure about the limited scope of the representation and relevant conflicts of interest information stating that the inquirer is also general counsel to the brokerage. Further, the customer would be advised that if conflicts of interest were to arise between them and the brokerage, the inquirer would immediately cease representation of either party and each would need to secure separate counsel. Customer questions within the limited-scope would be answered by the inquirer and, if the [sic] outside the limited-scope, the customer would be advised to seek outside counsel. The customer would not be charged any extra or special fees for the limited-scope representation because it would be part of the total services provided by the brokerage. The inquirer would be paid a straight salary for his legal work, regardless of if the services were as general counsel only or included limited-scope representation of the customers."; explaining that the in-house lawyer would be violating the fee-split rules by engaging in the conduct).
- Georgia LEO 99-2 (10/18/99) (finding that a real estate lending institution's in-house lawyer may not provide legal services to the institution's customers "which are in any way related to the existing relationship between the institution and its customer" because "[s]uch conduct would . . . constitute an impermissible conflict of interest").
- Kansas LEO 97-03 (7/9/97) (prohibiting a computer company's provision of legal services to its customers through its in-house lawyers if the services are designed to assist in the sale of software providing essentially legal advice, although presumably allowing such representations otherwise).
- North Carolina RPC 201 (1/13/95) (explaining that an in-house lawyer cannot represent the lawyer's employer's customers; "Attorney A may only provide legal services to customers of Real Estate Company who are referred to him by Real Estate Company, but he may not share his legal fees with Real Estate Company nor may he pay Real Estate Company anything for recommending his services. See Rule 2.3(c), which prohibits a lawyer from giving anything of value to someone for recommending his services, and Rule 3.2, which prohibits the sharing of fees with nonlawyers. Moreover, if Attorney A is employed by Real Estate Company as in-house counsel and, as such, is providing legal services to the customers of Real Estate

Company, it would be a violation of G.S. §84-5 which forbids corporations to engage in the practice of law." (emphasis added)).

- Texas LEO 498 (3/1994) (prohibiting in-house lawyers from providing legal services to the corporation's customers, if the corporation receives some payment, but presumably permitting the representations otherwise).
- Virginia UPL Op. 167 (3/5/93) (citing an earlier UPL opinion "which concluded that, since a lay corporation cannot practice law, no lay corporation may provide legal services to its customers").
- Ohio LEO 92-17 (10/16/92) ("[a] corporation's lawyer may not provide private legal representation to the corporation's clients on matters relating to issues on which the corporation has worked"; such an arrangement "improperly compensates the corporation for a recommendation of professional employment" and carries other risks as well; although some of the ethical dangers may be avoided, "it would be impossible to comply with disciplinary rules regarding recommendation of professional employment"; noting that states disagree about this issue (emphasis added)).
- Virginia UPL Op. 160 (10/15/92) (explaining that a lawyer acting as "the defacto" in-house lawyer for a construction company and also acting as an engineer for the construction company can provide legal services to and prepare legal instruments for the employer, but not for the employer's customers; "[T]he Committee is of the opinion that it would constitute the unauthorized practice of law for the in-house counsel to provide legal services, including the completion of standard industry contract forms, to the various owners/clients of the architectural/engineering firm since those owners/clients are not the 'regular employer' of the in-house counsel and since the architectural/engineering firm, as a lay firm, is not authorized to provide legal services." (emphases added); also explaining that even a non-lawyer can prepare contracts for the employer, although not for any of the employer's clients; "[S]ince bar membership is not a requisite for an individual to advise or prepare documents for his regular employer, the Committee is of the opinion that it would not constitute the unauthorized practice of law for non-lawyer employees to prepare standard industry construction contracts for the firm, although preparation of such documents for clients of the firm would not be permissible.").
- Philadelphia LEO 89-1 (3/1989) (expressing "substantial concern" with a consulting firm's provision of legal services by the firm's in-house counsel to the firm's clients (because of the possibility of fee-sharing, a non-lawyer's direction of legal services, and conflicts), but not totally prohibiting such representations).

- Tennessee LEO 84-F-74 (6/13/84) (repeating the holding of Tennessee LEO 83-F-44).
- District of Columbia LEO 135 (4/17/84) (in-house counsel may represent a corporate employer's client as long as no non-lawyer earns a profit, and as long as no non-lawyer exercises control over the representation).
- Virginia UPL Op. 57 (3/1/84) (in-house lawyers for a financial corporation may not provide legal services to the company's customers; explaining that the corporation billed the customers for the legal services, but apparently finding the representation improper even without such billing).
- Tennessee LEO 83-F-44 (4/14/83) ("[a]ny participation by corporate counsel in performing legal services to corporate customers is in violation of [the ethics Code] which prohibits a lawyer from aiding a non-lawyer in the unauthorized practice of law" (emphases added)).
- Iowa LEO 80-46 (11/7/80) ("[i]n]o legal services should be provided [by an in-house lawyer] specifically to third persons, namely, customers of that employer" (emphasis added)).

One 2009 Pennsylvania ethics opinion inexplicably permitted an in-house lawyer to represent non-clients on both sides of a transaction in which the lawyer's client/employer was involved.

- Pennsylvania LEO 2009-003 (1/26/09) (explaining that an in-house lawyer for a real estate developer may represent buyers and sellers of real estate in transactions in which the developer is involved; "Your employer has already given permission for you to be retained by individuals who would participate in these real estate transactions. Your participation would not be directly prohibited, at out [sic] the outset, but we believe that, prior to retention, you should obtain informed consent from your clients, pursuant to Rule 1.7(b)(4), for reasons presented in example [7] of the comments. You should inform your potential clients that although these transactions normally proceed uneventfully, there is a potential for conflict of interest in the event that the transaction fails and there are conflicting claims to the sum on deposit that your client initially provided or to which your client became entitled."; "In the event that such a conflict would arise in connection with the transaction, that conflict could not be resolved by consent, on the part of either your employer or your client, because the transaction becomes a prohibited representation as discussed in the comments in Rule 1.7. [Y]ou would be unable to continue representation of either party, your employer or your client, and you therefore would be required to withdraw from any and all representation. . . . You informed me that your employer is willing to have you withdraw from

representing that party, in the event of such a conflict, and your client would also be required to permit such withdrawal in the even[t] that the projected conflict actually arises."; inexplicably not dealing with the unauthorized practice of law issue).

### **Ethics Issues Implicated by In-House Lawyers' Representation of Customers**

In-house lawyers representing their client/employer's customers (where permitted by their bars) must wrestle with many of the same ethics issues confronting in-house lawyers representing corporate affiliates or corporate employees.

**Fees.** A number of state bars have dealt with the ethics implications of an in-house lawyer's client/employer charging for the lawyer's services provided to others. The analysis takes one of several approaches.

First, one opinion adopted a per se rule finding improper any arrangement under which the client/employer corporation receives any fee for the lawyer's services -- because the arrangement violates either the UPL or the fee-sharing rules.

- Texas LEO 498 (3/1994) ("In situations where a lawyer is employed by a corporation that is not a professional corporation and provides legal services to customers of the corporation, a major constraint imposed on the lawyer by the Texas Disciplinary Rules of Professional Conduct is that the corporation must not receive payment for the lawyer's services. If payment were received by the corporation, the arrangement would amount to an agreement by the lawyer to share legal fees with a nonlawyer (the corporation) in violation of Rule 5.04(a)." (emphases added)).

Second, one state found that a client/employer corporation's profiting from the in-house lawyer's services would violate the UPL or fee-sharing rules. Unlike the per se approach discussed above, this opinion apparently would allow the corporation to receive fees that equal the corporation's cost (presumably covering the in-house lawyer's salary, overhead, etc.).

- Massachusetts LEO 84-1 (1984) ("[a] charge by a bank to a mortgagor of a fee for legal services rendered to the bank by its staff attorney that exceeds

the cost to it of those services involves a prohibited sharing of legal fees with a non-lawyer"; explaining that the arrangement would be improper "if the bank charged the mortgagor more for the staff attorney's services than the actual, pro rata cost to the bank of those services, including overhead").

Third, a number of bars have dealt with the issue of fee splitting.

- Kansas LEO 97-03 (7/9/97) (finding that "the corporate attorney [who] gives legal advice to corporate customers" is not engaged in unethical fee splitting if "there is no direct or indirect charge by the corporation for that advice"; explaining, however, that if the cost of that legal advice is recouped by the corporation through the sale of its products, "this pass-through is an indirect violation" of the fee-split rules).
- Ohio LEO 92-17 (10/16/92) (explaining that any fee sharing concern "could be overcome by a corporate lawyer billing the corporate client directly for private legal services. In so doing, there would not be a sharing of legal fees with the corporation and thus, there would be no violation of the rule prohibiting division of fees with a non-lawyer."; nevertheless ultimately concluding that a corporation's in-house lawyer may not provide legal advice to the corporation's clients "on matters relating to issues on which the corporation has worked").
- Philadelphia LEO 89-1 (3/1989) (expressing "substantial concern" with a corporation's in-house lawyer providing legal services to the corporation's clients; explaining that impermissible fee-sharing would occur because "the lawyer's duties will include giving legal advice to clients of the consulting firm, and, presumably, a fee will be paid for that service," meaning that these fees become revenues of the firm and are distributed to non-lawyer personnel in violation of the fee-split rules).

**Payment for Recommendation.** One state indicated that in-house lawyers providing legal services to the corporate client/employer's customers inevitably violates the ethics rule barring lawyers from rewarding those who recommend him or her (the same rule prohibiting lawyers from making cash payments to ambulance drivers to recommend the lawyers to accident victims, etc.). That opinion found such an ethics violation essentially unavoidable.

- Ohio LEO 92-17 (10/16/92) ("[a] corporation's lawyer may not provide private legal representation to the corporation's clients on matters relating to issues on which the corporation has worked [because] it would be impossible to



comply with disciplinary rules regarding recommendation of professional employment. A corporation's attorney available to privately represent the corporation's clients adds value to the corporate services and thus improperly compensates the corporation for a recommendation of professional employment.").

\* \* \*

Most states prohibit in-house lawyers from representing their client/employers' customers. This approach makes sense in the abstract, because otherwise an in-house lawyer for a retail operation could represent the retail operation's customers -- essentially allowing the retail client/employer to become a law firm.

As explained above, in-house lawyers establishing their own separate practice may freely represent their client/employer's customer -- as long as they deal with all of the conflicts, malpractice insurance coverage, and other issues.

### **Best Answer**

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

N 8/12

## Multijurisdictional Practice: Relationship to the Lawyers' Home State

### Hypothetical 39

You handle the trust and estate work for several wealthy individuals who spend summers in your state but winters in Florida (where you are not licensed). Several multijurisdictional questions have just arisen in connection with your practice.

- (a) May you travel to Florida in February and meet with one of your clients to go over her estate plan?

**YES**

- (b) May you represent one of your client's Florida neighbors in preparing his estate plan (the neighbor lives permanently in Florida, but heard glowing reports about you from your client who lives next door)?

**MAYBE**

### Analysis

States prohibit nonlawyers from practicing law.

Although it might seem counter-intuitive, lawyers themselves can also be found liable for (or even charged criminally for) the unauthorized practice of law -- if they practice law in a state where they are not licensed to do so.

The ABA Model Rules contain a fairly basic prohibition:

A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

ABA Model Rule 5.5(a). A comment provides an explanation.

A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a)

applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person.

ABA Model Rule 5.5 cmt. [1].

Despite this flat prohibition, every state has what amounts to a "safety valve," which allows lawyers not licensed in a state to temporary practice law under certain conditions. This type of unauthorized practice of law is called "multijurisdictional practice."

### **ABA Model Rules**

As long as out-of-state lawyers undertake legal services on a "temporary basis," the ABA Model Rules take a very broad approach.

Even if the services are not related to proceedings before a tribunal or some alternative dispute resolution proceedings, lawyers may cross state lines to undertake services that

arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

ABA Model Rule 5.5(c)(4) (emphasis added).

A comment shows just how broadly the ABA interprets this provision.

Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

ABA Model Rule 5.5 cmt. [13].

The next comment takes a remarkably broad view of what type of "relationship" to the lawyer's home state suffices under this catch-all provision.

Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law. Lawyers desiring to provide pro bono legal services on a temporary basis in a jurisdiction that has been affected by a major disaster, but in which they are not otherwise authorized to practice law, as well as lawyers from the affected jurisdiction who seek to practice law temporarily in another jurisdiction, but in which they are not otherwise authorized to practice law, should consult the [Model Court Rule on Provision of Legal Services Following Determination of Major Disaster].

ABA Model Rule 5.5 cmt. [14] (emphases added).

Thus, the client does not have to be based in the lawyer's home jurisdiction -- as long as the client has "substantial contacts" with that jurisdiction.

In fact, the client does not have to have any connection to the lawyer's home jurisdiction -- it is enough that the "matter" has a "significant connection" to the home jurisdiction, even if it involves other jurisdictions. All in all, the ABA's catch-all provision

permits nearly any conceivable type of "temporary" provision of legal services in other states.

## Restatement

The Restatement takes a similarly broad approach.

A lawyer currently admitted to practice in a jurisdiction may provide legal services to a client . . . at a place within a jurisdiction in which the lawyer is not admitted to the extent that the lawyer's activities arise out of or are otherwise reasonably related to the lawyer's practice [where the lawyer is admitted].

Restatement (Third) of Law Governing Lawyers § 3(3) (2000). Thus, the Restatement uses the same basic "reasonably related to" standard as the ABA Model Rules.

The Restatement's comments mirror the ABA's expansive comments.

When other activities of a lawyer in a non-home state are challenged as impermissible for lack of admission to the state's bar, the context in which and purposes for which the lawyer acts should be carefully assessed. Beyond home-state activities, proper representation of clients often requires a lawyer to conduct activities while physically present in one or more other states. Such practice is customary in many areas of legal representation. As stated in Subsection (3), such activities should be recognized as permissible so long as they arise out of or otherwise reasonably relate to the lawyer's practice in a state of admission. In determining that issue, several factors are relevant, including the following: whether the lawyer's client is a regular client of the lawyer or, if a new client, is from the lawyer's home state, has extensive contacts with that state, or contacted the lawyer there; whether a multistate transaction has other significant connections with the lawyer's home state; whether significant aspects of the lawyer's activities are conducted in the lawyer's home state; whether a significant aspect of the matter involves the law of the lawyer's home state; and whether either the activities of the client involve multiple jurisdictions or the legal issues involved are primarily either multistate or federal in nature.

Restatement (Third) of Law Governing Lawyers § 3 cmt. e (2000) (emphases added).

The Restatement's approach essentially follows the ABA Model Rules approach, but contains a number of factors that reflect an even more liberal approach than the ABA Model Rules.

- First, one Restatement factor in determining the "relationship" to a lawyer's home state is whether the prospective client "contacted the lawyer there." That provision (which does not appear in ABA Model Rule 5.5 cmt. [14]), would dramatically expand a lawyer's freedom to temporarily practice in other states. It would examine (and presumably consider important) the fact that an out-of-state client called across state lines into the state where the lawyer was properly practicing law. If the lawyer has sufficient visibility in other states, or lives near a border, this could happen quite frequently. Thus, it creates a much broader range of scenarios in which lawyers may properly practice law in a state adopting the Restatement view. Most states adopt the narrower -- but still fairly broad -- ABA Model Rules approach.
- Second, the Restatement's focus on legal issues includes a reference to legal issues that "are primarily either multistate or federal in nature." ABA Model Rule 5.5 cmt. [14] uses a slightly different term: "a particular body of federal, nationally-uniform, foreign or international law." At least on its face, the Restatement seems to take a broader approach -- legal issues can be "multistate" even if they do not involve "nationally-uniform" law. However, ABA Model Rule 5.5 cmt. [14] also explains that lawyers may assist corporate clients "when the client's activities or the legal issues involve multiple jurisdictions" -- which presumably could include "multistate" legal issues that are not nationally uniform.

The Restatement also deals with lawyers engaged in multistate type practices -- paralleling the ABA Model Rules approach.

Particularly in the situation of a lawyer representing a multistate or multinational organization, the question of geographical connection may be difficult to assess or establish. Thus, a multinational corporation wishing to select a location in the United States to build a new facility may engage a lawyer to accompany officers of the corporation to survey possible sites in several states, perhaps holding discussions with local governmental officers about such topics as zoning, taxation, environmental requirements, and the like. Such occasional, temporary in-state services, when reasonable and appropriate in performing the lawyer's functions for the client, are a proper aspect of practice and do not constitute impermissible practice in the other state.

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

### **ACTEC Commentaries**

The ACTEC Commentaries also take a very broad approach to multijurisdictional practice.

Subject to the "temporary basis" threshold requirement, under paragraph (c)(4), a lawyer may provide legal services in a non-admitted jurisdiction that arise out of or are reasonably related to the lawyer's practice in an admitted jurisdiction. Comment 14 states that a variety of factors may establish that the services performed are reasonably related to the lawyer's practice in the admitted jurisdiction. For example, a lawyer provides estate planning services for a client in the lawyer's admitted jurisdiction. The client then moves to a non-admitted jurisdiction. The lawyer may continue to provide estate planning services for the client. Similarly, where a client retains the lawyer to represent the client in a fiduciary administration and the admitted jurisdiction is the natural situs for administration, the lawyer could provide legal services for ancillary administrations in non-admitted jurisdictions.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 5.5, at 162 (4th ed. 2006),

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

The ACTEC Commentaries also point to the ABA's "catch-all" provision.

While the language of paragraph (c) appears to state all of the exceptions available to a lawyer seeking to practice law in a non-admitted jurisdiction on a "temporary basis," Comment 5 specifically provides: "The fact that conduct is not [stated in (c)(1) through (4)] does not imply that the conduct is or is not authorized" (Comment 5 to MRPC 5.5, emphasis added). Given the diversity of legal services that can be offered in estate planning and administration matters, there may be other situations in which a lawyer may provide legal services in a non-admitted jurisdiction or concerning

the laws of a non-admitted jurisdiction not expressly covered in paragraphs (c)(1) through (4). In analyzing whether the lawyer may act on a "temporary basis" with regard to the requested services, the lawyer should consider whether or not the "circumstances . . . create an unreasonable risk to the interests of their clients, the public or the courts" (Comment 5 to MRPC 5.5). If the lawyer can demonstrate that there is no unreasonable risk, the lawyer may proceed with the requested representation on a "temporary basis." In the event, the lawyer should consider seeking an opinion of the non-admitted jurisdiction's bar counsel.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 5.5, at 163 (4th ed. 2006), [http://www.actec.org/Documents/misc/ACTEC\\_Commentaries\\_4th\\_02\\_14\\_06.pdf](http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf) (emphasis added).

\* \* \*

**(a)** The ABA Model Rules would clearly allow a lawyer to temporarily follow a client from her home state to another state to provide legal services.

For instance, ABA Model Rule 5.5 cmt. [14] recognizes that the "reasonable relationship" that permits an out-of-state lawyer to perform legal services in a state can include such factors as:

The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted.

ABA Model Rule 5.5 cmt. [14] (emphasis added).

As explained immediately below, the Restatement takes even a broader approach, and thus would clearly permit this conduct.

**(b)** The ABA might permit a lawyer to assist the neighbor in this setting, but probably not because of the neighbor's contact with the lawyer's home state.



Instead, the lawyer presumably would have to rely on such factors as the lawyer's expertise in "a particular body of federal, [or] nationally-uniform" law. ABA Model Rule 5.5 cmt. [14]. That factor could presumably justify the lawyer's assistance in federal tax law questions, but not state tax law questions.

The ACTEC Commentaries would probably take the same approach.

Where the lawyer has developed a recognized expertise in federal, nationally-uniform, foreign or international law, Comment 14 suggests that the lawyer's practice in non-admitted jurisdictions will be considered reasonably related to the lawyer's practice in the lawyer's admitted jurisdiction. For example, a lawyer with recognized expertise in retirement planning, charitable planning, estate and gift tax planning, or international estate planning may be able to practice in non-admitted jurisdictions. Because the comments are not binding, a lawyer who intends to rely on this analysis should consider seeking an opinion of the non-admitted jurisdiction's bar association. In addition, since this exception is based on "recognized expertise," a lawyer who chooses to rely on this exception should take steps to insure that the lawyer is recognized as an expert. These steps could include: obtaining certification as a specialist in those jurisdictions offering such programs; participating actively in bar sections related to the lawyer's expertise; participating in national associations of lawyers related to the lawyer's expertise; writing scholarly articles; teaching; participating in seminars and panel discussions; or any other activity that demonstrates the lawyer's expertise.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 5.5, at 162 (4th ed. 2006), [http://www.actec.org/Documents/misc/ACTEC\\_Commentaries\\_4th\\_02\\_14\\_06.pdf](http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf) (emphases added).

This hypothetical comes from a Restatement illustration -- which represents perhaps the most liberal view of multijurisdictional practice.

Lawyer is admitted to practice and has an office in Illinois, where Lawyer practices in the area of trusts and estates, an area involving, among other things, both the law of wills, property, taxation, and trusts of a particular state and federal income, estate, and gift tax law. Client A, whom Lawyer has represented in estate-planning matters, has recently moved to Florida and calls Lawyer from there with a request that leads to Lawyer's preparation of a codicil to A's will, which Lawyer takes to Florida to obtain the necessary signatures. While there, A introduces Lawyer to B, a friend of A, who, after learning of A's estate-planning arrangements from A, wishes Lawyer to prepare a similar estate arrangement for B. Lawyer prepares the necessary documents and conducts legal research in Lawyer's office in Illinois, frequently conferring by telephone and letter with B in Florida. Lawyer then takes the documents to Florida for execution by B and necessary witnesses. Lawyer's activities in Florida on behalf of both A and B were permissible.

Restatement (Third) of Law Governing Lawyers § 3, illus. 5 (2000). Thus, the Restatement would even allow this type of out-of-state activity.

Presumably, the Restatement deliberately picked Florida as the jurisdiction in which this question arose. Undoubtedly driven by Florida lawyers' worry that northern lawyers will follow their wealthy "snowbirds" south (or work part-time themselves in Florida during the winter months), Florida seems more concerned than any other state with out-of-state lawyers providing legal services within its borders. The Restatement illustration represents an explicit challenge to this type of parochial turf-protection.

Not every state takes the narrow view that Florida has adopted (or polices multijurisdictional practice issues as aggressively as Florida), but all states protect their own lawyers to at least some extent.

**Best Answer**

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

N 8/12 [S,T]

## Multijurisdictional Practice: Lawyers' National Reputation

### Hypothetical 40

You have practiced for over 40 years as a trust and estate lawyer, and developed a national reputation in particular types of complicated estate planning techniques using specific trust agreements. You just received a call from a potential client in a state in which you are not licensed, and which you have never visited. The client wants to meet with you at his home in that state, because he has great difficulty traveling.

May you travel to the new client's state to discuss the particular type of estate planning techniques you have gained a national reputation for using?

### YES (PROBABLY)

#### Analysis

Under the broad ABA Model Rule 5.5 and Restatement approach, this type of national expertise normally would satisfy the requirement that the out-of-state lawyer's provision of legal services in the state be "reasonably related" to the lawyer's home jurisdiction.

Lawyers practicing federal law can sometimes point to the Constitution's Supremacy Clause to justify their actions in another state. However, even lawyers possessing expertise in uniform non-federal law can rely on language in the ABA Model Rules and the Restatement.

A comment to the ABA Model Rules states that

the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law.

ABA Model Rule 5.5 cmt. [14] (emphasis added).

The Restatement similarly notes that the pertinent factors include whether "the legal issues involved are primarily either multistate or federal in nature." Restatement (Third) of Law Governing Lawyers § 3 cmt. e (2000).

Theoretically, the Restatement's reference to "multistate" legal issues is somewhat broader than the ABA Model Rule's reference to "nationally-uniform" law (although ABA Model Rule 5.5 cmt. [14] explains that lawyers may assist corporate clients "when the client's activities or the legal issues involve multiple jurisdictions" -- which presumably could include "multistate" legal issues that are not nationally uniform).

The Restatement also indicates that the permissibility of a lawyer's action in another state depends in part on whether a new client "contacted the lawyer" in the lawyer's home state. Restatement (Third) of Law Governing Lawyers § 3 cmt. e (2000).

Not surprisingly, the ACTEC Commentaries emphasize this MJP rule.

Where the lawyer has developed a recognized expertise in federal, nationally-uniform, foreign or international law, Comment 14 suggests that the lawyer's practice in non-admitted jurisdictions will be considered reasonably related to the lawyer's practice in the lawyer's admitted jurisdiction. For example, a lawyer with recognized expertise in retirement planning, charitable planning, estate and gift tax planning, or international estate planning may be able to practice in non-admitted jurisdictions. Because the comments are not binding, a lawyer who intends to rely on this analysis should consider seeking an opinion of the non-admitted jurisdiction's bar association. In addition, since this exception is based on "recognized expertise," a lawyer who chooses to rely on this exception should take steps to insure that the lawyer is recognized as an expert. These steps could include: obtaining certification as a specialist in those jurisdictions offering such programs; participating actively in bar sections related to the lawyer's expertise; participating in national associations of lawyers related to the lawyer's expertise; writing scholarly articles; teaching; participating in seminars and panel discussions; or any other activity that demonstrates the lawyer's expertise.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 5.5, at 162 (4th ed. 2006),

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

(emphases added). Thus, the ACTEC Commentaries follow the ABA Model Rules in referring to "nationally-uniform" law, rather than using the arguably broader

Restatement "multistate" legal issues phrase.

Not all states would take such a liberal approach, but the ABA's, Restatement's and ACTEC Commentaries' attitude reflects a trend in the direction of permitting such activity in other states.

### **Best Answer**

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

N 8/12 [S,T]

## Multijurisdictional Practice: Practice in Federal Tribunals

### Hypothetical 41

You started practicing in Minnesota immediately after graduating from law school two years ago, but now have the opportunity to join a firm in another state. You are not able to waive into that state's bar, and for obvious reasons would like to avoid taking another bar exam. You decided from the beginning to limit your practice to trust and estate matters, usually involving federal tax issues. You wonder whether you can avoid taking the bar exam in your new state if you limit your practice even further -- working only on matters before the U.S. Tax Court in Washington, D.C.

May you continuously practice in a state if you limit your work to matters before a federal agency or specialized tribunal?

### YES (PROBABLY)

#### Analysis

The Supremacy Clause,<sup>1</sup> prevents states from prohibiting or restricting a lawyer's practice of law before a federal agency or specialized tribunal.

The ABA Model Rules indicate that a lawyer admitted to some United States jurisdictions (and not "disbarred or suspended from practice in any [other] jurisdiction") may provide legal services that

are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

ABA Model Rule 5.5(d)(2) (emphasis added). A comment provides additional explanation.

Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent.

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<sup>1</sup> U.S. Const. art. VI, § 2.

ABA Model Rule 5.5 cmt. [18] (emphasis added).

The ABA Model Rules explain that lawyers engaging in such practice must subject themselves to the disciplinary authority of the state where they are located,<sup>2</sup> and must accurately describe the limits of their license in all marketing material and in their disclosures to clients.<sup>3</sup>

The Restatement provides a more detailed explanation of what lawyers can and cannot do.

A lawyer properly admitted to practice before a federal agency or in a federal court . . . may practice federal law for a client either at the physical location of the agency or court or in an office in any state, so long as the lawyer's practice arises out of or is reasonably related to the agency's or court's business. Such a basis for authorized practice is recognized in Subsection (2). Thus, a lawyer registered with the United States Patent and Trademark Office could counsel a client from an office anywhere about filing a patent or about assigning the ensuing patent right, matters reasonably related to the lawyer's admission to the agency. (The permissible scope of practice of a nonlawyer patent agent may be less, since admission to the agency does not suggest competence to deal with matters, such as the assignment of patents, beyond the jurisdiction of the agency).

Restatement (Third) of Law Governing Lawyers § 3 cmt. g (2000) (emphasis added).

A Restatement illustration explains how these principles work in allowing a lawyer to practice before a federal agency (rather than a federal court).

Lawyer, who practices with a law firm in California, is a nationally known expert in corporate mergers and acquisitions. Utility is a major electricity generator and distributor in the southeastern United States. Under the new legislation referred to in Illustration 3, Utility is considering a

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<sup>2</sup> ABA Model Rule 5.5 cmt. [19].

<sup>3</sup> ABA Model Rule 5.5 cmt. [20].



hostile takeover of Old Company, an established regional electricity generator and distributor in the northeastern United States. Legal work on the acquisition would require the physical presence of Utility's mergers-and-acquisitions counsel in a number of states in addition to the West Coast state in which Lawyer is admitted, in addition to representation before at least one federal agency in Washington, D.C. Given the multistate and federal nature of the legal work, Lawyer and other members of Lawyer's firm may represent Utility as requested.

Restatement (Third) of Law Governing Lawyers § 3 cmt. e, illus. 4 (2000) (emphases added).

The ACTEC Commentaries explicitly take the position that lawyers licensed in any state should be able to practice before the Tax Court,<sup>4</sup> the IRS,<sup>5</sup> and other similar administrative tribunals<sup>6</sup> -- even if they are doing so while physically located in a state where they are not licensed.

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<sup>4</sup> American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 5.5, at 164 (4th ed. 2006), [http://www.actec.org/Documents/misc/ACTEC\\_Commentaries\\_4th\\_02\\_14\\_06.pdf](http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf) ("While the text of MRPC 5.5(d)(2) appears expressly to permit multijurisdictional practice in these circumstances, given the ease with which a lawyer can qualify to practice before the Tax Court or the IRS, the lawyer should consider seeking an opinion of the non-admitted jurisdiction's bar counsel.").

<sup>5</sup> American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 5.5, at 163 (4th ed. 2006), [http://www.actec.org/Documents/misc/ACTEC\\_Commentaries\\_4th\\_02\\_14\\_06.pdf](http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf) ("A lawyer providing legal services regarding estate planning and administration often represents clients in disputes with the IRS. A lawyer 'may practice before the Internal Revenue Service by filing with the Internal Revenue Service a written declaration that he or she is currently qualified as an attorney and is authorized to represent the party or parties on whose behalf he or she acts.' [31 CFR §10.3; see generally 31 CFR Part 10, §10.0 *et seq.* (published as a pamphlet as Treasury Department Circular No. 230)]. In addition, a lawyer may practice before the United States Tax Court by complying with its requirements for admission (Tax Court Rule 24). Pursuant to paragraph (d)(2) of MRPC 5.5, a lawyer who is authorized to practice before the IRS or the Tax Court would be able to practice in any non-admitted jurisdiction adopting MRPC 5.5(d)(2). Moreover, unlike MRPC 5.5(c), there is no requirement that the practice in the non-admitted jurisdiction be on a 'temporary basis.'").

<sup>6</sup> See, e.g., American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 5.5, at 164 (4th ed. 2006), [http://www.actec.org/Documents/misc/ACTEC\\_Commentaries\\_4th\\_02\\_14\\_06.pdf](http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf) ("In addition, states adopting MRPC 5.5(d)(2) may have state rules regulating practice before a state administrative tribunal, such as a tax commission, or an administrative law judge, that would authorize a lawyer admitted in another jurisdiction to practice before the commission or administrative law tribunal in the non-admitted state." While the text

This general principle allows lawyers to practice before the United States Patent and Trademark Office, military courts, etc. -- even if the lawyers establish a "continuous and systematic" presence in a state where they are not licensed.

Not surprisingly, the Virginia Bar has dealt with this issue -- because several federal agencies are located in Northern Virginia. For instance, the Virginia Bar has explicitly explained that out-of-state lawyers can practice in Virginia without being licensed in Virginia -- as long as they limit the practice to matters before the U.S. Patent Office.

Based on this authority, an attorney who is licensed other than in Virginia, who is registered and authorized to practice before the U.S. Patent Office and who is a member of a Virginia law firm can provide all legal services and representation related to a patent law practice to all clients needing such services and representation regardless of where the clients are located. These services and representation may include rendering legal advice and/or written opinions for clients on issues such a patent infringement, patent claim construction, patent validity, or enforceability of a patent. The patent attorney may provide such advice and opinions to a client whether related to a matter the patent attorney is actually handling for the client before the USPTO or not. The patent attorney can conduct this practice and provide these services while physically in Virginia and without the supervision or association of a Virginia licensed attorney, so long as the patent attorney limits his/her activity to the practice of patent law and is not in any manner attempting to practice Virginia law. Provided the patent attorney's practice is limited as described herein,

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of MRPC 5.5(d)(2) appears expressly to permit multijurisdictional practice in these circumstances, given the ease with which a lawyer can qualify to practice before the Tax Court or the IRS, the lawyer should consider seeking an opinion of the non-admitted jurisdiction's bar counsel. When authorized by federal or state law, including authorization by "statute, court rule, executive regulation or judicial precedent," the lawyer "may establish an office or other systematic and continuous presence in [the non-admitted] jurisdiction for the practice of law . . ." (MRPC 5.5, Comments 18 and 15). For example, a lawyer in South Carolina might be able to practice full-time in Georgia (Georgia having adopted MRPC 5.5(d)(2), if the practice were limited to handling tax appeals with the IRS and tax court litigation. However, the lawyer must take steps not to mislead potential clients about the lawyer's right to practice generally in Georgia [MRPC 5.5(b)(2) . . .]).

he or she may also maintain an office in Virginia to conduct that limited practice. If the patent attorney is a member of a law firm with offices in Virginia and elsewhere, the extent to which the patent attorney can conduct his/her practice outside of Virginia will depend on the unauthorized practice rules and/or rules of professional conduct in those other jurisdictions. If the patent attorney provides advice and counsel regarding patent law to a Virginia client from a location outside of Virginia, this would not be the unauthorized practice of law in Virginia because the attorney is not physically in Virginia and because he/she is otherwise authorized to practice patent law.

Virginia UPL Op. 210 (8/8/06) (footnote omitted; emphases added). The Virginia Bar warned the lawyer to explain in any marketing material the limits of the lawyer's license.

In an earlier legal ethics opinion, the Virginia Bar took the same approach to out-of-state lawyers practicing before military courts and boards.

- Virginia UPL Op. 89 (2/19/86) ("It is not the unauthorized practice of law for an attorney not licensed, but living, in Virginia to represent individuals before military courts and boards on military reservations.").

Courts also take this position.

- Augustine v. Dep't of Veterans Affairs, 429 F.3d 1334 (Fed. Cir. 2005) (holding that federal rather than state law governed a lawyer's ability to practice before the Merit Systems Protection Board and other federal agencies).

Lawyers relying on this principle must be very careful to limit their practice so they fit within this narrow exception. For instance, a client with a case before the Tax Court might want advice about such peripheral matters as state creditors' rights laws and regulations. A lawyer limiting his or her practice to Tax Court cases could not provide such advice.

Lawyers not carefully complying with these limitations can face serious consequences. For example, in 2010 a Virginia grand jury indicted a lawyer who was

eligible to practice before the U.S. Patent and Trademark Office -- but who held himself out as authorized to practice generally in Virginia, and actually did so.

- Peter Vieth, Williamsburg Patent Lawyer Charged With UPL, VLW Blog (Nov. 22, 2010), <http://valawyersweekly.com/vlwblog/2010/11/22/williamsburg-patent-lawyer-charged-with-upl/> ("A Williamsburg grand jury has returned an indictment charging patent attorney Bambi F. Walters with practicing law without a license, according to the local prosecutor."; "Williamsburg/James City County Commonwealth's Attorney Nate Green said the charge resulted from a Virginia State Bar [VSB] investigation. VSB Counsel Ned Davis confirmed his office had turned over results of its investigation to the local authorities."; "Walters is an attorney registered with the U.S. Patent and Trademark Office, but she does not hold a Virginia law license, according to officials at the VSB. Her website indicates she practices in patent, trademark and related areas. 'We have worked with many nonprofit organizations and associations,' her website also reads."; "Green declined to provide details of the UPL charge, but he said the indictment covers an entire year, from Nov. 17, 2009, to Nov. 16, 2010. 'We believe she was practicing law during that time,' he said."; "Virginia law bars federally licensed patent attorneys without Virginia licenses from appearing 'in any court or tribunal' other than those of the United States Patent Office. A Virginia Supreme Court rule bars patent lawyers from holding themselves out as authorized to practice law generally." (emphasis added); "The charge of unauthorized practice of law is a class 1 misdemeanor. 'Once she is served, a trial date will be set,' Green said." (emphasis added); [Editor's note: Other reports indicated that Ms. Walters was licensed in North Carolina during some of the pertinent time period, but was eventually disbarred there.]).

As a practical matter, lawyers find it very difficult to rely on this exception -- and most ultimately join the bar of the state where they are continuously practicing. Most wise lawyers would not dare risk an unauthorized practice of law charge by attempting to "thread the needle" in a state where they are not licensed. In addition to the possibility of criminal prosecution or bar discipline,<sup>7</sup> such lawyers would have to worry

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<sup>7</sup> Although it seems counter-intuitive, lawyers practicing in a state without being licensed there generally can be punished by the bar of that state -- even though they are not members of that bar. Most bars have arranged for such power (by statute, court rule or other regulation) so that they can enforce the unauthorized practice of law rules rather than rely on overworked law enforcement officials.

about disgruntled clients or former clients using the explicit or implicit threat of charging a UPL violation as leverage in a dispute with the lawyer.

Significantly, lawyers who do not move quickly in joining in their state's bar in these circumstances might forfeit the chance to join the bar without taking the bar exam. This is because some states' rules allowing out-of-state lawyers to be admitted by motion to their bar usually require that such applicants have practiced law for a certain number of years in a state where they are licensed. This often excludes from the calculation any time the lawyer spends in the state where he or she is not licensed -- even though the lawyer may permissibly engage in limited activities in that state.

**Best Answer**

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

B 2/13

## Multijurisdictional Practice: Lawyers' Limiting Their Practice to "Federal" Matters

### Hypothetical 42

You have not practiced long enough in Kentucky to waive into the Tennessee Bar, but you wonder whether you can move to Tennessee and practice there without a Tennessee license -- as long as you limit your practice to federal estate and gift tax matters.

May you practice in Tennessee without a license there, as long as you limit your practice to federal estate and gift tax matters?

### NO (PROBABLY)

### Analysis

This question deals with the application of the Supremacy Clause<sup>1</sup> to the type of law that a lawyer practices -- rather than to the forum (such as a federal agency or a federal court) in which the lawyer practices.

The ABA Model Rules indicate that a lawyer admitted in some United States jurisdiction (and not "disbarred or suspended from practice in any [other] jurisdiction") may provide legal services that

are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

ABA Model Rule 5.5(d)(2) (emphasis added). A comment provides additional explanation.

Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent.

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<sup>1</sup> U.S. Const. art. VI, § 2.

ABA Model Rule 5.5 cmt. [18] (emphasis added).

The ABA Model Rules indicate that lawyers engaging in such practice must subject themselves to the disciplinary authority of the state where they are located,<sup>2</sup> and must accurately describe the limits of their license in all marketing material and in their disclosure to clients.<sup>3</sup>

Not surprisingly, courts and bars dealing with this issue focus on several key issues.

First, any lawyer engaging in such conduct must avoid "holding himself out" as a lawyer licensed in that state.

- Gould v. Harkness, 470 F. Supp. 2d 1357, 1358, 1361, 1362, 1363 (S.D. Fla. 2006) (holding that a New York lawyer residing in Florida cannot advertise for clients who need help with "New York Legal Matters Only" or need the services of his "Federal Administrative Practice"; holding that the advertising does not deserve protection as commercial speech; "Plaintiff seeks to advertise his availability as an attorney in Florida even though he is only licensed in New York. Although he seems to limit his practice to New York legal matters, he does not state that he is not a member of the Florida Bar or that he is not authorized to practice in Florida. In other words, like the defendant in Tate, Plaintiff fails to state that he is only licensed to practice in New York. By stating 'Free Phone Consultation' and listing a Miami phone number along with a Miami address for his office, Plaintiff creates the impression that he is authorized to practice law in Florida."; also noting that the lawyer's establishment of a Florida office amounts to the unauthorized practice of law; "In this case, there is no evidence that anyone other than Plaintiff would be responsible for his office's operations and because Plaintiff is not a member of the Florida bar, his establishment of a Florida law office constitutes UPL."; noting that "[p]laintiff cannot point to federal legislation or regulations that specifically authorize him to engage in general federal administrative practice"; finding that the Florida MJP rule (effective in 2005) does not allow the lawyer to conduct his practice in Florida, because it is not a "temporary" practice), aff'd sub nom. Gould v. Florida Bar, 259 F. App'x 208 (11th Cir. 2007) (unpublished opinion), cert. denied, 553 U.S. 1032 (2008).

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<sup>2</sup> ABA Model Rule 5.5 cmt. [19].

<sup>3</sup> ABA Model Rule 5.5 cmt. [20].

- Attorney Grievance Comm'n of Md. v. Harris-Smith, 737 A.2d 567, 568 (Md. 1999) (suspending for thirty days a Pennsylvania lawyer who claimed to be engaging "exclusively" in bankruptcy law in Maryland, but whose letterhead listed the Maryland office without any explanation of the limitation on her license).

Second, lawyers attempting to limit their practice in this way must scrupulously avoid providing advice outside the narrow range of federal law. The more narrow the area of federal law, the more likely a court or bar is to approve such practice by an out-of-state lawyer. Even with these precautions, however, as a practical matter such a practice limited to certain topics (as opposed to certain courts or boards) usually cannot work.

Interestingly, most courts and bars analyzing this issue do not address the obvious issue facing a lawyer establishing a permanent presence in another state, but attempting to limit his or her practice to "federal" law. During any initial interview with a client, such a lawyer will have to essentially engage in a "triage" process -- separating "federal" from non-"federal" law, and advising the new client of the lawyer's inability to advise on the second type of legal questions. Even that process is the "practice of law" under nearly every state's definition, and obviously does not involve purely "federal" law.

Still, some courts and bars acknowledge the theoretical possibility that out-of-state lawyers can practice in the state on such narrow federal topics as "immigration" law.

- North Carolina Rule 7.5 cmt. [2] ("This rule does not prohibit the employment by a law firm of a lawyer who is licensed to practice in another jurisdiction, but not in North Carolina, provided the lawyer's practice is limited to areas that do not require a North Carolina law license such as immigration law, federal tort claims, military law, and the like. The lawyer's name may be included in the firm letterhead, provided all communications by such lawyer on behalf of the firm indicate the jurisdiction in which the lawyer is licensed as well as the fact that the lawyer is not licensed in North Carolina. If law



offices are maintained in another jurisdiction, the law firm is an interstate law firm and must register with the North Carolina State Bar as required by 27 N.C.A.C. 1E, Section .0200." (emphasis added)).

- New Jersey UPL Op. 44 (2008) (holding that lawyer not licensed in New Jersey may practice in a New Jersey law firm if he "solely engages in immigration law"; also holding that the lawyer can advertise his availability to practice immigration law, as long as all his advertising states that the lawyer is not licensed in New Jersey and limits his practice to immigration matters (emphasis added)).
- Philadelphia LEO 2005-14 (8/2005) ("Since the inquirer's situation clearly fits within 5.5d(2) it becomes clear that he is not required to be admitted to the Pennsylvania Bar in order to maintain an office here provided he limits his practice to immigration work. This is true whether or not he is in a partnership with a Pennsylvania admitted attorney." (emphasis added); "The Committee notes that oftentimes state law issues, for example domestic relations law, will have an impact on representation in an immigration matter. The inquirer is required by Rule 1.1 (Competence), if dealing with any of these questions to have sufficient knowledge of such law in order to provide competent advice. However, the inquirer's involvement in such areas must be limited to advice and discussion on such matters as they impact the client's immigration matter and nothing further. Should the client request that the inquirer become more involved, to do so would place the inquirer in violation of Rule 5.5." (emphasis added)).
- Philadelphia LEO 2004-6 (8/2004) (analyzing the following fact pattern: "The inquirer is an immigration attorney practicing in an LLP with one other attorney who is admitted to the Pennsylvania Bar. The firm's office is located in Pennsylvania. The inquirer practices only federal administrative law exclusively before the immigration courts in Philadelphia. He does not give advice or handle any matters involving Pennsylvania law nor does he hold himself out as a member of the Pennsylvania Bar."; explaining that the lawyer had earlier been advised that his practice was acceptable, but that he wondered whether Pennsylvania's recently revised Rule 5.5 changed the analysis; explaining that he could continue practicing even if he did not partner with a Pennsylvania lawyer who is actively participating in the matters; "As the inquirer is in partnership with a Pennsylvania-admitted attorney, his present practice of immigration law within his Pennsylvania office would be authorized by Rule 5.5(c)(1), provided his partner actively participates in the matter. However, even if his partner does not, Rule 5.5(d)(2) makes it clear that the inquirer is authorized to provide his immigration services by virtue of his admission to the Immigration Court." (emphases added); ultimately concluding that the lawyer could establish a continuous presence in Pennsylvania even if he was not admitted there; "Since the inquirer's situation clearly fits within 5.5d(2) it becomes clear that

he is not required to be admitted to the Pennsylvania Bar in order to maintain an office here provided he limits his practice to immigration work. This is true whether or not he is in a partnership with a Pennsylvania admitted attorney. The answer to the second question renders the third question moot." (emphasis added); "The Committee does remind the inquirer that since he is not admitted to practice generally in Pennsylvania and is only able to practice in immigration matters that any advertisements, stationary, cards, etc. must so note in accordance with Rules of Professional Conduct 7.1a and 7.5a.").

- Virginia UPL Op. 201 (1/23/01) (holding that an out-of-state lawyer practicing in Virginia "may advise and prepare legal documents for a Virginia client in Virginia on . . . matters ["involving federal law"], assuming that the foreign attorney is admitted to practice before that federal court"; warning that "[s]uch advice and document preparation may be provided only to the extent that the federal matter is not impacted by Virginia law and if Virginia legal issues are not involved.").

In sharp contrast, other courts and bars hold that out-of-state lawyers cannot continuously operate in the state and legitimately limit their practice to certain federal law topics.

- Gould v. Harkness, 470 F. Supp. 2d 1357, 1358, 1361, 1362, 1363 (S.D. Fla. 2006) (holding that a New York lawyer residing in Florida cannot advertise for clients who need help with "New York Legal Matters Only" or need the services of his "Federal Administrative Practice"; holding that the advertising does not deserve protection as commercial speech; "Plaintiff seeks to advertise his availability as an attorney in Florida even though he is only licensed in New York. Although he seems to limit his practice to New York legal matters, he does not state that he is not a member of the Florida Bar or that he is not authorized to practice in Florida. In other words, like the defendant in Tate, Plaintiff fails to state that he is only licensed to practice in New York. By stating 'Free Phone Consultation' and listing a Miami phone number along with a Miami address for his office, Plaintiff creates the impression that he is authorized to practice law in Florida."; also noting that the lawyer's establishment of a Florida office amounts to the unauthorized practice of law; "In this case, there is no evidence that anyone other than Plaintiff would be responsible for his office's operations and because Plaintiff is not a member of the Florida bar, his establishment of a Florida law office constitutes UPL."; noting that "[p]laintiff cannot point to federal legislation or regulations that specifically authorize him to engage in general federal administrative practice"; finding that the Florida MJP rule (effective in 2005) does not allow the lawyer to conduct his practice in Florida, because it is not a "temporary" practice (emphasis added)), aff'd sub nom. Gould v. Florida

Bar, 259 F. App'x 208 (11th Cir. 2007) (unpublished opinion), cert. denied, 553 U.S. 1032 (2008).

- In re Trester, 172 P.3d 31, 32 (Kan. 2007) (suspending the license of a Kansas lawyer who failed the California Bar four times but nevertheless practiced for nearly forty years in California without a California license; acknowledging that "[m]uch of his work was limited to the federal practice in the areas of immigration and labor law" (emphasis added); explaining that a client ultimately sued the lawyer for malpractice and fraud -- based on the lawyer's lack of a California license; noting that the lawyer entered a plea of no contest to three charges of felony theft, based on his acceptance of retainers from California clients without a California license).
- Maryland LEO 05-7 (2005) ("You contemplate the leasing of office space in Maryland, for use by attorneys from the District of Columbia office. You propose that the firm's letterhead, business cards and the door to the leased space would prominently display that that attorneys are not licensed to practice law in Maryland. You state that, as is the nature of your work in the District of Columbia, all matters handled out of the leased space would be limited to federal tax law. The firm would not actively seek or solicit clients in Maryland, and Maryland-based clients would rarely be seen there. Finally, you state that none of the attorneys utilizing the leased space would represent clients in Maryland courts." (emphasis added); "[O]pening a law office in Maryland, where no one is admitted to the practice of law in Maryland, will result in your firm's unauthorized practice of law in this jurisdiction.").

Some bars defer to courts in analyzing this issue.

- See, e.g., Maryland LEO 2007-06 (10/10/06) ("You state that you will practice from a home office and the practice will be strictly limited to the area of employment- and family-based immigration petitions. Moreover, you state that those areas do not involve state law." (emphasis added); explaining that "the Ethics Committee may only provide opinions regarding whether a practice is ethical, and may not provide legal opinions. Whether a certain practice, such as your limited immigration practice, constitutes the unauthorized practice of law is a legal issue that can only be determined by the Court of Appeals." (emphasis added); "In addition, you are referred to Rule 701 of the Rules of the U.S. District Court of the District of Maryland, should your limited immigration practice include activity in that court. Rule 701 provides that: 'Except as provided in subsection c of this rule, an attorney is qualified for admission to the bar of this District if the attorney is and continuously remains a member in good standing of the highest court of any State in which the attorney maintains his or her principal law office.' Subsection c is not applicable because your principal law office will be in your home office in Maryland. Subsection d, however, is applicable and

states that 'An attorney who is not a member of the Maryland Bar is not qualified for admission to the bar of this District if the attorney maintains any law office in Maryland.'").

Although it is theoretically possible for a lawyer to continuously practice in some area of "federal law" in a state where the lawyer is not licensed, the risk of crossing the line into unauthorized practice of law is very high. The less precise the area of federal law, the higher the risk.

### **Best Answer**

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

N 8/12 [S,T]

## General Confidentiality Duties

### Hypothetical 43

You just moved into a new law office in a suburban office park. The lawyer who moved out of the office was a well-known local trust and estate lawyer, who is nearing retirement and therefore downsizing her office. As you were setting up your new office, you noticed several boxes of documents in and next to a dumpster behind the office building. You checked out the boxes that day, and discovered that they contain some client files of the trust and estate lawyer who just moved out of the office.

- (a) Has the trust and estate lawyer violated the ethics rules by disposing of her client files in this way?

**YES (PROBABLY)**

- (b) Do you have an ethical duty to report the trust and estate lawyer's disposal of her client files in this way?

**NO (PROBABLY)**

### Analysis

(a) Lawyers' duty of confidentiality is the strongest of any profession's. Under ABA Model Rule 1.6, lawyers must protect the confidentiality (except in a few specific circumstances) of any "information relating to the representation of a client." ABA Model Rule 1.6(a).

This duty includes the obligation to properly handle and dispose of client confidential information.

This hypothetical comes from a 2009 Ohio case -- in which the Ohio Bar reprimanded a lawyer for disposing of client confidential files in this way.

- Disciplinary Counsel v. Shaver, 904 N.E.2d 883, 884 (Ohio 2009) (issuing a public reprimand against a lawyer (and Mayor of Pickerington, Ohio) for discarding client files in a dumpster, and leaving approximately 20 boxes of other client files next to the dumpster; noting that the tenant who had moved

into the office that was vacated by the lawyer "had misgivings about the propriety of respondent's disposal method," "examined the contents of several of the boxes left by the dumpster," and moved the boxes back into a garage that the lawyer continued to lease; also explaining that "[n]either of the property owners nor the new tenant contacted respondent again about his failure to remove all the contents of the garage. An anonymous tipster, however, contacted a television station about the incident, and the tip led to television news and newspaper stories."; publicly remanding the lawyer for violations of Rules 1.6(a) and 1.9(c)(2) -- which prohibit lawyers from revealing client confidences).

**(b)** Lawyers are not obligated to report another lawyer's ethics violation in every circumstance.

Under ABA Model Rule 8.3, a lawyer's obligation to report another lawyer's ethics violation arises only if the other lawyer's violation "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." ABA Model Rule 8.3(a).

Unless the other lawyer's misbehavior meets this standard, a lawyer does not have an obligation to report it.

### **Best Answer**

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

## Background Facts about Representations and Communications

### Hypothetical 44

You represent a wealthy couple who have for several decades been estranged from their drug addicted son. The son's lawyer just called to say that he would be filing a lawsuit on behalf of the son against his parents, alleging various claims based on changes to their trust and estate plans. The son's lawyer wants to know whether you still represent the couple in connection with their trust and estate planning with their son and their estate planning, how frequently you have met with the couple to discuss their plans, and who was present during those meetings.

- (a) Without your clients' consent, may you provide this information to the son's lawyer?

**NO**

- (b) If the son's lawyer files the threatened lawsuit and seeks this information in discovery, may you successfully assert attorney-client privilege protection for this information?

**NO**

### Analysis

This hypothetical highlights the dramatic difference between the ethics duty of confidentiality and the attorney-client privilege.

- (a) A lawyer's duty of confidentiality covers all information the lawyer learns while representing the client. ABA Model Rule 1.6.

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

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

**(b)** In stark contrast, the attorney-client privilege generally does not protect basic information about the attorney-client relationship.

The privilege normally does not protect such background information as the fact of an attorney-client relationship;<sup>1</sup> the fact of the lawyer's employment;<sup>2</sup> the fact that a client has contacted a lawyer;<sup>3</sup> or the fact of a lawyer's withdrawal.<sup>4</sup> As indicated above, the lawyer's ethics duty of confidentiality normally covers this information.

The attorney-client privilege normally does not protect a client's identity.<sup>5</sup> This general rule applies even if the lawyer has promised anonymity.<sup>6</sup> Some courts recognize a very narrow exception to this rule in the case of criminal cases in which the client's identity will incriminate the client.<sup>7</sup>

The privilege generally does not protect the general subject matter of a lawyer's representation of a client.<sup>8</sup> Similarly, courts generally find that other information about the lawyer's work does not deserve privilege protection. Examples include: the general subject matter of the consultation;<sup>9</sup> the nature and extent of the lawyer's work for a

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<sup>1</sup> Savoy v. Richard A. Carrier Trucking, Inc., 178 F.R.D. 346, 350 (D. Mass. 1998).

<sup>2</sup> Flannigan v. Cudzik, No. 00-0307 SECTION: "K" (4), 2000 U.S. Dist. LEXIS 18788, at \*2 (E.D. La. Dec. 18, 2000).

<sup>3</sup> Moudy v. Superior Court, 964 P.2d 469, 470-71 (Alaska Ct. App. 1998).

<sup>4</sup> United States v. Bertling, No. CR 05-4125-MWB, 2006 U.S. Dist. LEXIS 66752, at \*17 (N.D. Iowa Sept. 1, 2006).

<sup>5</sup> Gates v. Rohm & Haas Co., Civ. A. No. 06-1743, 2006 U.S. Dist. LEXIS 85562, at \*5-7, \*19-20 (E.D. Pa. Nov. 22, 2006).

<sup>6</sup> United States v. Under Seal (In re Grand Jury Subpoena), 204 F.3d 516, 519-21, 523 (4th Cir. 2000).

<sup>7</sup> Subpoenaed Witness v. United States (In re Subpoenaed Grand Jury Witness), 171 F.3d 511, 513-14 (7th Cir. 1999).

<sup>8</sup> General Elec. Co. v. Johnson, Civ. A. No. 00-2855 (JDB), 2006 U.S. Dist. LEXIS 64907, at \*52-53 (D.D.C. Sept. 12, 2006).

<sup>9</sup> Kovacs v. Hershey Co., Civ. A. No. 04-cv-01881-WYD-BNB, 2006 U.S. Dist. LEXIS 77777, at \*7 (D. Colo. Oct. 25, 2006).



client;<sup>10</sup> the general description of the work;<sup>11</sup> the purposes for which an attorney was retained;<sup>12</sup> information about the number of hours spent by the lawyer;<sup>13</sup> the date the lawyer's services were provided.<sup>14</sup>

It can be very difficult to draw the line between permissible discovery requests asking for general information about a lawyer's services, and improper discovery requests that seek the substance of a client-lawyer communication. For instance, an adversary probably will be permitted to ask a client "did you talk with your lawyer about the contract," but probably will not be able to ask "did you talk with your lawyer about the third sentence in section 6 of the contract?"

The attorney-client privilege normally does not protect information about a lawyer's fee arrangement with a client,<sup>15</sup> the amount of fees the client paid,<sup>16</sup> or the lawyer's bills.<sup>17</sup> The privilege might protect specific information in a lawyer's bill that would reveal or specifically reflect the substance of the lawyer's communications with the client.<sup>18</sup>

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<sup>10</sup> Zeus Enters., Inc. v. Alphin Aircraft, Inc., 190 F.3d 238, 244 (4th Cir. 1999).

<sup>11</sup> Kovacs, 2006 U.S. Dist. LEXIS 77777, at \*7-8.

<sup>12</sup> Estate of Monroe v. Bottle Rock Power Corp., Civ. A. No. 03-2682 SECTION "L" (3), 2004 U.S. Dist. LEXIS 5737, at \*36 (E.D. La. Apr. 2, 2004).

<sup>13</sup> BG Real Estate Servs., Inc. v. American Equity Ins. Co., Civ. A. No. 04-3408 SECTION "A" (2), 2005 U.S. Dist. LEXIS 10330, at \*20 (E.D. La. May 18, 2005).

<sup>14</sup> Savoy, 178 F.R.D. at 350.

<sup>15</sup> Stock v. Integrated Health Plan, Inc., Case No. 3:06-cv-215-DRH, 2006 U.S. Dist. LEXIS 78551, at \*6 (S.D. Ill. Oct. 27, 2006).

<sup>16</sup> Lexington Ins. Co. v. Swanson, No. C05-1614P, 2006 U.S. Dist. LEXIS 89424, at \*5 (W.D. Wash. Nov. 29, 2006).

<sup>17</sup> Miles v. Funk, Civ. No. 05-cv-56-JM, 2006 U.S. Dist. LEXIS 35717, at \*2 (D.N.H. May 31, 2006).

<sup>18</sup> Flagstar Bank, FSB v. Freestar Bank, N.A., Case No. 09 C 1941, 2009 U.S. Dist. LEXIS 76842, at \*12-14 (N.D. Ill. Aug. 25, 2009).

The privilege normally does not protect background facts about a lawyer-client communication. Examples include: fact of a communication between a client and a lawyer;<sup>19</sup> fact of a conversation between a client and a lawyer;<sup>20</sup> fact that a lawyer provided advice to a client;<sup>21</sup> date of the communication;<sup>22</sup> duration of a meeting;<sup>23</sup> date of a planned meeting between a client and lawyer;<sup>24</sup> identity of the person arranging for a meeting between a client and a lawyer;<sup>25</sup> request for a meeting with a lawyer;<sup>26</sup> location of a meeting between a client and a lawyer;<sup>27</sup> people present at a meeting between a client and a lawyer;<sup>28</sup> "provenance" of a document, and the circumstances surrounding its creation;<sup>29</sup> the identity of a decision-maker who authorized a Rule 30(b)(6) witness.<sup>30</sup>

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<sup>19</sup> Kovacs, 2006 U.S. Dist. LEXIS 77777, at \*4.

<sup>20</sup> DiBella v. Hopkins, 403 F.3d 102, 120-21 (2d Cir.), cert. denied, 546 U.S. 939 (2005).

<sup>21</sup> Constand v. Cosby, 232 F.R.D. 494, 503 (E.D. Pa. 2006).

<sup>22</sup> Purvis v. Bd. of Educ., Case Nos. 05-1348 & 05-1350, 2006 U.S. Dist. LEXIS 64533, at \*10-11 (C.D. Ill. Sept. 11, 2006).

<sup>23</sup> McKean v. City of New York, Nos. 03 Civ. 7790 (RWS)(MHD) & 03 Civ. 4526 (RWS) (MHD), 2005 U.S. Dist. LEXIS 23903, at \*3-4 (S.D.N.Y. Oct. 14, 2005).

<sup>24</sup> United States v. Freese, Case No. 8:05CR131, 2006 U.S. Dist. LEXIS 24629, at \*6 (D. Neb. Apr. 19, 2006).

<sup>25</sup> Kovacs, 2006 U.S. Dist. LEXIS 77777, at \*4-5.

<sup>26</sup> Isom v. Bank of Am., N.A., 628 S.E.2d 458, 462 (N.C. Ct. App. 2006).

<sup>27</sup> Burton v. R.J. Reynolds Tobacco Co., 170 F.R.D. 481, 484-85 (D. Kan.), motion granted in part, denied in part, 177 F.R.D. 491 (D. Kan. 1997).

<sup>28</sup> Id.

<sup>29</sup> Note Funding Corp. v. Bobian Inv. Co., No. 93 CIV. 7427 (DAB), 1995 WL 662402, at \*7 (S.D.N.Y. Nov. 9, 1995).

<sup>30</sup> Veritas-Scalable Inv. Prods. Fund, LLC v. FB Foods, Inc., No. 3:04 CV 1199 (JBA), 2006 U.S. Dist. LEXIS 25313, at \*10 (D. Conn. Apr. 25, 2006).

Some cases take a far broader view. One decision held that the attorney-client privilege even protected the date of a client's communication with a lawyer.<sup>31</sup> However, such an approach represents a distinct minority.

### **Best Answer**

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

N 8/12

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<sup>31</sup> Burlage v. Summerville Senior Living, Inc., Civ. A. No. 1:07cv352, 2007 U.S. Dist. LEXIS 79551 (E.D. Va. Oct. 25, 2007).

## Client Demeanor

### Hypothetical 45

You represent the matriarch of a large Greek family. She frequently changes her estate plan, because some of her many children fall in and out of her favor. You now believe that some of her children might challenge her will after she dies, claiming that she lacked the necessary mental state at the time she amended her estate plan. Your client can become quite emotional at times, and you wonder to what extent you might be called upon after she dies to describe her demeanor during your meetings.

- (a) Will you be able to assert attorney-client privilege protection for your description of the client's demeanor during a private meeting in your office?

### YES (PROBABLY)

- (b) Will you be able to assert attorney-client privilege protection for your description of the client's demeanor during a meeting at a crowded Greek restaurant near your client's home?

### NO (PROBABLY)

### Analysis

The attorney-client privilege generally protects "communications." The doctrine does not protect historical facts -- something either happened or it didn't happen. However, the privilege can protect communications between lawyers and clients about those historical facts.

The attorney-client privilege's applicability to a client's demeanor involves the proper characterization of that demeanor. To the extent that it is an historical fact, the client's demeanor would not deserve privilege protection. In contrast, a client's demeanor could deserve protection if it is characterized as some sort of client "communication" to the lawyer.

It seems clear that in certain circumstances the client's nonverbal communications can clearly deserve privilege protection. A client holding up three fingers in response to some question by a lawyer clearly intends to convey a communication through that physical act. Similarly, a client bursting into tears upon a lawyer's certain question is engaging in a "communication" to the lawyer (perhaps unintentionally).

Most cases involving the attorney-client privilege's applicability to a client's demeanor arise in the criminal context. Not surprisingly, courts normally require the criminal defendant's lawyer to testify about the client's demeanor if the client argues that he was not competent to stand trial, or (especially) enter into a plea agreement.<sup>1</sup> Some courts are a bit more protective.<sup>2</sup>

Outside the criminal context, only a few courts have dealt with the privileged nature of the client's demeanor. One 2005 New York court opinion found that a plaintiff's lawyer could not be forced to testify at a competency hearing about his client's competence.<sup>3</sup>

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<sup>1</sup> Restatement (Third) of Law Governing Lawyers § 69 cmt. f (2000) ("A lawyer may have knowledge about a client's mental state based on the client's communications with the lawyer. That knowledge may be relevant, for example, in the context of determining whether an accused is competent to stand trial. The lawyer in such cases is uniquely competent to testify concerning the client's ability to assist in presenting a defense. Testimony may be elicited that concerns the client's mode of thought but not if it would disclose particulars that would tend to incriminate the client.").

<sup>2</sup> State v. Meeks, 666 N.W.2d 859, 870 (Wis. 2003) (in reviewing a murder conviction, noting that courts disagree about whether the attorney-client privilege ever protects a lawyer's opinion about a client's mental state; "We agree with the jurisdictions that hold that an attorneys [sic] opinions, perceptions, and impressions of a client's competency to proceed are protected by the attorney-client privilege. An attorney's opinion of a client's mental competency is based largely upon private communications with the client.").

<sup>3</sup> Giannicos v. Bellevue Hosp. Med. Ctr., 793 N.Y.S.2d 893, 896-97, 897 (N.Y. Sup. Ct. 2005) (prohibiting defendants from compelling plaintiff's lawyer to testify at a competency hearing about his client's competence; "An attorney's observations of a client's demeanor, physical characteristics and mental capacity are not protected by the attorney-client privilege, however, because any member of the public could make these observations. . . . Therefore, the attorney-client privilege will not protect

In one of the few decisions arising in the trust and estate context, one court adopted a more subtle approach -- indicating that the privilege might cover the client's demeanor in a private setting with the lawyer, but not in a public setting.<sup>4</sup>

### **Best Answer**

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

N 8/12

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plaintiff's attorneys from having to reveal their observations about Mr. Giannicos's competency and demeanor."; "Nonetheless, public policy mandates that they not be compelled to testify. Discussion of this principle -- that attorneys should not be compelled to testify against their clients -- primarily arises in the context of depositions, most likely because the practice of calling opposing counsel as a witness at trial is so offensive to our conception of the adversarial process. Courts have made clear that attorneys should, only in rare and special circumstances, be forced to testify against their own clients."), aff'd, 840 N.Y.S.2d 327 (N.Y. App. Div. 2007).

<sup>4</sup> Eason v. Eason, 123 S.E.2d 361, 367 (Va. 1962) ("assuming, but not deciding" that the trial court had properly permitted a decedent's former lawyers "to testify as to any paper they may have prepared for [the decedent], as to any transactions or conversations they may have had with her in the presence of others, and to give their opinions of her mental competency based upon such contacts with her" but not "as to any transactions conducted in private with her, nor to give their opinions concerning her competency, based upon these private matters").

## Effect of a Client's Agents' Presence

### Hypothetical 46

You conduct a very active trust and estate practice, and sometimes meet with as many as five clients each day to go over their estate plan. On many occasions, you must decide how to deal with the presence of other people who accompany your clients when they come to your office. Specifically, you want to assure continued attorney-client privilege protection.

- (a) Will the attorney-client privilege protect your communications with an elderly client in the presence of her middle-aged daughter, to whom your client looks for guidance and "moral support"?

**MAYBE**

- (b) Will the attorney-client privilege protect your communications with a Korean-born client in the presence of his son, upon whom your client relies to translate your communications into Korean?

**YES**

- (c) Will the attorney-client privilege protect your communications with a client in the presence of the client's financial advisor, upon whom your client relies for decisions involving her money?

**NO (PROBABLY)**

- (d) Will the attorney-client privilege protect your communications with a client in the presence of your client's neighbor, to whom your client looks for assistance in making every major life decision?

**NO (PROBABLY)**

### Analysis

#### Introduction

The status of a client's agent can have a critical effect on the attorney-client privilege, in a number of settings: (1) communications between the client's lawyers and

the client's agent may or may not be privileged ab initio, depending on the agent's status; (2) an agent's presence during otherwise privileged communications between the client and her lawyer may or may not prevent the privilege from ever protecting those communications, depending on the agent's status; (3) later disclosure of privileged communications to a client's agent may or may not waive the privilege, depending on the agent's status.

This hypothetical involves the first scenario if the lawyer communicates directly with any of these client agents, and (especially) the second scenario -- the client agent's presence during an otherwise privileged communication.

### **Communication with the Client's Agents**

Every court applies the attorney-client privilege to client-agents assisting in the transmission of attorney-client communications.

Most courts require that the agent be "necessary";<sup>1</sup> "nearly indispensable";<sup>2</sup> or "vital"<sup>3</sup> for the transmission of the communications. Examples include: a member of the client's staff, such as a secretary or an administrative assistant, who merely files or transmits the communication;<sup>4</sup> an interpreter or translator required by the client to effectively communicate with a lawyer;<sup>5</sup> parents of a quadriplegic assisting in finding a

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<sup>1</sup> Leone v. Fisher, Civ. No. 3:05-CV-521 (CFD) (TPS), 2006 U.S. Dist. LEXIS 75571, at \*12, \*14-16 (D. Conn. Oct. 18, 2006).

<sup>2</sup> National Educ. Training Group, Inc. v. Skillsoft Corp., No. M8-85(WHP), 1999 U.S. Dist. LEXIS 8680, at \*10-13, \*14 (S.D.N.Y. June 9, 1999).

<sup>3</sup> Stayinfront, Inc. v. Tobin, Civ. A. No. 05-4563 (SRC), 2006 U.S. Dist. LEXIS 80498, at \*8-9, \*9 n.2, \*10-11 (D.N.J. Nov. 3, 2006) (not for publication).

<sup>4</sup> Bowen v. Parking Auth. of Camden, Civ. A. No. 00-5765 (JBS), 2002 U.S. Dist. LEXIS 14585, 89 Fair Empl. Prac. Cas. (BNA) 939 (D.N.J. July 30, 2002).

<sup>5</sup> Farahmand v. Jamshidi, Civ. A. No. 04-542 (JDB), 2005 U.S. Dist. LEXIS 2198, at \*8-9 (D.D.C. Feb. 11, 2005).



lawyer for their son;<sup>6</sup> a mother acting as her incarcerated son's agent in arranging for a lawyer;<sup>7</sup> parents helping a child who requires legal advice or representation.<sup>8</sup>

Interestingly, modern technology might play some role in this analysis. In 2010, well-respected Southern District of New York Magistrate Judge James Francis held that two individual plaintiffs waived their privilege by disclosing protected communications to their financial adviser, their accountant, and their own son. See Green v. Beer, No. 06 Civ. 4156 (KMW) (JCF), 2010 U.S. Dist. LEXIS 65974 (S.D.N.Y. July 2, 2010). Nearly two months later, in Green v. Beer, No. 06 Civ. 4156 (KMW) (JCF), 2010 U.S. Dist. LEXIS 87484 (S.D.N.Y. Aug. 24, 2010), Judge Kimba Wood agreed with Judge Francis's conclusion about the first two client agents – but disagreed about the son. Judge Wood pointed to the son's explanation that he was assisting his parents in sending and receiving emails – ultimately concluding that "the technical assistance provided by their son, in his capacity as their agent, should not constitute a waiver of the attorney-client privilege." Id. at \*13-14. Judge Wood also noted the public policy involved, explaining that clients without technical expertise "should not be prevented from enjoying the advantages of email correspondence for fear that the necessary assistance of a third party -- here, the [client's] son -- in sending or receiving such correspondence will lead to the forfeiture of the attorney-client privilege." Id. at \*14.

Courts take differing positions on the attorney-client privilege implications of involving client-agents who are not necessary for the transmission of the attorney-client communications.

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<sup>6</sup> Hendrick v. Avis Rent A Car Sys., Inc., 944 F. Supp. 187, 189-90 (W.D.N.Y. 1996).

<sup>7</sup> Gerheiser v. Stephens, 712 So. 2d 1252, 1254 (Fla. Dist. Ct. App. 1998).

<sup>8</sup> Grubbs v. K Mart Corp., 411 N.W.2d 477, 480 (Mich. Ct. App. 1987).

The Restatement and a few courts take a fairly liberal approach. The Restatement explains that

[a]n agent for communication need not take a direct part in client-lawyer communications, but may be present because of the Client's psychological or other need. A business person may be accompanied by a business associate or expert consultant who can assist the client in interpreting the legal situation.

Restatement (Third) of Law Governing Lawyers § 70 cmt. f (2000)<sup>9</sup> (emphasis added).

Courts taking this liberal view have protected communications to and from the following client-agents: claims administrator;<sup>10</sup> financial and tax adviser;<sup>11</sup> accountant who had the client's express authority to coordinate legal review of contracts and service relationships;<sup>12</sup> company owner's son who acted as his father's representative;<sup>13</sup> business consultant;<sup>14</sup> agent hired by a client for purposes of her communications with

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<sup>9</sup> Restatement (Third) of Law Governing Lawyers § 70 cmt. f (2000) ("A person is a confidential agent for communication if the person's participation is reasonably necessary to facilitate the client's communication with a lawyer or another privileged person and if the client reasonably believes that the person will hold the communication in confidence. Factors that may be relevant in determining whether a third person is an agent for communication include the customary relationship between the client and the asserted agent, the nature of the communication, and the client's need for the third person's presence to communicate effectively with the lawyer or to understand and act upon the lawyer's advice."; "An agent for communication need not take a direct part in client-lawyer communications, but may be present because of the Client's psychological or other need. A business person may be accompanied by a business associate or expert consultant who can assist the client in interpreting the legal situation.").

<sup>10</sup> Sevenson Envtl. Servs., Inc. v. Sirius Am. Ins. Co., 883 N.Y.S.2d 423 (N.Y. App. Div. 2009).

<sup>11</sup> Segerstrom v. United States, No. C 00-0833 SI, 2001 U.S. Dist. LEXIS 2949, at \*9-10 (N.D. Cal. Feb. 6, 2001).

<sup>12</sup> Caremark, Inc. v. Affiliated Computer Servs., Inc., 192 F.R.D. 263, 267-68 (N.D. Ill. 2000).

<sup>13</sup> National Converting & Fulfillment Corp. v. Bankers Trust Corp., 134 F. Supp. 2d 804, 805, 807 (N.D. Tex. 2001).

<sup>14</sup> McCaugherty v. Sifferman, 132 F.R.D. 234, 239, 240 (N.D. Cal. 1990).

attorneys;<sup>15</sup> insurance adjuster;<sup>16</sup> insurance agent;<sup>17</sup> friend;<sup>18</sup> risk management analyst.<sup>19</sup>

Several cases have taken a remarkably liberal view of client agents whose communications fall within the privilege protection.

- One court held that an insured's insurance broker was within the scope of the insured's privilege.<sup>20</sup>
- One court protected communications with the investment banking firm of Goldman Sachs.<sup>21</sup>

The vast majority of courts have taken a much narrower view -- refusing to provide privilege protection to client-agents who are not assisting in the transmission of information, but instead providing their own independent advice to the client.

Courts taking this majority -- narrow -- view have refused to protect communications to and from a variety of agents. Examples include: accountant;<sup>22</sup> investment banker;<sup>23</sup> investigator;<sup>24</sup> litigation consultant who was not assisting the

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<sup>15</sup> Hayles v. Advanced Travel Mgmt. Corp., No. 01 Civ. 10017 (BSJ) (DFE), 2002 U.S. Dist. LEXIS 7192, at \*2 (S.D.N.Y. Apr. 10, 2002).

<sup>16</sup> In re Arden, No. 08-03-00269-CV, 2004 Tex. App. LEXIS 2596, at \*8-9 (Tex. App. Mar. 24, 2004).

<sup>17</sup> Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp., 5 F.3d 1508, 1515 (D.C. Cir. 1993).

<sup>18</sup> Newman v. State, 863 A.2d 321, 334 (Md. 2004) (holding that the presence of a grown woman's friend at a meeting with the woman's lawyer did not destroy the privilege; noting that the lawyer had requested the friend's presence so the friend could provide a "cool head"; also noting that the friend "acted as a source of support" for the woman during divorce and custody proceedings).

<sup>19</sup> Head v. Inova Health Care Servs., 55 Va. Cir. 43, 45 (Va. Cir. Ct. 2001).

<sup>20</sup> Navigators Mgmt. Co. v. St. Paul Fire & Marine Ins. Co., Case No. 4:06CV1722 SNLJ, 2009 U.S. Dist. LEXIS 14021 (E.D. Mo. Feb. 24, 2009).

<sup>21</sup> Apsley v. Boeing Co., Case No. 05-1368-MLB, 2008 U.S. Dist. LEXIS 5274 (D. Kan. Jan. 22, 2008).

<sup>22</sup> Cavallaro v. United States, 284 F.3d 236, 249 (1st Cir. 2002).

<sup>23</sup> United States v. Ackert, 169 F.3d 136 (2d Cir. 1999); National Educ. Training Group, Inc. v. Skillsoft Corp., No. M8-85(WHP), 1999 U.S. Dist. LEXIS 8680 (S.D.N.Y. June 9, 1999).

attorneys;<sup>25</sup> environmental consultant hired to formulate a remediation plan;<sup>26</sup> financial adviser;<sup>27</sup> tax consultant;<sup>28</sup> consultant who prepared a government report;<sup>29</sup> public relations consultant;<sup>30</sup> valuation consultant;<sup>31</sup> paralegal acting only as a friend;<sup>32</sup> fellow law firm employee (unrelated to a request for legal advice);<sup>33</sup> union official with whom police union members spoke before they hired a lawyer;<sup>34</sup> another lawyer not representing the client (and who was not a participant in a common interest arrangement);<sup>35</sup> presidential aide who claimed that the president needed him as an intermediary to effectively communicate with presidential lawyers;<sup>36</sup> White House aide who sought privilege protection for notes of his conversations with journalists;<sup>37</sup> reorganization consultant;<sup>38</sup> management consultant;<sup>39</sup> managing agent for the client's

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<sup>24</sup> Carpenter v. Massachusetts Inst. of Tech., No. 03-2660, 2005 Mass. Super. LEXIS 246, at \*7-9 (Mass. Super. Ct. May 17, 2005).

<sup>25</sup> Blumenthal v. Drudge, 186 F.R.D. 236, 243 (D.D.C. 1999).

<sup>26</sup> United States Postal Serv. v. Phelps Dodge Ref. Corp., 852 F. Supp. 156, 161, 162 (E.D.N.Y. 1994).

<sup>27</sup> In re Fibermark, Inc., 330 B.R. 480, 499-500 (Bankr. D. Vt. 2005).

<sup>28</sup> In re G-I Holdings Inc., 218 F.R.D. 428 (D.N.J. 2003).

<sup>29</sup> In re Grand Jury Matter, 147 F.R.D. 82, 87 (E.D. Pa. 1992).

<sup>30</sup> Haugh v. Schroder Inv. Mgmt. N. Am., Inc., No. 02 Civ. 7955 (DLC), 2003 U.S. Dist. LEXIS 14586, at \*8, \*9 (S.D.N.Y. Aug. 25, 2003).

<sup>31</sup> Asousa P'ship v. Smithfield Foods, Inc. (In re Asousa P'ship), Ch. 11 Bankr. No. 01-12295DWS, Adv. No. 04-1012, 2005 Bankr. LEXIS 2373, at \*14, \*18-19, \*34-35 (Bankr. E.D. Pa. Nov. 17, 2005).

<sup>32</sup> State v. Ingraham, 966 P.2d 103, 121 (Mont. 1998).

<sup>33</sup> McDonald v. Cates, No. CA 99-1205, 2000 Ark. App. LEXIS 558, at \*5 (Ark. Ct. App. Sept. 13, 2000).

<sup>34</sup> In re Grand Jury Subpoenas Dated Jan. 20, 1998, 995 F. Supp. 332, 338-40 (E.D.N.Y. 1998).

<sup>35</sup> United States v. Bankston, No. 96-207 SECTION: "R," 2000 U.S. Dist. LEXIS 12891, at \*10, \*12 (E.D. La. Sept. 1, 2000).

<sup>36</sup> In re Lindsey, 158 F.3d 1263, 1281 (D.C. Cir.), cert. denied, 525 U.S. 996 (1998).

<sup>37</sup> Blumenthal v. Drudge, 186 F.R.D. 236, 241 (D.D.C. 1999).

<sup>38</sup> Kaminski v. First Union Corp., Nos. 98-CV-1623, 98-CV-6318, 99-CV-1509, 99-CV-4783, 99-CV-6523, 2001 U.S. Dist. LEXIS 9688, at \*14-15 (E.D. Pa. July 10, 2001).

apartment complex;<sup>40</sup> insurance consultant;<sup>41</sup> insurance broker;<sup>42</sup> testifying expert;<sup>43</sup> patent agent.<sup>44</sup>

Several decisions have highlighted the narrowness of the attorney-client privilege.

For instance, one court indicated that a plaintiff's father was within the scope of the privilege until the plaintiff turned 18, but starting on that date the father "could no longer claim to be an agent for his son" -- and therefore fell outside the privilege.<sup>45</sup>

Another court held that the privilege did not protect communications between a defendant and his mother or his father, even though the father was a lawyer. The court held that the defendant had not carried his burden of showing that he had sought his father's advice as a lawyer rather than as "a concerned parent."<sup>46</sup>

Two courts found that well-known law firms had engaged in communications with client-agents that did not deserve privilege protection.

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<sup>39</sup> De Beers LV Trademark Ltd. v. DeBeers Diamond Syndicate Inc., No. 04 Civ. 4099 (DLC), 2006 U.S. Dist. LEXIS 6091, at \*2-3, \*4-5 (S.D.N.Y. Feb. 15, 2006).

<sup>40</sup> Horton v. United States, 204 F.R.D. 670, 672, 673 (D. Colo. 2002).

<sup>41</sup> SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props. LLC, No. 01 Civ. 9291(JSM), 2002 U.S. Dist. LEXIS 11949 (S.D.N.Y. July 3, 2002).

<sup>42</sup> Cellco P'ship v. Certain Underwriters at Lloyd's London, Civ. A. No. 05-3158 (SRC), 2006 U.S. Dist. LEXIS 28877, at \*9-10, \*11 (D.N.J. May 11, 2006).

<sup>43</sup> Residential Constructors, LLC v. Ace Prop. & Cas. Ins. Co., Case No. 2:05-cv-01318-BES-GWF, 2006 U.S. Dist. LEXIS 80403, at \*44-45 (D. Nev. Nov. 1, 2006).

<sup>44</sup> In re Rivastigmine Patent Litig. (MDL No. 1661), 237 F.R.D. 69 (S.D.N.Y. 2006) (U.S. District Judge Harold Baer approved Magistrate Judge Francis's ruling, In re Rivastigmine Patent Litig., 239 F.R.D. 351 (S.D.N.Y. 2006)).

<sup>45</sup> C.T. v. Liberal Sch. Dist., Case Nos. 06-2093-JWL, 06-2360-JWL & 06-2359-JWL, 2008 U.S. Dist. LEXIS 5863, at \*23 (D. Kan. Jan. 25, 2008).

<sup>46</sup> El Bannan v. Yonts, Case No. 5:06-cv-173-R, 2007 U.S. Dist. LEXIS 34870, at \*12 (W.D. Ky. May 11, 2007).

In one case, Judge John Keenan of the Southern District of New York discussed the role of an agent who participated in (or received copies of) communications between a Cleary Gottlieb lawyer and one of the firm's clients in connection with an art purchase. The Cleary Gottlieb lawyer had copied the agent on some emails to the client. Cleary Gottlieb actually represented the agent in arguing that she was within the scope of the privilege, because she had acted as an intermediary between Cleary Gottlieb and its client. The court rejected Cleary Gottlieb's argument, explaining that "regardless of how Levy's [the agent's] position is defined, she did not play an indispensable role in facilitating attorney-client communications between [the client] Studio Capital and Cleary." Acknowledging that the agent "may have provided some help to Cleary in classifying certain factual issues," the court relied on an earlier Southern District decision in noting that "'where the third party's presence is merely "useful" but not "necessary," the privilege is lost.'"<sup>47</sup>

In another case arising in the trust and estate context, Skadden Arps represented decedent's son in a dispute with his stepmother (the decedent's surviving wife). A Skadden Arps lawyer sent a memorandum to the firm's client, with a copy to the client's mother (the decedent's former wife). The stepmother sought a copy of the memorandum, claiming that Skadden Arps waived the privilege by copying the client's mother. Skadden Arps first argued that it also represented its client's mother, but the court noted "there is nothing in the record suggesting that either the [Skadden Arps lawyer's] memo was sent to [the mother] in the course of Skadden Arps' [sic] representation of her or that [the mother] was acting as [her son's] agent." The court

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<sup>47</sup> In re Application Pursuant to 28 U.S.C. § 1782, 249 F.R.D. 96, 101 (S.D.N.Y. 2008) (citation omitted).

then held that the client's "expectation that [the memo] would remain confidential cannot be considered reasonable in the absence of any indication that she [the client's mother] was acting as his agent." The court granted the stepmother's motion to compel production of the memo Skadden Arps had shared with its client's mother.<sup>48</sup>

The Cleary Gottlieb and Skadden Arps lawyers fought to protect these communications -- but lost. Thus, they obviously thought at the time that their communications had not jeopardized the privilege.

The fact that two such prominent law firms lost the privilege by including client-agents in their communications highlights the narrowness of the majority approach to the privilege's application to communications with client-agents. Courts taking this narrow approach also generally hold: (1) that the presence of such agents during an otherwise privileged attorney-client communication prevents the privilege from ever arising; and (2) that sharing a privileged communication with such an agent waives the privilege.

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<sup>48</sup> Estate of Kotick, [No number in original], 2008 N.Y. Misc. LEXIS 2597, at \*6-7, \*8 (N.Y. Sur. Ct. Apr. 25, 2008) (assessing a motion by a decedent's surviving spouse to compel a production of documents that the decedent's son withheld from production in a dispute over a million-dollar promissory note; explaining that among the documents at issue was a memorandum from a Skadden Arps lawyer who was representing the decedent's son to another lawyer at another firm, which the son also claimed to be representing him at the time; also noting that the Skadden Arps lawyer "testified that Hans [the decedent's ex-wife and mother of the decedent's son] was a client of Skadden Arps during this period" but explaining that "the relevance of this, if any, to her receipt of the . . . memo is unexplained"; "Robert [decedent's son] asserts privilege with respect to the Weiss memo as a communication, between his various counsel, Skadden Arps and Sheresky [other law firm supposedly representing the decedent's son]. However, the issue is not that the memo was between two counsel representing the same party, but the unexplained inclusion of Hans as a recipient. Although Robert avers that he 'expected the communications reflected [in the Weiss [Skadden Arps' lawyer] memo] to remain confidential and protected by the attorney-client privilege despite my mother's receipt of this document,' and Weiss has stated that Skadden Arps represented Hans during this time, there is nothing in the record suggesting either that the Weiss memo was sent to Hans in the course of Skadden Arps' [sic] representation of her or that Hans was acting as Robert's agent."; "[H]owever, Han's inclusion as a recipient of the Weiss memo remains unexplained, and Robert's expectation that it would remain confidential cannot be considered reasonable in the absence of any indication that she was acting as his agent. Petitioner has failed to meet his burden that the Weiss memo should be withheld on grounds of privilege."). B 7/09

## **Agents' Presence during Otherwise Privileged Communications**

Properly characterizing a client agent becomes very important if the client attends an otherwise privileged meeting between a lawyer and his or her client.

Not surprisingly, the ACTEC Commentaries warn that

[i]n meeting with the client and others, the lawyer should consider the impact of a joint meeting on the attorney-client evidentiary privilege.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.14, at 132 (4th ed. 2006), [http://www.actec.org/Documents/misc/ACTEC\\_Commentaries\\_4th\\_02\\_14\\_06.pdf](http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf) (emphasis added).

Several courts have examined various types of client-agents and the effect on the privilege of their presence during otherwise privileged communications between clients and their lawyers. Courts generally hold that the privilege survives the presence of client-agents necessary for the transmission of the communications. Examples include: a son-in-law who spoke Farsi and could therefore help the client understand the communication;<sup>49</sup> a Korean businessman who could help a Korean client understand the culture and communications involved.<sup>50</sup>

Courts taking a liberal view hold that other client-agents can also be present without destroying the privilege. Examples include: business consultant (in dicta);<sup>51</sup>

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<sup>49</sup> Farahmand v. Jamshidi, Civ. A. No. 04-542 (JDB), 2005 U.S. Dist. LEXIS 2198, at \*8-9 (D.D.C. Feb. 11, 2005).

<sup>50</sup> Oxyn Telecomms., Inc. v. Onse Telecom, No. 01 Civ. 1012 (JSM), 2003 U.S. Dist. LEXIS 2671 (S.D.N.Y. Feb. 25, 2003).

<sup>51</sup> Winchester Capital Mgmt. Co. v. Manufacturers Hanover Trust Co., 144 F.R.D. 170, 172-74 (D. Mass. 1992).



investment banker in a client-lawyer meeting about a corporate transaction;<sup>52</sup> insurance adjuster from another insurance company;<sup>53</sup> client's friend who could add a "cool head" to meetings between the client and the client's lawyer.<sup>54</sup>

Courts taking the majority (narrow) view hold that client-agents' presence during otherwise privileged communications prevents the privilege from arising. Examples include: friend;<sup>55</sup> client's agent who accompanied the client to a meeting with a lawyer and then stayed at the meeting;<sup>56</sup> third-party doctor participating in a telephone call between a lawyer and a client;<sup>57</sup> employees from another company;<sup>58</sup> co-venturer and the co-venturer's medical adviser;<sup>59</sup> political allies;<sup>60</sup> witness attending a meeting between a client and lawyer;<sup>61</sup> investment banker attending a corporate board meeting;<sup>62</sup> outside auditor attending a corporate board meeting;<sup>63</sup> outside auditor

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<sup>52</sup> Jedwab v. MGM Grand Hotels, Inc., No. 8077, 1986 Del. Ch. LEXIS 383, at \*4 (Del. Ch. Mar. 19, 1986).

<sup>53</sup> Safeguard Lighting Sys. v. North Am. Specialty Ins. Co., Civ. A. No. 03-4145, 2004 U.S. Dist. LEXIS 26136, at \*6 (E.D. Pa. Dec. 30, 2004).

<sup>54</sup> Newman v. State, 863 A.2d 321, 334 (Md. 2004) (holding that the presence of a grown woman's friend at a meeting with the woman's lawyer did not destroy the privilege; noting that the lawyer had requested the friend's presence so the friend could provide a "cool head"; also noting that the friend "acted as a source of support" for the woman during divorce and custody proceedings).

<sup>55</sup> United States v. Evans, 113 F.3d 1457 (7th Cir. 1997).

<sup>56</sup> In re Pfohl Bros. Landfill Litig., 175 F.R.D. 13, 24 (W.D.N.Y. 1997).

<sup>57</sup> Cooney v. Booth, 198 F.R.D. 62 (E.D. Pa. 2000).

<sup>58</sup> Liggett Group, Inc. v. Brown & Williamson Tobacco Corp., 116 F.R.D. 205, 211 (M.D.N.C. 1986).

<sup>59</sup> XYZ Corp. v. United States (In re Keeper of the Records), 348 F.3d 16, 21 (1st Cir. 2003).

<sup>60</sup> Federal Election Comm'n v. Christian Coalition, 178 F.R.D. 61, 72 (E.D. Va.), aff'd in part, modified in part, 178 F.R.D. 456 (E.D. Va. 1998).

<sup>61</sup> Jones v. Ada S. McKinley Cmty. Servs., No. 89 C 0319, 1989 U.S. Dist. LEXIS 14312, at \*4 (N.D. Ill. Nov.28, 1989).

<sup>62</sup> National Educ. Training Group, Inc. v. SkillSoft Corp., No. M8-85 (WHP), 1999 U.S. Dist. LEXIS 8680, at \*10 (S.D.N.Y. June 9, 1999).

<sup>63</sup> AMPA Ltd. v. Kentfield Capital LLC, No. 00 Civ. 0508 (NRB)(AJP), 2000 U.S. Dist. LEXIS 11638, at \*1 (S.D.N.Y. Aug. 16, 2000).

attending meetings of the company's audit committee (which allowed forensic accountants to ask the outside auditors factual questions);<sup>64</sup> Merrill Lynch employees;<sup>65</sup> independent contractor acting as a mental health consultant;<sup>66</sup> insurance agent;<sup>67</sup> consultant;<sup>68</sup> auditors.<sup>69</sup>

Several courts have analyzed the presence of family members during an otherwise privileged communication.

The ABA Model Rules take a very liberal approach.

The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege.

ABA Model Rule 1.14 cmt. [3].

Some courts find that the privilege applies despite the presence of family members. Examples include: a daughter accompanying her 76-year-old mother (holding that the daughter acted as her mother's "agent");<sup>70</sup> a parent accompanying a

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<sup>64</sup> Chinn v. Endocare, Inc., C.A. No. 20262, 2003 Del. Ch. LEXIS 70, at \*2, 3 (Del. Ch. July 1, 2003), aff'd, 829 A.2d 935 (Del. 2003).

<sup>65</sup> Southern Union Co. v. Southwest Gas Corp., 205 F.R.D. 542, 551 (D. Ariz. 2002).

<sup>66</sup> Crowley v. L.L. Bean, Inc., No. 00-183-P-C, 2001 U.S. Dist. LEXIS 3726, at \*3 (D. Me. Feb. 1, 2001).

<sup>67</sup> Miller v. Haulmark Transp. Sys., 104 F.R.D. 442, 444-45 (E.D. Pa. 1984).

<sup>68</sup> James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138, 141 (D. Del. 1982).

<sup>69</sup> SEC v. Brady, 238 F.R.D. 429, 439 (N.D. Tex. 2006).

<sup>70</sup> Stroh v. General Motors Corp., 623 N.Y.S.2d 873, 874-75 (N.Y. App. Div. 1995).

child;<sup>71</sup> a son-in-law who spoke Farsi and could therefore help his father-in-law understand the communication.<sup>72</sup>

Other courts find that the presence of family members destroys the privilege. Examples include: children in a mother's meeting with a court-appointed psychologist;<sup>73</sup> a mother and a fiancé;<sup>74</sup> a daughter;<sup>75</sup> a sister who placed a telephone call to a lawyer for her incarcerated brother and then stayed on the line during their conversation.<sup>76</sup> One court held that the privilege did not protect a meeting between a client and a lawyer, because the client's sister attended the meeting.<sup>77</sup>

Another court addressing a dispute in the estate context held that the privilege did not protect communications between a woman and her lawyer (who was preparing the woman's will), because the woman's daughter also attended the meeting.<sup>78</sup>

Courts take varying approaches to the effect on the privilege of the presence of a client's spouse.<sup>79</sup> One court held that a husband's presence destroyed the privilege that

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<sup>71</sup> Grubbs v. K Mart Corp., 411 N.W.2d 477, 480 (Mich. Ct. App. 1987).

<sup>72</sup> Farahmand v. Jamshidi, Civ. A. No. 04-542 (JDB), 2005 U.S. Dist. LEXIS 2198, at \*8-9 (D.D.C. Feb. 11, 2005).

<sup>73</sup> D.A.S. v. People, 863 P.2d 291 (Colo. 1993).

<sup>74</sup> In re Himmel, 533 N.E.2d 790, 794 (Ill. 1988).

<sup>75</sup> State v. Shire, 850 S.W.2d 923, 932 (Mo. Ct. App. 1993).

<sup>76</sup> Black v. State, 920 So. 2d 668, 669 (Fla. Dist. Ct. App. 2006).

<sup>77</sup> In re Grand Jury Proceedings Subpoena to de Mayolo, No. 06-MC-64-LRR, 2007 U.S. Dist. LEXIS 27912, at \*19-20 (N.D. Iowa Apr. 16, 2007).

<sup>78</sup> Lynch v. Hamrick, 968 So. 2d 11, 16 (Ala. 2007) (assessing privilege issues in a family dispute in which a mother met with her daughter and son in connection with preparing her will; rejecting the argument that the daughter's presence during the communications between her mother and the mother's lawyer was necessary because the daughter had driven the mother to the meeting; explaining that the mother "appeared competent and appeared to know what she wanted to have done in regard to the disposition of her property"; also noting that the mother eventually drove herself to another city to execute the instruments; "The burden is on the party asserting the attorney-client privilege to show that the presence of a third party did not destroy the privilege. . . . The record demonstrates that the evidence regarding Juanita's [mother] mental and physical capacities was in conflict. Therefore, the trial court was within its discretion in concluding that Hamrick [daughter] was an unnecessary third party at the meeting between Juanita and Wills [mother's lawyer].").

would otherwise have protected communications between his wife and her lawyer.<sup>80</sup> A Connecticut court denied privilege protection for communications between a personal injury plaintiff and her lawyer, because the plaintiff's husband attended the meetings. The court noted that "there is no claim that [the husband] was acting as her attorney's assistant."<sup>81</sup> Other courts take the same approach.<sup>82</sup>

In contrast, a New York court held that the privilege protected communications between an executor and her lawyer, despite the presence of the executor's husband. The court explained that "[i]n some states, the presence of a spouse does not negate the confidentiality of an attorney-client communication, on the theory that the marital communications privilege is incorporated into the transaction." The court ultimately

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<sup>79</sup> In re Wesp, 33 P.3d 191, 199 (Colo. 2001).

<sup>80</sup> Smith v. Fox, Civ. A. No. 5:08-CV-22-KSF, 2009 U.S. Dist. LEXIS 59275, at \*9-10, \*10 (E.D. Ky. July 10, 2009) (holding that the plaintiff's husband's presence during an otherwise privileged communication destroyed the privilege; "Plaintiff does not claim any attorney-client relationship with Mr. Smith, nor does Plaintiff claim any other privilege that might be applicable under the facts of this case. Plaintiff does not cite any authority that would preclude discovery of communication that took place in Mr. Smith's presence. In Reed v. Baxter, 134 F.3d 351 (6<sup>th</sup> Cir. 1998), the court said: '[i]t is clear that the attorney-client privilege will not shield from disclosure statements made by a client to his or her attorney in the presence of a third party.' Id. at 357, citing 8 Wigmore on Evidence § 2311 (3d ed. 1940)."; "Accordingly, the Court will permit Defendant to continue the discovery deposition of Mr. Smith on the limited issue of communications between Plaintiff and counsel that Mr. Smith overheard."; not dealing with the work product protection issue).

<sup>81</sup> Baeder v. Fourth of July Celebration Comm., Inc., No. CV045000893, 2007 Conn. Super. LEXIS 204, at \*6 (Conn. Super. Ct. Jan. 24, 2007) (unreported decision) (assessing privilege claims in a personal injury action brought by a church volunteer who fell at a local fair; noting that plaintiff's husband worked with his wife at the fair and was a witness to the accident; addressing a motion for protective order filed by the plaintiff in connection with depositions scheduled by the defendant, the committee which organized the fair; denying plaintiff's motion for protective order based (among other things) on the attorney-client privilege; explaining that the husband's presence during his wife's meetings with her lawyer would not be privileged, because "there is no claim that he was acting as her attorney's assistant").

<sup>82</sup> See, e.g., People v. Allen, 427 N.Y.S.2d 698, 699 (N.Y. Sup. Ct. 1980) (holding that a three-way conversation occurring in jail among a murder suspect, his wife and his lawyer were not protected by the husband-wife privilege or the attorney-client privilege; "[T]he law is clear that communications between husband and wife made in the known presence of a third person are not confidential and, hence, are not privileged. . . . The attorney-client privilege is similarly waived.").

found that the husband attended the meeting between his wife and the lawyer "in his capacity as agent for his wife with regard to" the estate.<sup>83</sup>

Of course, the marital privilege might provide protection for such communications in some states.

(a) As indicated above, the ABA Model Rules would find that the presence of the daughter would not destroy the privilege if the daughter's presence was "necessary to assist in the representation."<sup>84</sup> The Restatement would clearly protect these communications, if the daughter's presence satisfied the mother's "psychological or other need."<sup>85</sup>

On the other hand, some courts might not be quite as generous. For instance, one court addressing a dispute in the estate context held that the privilege did not

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<sup>83</sup> In re Horowitz, 841 N.Y.S.2d 826, 826 (N.Y. Sur. Ct. 2007) (unpublished opinion) (assessing the privilege ramifications of an executrix for a \$130 Million estate involving her husband in correspondence with the executrix's lawyer, and inviting her husband to participate in meetings with her lawyer; acknowledging that "[g]enerally, conversations between attorney and client made in the presence of third parties are not privileged"; also explaining that "[i]n some states, the presence of a spouse does not negate the confidentiality of an attorney-client communication, on the theory that the marital communications privilege is incorporated into the transaction"; explaining holdings in earlier cases in which a client's family member was deemed to be a protected "agent" for the client, often to provide moral support for the client; noting the executrix's argument that her husband was her agent for privilege purposes; explaining that "[a] principal and agent relationship may be established by evidence of consent by one person to allow another to act on his or her behalf and subject to his or her control"; also noting that "executors routinely retain attorneys, accountants . . . and other agents . . . to assist in the administration of an estate"; "Petitioners allege that Richard Nagler [executrix's husband] was familiar with the decedent's business enterprises and was thus able to provide information and advice to the executrix with respect to the instant claim."; "Here, it is clear to the court that Richard Nagler's presence at the meetings and during conference calls was in his capacity as agent for his wife with regard to this estate valued at approximately \$130,000,000. Under the facts presented here, the court concludes, as the Court did in Matter of Stroh that it would be unreasonable to discern any expectation on the part of Sheila Sosnow [executrix] or her attorneys other than that their conversations in the presence of Richard Nagler would remain strictly confidential.").

<sup>84</sup> ABA Model Rule 1.14 cmt. [3].

<sup>85</sup> Restatement (Third) of Law Governing Lawyers § 70 cmt. f (2000).

protect communications between a woman and her lawyer (who was preparing the woman's will), because the woman's daughter also attended the meeting.<sup>86</sup>

Most courts would probably analyze (among other things) the client's age and condition. For instance, a healthy and mentally alert 60-year-old client normally would not need a child's presence during a meeting with a lawyer, so the child's presence probably would waive the privilege under the majority rule. On the other hand, a nevertheless 95-year-old frail client might be competent for testamentary capacity purposes, but rely on a child. Courts presumably would be less inclined to find that the presence of such a child in that setting destroyed the privilege.

**(b)** The privilege clearly protects communications with, or in the presences of, the client's agent necessary for the transmission of the information -- such as a translator.

**(c)** Only the most liberal approach would protect communications with, or in the presence of, the client's financial advisor.

The advisor clearly is not necessary for the transmission of the information, and does not fall within the ABA Model Rule's characterization of persons who are "necessary to assist in the representation" of the client.<sup>87</sup> There is a chance that the very liberal Restatement<sup>88</sup> standard would protect these communications, but most courts would not.

This basic principle can present some very awkward moments for trust and estate lawyers. For example, some lawyers receive client referrals from accountants,

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<sup>86</sup> Lynch v. Hamrick, 968 So. 2d 11, 16 (Ala. 2007).

<sup>87</sup> ABA Model Rule 1.14 cmt. [3].

<sup>88</sup> Restatement (Third) of Law Governing Lawyers § 70 cmt. f (2000).

financial planners, or other professionals whose clients need estate planning advice. Those other professionals might justifiably want to be involved in the lawyer's communications with the clients they have referred to the lawyer, sit in on the lawyer's meetings with their client, or review communications between the lawyer and their clients. Unfortunately, such involvement might destroy the attorney-client privilege protection between the lawyer and these other professional's clients.

Sophisticated professionals will understand this, but other professionals might think that the lawyer is attempting to "elbow" them out of the relationship. Lawyers might have to explain to such other professionals that the lawyers are not attempting to exclude those professionals from the lawyers' communications with their clients for some sinister purpose, but instead attempting to assure the attorney-client privilege's applicability.

**(d)** Only the most liberal standard would protect communications in the presence of the client's neighbor.

### **Conclusion and Best Practices**

In nearly every situation, lawyers representing trust and estate clients should: (1) avoid involving any third parties in communications with their clients; (2) ask any third parties to leave the room when they communicate with their clients; and (3) avoid sharing any privileged communications with any third parties (and warn their clients not to do so).

If the lawyer believes that a third party falls within the privilege protection, the lawyer should carefully document that fact -- so a court will have some contemporaneous explanation of why the lawyer involved a third party in protected

communications (or shared them later). For instance, a lawyer representing an elderly client who wants his son to assist in the lawyer's representation of the client might ask the client to sign some statement explaining why the client needs his son to participate in the estate planning process (to explain any legal complications, provide "moral support," etc.). Of course, such a contemporaneous document is not dispositive, but presumably would assist the lawyer in later attempting to assert privilege protection.

Another option is for the lawyer to jointly represent both the client and the third person. Such communications clearly deserve privilege protection, but raise all of the conflicts issues inherent in any joint representation (including loyalty, information flow and confidentiality).

### **Best Answer**

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

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## Waiver Impact of Disclosed Privilege Communications to a Client's Agent

### Hypothetical 47

Over the past twenty years, you have had a very good relationship with a local financial planner. Last month, the planner recommended that one of her clients hire you to prepare an estate plan. After meeting several times with your new client, you sent her a confidential legal analysis of her estate planning issues. Some of these are quite sensitive, because the client has engaged in some very questionably financial transactions while represented by her previous lawyer. The client just called you to report that your financial planner friend has asked her for a copy of your memorandum.

Will disclosure of your memorandum to the financial planner waive the attorney-client privilege?

**YES**

### Analysis

The status of a client's agent can have a critical effect on the attorney-client privilege, in a number of settings: (1) communications between the client's lawyers and the client's agent may or may not be privileged ab initio, depending on the agent's status; (2) an agent's presence during otherwise privileged communications between the client and lawyer may or may not prevent the privilege from ever protecting those communications, depending on the agent's status; (3) later disclosure of privileged communications to client's agent may or may not waive the privilege, depending on the agent's status.

This hypothetical deals with the third scenario.

Disclosure of privileged communications to other client-agents or consultants generally waives the privilege if the court analyzing the issue considers the agents to be outside the intimate attorney-client relationship.

Courts taking a liberal approach find that disclosing privileged communications to third parties does not waive the privilege. Examples include: landman;<sup>1</sup> client's liability insurer;<sup>2</sup> insurance broker;<sup>3</sup> reinsurer;<sup>4</sup> another insurance company's adjuster;<sup>5</sup> investment banker.<sup>6</sup>

The majority of courts find that disclosure to most client-agents waives the privilege. Examples include: attest auditors;<sup>7</sup> accountants<sup>8</sup> (one court explained that when discussing an accountant, "[t]he mere fact that it is more efficient to keep consultants in the loop by including them in attorney-client communications is not enough to avoid waiver of the privilege"<sup>9</sup>); investment bankers;<sup>10</sup> public relations consultants;<sup>11</sup> insurance brokers.<sup>12</sup>

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<sup>1</sup> In re Small, 346 S.W.3d 657 (Tex. App. 2009).

<sup>2</sup> State ex rel. Med. Assurance of W. Va., Inc. v. Recht, 583 S.E.2d 80 (W. Va. 2003).

<sup>3</sup> American Colloid Co. v. Old Republic Ins. Co., No. 93 C 0665, 1993 U.S. Dist. LEXIS 7619, at \*3 (N.D. Ill. June 4, 1993).

<sup>4</sup> Gulf Ins. Co. v. Transatlantic Reinsurance Co., 788 N.Y.S.2d 44, 45-46 (N.Y. App. Div. 2004).

<sup>5</sup> Safeguard Lighting Sys. v. North Am. Specialty Ins. Co., Civ. A. No. 03-4145, 2004 U.S. Dist. LEXIS 26136, at \*6 (E.D. Pa. Dec. 30, 2004).

<sup>6</sup> Hexion Specialty Chems., Inc. v. Huntsman Corp., C. A. No. 3841-VCL, 2008 Del. Ch. LEXIS 108 (Del. Ch. Aug. 12, 2008).

<sup>7</sup> SEC v. Brady, 238 F.R.D. 429, 439, 439-40, 440 (N.D. Tex. 2006).

<sup>8</sup> American Health Sys., Inc. v. Liberty Health Sys., No. 90-3112, 1991 WL 42310, at \*5-6 (E.D. Pa. Mar. 26, 1991).

<sup>9</sup> Ross v. UKI Ltd., No. 02 Civ. 9297 (WHP)(JCF), 2003 U.S. Dist. LEXIS 17955, at \*6 (S.D.N.Y. Oct. 8, 2003).

<sup>10</sup> Louisiana Mun. Police Employees Ret. Sys. v. Sealed Air Corp., 253 F.R.D. 300, 312 (D.N.J. 2008); National Educ. Training Group, Inc. v. Skillsoft Corp., No. M8-85 (WHP), 1999 U.S. Dist. LEXIS 8680, at \*12-13 (S.D.N.Y. June 9, 1999).

<sup>11</sup> Cellco P'ship v. Nextel Commc'n, Inc., No. M8-85(RO), 2004 U.S. Dist. LEXIS 12717, at \*3-4 (S.D.N.Y. July 7, 2004).

<sup>12</sup> Rhodes v. AIG Domestic Claims, Inc., No. 05-1306-BLS2, 2006 Mass. Super. LEXIS 19, at \*36-38 (Mass. Super. Ct. Jan. 23, 2006).

Nearly every court would find that disclosure to the financial planner would waive the client's attorney-client privilege.

This scenario might present an awkward situation for the lawyer, who essentially has to "shut out" the financial planner who recommended that the client hire the lawyer. The lawyer probably will have to explain that disclosure to the financial planner risks harming the client they both are attempting to serve. The lawyer might be able to prepare a fairly innocuous non-privileged memorandum that the client can share with the financial planner, which of course would not waive any privilege because it would not deserve privilege protection to begin with. Another option is to have the lawyer speak orally with the financial planner. The disclosure of any privileged communications during such an oral conversation would also waive the privilege, but as a matter of logistics would make it less likely that an adversary would discover the waiver or be able to exploit it. Sending the financial planner a privileged document leaves the document in the financial planner's possession, and thus vulnerable to a document request that a third party sends to the financial planner.

**Best Answer**

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

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## Effect of a Lawyers' Agents' Presence

### Hypothetical 48

One of your partners recently attended a seminar on the attorney-client privilege, and now periodically warns you about the privilege's fragility. For instance, your partner just told you that you risk destroying the attorney-client privilege by inviting certain people to sit in when you meet with an elderly client to discuss his estate planning.

- (a) Will the attorney-client privilege protect communications with your client in the presence of your secretary and paralegal?

YES

- (b) Will the attorney-client privilege protect communications with your client in the presence of an expert on Sharia law that you have hired to help you prepare a will meeting your Islamic client's desire to comply with Sharia law?

YES

- (c) Will the attorney-client privilege protect communications with your client in the presence of the client's longstanding financial advisor, whom you were clever enough to retain (and pay yourself) for purposes of helping you prepare your client's estate plan?

NO (PROBABLY)

### Analysis

Properly analyzing a lawyer's agents for privilege purposes can dramatically affect the privilege protection in three separate contexts: (1) communications with those agents; (2) communications between clients and lawyers in the presence of those agents; (3) privilege communications later shared with those agents.

One of the most dramatic and counter-intuitive principles in the privilege law is the distinction between a client's agent and a lawyer's agent.

Most courts protect as privileged only communications to and from a client's agent whose involvement is necessary for the transmission of communications to or from the client. Classic examples are translators, interpreters, parents for minor children, etc. Although the Restatement and some courts take a liberal view, the vast majority of courts consider other client-agents outside the intimate attorney-client relationship.

The law treats in a completely different fashion agents who are assisting lawyers in providing legal advice to their clients.

**(a)** Of course, the privilege can protect lawyer agents playing a role in transmitting communications between lawyers and their clients.

Lawyers normally cannot act without some logistical assistance, and the privilege therefore usually covers communications with (or in the presence of) their secretaries, paralegals, copy clerks, receptionists, etc.<sup>1</sup> These assistants help facilitate communications to and from clients, and also often assist the lawyers in the substantive work of providing legal advice.

**(b)** It is much more difficult to determine if the attorney-client privilege protects communications to and from, involving, or later shared with an agent whose obvious purpose is not to help in the transmission of the communication.

Courts must often determine if an agent should be considered a client's agent or a lawyer's agent.<sup>2</sup> Courts engaging in this analysis examine: who engaged the agent,<sup>3</sup>

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<sup>1</sup> Executive Risk Indem., Inc. v. Cigna Corp., No. 1495, 2006 WL 2439733, at \*7 (Pa. C.P. Phila. Aug. 18, 2006).

<sup>2</sup> AMCO Ins. Co. v. Madera Quality Nut LLC, No. 1:04-cv-06456-SMS, 2006 U.S. Dist. LEXIS 21205, at \*53-55 (E.D. Cal. Apr. 10, 2006).

<sup>3</sup> Lawrence E. Jaffee Pension Plan v. Household Int'l, Inc., 244 F.R.D. 412 (N.D. Ill. 2006).

when the agent was hired;<sup>4</sup> whether the client hired the agent before hiring the lawyer;<sup>5</sup> and what provisions in an engagement letter describe the agent's role.<sup>6</sup>

The 1961 Second Circuit decision in United States v. Kovel<sup>7</sup> gave its name to a doctrine extending privilege protection to communications between lawyers and agents other than staff assisting in the transmission of communications to and from clients.

In Kovel, a law firm employed a former Internal Revenue agent. The IRS claimed that communications to and from this law firm employee did not deserve privilege protection. The Second Circuit disagreed, analogizing the law firm employee's role to a "translator" assisting the lawyer in understanding the intricacies and nuances of accounting and tax issues. Not surprisingly, retainer letters with such privilege-protected lawyer agents are still known as "Kovel Letters."

Although it might be difficult to know in advance whether a court will find an agent to be within the intimate attorney-client relationship, lawyers hoping to protect communications with their agents should take steps to increase the odds of protection. Examples include: selecting agents who are not already assisting the client; explicitly explaining in the agents' retainer agreement what role the agents will play in the lawyer's providing legal advice to the client; directing the agents to communicate only with the lawyer or only in the lawyer's presence; incorporating the agents' work into the legal advice that the lawyer transmits to the client, rather than simply forwarding the agents' work to the client.

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<sup>4</sup> Bernardo v. Comm'r, 104 T.C. 677, 684-85 (1995).

<sup>5</sup> Cavallaro v. United States, 284 F.3d 236 (1st Cir. 2002).

<sup>6</sup> Olson v. Accessory Controls & Equip. Corp., 757 A.2d 14, 24, 26 (Conn. 2000).

<sup>7</sup> United States v. Kovel, 296 F.2d 918 (2d Cir. 1961).

As explained above, most courts protect as privileged communications to and from a client's agent if that agent was necessary for the transmission of communications to or from the client.

Some courts apply the same narrow standard to a lawyer's agent.<sup>8</sup> One court held that the attorney-client privilege did not protect communications between an in-house lawyer and the Anderson accounting firm, because "the Kovel doctrine applies only when the accountant's role is to clarify or facilitate communications between attorney and client" -- but not if the accountant only provided advice to the lawyer that would be "critical" to the lawyer's representation of the client.<sup>9</sup> Another court held that the privilege extended only to "third parties who are indispensable to an attorney's provision of legal services to the client."<sup>10</sup>

Some troubling decisions even conduct an ex post facto analysis of whether the lawyer's agent was really helpful to the lawyer in providing legal advice.<sup>11</sup>

This unfortunate approach creates just the type of uncertainty condemned by the United States Supreme Court in the Upjohn case.<sup>12</sup> As long as a lawyer can establish that she relied upon an agent in providing legal advice to the client, courts should not retroactively examine how helpful the agent actually was to the lawyer.<sup>13</sup>

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<sup>8</sup> Urban Box Office Network, Inc. v. Interfase Managers, L.P., No. 01 Civ. 8854 (LTS)(THK), 2006 U.S. Dist. LEXIS 20648, at \*20-32, \*31 (S.D.N.Y. Apr. 18, 2006).

<sup>9</sup> Comm'r of Revenue v. Comcast Corp., 901 N.E.2d 1185, 1198 (Mass. 2009).

<sup>10</sup> Kelley v. Microsoft Corp., Case No. C 07-475 MJP, 2009 U.S. Dist. LEXIS 8290, at \*4 (W.D. Wash. Jan. 23, 2009) (citation omitted).

<sup>11</sup> Via v. Commonwealth, 590 S.E.2d 583, 595 (Va. Ct. App. 2004).

<sup>12</sup> Upjohn Co. v. United States, 449 U.S. 383 (1981).

<sup>13</sup> Restatement (Third) of Law Governing Lawyers § 70 reporter's note cmt. g (2000).

Courts have protected communications to and from a wide variety of agents assisting lawyers in providing legal advice to their clients. Examples include: accountant;<sup>14</sup> translator;<sup>15</sup> private investigator;<sup>16</sup> medical facility risk manager collecting facts for the facility's lawyer;<sup>17</sup> patent agent;<sup>18</sup> psychiatrist;<sup>19</sup> public relations firm;<sup>20</sup> psychologist;<sup>21</sup> environmental consultant;<sup>22</sup> client employees interviewing other employees on the lawyer's behalf;<sup>23</sup> insurance company employees arranging for insureds to be represented by a lawyer hired by the insurance company;<sup>24</sup> financial adviser;<sup>25</sup> actuary;<sup>26</sup> investment banking firm;<sup>27</sup> consultant.<sup>28</sup>

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<sup>14</sup> Silverman v. Hidden Villa Ranch (In re Suprema Specialties, Inc.), Ch. 7 Case No. 02-10823 (JMP), Adv. No. 04-01078 (JMP), 2007 Bankr. LEXIS 2304, at \*12 n.5 (Bankr. S.D.N.Y. July 2, 2007) (unpublished opinion); AMCO Ins. Co. v. Madera Quality Nut LLC, No. 1:04-cv-06456-SMS, 2006 U.S. Dist. LEXIS 21205, at \*53-54, \*60 (E.D. Cal. Apr. 10, 2006).

<sup>15</sup> Carter v. Cornell Univ., 173 F.R.D. 92, 94 (S.D.N.Y. 1997).

<sup>16</sup> In re Witham Mem'l Hosp., 706 N.E.2d 1087, 1090-91 (Ind. Ct. App. 1999).

<sup>17</sup> Scripps Health v. Superior Court, 135 Cal. Rptr. 2d 126, 129-31 (Cal. Ct. App. 2003).

<sup>18</sup> MPT, Inc. v. Marathon Labels, Inc., No. 1:04 CV 2357, 2006 U.S. Dist. LEXIS 4998, at \*13-15 (N.D. Ohio Feb. 9, 2006).

<sup>19</sup> Floyd v. Floyd, 615 S.E.2d 465, 483 (S.C. Ct. App. 2005).

<sup>20</sup> In re Grand Jury Subpoenas Dated Mar. 24, 2003, 265 F. Supp. 2d 321, 330, 331 (S.D.N.Y. 2003).

<sup>21</sup> Rodriguez v. Superior Court, 18 Cal. Rptr. 2d 120, 123-24 (Cal. Ct. App. 1993).

<sup>22</sup> Olson v. Accessory Controls & Equip. Corp., 757 A.2d 14, 24, 26 (Conn. 2000).

<sup>23</sup> Fair Isaac Corp. v. Texas Mut. Ins. Co., Civ. A. No. H-05-3007, 2006 U.S. Dist. LEXIS 86576, at \*10 (S.D. Tex. Nov. 30, 2006).

<sup>24</sup> Schipp v. Gen. Motors Corp., 457 F. Supp. 2d 917, 922-23 (E.D. Ark. 2006).

<sup>25</sup> Urban Box Office Network, Inc. v. Interfase Managers, L.P., No. 01 Civ. 8854 (LTS)(THK), 2006 U.S. Dist. LEXIS 20648, at \*11-13, \*23-24, \*28 (S.D.N.Y. Apr. 18, 2006).

<sup>26</sup> Byrnes v. Empire Blue Cross Blue Shield, No. 98Civ.8520(BSJ)(MHD), 1999 U.S. Dist. LEXIS 17281 (S.D.N.Y. Nov. 4, 1999).

<sup>27</sup> Calvin Klein Trademark Trust v. Wachner, 124 F. Supp. 2d 207 (S.D.N.Y. 2000).

<sup>28</sup> In re CV Therapeutics, Inc. Sec. Litig., No. C-03-3709 SI (EMC), 2006 U.S. Dist. LEXIS 41568, at \*20-21 (N.D. Cal. June 16, 2006).



In contrast, courts have rejected the applicability of the privilege in other situations where the courts found that the agent actually was assisting the client rather than the lawyer -- meaning that the privilege did not protect communications to and from that agent. Examples include: engineering firm hired to conduct environmental studies;<sup>29</sup> insurance company employees arranging for insureds to be represented by a lawyer hired by the insurance company;<sup>30</sup> accountant;<sup>31</sup> litigation consultant;<sup>32</sup> investigator hired to perform public relations tasks;<sup>33</sup> financial adviser;<sup>34</sup> client's expert consultant hired to prepare a report for submission to the government;<sup>35</sup> company employees compiling data to assist business decision-makers;<sup>36</sup> public relations firm;<sup>37</sup> management consultant;<sup>38</sup> asset valuation consultant;<sup>39</sup> tax consultant.<sup>40</sup>

The attorney-client privilege can clearly protect communications involving a lawyer's agent whose job is to assist the lawyer in providing legal advice. An agent

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<sup>29</sup> United States Postal Serv. v. Phelps Dodge Refining Corp., 852 F. Supp. 156, 161, 162 (E.D.N.Y. 1994).

<sup>30</sup> Koster v. June's Trucking, Inc., 625 N.W.2d 82 (Mich. Ct. App. 2000).

<sup>31</sup> Cavallaro v. United States, 284 F.3d 236 (1st Cir. 2002).

<sup>32</sup> Blumenthal v. Drudge, 186 F.R.D. 236, 243 (D.D.C. 1999).

<sup>33</sup> John Doe Co. v. United States, Nos. 01-6079 & -6222, 2003 U.S. App. LEXIS 22572 (2d Cir. Oct. 31, 2003).

<sup>34</sup> Bowne of New York City, Inc. v. AmBase Corp., 150 F.R.D. 465, 491-92 (S.D.N.Y. 1993).

<sup>35</sup> In re Grand Jury Matter, 147 F.R.D. 82, 87 (E.D. Pa. 1992).

<sup>36</sup> Byrnes v. Empire Blue Cross Blue Shield, No. 98Civ.8520(BSJ) (MHD), 1999 U.S. Dist. LEXIS 17281 (S.D.N.Y. Nov. 4, 1999).

<sup>37</sup> Calvin Klein Trademark Trust v. Wachner, 198 F.R.D. 53 (S.D.N.Y. 2000).

<sup>38</sup> De Beers LV Trademark Ltd. v. DeBeers Diamond Syndicate Inc., No. 04 Civ. 4099 (DLC), 2006 U.S. Dist. LEXIS 6091, at \*2-3, \*4-5 (S.D.N.Y. Feb. 15, 2006).

<sup>39</sup> Asousa P'ship v. Smithfield Foods, Inc. (In re Asousa P'ship), Ch. 11 Bankr. No. 01-12295DWS, Adv. No. 04-1012, 2005 Bankr. LEXIS 2373, at \*14, \*16, \*18-19, \*31, \*34-35 (Bankr. E.D. Pa. Nov. 17, 2005).

<sup>40</sup> In re G-I Holdings Inc., 218 F.R.D. 428 (D.N.J. 2003).

assisting the lawyer in understanding some complicated subject (such as Sharia law) would normally fall within the attorney-client privilege.

(c) Lawyers cannot assure privilege protection simply by retaining the agent or consultant, or preparing a self-serving letter explaining that the lawyer will use the consultant's assistance to help give legal advice.

Courts look at the bona fides of the arrangement.<sup>41</sup> If the consultant is not actually assisting the lawyer in providing legal advice, communications with (or in the presence of) the consultant generally will not deserve protection.

In a good example of how courts address this issue, the Southern District of New York agreed that one law firm was legitimately relying on an investment banking firm's help in understanding its client's financial situation,<sup>42</sup> while rejecting another law firm's claim in the same matter that it was relying on a public relations consultant to assist it in giving legal advice to the client.<sup>43</sup>

Clients and lawyers cannot "launder" an agent's or consultant's advice through the lawyer in order to protect the communications. A case involving the well-known Hunton & Williams law firm highlights the risk of thinking that having the lawyer hire the consultant will assure privilege protection. In that case, the company received a proposal from a consultant who sought to appraise some of the company's assets. The company sent the consultant's name to its law firm (Hunton & Williams), and suggested Hunton & Williams hire the consultant and send the appraisal back to the company --

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<sup>41</sup> In re CV Therapeutics, Inc. Sec. Litig., No. C-03-3709 SI (EMC), 2006 U.S. Dist. LEXIS 41568, at \*22 (N.D. Cal. June 16, 2006).

<sup>42</sup> Calvin Klein Trademark Trust v. Wachner, 124 F. Supp. 2d 207, 209 (S.D.N.Y. 2000).

<sup>43</sup> Calvin Klein Trademark Trust v. Wachner, 198 F.R.D. 53, 54 (S.D.N.Y. 2000).

thus arguably protecting the consultants appraisal with the attorney-client privilege protection.

The court found that the client engaged in a "blatant subterfuge" by using the law firm to engage in "ghost-hiring" of the consultant on the client's behalf and later "laying of hands" upon the consultant's report before transmitting it to the client.<sup>44</sup> The court labeled the process "artifice, used solely to create the appearance of the now-asserted attorney-client privilege."<sup>45</sup>

### **Best Answer**

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

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<sup>44</sup> In re Asousa P'ship, 2005 Bankr. LEXIS 2373, at \*14, \*16.

<sup>45</sup> Id. at \*18-19.

## Privilege Protection for Communications To and From Lawyers Providing Non-Legal Services

### Hypothetical 49

Before you went to law school, you worked as a CPA for approximately ten years. Clients sometimes hire you to prepare their tax returns, because you can provide both legal advice and assist in tax return preparation. You wonder about the attorney-client privilege ramifications of such a dual role.

Will the attorney-client privilege protect your communications with your clients as you prepare their tax returns?

**MAYBE**

### Analysis

The attorney-client privilege obviously does not protect a communication merely because a lawyer participates in the communication.<sup>1</sup>

The attorney-client privilege only protects communications if their primary purpose was the client's request for, or the lawyer's providing of, legal services.

Courts taking a narrow view of the privilege have refused to protect communications to and from lawyers clearly playing non-legal roles. Examples include: member of corporate board of directors;<sup>2</sup> corporate officer;<sup>3</sup> scrivener;<sup>4</sup> economic adviser;<sup>5</sup> seller of equipment;<sup>6</sup> insurance claims adjuster;<sup>7</sup> expert witness;<sup>8</sup> negotiator;<sup>9</sup>

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<sup>1</sup> Smith v. Central Dauphin Sch. Dist., Civ. No. 1:CV-05-1003, 2006 U.S. Dist. LEXIS 53855, at \*2 (M.D. Pa. Aug. 3, 2006).

<sup>2</sup> Restatement (Third) of Law Governing Lawyers § 72 cmt. c (2000).

<sup>3</sup> United States v. Dakota, 197 F.3d 821, 825 (6th Cir. 1999).

<sup>4</sup> 40 Gardenville LLC v. Travelers Prop. Cas., No. 02CV788, 2004 U.S. Dist. LEXIS 8846, at \*9 (W.D.N.Y. Apr. 22, 2004).

<sup>5</sup> Hydraflow, Inc. v. Enidine, Inc., 145 F.R.D. 626, 631 (W.D.N.Y. 1993).

<sup>6</sup> United States v. Huberts, 637 F.2d 630, 640 (9th Cir. 1980), cert. denied, 451 U.S. 975 (1981).

accreditation consultant;<sup>10</sup> collection adviser;<sup>11</sup> claims investigator or adjuster;<sup>12</sup> funds transferor;<sup>13</sup> government regulator;<sup>14</sup> business transaction implementer;<sup>15</sup> friend;<sup>16</sup> agent for the disbursement of money or property;<sup>17</sup> landowner and developer;<sup>18</sup> police department officer.<sup>19</sup>

When examining the effect on the privilege protection of a lawyer's involvement in a communication, courts often assess whether a non-lawyer could have performed the same services.<sup>20</sup> As one court explained, "[a] client may not 'buy' a privilege by retaining an attorney to do something that a non-lawyer could do just as well."<sup>21</sup> The classic case is a client's retention of a lawyer to complete a tax return. Because anyone can prepare a tax return, that process does not deserve privilege protection simply

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<sup>7</sup> Dakota, Minn. E. R.R. v. Acuity, 771 N.W.2d 623 (S.D. 2009).

<sup>8</sup> ABA LEO 407 (5/13/97).

<sup>9</sup> Georgia-Pacific Corp. v. GAF Roofing Mfg. Corp., No. 93CIV.5125, 1996 WL 29392, at \*5 (S.D.N.Y. Jan. 25, 1996).

<sup>10</sup> Massachusetts Sch. of Law at Andover v. American Bar Ass'n, 895 F. Supp. 88, 90-91 (E.D. Pa. 1995).

<sup>11</sup> E.I. DuPont de Nemours & Co. v. Forma-Pack, Inc., 718 A.2d 1129, 1142 (Md. 1998).

<sup>12</sup> St. Paul Reinsurance Co. v. Commercial Fin. Corp., 197 F.R.D. 620 (N.D. Iowa 2000).

<sup>13</sup> Ralls v. United States, 52 F.3d 223, 226 (9th Cir. 1995).

<sup>14</sup> Texaco Puerto Rico, Inc. v. Department of Consumer Affairs, 60 F.3d 867, 884 (1st Cir. 1995).

<sup>15</sup> Boca Investering's P'ship v. United States, 31 F. Supp. 2d 9, 12 (D.D.C. 1998).

<sup>16</sup> Jones v. United States, 818 A.2d 169, 175, 176 (D.C. 2003).

<sup>17</sup> SEC v. Dowdell, No. 8:02-mc-94-T-17TBM, 2006 U.S. Dist. LEXIS 31803, at \*12 (M.D. Fla. May 15, 2006).

<sup>18</sup> Pascarella v. DeFranco, No. CV055000530S, 2006 Conn. Super. LEXIS 3445, at \*3-4 (Conn. Super. Ct. Nov. 14, 2006).

<sup>19</sup> Lewis v. City of Detroit, Case No. 05-70667, 2006 U.S. Dist. LEXIS 46663, at \*6 (E.D. Mich. July 11, 2006).

<sup>20</sup> Oil, Chem. & Atomic Workers Int'l Union v. American Home Prods., 790 F. Supp. 39, 41 (D.P.R. 1992).

<sup>21</sup> United States v. Under Seal (In re Grand Jury Subpoena), 204 F.3d 516, 523 (4th Cir. 2000) (internal quotations and citation omitted).

because the client hired a lawyer to perform the task. As the Restatement puts it, the privilege applies "[s]o long as the client consults to gain advantage from the lawyer's legal skills and training."<sup>22</sup>

Courts have addressed lawyers playing a variety of roles. Not surprisingly, courts have analyzed privilege protection for communications to and from lawyers working on a client's tax problem. As explained above, the privilege does not protect a lawyer's preparation of a simple tax return.<sup>23</sup> On the other hand, courts taking a more logical view hold that the privilege protects a lawyer's advice about the tax consequences of a client's activity.<sup>24</sup>

Some courts also refuse to protect communications to or from lawyers if they view the lawyers as simply acting as "conduits" for the client's disclosure of information to regulatory agencies.<sup>25</sup> This concept parallels the principle that the privilege does not protect communications intended to be disclosed outside the intimate attorney-client relationship (this is called the "expectation of disclosure" concept).

As in all contexts, a lawyer ultimately will have to establish that any communications that the lawyer asserts deserve attorney-client privilege protection were primarily motivated by legal advice and not by some other type of advice.

### **Best Answer**

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

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<sup>22</sup> Restatement (Third) of Law Governing Lawyers § 72 cmt. c (2000).

<sup>23</sup> In re Grand Jury Investigation, 842 F.2d 1223, 1224-25 (11th Cir. 1987).

<sup>24</sup> Diversified Group, Inc. v. Daugerdas, 139 F. Supp. 2d 445, 455 (S.D.N.Y. 2001).

<sup>25</sup> United States ex rel. Burroughs v. DeNardi Corp., 167 F.R.D. 680, 683 (S.D. Cal. 1996).

## Draft Documents

### Hypothetical 50

You represent a wealthy husband and wife in preparing their estate plan. They prepared some codicils for your review and revision, and you also prepared documents for their review. All of you expect that your clients' estranged daughter might ultimately challenge your clients' wills, and the husband just asked you a question about privilege protection for all of the documents that you have been exchanging during the estate planning process.

- (a) Will the attorney-client privilege protect drafts of the codicils that your clients prepare and send to you for your review and revision?

**YES**

- (b) Will the attorney-client privilege protect draft documents that you prepare for your client's review?

**YES**

### Analysis

- (a) Most courts properly hold that the privilege can protect contemporaneous draft documents clients send their lawyers.

This is because the client's draft document can contain confidences<sup>1</sup> about which the client seeks legal advice.<sup>2</sup> One court explained that "a draft is protected under the attorney-client privilege if the draft itself contains protected confidential communications

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<sup>1</sup> In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983, 731 F.2d 1032, 1037 (2d Cir. 1984).

<sup>2</sup> Fair Isaac Corp. v. Texas Mut. Ins. Co., Civ. A. No. H-05-3007, 2006 U.S. Dist. LEXIS 86576, at \*12 (S.D. Tex. Nov. 30, 2006).

from the client or the attorney."<sup>3</sup> Another court correctly recognized that such an exchange of documents between clients and lawyers represents a dialogue.<sup>4</sup>

Examples of such protected drafts include: draft letter to a third party;<sup>5</sup> draft interrogatory answers;<sup>6</sup> invention report, which was not accompanied by an explicit request for legal advice;<sup>7</sup> draft agreement, accompanied by a request for legal review and advice;<sup>8</sup> draft patent application;<sup>9</sup> draft email to a third party;<sup>10</sup> draft client policies.<sup>11</sup>

In some situations it can be difficult to analyze the privilege's applicability to lawyer's changes to such a draft -- because in some situations the lawyers are making editorial or grammatical changes, rather than changes that reflect legal advice. As one court explained it, "simple editing remarks do not equate to rendering legal advice."<sup>12</sup>

Unfortunately, some courts do not treat drafts as protected documents. One court explained that the attorney-client privilege did not protect an entire draft document reviewed by a lawyer, but instead extended only to portions not ultimately disclosed in

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<sup>3</sup> Loftin v. Bande, 258 F.R.D. 31, 35 (D.D.C. 2009).

<sup>4</sup> Kobluk v. University of Minn., 574 N.W.2d 436, 442 (Minn. 1998).

<sup>5</sup> Virginia Elec. & Power Co. v. Westmoreland-LG&E Partners, 526 S.E.2d 750, 755 (Va. 2000).

<sup>6</sup> Sperling v. City of Kennesaw Police Dep't, 202 F.R.D. 325, 327, 328 (N.D. Ga. 2001).

<sup>7</sup> In re Spalding Sports Worldwide, Inc., 203 F.3d 800, 806 (Fed. Cir. 2000).

<sup>8</sup> United States v. KPMG LLP, No. 02-0295 (TFH), 2003 U.S. Dist. LEXIS 18476, at \*34 (D.D.C. Oct. 8, 2003).

<sup>9</sup> In re Rivastigmine Patent Litig. (MDL No. 1661), 237 F.R.D. 69, 85-86 (S.D.N.Y. 2006) (U.S. District Judge Harold Baer approved Magistrate Judge Francis's ruling, In re Rivastigmine Patent Litig., 239 F.R.D. 351 (S.D.N.Y. 2006)).

<sup>10</sup> Fair Isaac Corp. v. Texas Mut. Ins. Co., Civ. A. No. H-05-3007, 2006 U.S. Dist. LEXIS 86576, at \*12 (S.D. Tex. Nov. 30, 2006).

<sup>11</sup> United States v. New York Metro. Transp. Auth., No. CV 2004-4237 (SLT)(MDG), 2006 U.S. Dist. LEXIS 93920, at \*4-5, \*5-6 (E.D.N.Y. Dec. 29, 2006).

<sup>12</sup> Freeport-McMoran Sulphur, LLC v. Mike Mullen Energy Equip. Res., Inc., Civ. A. No. 03-1496 c/w 03-1664 SECTION: "A" (4), 2004 U.S. Dist. LEXIS 10197, at \*30-31 (E.D. La. June 3, 2004).



the final document.<sup>13</sup> This almost surely represents an incorrect view of the law, but many courts share it.

**(b)** Most courts properly recognize that the privilege protects contemporaneous documents that lawyers draft for their clients' review.<sup>14</sup>

For instance, one court held that attorney-client privilege protected draft contract terms prepared by a paralegal at a lawyer's direction, and circulated to company executives for their review and comment.<sup>15</sup>

Many courts protect drafts exchanged between clients and lawyers before they are transmitted outside the intimate attorney-client relationship, without analyzing the exact nature of the changes and who made them.<sup>16</sup> Examples include drafts of: board related documents;<sup>17</sup> public filings;<sup>18</sup> public statements;<sup>19</sup> contracts;<sup>20</sup> letters.<sup>21</sup>

The attorney-client privilege should protect draft estate planning documents exchanged between clients and their lawyers, as long as the lawyer is providing legal advice input (rather than typographical changes, alterations based on the lawyer's business or family advice, etc.).

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<sup>13</sup> In re New York Renu, MDL No. 1785, 2008 U.S. Dist. LEXIS 88515, at \*18 (D.S.C. May 6, 2008).

<sup>14</sup> SmithKline Beecham Corp. v. Apotex Corp., 232 F.R.D. 467, 479 (E.D. Pa. 2005).

<sup>15</sup> Southeastern Pa. Transp. Auth. v. CaremarkPCS Health, L.P., 254 F.R.D. 253 (E.D. Pa. 2008).

<sup>16</sup> Urban Box Office Network, Inc. v. Interfase Managers, L.P., No. 01 Civ. 8854 (LTS)(THK), 2006 U.S. Dist. LEXIS 20648, at \*23-24, \*28 (S.D.N.Y. Apr. 18, 2006).

<sup>17</sup> Lee v. Engle, C.A. Nos. 3323 & 13284, 1995 Del Ch. LEXIS 149, at \*15-17 (Del.Ch. Dec. 15, 1995).

<sup>18</sup> Id.

<sup>19</sup> Chalimoniuk v. Interstate Brands Corp., Cause No. IP01-0788-C-T/K, 2002 U.S. Dist. LEXIS 9285 at \*11, 146 Lab. Cas. (CCH) P34,528, 82 Empl. Prac. Dec. (CCH) (S.D. Ind. May 21, 2002).

<sup>20</sup> Muller v. Walt Disney Prods., No. 93 Civ. 427 (GLG), 1994 U.S. Dist. LEXIS 20941, at \*3-4 (S.D.N.Y. Sept. 26, 1994).

<sup>21</sup> American Nat'l Bank & Trust Co. v. AXA Client Solutions, LLC, No. 00 C 6786, 2002 U.S. Dist. LEXIS 4805, at \*7 (N.D. Ill. Mar. 20, 2002).

Of course, the attorney-client privilege does not protect any document the lawyer or the client sends outside the intimate attorney-client relationship. The privilege protection evaporates the moment that the client and the lawyer agree to disclose the draft -- even before the actual disclosure itself. This is because the privilege depends on the expectation of confidentiality, which disappears when a client determines not to keep the document confidential.

**Best Answer**

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

N 8/12

## Expectation of Disclosure

### Hypothetical 51

You recently finished preparing estate planning documents for a wealthy couple who anticipate that their estranged daughter might file a lawsuit challenging their wills. Your clients have asked you to send their estate planning documents to their investment advisor.

Does the attorney-client privilege protect the final version of your clients' estate planning documents, which your client just first instructed you to send to their investment advisor?

### NO (PROBABLY)

### Analysis

Because the attorney-client privilege only protects communications that clients make in confidence and intend to keep confidential, the privilege does not extend to communications that the clients intend to disclose outside the intimate attorney-client relationship. The privilege evaporates at the moment the client creates that intent.

In some situations, the intent might be apparent from the beginning -- while in other situations the client might create the intent later.

The "expectation of disclosure" concept differs conceptually from the waiver doctrine. A waiver occurs when either the client or the lawyer actually discloses privileged communications outside the intimate attorney-client relationship. The "expectation of disclosure" doctrine prevents the privilege from protecting communications within the intimate attorney-client relation -- because the client and the lawyer expect them to be later revealed. For instance, one court held that the attorney-client privilege did not protect a party's demand letter which it intended to but ultimately

did not send to the adversary -- because the owner's intent to send the letter destroyed any expectation of confidentiality.<sup>1</sup>

One court explained this correctly, noting that the privilege's emphasis on confidentiality means that "courts have consistently refused to apply the privilege to information that the client intends or understands may be conveyed to others. This refusal is not based upon a finding of waiver of the privilege due to disclosure to third parties. Rather, courts find that the privilege never attached to the communications at all."<sup>2</sup>

Although most courts correctly analyze the basic "expectation of disclosure" rules in certain contexts, many courts seriously misapply the doctrine in other contexts.

Courts hold that facts clients convey to their lawyer for ultimate disclosure to third parties do not deserve privilege protection.<sup>3</sup> Examples include facts intended to be disclosed to: the IRS in tax returns;<sup>4</sup> bankruptcy court;<sup>5</sup> the Patent and Trademark Office.<sup>6</sup>

Courts also hold that the attorney-client privilege does not protect documents that a client provides to a lawyer, or that a lawyer prepares, for ultimate disclosure to third

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<sup>1</sup> Tect Aerospace Wellington, Inc. v. Thyssenkrupp Materials NA, Inc., Case No. 07-1306-JTM, 2009 U.S. Dist. LEXIS 40230 (D. Kan. May 12, 2009).

<sup>2</sup> Griffith v. Davis, 161 F.R.D. 687, 694 (C.D. Cal. 1995) (citations omitted).

<sup>3</sup> Restatement (Third) of Law Governing Lawyers § 71 cmt. d (2000).

<sup>4</sup> Kuehne v. United States, Civ. No. 06-MC-7008-AA, 2006 U.S. Dist. LEXIS 80784, at \*6-7, \*7 (D. Or. Oct. 12, 2006).

<sup>5</sup> United States v. Hubbard, 16 F.3d 694, 697 n.3 (6th Cir. 1994), rev'd in part, 514 U.S. 695 (1995).

<sup>6</sup> Saxholm AS v. Dynal, Inc., 164 F.R.D. 331, 336 (E.D.N.Y. 1996).

parties.<sup>7</sup> Examples include documents intended for ultimate disclosure to: the IRS;<sup>8</sup> the Patent and Trademark Office;<sup>9</sup> licensing authorities;<sup>10</sup> a reinsurer.<sup>11</sup> One court held that a bankrupt debtor's completed questionnaires about her financial status did not deserve privilege protection, because the information was intended for disclosure.<sup>12</sup>

The judicial analysis of the "expectation of confidentiality" element sometimes starts to go off track when courts consider communications between the client and the lawyer, rather than just the facts or documents relayed to the lawyer.

Some courts correctly analyze the issue. For instance, one court explained that "communications conducted by an attorney and his client to prepare a document that will ultimately be divulged to third parties do not lose their privileged status. . . . Only statements that are ultimately divulged in these documents, as opposed to statements made to prepare them, lose their privileged status."<sup>13</sup>

Courts which seem to misunderstand the basic concepts sometimes improperly strip away the privilege from information relating to the communications about documents that are intended to be disclosed. As one court put it, materials connected with the publicly disclosed statements are not protected by the attorney-client

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<sup>7</sup> Federal Election Comm'n v. Christian Coalition, 178 F.R.D. 61, 67 (E.D. Va.), aff'd in part, modified in part, 178 F.R.D. 456 (E.D. Va. 1998).

<sup>8</sup> In re Grand Jury Proceedings, 220 F.2d 568, 571-72 (7th Cir. 2000) Cir. 2000).

<sup>9</sup> Smithkline Beecham Corp. v. Pentech Pharms., Inc., No. 00 C 2855, 2001 U.S. Dist. LEXIS 18281, at \*18 (N.D. Ill. Nov. 5, 2001).

<sup>10</sup> In re Gaming Lottery Sec. Litig., No. 96 Civ. 5567 (RPP), 2000 U.S. Dist. LEXIS 11694, at \*20 (S.D.N.Y. Aug. 15, 2000).

<sup>11</sup> Aiena v. Olsen, 194 F.R.D. 134 (S.D.N.Y. 2000).

<sup>12</sup> In re Wilkerson, 393 B.R. 734 (Bankr. D. Colo. 2008).

<sup>13</sup> Frieman v. USAir Group, Inc., Civ. A. No. 93-3142, 1994 U.S. Dist. LEXIS 16994, at \*24 (E.D. Pa. Nov. 23, 1994).

privilege.<sup>14</sup> Another court indicated that the disclosure of information to a third party destroys the privilege "not only to the transmitted data, but also as to the details underlying that information."<sup>15</sup> Another court stated in a matter of fact way just how far this approach can go: "As a necessary corollary to the expectation-of-confidentiality doctrine, the attorney-client privilege does not extend to documents or communications relating to matters the client reveals or intends to reveal to others."<sup>16</sup>

Courts have applied this erroneous approach in discussing communications between the clients and the lawyers about disclosure to various third parties. Examples include disclosure to: the public;<sup>17</sup> investors who will receive a prospectus;<sup>18</sup> law enforcement authorities;<sup>19</sup> the government.<sup>20</sup>

These decisions misapply the basic doctrine. Clients and lawyers communicate constantly about documents that ultimately will be disclosed to third parties -- and the privilege surely covers those communications.

Courts properly applying the attorney-client privilege protection would protect preliminary drafts of estate planning documents (as long as they reflect the lawyer's legal advice input, and have not been shared with any third parties outside the privilege) -- but would conclude that the privilege "evaporates" at the moment that the

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<sup>14</sup> United States v. Under Seal (In re Grand Jury Proceedings), 33 F.3d 342, 355 (4th Cir. 1994).

<sup>15</sup> Commonwealth v. Edwards, 370 S.E.2d 296, 301 (Va. 1988) (citation omitted).

<sup>16</sup> Federal Election Comm'n, 178 F.R.D. at 67.

<sup>17</sup> Asousa P'ship v. Smithfield Foods, Inc. (In re Asousa P'ship), Ch. 11 Bankr. No. 01-12295DWS, Adv. No. 04-1012, 2005 Bankr. LEXIS 2373, at \*11 (Bankr. E.D. Pa. Nov. 17, 2005).

<sup>18</sup> Dudley v. Ski World, Inc., No. IP87-1025C, 1989 U.S. Dist. LEXIS 6283, at \*5-6, 1989 WL 73208, at \*2 (S.D. Ind. Feb. 20, 1989).

<sup>19</sup> State v. McIntosh, 444 S.E.2d 438, 442 (N.C. 1994).

<sup>20</sup> United States v. Sudikoff, 36 F. Supp. 2d 1196, 1204-05 (C.D. Cal. 1999).

client and lawyer decide that a draft should be shared with a third party outside the privilege.

**Best Answer**

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

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## Metadata

### Hypothetical 52

You just received an email with an attached settlement proposal from an adversary. Coincidentally, last evening you read an article about the "metadata" that accompanies many electronic documents, and which might allow you to see who made changes to the settlement proposal, when they made the changes, and even what changes they made (such as including a higher settlement demand in an earlier version of the proposal).

What do you do?

- (A) You must check for any metadata (to diligently serve your client).
- (B) You may check for any metadata, but you don't have to.
- (C) You may not check for any metadata.

**(B) OR (C), DEPENDING ON THE STATE**

### Analysis

This hypothetical situation involves "metadata," which is essentially data about data. The situation involves the same basic issue as the inadvertent transmission of documents, but is even more tricky because the person sending the document might not even know that the "metadata" is being transmitted and can be read.

### Ethics Opinions

**New York.** In 2001, the New York State Bar held that the general ethics prohibition on deceptive conduct prohibits New York lawyers from "get[ting] behind" electronic documents sent by adversaries who failed to disable the "tracking" software. New York LEO 749 (12/14/01).



Interestingly, the New York State Bar followed up this legal ethics opinion with New York LEO 782 (12/8/04), indicating that lawyers have an ethical duty to "use reasonable care when transmitting documents by e-mail to prevent the disclosure of metadata containing client confidences or secrets."

**Florida.** The Florida Bar followed the New York approach -- warning lawyers to be careful when they send metadata, but prohibiting the receiving lawyer from examining the metadata. Florida LEO 06-2 (9/15/06) (lawyers must take "reasonable steps" to protect the confidentiality of any information they transmit, including metadata; "It is the recipient lawyer's concomitant obligation, upon receiving an electronic communication or document from another lawyer, not to try to obtain from metadata information relating to the representation of the sender's client that the recipient knows or should know is not intended for the recipient. Any such metadata is to be considered by the receiving lawyer as confidential information which the sending lawyer did not intend to transmit."; not reconciling these positions with Florida Rule 4-4.4(b), under which the receiving lawyer must "promptly notify the sender" if the receiving lawyer "inadvertently obtains information from metadata that the recipient knows or should know was not intended for the recipient" but not preventing the recipient from reading or relying upon the inadvertently transmitted communication; explicitly avoiding any discussion of metadata "in the context of documents that are subject to discovery under applicable rules of court or law").

**ABA.** In 2006, the ABA took exactly the opposite position -- holding that the receiving lawyer may freely examine metadata. ABA LEO 442 (8/5/06) (as long as the receiving lawyer did not obtain an electronic document in an improper manner, the

lawyer may ethically examine the document's metadata, including even using "more thorough or extraordinary investigative measures" that might "permit the retrieval of embedded information that the provider of electronic documents either did not know existed, or thought was deleted"; the opinion does not analyze whether the transmission of such metadata is "inadvertent,"<sup>1</sup> but at most such an inadvertent transmission would require the receiving lawyer to notify the sending lawyer of the metadata's receipt; lawyers "sending or producing" electronic documents can take steps to avoid transmitting metadata (through new means such as scrubbing software, or more traditional means such as faxing the document); lawyers can also negotiate confidentiality agreements or protective orders allowing the client "to 'pull back,' or prevent the introduction of evidence based upon, the document that contains that embedded information or the information itself").

**Maryland.** Maryland then followed this ABA approach. Maryland LEO 2007-09 (2007) (absent some agreement with the receiving lawyer, the sending lawyer "has an

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<sup>1</sup> In 2011, the ABA explained its definition of the term "inadvertent" in a legal ethics opinion indicating that an employee's electronic communication with his or her own personal lawyer was not "inadvertently" transmitted to an employer who searches for and discovers such personal communications in the company's computer system. ABA LEO 460 (8/4/11) (despite some case law to the contrary, holding that a lawyer's Rule 4.4(b) duty to advise the sender if the lawyer receives "inadvertently sent" documents does not arise if the lawyer's client gives the lawyer documents the client has retrieved "from a public or private place where [the document] is stored or left"; explaining that a document is "inadvertently sent" when it is "accidentally transmitted to an unintended recipient, as occurs when an e-mail or letter is misaddressed or when a document is accidentally attached to an e-mail or accidentally included among other documents produced in discovery"; concluding that a lawyer representing an employer does not have such a disclosure duty if the employer retrieves and gives the lawyer privileged emails between an employee and the employee's lawyer that are stored on the employer's computer system; noting that such lawyers might face some duty or even punishment under civil procedure rules or court decisions, but the ethics rules "do not independently impose an ethical duty to notify opposing counsel" in such situations; holding that the employer client's possession of such employee documents is a confidence that the employer's lawyer must keep, absent some other duty or discretion to disclose it; concluding that if there is no law requiring such disclosure, the employer-client must decide whether to disclose its possession of such documents, although "it often will be in the employer-client's best interest to give notice and obtain a judicial ruling" on the admissibility of the employee's privileged communications before the employer's lawyer reviews the documents).

ethical obligation to take reasonable measures to avoid the disclosure of confidential or work product materials imbedded in the electronic discovery" (although not every inadvertent disclosure constitutes an ethics violation); there is no ethical violation if a lawyer or the lawyer's assistant "reviews or makes use of the metadata [received from another person] without first ascertaining whether the sender intended to include such metadata"; pointing to the absence in the Maryland Rules of any provision requiring the recipient of inadvertently transmitted privileged material to notify the sender; a receiving lawyer "can, and probably should, communicate with his or her client concerning the pros and cons of whether to notify the sending attorney and/or to take such other action which they believe is appropriate"; noting that the 2006 Amendments to the Federal Rules will supersede the Maryland ethics provisions at least in federal litigation, and that violating that new provision would likely constitute a violation of Rule 8.4(b) as being "prejudicial to the administration of justice").

**Alabama.** In early 2007, the Alabama Bar lined up with the bars prohibiting the mining of metadata. In Alabama LEO 2007-02 (3/14/07), the Alabama Bar first indicated that "an attorney has an ethical duty to exercise reasonable care when transmitting electronic documents to ensure that he or she does not disclose his or her client's secrets and confidences." The Alabama Bar then dealt with the ethical duties of a lawyer receiving an electronic document from another person. The Bar only cited New York LEO 749 (2001), and did not discuss ABA LEO 442. Citing Alabama Rule 8.4 (which is the same as ABA Model Rule 8.4), the Alabama Bar concluded that:

[t]he mining of metadata constitutes a knowing and deliberate attempt by the recipient attorney to acquire confidential and privileged information in order to obtain an unfair advantage against an opposing party.

Alabama LEO 2007-02 (3/14/07).

The Alabama Bar did not address Alabama's approach to inadvertently transmitted communications (Alabama does not have a corollary to ABA Model Rule 4.4(b)). The Bar acknowledged that "[o]ne possible exception" to the prohibition on mining metadata involves electronic discovery, because "metadata evidence may be relevant and material to the issues at hand" in litigation. Id.

**District of Columbia.** The D.C. Bar dealt with the metadata issue in late 2007. The D.C. Bar generally agreed with the New York and Alabama approach, but noted that as of February 1, 2007, D.C. Rule 4.4(b) is "more expansive than the ABA version," because it prohibits the lawyer from examining an inadvertently transmitted writing if the lawyer "knows, before examining the writing, that it has been inadvertently sent."

District of Columbia LEO 341 (9/2007).

The D.C. Bar held that:

[a] receiving lawyer is prohibited from reviewing metadata sent by an adversary only where he has actual knowledge that the metadata was inadvertently sent. In such instances, the receiving lawyer should not review the metadata before consulting with the sending lawyer to determine whether the metadata includes work product of the sending lawyer or confidences or secrets of the sending lawyer's client.

Id. (emphases added).

After having explicitly selected the "actual knowledge" standard, the D.C. Bar then proceeded to abandon it.

First, the D.C. Bar indicated that lawyers could not use "a system to mine all incoming electronic documents in the hope of uncovering a confidence or secret, the disclosure of which was unintended by some hapless sender." Id. n.3. The Bar warned

that "a lawyer engaging in such a practice with such intent cannot escape accountability solely because he lacks 'actual knowledge' in an individual case." Id.

Second, in discussing the "actual knowledge" requirement, the D.C. Bar noted the obvious example of the sending lawyer advising the receiving lawyer of the inadvertence "before the receiving lawyer reviews the document." District of Columbia LEO 341. However, the D.C. Bar then gave another example that appears much closer to a negligence standard.

Such actual knowledge may also exist where a receiving lawyer immediately notices upon review of the metadata that it is clear that protected information was unintentionally included. These situations will be fact-dependent, but can arise, for example, where the metadata includes a candid exchange between an adverse party and his lawyer such that it is "readily apparent on its face," . . . that it was not intended to be disclosed.

Id.

The D.C. Bar indicated that "a prudent receiving lawyer" should contact the sending lawyer in such a circumstance -- although the effect of District of Columbia LEO 341 is to allow ethics sanctions against an imprudent lawyer. Id.

Third, the Bar also abandoned the "actual knowledge" requirement by using a "patently clear" standard. The D.C. Bar analogized inadvertently transmitted metadata to a situation in which a lawyer "inadvertently leaves his briefcase in opposing counsel's office following a meeting or a deposition." Id. n.4.

The one lawyer's negligence in leaving the briefcase does not relieve the other lawyer from the duty to refrain from going through that briefcase, at least when it is patently clear from the circumstances that the lawyer was not invited to do so.

Id.

After describing situations in which the receiving lawyer cannot review metadata, the Bar emphasized that even a lawyer who is free to examine the metadata is not obligated to do so.

Whether as a matter of courtesy, reciprocity, or efficiency, "a lawyer may decline to retain or use documents that the lawyer might otherwise be entitled to use, although (depending on the significance of the documents) this might be a matter on which consultation with the client may be necessary."

Id. n.9 (citation omitted).

Unlike some of the other bars which have dealt with metadata, the D.C. Bar also explicitly addressed metadata included in responsive documents being produced in litigation. Interestingly, the D.C. Bar noted that other rules might prohibit the removal of metadata during the production of electronic documents during discovery. Thus:

[i]n view of the obligations of a sending lawyer in providing electronic documents in response to a discovery request or subpoena, a receiving lawyer is generally justified in assuming that metadata was provided intentionally.

District of Columbia LEO 341. Even in the discovery context, however, a receiving lawyer must comply with D.C. Rule 4.4(b) if she has "actual knowledge" that metadata containing protected information has been inadvertently included in the production.

**Arizona.** In Arizona LEO 07-03,<sup>2</sup> the Arizona Bar first indicated that lawyers transmitting electronic documents had a duty to take "reasonable precautions" to prevent the disclosure of confidential information.

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<sup>2</sup> Arizona LEO 07-03 (11/2007) (a lawyer sending electronic documents must take "reasonable precautions" to prevent the disclosure of client confidential information; also explicitly endorsing the approach of New York, Florida and Alabama in holding that "a lawyer who receives an electronic communication may not examine it for the purpose of discovering the metadata embedded in it"; noting that Arizona's version of Rule 4.4(b) requires a lawyer receiving an inadvertently sent document to "promptly notify the sender and preserve the status quo for a reasonable period of time in order to permit

The Arizona Bar nevertheless agreed with those states prohibiting the receiving lawyer from mining metadata -- noting that Arizona's Ethical Rule 4.4(b) requires a lawyer receiving an inadvertently sent document to "promptly notify the sender and preserve the status quo for a reasonable period of time in order to permit the sender to take protective measures." The Arizona Bar acknowledged that the sending lawyer might not have inadvertently sent the document, but explained that the lawyer did not intend to transmit metadata -- thus triggering Rule 4.4(b). The Arizona Bar specifically rejected the ABA approach, because sending lawyers worried about receiving lawyers reading their metadata "might conclude that the only ethically safe course of action is to forego the use of electronic document transmission entirely."

**Pennsylvania.** In Pennsylvania LEO 2007-500, the Pennsylvania Bar promised that its opinion "provides ethical guidance to lawyers on the subject of metadata received from opposing counsel in electronic materials" -- but then offered a totally useless standard.

[I]t is the opinion of this Committee that each attorney must, as the Preamble to the Rules of Professional Conduct states, "resolve [the issue] through the exercise of sensitive and moral judgment guided by the basic principles of the Rules" and determine for himself or herself whether to utilize the metadata contained in documents and other electronic files based upon the lawyer's judgment and the particular factual situation.

Pennsylvania LEO 2007-500 (2007). The Pennsylvania Bar's conclusion was equally useless.

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the sender to take protective measures"; finding that any client confidential metadata was inadvertently transmitted, and thus fell under this rule; "respectfully" declining to adopt the ABA approach, under which lawyers "might conclude that the only ethically safe course of action is to forego the use of electronic document transmission entirely"; also disagreeing with District of Columbia LEO 341 (9/2007), although misreading that LEO as generally allowing receiving lawyers to examine metadata).

Therefore, this Committee concludes that, under the Pennsylvania Rules of Professional Conduct, each attorney must determine for himself or herself whether to utilize the metadata contained in documents and other electronic files based upon the lawyer's judgment and the particular factual situation. This determination should be based upon the nature of the information received, how and from whom the information was received, attorney-client privilege and work product rules, and common sense, reciprocity and professional courtesy.

Id. As explained below, the Pennsylvania Bar returned to this topic two years later.

**New York County.** Another legal ethics opinion on this issue came from the New York County Lawyers' Association Committee on Professional Ethics in 2008.

In N.Y. County Law. Ass'n LEO 738, the Committee specifically rejected the ABA approach, and found that mining an adversary's electronic documents for metadata amounts to unethical conduct that "is deceitful and prejudicial to the administration of justice."<sup>3</sup>

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<sup>3</sup> New York County Law. Ass'n LEO 738 (3/24/08) (holding that a lawyer "has the burden to take due care" in scrubbing metadata before sending an electronic document, but that the receiving lawyer may not seek to discover the metadata; "By actively mining an adversary's correspondence or documents for metadata under the guise of zealous representation, a lawyer could be searching only for attorney work product or client confidences or secrets that opposing counsel did not intend to be viewed. An adversary does not have the duty of preserving the confidences and secrets of the opposing side under DR 4-101 and EC 4-1. Yet, by searching for privileged information, a lawyer crosses the lines drawn by DR 1-102(A)(4) and DR 1-102(A)(5) by acting in a manner that is deceitful and prejudicial to the administration of justice. Further, the lawyer who searches an adversary's correspondence for metadata is intentionally attempting to discover an inadvertent disclosure by the opposing counsel, which the Committee has previously opined must be reported to opposing counsel without further review in certain circumstances. See NYCLA Op. 730 (2002). Thus, a lawyer who seeks to discover inadvertent disclosures of attorney work product or client confidences or secrets or is likely to find such privileged material violates DR 1-102(A)(4) and DR 1-102(A)(5)."; specifically excluding from its analysis electronic documents produced during litigation discovery; specifically rejecting the ABA approach, and instead agreeing with New York LEO 749 (12/14/01); "While this Committee agrees that every attorney has the obligation to prevent disclosing client confidences and secrets by properly scrubbing or otherwise protecting electronic data sent to opposing counsel, mistakes occur and an attorney may neglect on occasion to scrub or properly send an electronic document. The question here is whether opposing counsel is permitted to take advantage of the sending attorney's mistake and hunt for the metadata that was improperly left in the document. This Committee finds that the NYSBA rule is a better interpretation of the Code's disciplinary rules and ethical considerations and New York precedents than the ABA's opinion on this issue. Thus, this Committee concludes that when a lawyer sends opposing counsel correspondence or other material with metadata, the receiving attorney may not ethically search the



**Colorado.** Colorado dealt with this issue in mid-2008.

Relying on a unique Colorado rule, the Colorado Bar explained that a receiving lawyer may freely examine any metadata unless the lawyer received an actual notice from the sending lawyer that the metadata was inadvertently included in the transmitted document. In addition, the Colorado Bar explicitly rejected the conclusion reached by jurisdictions prohibiting receiving lawyers from examining metadata. For instance, the Colorado Bar explained that "there is nothing inherently deceitful or surreptitious about searching for metadata." The Colorado Bar also concluded that "an absolute ethical bar on even reviewing metadata ignores the fact that, in many circumstances, metadata do not contain Confidential Information."<sup>4</sup>

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metadata in those electronic documents with the intent to find privileged material or if finding privileged material is likely to occur from the search.").

<sup>4</sup> Colorado LEO 119 (5/17/08) (addressing a receiving lawyer's right to review metadata in an electronic document received from a third party; explaining that the receiving lawyer should assume that any confidential or privileged information in the metadata was sent inadvertently; noting that Colorado ethics rules require the receiving lawyer to notify the sending lawyer of such inadvertent transmission of privileged communications; "The Receiving Lawyer must promptly notify the Sending Lawyer. Once the Receiving Lawyer has notified the Sending Lawyer, the lawyers may, as a matter of professionalism, discuss whether a waiver of privilege or confidentiality has occurred. In some instances, the lawyers may be able to agree on how to handle the matter. If this is not possible, then the Sending Lawyer or the Receiving Lawyer may seek a determination from a court or other tribunal as to the proper disposition of the electronic documents or files, based on the substantive law of waiver."; relying on a unique Colorado ethics rule to conclude that "[i]f, before examining metadata in an electronic document or file, the Receiving Lawyer receives notice from the sender that Confidential Information was inadvertently included in metadata in that electronic document or file, the Receiving Lawyer must not examine the metadata and must abide by the sender's instructions regarding the disposition of the metadata"; rejecting the conclusion of jurisdictions which have forbidden receiving lawyers from reviewing metadata; "First, there is nothing inherently deceitful or surreptitious about searching for metadata. Some metadata can be revealed by simply passing a computer cursor over a document on the screen or right-clicking on a computer mouse to open a drop-down menu that includes the option to review certain metadata. . . . Second, an absolute ethical bar on even reviewing metadata ignores the fact that, in many circumstances, metadata do not contain Confidential Information."; concluding that "where the Receiving Lawyer has no prior notice from the sender, the Receiving Lawyer's only duty upon viewing confidential metadata is to notify the Sending Lawyer. See RPC 4.4(b). There is no rule that prohibits the Receiving Lawyer from continuing to review the electronic document or file and its associated metadata in that circumstance.").

**Maine.** The next state to vote on metadata was Maine. In Maine LEO 196,<sup>5</sup> the Maine Bar reviewed most of the other opinions on metadata, and ultimately concluded that:

an attorney may not ethically take steps to uncover metadata, embedded in an electronic document sent by counsel for another party, in an effort to detect information that is legally confidential and is or should be reasonably known not to have been intentionally communicated.

Maine LEO 196 (10/21/08). The Maine Bar explained that "[n]ot only is the attorney's conduct dishonest in purposefully seeking by this method to uncover confidential information of another party, that conduct strikes at the foundational principles that protect attorney-client confidences, and in doing so it clearly prejudices the administration of justice."

Not surprisingly, the Maine Bar also held that:

the sending attorney has an ethical duty to use reasonable care when transmitting an electronic document to prevent the disclosure of metadata containing confidential information. Undertaking this duty requires the attorney to reasonably apply a basic understanding of the existence of metadata embedded in electronic documents, the features of the software used by the attorney to generate the document and practical measures that may be taken to purge documents of sensitive metadata where appropriate to prevent the disclosure of confidential information.

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<sup>5</sup> Maine LEO 196 (10/21/08) (reviewing most of the other opinions on metadata, and concluding that "an attorney may not ethically take steps to uncover metadata, embedded in an electronic document sent by counsel for another party, in an effort to detect information that is legally confidential and is or should be reasonably known not to have been intentionally communicated"; explaining that "[n]ot only is the attorney's conduct dishonest in purposefully seeking by this method to uncover confidential information of another party, that conduct strikes at the foundational principles that protect attorney-client confidences, and in doing so it clearly prejudices the administration of justice"; also explaining that "the sending attorney has an ethical duty to use reasonable care when transmitting an electronic document to prevent the disclosure of metadata containing confidential information. Undertaking this duty requires the attorney to reasonably apply a basic understanding of the existence of metadata embedded in electronic documents, the features of the software used by the attorney to generate the document and practical measures that may be taken to purge documents of sensitive metadata where appropriate to prevent the disclosure of confidential information.").

Id.

**Pennsylvania.** Early in 2009, the Pennsylvania Bar issued another opinion dealing with metadata -- acknowledging that its 2007 opinion (discussed above) "provided insufficient guidance" to lawyers.<sup>6</sup>

Unlike other legal ethics opinions, the Pennsylvania Bar reminded the receiving lawyer that his client might be harmed by the lawyer's review of the adversary's metadata -- depending on the court's attitude. However, the Bar reminded lawyers that the receiving lawyer must undertake this analysis, because:

an attorney who receives such inadvertently transmitted information from opposing counsel may generally examine and use the metadata for the client's benefit without violating the Rules of Professional Conduct.

Pennsylvania LEO 2009-100 (2009).

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<sup>6</sup> Pennsylvania LEO 2009-100 (2009) (revisiting the issue of metadata following a 2007 opinion that "provided insufficient guidance" to lawyers; emphasizing the sending lawyer's duty to preserve client confidences when transmitting electronic documents; explaining that Pennsylvania's Rule 4.4(b) required a lawyer receiving an inadvertent document to "promptly notify the sender"; "When applied to metadata, Rule 4.4(b) requires that a lawyer accessing metadata evaluate whether the extra-textual information was intended to be deleted or scrubbed from the document prior to transmittal. In many instances, the process may be relatively simple, such as where the information does not appear on the face of the document sent but is accessible only by means such as viewing tracked changes or other mining techniques, or, in the alternative, where a covering document may advert to the intentional inclusion of metadata. The resulting conclusion or state of knowledge determines the course of action required. The foregoing again presumes that the mere existence of metadata confirms inadvertence, which is not warranted. This conclusion taken to its logical conclusion would mean that the existence of any and all metadata be reported to opposing counsel in every instance."; explaining that despite the possible ethics freedom to review metadata, the client might be harmed if the pertinent court would find such reading improper; describing the duty of the receiving lawyer as follows: "The receiving lawyer: '(a) must then determine whether he or she may use the data received as a matter of substantive law; (b) must consider the potential effect on the client's matter should the lawyer do so; and (c) should advise and consult with the client about the appropriate course of action under the circumstances.'"; "If the attorney determines that disclosure of the substance of the metadata to the client may negatively affect the process or outcome of the case, there will in most instances remain a duty to advise the client of the receipt of the metadata and the reason for nondisclosure. The client may then make an informed decision whether the advantages of examining or utilizing the metadata outweigh the disadvantages of so doing."; ultimately concluding "that an attorney has an obligation to avoid sending electronic materials containing metadata, where the disclosure of such metadata would harm the client's interests. In addition, an attorney who receives such inadvertently transmitted information from opposing counsel may generally examine and use the metadata for the client's benefit without violating the Rules of Professional Conduct.").

**New Hampshire.** New Hampshire dealt with metadata in early 2009. In an April 16, 2009 legal ethics opinion,<sup>7</sup> the New Hampshire Bar indicated that receiving lawyers may not ethically review an adversary's metadata. The New Hampshire Bar pointed to the state's version of Rule 4.4(b), which indicates that lawyers receiving materials inadvertently sent by a sender "shall not examine the materials," but instead should notify the sender and "abide by the sender's instructions or seek determination by a tribunal."

Interestingly, although the New Hampshire Bar could have ended the analysis with this reliance on New Hampshire Rule 4.4(b), it went on to analogize the review of an adversary's metadata to clearly improper eavesdropping.

Because metadata is simply another form of information that can include client confidences, the Committee sees little difference between a receiving lawyer uncovering an opponent's metadata and that same lawyer peeking at opposing counsel's notes during a deposition or purposely eavesdropping on a conversation between counsel and client. There is a general expectation of honesty, integrity, mutual courtesy and professionalism in the New Hampshire bar. Lawyers should be able to reasonably assume that

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<sup>7</sup> New Hampshire LEO 2008-2009/4 (4/16/09) ("Receiving lawyers have an ethical obligation not to search for, review or use metadata containing confidential information that is associated with transmission of electronic materials from opposing counsel. Receiving lawyers necessarily know that any confidential information contained in the electronic material is inadvertently sent, triggering the obligation under Rule 4.4(b) not to examine the material. To the extent that metadata is mistakenly reviewed, receiving lawyers should abide by the directives in Rule 4.4(b)."; noting that under New Hampshire Rule 4.4(b), a lawyer receiving "materials" inadvertently sent by a sender "shall not examine the materials," but instead should notify the sender and "abide by the sender's instructions or seek determination by a tribunal"; finding that this Rule applies to metadata; "The Committee believes that all circumstances, with the exception of express waiver and mutual agreement on review of metadata, lead to a necessary conclusion that metadata is 'inadvertently sent' as that term is used in Rule 4.4(b)."; analogizing the reading of metadata to clearly improper eavesdropping; "Because metadata is simply another form of information that can include client confidences, the Committee sees little difference between a receiving lawyer uncovering an opponent's metadata and that same lawyer peeking at opposing counsel's notes during a deposition or purposely eavesdropping on a conversation between counsel and client. There is a general expectation of honesty, integrity, mutual courtesy and professionalism in the New Hampshire bar. Lawyers should be able to reasonably assume that confidential information will not be sought out by their opponents and used against their clients, regardless of the ease in uncovering the information.").

confidential information will not be sought out by their opponents and used against their clients, regardless of the ease in uncovering the information.

New Hampshire LEO 2008-2009/4 (4/16/09) (emphasis added).

**West Virginia.** In West Virginia LEO 2009-01,<sup>8</sup> the West Virginia Bar warned sending lawyers that they might violate the ethics rules by not removing confidential metadata before sending an electronic document.

On the other hand:

[w]here a lawyer knows that privileged information was inadvertently sent, it could be a violation of Rule 8.4(c) for the receiving lawyer to review and use it without consulting with the sender. Therefore, if a lawyer has received electronic documents and has actual knowledge that metadata was inadvertently sent, the receiving lawyer should not review the metadata before consulting with the sending lawyer to determine whether the metadata includes work-product or confidences.

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<sup>8</sup> West Virginia LEO 2009-01 (6/10/09) (warning lawyers that "it is important to be familiar with the types of metadata contained in computer documents and to take steps to protect or remove it whenever necessary. Failure to do so could be viewed as a violation of the Rules of Professional Conduct. Additionally, searching for or viewing metadata in documents received from others after an attorney has taken steps to protect such could also be reviewed as a violation of the Rules of Professional Conduct."; also explaining that "[w]here a lawyer knows that privileged information was inadvertently sent, it could be a violation of Rule 8.4(c) [which prohibits 'conduct involving dishonesty, fraud, deceit or misrepresentation'] for the receiving lawyer to review and use it without consulting with the sender. Therefore, if a lawyer has received electronic documents and has actual knowledge that metadata was inadvertently sent, the receiving lawyer should not review the metadata before consulting with the sending lawyer to determine whether the metadata includes work-product or confidences."; noting that lawyers producing electronic document in "a discovery or a subpoena context" might have to deal with metadata differently, including asserting privilege for protected metadata; "In many situations, it may not be clear whether the disclosure was inadvertent. In order to avoid misunderstandings, it is always safer to notify the sender before searching electronic documents for metadata. If attorneys cannot agree on how to handle the matter, either lawyer may seek a ruling from a court or other tribunal on the issue."; ultimately concluding that "[t]he Board finds that there is a burden on an attorney to take reasonable steps to protect metadata in transmitted documents, and there is a burden on a lawyer receiving inadvertently provided metadata to consult with the sender and abide by the sender's instructions before reviewing such metadata").

West Virginia LEO 2009-01 (6/10/09). West Virginia Rule 8.4(c) prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation." The West Virginia Bar also explained that:

[i]n many situations, it may not be clear whether the disclosure was inadvertent. In order to avoid misunderstandings, it is always safer to notify the sender before searching electronic documents for metadata. If attorneys cannot agree on how to handle the matter, either lawyer may seek a ruling from a court or other tribunal on the issue.

West Virginia LEO 2009-01 (6/10/09).

**Vermont.** In Vermont LEO 2009-1, the Bar pointed to its version of Rule 4.4(b) -- which takes the ABA approach -- in allowing lawyers to search for any hidden metadata in electronic documents they receive.<sup>9</sup>

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<sup>9</sup> Vermont LEO 2009-1 (9/2009) (holding that lawyers must take reasonable steps to avoid sending documents that contain client confidential metadata; also holding that lawyers who receive electronic documents may search for metadata; "The Bar Associations that have examined the duty of the sending lawyer with respect to metadata have been virtually unanimous in concluding that lawyers who send documents in electronic form to opposing counsel have a duty to exercise reasonable care to ensure that metadata containing confidential information protected by the attorney client privilege and the work product doctrine is not disclosed during the transmission process."; "This Opinion agrees that, based upon the language of the VRPC, a lawyer has a duty to exercise reasonable care to ensure that confidential information protected by the attorney client privilege and the work product doctrine is not disclosed. This duty extends to all forms of information handled by an attorney, including documents transmitted to opposing counsel electronically that may contain metadata embedded in the electronic file."; noting that Vermont Rule 4.4(b) follows the ABA approach, and was effective as of September 1, 2009; declining to use the word "mine" in describing the search for metadata, because of its "pejorative characterization"; "[T]he Vermont Bar Association Professional Responsibility Section finds nothing to compel the conclusion that a lawyer who receives an electronic file from opposing counsel would be ethically prohibited from reviewing that file using any available tools to expose the file's content, including metadata. A rule prohibiting a search for metadata in the context of electronically transmitted documents would, in essence, represent a limit on the ability of a lawyer diligently and thoroughly to analyze material received from opposing counsel." (footnote omitted); "The existence of metadata is an unavoidable aspect of rapidly changing technologies and information data processing tools. It is not within the scope of this Section's authority to insert an obligation into the Vermont Rules of Professional Conduct that would prohibit a lawyer from thoroughly reviewing documents provided by opposing counsel, using whatever tools are available to the lawyer to conduct this review."; also explaining that Federal Rule of Evidence 502 provides the substantive law that governs waiver issues, and that documents produced in discovery (which may contain metadata) must be handled in the same way as other documents being produced).

**North Carolina.** In early January 2010, the North Carolina Bar joined other bars in warning lawyers to take "reasonable precautions" to avoid disclosure of confidential metadata in documents they send.

The Bar also prohibited receiving lawyers from searching for any confidential information in metadata, or using any confidential metadata the receiving lawyer "unintentionally views."<sup>10</sup>

The North Carolina Bar analogized the situation to a lawyer who receives "a faxed pleading that inadvertently includes a page of notes from opposing counsel." The North Carolina Bar concluded that a lawyer searching for metadata in an electronic document received from another lawyer would violate Rule 8.4(d)'s prohibition on conduct that is "prejudicial to the administration of justice" -- because such a search "interferes with the client-lawyer relationship of another lawyer and undermines the confidentiality that is the bedrock of the relationship."

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<sup>10</sup> North Carolina LEO 2009-1 (1/15/10) (in an opinion issued sua sponte, concluding that a lawyer "who sends an electronic communication must take reasonable precautions to prevent the disclosure of confidential information, including information in metadata, to unintended recipients."; also concluding that "a lawyer may not search for confidential information embedded in metadata of an electronic communication from another party or a lawyer for another party. By actively searching for such information, a lawyer interferes with the client-lawyer relationship of another lawyer and undermines the confidentiality that is the bedrock of the relationship. Rule 1.6. Additionally, if a lawyer unintentionally views confidential information within metadata, the lawyer must notify the sender and may not subsequently use the information revealed without the consent of the other lawyer or party."; analogizing the presence of embedded confidential metadata in a document received by the lawyer to "a faxed pleading that inadvertently includes a page of notes from opposing counsel"; noting that under North Carolina Rule 4.4(b), the receiving lawyer in that situation must "promptly notify the sender," and not explaining why the receiving lawyer must do anything more than comply with this rule when receiving an electronic document and discovering any metadata that the sender appears to have inadvertently included; later reiterating that "a lawyer who intentionally or unintentionally discovers confidential information embedded within the metadata of an electronic communication may not use the information revealed without the consent of the other lawyer or party."; explaining that a lawyer searching for metadata would violate Rule 8.4(d)'s prohibition on conduct that is "prejudicial to the administration of justice"; concluding that "a lawyer may not search for and use confidential information embedded in the metadata of an electronic communication sent to him or her by another lawyer or party unless the lawyer is authorized to do so by law, rule, court order or procedure, or the consent of the other lawyer or party. If a lawyer unintentionally views metadata, the lawyer must notify the sender and may not subsequently use the information revealed without the consent of the other lawyer or party.").

The North Carolina Bar did not explain why the receiving lawyer must do anything more than notify the sending lawyer of the inadvertently included confidential metadata -- which is all that is required in the North Carolina Rule 4.4(b). Like other parallels to ABA Model Rule 4.4(b), the North Carolina Rule does not prohibit receiving lawyers from searching for confidential information in a document or documents received from an adversary, and likewise does not address the receiving lawyer's use of any confidential information the receiving lawyer discovers.

**Minnesota.** In March 2010, Minnesota issued an opinion dealing with metadata. Minnesota LEO 22 (3/26/10).<sup>11</sup>

The court pointed to some examples of the type of metadata that a receiving lawyer could find useful.

Other metadata may contain confidential information the disclosure of which can have serious adverse consequences to a client. For example, a lawyer may use a template for pleadings, discovery and affidavits which contain metadata

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<sup>11</sup> Minnesota LEO 22 (3/26/10) (analyzing the ethics issues raised by lawyers' use of metadata; warning the sending lawyer to avoid inadvertently including metadata, and pointing to Minnesota's Rule 4.4(b) (which matches the ABA version) in simply advising the receiving lawyer to notify the sending lawyer; providing some examples of the type of metadata that could provide useful information; "Other metadata may contain confidential information the disclosure of which can have serious adverse consequences to a client. For example, a lawyer may use a template for pleadings, discovery and affidavits which contain metadata within the document with names and other important information about a particular matter which should not be disclosed to another party in another action. Also as an example, a lawyer may circulate within the lawyer's firm a draft pleading or legal memorandum on which other lawyers may add comments about the strengths and weaknesses of a client's position which are embedded in the document but not apparent in the document's printed form. Similarly, documents used in negotiating a price to pay in a transaction or in the settlement of a lawsuit may contain metadata about how much or how little one side or the other may be willing to pay or to accept."; concluding that "a lawyer is ethically required to act competently to avoid improper disclosure of confidential and privileged information in metadata in electronic documents."; pointing to Minnesota's Rule 4.4(b) in holding that "[i]f a lawyer receives a document which the lawyer knows or reasonably should know inadvertently contains confidential or privileged metadata, the lawyer shall promptly notify the document's sender as required by Rule 4.4(b), MRPC."; not pointing to any other state's approach to the receiving lawyer's ethics duty; explicitly indicating that "Opinion 22 is not meant to suggest there is an ethical obligation on a receiving lawyer to look or not to look for metadata in an electronic document. Whether and when a lawyer may be advised to look or not to look for such metadata is a fact specific question beyond the scope of this Opinion.").



within the document with names and other important information about a particular matter which should not be disclosed to another party in another action. Also as an example, a lawyer may circulate within the lawyer's firm a draft pleading or legal memorandum on which other lawyers may add comments about the strengths and weaknesses of a client's position which are embedded in the document but not apparent in the document's printed form. Similarly, documents used in negotiating a price to pay in a transaction or in the settlement of a lawsuit may contain metadata about how much or how little one side or the other may be willing to pay or to accept.

Id. The Minnesota Bar then emphasized the sending lawyer's responsibility to "scrub" metadata.

In discussing the receiving lawyer's ethics duty, the Minnesota Bar essentially punted. It cited Minnesota's version of Rule 4.4(b) (which matches the ABA Model Rule version) -- which simply requires the receiving lawyer to notify the sending lawyer of any inadvertently transmitted document. In fact, the Minnesota Bar went out of its way to avoid taking any position on the receiving lawyer's ethics duty.

Opinion 22 is not meant to suggest there is an ethical obligation on a receiving lawyer to look or not to look for metadata in an electronic document. Whether and when a lawyer may be advised to look or not to look for such metadata is a fact specific question beyond the scope of this Opinion.

Id. It is difficult to imagine how the receiving lawyer's decision is "fact specific." The Minnesota Bar did not even indicate where the receiving lawyer should look for ethics guidance.

Amazingly, the Minnesota Bar did not point to any other state's opinion on metadata, or even acknowledge the national debate.

**Oregon.** In November 2011, Oregon took a novel approach to the metadata issue, articulating an ethics standard that varies with technology.

In Oregon LEO 2011-187 (11/2011),<sup>12</sup> the bar started with three scenarios. The first scenario involved a lawyer receiving a draft agreement from another lawyer. The receiving lawyer was "able to use a standard word processing feature" to reveal the document's metadata. That process showed that the sending lawyer had made a number of revisions to the draft, and later deleted some of them.

The next scenario started with the same facts, but then added a twist. In that scenario, "shortly after opening the document and displaying the changes" the receiving lawyer received an "urgent request" from the sending lawyer asking the receiving lawyer to delete the document because the sending lawyer had "mistakenly not removed the metadata."

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<sup>12</sup> Oregon LEO 2011-187 (11/2011) (holding that lawyers may use a "standard word processing feature" to find metadata in documents they receive, but that using "special software" to thwart metadata scrubbing is unethical; explaining that lawyers' duties of competence and confidentiality require them to take "reasonable care" to prevent the inadvertent disclosure of metadata; noting that Oregon's Rule 4.4(b) at most requires a lawyer to notify the sender if the receiving lawyer "knows or should have known" that the document contains inadvertently transmitted metadata; concluding that the receiving lawyer (1) may use "a standard word processing feature" to find metadata; (2) does not have to comply with the sender's "urgent request" asking that the receiving lawyer delete a document without reading it because the sender "had mistakenly not removed the metadata" -- even if the lawyer receives the request "shortly after opening the document and displaying the changes" using such a "standard word processing feature"; (3) "should consult with the client" about "the risks of returning a document versus the risks of retaining and reading the document and its metadata"; (4) may not use special software "designed to thwart the metadata removal tools of common word processing software"; acknowledging that it is "not clear" whether the receiving lawyer has a duty to notify the sender if the receiving lawyer uncovers metadata using such "special software"; although answering "No" to the short question "[May the receiving lawyer] use special software to reveal the metadata in the document," describing that prohibition elsewhere as conditioned on it being "apparent" that the sending lawyer attempted to scrub the metadata; "Searching for metadata using special software when it is apparent that the sender has made reasonable efforts to remove the metadata may be analogous to surreptitiously entering the other lawyer's office to obtain client information and may constitute 'conduct involving dishonesty, fraud, deceit or misrepresentation' in violation of Oregon RPC 8.4(a)(3).").

In the third scenario, the receiving lawyer wanted to search for metadata using "software designed to thwart the metadata removal tools of common word processing software."

In sum, the Oregon Bar concluded that the receiving lawyer (1) could use "a standard word processing feature" to search for metadata, and at most must notify the sending lawyer of the metadata's existence; (2) could ignore the sending lawyer's request to delete the document; and (3) could not use "special software" to find the metadata that the sending lawyer intended to remove before sending the document.

The Oregon Bar started its analysis by emphasizing the sending lawyer's duty to take "reasonable care" to avoid inadvertently including metadata in an electronic document. The Oregon Bar relied on both competence and confidentiality duties.

The Oregon Bar next pointed to its version of Rule 4.4(b), which matches the ABA's Model Rule 4.4(b).

In turning to the receiving lawyer's duties, the Oregon Bar presented another scenario -- involving a sending lawyer's inadvertent inclusion of notes on yellow paper with a hardcopy of a document sent to an adversary. The Oregon Bar explained that the receiving lawyer in that scenario "may reasonably conclude" that the sending lawyer inadvertently included the yellow note pages, and therefore would have a duty to notify the sending lawyer. The same would not be true of a "redline" draft transmitted by the sending lawyer, given the fact that "it is not uncommon for lawyers to share marked-up drafts."

If the receiving lawyer "knows or reasonably should know" that a document contains inadvertently transmitted metadata, the receiving lawyer at most has a duty to notify the sending lawyer. The Oregon Bar bluntly explained that Rule 4.4(b):

does not require the receiving lawyer to return the document unread or to comply with the request by the sender to return the document.

Id. (emphasis added). In fact, the receiving lawyer's duty to consult with the client means that the receiving lawyer:

should consult with the client about the risks of returning the document versus the risks of retaining and reading the document and its metadata.

Id. Other bars have also emphasized the client's right to participate in the decision-making of how to treat an inadvertently transmitted document. The Oregon Bar acknowledged the language in Comment [3] to ABA Model Rule 4.4(b) that such a decision is "a matter of professional judgment reserved to the lawyer,"<sup>13</sup> but also pointed to other ethics rules requiring lawyers to consult with their clients.

The Oregon Bar then turned to a situation in which the sending lawyer has taken "reasonable efforts" to "remove or screen metadata from the receiving lawyer." The Oregon Bar explained that the receiving lawyer might be able to "thwart the sender's efforts through software designed for that purpose." The Oregon Bar conceded that it is "not clear" whether the receiving lawyer learning of the metadata's existence has a duty to notify the sending lawyer in that circumstance. However, the Oregon Bar concluded with a warning about the use of such "special software."

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<sup>13</sup> Interestingly, the Oregon Bar did not fully quote ABA Model Rule 4.4(b), cmt. [3], which indicates that the decision is "a matter of professional judgment ordinarily reserved to the lawyer" (emphasis added).

Searching for metadata using special software when it is apparent that the sender has made reasonable efforts to remove the metadata may be analogous to surreptitiously entering the other lawyer's office to obtain client information and may constitute "conduct involving dishonesty, fraud, deceit or misrepresentation" in violation in Oregon RPC 8.4(a)(3).

Id.

Although this conclusion indicated that such conduct "may be" analogous to improper conduct, the Oregon Bar offered a blunt "No" to the question: "May Lawyer B use special software to reveal the metadata in the document?" The short answer to that question did not include the premise that it be "apparent" that the sending lawyer tried to scrub the metadata. Thus, the simple "No" answer seemed to indicate that in that circumstance it would clearly be improper (rather than "may be" improper) for a receiving lawyer to use the "special software."

The Oregon Bar's analysis seems sensible in some ways, but nearly impossible to apply. First, it assumes that any metadata might have been "inadvertently" transmitted, and thus trigger a Rule 4.4(b) analysis. It is equally plausible to consider the metadata as having been intentionally sent. Perhaps the sending lawyer did not intend that the receiving lawyer read the metadata, but the sending lawyer surely directed the document to the receiving lawyer, unlike an errant fax or even the notes on yellow paper that the sending lawyer did not mean to include. The metadata is part of the document that was intentionally sent -- it is just that the sending lawyer might not know it is there. Considering that to be an "inadvertent" transmission might let someone argue that a sending lawyer "inadvertently" made some admission in a letter, or "inadvertently" relied on a case that actually helps the adversary, etc.

Second, if someone could use "special software" to discover metadata, it would be easy to think that the sending lawyer has almost by definition not taken "reasonable effort" to avoid disclosure of the metadata. The sending lawyer could just send a scanned PDF of the document, a fax, a hard copy, etc.

Third, the Oregon Bar makes quite an assumption in its conclusion about the receiving lawyer's use of "special software" that not only finds the metadata, but also renders it "apparent that the sender has made reasonable efforts to remove the metadata." The Oregon Bar did not describe any such "special software," so it is unclear whether it even exists. However, the Oregon Bar's conclusion rested (at least in part of the opinion) on the receiving lawyer discovering that the sending lawyer has attempted to remove the metadata. As explained above, however, the short question and answer at the beginning of the legal ethics opinion seems to prohibit the use of such "special software" regardless of the receiving lawyer's awareness that the sending lawyer had attempted to scrub the software.

Fourth, it is frightening to think that some lawyer using "a standard word processing feature" to search for metadata is acting ethically, but a lawyer using "special software designed to thwart the metadata removal tools of common word processing software" might lose his or her license. It is difficult to imagine that the line between ethical and unethical conduct is currently defined by whether a word processing feature is "standard" or "special." And of course that type of technological characterization changes every day.

**Washington.** The Washington State Bar Association dealt with metadata in a 2012 opinion. Washington LEO 2216 (2012).<sup>14</sup> In essence, Washington followed Oregon's lead in distinguishing between a receiving lawyer's permissible use of "standard" software to search for metadata and the unethical use of "special forensic software" designed to thwart the sending lawyer's scrubbing efforts.

The Washington LEO opinion posed three scenarios. In the first, a sending lawyer did not scrub metadata, so the receiving lawyer was able to use "standard word processing features" to find metadata in a proposed settlement document. Id.

Washington state began its analysis of this scenario by noting that the sending lawyer:

has an ethical duty to "act competently" to protect from disclosure the confidential information that may be reflected in a document's metadata, including making reasonable efforts to "scrub" metadata reflecting any protected information from the document before sending it electronically . . . .

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<sup>14</sup> Washington LEO 2216 (2012) (analyzing both the sending and the receiving lawyers' responsibilities in connection with metadata; analyzing three hypotheticals: (1) a receiving lawyer uses "standard word processing features" to view metadata; concluding that the receiving lawyer's sole duty is to notify the sending lawyer of the metadata's presence; (2) "shortly after opening the document and discovering the readily accessible metadata, [receiving lawyer] receives an urgent email from [sending lawyer] stating that the metadata had been inadvertently disclosed and asking [receiving lawyer] to immediately delete the document without reading it"; concluding that the receiving lawyer "is not required to refrain from reading the document, nor is [receiving lawyer] required to return the document to [sending lawyer]. . . . [Receiving lawyer] may, however, be under a legal duty separate and apart from the ethical rules to take additional steps with respect to the document."; explaining that absent a legal duty governing the situation, the receiving lawyer must consult with the client about what steps to take; (3) a sending lawyer makes "reasonable efforts to 'scrub' the document" of metadata, and believes that he has successfully scrubbed the metadata; concluding that the receiving lawyer's use of "special forensic software designed to circumvent metadata removal tools" would be improper; "The ethical rules do not expressly prohibit [receiving lawyer] from utilizing special forensic software to recover metadata that is not readily accessible or has otherwise been 'scrubbed' from the document. Such efforts would, however, in the opinion of this committee, contravene the prohibition in RPC 4.4(a) against 'us[ing] methods of obtaining evidence that violate the legal rights of [third persons]' and would constitute 'conduct that is prejudicial to the administration of justice' in contravention of RPC 8.4(d). To the extent that efforts to mine metadata yield information that intrudes on the attorney-client relationship, such efforts would also violate the public policy of preserving confidentiality as the foundation of the attorney-client relationship. . . . As such, it is the opinion of this committee that the use of special software to recover, from electronic documents, metadata that is not readily accessible does violate the ethical rules.").

Id. The Bar pointed to the Washington version of Rule 4.4(b) in explaining that the receiving lawyer could read the metadata. The Bar indicated that the receiving lawyer in that scenario simply had a duty to notify the sending lawyer "that the disclosed document contains readily accessible metadata." Id.

In the second scenario:

shortly after opening the document and discovering the readily accessible metadata, [the receiving lawyer] receives an urgent e-mail from [the sending lawyer] stating that the metadata had been inadvertently disclosed and asking [the receiving lawyer] to immediately delete the document without reading it.

Id. Somewhat surprisingly, the Washington Bar indicated that in that scenario the receiving lawyer:

is not required to refrain from reading the document, nor is [the receiving lawyer] required to return the document to [the sending lawyer]. . . . [The receiving lawyer] may, however, be under a legal duty separate and apart from the ethical rules to take additional steps with respect the document.

Id. The Bar explained that if there were no such separate legal duty applicable, the receiving lawyer would have to decide what steps to take in a consultation with the client.

In the third scenario, the sending lawyer had taken "reasonable efforts to 'scrub' the document" of metadata and believed that he had done so. Id. However, the receiving lawyer "possesses special forensic software designed to circumvent metadata removal tools." Id. The Washington Bar found that a receiving lawyer's use of such "special forensic software" violated Rule 8.4.

The ethical rules do not expressly prohibit [the receiving lawyer] from utilizing special forensic software to recover metadata that is not readily accessible or has otherwise



been 'scrubbed' from the document. Such efforts would, however, in the opinion of this committee, contravene the prohibition in RPC 4.4(a) against 'us[ing] methods of obtaining evidence that violate the legal rights of [third persons]' and would constitute 'conduct that is prejudicial to the administration of justice' in contravention of RPC 8.4(d). To the extent that efforts to mine metadata yield information that intrudes on the attorney-client relationship, such efforts would also violate the public policy of preserving confidentiality as the foundation of the attorney-client relationship. . . . As such, it is the opinion of this committee that the use of special software to recover, from electronic documents, metadata that is not readily accessible does violate the ethical rules.

Id.

**New Jersey.** The New Jersey Supreme Court articulated that state's approach to metadata on April 14, 2016.<sup>15</sup>

Unlike states which provide complete freedom for receiving lawyers to check for metadata or flatly prohibit lawyer from checking for metadata, the New Jersey standard contained a potentially confusing subjective element.

The New Jersey rule permitted receiving lawyers to check for metadata, under certain conditions.

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<sup>15</sup> New Jersey Supreme Court, Administrative Determinations on the Report and Recommendations of the Working Group on Ethical Issues Involving Metadata in Electronic Documents, Apr. 14, 2016, (adopting a change in New Jersey Rule 4.4(b); Official Comment (Aug. 1, 2016); "A lawyer who receives an electronic document that contains unrequested metadata may, consistent with Rule of Professional Conduct 4.4(b), review the metadata provided the lawyer reasonably believes that the metadata was not inadvertently sent. When making a determination as to whether the metadata was inadvertently sent, the lawyer should consider the nature and purpose of the document. For example, absent permission from the sender, a lawyer should not review metadata in a mediation statement or correspondence from another lawyer, as the metadata may reflect attorney-client communications, work product or internal communications not intended to be shared with opposing counsel. The lawyer should also consider the nature of the metadata at issue. Metadata is presumed to be inadvertently sent when it reflects privileged attorney-client or work product information. Metadata is likely to be inadvertently sent when it reflects private or proprietary information, information that is outside the scope of discovery by agreement or court order, or information specifically objected to in discovery. If a lawyer must use forensic 'mining' software or similar methods to reveal metadata in an electronic document when metadata was not specifically requested, as opposed to using simply computer keystrokes on ordinary business software, it is likely that the information so revealed was inadvertently sent, given the degree of sophistication required to reveal the metadata."), available at <http://www.judiciary.state.nj.us/notices/2016/n160809a.pdf>.

A lawyer who receives an electronic document that contains unrequested metadata may, consistent with Rule of Professional Conduct 4.4(b), review the metadata provided the lawyer reasonably believes that the metadata was not inadvertently sent.

Id. (emphasis added). New Jersey's explanation of this subjective element did not provide any certainty, but offered some guidance.

When making a determination as to whether the metadata was inadvertently sent, the lawyer should consider the nature and purpose of the document. For example, absent permission from the sender, a lawyer should not review metadata in a mediation statement or correspondence from another lawyer, as the metadata may reflect attorney-client communications, work product or internal communications not intended to be shared with opposing counsel. The lawyer should also consider the nature of the metadata at issue. Metadata is presumed to be inadvertently sent when it reflects privileged attorney-client or work product information. Metadata is likely to be inadvertently sent when it reflects private or proprietary information, information that is outside the scope of discovery by agreement or court order, or information specifically objected to in discovery. If a lawyer must use forensic 'mining' software or similar methods to reveal metadata in an electronic document when metadata was not specifically requested, as opposed to using simply computer keystrokes on ordinary business software, it is likely that the information so revealed was inadvertently sent, given the degree of sophistication required to reveal the metadata.").

Id.

Lawyers governed by this New Jersey standard would be wise to avoid searching for any metadata in other lawyers' correspondence or in mediation statements, although the New Jersey Supreme Court approach did not even totally prohibit such review. Similarly, such lawyers should probably not rely on special forensic metadata mining software, although New Jersey does not flatly prohibit such software's use.

Interestingly, the New Jersey approach also focused on the metadata's content as a factor in determining whether the sending lawyer inadvertently included it. That seems odd, because the receiving lawyer cannot assess that content without first finding and reviewing the metadata.

**Texas**. A Texas legal ethics opinion stated that state's metadata approach in December 2016.<sup>16</sup>

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<sup>16</sup> Texas LEO 665 (12/16) (holding that lawyers must take reasonable steps to prevent the inadvertent transmission of metadata to adversaries, but also noting that the receiving lawyers may read such metadata -- although they should keep in mind the risk of disqualification; "Lawyers . . . have a duty to take reasonable measures to avoid the transmission of confidential information embedded in electronic documents, including the employment of reasonably available technical means to remove such metadata before sending such documents to persons to whom such confidential information is not to be revealed pursuant to the provisions of Rule 1.05. Commonly employed methods for avoiding the disclosure of confidential information in metadata include the use of software to remove or 'scrub' metadata from the document before transmission, the conversion of the document into another format that does not preserve the original metadata, and transmission of the document by fax or hard copy."; "[A]lthough the Texas Disciplinary Rules do not prohibit a lawyer from searching for, extracting, or using metadata and do not require a lawyer to notify any person concerning metadata obtained from a document received, a lawyer who has reviewed metadata must not, through action or inaction, convey to any person or adjudicative body information that is misleading or false because the information conveyed does not take into account what the lawyer has learned from such metadata. For example, a Texas lawyer, in responding to a question, is not permitted to give an answer that would be truthful in the absence of metadata reviewed by the lawyer but that would be false or misleading when the lawyer's knowledge gained from the metadata is also considered." (emphasis added); "A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender." (citation omitted); "To the extent a Texas lawyer becomes subject to the disciplinary rules of other jurisdictions, the lawyer may be subject to additional requirements concerning the treatment of metadata that would not be applicable if only the Texas Disciplinary Rules of Professional Conduct were considered." (emphasis added); "The Committee also cautions that a lawyer's conduct upon receipt of an opponent's confidential information may have material consequences for the client, including the possibility of procedural disqualification. . . . If in a given situation a client will be exposed to material risk by a lawyer's intended treatment of an opponent's inadvertently transmitted confidential information contained in metadata, the lawyer should discuss with the client the risks and benefits of the proposed course of action as well as other possible alternatives so that the client can make an informed decision. See Rule 1.03(b) ('A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.')" (emphasis added); "This opinion applies only to the voluntary transmission of electronic documents outside the normal course of discovery. The production of electronic documents in discovery is governed by court rules and other law, which may prohibit the removal or alteration of metadata. Court rules may also govern the obligations of a lawyer who receives inadvertently transmitted privileged information in the course of discovery. See, e.g., Tex. R. Civ. P. 193.3(d)." (emphasis added); "The Texas Disciplinary Rules of Professional Conduct require lawyers to take reasonable measures to avoid the transmission of confidential information embedded in electronic documents, including the employment of reasonably available technical means to remove such metadata before sending such documents to persons other

The Texas legal ethics opinion allowed lawyers to search for metadata in documents they receive, but included a series of warnings – some of which were obvious, and some of which were unique.

After reminding sending lawyers about the risk of including metadata in their communications, the Texas legal ethics opinion coupled its statement freeing Texas lawyers to review such metadata with a warning that they cannot lie about it.

[A]lthough the Texas Disciplinary Rules do not prohibit a lawyer from searching for, extracting, or using metadata and do not require a lawyer to notify any person concerning metadata obtained from a document received, a lawyer who has reviewed metadata must not, through action or inaction, convey to any person or adjudicative body information that is misleading or false because the information conveyed does not take into account what the lawyer has learned from such metadata.

Texas LEO 665 (12/16) (emphasis added).

The Texas legal ethics opinion then understandably warned lawyers that other states' ethics rules might apply.

To the extent a Texas lawyer becomes subject to the disciplinary rules of other jurisdictions, the lawyer may be subject to additional requirements concerning the treatment of metadata that would not be applicable if only the Texas Disciplinary Rules of Professional Conduct were considered.

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than the lawyer's client. Whether a lawyer has taken reasonable measures to avoid the disclosure of confidential information in metadata will depend on the factual circumstances.";"While the Texas Disciplinary Rules of Professional Conduct do not prescribe a specific course of conduct for a lawyer who receives from another lawyer an electronic document containing confidential information in metadata that the receiving lawyer believes was not intended to be transmitted to the lawyer, court rules or other applicable rules of conduct may contain requirements that apply in particular situations. Regardless, a Texas lawyer is required by the Texas Disciplinary Rules to avoid misleading or fraudulent use of information the lawyer may obtain from the metadata. In the absence of specific governing provisions, a lawyer who is considering the proper course of action regarding confidential information in metadata contained in a document transmitted by opposing counsel should determine whether the possible course of action poses material risks to the lawyer's client. If so, the lawyer should explain the risks and potential benefits to the extent reasonably necessary to permit the client to make informed decisions regarding the matter.").

Id.

Implicitly acknowledging that courts may take a different attitude about lawyers' search for metadata, the Texas legal ethics opinion also warned receiving lawyers about the risk of their disqualification should they review metadata, and advised lawyers to review such risks with their clients.

The Committee also cautions that a lawyer's conduct upon receipt of an opponent's confidential information may have material consequences for the client, including the possibility of procedural disqualification. . . . If in a given situation a client will be exposed to material risk by a lawyer's intended treatment of an opponent's inadvertently transmitted confidential information contained in metadata, the lawyer should discuss with the client the risks and benefits of the proposed course of action as well as other possible alternatives so that the client can make an informed decision.

Id.

### **Current "Scorecard"**

A chronological list of state ethics opinions dealing with metadata highlights the states' widely varying approaches.

The following is a chronological list of state ethics opinions, and indication of whether receiving lawyers can examine an adversary's electronic document for metadata.

#### **2001**

New York LEO 749 (12/14/01) -- **NO**

#### **2004**

New York LEO 782 (12/18/04) -- **NO**

**2006**

ABA LEO 442 (8/5/06) -- **YES**

Florida LEO 06-2 (9/5/06) -- **NO**

**2007**

Maryland LEO 2007-9 (2007) -- **YES**

Alabama LEO 2007-02 (3/14/07) -- **NO**

District of Columbia LEO 341 (9/2007) -- **NO**

Arizona LEO 07-3 (11/2007) -- **NO**

Pennsylvania LEO 2007-500 (2007) -- **YES**

**2008**

N.Y. County Law. Ass'n LEO 738 (3/24/08) -- **NO**

Colorado LEO 119 (5/17/08) -- **YES**

Maine LEO 196 (10/21/08) -- **NO**

**2009**

Pennsylvania LEO 2009-100 (2009) -- **YES**

New Hampshire LEO 2008-2009/4 (4/16/09) -- **NO**

West Virginia LEO 2009-01 (6/10/09) -- **NO**

Vermont LEO 2009-1 (10/2009) -- **YES**

**2010**

North Carolina LEO 2009-1 (1/15/10) -- **NO**

Minnesota LEO 22 (3/26/10) -- **MAYBE**

## **2011**

Oregon LEO 2011-187 (11/2011) -- **YES** (using "standard word processing features") and **NO** (using "special software" designed to thwart metadata scrubbing).

## **2012**

Washington LEO 2216 (2012) -- **YES** (using "standard word processing features") and **NO** (using "special forensic software" designed to thwart metadata scrubbing).

## **2016**

New Jersey Rules change (4/14/16) – **YES** (if receiving lawyers reasonably believe the metadata was not inadvertently sent).

## **Texas LEO 665 (12/16)** -- **YES**

Thus, states take widely varying approaches to the ethical propriety of mining an adversary's electronic documents for metadata.

Interestingly, neighboring states have taken totally different positions. For instance, in late 2008, the Maine Bar prohibited such mining -- finding it "dishonest" and prejudicial to the administration of justice -- because it "strikes at the foundational principles that protect attorney-client confidences." Maine LEO 196 (10/21/08).

About six months later, New Hampshire took the same basic approach (relying on its version of Rule 4.4(b)), and even went further than Maine in condemning a receiving lawyer's mining of metadata -- analogizing it to a lawyer "peeking at opposing counsel's notes during a deposition or purposely eavesdropping on a conversation between counsel and client." New Hampshire LEO 2008-2009/4 (4/16/09).

However, another New England state (Vermont) reached exactly the opposite conclusion in 2009. Pointing to its version of Rule 4.4(b), Vermont even declined to use

the term "mine" in determining the search, because of its "pejorative characterization."  
Vermont LEO 2009-1 (9/2009).

### **Basis for States' Differing Positions**

In some situations, the bars' rulings obviously rest on the jurisdiction's ethics rules. For instance, the District of Columbia Bar pointed to its version of Rule 4.4(b), which the bar explained is "more expansive than the ABA version," because it prohibits the lawyer from examining an inadvertently transmitted writing if the lawyer "knows, before examining the writing, that it has been inadvertently sent." District of Columbia LEO 341 (9/2007).

On the other hand, some of these bars' rulings seem to contradict their own ethics rules. For instance, Florida has adopted ABA Model Rule 4.4(b)'s approach to inadvertent transmissions (requiring only notice to the sending lawyer), but the Florida Bar nevertheless found unethical the receiving lawyer's "mining" of metadata.<sup>17</sup>

Other jurisdictions have not adopted any version of Rule 4.4(b), and therefore were free to judge the metadata issue without reference to a specific rule. See, e.g., Alabama LEO 2007-02 (3/14/07).

On the other hand, some states examining the issue of metadata focus on the basic nature of the receiving lawyer's conduct in attempting to "mine" metadata. Such conclusions obviously do not rest on a particular state's ethics rules. Instead, the different bars' characterization of the "mining" reflects a fascinating dichotomy resting on each state's view of the conduct.

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<sup>17</sup> Florida LEO 06-2 (9/16/06).



- On March 24, 2008, the New York County Bar explained that mining an adversary's electronic documents for metadata amounted to unethical conduct that "is deceitful and prejudicial to the administration of justice." N.Y. County Law. Ass'n LEO 738 (3/24/08).
- Less than two months later, the Colorado Bar explained that "there is nothing inherently deceitful or surreptitious about searching for metadata." Colorado LEO 119 (5/17/08).
- A little over five months after that, the Maine Bar explained that "[n]ot only is the attorney's conduct dishonest in purposefully seeking by this method to uncover confidential information of another party, that conduct strikes at the foundational principles that protect attorney-client confidences, and in doing so it clearly prejudices the administration of justice." Maine LEO 196 (10/21/08).

Thus, in less than seven months, two states held that mining an adversary's electronic document for metadata was deceitful, and one state held that it was not.

### **Best Answer**

The best answer to this hypothetical is **(b) or (c), DEPENDING ON THE STATE.**

B 4/17]

## Duty to Disclose an Adversary's Document Error

### Hypothetical 53

You represent an estranged son who has been feuding with his wealthy parents. The parents have agreed to include certain provisions in their estate plan in an effort to resolve the latest dispute, and you and the parents' lawyer have been exchanging drafts of the parents' estate plan documents. You finished your negotiations last night, and early this morning received an agreement that the parents' lawyer says memorializes your final agreement. However, you notice that the parents' lawyer failed to include a provision that you had reluctantly agreed to last night -- which would be favorable to the parents rather than to your client.

- (a) Without your client's consent, must you advise the parents' lawyer of her mistake?

### YES (PROBABLY)

- (b) Must you advise your client of the parents' lawyer's mistake?

### NO (PROBABLY)

### Analysis

The issue here is whether you must disclose what amounts to a typographical error by the adversary.

- (a) The first question is whether a lawyer in this situation must advise the adversary of the error.

The ABA dealt with this situation in ABA Informal Op. 1518 (2/9/86). The ABA ultimately concluded that "the omission of the provision from the document is a 'material fact' which . . . must be disclosed to [the other side's] lawyer." Id.

The more recent Ethical Guidelines for Settlement Negotiations similarly indicates that lawyers "should identify changes from draft to draft or otherwise bring them explicitly to the other counsel's attention." ABA, Ethical Guidelines for Settlement

Negotiations 57 (Aug. 2002). The Guidelines explain that "[i]t would be unprofessional, if not unethical, knowingly to exploit a drafting error or similar error concerning the contents of the settlement agreement." Id.

Other authorities agree. See, e.g., Patrick E. Longan, Ethics in Settlement Negotiations: Foreword, 52 Mercer L. Rev. 807, 815 (2000-2001) (" the lawyer has the duty to correct the mistakes" if the lawyer notices typographical or calculation errors in a settlement agreement).

Several courts have dealt with this situation. In Stare v. Tate, 98 Cal. Rptr. 264 (Cal. Ct. App. 1971), a husband negotiating a property settlement with his former wife noticed two calculation errors in the agreement. The husband nevertheless signed the settlement without notifying his former wife of the errors. The court explained the predictable way in which the issue arose.

The mistake might never have come to light had not Tim desired to have that exquisite last word. A few days after Joan had obtained the divorce he mailed her a copy of the offer which contained the errant computation. On top of the page he wrote with evident satisfaction: "PLEASE NOTE \$100,000.00 MISTAKE IN YOUR FIGURES. . . ." The present action was filed exactly one month later."

Id. at 266. The court pointed to a California statute allowing lawyers to revise written contracts that contain a "mistake of one party, which the other at the time knew or suspected." Id. at 267. The court reformed the property settlement agreement to match the parties' agreement.

**(b)** In some ways, the more difficult question is whether the lawyer must advise her client of the adversary's mistake, and how the lawyer must or should react to the client's possible direction to keep the mistake secret.

In ABA Informal Op. 1518 (2/9/86), the ABA "conclude[d] that the error is appropriate for correction between the lawyers without client consultation." The ABA indicated that a lawyer's obligation under ABA Model Rule 1.4 to keep the client adequately informed does not require disclosure of a typographical error, because the client does not need to make an "informed decision" in connection with the matter. As the ABA explained it, "the decision on the contract has already been made by the client." The ABA also pointed to a comment to ABA Model Rule 1.2 (now Comment [2]) indicating that lawyers generally have responsibility for "technical" matters involving the representation.

"Assuming for purposes of discussion" that the error was protected by the general confidentiality rule in ABA Model Rule 1.6, the ABA concluded that the lawyer would have "implied authority" to disclose the other side's error, in order to complete the "commercial contract already agreed upon and left to the lawyers to memorialize."

Interestingly, the ABA indicated that "[w]e do not here reach the issue of the lawyer's duty if the client wishes to exploit the error." A lawyer presumably will never face this issue if she discloses the error to the adversary without disclosing it to her own client.

### **Best Answer**

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

N 8/12 [M]

## Relying on Independent Contractors

### Hypothetical 54

Several of your best paralegals recently decided to stop working full time (one to raise a child, and one to at least partially retire). Both of them have expressed an interest in continuing to work at least part time out of their homes, and you wonder what possibilities would pass muster under the ethics rules.

- (a) Must you advise your clients if you rely on these paralegals (working out of their homes) to prepare the first draft of estate planning documents for your review?

**MAYBE**

- (b) May you bill for these paralegals' time at an hourly rate higher than you pay them (without advising clients of the "spread")?

**MAYBE**

### Analysis

Lawyers working with part-time independent contractors must consider a number of factors, including possible notice to the client and billing issues.

- (a) The ABA has dealt with a lawyer's obligations to notify a client when relying on temporary lawyers who work primarily out of their home (or some other place other than the law firm).

In a 1988 legal ethics opinion, the ABA dealt with what it called "temporary lawyers." The ABA defined that term as follows:

The term "temporary lawyer" means a lawyer engaged by a firm for a limited period, either directly or through a lawyer placement agency. The term does not, however, include a lawyer who works part time for a firm or full time but without contemplation of permanent employment, who is nevertheless engaged by the firm as an employee for an extended period and does legal work only for that firm.

ABA LEO 356 n.1 (12/16/88). Significantly,

[t]he temporary lawyer may work in the firm's office or may visit the office only occasionally when the work requires. The temporary lawyer may work exclusively for the firm during a period of temporary employment or may work simultaneously on other matters for other firms.

ABA LEO 356 (emphases added). The ABA concluded that a lawyer relying on such a temp will not ordinarily have to disclose the arrangement to the client, as long as the "temporary lawyer is working under the direct supervision of a lawyer associated with the firm." Id. In 2000, the ABA reiterated this conclusion in its summary of this 1988 legal ethics opinion (as discussed below).

The ABA returned to this issue in 2000. In ABA LEO 420, the ABA dealt with law firms billing for services provided by what the ABA called "Contract Lawyers."

After explaining the variety of contexts in which such Contract Lawyers might work, the ABA explained that "the contract lawyer functions as a part of the legal services delivery group and reports to a retaining lawyer." ABA LEO 420 (11/29/00).

The work of the contract lawyer may be performed on the premises of the retaining lawyer or elsewhere and the degree of supervision will vary, as will the contract lawyer's participation in the general practice activities of the retaining lawyer of the law firm.

Id. (emphasis added).

In this legal ethics opinion, the ABA explained that it was not addressing the law firm's possible obligation to disclose such a contract lawyer's role in the delivery of legal services.

This opinion does not address whether and in what circumstances disclosure to the client of a relationship of the retaining lawyer with a contract lawyer is required. Although the Committee finds no requirement under the rules for

disclosing the identity of specific personnel assigned to a client's matter absent client inquiry, the Committee recognizes that client expectations and the overall client-lawyer relationship may make such disclosure desirable.

Id. n.1. The ABA explained that its 1988 legal ethics opinion

should be regarded as supporting the conclusion that the role of contract lawyers retained to work on a client's matter(s) should be disclosed to the client . . . based on the relationship of the contract lawyers with the firm, particularly when the work of the contract lawyer will not be supervised within the justifiable expectations of the client.

ABA LEO 420 (emphasis added). The obvious inference is that such disclosure would not be required if the law firm supervised the contract lawyer.

In 2008, the ABA addressed this issue again, in its widely-circulated opinion on outsourcing. ABA LEO 451 (8/5/08).

The ABA first reiterated the principles stated in the 1988 legal ethics opinion.

In [1988] Formal Opinion 88-356, we opined that when a lawyer engaged the services of a temporary lawyer, a form of outsourcing, an obligation to advise the client of that fact and to seek the client's consent would arise if the temporary lawyer was to perform independent work for the client without the close supervision of the hiring lawyer or another lawyer associated with her firm.

Id. (footnote omitted; emphasis added). The ABA explained that the conclusion it adopted in that earlier LEO

was predicated on the assumption that the relationship between the firm and the temporary lawyer involved a high degree of supervision and control, so that the temporary lawyer would be tantamount to an employee, subject to discipline or even firing for misconduct.

Id. (emphasis added).

The ABA acknowledged that such "high degree of supervision and control" ordinarily would not exist "in a relationship involving outsourcing through an intermediary." ABA LEO 451. Presumably, a law firm would have to disclose the outsourcing arrangement only if it did not involve such supervision and control.

Thus, both for client disclosure and consent purposes and for billing purposes, independent contractors who are directly supervised by law firm lawyers generally will be treated as if they were lawyers practicing at the firm.<sup>1</sup>

**(b)** The ABA has also dealt several times with the way that lawyers may ethically bill for time spent by lawyers not physically working within the law firm.

In ABA LEO 356 (12/16/88), the ABA dealt with temporary lawyers, who "may visit the office only occasionally when the work requires" -- but who were "working under the direct supervision of a lawyer associated with the firm."

After concluding that the lawyer paying such a temp was not engaged in a fee-split under the ABA Model Rules (because the lawyer was not considered to be "outside the firm" for those purposes), the ABA turned to how the lawyer could bill for the temp's services.

Assuming that a law firm simply pays the temporary lawyer reasonable compensation for the services performed for the firm and does not charge the payments thereafter to the client as a disbursement, the firm has no obligation to reveal to the client the compensation arrangement with the temporary lawyer.

ABA LEO 356 (emphasis added).

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<sup>1</sup> Depending on whether the lawyers are sufficiently integrated into the firm to be considered "associated" with the firm under ABA Model Rule 1.10(a), any individual independent contractor's disqualification might be imputed to the entire firm.



Not surprisingly, the ABA also indicated that the "total fee" charged to the client must be "reasonable." Significantly, the ABA explained that

[t]he requirement of Rule 1.5(a) that the total fee be reasonable is, of course, a restriction only on the fee charged to the client and not on how much is paid to the temporary lawyer. That requirement must be satisfied in all events.

Id. (emphasis added). Thus, the "reasonable fee" requirement does not include an examination of the difference between what the law firm pays the temporary lawyer and what the law firm charges the client for the temporary lawyer's services. Instead, the "reasonable fee" requirement looks at the amount the law firm bills the client.

In its 2000 legal ethics opinion on these issues, the ABA explained that a law firm could bill for the contract lawyer's services in one of two ways.

Services of a contract lawyer may be billed to the client either as fees for legal services or as costs or expenses incurred by the retaining lawyer. Whether the cost attributable to a contract lawyer is billed as an expense or included in legal services fees is not addressed by the Model Rules and does not seem to be a matter of ethics.

ABA LEO 420 (11/29/00) (emphases added). Thus, the law firm's choice of billing did not even implicate the ethics rules.

In discussing the law firm's choice of billing for the contract lawyer's legal services, the ABA explained that the only limit was the overall requirement that the lawyer's fee be "reasonable."

The [reasonable fee] rule specifically does not address the individual components that, taken together, determine the actual amount of any legal fee, such as costs associated with delivering the legal services, or the part of a fee that might constitute the lawyer's profit. Certainly, the absence of a specific reference to a lawyer's profit in Rule 1.5 cannot reasonably be read to prohibit a lawyer from including a

profit factor in her fees. It is implicit in Formal Opinion 93-379 that profit from providing legal services is expected and appropriate, as long as the total fee is reasonable.

Id. (emphases added).

The ABA then discussed the two ways the lawyer could bill the client for the contract lawyer's services.

First, the ABA addressed the law firm's choice to bill as fees for legal services.

The ABA explained that

[w]hen a contract lawyer's services are billed with the retaining lawyer's as fees for legal services, however, the client's reasonable expectation is that the retaining lawyer has supervised the work of the contract lawyer or adopted that work as her own.

ABA LEO 420 (emphasis added). In that situation,

[t]here is no duty to disclose the surcharge when the work of the contract lawyer is supervised or, absent supervision, when the work of the contract lawyer is adopted as the work of the retaining lawyer.

Id. (emphasis added). Independent contractors supervised by firm lawyers to that extent can be billed as if they were firm lawyers.

Second, the ABA turned to the other way that the law firm could charge the client for the contract lawyer's services. Here, the ABA pointed to earlier ABA LEO 379 (which dealt with other goods and services).

[I]n the absence of disclosure, it is improper to assess a surcharge on disbursements over and above the actual payment of funds to third persons made by the lawyer on the client's behalf, unless the lawyer herself incurs additional expenses beyond the actual cost of the disbursement item.

Id. Although that earlier opinion did not deal with legal services supplied by contract lawyers, the ABA concluded that

the principles of Opinion 93-379 equally are applicable to surcharges for legal services provided by contract lawyers when billed to the client as a cost or expense.

Id. If a law firm chooses to bill an independent contractor as a disbursement, the law firm cannot add a "surcharge" absent client consent after full disclosure.

In 2008, the ABA discussed billing arrangements in the context of outsourcing. It is worth noting that in ABA LEO 451 (8/5/08), the ABA defined "outsourcing" very broadly -- to include not only independent contractor lawyers, but also tasks such as copying documents or creating computer databases. The ABA mentioned "engagement of a group of foreign lawyers" as just another example of outsourcing.

As in its earlier analyses, the ABA concluded that the law firm could decide for itself how to bill for the outsourced services.

First, the law firm could bill for the service provider's services as it would a lawyer in the firm.

In Formal Opinion No. 00-420, we concluded that a law firm that engaged a contract lawyer could add a surcharge to the cost paid by the billing lawyer provided the total charge represented a reasonable fee for the services provided to the client. This is not substantively different from the manner in which a conventional law firm bills for the services of its lawyers. The firm pays a lawyer a salary, provides him with employment benefits, incurs office space and other overhead costs to support him, and also earns a profit from his services; the client generally is not informed of the details of the financial relationship between the law firm and the lawyer. Likewise, the lawyer is not obligated to inform the client how much the firm is paying a contract lawyer; the restraint is the overarching requirement that the fee charged for the services not be unreasonable.

ABA LEO 451 (emphasis added; footnote omitted).

Although the ABA analogized the situation to a law firm paying its own lawyers, it is important to remember that the earlier ABA LEO 420 involved a contract lawyer whose work "may be performed on the premises of the retaining lawyer or elsewhere." ABA LEO 420 (11/29/00) (emphasis added).

The ABA then turned to the second way that the law firm might decide to bill for the outsourced legal services.

If the firm decides to pass those costs through to the client as a disbursement, however, no markup is permitted. In the absence of an agreement with the client authorizing a greater charge, the lawyer may bill the client only its actual cost plus a reasonable allocation of associated overhead, such as the amount the lawyer spent on any office space, support staff, equipment, and supplies for the individuals under contract. The analysis is no different for other outsourced legal services, except that the overhead costs associated with the provision of such services may be minimal or nonexistent if and to the extent that the outsourced work is performed off-site without the need for infrastructural support. If that is true, the outsourced services should be billed at cost, plus a reasonable allocation of the cost of supervising those services if not otherwise covered by the fees being charged for legal services.

ABA LEO 451 (8/5/08) (footnote omitted).

In all three of its legal ethics opinions dealing with independent contractors, the ABA has maintained the same basic principle. Law firms do not have to notify their clients if the law firms rely on non-law firm employees who are working under the direct supervision of law firm lawyers. In that situation, lawyers may also choose to bill those independent contractors as if they were firm lawyers -- in which case the law firm can earn a profit on the independent contractors without disclosure to the client. If the law

firm chooses to bill such independent contractors as a disbursement, the law firm may not earn a profit unless the client consents after full disclosure.

**Best Answer**

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

N 8/12

## Outsourcing

### Hypothetical 55

You have been looking for ways to reduce the cost of preparing routine estate planning documents. Among other things, you have considered hiring a company in Bangalore, India, which advertises the ability to quickly and inexpensively prepare simple estate planning documents.

May you outsource estate planning document preparation to India?

**YES**

### Analysis

More and more law firms and corporate law departments are relying on foreign outsourcing for large projects like this.

Lawyers analyzing these issues must protect their clients from real risks, while avoiding the sort of "guild mentality" that will prevent the lawyer from exploring all of the options that might save the client money.

No ethics rules prohibit such outsourcing. Just as lawyers may arrange for co-counsel from Indiana, so they can arrange for co-counsel or other assistance from India.

The ABA and state bars are still wrestling with the ethics implications of foreign outsourcing.

The ABA has explicitly explained that lawyers may hire "contract" lawyers to assist in projects -- although the ABA focused on billing questions.<sup>1</sup>

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<sup>1</sup> ABA LEO 420 (11/29/00) (a law firm hiring a contract lawyer may either bill his or her time as: (1) fees, in which case the client would have a "reasonable expectation" that the contract lawyer has been supervised, and the law firm can add a surcharge without disclosure to the client (although some state bars and courts require disclosure of both the hiring and the surcharge); or (2) costs, in which case the law firm can only bill the actual cost incurred "plus those costs that are associated directly with the provision of services" (as explained in ABA LEO 379)); ABA LEO 356 (12/16/88) (temporary lawyers must comply with all ethics rules arising from a lawyer's representation of a client, but depending on the facts

State bars have also dealt with ethics issues implicated by lawyers employing "temps"<sup>2</sup> and "independent contractor" lawyers.<sup>3</sup>

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(such as whether the temporary lawyer "has access to information relating to the representation of firm clients other than the clients on whose matters the lawyer is working") may not be considered "associated" with law firms for purposes of the imputed disqualification rules (the firm should screen such temporary lawyers from other representations); lawyers hiring temporary lawyers to perform "independent work for a client without the close supervision of a lawyer associated with the law firm" must obtain the client's consent after full disclosure; lawyers need not obtain the client's consent to having temporary lawyers working on the client matters if the temporary lawyers are "working under the direct supervision of a lawyer associated with the firm"); lawyers need not advise clients of the compensation arrangement for temporary lawyers "[a]ssuming that a law firm simply pays the temporary lawyer reasonable compensation for the services performed for the firm and does not charge the payments thereafter to the client as a disbursement").

<sup>2</sup> Virginia LEO 1712 (7/22/98) (this is a comprehensive opinion dealing with temporary lawyers ("Lawyer Temps"); a lawyer temp is treated like a lateral hire for conflicts purposes (although lawyer temps who are not given "broad access to client files and client communications" could more easily argue that they had not obtained confidences from firm clients for which they had not directly worked); as with lateral hires, screening lawyer temps does not cure conflicts; lawyer temps may reveal the identity of other clients for which they have worked unless the clients request otherwise or the disclosure would be embarrassing or detrimental to the former clients; paying a staffing agency (which in turn pays the lawyer temp) does not amount to fee-splitting because the agency has no attorney-client relationship with the client and is not practicing law (the New York City Bar took a different approach, suggesting that the client separately pay the lawyer temp and agency); if a firm lawyer closely supervises the lawyer temp, the hiring of lawyer temps need not be disclosed to the client; a lawyer must inform the client before assigning work to a lawyer other than one designated by the client; because "[a] law firm's mark-up of or surcharge on actual cost paid the staffing agency is a fee," the firm must disclose it to the client if the "payment made to the staffing agency is billed to the client as a disbursement, or a cost advanced on the client's behalf"; on the other hand, the firm "may simply bill the client for services rendered in an amount reflecting its charge for the Lawyer Temp's time and services" without disclosing the firm's cost, just as firms bill a client at a certain rate for associates without disclosing their salaries; in that case, the "spread" between the salary and the fees generated "is a function of the cost of doing business including fixed and variable overhead expenses, as well as a component for profit"; because the relationship between a lawyer temp and a client is a traditional attorney-client relationship, the agency "must not attempt to limit or in any way control the amount of time a lawyer may spend on a particular matter, nor attempt to control the types of legal matters which the Lawyer Temp may handle"; agencies may not assign lawyer temps to jobs for which they are not competent).

<sup>3</sup> Virginia LEO 1735 (10/20/99) (a law firm may employ independent contractor lawyers under the following conditions: whether acting as independent contractors, contract attorneys or "of counsel," the lawyers must be treated as part of the law firm for confidentiality and conflicts of interest purposes; the firm must advise clients of any "mark-up" between the amount billed for the independent contractor lawyers' services and the amount paid to them if "the firm bills the amount paid to Attorney as an out-of-pocket expense or disbursement," but need not make such disclosure to the clients if the firm bills for the lawyers' work "in the same manner as it would for any other associate in the Firm" and the independent contractor lawyer works under another lawyer's "direct supervision" or the firm "adopts the work product as its own"; the independent contractor lawyers may be designated as "of counsel" to the firm if they have a "close, continuing relationship with the Firm and direct contact with the firm and its clients" and avoid holding themselves out as being partners or associates of the firm; the firm must disclose to clients that an independent contractor lawyer is working on the client's matter if the lawyers "will work independently, without close supervision by an attorney associated with the Firm," but need not make such disclosure if

Law firms hiring such lawyers and those lawyers themselves must also follow the unauthorized practice of law rules of the jurisdiction in which they will be practicing.

See, e.g., District of Columbia UPL Op. 16-05 (6/17/05) (holding that contract lawyers who are performing the work of lawyers rather than paralegals or law clerks must join the D.C. Bar if they work in D.C. or "regularly" take "short-term assignments" in D.C.).

In recent years, a number of state bars have approved foreign outsourcing of legal services.

- Virginia LEO 1850 (12/28/10) (in a compendium opinion, providing advice about lawyers outsourcing, defined as follows: "Outsourcing takes many forms: reproduction of materials, document retention database creation, conducting legal research, drafting legal memoranda or briefs, reviewing discovery materials, conducting patent searches, and drafting contracts, for example."; explaining that, among other things, a lawyer engaging in such outsourcing must: (1) "exercise due diligence in the selection of lawyers or nonlawyers"; (2) avoid the unauthorized practice of law (explaining that the Rules: "do not permit a nonlawyer to counsel clients about legal matters or to engage in the unauthorized practice of law, and they require that the delegated work shall merge into the lawyer's completed work product" and direct that "the initial and continuing relationship with the client is the responsibility of the employing lawyer," ultimately concluding that "in order to avoid the unauthorized practice of law, the lawyer must accept complete responsibility for the nonlawyer's work. In short, the lawyer must, by applying professional skill and judgment, first set the appropriate scope for the nonlawyer's work and then vet the nonlawyer's work and ensure its quality."); (3) "obtain the client's informed consent to engage lawyers or nonlawyers who are not directly associated with or under the direct supervision of the lawyer or law firm that the client retained"; (4) assure client confidentiality; noting that "if payment is billed to the client as a disbursement," the lawyer must pass along any cost without mark-up unless the client consents (although the lawyer may also pass along any overhead costs -- which in the case of outsourced services "may be minimal or nonexistent"), and that "if the firm plans to bill the client on a basis other than the actual cost which can include a reasonable allocation of overhead charges associated with the work," the client must consent to such a billing arrangement "in cases where the nonlawyer is working independently and outside the direct supervision of

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the "temporary or contract attorney works directly under the supervision of an attorney in the Firm"; the firm may pay a "forwarding" or "referral" fee to the independent contractor lawyers for bringing in a client under the new Rules).



a lawyer in the firm"; explaining that a lawyer contemplating outsourcing at the start of an engagement "should" obtain "client consent to the arrangement" and provide "a reasonable explanation of the fees and costs associated with the outsourced project." [The remainder of the opinion appears to allow a law firm hiring outsourced service providers working under the direct supervision of a lawyer associated with the firm to treat them as if they were lawyers in the firm -- both for client disclosure and consent purposes, as well as for billing purposes.]; acknowledging that a lawyer can treat as inside the firm for disclosure and billing purposes an outsourced service provider who handles "specific legal tasks" for the firm while working out of her home (although not meeting clients there), who has "complete access to firm files and matters as needed" and who "works directly with and under the direct supervision" of a firm lawyer, but that a law firm may not treat (for consent and billing purposes) outsourced service providers as if they are in the firm who are working in India and, who conduct patent searches and prepare applications for firm clients, but who "will not have access to any client confidences with the exception of confidential information that is necessary to perform the patent searches and prepare the patent applications"; explaining that the same is true of lawyers whom the law firm occasionally hire, but who also work "for several firms on an as needed contract basis"; noting that a lawyer does not need to inform the client when a lawyer outsources "truly tangential, clerical or administrative" legal supports services, or "basic legal research or writing" services (such as arranging for a "legal research 'think tank' to produce work product that is then incorporated into the work product" of the firm). [The Bar's hypotheticals do not include the possibility of an overseas lawyer or a lawyer working for several U.S. law firms on an "as needed contract basis" -- but who work under the "direct supervision" of a lawyer associated with the firm.]; concluding that lawyers "must advise the client of the outsourcing of legal services and must obtain client consent anytime there is disclosure of client confidential information to a nonlawyer who is working independently and outside the direct supervision of a lawyer in the firm, thereby superseding any exception allowing the lawyer to avoid discussing the legal fees and specific costs associated with the outsourcing of legal services").

- Ohio LEO 2009-6 (8/14/09) (offering guidance for lawyers outsourcing legal services; defining "legal services" as follows: "[L]egal services include but are not limited to document review, legal research and writing, and preparation of briefs, pleadings, legal documents. Support services include, but are not limited to ministerial services such as transcribing, compiling, collating, and copying."; ultimately concluding that a lawyer was not obligated to advise the client if a "temp" lawyer was working inside the firm under the direct supervision of a firm lawyer; also ultimately concluding that a lawyer can decide whether to bill for outsourced services as a fee, but that the lawyer must advise the client of how the lawyer will bill for those services; "[P]ursuant to Prof. Cond. Rules 1.4(a)(2), 1.2(a), and 1.6(a), a lawyer is required to disclose and consult with a client and obtain informed consent before

outsourcing legal or support services to lawyer or nonlawyers. Disclosure, consultation, and informed consent is not necessary in the narrow circumstance where a lawyer or law firm temporarily engages the services of a nonlawyer to work inside the law firm on a legal matter under the close supervision and control of a lawyer in the firm, such as when a sudden illness of an employee requires a temporary replacement who functions as an employee of the law firm. Outside this narrow circumstance, disclosure, consultation, and consent are the required ethical practice."; explaining how the lawyer may bill for the outsourced services; explaining how the duty of confidentiality applies; "[P]ursuant to Prof. Cond. Rules 1.5(a) and 1.5(b), a lawyer is required to establish fees and expenses that are reasonable, not excessive, and to communicate to the client the basis or rate of the fee and expenses; these requirements apply to legal and support services outsourced domestically or abroad. The decision as to whether to bill a client for outsourced services as part of the legal fee or as an expense is left to a lawyer's exercise or professional judgment, but in either instance, if any amount beyond cost is added, it must be reasonable, such as a reasonable amount to cover a lawyer's supervision of the outsourced services. The decision must be communicated to the client preferably in writing, before or within a reasonable time after commencing the representation, unless the lawyer will charge a client whom the lawyer has regularly represented on the same basis as previously charged.").

- Colorado LEO 121 (adopted 5/17/08) (approving outsourcing of legal services to lawyers licensed only in other states or only in other countries; ultimately concluding that paying a "temp" lawyer does not amount to a fee-split for ethics rules purposes; also concluding that the lawyer can add a markup when billing the client for the foreign lawyer's outsourced services, and does not have to disclose that markup to the client even if it is "substantial"; warning Colorado lawyers that they must undertake certain steps; "Reasonable efforts include: (a) confirming that the Domestic or Foreign Lawyer is licensed and in good standing in his or her home jurisdiction; (b) confirming that the Domestic or Foreign Lawyer is competent to undertake the work to be assigned; and (c) supervising the work of any nonlawyer hired by the Colorado lawyer to assist in assigned tasks."; also warning that "in general, the Colorado lawyer must determine whether the activities of the Domestic or Foreign Lawyer constitute the practice of law in Colorado, and, if so, whether and to what extent those activities are authorized by virtue of the Colorado lawyer's supervision of and responsibility for the Domestic or Foreign Lawyer's work."; advising the Colorado lawyer to assure that the temporary lawyer does not have a conflict of interest; finding that the fee-splitting rules do not apply "if the firm is responsible for paying the Domestic or Foreign Lawyer regardless of whether the client pays the firm, and if the Domestic or Foreign Lawyer's compensation is not a percentage or otherwise directly tied to the amount paid by the client. If the payment to a Domestic or Foreign Lawyer under this analysis constitutes the division of a fee, then the

- hiring Colorado Lawyer must comply with Colo. RPC 1.5(d)."; "Whether the delegation of tasks to a Domestic or Foreign Lawyer constitutes a significant development that the Colorado Lawyer must disclose to the client depends on the circumstances. If the lawyer reasonably believes that a client expects its legal work to be performed exclusively by Colorado Lawyers, the Colorado Lawyer may be required to disclose the fact of delegation, as well as its nature and extent. The Committee continues to conclude that a Colorado lawyer is not required to affirmatively disclose the amount of fees paid to, and profits made from, the services of Domestic and Foreign Lawyers, even where the mark-up is substantial."; "[W]hether the Colorado Lawyer must inform a client of the use of Foreign or Domestic Lawyers will depend upon the facts of the matter, particularly the client's expectations. At least as of this writing, the Committee is of the opinion that most clients of Colorado Lawyers do not expect their legal work to be outsourced, particularly to a foreign county. Thus in the vast majority of cases, a Colorado Lawyer outsourcing work to a Foreign Lawyer who is not affiliated with the Colorado law firm would constitute a 'significant development' in the case and disclosure to the client would be required.").
- North Carolina LEO 2007-12 (4/25/08) (analogizing foreign outsourcing and lawyers' reliance on the services of "any nonlawyer assistant"; concluding that a lawyer in that circumstance must advise the client of any foreign outsourcing; indicating that lawyers may arrange for foreign outsourcing, as long as the lawyers: "determine that delegation is appropriate"; make "'reasonable efforts' to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer"; "exercise due diligence in the selection of the foreign assistant" (including taking such steps as investigating the assistant's background, obtaining a resume and work product samples, etc.); "review the foreign assistant's work on an ongoing basis to ensure its quality"; "review thoroughly" the foreign assistant's work; make sure that "[f]oreign assistants may not exercise independent legal judgment in making decisions on behalf of the client"; "ensure that procedures are in place to minimize the risk that confidential information might be disclosed" (including the selection of a mode of communication); obtain the client's "written informed consent to the outsourcing," because absent "a specific understanding between a lawyer and client to the contrary, the reasonable expectation of the client is that the lawyer retained by the client, using the resources within the lawyer's firm, will perform the requested legal services").
  - Florida LEO 07-2 (1/18/08) (addressing foreign outsourcing; concluding that a lawyer might be obligated to advise the client of such foreign outsourcing; "A lawyer is not prohibited from engaging the services of an overseas provider to provide paralegal assistance as long as the lawyer adequately addresses ethical obligations relating to assisting the unlicensed practice of law, supervision of nonlawyers, conflicts of interest, confidentiality, and billing. The lawyer should be mindful of any obligations under law regarding

disclosure of sensitive information of opposing parties and third parties."; "The committee believes that the law firm should obtain prior client consent to disclose information that the firm reasonably believes is necessary to serve the client's interests. Rule 4-1.6 (c)(1), Rules Regulating The Florida Bar. In determining whether a client should be informed of the participation of the overseas provider an attorney should bear in mind factors such as whether a client would reasonably expect the lawyer or law firm to personally handle the matter and whether the non-lawyers will have more than a limited role in the provision of the services."; "The law firm may charge a client the actual cost of the overseas provider, unless the charge would normally be covered as overhead.").

- San Diego County LEO 2007-1 (undated) (assessing a situation in which a lawyer in a two-lawyer firm was retained to defend a "complex intellectual property dispute" although he was not experienced in intellectual property litigation; noting that the lawyer hired an Indian firm "to do legal research, develop case strategy, prepare deposition outlines, and draft correspondence, pleadings, and motions in American intellectual property cases at a rate far lower than American lawyers could charge clients if they did the work themselves"; also noting that the lawyer had not advised his client that he had retained the Indian firm; explaining that the lawyer eventually was successful on summary judgment in the case; holding that: (1) the lawyers did not assist in the unauthorized practice of law; explaining that it is not necessary for a non-lawyer to be physically present in California to violate the UPL Rules, as long as the non-lawyer communicated into California; concluding that "[t]he California lawyer in this case retained full control over the representation of the client and exercised independent judgment in reviewing the draft work performed by those who were not California attorneys. His fiduciary duties and potential liability to his corporate client for all of the legal work that was performed were undiluted by the assistance he obtained from Legalworks [the Indian firm]. In short, in the usual arrangement, and in the scenario described above in particular, the company to whom work was outsourced has assisted the California lawyer in practicing law in this state, not the other way around. And that is not prohibited."; (2) the lawyer had a duty to inform the client of the firm's retention of the Indian firm, because the work was within the "reasonable expectation under the circumstances" that the client would expect the lawyer to perform (citation omitted); (3) whether the lawyer violated his duty of competence depended on whether he was capable of adequately supervising the Indian firm; "The Committee concludes that outsourcing does not dilute the attorney's professional responsibilities to his client, but may result in unique applications in the way those responsibilities are discharged. Under the hypothetical as we have framed it, the California attorneys may satisfy their obligations to their client in the manner in which they used Legalworks, but only if they have sufficient knowledge to supervise the outsourced work properly and they make sure the outsourcing does not compromise their other

- duties to their clients. However, they would not satisfy their obligations to their clients unless they informed the client of Legalworks' anticipated involvement at the time they decided to use the firm to the extent stated in this hypothetical.").
- N.Y. City LEO 2006-3 (8/2006) (assessing the ethics ramifications of New York lawyers outsourcing legal support services overseas; distinguishing between the outsourcing of "substantive legal support services" (and "administrative legal support services" such as transcriptions, accounting services, clerical support, data entry, etc.; holding that New York lawyers may ethically outsource such substantive services if they: (1) avoid aiding non-lawyers in the unauthorized practice of law, which requires that the lawyer "must at every step shoulder complete responsibility for the non-lawyer's work. In short, the lawyer must, by applying professional skill and judgment, first set the appropriate scope for the non-lawyer's work and then vet the non-lawyer's work and ensure its quality."; (2) adequately supervise the overseas workers, which requires that the "New York lawyer must be both vigilant and creative in discharging the duty to supervise. Although each situation is different, among the salutary steps in discharging the duty to supervise that the New York lawyer should consider are to (a) obtain background information about any intermediary employing or engaging the non-lawyer, and obtain the professional résumé of the non-lawyer; (b) conduct reference checks; (c) interview the non-lawyer in advance, for example, by telephone or by voice-over-internet protocol or by web cast, to ascertain the particular non-lawyer's suitability for the particular assignment; and (d) communicate with the non-lawyer during the assignment to ensure that the non-lawyer understands the assignment and that the non-lawyer is discharging the assignment according to the lawyer's expectations."; (3) preserve the client's confidences, suggesting "[m]easures that New York lawyers may take to help preserve client confidences and secrets when outsourcing overseas include restricting access to confidences and secrets, contractual provisions addressing confidentiality and remedies in the event of breach, and periodic reminders regarding confidentiality"; (4) avoid conflicts of interest, advising that "[a]s a threshold matter, the outsourcing New York lawyer should ask the intermediary, which employs or engages the overseas non-lawyer, about its conflict-checking procedures and about how it tracks work performed for other clients. The outsourcing New York lawyer should also ordinarily ask both the intermediary and the non-lawyer performing the legal support service whether either is performing, or has performed, services for any parties adverse to the lawyer's client. The outsourcing New York lawyer should pursue further inquiry as required, while also reminding both the intermediary and the non-lawyer, preferably in writing, of the need for them to safeguard the confidences and secrets of their other current and former clients."; (5) bill appropriately, noting that "[b]y definition, the non-lawyer performing legal support services overseas is not performing legal services. It is thus inappropriate for the New York lawyer to include the

cost of outsourcing in his or her legal fees. . . . Absent a specific agreement with the client to the contrary, the lawyer should charge the client no more than the direct cost associated with outsourcing, plus a reasonable allocation of overhead expenses directly associated with providing that service.";

(6) obtain the client's consent when necessary, as "there is little purpose in requiring a lawyer to reflexively inform a client every time that the lawyer intends to outsource legal support services overseas to a non-lawyer. But the presence of one or more additional considerations may alter the analysis: for example, if (a) non-lawyers will play a significant role in the matter, e.g., several non-lawyers are being hired to do an important document review; (b) client confidences and secrets must be shared with the non-lawyer, in which case informed advance consent should be secured from the client; (c) the client expects that only personnel employed by the law firm will handle the matter; or (d) non-lawyers are to be billed to the client on a basis other than cost, in which case the client's informed advance consent is needed.").

The ABA joined this chorus in July 2008.

- ABA LEO 451 (8/5/08) (generally approving the use of outsourcing of legal services, after analogizing them to such "[o]utsourced tasks" as reliance on a local photocopy shop, use of a "document management company," "use of a third-party vendor to provide and maintain a law firm's computer system" and "hiring of a legal research service," or "foreign outsourcing"; lawyers arranging for such outsourcing must always "render legal services competently," however the lawyers perform or delegate the legal tasks; lawyers must comply with their obligations in exercising "direct supervisory authority" over both lawyers and nonlawyers, "regardless of whether the other lawyer or the nonlawyer is directly affiliated with the supervising lawyer's firm"; the lawyer arranging for outsourcing "should consider" conducting background checks of the service providers, checking on their competence, investigating "the security of the provider's premises, computer network, and perhaps even its recycling and refuse disposal procedures"; lawyers dealing with foreign service providers should analyze whether their education and disciplinary process is compatible with that in the U.S. -- which may affect the level of scrutiny with which the lawyer must review their work product; such lawyers should also explore the foreign jurisdiction's confidentiality protections (such as the possibility that client confidences might be seized during some proceedings, or lost during adjudication of a dispute with the service providers); because the typical outsourcing arrangement generally does not give the hiring lawyer effective "supervision and control" over the service providers (as with temporary lawyers working within the firm), arranging for foreign outsourced work generally will require the client's informed consent; lawyers must also assure the continued confidentiality of the client's information (thus, "[w]ritten confidentiality agreements are . . . strongly advisable in outsourcing relationships"); to minimize the risk of disclosure of client confidences, the lawyer should verify that the service providers are not

working for the adversary in the same or substantially related matter; explaining that (among other things) lawyers can charge "reasonable" fees for the outsourced lawyer's work by deciding whether to treat the outsourced lawyer in one of two ways: (1) like a contract lawyer (noting that "a law firm that engaged a contract lawyer [and directly supervises the contract lawyer] could add a surcharge to the cost paid by the billing lawyer provided the total charge represented a reasonable fee for the services provided to the client," and that "the lawyer is not obligated to inform the client how much the firm is paying a contract lawyer" as long as the fee is reasonable); or (2) as an expense to be passed along to the client (noting that "[i]f the firm decides to pass those costs through to the client as a disbursement," the lawyer cannot absent client consent add any markup other than "associated overhead" -- which in the case of outsourced legal services "may be minimal or nonexistent" to the extent that the outsourced work is "performed off-site without the need for infrastructural support").

Although there are some variations among these bars' analyses, all of them take the same basic approach.

First, lawyers must avoid aiding non-lawyers in the unauthorized practice of law. This requires the lawyers to take responsibility for all of the outsourced work. The lawyers must ultimately adopt the outsourced work as their own.

Second, lawyers must provide some degree of supervision -- although the exact nature and degree of the supervision is far from clear. Lawyers should consider such steps as researching the entity that will conduct the outsourced work, conducting reference checks, interviewing the folks who will handle the outsourced work, specifically describing the work the lawyers require, and reviewing the work before adopting it as their own.

Third, lawyers must assure that the organization they hire adequately protects the client's confidences. This duty might involve confirming that the foreign lawyers' ethics are compatible with ours, and might also require some analysis of the confidentiality precautions and technologies that the foreign organization uses.

Fourth, the lawyers arranging for such outsourcing should avoid conflicts of interest. At the least the lawyers should assure that the organization handling the outsourced work is not working for the adversary. Some of the bars warn lawyers to take this step to avoid the inadvertent disclosure of confidential communications rather than to avoid conflicts.

Fifth, lawyers must bill appropriately. As explained above, if the lawyers are not "adding value" to the outsourced workers, they should pass along the outsourcing bill directly to their client as an expense. In that situation, the lawyer generally may add overhead expenses to the bill (although the ABA noted that there will be very few overhead expenses in a foreign outsourcing operation).

Sixth, lawyers usually must advise their clients that they are involving another organization in their work. As the various legal ethics opinions explain, such disclosure may not be required if the contract or temporary lawyers act under the direct supervision of the law firm -- but disclosure is always best, and almost surely would be required in a situation involving a foreign law organization. For instance, the ABA indicated that the lawyer's lack of immediate supervision and control over foreign service providers means that they must obtain the client's consent to send work overseas. The North Carolina Bar indicated that lawyers arranging for outsourcing must always obtain their clients' written informed consent.

### **Best Answer**

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

N 8/12 [B]



## Liability to Non-Clients for Negligence

### Hypothetical 56

Your law firm has for many years represented the patriarch of a wealthy but dysfunctional family. You prepared the patriarch's estate documents. He died several months ago, and you just heard this morning that two family members have filed malpractice lawsuits against your firm based on the patriarch's estate documents.

- (a) Is a named beneficiary likely to succeed in a malpractice case based on your failure to include a certain tax-saving provision, which cost the beneficiary \$250,000?

**YES**

- (b) Is a distant relative likely to succeed in a malpractice case based on your failure to include in the estate planning documents any bequest to her (she claims that you should have known that the patriarch intended to leave her at least some amount of money)?

**NO**

### Analysis

Lawyers' liability to non-clients for negligence normally plays out in malpractice cases rather than in ethics analyses. Such liability has evolved over the years, and continues to differ from state to state.

The ABA Model Rules do not deal with this issue, but the Restatement and case law have extensively analyzed lawyers' possible liability to non-clients for negligence.

### **Restatement**

The Restatement deals extensively with a lawyer's possible liability to third parties for negligence.

A Restatement comment explains the law's reluctance to impose such liability.

Lawyers regularly act in disputes and transactions involving nonclients who will foreseeably be harmed by inappropriate acts of the lawyers. Holding lawyers liable for such harm is sometimes warranted. Yet it is often difficult to distinguish between harm resulting from inappropriate lawyer conduct on the one hand and, on the other hand, detriment to a nonclient resulting from a lawyer's fulfilling the proper function of helping a client through lawful means. Making lawyers liable to nonclients, moreover, could tend to discourage lawyers from vigorous representation. Hence, a duty of care to nonclients arises only in the limited circumstances described in the Section. Such a duty must be applied in light of those conflicting concerns.

Restatement (Third) of Law Governing Lawyers § 51 cmt. b (2000) (emphases added).

Not surprisingly, state law defines the duties.

When a lawyer owes a duty to a nonclient under this Section, whether the nonclient's cause of action may be asserted in contract or in tort should be determined by reference to the applicable law of professional liability generally. The cause of action ordinarily is in substance identical to a claim for negligent misrepresentation and is subject to rules such as those concerning proof of materiality and reliance . . . . Whether the representations are actionable may be affected by the duties of disclosure, if any, that the client owes the nonclient . . . . In the absence of such duties of disclosure, the duty of a lawyer providing an opinion is ordinarily limited to using care to avoid making or adopting misrepresentations.

Restatement (Third) of Law Governing Lawyers § 51 cmt. e (2000).

The Restatement articulates three situations in which a lawyer might be liable to non-clients for negligence.

**Third Parties Invited to Rely on the Lawyer's Services.** First, the lawyer "owes a duty to use care"

to a nonclient when and to the extent that:

(a) the lawyer or (with the lawyer's acquiescence) the lawyer's client invites the nonclient to rely on the lawyer's

opinion or provision of other legal services, and the nonclient so relies; and

(b) the nonclient is not, under applicable tort law, too remote from the lawyer to be entitled to protection.

Restatement (Third) of Law Governing Lawyers § 51(2) (2000) (emphasis added).

A comment explains this concept.

When a lawyer or that lawyer's client (with the lawyer's acquiescence) invites a nonclient to rely on the lawyer's opinion or other legal services, and the nonclient reasonably does so, the lawyer owes a duty to the nonclient to use care . . ., unless the jurisdiction's general tort law excludes liability on the ground of remoteness. Accordingly, the nonclient has a claim against the lawyer if the lawyer's negligence with respect to the opinion or other legal services causes injury to the nonclient . . . . The lawyer's client typically benefits from the nonclient's reliance, for example, when providing the opinion was called for as a condition to closing under a loan agreement, and recognition of such a claim does not conflict with duties the lawyer properly owed to the client. Allowing the claim tends to benefit future clients in similar situations by giving nonclients reason to rely on similar invitations. . . . If a client is injured by a lawyer's negligence in providing opinions or services to a nonclient, for example because that renders the client liable to the nonclient as the lawyer's principal, the lawyer may have corresponding liability to the client . . . .

Clients or lawyers may invite nonclients to rely on a lawyer's legal opinion or services in various circumstances . . . . For example, a sales contract for personal property may provide that as a condition to closing the seller's lawyer will provide the buyer with an opinion letter regarding the absence of liens on the property being sold . . . . A nonclient may require such an opinion letter as a condition for engaging in a transaction with a lawyer's client. A lawyer's opinion may state the results of a lawyer's investigation and analysis of facts as well as the lawyer's legal conclusions . . . . On when a lawyer may properly decline to provide an opinion and on a lawyer's duty when a client insists on nondisclosure, see § 95, comment 3. A lawyer's acquiescence in use of the lawyer's opinion may be manifested either before or after the lawyer renders it.

Restatement (Third) of Law Governing Lawyers § 51 cmt. e (2000) (emphases added).

The same comment also explains how lawyers can avoid such possibly unintended liability to non-clients.

A lawyer may avoid liability to nonclients under Subsection (2) by making clear that an opinion or representation is directed only to a client and should not be relied on by others. Likewise, a lawyer may limit or avoid liability under Subsection (2) by qualifying a representation, for example by making clear through a limiting or disclaiming language in an opinion letter that the lawyer is relying on facts provided by the client without independent investigation by the lawyer (assuming that the lawyer does not know the facts provided by the client to be false, in which case the lawyer would be liable for misrepresentation). The effectiveness of a limitation or disclaimer depends on whether it was reasonable in the circumstances to conclude that those provided with the opinion would receive the limitation or disclaimer and understand its import. The relevant circumstances include customary practices known to the recipient concerning the construction of opinions and whether the recipient is represented by counsel or a similarly experienced agent.

When a nonclient is invited to rely on a lawyer's legal services, other than the lawyer's opinion, the analysis is similar. For example, if the seller's lawyer at a real-estate closing offers to record the deed for the buyer, the lawyer is subject to liability to the buyer for negligence in doing so, even if the buyer did not thereby become a client of the lawyer. When a nonclient is invited to rely on a lawyer's nonlegal services, the lawyer's duty of care is determined by the law applicable to providers of the services in question.

Restatement (Third) of Law Governing Lawyers § 51 cmt. e (2000) (emphases added).

Another comment deals with a much more specific situation -- a liability insurance company's claim of negligence by a lawyer it hires to represent its insured.

Under Subsection (3), a lawyer designated by an insurer to defend an insured owes a duty of care to the insurer with respect to matters as to which the interests of the insurer and insured are not in conflict, whether or not the insurer is

held to be a co-client of the lawyer . . . . For example, if the lawyer negligently fails to oppose a motion for summary judgment against the insured and the insurer must pay the resulting adverse judgment, the insurer has a claim against the lawyer for any proximately caused loss. In such circumstances, the insured and insurer, under the insurance contract, both have a reasonable expectation that the lawyer's services will benefit both insured and insurer. Recognizing that the lawyer owes a duty to the insurer promotes enforcement of the lawyer's obligations to the insured. However, such a duty does not arise when it would significantly impair, in the circumstances of the representation, the lawyer's performance of obligations to the insured. For example, if the lawyer recommends acceptance of a settlement offer just below the policy limits and the insurer accepts the offer, the insurer may not later seek to recover from the lawyer on a claim that a competent lawyer in the circumstances would have advised that the offer be rejected. Allowing recovery in such circumstances would give the lawyer an interest in recommending rejection of a settlement offer beneficial to the insured in order to escape possible liability to the insurer.

Restatement (Third) of Law Governing Lawyers § 51 cmt. g (2000) (emphasis added).<sup>1</sup>

**Intended Third-Party Beneficiaries of the Lawyer's Services.** Second, a lawyer owes a similar duty of care

to a nonclient when and to the extent that:

(a) the lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer's services benefit the nonclient;

(b) such a duty would not significantly impair the lawyer's performance of obligations to the client; and

(c) the absence of such a duty would make enforcement of those obligations to the client unlikely . . . .

Restatement (Third) of Law Governing Lawyers § 51(3) (2000) (emphasis added).

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<sup>1</sup> Accord General Sec. Ins. v. Jordan, Coyne & Savits, LLP, Case No. 1:04cv1436, 2005 U.S. Dist. LEXIS 2937 (E.D. Va. Feb. 23, 2005) (holding that an insurance company can sue the insured's lawyer for malpractice).

Several comments provide an explanation.

In some circumstances, reliance by unspecified persons may be expected, as when a lawyer for a borrower writes an opinion letter to the original lender in a bank credit transaction knowing that the letter will be used to solicit other lenders to become participants in syndication of the loan. Whether a subsequent syndication participant can recover for the lawyer's negligence in providing such an opinion letter depends on what, if anything, the letter says about reliance and whether the jurisdiction in question, as a matter of general tort law, adheres to the limitations on duty of Restatement Second, Torts § 552(2) or those of Ultramares Corp. v. Touche, 174 N.E. 441 (N.Y.1931), or has rejected such limitations. To account for such differences in general tort law, Subsection (2) refers to applicable law excluding liability to persons too remote from the lawyer.

Restatement (Third) of Law Governing Lawyers § 51 cmt. e (2000) (emphasis added).

When a lawyer knows . . . that a client intends a lawyer's services to benefit a third person who is not a client, allowing the nonclient to recover from the lawyer for negligence in performing those services may promote the lawyer's loyal and effective pursuit of the client's objectives. The nonclient, moreover, may be the only person likely to enforce the lawyer's duty to the client, for example because the client has died.

A nonclient's claim under Subsection (3) is recognized only when doing so will both implement the client's intent and serve to fulfill the lawyer's obligations to the client without impairing performance of those obligations in the circumstances of the representation. A duty to a third person hence exists only when the client intends to benefit the third person as one of the primary objectives of the representation . . . . Without adequate evidence of such an intent, upholding a third person's claim could expose lawyers to liability for following a client's instructions in circumstances where it would be difficult to prove what those instructions had been. Threat of such liability would tend to discourage lawyers from following client instructions adversely affecting third persons. When the claim is that the lawyer failed to exercise care in preparing a document, such as a will, for which the law imposes formal or evidentiary requirements, the third party must prove the client's intent by evidence that

would satisfy the burden of proof applicable to construction or reformation (as the case may be) of the document.

Restatement (Third) of Law Governing Lawyers § 51 cmt. f (2000) (emphasis added).

The Restatement provides three illustrations that address this scenario.

Client retains Lawyer to prepare and help in the drafting and execution of a will leaving Client's estate to Nonclient. Lawyer prepares the will naming Nonclient as the sole beneficiary, but negligently arranges for Client to sign it before an inadequate number of witnesses. Client's intent to benefit Nonclient thus appears on the face of the will executed by Client. After Client dies, the will is held ineffective due to the lack of witnesses, and Nonclient is thereby harmed. Lawyer is subject to liability to Nonclient for negligence in drafting and supervising execution of the will.

Restatement (Third) of Law Governing Lawyers § 51 cmt. f, illus. 2 (2000) (emphases added).

Same facts as in Illustration 2, except that Lawyer arranges for Client to sign the will before the proper number of witnesses, but Nonclient later alleges that Lawyer negligently wrote the will to name someone other than Nonclient as the legatee. Client's intent to benefit Nonclient thus does not appear on the face of the will. Nonclient can establish the existence of a duty from Lawyer to Nonclient only by producing clear and convincing evidence that Client communicated to Lawyer Client's intent that Nonclient be the legatee. If Lawyer is held liable to Nonclient in situations such as this and the preceding Illustration, applicable principles of law may provide that Lawyer may recover from their unintended recipients the estate assets that should have gone to Nonclient.

Restatement (Third) of Law Governing Lawyers § 51 cmt. f, illus. 3 (2000) (emphasis added).

Same facts as in Illustration 2, except that Lawyer arranges for Client to sign the will before the proper number of witnesses. After Client's death, Heir has the will set aside on the ground that Client was incompetent and then sues Lawyer for expenses imposed on Heir by the will, alleging

that Lawyer negligently assisted Client to execute a will despite Client's incompetence. Lawyer is not subject to liability to Heir for negligence. Recognizing a duty by lawyer to heirs to use care in not assisting incompetent clients to execute wills would impair performance of lawyers' duty to assist clients even when the clients' competence might later be challenged. Whether Lawyer is liable to Client's estate or personal representative (due to privity with the lawyer) is beyond the scope of this Restatement. On the lawyer's obligations to a client with diminished capacity, see § 24.

Restatement (Third) of Law Governing Lawyers § 51 cmt. f, illus. 4 (2000) (emphasis added).

**Clients as Fiduciaries Relying on the Lawyer's Services.** Third, lawyers owe a similar duty

to a nonclient when and to the extent that:

(a) the lawyer's client is a trustee, guardian, executor, or fiduciary acting primarily to perform similar functions for the nonclient;

(b) the lawyer knows that appropriate action by the lawyer is necessary with respect to a matter within the scope of the representation to prevent or rectify the breach of a fiduciary duty owed by the client to the nonclient, where (i) the breach is a crime or fraud or (ii) the lawyer has assisted or is assisting the breach;

(c) the nonclient is not reasonably able to protect its rights; and

(d) such a duty would not significantly impair the performance of the lawyer's obligations to the client.

Restatement (Third) of Law Governing Lawyers § 51(4) (2000).

A comment explains this concept.

A lawyer representing a client in the client's capacity as a fiduciary (as opposed to the client's personal capacity) may in some circumstances be liable to a beneficiary for a failure to use care to protect the beneficiary. The duty should be



recognized only when the requirements of Subsection (4) are met and when action by the lawyer would not violate applicable professional rules . . . . The duty arises from the fact that a fiduciary has obligations to the beneficiary that go beyond fair dealing at arm's length. A lawyer is usually so situated as to have special opportunity to observe whether the fiduciary is complying with those obligations. Because fiduciaries are generally obliged to pursue the interests of their beneficiaries, the duty does not subject the lawyer to conflicting or inconsistent duties. A lawyer who knowingly assists a client to violate the client's fiduciary duties is civilly liable, as would be a nonlawyer . . . . Moreover, to the extent that the lawyer has assisted in creating a risk of injury, it is appropriate to impose a preventive and corrective duty on the lawyer . . . .

Restatement (Third) of Law Governing Lawyers § 51 cmt. h (2000) (emphases added).

That comment explains the limitation on this general principle.

The duty recognized by Subsection (4) is limited to lawyers representing only a limited category of the persons described as fiduciaries -- trustees, executors, guardians, and other fiduciaries acting primarily to fulfill similar functions. Fiduciary responsibility, imposing strict duties to protect specific property for the benefit of specific, designated persons, is the chief end of such relationships. The lawyer is hence less likely to encounter conflicting considerations arising from other responsibilities of the fiduciary-client than are entailed in other relationships in which fiduciary duty is only a part of a broader role. Thus, Subsection (4) does not apply when a client is a partner in a business partnership, a corporate officer or director, or a controlling stockholder.

Restatement (Third) of Law Governing Lawyers § 51 cmt. h (2000).

For obvious reasons, the lawyer's liability varies directly with the client's fiduciary duties.

The scope of a client's fiduciary duties is delimited by the law governing the relationship in question . . . . Whether and when such law allows a beneficiary to assert derivatively the claim of a trust or other entity against a lawyer is beyond the scope of this Restatement . . . . Even when a

relationship is fiduciary, not all the attendant duties are fiduciary. Thus, violations of duties of loyalty by a fiduciary are ordinarily considered breaches of fiduciary duty, while violations of duties of care are not.

Restatement (Third) of Law Governing Lawyers § 51 cmt. h (2000). The comment also deals with a situation in which the lawyer represents both the fiduciary and a beneficiary.

Sometimes a lawyer represents both a fiduciary and the fiduciary's beneficiary and thus may be liable to the beneficiary as a client . . . and may incur obligations concerning conflict of interests . . . . A lawyer who represents only the fiduciary may avoid such liability by making clear to the beneficiary that the lawyer represents the fiduciary rather than the beneficiary . . . .

Restatement (Third) of Law Governing Lawyers § 51 cmt. h (2000).

The lawyer's liability in this setting arises only when the lawyer knows of the client's breach of fiduciary duty.

The duty recognized by Subsection (4) arises only when the lawyer knows that appropriate action by the lawyer is necessary to prevent or mitigate a breach of the client's fiduciary duty. As used in this Subsection and Subsection (3) . . . , "know" is the equivalent of the same term defined in ABA Model Rules of Professional Conduct, Terminology P [5] (1983) (" . . . 'Knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances."). The concept is functionally the same as the terminology "has reason to know" as defined in Restatement Second, Torts § 12(1) (actor has reason to know when actor "has information from which a person of reasonable intelligence or of the superior intelligence of the actor would infer that the fact in question exists, or that such person would govern his conduct upon the assumption that such facts exists."). The "know" terminology should not be confused with "should know" (see id. § 12(2)). As used in Subsection (3) and (4) "knows" neither assumes nor requires a duty of inquiry.

Restatement (Third) of Law Governing Lawyers § 51 cmt. h (2000). In essence, the lawyer may give the client/fiduciary the benefit of the doubt when following his or her instructions.

Generally, a lawyer must follow instruction of the client-fiduciary . . . and may assume in the absence of contrary information that the fiduciary is complying with the law. The duty stated in Subsection (4) applies only to breaches constituting crime or fraud, as determined by applicable law . . . or those in which the lawyer has assisted or is assisting the fiduciary. A lawyer assists fiduciary breaches, for example, by preparing documents needed to accomplish the fiduciary's wrongful conduct or assisting the fiduciary to conceal such conduct. On the other hand, a lawyer subsequently consulted by a fiduciary to deal with the consequences of a breach of fiduciary duty committed before the consultation began is under no duty to inform the beneficiary of the breach or otherwise to act to rectify it. Such a duty would prevent a person serving as fiduciary from obtaining the effective assistance of counsel with respect to such a past breach.

Restatement (Third) of Law Governing Lawyers § 51 cmt. h (2000). The liability in this scenario also arises only if the beneficiary cannot protect his or her own rights.

Liability under Subsection (4) exists only when the beneficiary of the client's fiduciary duty is not reasonably able to protect its rights. That would be so, for example, when the fiduciary client is a guardian for a beneficiary unable (for reasons of youth or incapacity) to manage his or her own affairs. By contrast, for example, a beneficiary of a family voting trust who is in business and has access to the relevant information has no similar need of protection by the trustee's lawyer. In any event, whether or not there is liability under this Section, a lawyer may be liable to a nonclient . . . .

Restatement (Third) of Law Governing Lawyers § 51 cmt. h (2000).

Finally, a lawyer faces liability in this setting only if it would not conflict with some other duty that the lawyer owes.

A lawyer owes no duty to a beneficiary if recognizing such duty would create conflicting or inconsistent duties that might significantly impair the lawyer's performance of obligations to the lawyer's client in the circumstances of the representation. Such impairment might occur, for example, if the lawyer were subject to liability for assisting the fiduciary in an open dispute with a beneficiary or for assisting the fiduciary in exercise of its judgment that would benefit one beneficiary at the expense of another. For similar reasons, a lawyer is not subject to liability to a beneficiary under Subsection (4) for representing the fiduciary in a dispute or negotiation with the beneficiary with respect to a matter affecting the fiduciary's interests.

Under Subsection (4) a lawyer is not liable for failing to take action that the lawyer reasonably believes to be forbidden by professional rules (see § 54(1)). Thus, a lawyer is not liable for failing to disclose confidences when the lawyer reasonably believes that disclosure is forbidden. For example, a lawyer is under no duty to disclose a prospective breach in a jurisdiction that allows disclosure only regarding a crime or fraud threatening imminent death or substantial bodily harm. However, liability could result from failing to attempt to prevent the breach of fiduciary duty through means that do not entail disclosure. In any event, a lawyer's duty under this Section requires only the care set forth in § 52.

Restatement (Third) of Law Governing Lawyers § 51 cmt. h (2000).

Several illustrations show how these principles work.

Lawyer represents Client in Client's capacity as trustee of an express trust for the benefit of Beneficiary. Client tells Lawyer that Client proposes to transfer trust funds into Client's own account, in circumstances that would constitute embezzlement. Lawyer informs Client that the transfer would be criminal, but Client nevertheless makes the transfer, as Lawyer then knows. Lawyer takes no steps to prevent or rectify the consequences, for example by warning Beneficiary or informing the court to which Client as trustee must make an annual accounting. The jurisdiction's professional rules do not forbid such disclosures . . . . Client likewise makes no disclosure. The funds are lost, to the harm of Beneficiary. Lawyer is subject to liability to Beneficiary under this Section.

. . . Same facts as in Illustration 5, except that Client asserts to Lawyer that the account to which Client proposes to transfer trust funds is the trust's account. Even though lawyer could have exercised diligence and thereby discovered this to be false, Lawyer does not do so. Lawyer is not liable to the harmed Beneficiary. Lawyer did not owe Beneficiary a duty to use care because Lawyer did not know (although further investigation would have revealed) that appropriate action was necessary to prevent a breach of fiduciary duty by Client.

. . . Same facts as in Illustration 5, except that Client proposes to invest trust funds in a way that would be unlawful, but would not constitute a crime or fraud under applicable law. Lawyer's services are not used in consummating the investment. Lawyer does nothing to discourage the investment. Lawyer is not subject to liability to Beneficiary under this Section.

Restatement (Third) of Law Governing Lawyers § 51 cmt. h, illus. 5, 6, 7 (2000)

(emphases added).

**Situations in which Lawyers will not be Held Liable.** The Restatement also provides examples of situations in which lawyers will not be held liable for negligence to third parties.

One comment deals with adversaries.

A lawyer representing a party in litigation has no duty of care to the opposing party under this Section, and hence no liability for lack of care, except in unusual situations such as when a litigant is provided an opinion letter from opposing counsel as part of a settlement (see Subsection (2) and Comment e hereto). Imposing such a duty could discourage vigorous representation of the lawyer's own client through fear of liability to the opponent. Moreover, the opposing party is protected by the rules and procedures of the adversary system and, usually, by counsel. In some circumstances, a lawyer's negligence will entitle an opposing party to relief other than damages, such as vacating a settlement induced by negligent misrepresentation . . . .

Similarly, a lawyer representing a client in an arm's-length business transaction does not owe a duty of care to opposing nonclients, except in the exceptional circumstances described in this Section.

Restatement (Third) of Law Governing Lawyers § 51 cmt. c (2000) (emphasis added).

An illustration provides an example.

Lawyer represents Plaintiff in a personal-injury action against Defendant. Because Lawyer fails to conduct an appropriate factual investigation, Lawyer includes a groundless claim in the complaint. Defendant incurs legal expenses in obtaining dismissal of this claim. Lawyer is not liable for negligence to Defendant. Lawyer may, however, be subject to litigation sanctions for having asserted a claim without proper investigation . . . .

Restatement (Third) of Law Governing Lawyers § 51 cmt. c, illus. 1 (2000).

## **Case Law**

**Introduction.** As early as 1879 the United States Supreme Court held that lawyers may not be sued by third parties for malpractice, absent intentional misconduct or privity of contract. Savings Bank v. Ward, 100 U.S. 195 (1879).

However, as in many other areas of the law, the protection has eroded over the years.

A 2009 article described the breakdown in the traditional "privity" requirement, and the various standards under which courts sometimes find lawyers liable to third parties for negligence.

- Kevin H. Michels, Third-Party Negligence Claims Against Counsel: A Proposed Unified Liability Standard, 22 Geo. J. Legal Ethics 143, 145-199 (2009) (explaining the current rules governing a non-client's ability to file a malpractice case against a lawyer; first explaining the "privity" doctrine; "The privity-of-contract principle holds that only 'those who have entered into a contract for legal services with the lawyer' may sue an attorney for negligence. Thus, the privity standard would in its purest form ban all nonclient claims for negligence against an attorney. Many states have

general pronouncements in their case law to this effect." (footnote omitted); next explaining the "third-party beneficiary doctrine": "The third-party beneficiary doctrine derives from 'the basic principle that the parties to a contract have the power, if they so intend, to create a right in a third person. Thus, if two parties enter into a contract intending that a third party receive some benefit from the promised performance under the contract, then the third party has the right to enforce such promise against the promisor. Because third-party beneficiary law is a principle of contract law, the intentions of the contracting parties are the touchstone: those whom the contracting parties do not intend to benefit, termed incidental beneficiaries, have no right to enforce the agreement." (footnotes omitted); also explaining the California "balancing" test; "The California 'balancing' approach offers an array of factors to consider in determining whether to recognize an attorney duty of care to a third party. The balancing test was first announced in Biakanja v. Irving [320 P.2d 16 (Cal. 1958)], in which a notary erred in supervising the attestation of a will." (footnote omitted); "The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm." (quoting Biakanja, 320 P.2d at 19); also explaining the "Restatement" approach: "Section 51 of the Restatement implicitly rejects the California balancing approach to third-party liability, and instead seeks to capture the specific instances in which attorneys owe a duty of care to nonclients. Under Section 51(2), a lawyer owes a duty to a nonclient if the lawyer or client 'invited' the nonclient to rely on the lawyer's opinion or provision of other legal services and the third party is not too remote to warrant such protection. Under Section 51(3), a lawyer owes a duty to a nonclient when the 'lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer's services benefit the nonclient,' provided that such duty will not 'significantly impair' the lawyer's client duties, and the absence of such duty would make enforcement of this duty unlikely." (footnote omitted)).

Several years earlier, a Wyoming Supreme Court case provided a similar analysis.

- Connely v. McColloch (In re Estate of Drwenski), 83 P.3d 457, 463, 462, 463 (Wyo. 2004) (addressing a situation in which a lawyer represented the husband in a divorce; explaining that the lawyer failed to finalize the divorce before the client died; noting that the client left an estate of over \$3,000,000, against which his wife claimed her elective share under Wyoming law;

explaining that the client's daughter sued the lawyer, claiming that the wife (her stepmother) would not have been entitled to her elective share if the lawyer had properly finished the divorce action; ultimately concluding that the daughter could not assert a malpractice action; providing a history of non-clients' malpractice claims against lawyers; noting that only four states (New York, Texas, Ohio, Nebraska) "continue to hold there is no recovery for nonclients"; explaining that many states recognize a "third party beneficiary contract theory," under which a designated beneficiary under a client's will can bring a malpractice action against the client's lawyer -- because "the client's intent to benefit the non-client was the direct purpose of the attorney-client relationship"; explaining that "[t]he duty does not extend to those incidentally deriving an indirect benefit . . . . Neither does it extend to those in an adversarial relationship with the client. The third party beneficiary test requires the plaintiff to prove clearly that (1) the client intended to benefit the plaintiff by entering into a contract with the attorney, (2) the attorney breached his contract with the client by failing to perform under its terms, and (3) giving the plaintiff the right to stand 'in the client's shoes' would be appropriate to give effect to the intent of the contract."; identifying the jurisdictions adopting this approach: Illinois; Maryland; Oregon; Pennsylvania; explaining that Arizona recognizes a variation of the test, and "requires plaintiffs to prove negligence by the attorney toward the client, not just a deleterious effect upon the beneficiary due to the attorney's negligence").

**Cases Allowing Negligence Actions Only by Clients.** Some states continue to rely on the traditional rule that only permitted clients to sue lawyers for negligence.

- See, e.g., Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 192 S.W.3d 780, 783 (Tex. 2006) (holding that plaintiff may pursue an "estate-planning malpractice claim" against lawyers, in their capacity as their father's personal representatives; "Thus, in Texas, a legal malpractice claim in the estate-planning context may be maintained only by the estate planner's client. This is the minority rule in the United-States -- only eight other states require strict privity in estate-planning malpractice suits. In the majority of states, a beneficiary harmed by a lawyer's negligence in drafting a will or trust may bring a malpractice claim against the attorney, even though the beneficiary was not the attorney's client." (footnote omitted)).

Some states have recognized a fairly narrow exception to this general rule, if the lawyer has committed fraud or some other intentional wrongdoing (which might also give such non-clients standing under traditional tort rules).

- See, e.g., Shoemaker v. Gindlesberger, 887 N.E.2d 1167, 1170, 1171-72 (Ohio 2008) (holding that beneficiary could not file a lawsuit against the



decedent's lawyer, whom negligently prepared a will; noting that "The necessity for privity may be overridden if special circumstances such as 'fraud, bad faith, collusion or other malicious conduct' are present." (citation omitted); "We decline the appellants' invitation to relax our strict privity rule. Although the court of appeals commented that this rule does not allow a remedy for the wrong, that is not necessarily so. Other courts have suggested that a testator's estate or a personal representative of the estate might stand in the shoes of the testator in an action for legal malpractice in order to meet the strict privity requirement. . . . While recognizing that public policy reasons exist on both sides of the issue, we conclude that the bright-line rule of privity remains beneficial. The rule provides for certainty in estate planning and preserves an attorney's loyalty to the client. In this case, for example, Gindlesberger maintains that he did exactly what Margaret Schlegel wished. She wished to transfer the Hanna farm but also wanted to retain a life estate. The deed Gindlesberger prepared accomplished just that. Moreover, appellants' claim is that the deed and the will drafted by Gindlesberger created a tax liability for the estate that depleted its assets. It is conceivable that a testator may not wish to optimize tax liability, instead seeking to further a different goal. In those instances, what is good for one beneficiary may not be good for another beneficiary, or for the estate as a whole. In this case, the basis for extending liability is even more tenuous because the increased tax liability to the estate arose from the transfer of the Hanna farm, not from the decedent's will. A holding that attorneys have a duty to beneficiaries of a will separate from their duty to the decedent who executed the will could lead to significant difficulty and uncertainty, a breach in confidentiality, and divided loyalties.").

### **Cases Allowing Negligence Actions by Third Parties Invited to Rely on the**

**Lawyer's Services.** As explained above, the Restatement indicates that non-clients who were invited to rely on a lawyer's services can sue that lawyer for negligence.

This situation most frequently involves corporate transactions in which the client sends the lawyer's legal opinion to a lender or other party to a transaction, etc. It should come as no surprise that such non-clients invited to rely on the lawyer's opinion can sue for negligence. These lawsuits might focus on the client who invited the reliance, but it is a short step from there to allowing a direct lawsuit against the lawyer.

### **Cases Allowing Negligence Actions by Third Party Beneficiaries of the**

**Lawyer's Services.** As explained above, the Restatement extensively analyzes the

lawyer's malpractice liability to third-party beneficiaries of the lawyer's services to a client.

A large number of courts have analyzed this issue -- most frequently in the trust and estate context.

To be sure, courts sometimes analyze the issue in the context other than the trust and estate setting.

- See, e.g., Credit Union Central Falls v. Groff, 966 A.2d 1262 (R.I. 2009) (holding that a lender could sue the lawyer for a borrower, because the lender was the intended third-party beneficiary of the lawyer's services).

In the trust and estate context, a number of courts have held that a named beneficiary can sue the decedent's lawyers for malpractice.

- Calvert v. Scharf, 619 S.E.2d 197, 207 (W. Va. 2005) ("[W]hile a majority of courts grant intended beneficiaries standing to sue a lawyer who negligently drafts a will, they have imposed various limitations on such a cause of action. Accordingly, we now hold that direct, intended, and specifically identifiable beneficiaries of a will have standing to sue the lawyer who prepared the will where it can be shown that the testator's intent, as expressed in the will, has been frustrated by negligence on the part of the lawyer so that the beneficiaries' interest(s) under the will is either lost or diminished." (emphasis added)).
- Osornio v. Weingarten, 21 Cal. Rptr. 3d 246 (Cal. Ct. App. 2004) (holding that the beneficiary of a will could sue the will's drafting attorney because he had not advised her that as a care custodian to the testator she was presumptively disqualified from taking under the will unless she had taken a certain specified step under California law).
- Harrigfeld v. Hancock (In re Order Certifying Question of Law), 90 P.3d 884, 888, 888-89 (Idaho 2004) ("[W]e hold that an attorney preparing testamentary instruments owes a duty to the beneficiaries named or identified therein to prepare such instruments, and if requested by the testator to have them properly executed, so as to effectuate the testator's intent as expressed in the testamentary instruments. If, as a proximate result of the attorney's professional negligence, the testator's intent as expressed in the testamentary instruments is frustrated in whole or in part and the beneficiary's interest in the estate is either lost, diminished, or unrealized, the attorney would be liable to the beneficiary harmed. The testamentary instruments from which the

testator's intent is to be ascertained would not include any will, codicil, or other instrument that had been revoked." (emphasis added); "Our extension of the attorneys' duty is very limited. It does not extend to beneficiaries not named or identified in the testamentary instruments. The attorney has no duty to insure that persons who would normally be the objects of the testator's affection are included as beneficiaries in the testamentary instruments. . . .

An attorney preparing a document that revokes or amends a client's existing testamentary instrument(s) has no duty to the beneficiaries named or identified in such instruments to notify them, consult with them, or in any way dissuade the testator from eliminating or reducing their share of his or her estate. Likewise, that attorney could not be held liable to such beneficiaries based upon their assertion that the testator would not have intended to revoke such instrument(s). This extension of an attorney's duty will not subject attorneys to lawsuits by persons who simply did not receive what they believed was their fair share of the testator's estate, or who simply did not receive in the testamentary instruments what they understood the testator had stated or indicated they would receive." (emphasis added)).

- Pinckney v. Tigani, C.A. No. 02C-08-129 FSS, 2004 Del. Super. LEXIS 386, at \*16, \*16-17, \*18-19, \*21, \*28-29 (Del. Super. Ct. Nov. 30, 2004) (not released for publication) ("Strict privity . . . is the approach historically followed by courts, but it has become outdated. In order to recover for legal malpractice, plaintiff must show that the attorney owed a duty of care to plaintiff, the attorney breached that duty, and the attorney's negligence proximately caused plaintiff's injury and damages. Privity is a contract-based principle, preventing actions against the attorney by parties who do not have a significant nexus with the attorney. Privity helps establish whether an attorney-client relationship exists. That relationship triggers the duty, the first prong of liability." (footnotes omitted); "Strict privity, the rule in Alabama, Maryland, Nebraska, Ohio, Texas, and, as mentioned, New York, completely bars malpractice actions by beneficiaries against estate planning attorneys." (footnotes omitted); "In the estate planning context, an attorney is usually sued by a disappointed heir or intended beneficiary rather than the client's estate. The client's death often triggers the action. The client's injury, if discovered in time, is the expense of redrafting the will, whereas the intended beneficiary's loss is the bequest. The prevailing rule now is that under some circumstances an intended beneficiary may bring a negligence action against an attorney. Courts rely on various theories, but the vast majority gives at least some beneficiaries standing to sue estate planning attorneys for legal negligence." (footnotes omitted; emphasis added); "Connecticut, Virginia, Oregon, Michigan and most importantly for present purposes, Pennsylvania have adopted the third-party, beneficiary rule articulated in § 302 of the Restatement (Second) of Contracts." (footnotes omitted); "The settlor's original, testamentary intent was clear enough. It undisputed that Jeanne [deceased mother of plaintiff] intended to create a trust for Plaintiff. And it is equally undisputed that Defendant drafted a trust agreement reflecting the

settlor's original intent. The bequest undeniably failed because the settlor's money went elsewhere. Although the court appreciates that, in theory, the estate could have been restructured to fund Plaintiff's share of the trust, the settler would have had to hire Plaintiff, or someone else, to review her financial situation. Then she would have had to agree to divert money from elsewhere. And although the court further appreciates that Defendant's alleged negligence may have contributed to the settlor's failure to discover and correct her misimpression about her assets, Plaintiff's position nonetheless creates a series of 'what ifs' involving someone who has passed on. This goes to the heart of the concerns favoring a privity requirement, and mandates the outcome here.").

- Leak-Gilbert v. Fahle, 55 P.3d 1054, 1056, 1058, 1060-61, 1062 (Okla. 2002) (providing an answer to a question certified from the United States federal court; "We hold that: (1) when an attorney is retained to prepare a will, the attorney's duty to prepare the will according to the testator's wishes does not ordinarily include an investigation of a client's heirs independent of, or in addition to, the information provided by the client, unless the client requests such an investigation; and (2) an intended will beneficiary may maintain a legal malpractice action under either negligence or contract theories against the drafter when the will fails to identify all the decedent's heirs as a result of the attorney's substandard professional performance." (emphasis added); "[T]o hold that an attorney has a duty to confirm heir information by conducting an investigation into a client's heirs independent of, or in addition to, the information provided by the client, even when not requested to do so, would expand the obligation of the lawyer beyond reasonable limits. The duty between an attorney and third persons affected by the attorney-client agreement should not be any greater than the duty between the attorney and the client. Although some exceptional circumstances might exist which would give rise to such a duty, none are present here. Consequently, we hold that, unless the client requests such an investigation, when an attorney is retained to draft a will, the attorney's duty to prepare a will according to the testator's wishes does not include the duty to investigate into a client's heirs independent of, or in addition to, the information provided by the client."; "A few jurisdictions refuse to allow non-client, intended beneficiaries to bring such malpractice actions. However, our decision is Hesser [Hesser v. Cent. Nat'l Bank & Trust Co., 956 P.2d 864 (Okla. 1998)] is in accord with the majority of jurisdictions which recognize that intended beneficiaries harmed by a lawyer's malpractice may maintain a cause of action against lawyers who draft testamentary documents even though no attorney-client relationship exists. Some of these courts have recognized such actions as negligence actions, while others have determined that in an intended will beneficiary may proceed under either negligence or contract theories." (footnotes omitted); "Those allowing an intended beneficiary of a will to assert a third party breach of contract theory generally recognize that when such a breach occurs, named intended beneficiaries of a will also hold third party beneficiary status

under the agreement between the testator and the attorney to draft a will according to the testator's wishes."; "[W]e hold that an intended will beneficiary may maintain a legal malpractice action under negligence or contract theories against an attorney when the will fails to identify all of the decedent's heirs as a result of the attorney's substandard professional performance.").

- Timmons v. J.D., 49 Va. Cir. 201, 201, 201-02, 202, 203, 204 (Va. Cir. Ct. 1999) (finding that a malpractice case against the lawyer should proceed; explaining the background: "Plaintiff avers that Leslie Ann Marshall ('decedent') hired the Defendant to draft a will for her in January of 1979. Under the terms of the will, decedent's property was to be given to Grandville T. Johnson and Betty Angieline Timmons ('Plaintiff') in equal shares, or to the survivor should either beneficiary predecease the decedent. Johnson died in 1986, leaving Plaintiff as the sole beneficiary under the will."; "Plaintiff claims that an implied contract arose between decedent and Defendant that Defendant would exercise reasonable care in safeguarding the will, that Defendant would deliver the will to a proper third party in the event of decedent's death, and that Defendant would deliver the will to Plaintiff (who was also the administrator of the estate) at decedent's death. Decedent died on July 8, 1993, after which time decedent's heirs-at-law filed a claim in this court seeking to recover their shares of decedent's estate on the presumption that decedent died intestate. Decedent apparently did not retain a copy of the will, and Defendant never notified Plaintiff or the heirs of its existence. Plaintiff claims that, under intestate succession, she received only approximately \$2,500.00 of the \$33,000.00 estate, and she is suing for the difference."; acknowledging that a normal malpractice case would be barred because of "a lack of privity"; relying on Copenhaver v. Rogers, 384 S.E.2d 593 (Va. 1989), in explaining the Virginia rule; "[T]he rule that emerges from Copenhaver is that in these circumstances, the Plaintiff must allege that the decedent clearly and directly intended to benefit the beneficiaries when she entered into the contract for legal services with her attorney." (emphasis added); ultimately finding the plaintiff's motion for judgment should proceed; "The most conspicuous factor that suggests that the decedent 'clearly and definitely intended' to benefit the Plaintiff is that she singled out only two beneficiaries in her will. This scenario is thus unlike one in which a testator identifies dozens of beneficiaries in the will, making it unlikely that the overriding purpose in contracting for legal services was to benefit a specific person. In this case, however, decedent specified that she wanted her modest estate to go to two specific individuals, rather than to her heirs-at-law. Thus, the overriding purpose in hiring Defendant to draft the will was to channel her estate to two specific people. Otherwise, she would not have wasted the time and money in hiring an attorney if she was content to die intestate. The size of the estate also weighs in the balance because it is difficult to argue that the decedent's purpose was avoiding taxes when her estate was so small. Therefore, based on the number of beneficiaries, the

size of the estate, and the fact that the Plaintiff was not the primary intestate taker, the Court concludes that Plaintiff has adequately alleged facts sufficient to draw the inference that the decedent's overriding purpose in contracting with Defendant was to benefit the Plaintiff." (emphasis added); overruling defendant's demurrer).

On the other hand, a number of courts have rejected negligence claims by non-clients in this setting, explaining that the decedent could have changed the trust or estate plan before his or her death, or for some reason could have deliberately decided not to complete whatever trust and estate planning the decedent had initiated.

- Harrison v. Lovas, 234 P.3d 76, 78 (Mont. 2010) (holding that expected beneficiaries of a change in a trust could not sue the lawyer who represented the client considering the change in the trust; rejecting the plaintiffs' argument that the grantor wanted the trust amended so they could obtain more money; "We observe at the outset that, contrary to Plaintiffs characterization of the record, it is not self-evident that the Harrisons [grantors] intended that the Trust be amended. The record reflects that Lovas [Harrisons' lawyer] needed, among other things, legal descriptions of the property to be transferred in order to complete the proposed amendment. It is not disputed that Lovas advised the Harrisons of this in her office, and again on the telephone and in two subsequent letters. The record does not reflect why the Harrisons failed to respond. The only thing that is clear from the record is that Lovas did not complete the amendment because the Harrisons failed to provide the information necessary to do so." (emphasis added); "[W]hile Plaintiffs were named beneficiaries of an existing Trust, their complaint against Lovas is premised entirely upon a potential, unexecuted amendment to that existing Trust. The documents at issue in this case were never even prepared because the Harrisons failed to provide Lovas with information that she required. Plaintiffs in this case therefore had merely a hope for, but not legal entitlement to, revised beneficiary status." (emphasis added); affirming summary judgment for the lawyer).
- Peleg v. Spitz, 2007 Ohio 6304 (Ohio Ct. App. 2007) (holding that a trust's residual beneficiary could not bring a malpractice action against the attorney who drafted the trust, because the trust settlor could have changed the trust before her death), aff'd without published opinion, 889 N.E.2d 1019 (Ohio 2008).
- Harrigfeld v. Hancock (In re Order Certifying Question of Law), 90 P.3d 884, 888, 888-89 (Idaho 2004) ("[W]e hold that an attorney preparing testamentary instruments owes a duty to the beneficiaries named or identified therein to prepare such instruments, and if requested by the testator to have them

- properly executed, so as to effectuate the testator's intent as expressed in the testamentary instruments. If, as a proximate result of the attorney's professional negligence, the testator's intent as expressed in the testamentary instruments is frustrated in whole or in part and the beneficiary's interest in the estate is either lost, diminished, or unrealized, the attorney would be liable to the beneficiary harmed. The testamentary instruments from which the testator's intent is to be ascertained would not include any will, codicil, or other instrument that had been revoked." (emphasis added); "Our extension of the attorneys' duty is very limited. It does not extend to beneficiaries not named or identified in the testamentary instruments. The attorney has no duty to insure that persons who would normally be the objects of the testator's affection are included as beneficiaries in the testamentary instruments. . . . An attorney preparing a document that revokes or amends a client's existing testamentary instrument(s) has no duty to the beneficiaries named or identified in such instruments to notify them, consult with them, or in any way dissuade the testator from eliminating or reducing their share of his or her estate. Likewise, that attorney could not be held liable to such beneficiaries based upon their assertion that the testator would not have intended to revoke such instrument(s). This extension of an attorney's duty will not subject attorneys to lawsuits by persons who simply did not receive what they believed was their fair share of the testator's estate, or who simply did not receive in the testamentary instruments what they understood the testator had stated or indicated they would receive.").
- Featherson v. Farwell, 20 Cal. Rptr. 3d 412, 415-16, 416, 417 (Cal. Ct. App. 2004) (affirming a judgment in favor of a lawyer who did not immediately deliver a deed that would have benefited one of client's daughters; holding that the beneficiary of a deed that a lawyer prepared for a client could not sue the lawyer for not having recorded the deed before the client died; explaining that the decedent might not have wanted the deed delivered; "[T]he cases have repeatedly held that an attorney who assumes preparation of a will incurs a duty not only to the testator client, but also to his intended beneficiaries, and lack of privity does not preclude that testamentary beneficiary from maintaining an action against the attorney based on either the contractual theory of third party beneficiary or the tort theory of negligence.' . . . But the lawyer's liability to the 'intended beneficiary' is not automatic or absolute, and there is no such liability where the testator's intent or capacity is questioned."; "But liability to a third party will not be imposed where there is a question about whether the third party was in fact the intended beneficiary of the decedent, or where it appears that a rule imposing liability might interfere with the attorney's ethical duties to his client or impose an undue burden on the profession."; "The primary duty is owed to the testator-client, and the attorney's paramount obligation is to serve and carry out the intention of the testator. Where, as here, the extension of that duty to a third party could improperly compromise the lawyer's primary duty of undivided loyalty by creating an incentive for him to exert pressure on his

client to complete her estate planning documents summarily, or by making him the arbiter of a dying client's true intent, the courts simply will not impose that insurmountable burden on the lawyer."), review denied and ordered not published, No. S129892, 2005 Cal. LEXIS 2025 (Cal. Feb. 23, 2005).

A number of other courts have explained that those not named as beneficiaries generally cannot sue the decedent's lawyer for malpractice.

Most typically, this type of case involves the plaintiff alleging that the decedent's lawyer should have realized that the decedent must have meant to include the plaintiff in the decedent's estate planning, yet did not make such arrangements.

- Rydde v. Morris, 675 S.E.2d 431 (S.C. 2009) (holding that a prospective beneficiary could not sue the decedent's lawyer for not having prepared a will before the decedent died).
- Harrigfeld v. Hancock (In re Order Certifying Question of Law), 90 P.3d 884, 888, 888-89 (Idaho 2004) ("[W]e hold that an attorney preparing testamentary instruments owes a duty to the beneficiaries named or identified therein to prepare such instruments, and if requested by the testator to have them properly executed, so as to effectuate the testator's intent as expressed in the testamentary instruments. If, as a proximate result of the attorney's professional negligence, the testator's intent as expressed in the testamentary instruments is frustrated in whole or in part and the beneficiary's interest in the estate is either lost, diminished, or unrealized, the attorney would be liable to the beneficiary harmed. The testamentary instruments from which the testator's intent is to be ascertained would not include any will, codicil, or other instrument that had been revoked."; "Our extension of the attorneys' duty is very limited. It does not extend to beneficiaries not named or identified in the testamentary instruments. The attorney has not duty to insure that persons who would normally be the objects of the testator's affection are included as beneficiaries in the testamentary instruments. . . . An attorney preparing a document that revokes or amends a client's existing testamentary instrument(s) has no duty to the beneficiaries named or identified in such instruments to notify them, consult with them, or in any way dissuade the testator from eliminating or reducing their share of his or her estate. Likewise, that attorney could not be held liable to such beneficiaries based upon their assertion that the testator would not have intended to revoke such instrument(s). This extension of an attorney's duty will not subject attorneys to lawsuits by persons who simply did not receive what they believed was their fair share of the testator's estate, or who simply did not receive in the testamentary instruments what they understood the testator had stated or indicated they would receive." (emphasis added)).



- Swanson v. Ptak, 682 N.W.2d 225, 231 (Neb. 2004) (affirming summary judgment for a lawyer, who was sued by a client's niece because the lawyer was not able to arrange for the beneficiaries of the client's estate to share part of the estate with the niece; "We have held that the duty of a lawyer who drafts a will on behalf of a client does not extend to heirs or purported beneficiaries who claim injury resulting from negligent draftsmanship. . . . Here, the basis for extending the lawyer's duty to a third party is even more tenuous than in those cases, given the nature of Swanson's [niece] claim to a share of the estate. No lawyer, and particularly not one who serves as the personal representative of an intestate estate, could compel persons who are lawful heirs to share the estate with persons who are not. We therefore conclude that as an attorney, Ptak [lawyer] had no professional duty to secure a gratuitous agreement from Wilma's [decedent ] heirs for the benefit of Swanson." (emphasis added)).
- Leak-Gilbert v. Fahle, 55 P.3d 1054, 1056, 1058, 1060-61, 1062 (Okla. 2002) (providing an answer to a question certified from the United States federal court; "We hold that: (1) when an attorney is retained to prepare a will, the attorney's duty to prepare the will according to the testator's wishes does not ordinarily include an investigation of a client's heirs independent of, or in addition to, the information provided by the client, unless the client requests such an investigation; and (2) an intended will beneficiary may maintain a legal malpractice action under either negligence or contract theories against the drafter when the will fails to identify all the decedent's heirs as a result of the attorney's substandard professional performance."; "[T]o hold that an attorney has a duty to confirm heir information by conducting an investigation into a client's heirs independent of, or in addition to, the information provided by the client, even when not requested to do so, would expand the obligation of the lawyer beyond reasonable limits. The duty between an attorney and third persons affected by the attorney-client agreement should not be any greater than the duty between the attorney and the client. Although some exceptional circumstances might exist which would give rise to such a duty, none are present here. Consequently, we hold that, unless the client requests such an investigation, when an attorney is retained to draft a will, the attorney's duty to prepare a will according to the testator's wishes does not include the duty to investigate into a client's heirs independent of, or in addition to, the information provided by the client." (emphasis added); "A few jurisdictions refuse to allow non-client, intended beneficiaries to bring such malpractice actions. However, our decision is Hesser [Hesser v. Cent. Nat'l Bank & Trust Co., 956 P.2d 864 (Okla. 1998)] is in accord with the majority of jurisdictions which recognize that intended beneficiaries harmed by a lawyer's malpractice may maintain a cause of action against lawyers who draft testamentary documents even though no attorney-client relationship exists. Some of these courts have recognized such actions as negligence actions, while others have determined that in an intended will beneficiary may proceed under either negligence or contract theories." (footnotes omitted); "Those

allowing an intended beneficiary of a will to assert a third party breach of contract theory generally recognize that when such a breach occurs, named intended beneficiaries of a will also hold third party beneficiary status under the agreement between the testator and the attorney to draft a will according to the testator's wishes."; "[W]e hold that an intended will beneficiary may maintain a legal malpractice action under negligence or contract theories against an attorney when the will fails to identify all of the decedent's heirs as a result of the attorney's substandard professional performance.").

The analysis can be more subtle than one might think.

For instance, one decision explained that a named beneficiary might not automatically be the intended recipient of the client's gift or estate planning.

- Copenhaver v. Rogers, 384 S.E.2d 593, 596-97 (Va. 1989) (finding that under Virginia law only the direct third party beneficiary of a contract can sue a lawyer for malpractice; affirming a judgment for a lawyer in an action brought by individuals who never alleged such a contract of which they were the intended beneficiaries; "There is a critical difference between being the intended beneficiary of an estate and being the intended beneficiary of a contract between a lawyer and his client. A set of examples will illustrate the point: A client might direct his lawyer to put his estate in order and advise his lawyer that he really does not care what happens to his money except that he wants the government to get as little of it as possible. Given those instructions, a lawyer might devise an estate plan with various features, including inter vivos trusts to certain relatives, specific bequests to friends, institutions, relatives and the like. In this first example, many people and institutions might be beneficiaries of the estate, but none could fairly be described as beneficiaries of the contract between the client and his attorney because the intent of that arrangement was to avoid taxes as much as possible. By contrast, a client might direct his lawyer to put his estate in order and advise his lawyer that his one overriding intent is to ensure that each of his grandchildren receive one million dollars at his death and that unless the lawyer agrees to take all steps . . . necessary to ensure that each grandchild receives the specified amount, the client will take his legal business elsewhere. In this second example, if the lawyer agrees to comply with these specific directives, one might fairly argue that each grandchild is an intended beneficiary of the contract between the client and the lawyer." (emphases added)).

**Clients as Fiduciaries Relying on the Lawyer's Services.** As explained above, the Restatement recognizes possible negligence liability by a lawyer

representing a fiduciary -- who sometimes can be sued by the beneficiaries of the fiduciary's duties.

Most case law on this issue focuses on the "fiduciary exception" to the attorney-client privilege rather than on liability.

**California "Balancing Test."** California frequently creates its own test for various legal doctrines.

Among other things, California has created a multi-factor test to determine if a non-client can sue a lawyer for malpractice. States outside California have adopted the test as well.

- France v. Podleski, 303 S.W.3d 615, 619, 620 (Mo. Ct. App. 2010) (holding that lawyers representing a county's public administrator in guardianship and related proceedings does not owe a duty to the wards that are beneficiaries of the public administrator's fiduciary duty; "The question of the legal duty owed by an attorney to non-clients is determined by weighing six factors: (1) the existence of a client's specific intent that the purpose of the attorney's services be to benefit the non-client plaintiffs' (2) the foreseeability of harm to the plaintiffs as a result of the attorney's negligence; (3) the degree of certainty that the plaintiffs will suffer injury from the attorney's misconduct; (4) the closeness of the connection between the injury and the attorney's conduct; (5) the policy of preventing future harm; and (6) the burden on the profession of recognizing liability in those circumstances."; "While it is true that the Public Administrator was a fiduciary to Appellants, we decline to hold that the fiduciary relationship between the Public Administrator and Appellants extended to Respondents on these facts. Appellants fail to cite any case law stating that Respondents' representation of the Public Administrator created a legal duty of Respondents to represent Appellants, and to demonstrate that the Public Administrator had the specific intent that Respondents' purpose in representing the Public Administrator be to benefit Appellants, as opposed to representing the Public Administrator before the probate court. In addition, were we to hold that Respondents owed a duty to Appellants in this case, we would place other attorneys representing a public administrator in a rather precarious position. Essentially, a public administrator would be appointed as guardian or conservator of someone deemed incompetent by the probate court, and a public administrator's attorney would then be forced to argue on behalf of the ward that the ward was competent and that the appointment of a public administrator as guardian or conservator was unnecessary. We decline to issue a holding that would

create such a conflict. Finding that Appellants have not met their burden of alleging facts to support the first element of their malpractice claim, we need not consider the others. Point III is denied.").

Various courts have adopted the California test in the trust and estate setting.

Some courts applying the standard have permitted non-clients to sue a decedent's lawyer for malpractice.

- Perez v. Stern, 777 N.W.2d 545, 550-51, 553 (Neb. 2010) ("The substantial majority of courts to have considered that question have adopted a common set of cohesive principles for evaluating an attorney's duty of care to a third party, founded upon balancing the following factors: (1) the extent to which the transaction was intended to affect the third party, (2) the foreseeability of harm, (3) the degree of certainty that the third party suffered injury, (4) the closeness of the connection between the attorney's conduct and the injury suffered, (5) the policy of preventing future harm, and (6) whether recognition of liability under the circumstances would impose an undue burden on the profession. And courts have repeatedly emphasized that the starting point for analyzing an attorney's duty to a third party is determining whether the third party was a direct and intended beneficiary of the attorney's services." (footnote omitted); "[W]e have held that an attorney who prepared a decedent's will owed no duty to any particular alleged beneficiary of the will. Similarly, we have held that an attorney acting as the personal representative of an estate owed no duty to nonbeneficiaries of the estate to secure a gratuitous agreement from the beneficiaries to share their inheritance. We have also held that the attorney for a joint venture owed no duty to three individual partners that was separate from the duty owed to the joint venture as a whole. And we have held that an attorney owed no duty to the guarantors of leases which the attorney's clients defaulted on, and that an attorney for a debtor owed no duty to a creditor based on allegedly defective collateral for the debt." (footnotes omitted); "Courts to have considered the question have generally concluded that policy considerations weigh in favor of recognizing an attorney's duty to a decedent's next of kin in a wrongful death action. We agree. In this case, it is clear that the children were direct and intended beneficiaries of the transaction. Stern was certainly aware of Guido's intent to benefit the children." (footnote omitted)).
- Osornio v. Weingarten, 21 Cal. Rptr. 3d 246, 263 (Cal. Ct. App. 2004) ("[I]t is readily apparent that Osornio could have alleged that Weingarten breached a duty of care owed to her: Weingarten negligently failed to advise Ellis that the intended beneficiary under her 2001 Will, Osornio, would be presumptively qualified because of her relationship as Ellis's care custodian. Under this theory, Weingarten was negligent not only by failing to advise Ellis of the consequences of section 21350(a); he was also negligent in failing to address

Osornio's presumptive disqualification by making arrangements to refer Ellis to independent counsel to advise her and to provide a Certificate of Independent Review required by section 21351(b)." (footnote omitted); allowing the non-client to file an amended complaint against the lawyer).

- Donahue v. Shughart, Thomson & Kilroy, P.C., 900 S.W.2d 624, 626-27, 627, 628, 629-30 (Mo. 1995) (adopting the California "balancing test" in describing the ability of a non-client to sue for malpractice; explaining that intended beneficiaries of a trust transfer sued the lawyer which had set up the transfers; explaining that "[t]he more complicated question is whether the intended beneficiaries, in this case, Donahue and McClung, have standing to bring a legal malpractice action against Stamper and the law firm because the lawyers failed to effectuate a transfer in accordance with the wishes of their client, Stockton"; noting the national debate about the ability of a non-client to sue a lawyer for malpractice; "Courts of other states have considered whether an attorney can be held liable for negligence to a person other than the client. Generally, the analysis begins with the historical rule requiring privity of contract to maintain an action for professional negligence."; noting that some courts have adopted what is called the California "balancing" test, while others have relied on "the concept of a third party beneficiary contract"; "The two most common approaches do not appear to be irreconcilable. The first factor of the balancing test addresses the extent to which the transaction was intended to benefit the plaintiff and bears a remarkable resemblance to the third party beneficiary theory. The question of whether the client had a specific intent to benefit the plaintiff plays an important role in determining if a legal duty exists under the balancing of factors test. The first factor identified in Westerhold [Westerhold v. Carroll, 419 S.W.2d 73 (Mo. 1967)] and Lucas [Lucas v. Hamm, 364 P.2d 685 (Cal. 1961)] should be modified to reflect that the factor weighs in favor of a legal duty by an attorney where the client specifically intended to benefit the plaintiffs. With that modification, that approach is an appropriate method for determining an attorney's duty to non-clients. The weighing of factors allows consideration of relevant policy concerns and is consistent with prior case law, as expressed in Westerhold. Concurrently, the ultimate factual issue that must be pleaded and proved is that an attorney-client relationship existed in which the client specifically intended to benefit the plaintiff."; ultimately adopting a balancing test; "To summarize, the Court concludes that the first element of a legal malpractice action may be satisfied by establishing as a matter of fact either that an attorney-client relationship exists between the plaintiff and defendant or an attorney-client relationship existed in which the attorney-defendant performed services specifically intended by the client to benefit plaintiffs. As a separate matter, the question of legal duty of attorneys to non-clients will be determined by weighing the factors in the modified balancing test. The factors are: (1) the existence of a specific intent by the client that the purpose of the attorney's services were to benefit the plaintiffs. (2) the foreseeability of the harm to the plaintiffs as a result of the attorney's negligence. (3) the

degree of certainty that the plaintiffs will suffer injury from attorney misconduct. (4) the closeness of the connection between the attorney's conduct and the injury. (5) the policy of preventing future harm. (6) the burden on the profession of recognizing liability under the circumstances."; concluding that the intended beneficiaries could pursue a malpractice claim against the lawyer).

Other courts applying this standard have held that non-clients could not maintain a malpractice action against the decedent's lawyer.

- Boronian v. Clark, 20 Cal. Rptr. 3d 405, 411 (Cal. Ct. App. 2004) (directing a judgment in favor of a lawyer, in an action brought by a beneficiary who claimed to have been wrongfully disinherited by a decedent shortly before her death; "[A] lawyer who is persuaded of his client's intent to dispose of her property in a certain manner, and who drafts the will accordingly, fulfills his duty of loyalty to his client and is not required to urge the testator to consider an alternative plan in order to forestall a claim by someone thereby excluded from the will (or included in the will but deprived of a specific asset bequeathed to someone else).
- Goldberger v. Kaplan, Strangis and Kaplan, P.A., 534 N.W. 2d 734, 738, 738-39, 739 (Minn. Ct. App. 1995) (holding that an estate beneficiary could not sue the decedent's lawyer for malpractice; "The exception is that a nonclient may maintain a cause of action against an attorney for professional malpractice as an intended third-party beneficiary in those limited situations where the client's sole purpose in retaining the attorney is to benefit the nonclient directly, and the attorney's negligence instead causes the nonclient to suffer a loss. . . . Determining whether an attorney owes a duty to a nonclient involves a balancing of factors, including: (1) the extent to which the transaction was intended to affect the nonclient; (2) the foreseeability of harm to the nonclient; (3) the degree of certainty that the nonclient suffered injury; (4) the closeness of the connection between the attorney's conduct and the injury; (5) the policy of preventing future harm; and (6) whether recognition of liability under the circumstances would impose an undue burden on the profession. Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 687-88, 15 Rptr. 821 (Cal. 1961), cert. denied, 368 U.W. 987 (1962)."; concluding that "[h]ere, appellants are not the direct, intended beneficiaries of the personal representative's attorneys' services. As permitted by statute, the personal representative hired the attorneys to assist and advise him in fulfilling his fiduciary duty to manage the estate in accordance with the terms of the will and the law and 'consistent with the best interests of the estate.'" (citation omitted); explaining that "[m]oreover, an estate beneficiary's interests may not necessarily coincide with those of the estate. Until an estate is closed, it is uncertain whether any attorney malpractice actually injures a beneficiary."; "We hold, therefore, that the estate beneficiaries lack standing

to sue the personal representative's attorneys because the attorneys were not hired for their direct benefit, other procedures are available to protect the beneficiaries' interests from malpractice, and the potential for conflict of interest would unduly burden the legal profession.").

**(a)** It is likely that an intended named beneficiary can sue the decedent client's lawyer for negligence which cost the beneficiary tax savings because of the lawyer's malpractice.

**(b)** It is not likely that a distant relative of a decedent could sue the decedent's lawyer for negligent failure to include the beneficiary in the decedent's estate plan.

**Best Answer**

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

N 8/12 [A,C,I,J]

## Liability to Non-Clients for Intentional Torts

### Hypothetical 57

You represented a client in a nasty divorce, which you finally settled after several years of acrimonious litigation. As part of the settlement, your client agreed to leave most of his estate to his children. However, several months ago your now-divorced client told you that he intended to remarry, and directed you to prepare an estate plan that leaves all of his assets to his new fiancée. You want to follow your client's direction if that is permissible, but you also worry about your possible liability to the children.

If you follow your client's direction, may you be sued by your client's children if your client dies and the children do not receive the inheritance agreed to in the divorce settlement.

### YES (PROBABLY)

#### Analysis

Lawyers can be sued for intentional torts just like any other person. Although this scenario might be rare, it occasionally arises in the trust and estate context.

This hypothetical comes from a 2009 Wisconsin case. The court found that the lawyer (at the well-known firm of Michael Best) had engaged in intentional wrongdoing, but not negligence.

- Tensfeldt v. Haberman, 768 N.W.2d 641, 644, 659 (Wis. 2009) (analyzing a situation in which a lawyer at Michael Best prepared a client's will which violated the terms of the client's early divorce settlement and judgment; ultimately finding that the lawyer had engaged in intentional wrongdoing, but not negligence; "We determine that the circuit court properly concluded that LaBudde [Michael Best lawyer] is liable as a matter of law for intentionally aiding and abetting his client's unlawful act. The divorce judgment was enforceable at the time it was entered and at the time Robert [Michael Best's client] asked LaBudde to draft an estate plan that violated the judgment. Under these facts, LaBudde is not entitled to either qualified immunity or the good faith advice privilege."; "Additionally, on the children's third-party negligence claim, LaBudde argues that the circuit court improperly denied his motion for summary judgment. We determine that the circuit court erred in denying LaBudde's motion for summary judgment because the children cannot establish the LaBudde's negligence thwarted Robert's clear intent.";



"Being named in the instrument is a necessary but not a sufficient condition for overcoming the general rule that attorneys are immune from liability for negligence to third parties. The third party beneficiary must be able to establish that the attorney's failure thwarted the decedent's clear intent."; "It is undisputed that LaBudde carried out Robert's explicit instructions when he crafted an estate plan that did not leave two-thirds of Robert's net estate outright to his children. To this end, we determine that the children's third party negligence claim cannot be maintained because they cannot establish that LaBudde's negligence thwarted Robert's clear intent. We conclude that the circuit court erred in denying LaBudde's motion for summary judgment on the negligence claim."; also finding that another Michael Best lawyer had not acted negligently in failing to advise the same client about a new case that affected his estate plan).

On reflection, this result should come as no surprise. The lawyer deliberately assisted a client in conduct that both the client and the lawyer knew violated the legal rights of a third person.

### **Best Answer**

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

N 8/12

## Liability for Failing to Inform Former Clients of Changes in the Law

### Hypothetical 58

As your firm's trust and estate department's newest partner, you have taken the lead in trying to update and expand your firm's marketing efforts. Among other things, you have arranged for a young associate to send out email "alerts" every few months to individuals whose estate planning your firm has handled over the last five or ten years. Because the email "alerts" go to both current and former clients, you address the emails to "Clients and Friends." You just heard from your firm's mailroom that your firm was served with a complaint by the executor of a former client's estate. One of your partners had prepared that client's estate plan about three years ago. Although no one at your firm worked for that client after it prepared his estate plan, the executor has sued your firm for malpractice -- claiming that your email "alerts" did not adequately inform the former client of an important tax change (passed two years ago) that could have saved him about \$500,000 in estate tax. The executor cites your firm's email "alerts" as creating a continuing duty to advise of such changes in the tax law.

Is a court likely to find that the complaint against your firm states a valid cause of action?

### NO (PROBABLY)

#### Analysis

This scenario raises both ethics issues and (more ominously) malpractice issues.

The ABA Model Rules generally recognize that a client should be characterized either as a current client or former client. Lawyers obviously owe many duties to current clients, but very few duties to former clients (most of which involve protection of the client at the end of the representation, and confidentiality thereafter).

The Restatement takes the same basic position, although it acknowledges that in certain circumstances a lawyer might have some obligation to relay pertinent communications to former clients.

After termination a lawyer might receive a notice, letter, or other communication intended for a former client. The

lawyer must use reasonable efforts to forward the communication. The lawyer ordinarily must also inform the source of the communication that the lawyer no longer represents the former client . . . . The lawyer must likewise notify a former client if a third person seeks to obtain material relating to the representation that is still in the lawyer's custody.

A lawyer has no general continuing obligation to pass on to a former client information relating to the former representation. The lawyer might, however, have such an obligation if the lawyer continues to represent the client in other matters or under a continuing relationship. Whether such an obligation exists regarding particular information depends on such factors as the client's reasonable expectations; the scope, magnitude, and duration of the client-lawyer relationship; the evident significance of the information to the client; the burden on the lawyer in making disclosure; and the likelihood that the client will receive the information from another source.

Restatement (Third) of Law Governing Lawyers § 33 cmt. h (2000) (emphasis added).

This comment seems to focus on "information" other than new legal developments, some changes in the law, etc.

Neither the ABA Model Rules nor the Restatement discusses lawyers' possible duty to keep former clients updated on any legal developments.

The ACTEC Commentaries recognize a strange "dormant" representation -- in which clients apparently can continue to receive the benefit of the lawyer's duties normally owed only to current clients (even though the lawyer is not then handling any matters for such "dormant" clients).

The execution of estate planning documents and the completion of related matters, such as changes in beneficiary designations and the transfer of assets to the trustee of a trust, normally ends the period during which the estate planning lawyer actively represents an estate planning client. At that time, unless the representation is terminated by the lawyer or client, the representation

becomes dormant, awaiting activation by the client. At the client's request, the lawyer may retain the original documents executed by the client. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: Current Clients). Although the lawyer remains bound to the client by some obligations, including the duty of confidentiality, the lawyer's responsibilities are diminished by the completion of the active phase of the representation. As a service the lawyer may communicate periodically with the client regarding the desirability of reviewing his or her estate planning documents. Similarly, the lawyer may send the client an individual letter or a form letter, pamphlet or brochure regarding changes in the law that might affect the client. In the absence of an agreement to the contrary, a lawyer is not obligated to send a reminder to a client whose representation is dormant or to advise the client of the effect that changes in the law or the client's circumstances might have on the client's legal affairs.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.4, at 57 (4th ed. 2006),

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

(emphasis added).

The ACTEC Commentaries provide an illustration of this point.

Example 1.4-1. Lawyer (L) prepared and completed an estate plan for Client (C). At C's request, L retained the original documents executed by C. L performed no other legal work for C in the following two years but has no reason to believe that C has engaged other estate planning counsel. L's representation of C is dormant. L may, but is not obligated to, communicate with C regarding changes in the law. If L communicates with C about changes in the law, but is not asked by C to perform any legal services, L's representation remains dormant. C is properly characterized as a client and not a former client for purposes of MRPCs 1.7 (Conflict of Interest: Current Client) and 1.9 (Duties to Former Clients).

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.4, at 58 (4th ed. 2006),

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

The ACTEC Commentaries repeat this approach in a later section.

[S]ending a client periodic letters encouraging the client to review the sufficiency of the client's estate plan or calling the client's attention to subsequent legal developments does not increase the lawyer's obligations to the client. See ACTEC Commentary on MRPC 1.4 (Communication) for a discussion of the concept of dormant representation.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.8, at 113-14 (4th ed. 2006),

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

(emphasis added).

The ACTEC Commentaries clearly hope to avoid burdening trust and estate lawyers with liability for not updating the estate plans of arguably former clients. Thus, the answer probably is not as clear as the ACTEC Commentaries would like it to be.

There seem to be few if any malpractice cases against lawyers for failing to advise former clients of changes in the law. This lack of case law seems somewhat surprising, given both lawyers' increasing use of emails and other forms of electronic communications to send "alerts" and "updates" to former clients, as well as the incentives for former clients to sue the "deep pockets" that lawyers frequently represent.

### **Best Answer**

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

## Identifying the Client

### Hypothetical 59

You just received a call from one of your neighbors, whose wealthy mother just died. The mother's will names your neighbor as executor, and she wants to hire you.

Will your client be the neighbor (executor) rather than the estate?

### YES (PROBABLY)

#### Analysis

Ironically, despite the critical importance of identifying the "client" in the estate administration context, states disagree about whom the lawyer actually represents in many aspects of estate administration work.

This issue has generated considerable debate among trust and estate lawyers. An estate does not have a separate existence as an entity (such as a corporation), so it is difficult to conceive of the "estate" as a client. On the other hand, it seems odd to consider the client to be an individual -- because the individual's interests could differ from that of the corpus at issue (for instance, if the executor seeks inappropriately large fees from the estate) or from that of the estate's beneficiaries (to whom the executor owes fiduciary duties).

The ABA Model Rules acknowledge this debate – explaining that

[i]n estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries.

ABA Model Rule 1.7 cmt. [27] (emphasis added).

The ABA dealt with this issue in a 1994 legal ethics opinion. The ABA first explained that states take very different positions on this situation.

The majority of jurisdictions consider that a lawyer who represents a fiduciary does not also represent the beneficiaries, see Succession of Wallace, 574 So.2d 348 (La. 1991) (citing cases), and we understand the Model Rules to reflect this majority view. The law varies somewhat among jurisdictions, however, as is recognized in the following comment to Rule 1.7: In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved. Thus, in some jurisdictions, a lawyer representing a fiduciary also owes fiduciary obligations to the beneficiaries that in some circumstances will override obligations otherwise owed by the lawyer to the fiduciary, such as the obligation of confidentiality. See Charleson v. Hardesty, 839 P.2d 1303 (Nev. 1992). There is also some authority for the view that when a lawyer represents a fiduciary in a trust or estate matter, the client is not the fiduciary, but rather the trust estate. See, e.g., Steinway v. Bolden, 460 N.W.2d 306 (Mich. App. 1990). In a jurisdiction where that is the prevailing law, the trust or estate would presumably be the "entity as client" that is contemplated by Rule 1.13.

ABA LEO 380 (5/9/94) (emphases added).

Not surprisingly, the American College of Trust & Estate Counsel ("ACTEC") Commentaries also deal with this issue. Like the 1994 ABA legal ethics opinion, the ACTEC Commentaries acknowledge the debate, and then describe the majority view as considering that the lawyer represents the fiduciary (executor or trustee) rather than an estate, trust, etc.

A very small minority of cases and ethics opinions have adopted the so-called entity approach under which the fiduciary estate is characterized as the lawyer's client. However, most cases and ethics opinions treat the fiduciary

as the lawyer's client and the beneficiaries as persons to whom the lawyer may owe some duties.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.13, at 128 (4th ed. 2006),  
[http://www.actec.org/Documents/misc/ACTEC\\_Commentaries\\_4th\\_02\\_14\\_06.pdf](http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf)  
(emphasis added).

Most bars and courts take the same approach.

- Florida Rule 1.7 Comment ("In Florida, the personal representative is the client rather than the estate or the beneficiaries. The lawyer should make clear the relationship to the parties involved.").
- McClure & O'Farrell, P.C. v. Grigsby, 918 N.E.2d 335 (Ind. Ct. App. 2009) (denying an estranged wife's efforts to obtain information about services performed for her late husband by the law firm that he hired in a divorce proceeding between them; noting that the estranged wife was neither an executrix nor beneficiary, and therefore was not entitled to the information).
- Borisoff v. Taylor & Faust, 93 P.3d 337, 340 (Cal. 2004) (holding that a state fiduciary can sue the predecessor fiduciary's lawyer; explaining that under California law "[W]hen a fiduciary hires an attorney for guidance in administering a trust, the fiduciary alone, in his or her capacity as fiduciary, is the attorney's client. . . . The trust is not the client, because 'a trust is not a person but rather "a fiduciary relationship with respect to property.'" . . . Neither is the beneficiary the client, because fiduciaries and beneficiaries are separate persons with distinct legal interests.").
- Ken's Foods, Inc. v. Ken's Steak House, Inc., 213 F.R.D. 89, 98 (D. Mass. 2002) (explaining that an estate "is not a separate legal entity," and that a lawyer representing an executor does not represent the "estate").
- Kentucky LEO KBA E-401 (9/1997) (explaining that a lawyer representing a fiduciary did not owe any duties to the beneficiaries, but could jointly represent a fiduciary and a beneficiary under certain circumstances; "This Committee adopts the ACTEC Commentaries because the Commentaries properly set forth a lawyer's ethical obligations. Further, this Committee agrees with ABA Formal Opinion 94-380, and adopts the majority view, that is, that a lawyer who represents a fiduciary does not also represent the beneficiaries. We reject the view that a lawyer who represents a fiduciary also owes obligations to the beneficiaries that in some circumstances will override obligations otherwise owed by the lawyer to the fiduciary, such as



the obligation of confidentiality. We also reject the view that when a lawyer represents a fiduciary in a trust or estate matter, the client is not the fiduciary, but is the trust estate." (emphasis added)).

- Delaware LEO 1989-4 (1989) (holding that a lawyer representing an executor could also represent the same individual in his role as the donee of a gift; explaining that "[a]ccordingly, we are of the view an 'estate' has no legal existence, but instead describes the property and debts of a decedent. Given that conclusion, we do not believe an estate can be a 'client' as that term is used under Rule 1.7, and the commonly used phrase 'attorney for the estate' incorrectly describes the relationship existing between a lawyer and the executor. An attorney does not serve as an attorney for the estate; rather he or she serves as an attorney for the executor or other personal representative in that person's dealings concerning the estate of the decedent." (emphasis added); "Thus, the Committee believes, based upon both the court decisions defining the word 'estate,' and the implications arising from their treatment of lawyers 'representing estates,' that the Delaware Courts would conclude any attorney 'for' an estate represents (and indeed could only represent) the executor and not the estate as a separate entity. From this we draw the further conclusion that there is no conflict between the lawyer's representation of the executor when serving in such role and in his role as the donee of an inter vivos gift. We base this conclusion upon the fact that a lawyer represents a client, and not the underlying function that client performs. See, e.g., Rule 1.2. Thus while the executor might have an internal conflict of interest between his different roles, the lawyer has no such conflict because he represents the person and not the role. We note, however, that this conclusion leaves unresolved certain tensions relating to the lawyer's potential fiduciary duties to the beneficiaries of an estate. Although we have found no court decision that thoroughly explores those duties, they do appear to exist, and thus raise questions relating to the lawyer's conduct in relation to the beneficiaries. But, whatever the nature and extent of a lawyer's duties to a decedent's beneficiaries, we do not view them as rising to a level that would implicate a lawyer's duty of loyalty as expressed in Rule 1.7. Accordingly, we believe the attorney here may properly represent the executor in his capacity as the donee of the inter vivos gift." (emphases added)).

At least one court has recognized a different approach, based on odd facts.<sup>1</sup>

Given the importance of defining the "client" for lawyers trying to assess their responsibilities, any uncertainty is remarkable.

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<sup>1</sup> Johnson v. Hart, 692 S.E.2d 239 (Va. 2010) (inexplicably noting that both an executor seeking to pursue a malpractice claim against a lawyer whom she had hired and the lawyer she had hired stipulated to the fact that the lawyer represented the estate and not the executor; not explaining whether the court agreed with that conclusion).

**Best Answer**

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

N 8/12

## Conflicts of Interest Caused by a Lawyer's Role as Executor or Representation of an Executor

### Hypothetical 60

You just merged with a small trust and estate "boutique" firm, and you wonder about some of the conflicts implications of your new partners' roles as executors or lawyers for executors.

- (a) May one of your partners act as executor of the estate of your largest corporate client's former president?

MAYBE

- (b) Will your firm's representation of a local bank in its role as an estate fiduciary prevent you from taking unrelated matters adverse to the bank (without its consent)?

MAYBE

### Analysis

(a) Lawyers frequently act as executors or as lawyers for executors. Both of these roles can implicate ethics principles (especially conflicts of interest rules).

A lawyer acting only as an executor does not himself or herself automatically face conflicts issues -- which arise only when a lawyer represents a client, or acquires information that might affect the lawyer's representation of other clients in other matters.

However, a lawyer's role as executor might well materially affect her, or one of her partner's, representation of another client.

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 provides "informed consent." ABA Model Rule 1.7(b).<sup>1</sup>

One would expect the most difficult type of conflict to involve the lawyer's receipt of information from either the corporation or the executor that would materially affect the lawyer's or the law firm's representation of one or the other. For instance, the executive (or his or her estate) might have a claim against the company, or vice versa. Similarly, the executor of the executive's estate might plan to dump the company stock that is in the estate, etc. This type of information-caused conflict can be the most difficult to resolve, because the information issue sometimes prevents the type of disclosure that must underlie any consent.

The Restatement discusses this issue in the context of a lawyer acting as a fiduciary.

A lawyer's service as executor of a will or trustee of a trust can create conflicts between the duties of the lawyer as such a fiduciary and the interests of clients whom the lawyer represents. When those duties would materially and adversely affect the lawyer's representation of the client, the lawyer must either withdraw from the representation, withdraw from the conflicting office, or, after making suitable adjustments in order to provide adequate legal services to the client . . . , obtain the informed consent of the client.

Restatement (Third) of Law Governing Lawyers § 135 cmt. c (2000).

The Restatement provides two illustrations of how this principle applies

1. Lawyer is outside counsel to Company, a business corporation. Lawyer is also executor of the estate of Boss, the former president of Company. From examining Boss's papers, Lawyer knows that Company has plausible claims against the estate for the return of Company assets taken by

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<sup>1</sup> The ABA Model Rules require such consent to be "confirmed in writing," but many states do not. ABA Model Rule 1.7(b)(4).

Boss for personal use. Lawyer may not represent Company in seeking compensation for the assets because Lawyer's obligation as executor would be to resist the claims of Company. Whether Lawyer may inform Company of the existence of the claims depends on whether the law applicable to executors imposes a duty of confidentiality on Lawyer as executor.

2. The same facts as in Illustration 1, except that Company through another lawyer asserts the claim against Boss's estate. Because of the antagonistic positions between the Company and Lawyer as executor, Lawyer must withdraw from representing Company on unrelated matters, unless Company gives informed consent to Lawyer's continued representation. . . . Whether, due to Lawyer's relationship with Company, Lawyer may continue as executor after Company asserts its claim is determined under the law governing executors.

Id. illus. 1, 2.

Thus, lawyers undertaking a fiduciary role must analyze how it might affect the lawyer's representation of clients, or partners' representation of clients.

**(b)** It can be difficult to analyze the conflicts of interest effects of a lawyer representing a bank or other corporate client in its fiduciary role rather than in its more traditional bank role.

To make matters more complicated, the ethics rules generally do not analyze conflicts using a "real party in interest" standard. In other words, the conflicts rules generally recognize a bank as a client even if the bank is acting in the role of a trustee or other representative capacity.

The ACTEC Commentaries deal with this situation.

A lawyer who is asked to represent a corporate fiduciary in connection with a fiduciary estate should consider discussing with the fiduciary the extent to which the representation might preclude the lawyer from representing an adverse party in an unrelated matter. In the absence of a contrary

agreement, a lawyer who represents a corporate fiduciary in connection with the administration of a fiduciary estate should not be treated as representing the fiduciary generally for purposes of applying MRPC 1.7 with regard to a wholly unrelated matter. In particular, the representation of a corporate fiduciary in a representative capacity should not preclude the lawyer from representing a party adverse to the corporate fiduciary in connection with a wholly unrelated matter, such as a real estate transaction, labor negotiation, or another estate or trust administration.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct Commentary on MRPC 1.7, at 93 (4th ed. 2006),

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

(emphasis added).

This ACTEC analysis does not purport to represent the majority view, and to a certain extent could be seen as "wishful thinking." Of course, a client can always consent to an arrangement under which a lawyer represents the client in its fiduciary capacity but is free to take matters adverse to that client on unrelated matters. However, most courts would not allow such an arrangement, absent consent.

### **Best Answer**

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

N 8/12

## Fiduciaries' Lawyers' Duties to Beneficiaries

### Hypothetical 61

Last week your neighbor hired you to represent her in her role as executor of her wealthy mother's estate. You quickly learned that the mother had executed a lengthy will identifying many beneficiaries, and providing such disproportionate bequests to some of the beneficiaries that you know for certain there will be enormous acrimony within the family. You are worried that this could be very awkward, because you know some of the beneficiaries on a social basis.

As the executor's lawyer, do you owe any duties to the estate's beneficiaries?

**MAYBE**

### Analysis

As in other areas, authorities take varying positions on possible duties that a fiduciary's lawyer owes to beneficiaries.

### **ABA Model Rules**

A 1994 ABA legal ethics opinion explains that a fiduciary's lawyer generally does not owe any special duties to beneficiaries.

A lawyer who represents the fiduciary in a trust or estate matter is subject to the same limitations imposed by the Model Rules of Professional Conduct as are all other lawyers. The fact that the fiduciary has obligations to the beneficiaries of the trust or estate does not in itself either expand or limit the lawyer's obligations to the fiduciary client under the Model Rules, nor impose on the lawyer obligations toward the beneficiaries that the lawyer would not have toward other third parties. Specifically, the lawyer's obligation to preserve the client's confidences under Rule 1.6 is not altered by the circumstance that the client is a fiduciary.

ABA LEO 380 (5/9/94) (emphasis added).



## Restatement

The Restatement provides a much deeper analysis than the ABA Model Rules, and also describes various situations in which a fiduciary's lawyer might be liable to beneficiaries.

The Restatement explains that a lawyer will be liable

to a nonclient when and to the extent that: (a) the lawyer's client is a trustee, guardian, executor, or fiduciary acting primarily to perform similar functions for the nonclient; (b) the lawyer knows that appropriate action by the lawyer is necessary with respect to a matter within the scope of the representation to prevent or rectify the breach of a fiduciary duty owed by the client to the nonclient, where (i) the breach is a crime or fraud or (ii) the lawyer has assisted or is assisting the breach; (c) the nonclient is not reasonably able to protect its rights; and (d) such a duty would not significantly impair the performance of the lawyer's obligations to the client.

Restatement (Third) of Law Governing Lawyers § 51(4) (2000).

A comment explains this concept.

A lawyer representing a client in the client's capacity as a fiduciary (as opposed to the client's personal capacity) may in some circumstances be liable to a beneficiary for a failure to use care to protect the beneficiary. The duty should be recognized only when the requirements of Subsection (4) are met and when action by the lawyer would not violate applicable professional rules . . . . The duty arises from the fact that a fiduciary has obligations to the beneficiary that go beyond fair dealing at arm's length. A lawyer is usually so situated as to have special opportunity to observe whether the fiduciary is complying with those obligations. Because fiduciaries are generally obliged to pursue the interests of their beneficiaries, the duty does not subject the lawyer to conflicting or inconsistent duties. A lawyer who knowingly assists a client to violate the client's fiduciary duties is civilly liable, as would be a nonlawyer . . . . Moreover, to the extent that the lawyer has assisted in creating a risk of injury, it is appropriate to impose a preventive and corrective duty on the lawyer . . . .

Restatement (Third) of Law Governing Lawyers § 51 cmt. h (2000). This comment explains the limitation on this general principle.

The duty recognized by Subsection (4) is limited to lawyers representing only a limited category of the persons described as fiduciaries -- trustees, executors, guardians, and other fiduciaries acting primarily to fulfill similar functions. Fiduciary responsibility, imposing strict duties to protect specific property for the benefit of specific, designated persons, is the chief end of such relationships. The lawyer is hence less likely to encounter conflicting considerations arising from other responsibilities of the fiduciary-client than are entailed in other relationships in which fiduciary duty is only a part of a broader role. Thus, Subsection (4) does not apply when a client is a partner in a business partnership, a corporate officer or director, or a controlling stockholder.

Id.

For obvious reasons, the lawyer's liability varies directly with the client's fiduciary duties.

The scope of a client's fiduciary duties is delimited by the law governing the relationship in question . . . . Whether and when such law allows a beneficiary to assert derivatively the claim of a trust or other entity against a lawyer is beyond the scope of this Restatement . . . . Even when a relationship is fiduciary, not all the attendant duties are fiduciary. Thus, violations of duties of loyalty by a fiduciary are ordinarily considered breaches of fiduciary duty, while violations of duties of care are not.

Id. The comment also deals with a situation in which the lawyer represents both the fiduciary and a beneficiary.

Sometimes a lawyer represents both a fiduciary and the fiduciary's beneficiary and thus may be liable to the beneficiary as a client . . . and may incur obligations concerning conflict of interests . . . . A lawyer who represents only the fiduciary may avoid such liability by making clear to the beneficiary that the lawyer represents the fiduciary rather than the beneficiary . . . .

Id.

The lawyer's liability in this setting arises only when the lawyer knows of the client's breach of fiduciary duty.

The duty recognized by Subsection (4) arises only when the lawyer knows that appropriate action by the lawyer is necessary to prevent or mitigate a breach of the client's fiduciary duty. As used in this Subsection and Subsection (3) . . . , "know" is the equivalent of the same term defined in ABA Model Rules of Professional Conduct, Terminology P [5] (1983) (" . . . 'Knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances."). The concept is functionally the same as the terminology "has reason to know" as defined in Restatement Second, Torts § 12(1) (actor has reason to know when actor "has information from which a person of reasonable intelligence or of the superior intelligence of the actor would infer that the fact in question exists, or that such person would govern his conduct upon the assumption that such facts exists."). The "know" terminology should not be confused with "should know" (see id. § 12(2)). As used in Subsection (3) and (4) "knows" neither assumes nor requires a duty of inquiry.

Id. In essence, the lawyer may give the client/fiduciary the benefit of the doubt when following his or her instructions.

Generally, a lawyer must follow instruction of the client-fiduciary . . . and may assume in the absence of contrary information that the fiduciary is complying with the law. The duty stated in Subsection (4) applies only to breaches constituting crime or fraud, as determined by applicable law . . . or those in which the lawyer has assisted or is assisting the fiduciary. A lawyer assists fiduciary breaches, for example, by preparing documents needed to accomplish the fiduciary's wrongful conduct or assisting the fiduciary to conceal such conduct. On the other hand, a lawyer subsequently consulted by a fiduciary to deal with the consequences of a breach of fiduciary duty committed before the consultation began is under no duty to inform the beneficiary of the breach or otherwise to act to rectify it. Such a duty would prevent a person serving as fiduciary

from obtaining the effective assistance of counsel with respect to such a past breach.

Id. The liability in this scenario also arises only if the beneficiary cannot protect his or her own rights.

Liability under Subsection (4) exists only when the beneficiary of the client's fiduciary duty is not reasonably able to protect its rights. That would be so, for example, when the fiduciary client is a guardian for a beneficiary unable (for reasons of youth or incapacity) to manage his or her own affairs. By contrast, for example, a beneficiary of a family voting trust who is in business and has access to the relevant information has no similar need of protection by the trustee's lawyer. In any event, whether or not there is liability under this Section, a lawyer may be liable to a nonclient . . . .

Id.

Finally, a lawyer faces liability in this setting only if it would not conflict with some other duty that the lawyer owes.

A lawyer owes no duty to a beneficiary if recognizing such duty would create conflicting or inconsistent duties that might significantly impair the lawyer's performance of obligations to the lawyer's client in the circumstances of the representation. Such impairment might occur, for example, if the lawyer were subject to liability for assisting the fiduciary in an open dispute with a beneficiary or for assisting the fiduciary in exercise of its judgment that would benefit one beneficiary at the expense of another. For similar reasons, a lawyer is not subject to liability to a beneficiary under Subsection (4) for representing the fiduciary in a dispute or negotiation with the beneficiary with respect to a matter affecting the fiduciary's interests.

Under Subsection (4) a lawyer is not liable for failing to take action that the lawyer reasonably believes to be forbidden by professional rules (see § 54(1)). Thus, a lawyer is not liable for failing to disclose confidences when the lawyer reasonably believes that disclosure is forbidden. For example, a lawyer is under no duty to disclose a prospective breach in a jurisdiction that allows disclosure only regarding a crime or fraud threatening imminent death or substantial

bodily harm. However, liability could result from failing to attempt to prevent the breach of fiduciary duty through means that do not entail disclosure. In any event, a lawyer's duty under this Section requires only the care set forth in § 52.

Id.

Several illustrations show how these principles work.

5. Lawyer represents Client in Client's capacity as trustee of an express trust for the benefit of Beneficiary. Client tells Lawyer that Client proposes to transfer trust funds into Client's own account, in circumstances that would constitute embezzlement. Lawyer informs Client that the transfer would be criminal, but Client nevertheless makes the transfer, as Lawyer then knows. Lawyer takes no steps to prevent or rectify the consequences, for example by warning Beneficiary or informing the court to which Client as trustee must make an annual accounting. The jurisdiction's professional rules do not forbid such disclosures . . . . Client likewise makes no disclosure. The funds are lost, to the harm of Beneficiary. Lawyer is subject to liability to Beneficiary under this Section.

6. Same facts as in Illustration 5, except that Client asserts to Lawyer that the account to which Client proposes to transfer trust funds is the trust's account. Even though lawyer could have exercised diligence and thereby discovered this to be false, Lawyer does not do so. Lawyer is not liable to the harmed Beneficiary. Lawyer did not owe Beneficiary a duty to use care because Lawyer did not know (although further investigation would have revealed) that appropriate action was necessary to prevent a breach of fiduciary duty by Client.

7. Same facts as in Illustration 5, except that Client proposes to invest trust funds in a way that would be unlawful, but would not constitute a crime or fraud under applicable law. Lawyer's services are not used in consummating the investment. Lawyer does nothing to discourage the investment. Lawyer is not subject to liability to Beneficiary under this Section.

Id. illus. 5, 6, 7.

The Restatement's detailed analysis of a fiduciary's lawyer's duties to the beneficiaries provide useful guidance to lawyers involved in this situation.

### **ACTEC Commentaries**

The ACTEC Commentaries also deal with this complicated situation.

After determining that a lawyer generally represents the fiduciary rather than an "estate" or a "trust," the ACTEC Commentaries deal with another obvious question -- what duties does such a lawyer owe the beneficiaries of an estate or trust?

The ACTEC Commentaries conclude that a lawyer representing a fiduciary in an individual capacity owed "few, if any, duties to the beneficiaries of the fiduciary estate other than the duties the lawyer owes to other third parties generally."

The scope of the representation of a fiduciary is an important factor in determining the nature and extent of the duties owed to the beneficiaries of the fiduciary estate. For example, a lawyer who is retained by a fiduciary individually may owe few, if any, duties to the beneficiaries of the fiduciary estate other than duties the lawyer owes to other third parties generally. Thus, a lawyer who is retained by a fiduciary to advise the fiduciary regarding the fiduciary's defense to an action brought against the fiduciary by a beneficiary may have no duties to the beneficiaries beyond those owed to other adverse parties or nonclients. In resolving conflicts regarding the nature and extent of the lawyer's duties, some courts have considered the source from which the lawyer is compensated. The relationship of the lawyer for a fiduciary to a beneficiary of the fiduciary estate and the content of the lawyer's communications regarding the fiduciary estate may be affected if the beneficiary is represented by another lawyer in connection with the fiduciary estate. In particular in such a case, unless the beneficiary and the beneficiary's lawyer consent to direct communications, the lawyer for the fiduciary should communicate with the lawyer for the beneficiary regarding matters concerning the fiduciary estate rather than communicating directly with the beneficiary. . . . However, even though a separately represented beneficiary and the

fiduciary are adverse with respect to a particular matter, the fiduciary and a lawyer who represents the fiduciary generally continue to be bound by duties to the beneficiary. Additionally, the lawyer's communications with the beneficiaries should not be made in a manner that might lead the beneficiaries to believe that the lawyer represents the beneficiaries in the matter except to the extent the lawyer actually does represent one or more of them.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.2, at 36 (4th ed. 2006), [http://www.actec.org/Documents/misc/ACTEC\\_Commentaries\\_4th\\_02\\_14\\_06.pdf](http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf).

The Commentaries provide some analysis of those peripheral duties.

The nature and extent of the lawyer's duties to the beneficiaries of the fiduciary estate may vary according to the circumstances, including the nature and extent of the representation and the terms of any understanding or agreement among the parties (the lawyer, the fiduciary, and the beneficiaries). The lawyer for the fiduciary owes some duties to the beneficiaries of the fiduciary estate although he or she does not represent them. The duties, which are largely restrictive in nature, prohibit the lawyer from taking advantage of his or her position to the disadvantage of the fiduciary estate or the beneficiaries. In addition, in some circumstances the lawyer may be obligated to take affirmative action to protect the interests of the beneficiaries. Some courts have characterized the beneficiaries of a fiduciary estate as derivative or secondary clients of the lawyer for the fiduciary. The beneficiaries of a fiduciary estate are generally not characterized as direct clients of the lawyer for the fiduciary merely because the lawyer represents the fiduciary generally with respect to the fiduciary estate.

Id. (emphases added).

Not surprisingly, the Commentaries warn lawyers that they should carefully explain all of this to their clients and to the beneficiaries.

As a general rule, the lawyer for the fiduciary should inform the beneficiaries that the lawyer has been retained by

the fiduciary regarding the fiduciary estate and that the fiduciary is the lawyer's client; that while the fiduciary and the lawyer will, from time to time, provide information to the beneficiaries regarding the fiduciary estate, the lawyer does not represent them; and that the beneficiaries may wish to retain independent counsel to represent their interests.

Id. at 33.

As in other areas, the ACTEC Commentaries take a more subtle (and therefore a more confusing) approach than the ABA Model Rules and the Restatement. For instance, the ACTEC Commentaries in one place explain that the fiduciary's lawyer owes "few, if any, duties to the beneficiaries." A later provision indicates clearly that such a lawyer "owes some duties to the beneficiaries of the fiduciary's estate." Therefore, the phrase "few, if any" seems to mischaracterize that later provision. All in all, the ACTEC Commentaries seem to recognize more duties than the ABA Model Rules or the Restatement.

### **State Authorities**

At least one state legal ethics opinion adopted a narrow view of a fiduciary's lawyer's duties to beneficiaries. Interestingly, this legal ethics opinion cites both the ABA legal ethics opinion and the ACTEC Commentaries in its analysis, even though those two sources take fairly divergent approaches to the issue.

- Kentucky LEO KBA E-401 (9/1997) (explaining that a lawyer representing a fiduciary did not owe any duties to the beneficiaries, but could jointly represent a fiduciary and a beneficiary under certain circumstances; "This Committee adopts the ACTEC Commentaries because the Commentaries properly set forth a lawyer's ethical obligations. Further, this Committee agrees with ABA Formal Opinion 94-380, and adopts the majority view, that is, that a lawyer who represents a fiduciary does not also represent the beneficiaries. We reject the view that a lawyer who represents a fiduciary obligations to the beneficiaries that in some circumstances will override obligations otherwise owed by the lawyer to the fiduciary, such as the



obligation of confidentiality. We also reject the view that when a lawyer represents a fiduciary in a trust or estate matter, the client is not the fiduciary, but is the trust estate.").

**Best Answer**

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

N 8/12

## Joint Representations in Estate Administration

### Hypothetical 62

One of your long-time clients died recently, and named his wife and a local bank as co-executors.

- (a) May you jointly represent both the wife and the bank in their role as executors?

YES

- (b) May you represent both the wife and one of the other beneficiaries (the client's brother)?

YES

### Analysis

As in the estate planning context, undertaking joint representations of multiple clients on the same matter creates complications in the estate administration context.

- (a) Lawyers undertaking a joint representation must always consider both (1) the possibility of some adversity arising between them, and (2) the information flow among the jointly represented clients.

The ACTEC Commentaries deal with this type of joint representation.

[A] lawyer may represent co-fiduciaries whose interests do not conflict to an impermissible degree.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of

Professional Conduct, Commentary on MRPC 1.7, at 92 (4th ed. 2006),

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

A comment notes the possibility of adversity developing between the joint clients.

Lawyer (L) represented Husband (H) and Wife (W) jointly with respect to estate planning matters. H died leaving a will

that appointed Bank (B) as executor and as trustee of a trust for the benefit of W that meets the QTIP requirements under I.R.C. 2056(b)(7). L has agreed to represent B and knows that W looks to him as her lawyer. L may represent both B and W if the requirements of MRPC 1.7 are met. If a serious conflict arises between B and W, L may be required to withdraw as counsel for B or W or both. L may inform W of her elective share, support, homestead or other rights under the local law without violating MRPC 1.9 (Duties to Former Clients). However, without the informed consent of all affected parties confirmed in writing, L should not represent W in connection with an attempt to set aside H's will or to assert an elective share.

Id. at 93.

Thus, joint representations in the estate administration context follow the same basic rules as other joint representations. Lawyers should not undertake such joint representations if adversity seems inevitable, but may undertake such joint representations otherwise. If adversity develops, the lawyer must withdraw from both representations absent some prospective or current consent.

In addition to that loyalty analysis, lawyers undertaking joint representations in the estate administration context must also deal with the information flow issue.

**(b)** The ACTEC Commentaries also deal with a lawyer's joint representation of a fiduciary and a beneficiary.

A client who is adequately informed may waive some conflicts that might otherwise prevent the lawyer from representing another person in connection with the same or a related matter. These conflicts are said to be "waivable." Thus, a surviving spouse who serves as the personal representative of her husband's estate may give her informed consent, confirmed in writing, to permit the lawyer who represents her as personal representative also to represent a child who is a beneficiary of the estate. The lawyer also would need an informed consent from the child that is confirmed in writing before undertaking such a dual representation.

Id. (emphasis added).

It is not clear from the ACTEC Commentaries whether the proposed representation is a joint representation on the same matter, or separate representations on the same matter. If the former, the lawyer would have to deal with both the loyalty issues and the information flow issues discussed above.

These Commentaries follow the ABA Model Rule 1.7's insistence that the clients' consent be in writing. Some states do not require written consent.

### **Best Answer**

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

N 8/12

## Effect of a Joint Representation in Estate Administration

### Hypothetical 63

For several years, you have jointly represented three beneficiaries of a large estate, as well the trustee named in the trust instrument. That trustee just died, and was replaced earlier this week by the successor trustee named in the trust instrument -- who is from the opposite side of this large family, and hostile to the three beneficiaries you represent. Both the estate planning and the estate administration has been a nightmare because of the family's dysfunctional nature, and now you wonder about the effect of this new trustee's involvement.

- (a) Will the successor trustee be entitled to see all of your files created during the joint representation of the three beneficiaries and the now-deceased initial trustee?

### YES (PROBABLY)

- (b) Will the successor trustee be entitled to see the flurry of emails you sent to the three beneficiaries after the initial trustee died?

### NO (PROBABLY)

### Analysis

Absent some agreement to the contrary, any jointly represented client normally is entitled to see the files created by the lawyer. Because the successor trustee steps into the shoes of the initial trustee, he or she presumably can have access to the files generated by the lawyer representing the initial trustee -- and any other clients the lawyer was jointly representing along with the initial trustee.

**(a)-(b)** This hypothetical comes from a 2010 California case -- in which the court held that the lawyer jointly representing the three beneficiaries and the initial trustee had to turn over to the successor trustee any files created during the joint representation, but not created after the initial trustee's death.

- Sheen v. Galliani, No. B206086, 2010 Cal. App. Unpub. LEXIS 1302, at \*4, \*8, \*8-9, \*11, \*13 (Cal. Ct. App. Feb. 24, 2010) (analyzing a situation in which a lawyer jointly represented a trustee and three beneficiaries of a trust, who ultimately prevailed at a trial and successfully restored "several million dollars worth of property to the trust"; explaining that the trustee died, and was replaced pursuant to the trust by another family member who was adverse to the beneficiary; ultimately concluding that the successor trustee was entitled to the files of the lawyer who had jointly represented the predecessor trustee and the beneficiaries; "Anthony Sheen's asserted right to the trust file derived from his status as successor to Ringgold, the predecessor trustee whom the attorneys represented -- with the beneficiaries -- in the section 850 proceedings [litigation in which Howell and Galliani represented the predecessor trustee and the beneficiaries in restoring property to the trust]. Generally speaking, a successor trustee succeeds to all the rights of the predecessor in that capacity, including the right to receive the trust file of an attorney previously retained to assist in administering the trust." (emphasis added); "Primarily, appellants contend that Howell and Galliani [lawyers who had jointly represented the predecessor trustee and the beneficiaries] represented Sheen's predecessor Ringgold only as an individual, not as a trustee, in the section 850 proceeding. Conjunctively, appellants assert that the section 850 proceeding did not involve trust administration. . . . The record does not support these contentions."; "Howell's retainer with Ringgold specified that she was being represented as both individual beneficiary and trustee. The absence of similar language from Galliani's retainer cannot be seen as retracting the original representation, and of course the amended petition filed under Galliani's auspices, like its predecessor, alleged Ringgold's trustee status. Howell later declared under oath: 'I was retained to return property to the [trust] . . . . I represented [Ringgold] as a beneficiary and as trustee to litigate to put the property back . . . .['"; finding that the successor trustee was not entitled to any files prepared after the predecessor trustee died; also rejecting the beneficiaries' argument that the successor trustee might misuse the files; "Appellants argue that no privileged trustee communications should be disclosed to Anthony Sheen because he may yet be removed as trustee, as a result of the beneficiaries' still-pending 2006 petition for removal. Additionally, it is argued that he poses a potential threat of a breach of confidentiality and improper dissemination. These arguments are simply speculative. Moreover, they cannot overcome Anthony Sheen's existing position as trustee and successor to Ringgold."; also rejecting the lawyers' argument that the successor beneficiary should not receive their work product, because they also have a work product claim; ultimately holding that "[d]ifferent considerations, and a different result, prevail with respect to an attorney's obligation to transfer a former client's papers to the client. The present order's preclusion of work product privilege objections to the transfer of files was not erroneous.").

This principle applies in other situations too. Lawyers undertaking joint representations therefore must remember that one of the lawyer's clients (or that client's successor) might not be as friendly as at the beginning of the representation. However, the general rules usually require the lawyer to provide the lawyer's files even to these unfriendly former clients (or their successors). Lawyers might be able to vary this rule (with their clients' consent) -- if all of the participants in the joint representation agree to a "keep secrets" approach.

**Best Answer**

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

N 8/12

## Representing a Person Who is Both an Executor and a Beneficiary

### Hypothetical 64

Your neighbor just asked to see you about possibly representing her in connection with her wealthy mother's estate. She and her brother are the only beneficiaries of the estate. They have not been on friendly terms for years, and your neighbor thinks that her mother's designation of her (rather than her brother) as the executor of the estate will only exacerbate their personal conflicts. Your neighbor would like you to represent her both in her role as executor and in her status as a beneficiary.

May a lawyer represent a person in her role both as a fiduciary and as a beneficiary?

**MAYBE**

### Analysis

Determining the permissibility of a joint representation in the estate administration context obviously starts with identifying the "client" for conflicts analysis purposes.

Most courts and bars consider an estate administration lawyer's "client" to be the executor rather than the "estate" or "trust" -- because those are not considered separate legal entities like corporations.

As if this issue were not complicated enough, lawyers must also analyze whether they can represent the executor or other fiduciary in both that person's fiduciary and individual roles.<sup>1</sup>

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<sup>1</sup> Not surprisingly, lawyers may represent a fiduciary in his or her fiduciary role, and also represent the same individual in unrelated matters.

Lawyer (L) represents Trustee (T) as trustee of a trust created by X. L may properly represent T in connection with other matters that do not involve a conflict of interest, such as the preparation of a will or other personal matters not related to the trust. L should not charge the trust for any personal services that are performed for T. Moreover, in order to



Not surprisingly, the American College Trusts & Estates Counsel has dealt with this issue.

The ACTEC Commentaries first address the lawyer's representation of someone in a fiduciary role,<sup>2</sup> as compared to the lawyer's representation of him or her in an individual capacity.

A lawyer represents the fiduciary generally (i.e., in a representative capacity) when the lawyer is retained to advise the fiduciary regarding the administration of the fiduciary estate or matters affecting the estate. On the other hand, a lawyer represents a fiduciary individually when the lawyer is retained for the limited purpose of advancing the interests of the fiduciary and not necessarily the interests of the fiduciary estate or the persons beneficially interested in the estate. For example, a lawyer represents a fiduciary individually when the lawyer, who may or may not have previously represented the fiduciary generally with respect to the fiduciary estate, is retained to negotiate with the beneficiaries regarding the compensation of the fiduciary or to defend the fiduciary against charges or threatened charges of maladministration of the fiduciary estate.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.2, at 35 (4th ed. 2006),  
[http://www.actec.org/Documents/misc/ACTEC\\_Commentaries\\_4th\\_02\\_14\\_06.pdf](http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf).

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avoid misunderstandings, L should charge T for any substantial personal services that L performs for T.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct Commentary on MRPC 1.7, at 93 (4th ed. 2006), [http://www.actec.org/Documents/misc/ACTEC\\_Commentaries\\_4th\\_02\\_14\\_06.pdf](http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf).

<sup>2</sup> Not surprisingly, The ACTEC Commentaries allow lawyers to jointly represent co-fiduciaries.

[A] lawyer may represent co-fiduciaries whose interests do not conflict to an impermissible degree. A lawyer who represents co-fiduciaries may also represent one or both of them as beneficiaries so long as no disabling conflict arises.

Id. at 92.

The ACTEC Commentaries then acknowledge that a lawyer may represent the same person who is both an executor and beneficiary (with possible interests adverse to other beneficiaries' interests).

A lawyer who represents a fiduciary generally may normally also undertake to represent the fiduciary individually. If the lawyer has previously represented the fiduciary generally and is now representing the fiduciary individually, the lawyer should advise the beneficiaries of this fact.

Id.

An illustration explains how this principle applies.

Example 1.2-1. Lawyer (L) drew a will for X in which X left her entire estate in equal shares to A and B and appointed A as executor. X died, survived by A and B. A asked L to represent her both as executor and as beneficiary. L explained to A the duties A would have as personal representative, including the duty of impartiality toward the beneficiaries. L also described to A the implications of the common representation, to which A consented. L may properly represent A in both capacities. However, L should inform B of the dual representation and indicate that B may, at his or her own expense, retain independent counsel. In addition, L should maintain separate records with respect to the individual representation of A, who should be charged a separate fee (payable by A individually) for that representation. L may properly counsel A with respect to her interests as beneficiary. However, L may not assert A's individual rights on A's behalf in a way that conflicts with A's duties as personal representative. If a conflict develops that materially limits L's ability to function as A's lawyer in both capacities, L should withdraw from representing A in one or both capacities.

Id. at 33.

Thus the ACTEC Commentaries acknowledge that a lawyer can represent the same person in more than one role, but describe limits on those representations and various logistic requirements (maintaining separate files, properly billing for the services,

etc.). In essence, the representation is not considered "joint" because there is only one client -- although that client wears different hats.

Other authorities take this approach.

- Baker Manock & Jensen v. Superior Court, 96 Cal. Rptr. 3d 785, 787, 789, 791, 792 (Cal. Ct. App. 2009) (analyzing a situation in which a law firm which had prepared the decedent's will represented two of the decedent's four sons as co-executors of the will; ultimately overturning the lower court's disqualification of the law firm from representing both the executors and one of the executors in his individual capacity as a beneficiary of his mother's estate -- in opposing his brother's application seeking judicial confirmation that a petition would not violate the "no contest" clause in his mother's will; "The trial court concluded the law firm had a conflict of interest. The court reasoned as follows: Because it had represented Lillian [decedent] in the drafting of her will, the law firm had a 'duty of loyalty' to Lillian. Because it drafted the will, the law firm had a 'duty of care' to the beneficiaries of the will. Because it represented the executor, the law firm was not permitted to 'represent a beneficiary of an estate in a controversy with other beneficiaries except in those unusual cases where each of the parties expressly consents in writing and the attorney is not professionally hampered by the conflict problem.'" (citation omitted); ultimately holding that "we conclude the attorney for the executor does not have a conflict of interest merely because he or she represents one beneficiary of a will in a dispute with another beneficiary, unless such representation presents a conflict between two clients of the attorney, namely, the executor and the represented beneficiary" (emphasis added); "[W]here the executor has a good faith belief that a contestant (whether a beneficiary or a stranger to the will) seeks to deprive the estate of assets rightfully belonging to the estate, it cannot be a conflict of interest for the executor's attorney merely to represent the executor in the discharge of the executor's duty to preserve the estate."; "[I]n the case before us there is no divergence of the interests of George as executor and George as beneficiary. Accordingly, there is no conflict of interest in representing both the executor and the beneficiary." (emphasis added)).
- Virginia LEO 1778 (5/19/03) (a lawyer may represent a husband both in his role as administrator of an estate and in his role as individual beneficiary in litigation "regarding whether certain real estate belongs in the augmented estate."; although the husband has different roles, he is be considered the same client for conflicts purposes).
- Virginia LEO 1599 (8/12/94) (explaining that a lawyer representing an executor and one of two beneficiaries does not have a conflict unless the lawyer also represents the other beneficiary; noting that the lawyer must advise the client that communications with the client as beneficiary may not

- be entitled to attorney-client privilege protection, because communications with the client as fiduciary may similarly not be protected from disclosure to the beneficiaries; explaining that the lawyer has "no attorney-client relationship with the beneficiaries of the estate other than the executor," and has no "derivative duty" to the other beneficiary by virtue of the client's fiduciary duty (as executor) to the other beneficiary, although the lawyer must "be alert to indications that [the other beneficiary] does not understand the attorney's role;" warning that the lawyer may not advise or represent the executor in actions that breach the executor's fiduciary duty, but concluding that the lawyer "does not take on the executor's duties to the beneficiaries simply by performing the executor's administrative tasks;" reminding the lawyer that he or she may not charge the estate for any services rendered to the client in the client's capacity as a beneficiary).
- Delaware LEO 1989-4 (1989) (holding that a lawyer representing an executor could also represent the same individual in his role as the donee of a gift; explaining that "[a]ccordingly, we are of the view an 'estate' has no legal existence, but instead describes the property and debts of a decedent. Given that conclusion, we do not believe an estate can be a 'client' as that term is used under Rule 1.7, and the commonly used phrase 'attorney for the estate' incorrectly describes the relationship existing between a lawyer and the executor. An attorney does not serve as an attorney for the estate; rather he or she serves as an attorney for the executor or other personal representative in that person's dealings concerning the estate of the decedent."; "Thus, the Committee believes, based upon both the court decisions defining the word 'estate,' and the implications arising from their treatment of lawyers 'representing estates,' that the Delaware Courts would conclude any attorney 'for' an estate represents (and indeed could only represent) the executor and not the estate as a separate entity. From this we draw the further conclusion that there is no conflict between the lawyer's representation of the executor when serving in such role and in his role as the donee of an inter vivos gift. We base this conclusion upon the fact that a lawyer represents a client, and not the underlying function that client performs. [See], e.g., Rule 1.2. Thus while the executor might have an internal conflict of interest between his different roles, the lawyer has no such conflict because he represents the person and not the role. We note, however, that this conclusion leaves unresolved certain tensions relating to the lawyer's potential fiduciary duties to the beneficiaries of an estate. Although we have found no court decision that thoroughly explores those duties, they do appear to exist, and thus raise questions relating to the lawyer's conduct in relation to the beneficiaries. But, whatever the nature and extent of a lawyer's duties to a decedent's beneficiaries, we do not view them as rising to a level that would implicate a lawyer's duty to loyalty as expressed in Rule 1.7. Accordingly, we believe the attorney here may properly represent the executor in his capacity as the donee of the inter vivos gift." (emphases added)).

Even though most courts and bars would find such a joint representation ethically permissible in some circumstances, a lawyer might well choose not to undertake such a representation -- because of the obvious emotional issues involved. Any lawyer undertaking such a representation must also deal with some of the limits on the representation discussed above, as well as some of the logistical issues (including proper billing).

**Best Answer**

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

N 8/12

## Ex Parte Communications

### Hypothetical 65

You have served as an executor and also represented executors, and frequently have had to deal with frustrated beneficiaries and their lawyers. You frequently have found that beneficiaries' lawyers seem to discourage settlements, and you suspect that they may do so simply to run up their fees. You wonder to what extent you can deal directly with beneficiaries in those circumstance.

- (a) If you represent an executor, may you call a beneficiary directly without the beneficiary's lawyer's consent?

**NO**

- (b) If you are acting as an executor, may you call a beneficiary directly without the beneficiary's lawyer's consent?

**YES**

### Analysis

Although the ex parte communication rule applies the same way in the estate administration context as in other contexts, the varying roles that lawyers can play in the estate administration context sometimes has somewhat surprising practical effects.

(a) ABA Model Rule 4.2 clearly indicates that "[i]n representing a client" a lawyer "shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter" -- unless that other lawyer consents. The Restatement takes the same approach. Restatement (Third) of Law Governing Lawyers § 99(1) (2000).

Thus, a lawyer representing an executor may not communicate ex parte with another person the lawyer knows to be represented in the matter. If the beneficiary has a lawyer, that lawyer must consent to all ex parte communications.

(b) The ABA Model Rule begins with the phrase "[i]n representing a client, . . . ." ABA Model Rule 4.2. Thus, the provision only applies when the lawyer acts in a representational capacity. Restatement (Third) of Law Governing Lawyers § 99(1) (2000) uses the same phrase.

Although the ABA Model Rules and comments do not deal with the significance of that phrase, the law is clear that lawyers acting in other capacities are not bound by the general prohibition on ex parte communications.

In some situations involving ex parte contacts, lawyers are not acting as client representatives.

- Maryland LEO 2006-7 (2006) (holding that a lawyer appointed by the court as guardian of the property of a disabled nursing home resident may communicate directly with the nursing facility, even though the facility is represented by a lawyer; contrasting the role of a guardian with that of a lawyer; "A guardian is not an agent of a ward, because guardians are not subject to the ward's control; rather, the guardians serve a unique role as agents of the court. In reality the court is the guardian; an individual who is given that title is merely an agent or arm of the tribunal in carrying out its sacred responsibility. Thus, a ward may not select, instruct, terminate, or otherwise control his guardian. In contrast, an attorney-client relationship is 'an agent-principal relationship.' . . . 'A client's right to select and direct his or her attorney is a fundamental aspect of attorney-client relations. Thus, the principal-agent relationship between a client and an attorney is always a consensual one.' From this explication, it does not appear that the member appointed by the court as Guardian 'represents' the Resident. From your recitation of the facts, no attorney-client relationship exists, only a guardian-ward relationship. Accordingly, MRPC 4.2 is not applicable to communications between the Guardian and the Nursing Facility." (citation omitted)).
- Arizona LEO 03-02 (4/2003) (addressing ex parte contact with debtors by lawyers who are acting as bankruptcy trustees; "The lawyer-trustee may communicate directly with persons who are represented by counsel concerning the subject matter of the bankruptcy case. This direct communication is limited to situations where an attorney is appointed to act exclusively as a bankruptcy trustee. If the attorney has dual appointment to act also as attorney for the trustee, then ER 4.2 applies and prohibits ex parte contacts and communications, unless otherwise authorized by law.").

Interestingly, the ACTEC Commentaries do not address ABA Model Rule 4.2. Still, there is no reason to think that a lawyer acting as an executor (and not representing anyone in the matter) would be prohibited from ex parte communications with represented persons in the matter.

At first blush, this seems like an odd conclusion. To the extent that the prohibition on ex parte communications rests on a lawyer's ability to take advantage of another person by depriving that person of a lawyer's assistance, one would think that the rule would apply equally to a lawyer representing a client or acting in some other capacity. After all, whether acting in a representational or non-representational role, the lawyer presumably can use the same persuasive skills. However, states apply the ex parte rule as it is written -- and apply it only to a lawyer who is "representing a client" in the ex parte communication.

### **Best Answer**

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

N 8/12



## Witness-Advocate Rule

### Hypothetical 66

You represented a woman who entered into a pre-nuptial agreement with a wealthy socialite. The socialite just died, and your former client now wants you to represent her in challenging the pre-nup. You worry that you might have to be a witness in the case.

May you represent the socialite in challenging the pre-nup?

**MAYBE**

### Analysis

The witness-advocate rule applies to lawyers in all contexts, but lawyers involved in estate planning or administration might find the rule more likely to apply to them than to other lawyers. Whenever a lawyer assists a client in a transaction that might later be the subject of litigation, the lawyer must very carefully assess the rule's possible application to their representation of the client in litigation involving the transaction.

Every state's ethics rules prohibit the same lawyer from acting as an advocate for a client while testifying as a witness at the same trial -- absent unusual circumstances. ABA Model Rule 3.7.

Under the old ABA Model Code formulation, a lawyer could not even accept a representation if the lawyer was likely to be a witness. ABA Model Code of Prof'l Responsibility DR 5-101(A). An individual lawyer's disqualification was imputed to the entire law firm. Id. DR 5-101(B), DR 5-102(A).

However, the witness-advocate rule has dramatically lost its force over the past several decades.

First, the ABA Model Rules do not speak to a lawyer's decision whether or not to undertake a representation. Instead, the rules indicate that a lawyer "shall not act as advocate at a trial" in which the lawyer might testify. ABA Model 3.7(a) (emphasis added). Although courts and bars continue to debate the extent to which a lawyer expecting to testify at a trial may engage in pre-trial activities, the ABA Model Rule's focus on the trial (rather than the acceptance of a representation) clearly weakens the witness-advocate rule's strength.

Second, the ABA Model Rule's prohibition only applies if the lawyer is "likely to be a necessary witness." ABA Model Rule 3.7(a) (emphasis added). Thus, the rule does not prevent a lawyer from acting as an advocate if the lawyer could only provide corroborative or cumulative testimony. In addition, this formulation deprives an adversary of the power to call the lawyer as a fact witness, in an effort to knock the lawyer out as an advocate. The old ABA Code applied different standards depending on who might call the lawyer as witness. ABA Model Code of Prof'l Responsibility DR 5-102. The ABA Model Rule formulation looks only at whether the lawyer is a necessary witness.

Third, ABA Model Rule 3.7 does not impute an individual lawyer's disqualification under the witness-advocate rule to the entire law firm. ABA Model Rule 3.7(b). The law firm is disqualified only if the lawyer's testimony would harm the client. In that situation, the normal conflicts rules apply.

To be sure, the ABA Model Rules follow the ABA Model Code in recognizing only very narrow exceptions to the witness-advocate rule. A lawyer who must be a "necessary" witness at a trial can continue to act as advocate only if the lawyer's

testimony "relates to an uncontested issue," involves the "nature and value of legal services" the lawyer has rendered in the case, or if the lawyer's disqualification would "work substantial hardship on the client." ABA Model Rule 3.7(a)(1)-(3). Courts apply the last exception very narrowly, worried that it might swallow the witness-advocate rule if applied liberally.

A lawyer determining the effect of the witness-advocate rule must first assess whether she can help the client more as a witness than as an advocate. If so, the lawyer is a "necessary" witness, and must abandon the advocate role in favor of the witness role. If the adversary argues that the lawyer is a necessary witness, the lawyer and her client should assess the strategic and tactical factors -- such as the lawyer's inability to explain historical facts or her role if the adversary arranges for the lawyer to be mentioned during the adversary's case or on cross-examination.

Thus, there is no per se rule prohibiting a lawyer from helping a client in a transaction and then representing the client in litigation involving that transaction, but lawyers must always keep the witness-advocate rule in mind.

### **Best Answer**

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

N 8/12

## Duration of the Confidentiality Duty and Attorney-Client Privilege

### Hypothetical 67

Over lunch today, one of your partners told you about a decision that she just read. That decision held that a defunct corporation could no longer assert the attorney-client privilege -- so the corporation's previous lawyer could not refuse to answer questions about otherwise privileged communications with management while the corporation was operational. Your partner wonders whether the same principle applies to individuals.

Does the lawyer's ethics duty of confidentiality and the attorney-client privilege survive an individual's death?

**YES**

### Analysis

Lawyers' duty of confidentiality lasts forever. Similarly, the attorney-client privilege clearly survives an individual's death.

In fact, the United States Supreme Court affirmed this principle in one of the very few cases it has decided on the attorney-client privilege over the past few decades.<sup>1</sup>

The Restatement agrees with this approach. Accord Restatement (Third) of Law Governing Lawyers § 77 cmt. c (2000) ("The privilege survives the death of the client.").

The ACTEC Commentaries take the same approach.

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<sup>1</sup> Swidler & Berlin v. United States, 524 U.S. 399, 405-07 (1998) ("The great body of this caselaw supports, either by holding or considered dicta, the position that the privilege does survive in a case such as the present one. . . . Commentators on the law also recognize that the general rule is that the attorney-client privilege continues after death. . . . Despite the scholarly criticism, we think there are weighty reasons that counsel in favor of posthumous application. Knowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel. While the fear of disclosure, and the consequent withholding of information from counsel, may be reduced if disclosure is limited to posthumous disclosure in a criminal context, it seems unreasonable to assume that it vanishes altogether. Clients may be concerned about reputation, civil liability, or possible harm to friends or family. Posthumous disclosure of such communications may be as feared as disclosure during the client's lifetime."; finding that the attorney-client privilege belonging to Vincent Foster survived his suicide).

[i]n general, the lawyer's duty of confidentiality continues after the death of a client.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.6, at 73 (4th ed. 2006),

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

Other courts and bars take the same approach -- applying it to both the lawyer's duty of confidentiality and to the attorney-client privilege.

- Philadelphia LEO 91-4 (3/1991) ("The mandatory language of Rule 1.6(a) prohibits you from disclosing the contents of the Will to the children or their attorney, as your client, the Testator, has not authorized you to do so. The earlier Will constitutes confidential information relating to your representation of the Testator, and your duty not to reveal its contents continues even after your client's death. (Since the children learned from the Testator that the earlier Will existed, we do not address whether you may properly reveal the existence of an earlier Will when contacted by a family member.) Confidentiality is not affected by the provisions in the earlier Will naming you and a child as Executor and alternate. This inchoate representation was eliminated when the new Will revoked the earlier Will. This opinion does not address whether a court of competent jurisdiction may order you to produce the earlier Will, or whether applicable substantive law would allow the personal representative to waive the attorney client privilege.").
- Missouri Informal Advisory Op. 990146 (undated) ("The duty of confidentiality under Rule 4-1.6 survives death. Attorney may not voluntarily provide the estate planning file, or information about the advice provided to the deceased family member, unless that person expressly consented to such disclosure. If Attorney is subpoenaed to provide the information, Attorney may only do so after the factual and legal issues related to confidentiality are fully presented to the court and the court orders Attorney to disclose the information.").

Thus, both the ethics duty of confidentiality and the attorney-client privilege last beyond the attorney-client relationship.

### **Best Answer**

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

## Ownership of the Confidentiality Duty/Attorney-Client Privilege after a Decedent's Death: General Rule

### Hypothetical 68

You represented a wealthy woman in preparing her estate planning documents -- which named her son and a local bank as executors, and her daughter as the primary beneficiary.

Your client just died, and now you wonder who owns the attorney-client privilege protecting the communications you had with her shortly before her death.

- (a) Does your deceased client's daughter (the primary beneficiary) own the attorney-client privilege?

**NO**

- (b) Does your deceased client's son (as one of the two executors) own the attorney-client privilege?

**YES**

- (c) Will your deceased client's son (as one of the two executors) own the attorney-client privilege after he completes his work as executor?

**MAYBE**

### Analysis

Determining ownership of the duty of confidentiality and the attorney-client privilege after an individual dies can be more complicated than would seem at first blush.

Courts uniformly hold that the attorney-client privilege survives the client's death.<sup>1</sup>

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<sup>1</sup> See, e.g., Swidler & Berlin v. United States, 524 U.S. 399 (1998); Restatement (Third) of Law Governing Lawyers § 77 cmt. c (2000).

Although the duty of confidentiality and the attorney-client privilege generally outlive a deceased client, the key question becomes who controls the privilege. This can be important, because control allows the privilege's owner to waive the protection.

**(a)-(b)** As a matter of statute or case law, control of the privilege usually passes to the individual's legal successor -- who may be an executor, administrator, or other representative.

The Restatement explains that

[i]n general, modern evidence codes reflect the view that the privilege may be asserted by the personal representative of a deceased client (either an executor or administrator).

Restatement (Third) of Law Governing Lawyers § 77 reporter's note cmt. c (2000).

Presumably, the power to waive the privilege likewise passes to such representatives.

The ACTEC Commentaries similarly explain that the decedent's lawyer may disclose otherwise privileged communications with the decedent "if consent is given by the client's personal representative."

In general, the lawyer's duty of confidentiality continues after the death of a client. Accordingly, a lawyer ordinarily should not disclose confidential information following a client's death. However, if consent is given by the client's personal representative, or if the decedent had expressly or impliedly authorized disclosure, the lawyer who represented the deceased client may provide an interested party, including a potential litigant, with information regarding a deceased client's dispositive instruments and intent, including prior instruments and communications relevant thereto. A lawyer may be impliedly authorized to make appropriate disclosure of client confidential information that would promote the client's estate plan, forestall litigation, preserve assets, and further family understanding of the decedent's intention. Disclosures should ordinarily be limited to information that the lawyer would be required to reveal as a witness.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.6, at 73 (4th ed. 2006),

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

Most courts and bars follow this approach.

- Liberty Life Assurance Co. v. Smith, Case Nos. 1:07-cv-00050 c/w -00069, 2010 U.S. Dist. LEXIS 78406, at \*4, \*11 (E.D. Tenn. Aug. 3, 2010) (holding that a decedent's estate control the privilege; "The Estate contends that state law, not federal law, applies in determining whether Ms. Winer, Ms. Buchanan and Mr. Giglio can be deposed concerning the mediation. The Estate concedes, however, that whether Tennessee or federal law is applied, there is little substantive difference between the applicable state and federal laws. In the interest of economy, I decline to reach a decision as to whether state or federal law applies noting that, as practical matter, the outcome will be the same."; "As to communications made by Cheryl Smith on behalf of the Estate to Ms. Winer, the Estate has consented to have those communications revealed. Where the party so consents, those communications may be revealed." (emphasis added)).
- Maryland LEO 2009-05 (2009) ("[I]t is hornbook law that a duly appointed personal representative/legal administrator of a deceased person has all of the rights and privileges of the deceased, commonly stated as 'stands in the shoes' of the deceased. See, Md. Code Ann., Estates and Trusts Article, Sec. 1-301(a). That being the case, the Personal Representatives are entitled to possess anything that belonged to the deceased, which would obviously include the unexecuted copy of the will."; "Pursuant to this rule a lawyer must promptly deliver to a client or a third person any property that the client or third person is entitled to receive. Even if the Personal Representative is not actually the 'client,' he/she certainly has, under the law, the right to receive all property of the decedent. The unexecuted will prepared for the client is such property and the personal representative is entitled to receive it.").
- McClure & O'Farrell, P.C. v. Grigsby, 918 N.E.2d 335 (Ind. Ct. App. 2009) (denying an estranged wife's efforts to obtain information about services performed for her late husband by the law firm that he hired in a divorce proceeding between them; noting that the estranged wife was neither an executrix nor beneficiary, and therefore was not entitled to the information).
- Estate of Putnam v. State, No. CV095010669, 2009 Conn. Super. LEXIS 3519, at \*13, \*14 (Conn. Super. Ct. Dec. 29, 2009) (addressing ownership of the privilege in a situation where a mentally ill man committed suicide; explaining that the man's mother was appointed the administratrix of her son's



estate and filed a wrongful death action against the Connecticut Department of Corrections; analyzing ownership of the privilege covering communications between the man and the public defender who had been representing him at the time of his suicide; ultimately finding that the mother controlled the privilege; "Rhode Island is among the vast majority of states which recognize that the fiduciary of a decedent's estate can waive the attorney-client privilege." (emphasis added); "All of the Connecticut's immediate neighbors, New York, and Massachusetts, and Rhode Island, follow the rule."; "The most recognized commentator of the Law of Evidence through the years, Professor John Henry Wigmore, is adamant that the fiduciary of a decedent's estate can waive the decedent's attorney-client privilege."; "The court holds, in line with the vast majority of the authority on the question, that the plaintiff, the administratrix of the estate of Joshua Putnam can waive Joshua's attorney client privilege." (emphasis added); denying a motion by the public defender to quash a subpoena seeking access to his communications with the man before the suicide).

- Philadelphia LEO 2008-10 (9/2008) (explaining that the executor of an estate controls the attorney-client privilege; "[T]he executrix of the will, who stands in the place of the decedent, can give her consent to waiving confidentiality and thus allow such disclosures.").
- Tripp v. Salkovitz, 919 So. 2d 716 (Fla. Dist. Ct. App. 2006) (holding that a deceased individual's estate now controlled the privilege).
- Wallace v. McElwain, 2006 Ohio 5226, at ¶¶ 18, 30 (Ohio Ct. App. 2006) ("The attorney-client testimonial privilege survives the death of the client. . . . Pursuant to R.C. 2317.02(A), if the client is deceased, the attorney may testify by express consent of the executor or administrator of the estate of the deceased client. The attorney-client privilege is governed strictly by R.C. 2317.02(A) and Ohio case law interpreting that provision.").
- Gould, Larson, Bennet, Wells & McDonnell, P.C. v. Panico, 869 A.2d 653, 660 n.9 (Conn. 2005) ("About one half of the states have codified the testamentary exception by providing that a personal representative of the deceased can waive the privilege when heirs or devisees claim through the deceased client, as opposed to parties claiming against the estate, for whom the privilege is not waived.").
- In re Will of Bronner, No. 318627, 2005 NY Slip Op. 50705U, at \*4 (N.Y. Sup. Ct. May 13, 2005) ("[T]he common law 'has always provided that an executor may, in the interest of the estate, waive the attorney-client privilege of the deceased client' . . . . An authoritative treatise states that this rule is 'accepted with practical unanimity.'" (citation omitted)).

- Philadelphia LEO 2003-11 (8/2003) ("Rule 1.14, which deals with a client under a disability, recognizes the court's ability to appoint a legal representative, such as a guardian, to act on behalf of a client in certain circumstances. The comments to Rule 1.14 state that when a legal representative has been appointed for a client, the lawyer should look to the representative for decisions on behalf of the client. Since an executor is the legal representative of a decedent's estate, it follows that a lawyer may look to that person for decisions on behalf of the estate. Therefore, if appointed executor of the client's estate, the father would be authorized to consent to the disclosure of confidential information and information relating to the representation of the client." (emphasis added); "The inquirer should be cautioned that confidentiality of information is a fundamental principle in the client-lawyer relationship. It is important that the inquirer limit disclosure of information relating to the representation of the client to that which is necessary to protect or assert the actual or potential rights of the decedent's. Furthermore, if the inquirer is aware through his representation that the deceased client would not consent to the revelation then the information should not be disclosed to anyone.").
- District Attorney v. Magraw, 628 N.E.2d 24 (Mass. 1994) (holding that an executor or administrator can waive the decedent's attorney-client privilege).

Some state statutes differ from this majority rule, which can create confusing situations.

- Estate of Hohler v. Hohler, 924 N.E.2d 419, 423, 425, 426, 428, 429 (Ohio Ct. App. 2009) (holding that a surviving spouse can rely on an Ohio statute to waive the decedent's privilege, but not his work product doctrine protection; explaining that "[p]ursuant to R.C. 2317.02(A), 'The following persons shall not testify in certain respects: (A)(1) An attorney, concerning a communication made to the attorney by a client in that relation or the attorney's advice to a client, except that the attorney may testify by express consent of the client or, if the client is deceased, by the express consent of the surviving spouse or the executor or administrator of the estate of the deceased client.'"; "The estate argues that a surviving spouse's waiver of the decedent's attorney-client privilege is subject to the trial court's discretion to impose policy limitations as evidenced by the use of 'may' in the statute. The estate also contends that this discretion anticipates the application of certain limitations on the surviving spouse's waiver. For instance, the estate urges that the waiver should not be self-serving where such waiver is to the detriment of the decedent. In addition, the estate urges that the surviving spouse's waiver should not apply to communications that occurred prior to marriage."; explaining that the surviving spouse could rely on the statute to seek documents relating to her prenuptial agreement with the decedent, which was in the possession of the decedent's lawyer; finding that the Ohio

statute gave total power to the surviving spouse; "[T]he trial court's only decision here is whether the decedent was married at the time of his or her death and whether that surviving spouse wished to waive the decedent's attorney-client privilege. If the legislature wished to limit the surviving spouse's waiver so that it applied only to communications occurring during marriage or to cases where the disclosure is in the decedent's best interests, it could have done so. . . . Because the surviving spouse's waiver is elevated to the same status as the decedent's waiver, there are no limitations on said waiver if it is done voluntarily by a person occupying the position of surviving spouse. This assignment of error is overruled, and the trial court's finding that attorney-client privilege was waived is upheld."; "[I]tems that are not attorney-client communications are not subject to R.C. 2317.02(A) as this statute only involves communications to or from the client. That is, an attorney's personal notes about his theories, opinions, or mental impressions are not communications, which can be waived by the client or the deceased client's surviving spouse or representative."; nevertheless finding that the work product doctrine protected documents relating to the prenuptial agreement, because they met the "because of" test for work product protection; "Under this test, the document surrounding the preparation of the prenuptial agreement would be initially protected by work product as they were created 'because of' the prospect of litigation in a future divorce or will contest. The nature of the documents and the factual circumstances surrounding their creation support this conclusion. The preparation of the prenuptial agreement shows a subjective belief that litigation was a real possibility and such belief was not objectively unreasonable. Notably, the surviving spouse had three prior divorces and the decedent had two prior divorces. Moreover, the intention to omit one's spouse from a will makes the possibility of litigation in probate court objectively real as well."; "In conclusion, the prenuptial agreement was not prepared in the ordinary course of business. The agreement was drafted in order to avoid litigation and in order to provide the parameters of a cause of action in the case of litigation. The documents relating to the preparation of the document served the same purposes of the agreement itself. As such, the documents concerning the agreement clearly anticipated future litigation."; ultimately concluding that the surviving spouse could not establish the required "need" to overcome the decedent's work product protection; remanding with an order requiring an *in camera* review; "The trial court is instructed to distinguish between ordinary fact items and opinions, mental impressions, or theories of the attorney, which are almost absolutely privileged from disclosure as the surviving spouse's brief concedes.").

- Ohio v. Doe, 433 F.3d 502, 504 (6th Cir. 2006) (assessing a former federal public defender's refusal to answer questions about communications with her former client; concluding that the case should not have been removed to federal district court based on issuance of a new subpoena after the first grand jury term expired, thus not directly addressing who had power to waive

the decedent's privilege; explaining the unresolved issue as follows: "Ohio statutory law establishes that attorney-client privilege generally survives a client's death, but the statute permits a surviving spouse to waive a deceased spouse's privilege. Ohio Rev. Code § 2317.02 [noting that the decedent's surviving spouse had waived the privilege]. Lewis resists responding to the interrogatories, arguing that the communications with her former client continue to be protected under federal attorney-client privilege law. The United States Supreme Court has held that the federal common law attorney-client privilege survives a client's death and has not recognized any exception that would allow waiver in the criminal context.").

- State v. Doe, 803 N.E.2d 777 (Ohio 2004) (finding that under Ohio law a decedent's executor controlled the privilege), cert. denied, 543 U.S. 943 (2004).

In one celebrated case, the North Carolina Supreme Court dealt with a situation in which a decedent's surviving wife was not empowered under North Carolina law to assert or waive the privilege.<sup>2</sup> The court recognized a very narrow exception to the

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<sup>2</sup> In re Investigation of Death of Miller, 584 S.E.2d 772, 776, 777, 779, 780 & n.1, 781-82, 785, 788, 789, 790, 791 (N.C. 2003) ("This case involves the attorney-client privilege and raises the primary question of whether, in the context of a pretrial criminal investigation, there can be a viable basis for the application of an interest of justice balancing test or an exception to the privilege which would allow a trial court to compel disclosure of confidential communications where the client is deceased, an issue of first impression for this Court."; describing the factual background; "On the evening of 15 November 2000, Dr. Miller went bowling at AMF Bowling Center in Raleigh, North Carolina, with several of Mrs. Miller's co-workers. While at the bowling alley, Dr. Miller partially consumed a cup of beer given to him by Mrs. Miller's co-workers Derril H. Willard (Mr. Willard). Dr. Miller commented to those present that the beer had a bad or 'funny' taste."; explaining that the police ultimately determined that Willard was having an affair with Dr. Miller's wife, and killed himself shortly after speaking with a lawyer; confirming that the attorney-client privilege survives the death of the client; noting that Willard's wife (executrix of his estate) submitted an affidavit "purporting to waive the privilege on Mr. Willard's behalf"; however, noting that "[w]e find no basis under any concept of statutory construction to support the State's position on this point and thus hold that N.C.G.S. § 32-27 does not empower an executor or executrix to waive a decedent's attorney-client privilege." contrasting a North Carolina rule with the law in many other states; "We find it noteworthy that whereas many jurisdictions have enacted provisions empowering a personal representative to claim and exercise (and by necessary inference also waive) the decedent's attorney-client privilege, the North Carolina General Assembly has enacted no such provision."; rejecting the state's contention that Willard's widow could or did waive the privilege; "[T]he record more strongly suggests that Mr. Willard's estate was reopened in order to enable Mrs. Willard to submit an affidavit to further the ongoing criminal investigation, and that Mrs. Willard's decision to waive the attorney-client privilege was not for a purpose related to the preservation of Mr. Willard's estate. . . . We therefore conclude that because Mr. Willard's will did not expressly grant the executrix the power to waive his attorney-client privilege, or any powers similar thereto, Mrs. Willard does not have the power to waive Mr. Willard's attorney-client privilege."; ultimately adopting a "strict balancing test" in these circumstances; "A strict balancing test involving the attorney-client privilege, in the context of the present case after the client's death, subjects the client's reasonable expectation of nondisclosure to a process without parameters or standards, with an end result no more predicable in any case than a public opinion poll, the

general rule recognizing that the deceased client's privilege lasts forever. In that case, the client had spoken to a lawyer and then committed suicide, after being caught assisting his lover (an unfaithful wife) in murdering her husband. The client's surviving wife might have had an interest in seeing that her husband's lover also faced murder

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weather over time, or any athletic contest. Such a test, regardless of how well intentioned and conducted it may be, or how exigent the circumstances, would likely have, in the immediate future and over time, a corrosive effect on the privilege's traditionally stable application and the corresponding expectations of clients."; "The practical consequences of a balancing test include the difficulty of demonstrating equality of treatment, the decline of judicial predictability, and the facilitation of judicial arbitrariness."; "We therefore conclude that, in the instant case, the trial court's decision to conduct an in camera review of the communications between respondent and Mr. Willard was procedurally correct. The trial court did not err in ordering respondent to provide the trial court with a sealed affidavit containing the communications which transpired between Mr. Willard and respondent, for the purpose of determining whether the attorney-client privilege applies to any portion of the communication. Upon such review on remand, the trial court's threshold inquiry is to determine whether the information communicated between respondent and Mr. Willard, or any portion thereof, is in fact privileged."; explaining that "we hold that when a trial court, after conducting an in camera review as described below, determines that some or all of the communications between a client and an attorney do not relate to a matter that affected the client at the time the statements were made, about which the attorney was professionally consulted within the parameters of the McIntosh [State v. McIntosh, 444 S.E.2d 438 (N.C. 1994)] test, such communications are not privileged and may be disclosed."; "Therefore, at the time Mr. Willard made the statements, anything he said relating his collaborative involvement with a third party in the death of Dr. Miller was covered by the attorney-client privilege."; "If, on the other hand, the trial court should determine that the communications asserted to be privileged would have no negative impact on Mr. Willard's interests, the purpose for the privilege no longer exists. When application of the privilege will no longer safeguard the client's interests, no reason exists in support of perpetual nondisclosure."; "In summary then, we hold that when a client is deceased, upon a nonfrivolous assertion that the privilege does not apply, with a proper, good-faith showing by the party seeking disclosure of communications, the trial court may conduct an in camera review of the substance of the communications. To the extent any portion of the communications between the attorney and the deceased client relate solely to a third party, such communications are not within the purview of the attorney-client privilege. If the trial court finds that some or all of the communications are outside the scope of the attorney-client privilege, the trial court may compel the attorney to provide the substance of the communications to the State for its use in the criminal investigation, consistent with the procedural formalities set forth below. To the extent the communications relate to a third party but also affect the client's own rights or interests and thus remain privileged, such communications may be revealed only upon a clear and convincing showing that their disclosure does not expose the client's estate to civil liability and that such disclosure would not likely result in additional harm to loved ones or reputation."; remanding to the trial court for an in camera review; later affirming the trial court's conclusion; In re Investigation of Death of Miller, 595 S.E.2d 120, 123 (N.C. 2004) ("We affirm the trial court's finding in the 'Order [Sealed by the Court]' that 'no information provided to Attorney Gammon by Derril Willard incriminated Mr. Willard in any manner, directly or indirectly, in the death of Eric Miller.'"; "We affirm the trial court's finding in the 'Order [Sealed by the Court]' that 'Derril Willard did provide to Attorney Gammon information concerning activities and statements of a third person regarding the death of Eric Miller. Such information concerning this third person did not reveal any collaborative involvement of Willard and did not implicate Willard in any way in the death of Eric Miller.'").

charges, but did not have the power under North Carolina law to assert or waive the privilege.

The North Carolina Supreme Court wrestled with the issue before allowing what amounts to a "peek" into the conversations between the client and his lawyer just before the client committed suicide.

Although states sometimes vary the general rule by statute or common law, the general approach gives a deceased individual's executor or other personal representative power over both the decedent's lawyer's duty of confidentiality and the attorney-client privilege that protects the communications the lawyer had before the decedent died.

(c) Although not many courts or bars have dealt with this theoretical issue, the personal representative's power over a decedent's attorney-client privilege might end when her job ends.

The Restatement explains that

[i]n general, modern evidence codes reflect the view that the privilege may be asserted by the personal representative of a deceased client (either an executor or administrator). A possible, unstated intimation is that the privilege perhaps lapses after the estate is wound up and the personal representative has no further power or responsibility to act in behalf of the estate.

Restatement (Third) of Law Governing Lawyers § 77 reporter's note cmt. c (2000)

(emphasis added).

Interestingly, this issue arose in the case of famed singer Bing Crosby's estate.

- HLC Props., Ltd. v. Superior Court, 105 P.3d 560, 563 & 567 (Cal. 2005) (holding that the privilege once owned by Bing Crosby passed to his executor, and ended when the executor finished his job; noting that a California law provided that "if the client is dead,' the holder of the attorney-client privilege is

the client's 'personal representative.' . . . Here, the Commission's comments confirm the plain meaning of the statutory provisions: the attorney-client privilege of a natural person transfers to the personal representative after the client's death, and the privilege thereafter terminates when there is no personal representative to claim it." (emphasis added); explaining that "[w]hen Crosby died, his privilege transferred to his personal representative, i.e., the executor of his estate. But once Crosby's estate was finally distributed and his personal representative discharged, the privilege terminated because there was no longer any privilege holder statutorily authorized to assert it." (emphasis added)).

One would think that the privilege would continue in this situation. After all, if some third party cares enough to seek the communications, there must be some relevance to them -- and the executor presumably continues to have an interest in protecting the communications from such a third party.

### **Best Answer**

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

N 8/12

## Ownership of the Confidentiality Duty and Privilege if the Decedent's Representative Has Interests Adverse to the Decedent

### Hypothetical 69

For six months, you represented an abused wife planning to divorce her husband. However, she committed suicide just before she started the divorce proceedings. You just received a call from the abusive widower -- who announced that he is his ex-wife's executor, knows from going through her documents that she had hired you to seek a divorce, and demands to see all your files.

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

**NO (PROBABLY)**

### Analysis

This situation only arises in unusual circumstances, but several bars have recognized the dilemma -- involving an executor or other personal representative who would normally control both the confidentiality duty and the attorney-client privilege formerly owned by the decedent, but who might have interests adverse to the decedent's interests.

The Restatement explains the occasional need for judicial involvement.

It would be desirable that a tribunal be empowered to withhold the privilege of a person then deceased as to a communication that bears on a litigated issue of pivotal significance. The tribunal could balance the interest in confidentiality against any exceptional need for the communication. The tribunal also could consider limiting the proof or sealing the record to limit disclosure. Permitting such disclosure would do little to inhibit clients from confiding in their lawyers. The fortuity of death prevents waiver of the privilege by the client. Appointing a personal representative to consider waiving the privilege simply transforms the issue into one before a probate court. It would be more direct to permit the judge in the proceeding in which the evidence is



offered to make a determination based on the relevant factors.

Restatement (Third) of Law Governing Lawyers § 77 cmt. d (2000).

One bar dealt with a lawyer's duty on the death of his client -- a wife who was planning to divorce her husband, who nevertheless was the executor of her estate.

That bar advised the decedent's lawyer to seek judicial guidance.

- Nassau County LEO 03-4 (6/17/03) ("A lawyer representing a wife who was secretly planning a divorce may not, after her sudden death, disclose her confidences or secrets to her husband, who is the executor of her estate, unless the lawyer is fully satisfied that the husband, acting in his fiduciary capacity and wholly in the interests of the estate and beneficiaries, gives informed consent, or unless a court orders disclosure. The wife had specifically instructed the lawyer not to advise her husband of her plans until after she had informed her children, which her sudden death prevented her from doing. The husband-executor has now asked the lawyer for itemized billing information regarding his representation of the wife; compliance with this request would reveal the wife's divorce plans. If the lawyer is not satisfied that the husband is acting to protect the interests of the estate and its beneficiaries, rather than to satisfy his personal interest, the lawyer should take legal steps to seek clarification before making disclosure. The lawyer's refusal to disclose information may lead the husband to seek a court order. At such time, the issue of confidentiality may be adjudicated. If the court orders disclosure the lawyer may either comply, or, in appropriate circumstances, seek appellate review." (see [2001-2005] ABA/BNA Law. Manual on Prof. Conduct 1201:6254)).

Another bar dealt with confidential information that the decedent would not want the executor to know -- rather than actual adversity between the executor and the decedent's interest. As in the more acute situation, the bar suggested that the decedent's lawyer seek judicial guidance in what the bar labeled as one of those "rare situations" in which the decedent might not want the personal representative to learn of the confidential information.

- District of Columbia LEO 324 (5/18/04) ("When a spouse who is executor of a deceased spouse's estate requests that the deceased spouse's former attorney turn over information obtained in the course of the professional

relationship between the deceased spouse and the former attorney, the former attorney may provide such information to the spouse/executor, if (1) the attorney concludes that the information is not a confidence or secret, or, (2) if it is a confidence or secret, the attorney has reasonable grounds for believing that release of the information is impliedly authorized in furthering the interests of the former client in settling her estate. Where these conditions are not met, the deceased spouse's former attorney should seek instructions from a court as to the disposition of materials reflecting confidences or secrets obtained in the course of the professional relationship with the former client."; providing a hypothetical that might result in the decedent's lawyer seeking judicial guidance; "To take a hypothetical example: Imagine that a wife's will states that she wishes to divide her property equally among her children. The wife later consults another attorney ('second attorney') and confides to this second attorney that, prior to her current marriage, she gave birth to a child about which she has not informed her current husband, and wishes to provide for that child in her will without disclosing the nature of her relationship to this individual. The second attorney begins to prepare a new draft of her will, but the wife unexpectedly dies before it is finalized and signed. After the wife's death, the husband, who is executor of the wife's estate, asks the second attorney for information about the representation. The second attorney must decide whether she has information that is a confidence or a secret. In the example, the fact of the wife's prior child is probably both: the wife told the second attorney this information in the course of seeking legal advice, and stated that she did not want this information disclosed to her husband. But whether the wife would want her wishes to provide for this individual to be known after her death is a more difficult question. The wife expressed to the second attorney her wish that all of her children be provided for, on the one hand, but may wish that her husband not learn of her prior child, on the other."; "The decision about what to do in such a situation will require the attorney to exercise her best professional judgment. An attorney who reasonably believes that she knows what her client would have wanted, on the basis of either what the client told her or the best available evidence of what the client's instructions would have been, should carry out her client's wishes. The attorney will usually be best situated to make this determination. In rare situations, however, the attorney may wish to seek an order from the court supervising disposition of the estate and present the materials at issue for the court's in camera consideration."; explaining that the decedent's lawyer "should seek instructions from the court" if there is any question about whether the decedent's lawyer should disclose the decedent's intent to the spouse/executor (emphases added)).

Lawyers finding themselves in this remarkably awkward position might have to seek judicial guidance.

**Best Answer**

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

N 8/12

## Exception for Those Taking Under a Will

### Hypothetical 70

You represented a wealthy author in preparing his estate plan. He recently died, and you expect several attacks on his estate.

- (a) Will the attorney-client privilege protect your communications with your client from discovery by his son, who was named as a beneficiary under the will but who disputes the executor's interpretation of the provision under which he takes?

**NO**

- (b) Will the attorney-client privilege protect your communications with your client from discovery by his estranged daughter, who claims that she should have been included as a beneficiary in the will?

**YES (PROBABLY)**

- (c) Will the attorney-client privilege protect your communications with your client from discovery by a creditor, who claims that the estate owes it \$500,000?

**YES**

### Analysis

Both the ethics duty of confidentiality and the attorney-client privilege contain an exception for communications between a client and a lawyer -- if disclosure of the communications after the client's death would help further the client's testamentary intent.

The ethics rule frees the lawyer to disclose the communications without risk of an ethics violation. The attorney-client privilege rule has the same effect on the lawyer's freedom, and also permits a third party to seek access to the communications if that third party needs them to discern the decedent's intent.

(a) Courts recognizing the narrow exception permit (and normally require) the decedent's lawyer to disclose privileged communications to clear up any issue about who should take under a will or other instrument which the decedent's lawyer prepared.

This exception certainly makes sense -- because a decedent presumably would want his or her lawyer to clear up any ambiguity about the will or other instrument to assure that the decedent's intent is carried out.

The Restatement explicitly recognizes this exception.

The attorney-client privilege does not apply to a communication from or to a decedent relevant to an issue between parties who claim an interest through the same deceased client, either by testate or intestate succession or by an inter vivos transaction.

Restatement (Third) of Law Governing Lawyers § 81 (2000). A comment provides an explanation.

The exception in the Section is sometimes justified on the ground that the decedent would have wished full disclosure to facilitate carrying out the client's intentions. The dispute might involve either testate or intestate succession or claims arising from inter vivos transactions to which the decedent was a party. The witness will most often be the decedent's lawyer, who is in a position to know the client's intentions and whose testimony ordinarily will not be tainted by personal interest. Suppressing such testimony would hamper the fair resolution of questions of testator intent in will-contest and similar types of cases. It is therefore probable that the exception does little to lessen the inclination to communicate freely with lawyers . . . . The exception applies even if the personal representative of the decedent client's estate refuses to waive the privilege.

Id. cmt. b (emphases added).

The ACTEC Commentaries also recognize this principle.

In general, the lawyer's duty of confidentiality continues after the death of a client. Accordingly, a lawyer ordinarily should

not disclose confidential information following a client's death. However, if consent is given by the client's personal representative, or if the decedent had expressly or impliedly authorized disclosure, the lawyer who represented the deceased client may provide an interested party, including a potential litigant, with information regarding a deceased client's dispositive instruments and intent, including prior instruments and communications relevant thereto. A lawyer may be impliedly authorized to make appropriate disclosure of client confidential information that would promote the client's estate plan, forestall litigation, preserve assets, and further family understanding of the decedent's intention. Disclosures should ordinarily be limited to information that the lawyer would be required to reveal as a witness.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.6, at 73 (4th ed. 2006),

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

(emphasis added).

Bars analyzing the ethics rules follow this principle.

- Philadelphia LEO 2008-10 (9/2008) (explaining that an executor of an estate controls the privilege, and has the decedent's implied consent to disclose privileged communications to advance the decedent's intent; "In addition, the Committee finds that there is implied consent under Rule 1.6b for the inquirer to disclose whatever may help further the 1996 testamentary intent of B since the inquirer was hired to draft a will to effectuate B's desire as to how her estate was to be distributed." (emphasis added); "In general, the lawyer's duty of confidentiality continues after the death of a client. Accordingly, a lawyer ordinarily should not disclose confidential information following a client's death. However, if consent is given by the client's personal representative, or if the decedent had expressly or impliedly authorized disclosure, the lawyer who represented the deceased client may provide an interested party, including a potential litigant, with information regarding a deceased client's dispositive instruments and intent, including prior instruments and communications relevant thereto. A lawyer may be impliedly authorized to make appropriate disclosure of client confidential information that would promote the client's estate plan, forestall litigation, preserve assets, and further family understanding of the decedent's intention. Disclosures should ordinarily be limited to information that the lawyer would be required to reveal as a witness." (quoting ACTEC Commentaries, Commentary on MRPC 1.6, at 73) (emphasis added)).

- Hawaii LEO 38 (5/27/99) ("Obtaining client consent is, of course, not possible if the client is deceased. Under HRPC 1.6, however, attorneys may reveal confidential information when disclosure has been impliedly authorized in order to carry out the representation. In determining what disclosures are necessary to carry out the representation of a deceased client, the attorney may consider the intentions of the client. For example, if an attorney reasonably and in good faith determines that confidentiality should be waived in order to effectuate the deceased clients' intended estate plan, the attorney would be permitted and obligated to make such disclosure.").

In dealing with the attorney-client privilege issue, courts take the same approach.

- Hicks v. Bush, 452 F. Supp. 2d 88, 100 & n.8 (D.D.C. 2006) (analyzing a privilege claim related to materials found in the cells of prisoners held at Guantanamo who had committed suicide; "Moreover, the privilege is subject to exceptions. The privilege does not apply to communications made in furtherance of committing a crime. . . . It is also subject to a testamentary exception, under which disclosure of otherwise privileged communications may be permitted after the client's death in order to settle disputes about the client's intent for his estate. . . . At least three other exceptions have been recognized. The privilege is inapplicable to communications relevant to a breach of duty between an attorney and client, to communications regarding an attested document to which the attorney is an attesting witness, and to communications relevant to a matter of common interest between joint clients, when offered in an action between the clients." (emphasis added)).
- Gast v. Hall, 858 N.E.2d 154, 163, 164 (Ind. Ct. App. 2006) ("The privilege generally excludes testimony of communications between a client and her attorney regarding the preparation of a will. . . . However, an exception to the posthumous survival of the privilege exists when 'a controversy arises concerning the validity of the will or between the claimants under the will[.]' . . . Stated succinctly, the 'testamentary exception' is as follows: '[C]ommunications by a client to the attorney who drafted his or her will, concerning the will and transactions leading to its execution, generally are not, after the client's death, protected as privileged communications in a suit between the testator's heirs, devisees, or other parties who claim under him or her[.]' . . . Plaintiffs ask that we extend this narrow exception to the testimony of an attorney who had contact with the client during the time leading up to the execution of the will, even if that attorney was not involved in the preparation of the will, in this case, Attorney Douglas. Plaintiffs claim that '[t]he logic and reasoning behind the exception to the attorney-client privilege for claimants claiming through the same testator apply to this case[.]' . . . We are not persuaded." (emphasis added); "Here, the evidence Attorney Douglas seeks to disclose does not pertain to the preparation of either of Uncle Joe's wills, and therefore it does not fall within the testamentary exception to the attorney-client privilege.").

- Gendal v. Billotti, No. 019926/2004, 2006 NY Slip Op. 51501U, at 3 (N.Y. Sup. Ct. July 31, 2006) (unpublished opinion) ("There are, however, cases in which a civil litigant may invade the attorney/client privilege held by another. First, the attorney/client privilege existing between an attorney and a testator or testatrix may be invaded in cases within the purview of CPLR 4503 (b) which involve the probate, validity or construction of a will. Second, a civil litigant, upon showing of good cause, may successfully invade the attorney/client privilege of one who owes that litigant a fiduciary duty . . . . Third, a civil litigant may, under limited circumstances, invade the attorney/client privilege of another where the subject communication was made for the purpose of furthering a future crime, fraud or other wrongdoing . . . . Finally, a civil litigant may invade the attorney/client privilege of another where such invasion is justified by strong public policy considerations . . . ." (emphasis added)).
- Gould, Larson, Bennet, Wells & McDonnell, P.C. v. Panico, 869 A.2d 653, 658, 659, 660 n.9 (Conn. 2005) (assessing the rule permitting a decedent's lawyer to disclose otherwise privileged communications with the decedent in a later dispute among those taken under the will or trust; noting that "[t]his rule is well settled law in many jurisdictions"; noting that "recent case law clearly underscores that mere need and relevance are not a sufficient basis to waive the privilege"; holding that the exception applies only if the decedent had executed a document that is being questioned; "[T]he exception to the privilege, like the privilege itself, is designed for the benefit of the decedent. When a decedent executes his will, he knows that it will be made public and established as his will in court before it can become effective. If the will does not reflect the testator's will, but rather that of another who induced him by undue influence to make it, we impute to the decedent an interest that he would not want such a will to be accepted as his own. If we were to protect his otherwise privileged communications under such circumstances, we would be helping to perpetuate the deceit and fraud, contrary to the decedent's interest. Therefore, we allow the attorney who prepared the executed will to disclose all that he knows concerning the testator's state of mind. When the communications do not, however, result in an executed will, the decedent does not assume the attorney's file, notes or memory will become part of any court proceedings and therefore we cannot assume that the decedent expected his communications to be made public." (emphasis added); "About one half of the states have codified the testamentary exception by providing that a personal representative of the deceased can waive the privilege when heirs or devisees claim through the deceased client, as opposed to parties claiming against the estate, for whom the privilege is not waived.").
- In re Will of Bronner, No. 318627, 2005 NY Slip Op. 50705U, at 3, 4 (N.Y. Sup. Ct. May 13, 2005) ("There is, however, a statutory exception to the attorney-client privilege which excludes from protection communication



- otherwise privileged between the attorney and the decedent concerning a Will's preparation, execution, and revocation in proceedings involving the probate, validity or construction of a Will, except as to matters that would tend to disgrace the memory of the decedent . . . . The exception, however, is a narrow one and does not apply to an attorney who did not prepare the Will." (emphasis added); "Furthermore, in controversies between heirs at law, devisees, legatees or next of kin of the client, such communication as in the instant case should not be held privileged because the proceedings are not adverse to the estate. Indeed, the decedent would expect the confidentiality of such communications to be lifted in the interests of resolving disputes over her Will. . . . Further, it is generally agreed that in testamentary contests, the privilege is divisible and may be waived by the executor, the next of kin or the legatee . . . . The court therefore determines that the objectant may waive the attorney-client privilege on behalf of the decedent in the interests of the estate in the truth-finding process.").
- In re Texas A&M-Corpus Christie Found., Inc., 84 S.W.3d 358, 361 (Tex. App. 2002) (granting a petition for writ of mandamus ordering discovery of a decedent's lawyers relating to the decedent's mental capacity at the time she transferred property; enforcing a statutory exception to the attorney-client privilege covering communications between a decedent and a decedent's lawyer if the communications were relevant in litigation among "parties who claim through the same deceased client" (emphasis added)).
  - Hebbeler v. Young (In re Estate of Hebbeler), 875 S.W.2d 163 (Mo. Ct. App. 1994) (holding that, since the decedent's relatives were seeking an inheritance under the same documents, the privilege did not prevent the decedent's lawyer from testifying).
  - United States v. Osborn, 561 F.2d 1334, 1340 & n.11 (9th Cir. 1977) ("[T]he general rule with respect to confidential communications between attorney and client for the purpose of preparing the client's will is that such communications are privileged during the testator's lifetime and also after the testator's death unless sought to be disclosed in litigation between the testator's heirs, legatees, devisees, or other parties, all of whom claim under the deceased client. . . . . The rationale behind the exception to the general rule is that the privilege itself is designed for the protection of the client, and it cannot be said to be in the interests of the testator, in a controversy between parties all of whom claim under the testator, to have those confidential communications of the testator and attorney excluded which are necessary to a proper fulfillment of the testator's intent" (emphasis added); finding that the exception did not apply because the case did not involve a contest over the "validity or construction" of the decedent's will).
  - Stegman v. Miller, 515 S.W.2d 244, 246 (Ky. Ct. App. 1974) ("As stated in Wigmore, . . . after a testator's death the attorney who drew the will 'is at

liberty to disclose all that affects the execution and tenor of the will,' for the reason that 'it seems hardly open to dispute that they are the very facts which the testator expected and intended to be disclosed after his death.'" (emphasis added)).

- Doherty v. Fairall, 413 F.2d 381, 382 (D.C. Cir. 1969) ("[C]arbon copies of prior wills are also subject to the discovery process; the initial intent of the testator was to have those documents made public at some time. While decedent presumably intended the will to be confidential during his lifetime, there is no warrant for assuming he wanted the document held confidential after his death, when it might help reveal the proper legal effect to be given to the last will and testament published in his name." (emphasis added)).
- Clark v. Turner, 183 F.2d 141, 142 (D.C. Cir. 1950) ("If decedent had executed a will, to exclude such testimony would defeat the carrying out of her intent, and certainly would in no way advance the purpose for which the privilege is granted.").
- Hugo v. Clark, 99 S.E. 521, 522, 524 (Va. 1919) ("It is generally considered that the rule of privilege does not apply in litigation, after the client's death, between parties, all of whom claim under the client; and so, where the question before the court is as to the validity or genuineness of an alleged will, the attorney of the testator may, according to the weight of authority, testify as to all matters relevant to the issue, although his testimony involves a disclosure of confidential communications between himself and his client, at least when such attorney is one of the subscribing witnesses to the will, as in such case the testator must be considered as having waived the privilege by requesting the attorney to sign as a witness. A decedent's attorney has also been held competent to prove the existence and contents of a lost will; and, in an action involving the construction of a will, the attorney who drew the will may testify as to relevant communications of the testator.' . . . 'It may be laid down as a general rule of law, gathered from all the authorities, that unless provided otherwise by statute, communications by a client to the attorney who drafted his will, in respect to that document, and all transactions occurring between them leading up to its execution, are not, after the client's death, within the protection of the rule as to privileged communications, in a suit between the testator's devisees and heirs at law, or other parties who all claim under him. The reason for such an exception to the general rule excluding confidential professional communications is that the rule is designed for the protection of the client, and it cannot be said to be for the interest of a testator, in a controversy between parties all of whom claim under him, to have those declarations and transactions excluded which are necessary to the proper fulfillment of his will.' The reason for excluding such communications, stated succinctly, is that it is essential to the administration of justice that clients should feel free to consult their legal advisers without any fear that their disclosures will be thereafter revealed to their detriment.

As a matter of public policy, this rule should be rigidly enforced in order that men may secure legal advice, after frank disclosures to their counsel without which they would be unable to defend themselves from threatened wrong. After the death of the client, however, it has been held that the privilege may be waived when the character and reputation of the deceased are not involved, by his executor or administrator, or in will contests by his heirs or legatees. The deceased has no longer any interest in the matter." (citation omitted; emphasis added); noting that because "this is a testamentary contest between the heirs at law on the one side, claiming that the decedent died intestate, and the devisee, claiming that the paper offered is the true last will and testament of the decedent, we conclude that the privilege does not exist").

- Glover v. Patten, 165 U.S. 394, 406 (1897) ("[W]e are of the opinion that, in a suit between devisees under a will, statements made by the deceased to counsel respecting the execution of the will, or other similar document, are not privileged. While such communications might be privileged if offered by third persons to establish claims against an estate, they are not within the reason of the rule requiring their exclusion, when the contest is between the heirs or next of kin." (emphases added)).

Not surprisingly, this principle likewise does not cover a lawyer who did not draft the will, or if the work did not result in an executed will.

- Gast, 858 N.E.2d at 163, 164 ("The privilege generally excludes testimony of communications between a client and her attorney regarding the preparation of a will. . . . However, an exception to the posthumous survival of the privilege exists when 'a controversy arises concerning the validity of the will or between the claimants under the will[.]' . . . Stated succinctly, the 'testamentary exception' is as follows: '[C]ommunications by a client to the attorney who drafted his or her will, concerning the will and transactions leading to its execution, generally are not, after the client's death, protected as privileged communications in a suit between the testator's heirs, devisees, or other parties who claim under him or her[.]' . . . Plaintiffs ask that we extend this narrow exception to the testimony of an attorney who had contact with the client during the time leading up to the execution of the will, even if that attorney was not involved in the preparation of the will, in this case, Attorney Douglas. Plaintiffs claim that '[t]he logic and reasoning behind the exception to the attorney-client privilege for claimants claiming through the same testator apply to this case[.]' . . . We are not persuaded." (emphasis added); "Here, the evidence Attorney Douglas seeks to disclose does not pertain to the preparation of either of Uncle Joe's wills, and therefore it does not fall within the testamentary exception to the attorney-client privilege." (emphases added)).

- Gould, Larson, Bennet, Wells & McDonnell, 869 A.2d at 659 (holding that the exception applies only if the decedent had executed a document that is being questioned; "[T]he exception to the privilege, like the privilege itself, is designed for the benefit of the decedent. When a decedent executes his will, he knows that it will be made public and established as his will in court before it can become effective. If the will does not reflect the testator's will, but rather that of another who induced him by undue influence to make it, we impute to the decedent an interest that he would not want such a will to be accepted as his own. If we were to protect his otherwise privileged communications under such circumstances, we would be helping to perpetuate the deceit and fraud, contrary to the decedent's interest. Therefore, we allow the attorney who prepared the executed will to disclose all that he knows concerning the testator's state of mind. When the communications do not, however, result in an executed will, the decedent does not assume the attorney's file, notes or memory will become part of any court proceedings and therefore we cannot assume that the decedent expected his communications to be made public." (emphasis added)).
- In re Will of Bronner, 2005 NY Slip Op. 50705U, at 3 (N.Y. Sup. Ct. May 13, 2005) ("There is, however, a statutory exception to the attorney-client privilege which excludes from protection communication otherwise privileged between the attorney and the decedent concerning a Will's preparation, execution, and revocation in proceedings involving the probate, validity or construction of a Will, except as to matters that would tend to disgrace the memory of the decedent . . . . The exception, however, is a narrow one and does not apply to an attorney who did not prepare the Will." (emphasis added)).

Although courts characterize the general "testamentary exception" principle as a limited exception to the attorney-client privilege, it is not self-executing. In other words, someone normally must seek disclosure of the otherwise privileged communications between decedents and their lawyers. One would normally think that a disgruntled beneficiary would seek such disclosure to support his or her claim for an inheritance. A lawyer besieged by calls or complaints from beneficiaries might offer to disclose the communications. Therefore, it seems logical to treat this issue as a waiver matter because someone must take an affirmative step to disclose the communications rather than simply as an evaporation of the privilege protection.

Although courts appear not to have analyzed the process very closely, it seems that lawyers disclosing privileged communications under this principle can reveal them only to the extent necessary. For instance, the decedent's attorney could offer joint access to the quarreling beneficiaries and their lawyers -- but not make the privileged communications generally available to the public. If the beneficiaries cannot agree among themselves on the effect of the privileged communications, they might engage in a public fight, perhaps even including a trial about the document's meaning.

Courts seem not to have addressed the effect of these various degrees of disclosure. This issue could become very important if a creditor or other third party seeks access to documents or communications that have already been shared with the quarreling beneficiaries. A court might find that a limited sharing with the beneficiaries and their lawyers has not caused a general waiver, therefore denying the third party's efforts to see the same documents. However, a court might rule the other way if the otherwise privileged communications have been introduced at a public trial.

Another important issue that courts seem not to have addressed is whether disclosure of these privileged communications causes a subject matter waiver, thus allowing a creditor or other third party to learn the substance of other privileged communications between the decedent and the decedent's lawyer that have not been revealed. In that situation, the effect could depend on characterizing the disclosure either as an automatic evaporation of the privilege (meaning that no privileged communications were actually disclosed) or as a waiver of the privilege. The former might not create a subject matter waiver, whereas the latter probably would.

(b) Courts generally recognize the limited exception only when someone taking under the will or other instrument raises an issue about the instrument's meaning.

This means that the limited exception usually does not apply to someone not named in the decedent's will or other instrument.

- Wesp v. Everson, 33 P.3d 191, 201 (Colo. 2001) (finding that the "testamentary exception" did not apply to communications between a mother and stepfather and their lawyer in a sexual abuse lawsuit brought by the daughter against the stepfather, because the case was not a will contest and the daughter "does not attempt to claim by succession").
- Curato v. Brain, 715 A.2d 631, 636 (R.I. 1998) ("The attorney-client privilege generally will survive the death of the client except in very limited circumstances where the information sought concerns conversations that relate to the drafting of a will. . . . Even then, these communications are discoverable only in the context of a will contest and to the extent that they evince the testator's intentions. . . . In this case, even though the communications between Breslin and John and Margaret were for the purpose of seeking professional advice in planning their estates and drafting their wills, Cathie is not seeking this testimony for the purpose of challenging the validity of the will. Rather she is seeking this disclosure for the purpose of challenging the conveyance of the property. Accordingly, these communications are privileged and are not subject to disclosure."; finding that the limited exception did not apply and that attorney-client privilege protected communications between decedent's second wife and his lawyer).
- Duggan v. Keto, 554 A.2d 1126,1141 (D.C. 1989) ("The Supreme Court held in Glover v. Patten, 165 U.S. 394, 17 S. Ct. 411, 41 L. Ed.760 (1897), that the attorney-client privilege does not apply in disputes between beneficiaries claiming under a will or heirs claiming through the decedent. However, when an heir or legatee makes a claim adverse to the estate, the estate may defend itself by invoking the privilege. See id. at 406. Appellants do not dispute their bequests among themselves in this action, nor do they claim under Mary's will. Rather, they allege that Mary breached a contract not to revoke an earlier will and seek damages for that breach. Their claim, under Glover v. Patten, is clearly adverse to the estate, and thus the estate may invoke the attorney-client privilege on behalf of Mary in defending against that claim.").
- Osborn, 561 F.2d at 1340 & n.11 ("[T]he general rule with respect to confidential communications between attorney and client for the purpose of preparing the client's will is that such communications are privileged during the testator's lifetime and also after the testator's death unless sought to be

disclosed in litigation between the testator's heirs, legatees, devisees, or other parties, all of whom claim under the deceased client. . . . The rationale behind the exception to the general rule is that the privilege itself is designed for the protection of the client, and it cannot be said to be in the interests of the testator, in a controversy between parties all of whom claim under the testator, to have those confidential communications of the testator and attorney excluded which are necessary to a proper fulfillment of the testator's intent"; finding that the exception did not apply because the case did not involve a contest over the "validity or construction" of the decedent's will.).

(c) No court applies this narrow exception if some third party (such as a creditor) seeks access to privileged communications between a decedent and a decedent's lawyer.

- See, e.g., Gould, Larson, Bennet, Wells & McDonnell, 869 A.2d at 660 n.9 ("About one half of the states have codified the testamentary exception by providing that a personal representative of the deceased can waive the privilege when heirs or devisees claim through the deceased client, as opposed to parties claiming against the estate, for whom the privilege is not waived.").

### **Best Answer**

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

N 8/12

## Fiduciary Exception

### Hypothetical 71

You represent the trustee of a trust established over 20 years ago. Several of the beneficiaries have objected to the trustee's administration of the trust, and have threatened to sue the trustee. The beneficiaries' lawyer just asked you to preserve all of your communications with the trustee, and warned you that she will be seeking all of those communications in the lawsuit she is about to file.

- (a) Will you be able to withhold your communications with the trustee about trust administration issues?

**MAYBE**

- (b) Will you be able to withhold your communications with the trustee about the trustee's possible liability?

**YES**

### Analysis

The so-called "fiduciary exception" sometimes allows the beneficiaries of a fiduciary's duties to obtain communications between the fiduciary and the fiduciary's lawyer advising the fiduciary about fulfilling those duties.

This concept began in the context of shareholders' derivative cases against corporate executives accused of wrongdoing. In those types of actions, the shareholders sue on behalf of the company, and seek recovery against executives or others that the company has chosen not to pursue. Courts look at a large number of factors in determining whether shareholders filing such a derivative case may obtain access to communications between the company's management (who owe the



shareholders fiduciary duties) and the corporate management's lawyers. This principle is called the Garner doctrine, after a 1970 Fifth Circuit case.<sup>1</sup>

Courts eventually expanded this doctrine to include many other fiduciary relationships. Examples include: ERISA plan beneficiaries;<sup>2</sup> union members;<sup>3</sup> non-union employees;<sup>4</sup> limited partners;<sup>5</sup> bankruptcy creditors' committee;<sup>6</sup> a beneficiary of a law firm's duty in a bank merger;<sup>7</sup> presidential advisers;<sup>8</sup> a beneficiary of a government Indian Trust;<sup>9</sup> an Indian nation.<sup>10</sup>

**(a)** The Restatement recognizes the fiduciary exception's applicability in the trust and estate context.

In a proceeding in which a trustee of an express trust or similar fiduciary is charged with breach of fiduciary duties by a beneficiary, a communication otherwise within § 68 is nonetheless not privileged if the communication: (a) is relevant to the claimed breach; and (b) was between the trustee and a lawyer (or other privileged person within the meaning of § 70) who was retained to advise the trustee concerning the administration of the trust.

Restatement (Third) of Law Governing Lawyers § 84 (2000). A comment provides somewhat more detail.

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<sup>1</sup> Garner v. Wolfenbarger, 430 F.2d 1093 (5th Cir. 1970), cert. denied, 401 U.S. 974 (1971).

<sup>2</sup> Vaughan v. Celanese Ams. Corp., Civ. No. 3:06CV104-W, 2006 U.S. Dist. LEXIS 89888, at \*13-14 (W.D.N.C. Dec. 11, 2006).

<sup>3</sup> Wessel v. City of Albuquerque, Misc. A. No. 00-00532 (ESH/AK), 2000 U.S. Dist. LEXIS 17494, at \*12-13 (D.D.C. Nov. 30, 2000).

<sup>4</sup> Harrington v. City of Albuquerque, No. CIV 01-0531 LH/WDS-ACE, 2004 U.S. Dist. LEXIS 10153 (D.N.M. May 11, 2004).

<sup>5</sup> Opus Corp. v. IBM Corp., 956 F. Supp. 1503, 1507 (D. Minn. 1996).

<sup>6</sup> In re Baldwin-United Corp., 38 B.R. 802 (Bankr. S.D. Ohio 1984).

<sup>7</sup> Stenovich v. Wachtell, Lipton, Rosen & Katz, 756 N.Y.S.2d 367, 381 (N.Y. Sup. Ct. 2003).

<sup>8</sup> In re Lindsey, 158 F.3d 1263, 1276 (D.C. Cir.), cert. denied, 525 U.S. 996 (1998).

<sup>9</sup> Cobell v. Norton, 213 F.R.D. 69, 73 (D.D.C. 2003).

<sup>10</sup> Osage Nation v. United States, 66 Fed. Cl. 244, 252 (Fed. Cl. 2005).

In litigation between a trustee of an express trust and beneficiaries of the trust charging breach of the trustee's fiduciary duties, the trustee cannot invoke the attorney-client privilege to prevent the beneficiaries from introducing evidence of the trustee's communications with a lawyer retained to advise the trustee in carrying out the trustee's fiduciary duties.

Id. cmt. b.

Some courts have applied this principle to private trusts.

This hypothetical comes from Lawrence v. Cohn, No. 90 Civ. 2396 (CSH)(MND), 2002 U.S. Dist. LEXIS 1226 (S.D.N.Y. Jan. 24, 2002). In that case, the law firm of Weil, Gotshal & Manges was compelled to produce most of its files to the plaintiff beneficiaries. As the court explained,

WGM [the law firm] represented Cohn [the executor] in that case only in his capacity as executor. In that capacity, he owed certain fiduciary responsibilities to the estate, and, thus, to its beneficiaries. Given these obligations, he cannot assert the privilege, nor can WGM invoke the work-product rule, against the estate or its beneficiaries. When a fiduciary retains an attorney to advise him in the exercise of his fiduciary responsibilities, his communications with that attorney are not absolutely protected from inquiry by the beneficiaries for whom the fiduciary performs. This principle is recognized in a variety of fiduciary contexts, although the prototype finds its source in the law of trusts.

Id. at \*9 (emphasis added).

Not all courts take this approach. For instance, in late 2010, a Connecticut court found the fiduciary exception inapplicable in a private trust setting. In Hubbell v. Ratcliffe, No. HHDX04CV08403824S, 2010 Conn. Super. LEXIS 2853 (Conn. Super. Ct. Nov. 8, 2010), the beneficiary of two family trusts sought to remove two trustees, and to recover damages for their alleged breach of fiduciary duty. Plaintiff moved to

compel production of communications between the trustees and their lawyer -- citing the fiduciary exception. After examining the case law from across the country, the court emphasized that the fiduciary's lawyer did not represent the beneficiaries.

The analysis in Spinner [v. Nutt], 631 N.E.2d 542 (Mass. 1994)], and Huie [v. DeShazo], 922 S.W.2d 920 (Tex. 1996)] is also consistent with decisions of this court and those of other Superior Court judges, which have found that an attorney for a fiduciary of an estate does not represent its beneficiaries.

Id. at \*14. The court also found that

the payment of counsel out of trust funds does not convert trust beneficiaries into clients of the trustees' counsel. . . . The beneficiaries of the Hubbell trusts, including the plaintiff, are not clients of the trustees' counsel.

Id. at \*15. The court then concluded that "[a]n exception to the attorney-client privilege is not warranted," so "the claimed fiduciary exception to the attorney-client privilege is not applicable here." Id.

This court's reasoning is not directly on point. The fiduciary exception does not rise or fall on the status of the beneficiaries actually having an attorney-client relationship with the fiduciary's lawyer. Instead, the fiduciary exception looks at the question in a more abstract way, pointing to duties rather than a formal relationship. Still, this court's basic approach is consistent with case law taking that side of the issue.

- See, e.g., Layton v. Layton, Ch. No. 920764 (Va. Cir. Ct. Dec. 29, 1992) (in the beneficiaries' action for breach of fiduciary duty, finding that the executor and trustee can assert the attorney-client privilege to protect disclosures to his lawyer).

The "fiduciary exception" is counter-intuitive, because the lawyer and the fiduciary might consider the beneficiary to be an outsider, and therefore unable to pierce the acknowledged attorney-client relationship between the fiduciary and the lawyer.

However, lawyers representing a fiduciary (or acting as fiduciaries themselves) should keep this exception to the attorney-client privilege in mind.

**(b)** The fiduciary exception does not apply to communications relating to the fiduciary's own liability.<sup>11</sup> Some courts call this the "liability exception" to the fiduciary exception.<sup>12</sup>

One court concluded that the fiduciary exception did not apply in an ERISA case, because "[a]ll of the communications to which Plaintiff seeks to apply the fiduciary exception related to the threatened litigation" against the fiduciary rather than the fiduciary's administration of the ERISA plan.<sup>13</sup> Another court found that the fiduciary exception did not apply to several documents at issue -- citing the inapplicability of the fiduciary exception to "legal advice to protect the plan administrator from personal liability, where the administrator's interests are adversarial to those of the plan beneficiaries."<sup>14</sup>

Not surprisingly, courts often must analyze each communication to determine the exception's applicability.<sup>15</sup>

Although the issue does not frequently arise, other courts have recognized the fiduciary exception's possible applicability in this setting.

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<sup>11</sup> Black v. Pitney Bowes, No. 05 Civ. 108 (GEL), 2006 U.S. Dist. LEXIS 92263 (S.D.N.Y. Dec. 21, 2006).

<sup>12</sup> Wachtel v. Health Net, Inc., 482 F.3d 225, 233 (3d Cir. 2007).

<sup>13</sup> Fortier v. Principal Life Ins. Co., No. 5:08-CV-5-D(3), 2008 U.S. Dist. LEXIS 43108, at \*6 (E.D.N.C. June 2, 2008).

<sup>14</sup> Tatum v. R.J. Reynolds Tobacco Co., 247 F.R.D. 488, 495 (M.D.N.C. 2008).

<sup>15</sup> Wachtel v. Guardian Life Ins. Co., Civ. Dkt. Nos. 01-4183 & 03-1801, 2006 U.S. Dist. LEXIS 28879, at \*30-31 (D.N.J. May 11, 2006), vacated in part and remanded on other grounds, 482 F.3d 225 (3d Cir. 2007).

- See, e.g., Parker v. Stone, Civ. A. No. 3:07-cv-00271 (VLB), 2009 U.S. Dist. LEXIS 33554, at \*9-10, \*13-14 (D. Conn. Apr. 21, 2009) (analyzing the applicability of the fiduciary exception in an action brought by the administrator of an estate against the estate's former conservator; "Many courts have recognized that trustees of estates are not protected by the attorney client privilege in their trustee capacity, though the Court is not aware of, and the parties did not cite, any Connecticut precedent. Connecticut decisions on trusts have historically followed the common law, and the Court thus looks to other jurisdictions' application of the fiduciary exception to the trusts and estates context. See, e.g., Matter of Estate of Baker, 139 Misc. 2d 573, 528 N.Y.S. 2d 470 (Sur. 1988) (holding attorney client privilege was unavailable to the fiduciaries of an estate as both fiduciary and beneficiaries were clients of the attorney); Riggs National Bank of Washington, D.C. v. Zimmer, 355 A.2d 709 (Del. Ch.1976) (holding estate beneficiaries are entitled to know what legal advice had been given on their behalf)."; noting that one of the factors was the source of payment of the lawyer's bills; ultimately finding that the party asserting the privilege had not presented any evidence; "That burden is discharged by the presentation of evidence in the form of testimony or affidavit concerning the document's content and use."; ultimately remanding and insisting on a privilege log for any withheld documents; "[S]tone [Estate's former conservator] retained Bearn [Trust and Estate's lawyer] to represent him as trustee of the Estate of King Lawrence Parker and the Alice Flagg Parker Trust. Bearn testified at his deposition that he never considered Stone to be his individual client. Any documentation related to the administration of the estate or trust falls within the fiduciary exception and is not entitled to protection under attorney client privilege. However, any document that was prepared in connection or anticipation of the current litigation or the adversarial show cause proceedings in probate court is exempted from this disclosure. Thus, Bearn should disclose to the plaintiffs all documents falling within these constrictions. Any documents for which Bearn maintains privilege should be properly detailed in a privilege log." (emphasis added)).

This "liability exception" to the "fiduciary exception" can obviously be a critical doctrine to a fiduciary worried about his or her own liability, and now in litigation with a beneficiary seeking to obtain communications in which the fiduciary expresses worries, admits to wrongdoing, etc. Because many fiduciaries rely on the same lawyer to advise them about their fiduciary responsibilities as well as their possible personal liability, drawing the line between protectable and nonprotectable communications can be very difficult. Fiduciaries would be wise to seek guidance about their own liability from a

lawyer who is not simultaneously advising them about their fiduciary role, but most fiduciaries do not do so.

**Best Answer**

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

N 8/12

## Crime-Fraud Exception

### Hypothetical 72

You just received word that a trustee you had represented for several years might have engaged in fraud. The beneficiary who claims to have been defrauded has hired an aggressive lawyer, who just indicated that she intends to seek access to all of your communications with the trustee under both the fiduciary exception and the crime-fraud exception to the attorney-client privilege. You have always understood that the fiduciary exception might open your communications to such beneficiaries, but you are deeply offended by the beneficiary's lawyer's reference to the crime-fraud exception. You steadfastly believe that you did nothing wrong, and that you had no idea that the trustee might have been using your advice to engage in wrongdoing.

Can the crime-fraud exception to the attorney-client privilege apply if the lawyer is innocent of any improper intent or knowledge?

**YES**

### Analysis

The attorney-client privilege does not protect communications in which clients and their lawyers plot or advance criminal or other serious wrongful conduct.<sup>1</sup>

The crime-fraud exception does not prevent clients and their lawyers from communications about past crimes.<sup>2</sup> In some situations, it can be difficult to determine if a crime has occurred, or is ongoing. For example, crimes such as a parent's child-snatching begin when the parent takes the child -- but arguably continues as long as the parent keeps the child. The crime-fraud exception can apply to ongoing crimes like that.<sup>3</sup>

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<sup>1</sup> Restatement (Third) of Law Governing Lawyers § 82 (2000).

<sup>2</sup> SEC v. Dowdell, No. 8:02-mc-94-T-17TBM, 2006 U.S. Dist. LEXIS 31803, at \*13 (M.D. Fla. May 15, 2006).

<sup>3</sup> In re Public Defender Serv., 831 A.2d 890, 895 (D.C. 2003).

All courts apply the crime-fraud exception to future criminal conduct.<sup>4</sup> Nearly every court also applies the doctrine to fraud.<sup>5</sup> Most courts apply the doctrine to common law fraud.<sup>6</sup> In contrast, courts sometimes do not apply the doctrine to conduct labeled as "fraud" under state law, but not amounting to egregious conduct.<sup>7</sup>

Courts have debated the doctrine's applicability to other wrongdoing. Some courts have applied the crime-fraud exception expansively to various kinds of wrongdoing. Examples include: intentional breach of fiduciary duty;<sup>8</sup> intentional torts moored in fraud;<sup>9</sup> baseless litigation (generally to the extent that it furthers some other wrongful conduct);<sup>10</sup> serious unlawful activity;<sup>11</sup> intentional infliction of emotional distress;<sup>12</sup> conspiracy to deprive people of their civil rights;<sup>13</sup> fraud on a court;<sup>14</sup> spoliation of evidence in criminal cases<sup>15</sup> and civil cases;<sup>16</sup> intentional torts;<sup>17</sup> gross negligence;<sup>18</sup> a lawyer's false discovery responses;<sup>19</sup> a lawyer's unprofessional

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<sup>4</sup> Aviles v. State, 165 S.W.3d 437, 439 (Tex. App. 2005).

<sup>5</sup> George v. Siemens Indus. Automation, Inc., 182 F.R.D. 134, 139 (D.N.J. 1998).

<sup>6</sup> Auerbach v. Analytica of Branford, Inc., No. NNHCV040485430, 2006 Conn. Super. LEXIS 3267, at \*12 (Conn. Super. Ct. Oct. 26, 2006).

<sup>7</sup> Lifewise Master Funding v. Telebank, 206 F.R.D. 298, 305 (D. Utah 2002).

<sup>8</sup> Mueller Indus., Inc. v. Berkman, 927 N.E. 2d 794, 808 (Ill. App. Ct. 2010).

<sup>9</sup> Cooksey v. Hilton Int'l Co., 863 F. Supp. 150, 151 (S.D.N.Y. 1994).

<sup>10</sup> Specialty Minerals, Inc. v. Pleuss-Stauffer AG, No. 98 Civ. 7775 (VM) (MHD), 2004 U.S. Dist. LEXIS 178 (S.D.N.Y. Jan. 6, 2004).

<sup>11</sup> Stryker Corp. v. Intermedics Orthopedics, Inc., 148 F.R.D. 493, 497 (E.D.N.Y. 1993).

<sup>12</sup> Diamond v. Stratton, 95 F.R.D. 503, 505 (S.D.N.Y. 1982).

<sup>13</sup> Horizon of Hope Ministry v. Clark County, 115 F.R.D. 1, 5-6 (S.D. Ohio 1986).

<sup>14</sup> Owens-Corning Fiberglas Corp. v. Watson, 413 S.E.2d 630, 638-39 (Va. 1992).

<sup>15</sup> In re Grand Jury Investigation, 445 F.3d 266, 274-76 (3d Cir. 2006).

<sup>16</sup> Rambus, Inc. v. Infineon Techs. AG, 220 F.R.D. 264, 283 (E.D. Va. 2004).

<sup>17</sup> Madanes v. Madanes, 199 F.R.D. 135, 148-49 (S.D.N.Y. 2001).

<sup>18</sup> Derrick Mfg. Corp. v. Sw. Wire Cloth, Inc., 934 F. Supp. 813, 816 (S.D. Tex. 1996).



behavior;<sup>20</sup> a lawyer's sanctionable conduct;<sup>21</sup> marketing of a defective product without advising the FDA;<sup>22</sup> violation of a foreign criminal law;<sup>23</sup> insurance bad faith;<sup>24</sup> securities fraud;<sup>25</sup> fraud on the United States Patent Office.<sup>26</sup>

Other courts take a narrower approach, and decline to apply the crime-fraud exception to various types of misconduct. Examples include: tortious conduct;<sup>27</sup> inequitable conduct in patent cases;<sup>28</sup> an insurance company's bad faith;<sup>29</sup> unfair trade practice;<sup>30</sup> late production of a document in litigation;<sup>31</sup> possible perjury in a malpractice case;<sup>32</sup> abuse of process;<sup>33</sup> errors in discovery;<sup>34</sup> frivolous lawsuit;<sup>35</sup> firing and replacing

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<sup>19</sup> Patel v. Allison, 54 Va. Cir. 155 (Va. Cir. Ct. 2000).

<sup>20</sup> Blanchard v. Edgemark Fin. Corp., 192 F.R.D. 233, 241 (N. D. Ill. 2000).

<sup>21</sup> Id.

<sup>22</sup> In re Grand Jury Subpoena, 220 F.R.D. 130 (D. Mass. 2004).

<sup>23</sup> Madanes, 199 F.R.D. 135.

<sup>24</sup> Hutchinson v. Farm Family Cas. Ins. Co., 867 A.2d 1, 13 (Conn. 2005).

<sup>25</sup> SEC v. Herman, No. 00 Civ. 5575 (PKC) (MHD), 2004 U.S. Dist. LEXIS 7829, at \*17 (S.D.N.Y. May 5, 2004).

<sup>26</sup> Danisco A/S v. Novozymes A/S, 427 F. Supp. 2d 443, 444-45 (S.D.N.Y. 2006).

<sup>27</sup> Hyde Constr. Co. v. Koehring Co., 455 F.2d 337, 342 (5th Cir. 1972).

<sup>28</sup> For Your Ease Only, Inc. v. Calgon Carbon Corp., No. 02 C 7345, 2003 U.S. Dist. LEXIS 7131, at \*14 (N.D. Ill. Apr. 24, 2003).

<sup>29</sup> Freedom Trust v. Chubb Group, 38 F. Supp. 2d 1170, 1171-72 (C.D. Cal. 1999).

<sup>30</sup> Ferrara & DiMercurio, Inc. v. St. Paul Mercury Ins. Co., 173 F.R.D. 7, 13 (D. Mass. 1997).

<sup>31</sup> Prudential Ins. Co. of Am. v. Massaro, Civ. A. No. 97-2022, 2000 U.S. Dist. LEXIS 11985, at \*34 (D.N.J. Aug. 14, 2000)

<sup>32</sup> Princeton Ins. Co. v. Vergano, 883 A.2d 44, 59 (Del. Ch. 2005).

<sup>33</sup> Tri-State Hosp. Supply Corp. v. United States, Civ. A. No. 00-1463 (HHK/JMF), 2005 U.S. Dist. LEXIS 33156, at \*15-16 (D.D.C. Dec. 16, 2005).

<sup>34</sup> Jinks-Umstead v. England, 232 F.R.D. 142, 145-46 (D.D.C. 2005).

<sup>35</sup> In re EEOC, 207 F. App'x 426, 433-34 (5th Cir. 2006) (unpublished opinion).

an employee;<sup>36</sup> lying about the reason for firing an employee;<sup>37</sup> government's malicious prosecution.<sup>38</sup>

Some courts require that the wrongdoing be completed before they are willing to apply the doctrine. As the Restatement explains, applying the crime-fraud exception to uncompleted criminal or wrongful acts "would penalize the client for doing what the privilege is designed to encourage -- consulting a lawyer for the purpose of achieving law compliance."<sup>39</sup>

Other courts apply the crime-fraud exception (as one court put it) "even if the clients' efforts are frustrated or halted short of consummation of the evil deed."<sup>40</sup> Many of these courts do not properly explain their reasoning. The crime-fraud exception should not apply if the lawyer's advice had stopped the client from undertaking the bad conduct. However, it might apply if the client has been prevented from consummating the bad act through some police intervention, etc.

The crime-fraud exception obviously cannot be triggered simply because the challenged communications might provide some evidence of a client's wrongdoing.<sup>41</sup> As with several other privilege principles, this issue arose in the government's action against Martha Stewart.<sup>42</sup>

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<sup>36</sup> Estes v. Health Ventures, Civ. No. 05-741-DRH, 2006 U.S. Dist. LEXIS 80719, at \*9-10 (S.D. Ill. Nov. 3, 2006).

<sup>37</sup> Id.

<sup>38</sup> Tri-State Hosp. Supply Corp v. United States, 238 F.R.D. 102, 104 (D.D.C. 2006).

<sup>39</sup> Restatement (Third) of Law Governing Lawyers § 82 cmt. c (2000).

<sup>40</sup> In re Public Defender Serv., 831 A.2d at 902.

<sup>41</sup> In re Omnicom Group Inc., Sec. Litig., 233 F.R.D. 400, 404-05 (S.D.N.Y. 2006).

<sup>42</sup> United States v. Stewart, No. 03 Cr. 717 (MGC), 2003 U.S. Dist. LEXIS 23180 (S.D.N.Y. Dec. 29, 2003).

The crime-fraud exception can apply to documents<sup>43</sup> or testimony.<sup>44</sup>

Courts taking a narrow view of the crime-fraud exception require that the litigants seeking application of the doctrine establish that the challenged communications furthered<sup>45</sup> or assisted<sup>46</sup> the wrongdoing. One court held that the crime-fraud exception did not apply to a client's threat to harm a judge and his family -- because the client had not asked the lawyer for any assistance (although the lawyer could ethically disclose such a threat under Massachusetts ethics Rule 1.6).<sup>47</sup>

Courts taking a broad view of the crime-fraud exception do not require that the communications at issue to further or assist the client's wrongdoing. Instead, these courts use phrases like "reasonable relation"<sup>48</sup> or "close relationship"<sup>49</sup> in determining the required link between the communications and the wrongdoing.

Because the crime-fraud exception involves clients and lawyers, courts obviously must address the intent of both participants when assessing the crime-fraud exception's applicability.

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<sup>43</sup> In re Seigel, 198 S.W.3d 21, 28-29 (Tex. App. 2006).

<sup>44</sup> I.L.G.W.U. Nat'l Ret. Fund v. Cuddlecoat, Inc., No. 01 Civ. 4019(BSJ)(DFE), 2002 U.S. Dist. LEXIS 2993 (S.D.N.Y. Feb. 22, 2002).

<sup>45</sup> Hicks v. Bush, 452 F. Supp. 2d 88, 100 & n.8 (D.D.C. 2006).

<sup>46</sup> Nobelpharma AB v. Implant Innovations, Inc., 930 F. Supp. 1241, 1260-61 (N.D. Ill. 1996).

<sup>47</sup> In re A Grand Jury Investigation, 902 N.E.2d 929 (Mass. 2009).

<sup>48</sup> In re Grand Jury Subpoena, 419 F.3d 329, 347, 336 n.7 (5th Cir. 2005).

<sup>49</sup> United States v. Under Seal (In re Grand Jury Proceedings #5), 401 F.3d 247, 251 (4th Cir. 2005).

The client's intent is built into the other element of the exception -- such as the existence of a crime.<sup>50</sup> Surprisingly, the Restatement apparently would not require proof that the client acted with the requisite intent.<sup>51</sup>

Significantly, courts examining lawyers' intent generally hold that a litigant seeking application of the crime-fraud exception need not establish (or presumably even argue) that the lawyer had a similarly evil state of mind.<sup>52</sup> As one court put it, "[t]he pertinent intent is that of the client, not of the attorney."<sup>53</sup>

Courts must analyze each pertinent communication to determine the crime-fraud exception's applicability.<sup>54</sup> One court found that the crime-fraud exception applied to certain sentences in some documents, but not to other sentences.<sup>55</sup>

In examining each communication, courts engage in a two-step analysis: (1) determining if the adversary has carried its burden of proof to justify the court's in camera review, and (2) determining (after an in camera review) whether the adversary has carried the burden of stripping away the privilege. Many courts do not distinguish between these two standards -- frequently making it difficult to understand the courts' analysis.

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<sup>50</sup> Kaminski v. First Union Corp., Nos. 98-CV-1623 & -6318, 99-CV-1509, -4783, & -6523, 2001 U.S. Dist. LEXIS 9688, at \*15-16 (E.D. Pa. July 9, 2001).

<sup>51</sup> Restatement (Third) of Law Governing Lawyers § 82 cmt. c (2000).

<sup>52</sup> SEC v. Chesnoff, Misc. A. No. 4:05-MC-043-Y, 2006 U.S. Dist. LEXIS 49090, at \*13 (N.D. Tex. July 18, 2006).

<sup>53</sup> Specialty Minerals, Inc. v. Pleuss-Stauffer AG, No. 98 Civ. 7775 (VM) (MHD), 2004 U.S. Dist. LEXIS 178, at \*11 (S.D.N.Y. Jan. 6, 2004).

<sup>54</sup> In re BankAmerica Corp. Sec. Litig., 270 F.3d 639, 644 (8th Cir. 2001).

<sup>55</sup> SEC v. Teo, Civ. A. No. 04-1815 (SDW), 2009 U.S. Dist. LEXIS 49537 (D.N.J. June 11, 2009) (not for publication).

In United States v. Zolin, 491 U.S. 554 (1989), the United States Supreme Court recognized that courts analyzing the crime-fraud exception normally must assess the pertinent documents or oral communications in camera.

The Zolin decision specified a lower -- but undefined -- standard for courts to use when determining if they should conduct such an in camera review. Courts analyzing the crime-fraud exception's applicability since Zolin have taken varying positions on the approach that should guide their decision about whether to conduct an in camera review. Most courts indicate they have the discretion to decide whether to review the communications in camera.<sup>56</sup> However, some courts seem to require an in camera review.<sup>57</sup>

Courts have also articulated the standard for an in camera review. Some courts require that the party seeking the in camera review establish a prima facie showing that the crime-fraud exception applies.<sup>58</sup> Other courts have looked at whether the party seeking the review has established a "good faith belief" that the in camera review might disclose evidence establishing the crime-fraud exception's applicability.<sup>59</sup>

Because the factual context affects the analysis, courts recognize that a litigant who fails to establish the crime-fraud exception's applicability can try again later if the facts change.<sup>60</sup>

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<sup>56</sup> Weniger v. Nationwide Ins. Co., Civ. A. No. 05-5396, 2006 U.S. Dist. LEXIS 33800, at \*3-4 (E.D. Pa. May 26, 2006).

<sup>57</sup> In re Grand Jury Proceedings #5, 401 F.3d at 253 n.5.

<sup>58</sup> Weniger, 2006 U.S. Dist. LEXIS 33800, at \*2-3.

<sup>59</sup> In re Grand Jury Proceedings #5, 401 F.3d at 253.

<sup>60</sup> In re Omnicom Group Inc., Sec. Litig., 233 F.R.D. 400.

Not surprisingly, applying the crime-fraud exception involves a number of process issues. Most courts hold that the court can consider just evidence supplied by the adversary seeking to strip away a litigant's privilege -- such as ex parte government evidence in a criminal case.<sup>61</sup> However, other courts take just the opposite approach.<sup>62</sup> One court explained that trial courts may examine evidence from the privilege's opponent (in a criminal case, the government).<sup>63</sup>

Courts have also debated the need for a hearing about the crime-fraud exception's possible applicability. Some courts have warned against the crime-fraud issue generating a series of mini trials that "would waste resources" and delay any grand jury proceedings.<sup>64</sup> On the other hand, some courts have indicated that a party seeking to assert the privilege (and resist a crime-fraud exception) has the right to a hearing.<sup>65</sup>

Courts use a variety of standards when articulating what is required for actually stripping away the privilege (as opposed to the standard justifying an in camera review). Examples include: prima facie showing;<sup>66</sup> probable cause;<sup>67</sup> reasonable cause.<sup>68</sup> To

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<sup>61</sup> United States v. Thompson, 518 F.3d 832 (10th Cir.), cert denied, 555 U.S. 993 (2008).

<sup>62</sup> Haines v. Liggett Group, Inc., 975 F.2d 81, 97 (3d Cir. 1992).

<sup>63</sup> United States v. Under Seal #4 (In re Grand Jury Subpoena #06-1), 274 F. App'x 306, 309-10 (4th Cir. 2008) (unpublished opinion).

<sup>64</sup> Intervenor v. United States (In re Grand Jury Subpoenas), 144 F.3d 653, 661 (10th Cir.), cert. denied, 525 U.S. 966 (1998).

<sup>65</sup> Haines, 975 F.2d at 97.

<sup>66</sup> United States v. Reeder, 170 F.3d 93, 106 (1st Cir.), cert denied, 528 U.S. 872 (1999).

<sup>67</sup> Kozlovich v. Kozlovich, Case No. FA0540003806S, 2006 Conn. Super. LEXIS 3291, at \*8 (Conn. Super. Ct. Oct. 26, 2006) (unreported decision).

<sup>68</sup> In re Grand Jury Subpoena, 220 F.R.D. at 152.

make things even more confusing, courts disagree about how to define phrases such as "probable cause" in the crime-fraud context.<sup>69</sup>

Lawyers finding themselves in the unfortunate situation of having to deal with the crime-fraud exception should familiarize themselves with the many subtle rules governing that doctrine.

### **Best Answer**

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

N 8/12

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<sup>69</sup> In re Omnicom Group Inc., Sec. Litig., 233 F.R.D. at 405.

## Work Product: "Litigation" Requirement

### Hypothetical 73

You are just starting into some estate administration work, and you can see possible trouble with the IRS and estate administrative agencies (including tax agencies) on the horizon. You would like to maximize work product protection, and you wonder about the applicable standards.

- (a) Is a threat of an IRS investigation sufficient to trigger work product protection?

**NO**

- (b) Can the work product doctrine protect documents created in anticipation of administrative proceedings?

**MAYBE**

### Analysis

On its face, the work product doctrine protects "documents and tangible things" that are prepared "in anticipation of litigation or for trial." Fed. R. Civ. P. 26(b)(3)(A).

Thus, the first element of a work product claim is "litigation." Courts must therefore determine what amounts to "litigation" for purposes of analyzing any claim of work product protection.

- (a) Civil<sup>1</sup> and criminal<sup>2</sup> proceedings clearly qualify as "litigation" for work product purposes.<sup>3</sup>

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<sup>1</sup> General Elec. Co. v. Johnson, Civ. A. No. 00-2855 (JDB), 2006 U.S. Dist. LEXIS 64907, at \*36 (D.D.C. Sept. 12, 2006).

<sup>2</sup> In re Grand Jury Subpoena, 463 F. Supp. 2d 573, 575 n.1 (W.D. Va. 2006).

<sup>3</sup> Some courts define other "litigation" in a surprisingly narrow way. For instance, one court refused to apply the work product doctrine to draft bankruptcy filings, holding that "[t]his bankruptcy filing was not itself 'litigation' in anticipation of which protected attorney work product can be created." United States v. Naegele, 468 F. Supp. 2d 165, 173 (D.D.C. 2007). Another court held that "bankruptcy itself constitutes 'litigation' for purposes of delineating" the work product doctrine. Brown v. Adams (In re Ft. Worth



Some courts seem to misapply the work product doctrine in the context of government investigations. Most courts hold that government investigations do not amount themselves to "litigation," but that an investigation can result in a reasonable anticipation of later litigation.<sup>4</sup> For instance, one court held that Bayer could have anticipated litigation when the government began an investigation into its disclosures to the FDA, because a government investigation "often represents 'more than a remote possibility of future litigation and provides reasonable grounds for anticipating litigation.'"<sup>5</sup>

Unfortunately, these courts usually state that the subject of a government investigation can reasonably anticipate litigation only after the government begins the investigation.<sup>6</sup> It is unclear whether these courts intend to limit the work product doctrine in the way their decisions could be read. It should seem clear that the subject of a government investigation might well anticipate ultimate litigation even before a government investigation begins.

**(b)** Outside the traditional civil and criminal litigation context, courts must sometimes analyze the applicability of the "litigation" requirement.

For instance, one court dealt with the applicability of the work product doctrine to documents prepared in connection with administrative proceedings before federal and California agencies. The court distinguished between administrative proceedings that

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*Osteopathic Hosp. Inc.*), Case Nos. 05-41513-DML-7 5-41503-DML-7, Adv. No. 07-04015-DML, Civ. A. No. 4:07-CV-206-Y, 2008 Bankr. LEXIS 3156, at \*44-45 (Bankr. N.D. Tex. Nov. 14, 2008).

<sup>4</sup> Pacamor Bearings, Inc. v. Minebea Co., 918 F. Supp. 491, 513 (D.N.H. 1996).

<sup>5</sup> In re TrasyloI Prods. Liab. Litig., Case No. 08-1928-MDL-MIDDLEBROOKS, 2009 U.S. Dist. LEXIS 85553, at \*86 (S.D. Fla. Aug. 12, 2009) (citation omitted).

<sup>6</sup> Thuma v. PolyMedica Corp. (In re PolyMedica Corp. Sec. Litig.), 235 F.R.D. 28, 31-32 (D. Mass. 2006).

are non-adversarial and those that are adversarial -- the work product doctrine only applies to documents created in connection with, or in anticipation of, the latter.<sup>7</sup>

Some courts have expanded the work product doctrine to other non-judicial proceedings. For instance, one court held that arbitration between a teacher and her school board employer amounted to litigation for work product purposes.<sup>8</sup> Other examples include: adversarial administrative proceeding;<sup>9</sup> adversarial rule making proceeding;<sup>10</sup> adversarial arbitration;<sup>11</sup> alternative dispute resolution proceeding;<sup>12</sup> adversarial patent proceeding;<sup>13</sup> patent interference proceeding;<sup>14</sup> grand jury proceeding;<sup>15</sup> Claims Commission proceeding;<sup>16</sup> investigative legislative hearing;<sup>17</sup> coroner's inquiry;<sup>18</sup> adversarial proceedings before a government agency.<sup>19</sup>

Thus, the administrative proceedings might or might not count as "litigation" for purposes of analyzing work product protection. In essence, the more adversarial and

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<sup>7</sup> Pacific Gas & Elec. Co. v. United States, 69 Fed. Cl. 784, 806, 808 (Fed. Cl. 2006).

<sup>8</sup> Berryman v. Madison Sch. Dist., No. 265996, 2007 Mich. App. LEXIS 464, at \*11 (Mich. Ct. App. Feb. 22, 2007) (unpublished opinion).

<sup>9</sup> Galvin v. Hoblock, No. 00 Civ. 6058 (DAB) (MHD), 2003 U.S. Dist. LEXIS 16704, at \*10 (S.D.N.Y. Sept. 23, 2003).

<sup>10</sup> Restatement (Third) of Law Governing Lawyers § 87 cmt. h (2000).

<sup>11</sup> Amobi v. D.C. Dep't of Corr., 262 F.R.D. 45 (D.D.C. 2009); Samuels v. Mitchell, 155 F.R.D. 195, 200 (N.D. Cal. 1994).

<sup>12</sup> Restatement (Third) of Law Governing Lawyers § 87 cmt. h (2000).

<sup>13</sup> Applied Telematics, Inc. v. Sprint Commc'ns Co., Civ. A. No. 94-4603, 1996 U.S. Dist. LEXIS 13782, at \*15-16 (E.D. Pa. Sept. 18, 1996).

<sup>14</sup> In re Grand Jury Subpoena, 220 F.R.D. 130, 147 (D. Mass. 2004).

<sup>15</sup> Restatement (Third) of Law Governing Lawyers § 87 cmt. h (2000).

<sup>16</sup> Id.

<sup>17</sup> Id.

<sup>18</sup> Id.

<sup>19</sup> Willingham v. Ashcroft, 228 F.R.D. 1, 4-5 (D.D.C. 2005).

court-like the administrative proceeding, the more likely a court is to recognize it as "litigation" for work product purposes.

**Best Answer**

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

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## Work Product: "Anticipation" Requirement

### Hypothetical 74

You are just starting on some estate administration work for a very complicated estate. You strongly suspect that the IRS will challenge some of the decisions you will be making on behalf of the estate. You naturally wonder about the work product protection that might apply to some of the documents you will be creating as you begin your work.

Will the work product doctrine protect documents you create because of your suspicion that the IRS will challenge some of the decisions you make?

### MAYBE

### Analysis

The second element of a work product claim is "anticipation" of litigation.

As tempting as it is to argue that a litigant asserting a work product claim in court obviously must have "anticipated" litigation -- because he is in court, after all -- the "anticipation" requirement is actually far more subtle. Somewhat ironically, it might be reasonable for a party to anticipate litigation even though it never occurs,<sup>1</sup> and it might be unreasonable to anticipate litigation even though it ultimately occurs.<sup>2</sup>

Courts recognize both a subjective and objective component of this "anticipation" of litigation element.<sup>3</sup> As one court put it, someone preparing work product "must at least have had a subjective belief that litigation was a real possibility, and that belief must have been objectively reasonable."<sup>4</sup>

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<sup>1</sup> National Jockey Club v. Ganassi, Case No. 04 C 3743, 2006 U.S. Dist. LEXIS 11826 (N.D. Ill. Mar. 22, 2006).

<sup>2</sup> O'Bar v. Lowe's Home Ctrs., Inc., Civ. No. 5:04-cv-00019-W, 2006 U.S. Dist. LEXIS 76282, at \*8 (W.D.N.C. Oct. 19, 2006).

<sup>3</sup> United States v. Roxworthy, 457 F.3d 590, 591, 594 (6th Cir. 2006).

<sup>4</sup> In re Sealed Case, 146 F.3d 881, 884 (D.C. Cir. 1998).

Courts apply widely varying views of what exactly must be "anticipated" to trigger the work product protection -- varying from litigation being "real and imminent."<sup>5</sup> to there being "some possibility of litigation."<sup>6</sup> Examples include: litigation is imminent;<sup>7</sup> there is an immediate anticipation of litigation;<sup>8</sup> litigation is impending;<sup>9</sup> there is a substantial and significant threat of litigation;<sup>10</sup> there is a substantial probability that litigation will start;<sup>11</sup> litigation is likely;<sup>12</sup> there is an actual event or series of events that reasonably could result in litigation;<sup>13</sup> the parties have an identifiable resolve to litigate;<sup>14</sup> litigation is a real possibility;<sup>15</sup> litigation is foreseeable;<sup>16</sup> there is a prospect of litigation;<sup>17</sup> there is a potential future prospect of litigation;<sup>18</sup> there is a reasonable contemplation of

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<sup>5</sup> McCoo v. Denny's Inc., 192 F.R.D. 675, 683 (D. Kan. 2000).

<sup>6</sup> In re Grand Jury Investigation, 599 F.2d 1224, 1229 (3d Cir. 1979).

<sup>7</sup> Minebea Co. v. Papst, 355 F. Supp. 2d 526, 529 (D.D.C. 2005).

<sup>8</sup> Power Mosfet Techs. v. Siemens AG, 206 F.R.D. 422, 424 (E.D. Tex. 2000).

<sup>9</sup> United States v. Ernstoff, 183 F.R.D. 148, 155, 156 (D.N.J. 1998).

<sup>10</sup> Smithkline Beecham Corp. v. Apotex Corp., 193 F.R.D. 530, 541 (N.D. Ill. 2000).

<sup>11</sup> Heavin v. Owens-Corning Fiberglass, No. 02-2572-KHV-DJW, 2004 U.S. Dist. LEXIS 2265, at \*15-16 (D. Kan. Feb. 3, 2004).

<sup>12</sup> BG Real Estate Servs., Inc. v. American Equity Ins. Co., Civ. A. No. 04-3408 SECTION "A" (2), 2005 U.S. Dist. LEXIS 10330, at \*20 (E.D. La. May 18, 2005).

<sup>13</sup> United States v. Duke Energy Corp., 214 F.R.D. 383, 390 (M.D.N.C. 2003).

<sup>14</sup> Weber v. Paduano, No. 02 Civ. 3392 (GEL), 2003 U.S. Dist. LEXIS 858, at \*23 (S.D.N.Y. Jan. 14, 2003).

<sup>15</sup> Jicarilla Apache Nation v. United States, 88 Fed. Cl. 1, 8 (Fed. Cl. 2009) ("it is well-recognized that for the rule to apply, litigation need not already have commenced or be imminent; rather, there must merely be a real possibility of litigation at the time the documents in question are prepared."), rev'd and remanded on other grounds, 131 S. Ct. 2313 (2011).

<sup>16</sup> Shaffer v. Northwestern Mut. Life Ins. Co., Civ. A. No. 5:05-CV-1, 2006 U.S. Dist. LEXIS 33539, at \*9 (N.D.W. Va. May 24, 2006).

<sup>17</sup> In re Fibermark, Inc., 330 B.R. 480, 503 (Bankr. D. Vt. 2005).

<sup>18</sup> Marsh v. Safir, No. 99 Civ. 8605 (JGK) (MHD), 2000 U.S. Dist. LEXIS 5136, at \*26 (S.D.N.Y. Apr. 20, 2000).

litigation;<sup>19</sup> there is more than an inchoate chance of litigation;<sup>20</sup> there is some possibility of litigation;<sup>21</sup> there is more than a remote prospect of litigation.<sup>22</sup>

Assessing the "anticipation of litigation" requirement can be very complicated. One court refused work product protection for documents created after litigating parties temporarily suspended the litigation under a "tolling agreement" which ultimately proved unsuccessful -- resulting in renewal of the litigation.<sup>23</sup> Another court held that a company's reasonable anticipation of government litigation against it dissipated after the lapse of eight months.<sup>24</sup>

At least in the abstract, a litigant claiming work product protection must identify the very moment at which he or she first anticipated litigation. It may not actually be necessary to identify that moment, because documents might have been created long before or long after that moment. Still, conceptually a litigant does not anticipate litigation one second, but anticipates it the next second.

It might be appropriate to call these "trigger" events. Although courts do not always differentiate between types of "trigger" events, it seems appropriate to consider various kinds of trigger events.

It can be useful to categorize these possible trigger events as discussed below, because they represent a spectrum of events starting with those over which no one has

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<sup>19</sup> Hertzberg v. Veneman, 273 F. Supp. 2d 67, 80 (D.D.C. 2003).

<sup>20</sup> In re Grand Jury Subpoena, 220 F.R.D. 130, 158 (D. Mass. 2004).

<sup>21</sup> AMCO Ins. Co. v. Madera Quality Nut LLC, No.1:04-cv-06456-SMS, 2006 U.S. Dist. LEXIS 21205, at \*48-49 (E.D. Cal. Apr. 10, 2006).

<sup>22</sup> SmithKline Beecham Corp. v. Apotex Corp., 232 F.R.D. 467, 484 (E.D. Pa. 2005).

<sup>23</sup> Minebea Co. v. Papst, 229 F.R.D. 1, 4 (D.D.C. 2005).

<sup>24</sup> In re Grand Jury Proceedings, No. M-11-189, 2001 U.S. Dist. LEXIS 15646, at \*59 (S.D.N.Y. Oct. 3, 2001).

control, and ending with those over which the litigant has control. The further along the spectrum, the more carefully a court should assess the trigger event -- to avoid the possibility that the litigant has "manufactured" the work product doctrine protection.

First, outside events that neither the litigant nor an adversary can control might trigger a reasonable anticipation of litigation. For instance, one court recognized that "[a] survey of cases reveals that the severity of an accident may make anticipation of litigation reasonable."<sup>25</sup> Examples include: a rear-end vehicular accident in a litigious county;<sup>26</sup> a serious automobile or other accident;<sup>27</sup> press articles about possible litigation or events that could result in litigation;<sup>28</sup> a rogue employee's action that causes a loss of \$691 million.<sup>29</sup>

Second, an action by the adversary might trigger a reasonable anticipation of litigation. Examples include: receipt of an adversary's statement that it intended to retain a lawyer;<sup>30</sup> an adversary's filing of litigation against a third party;<sup>31</sup> notice that the federal government was investigating the litigant for criminal wrongdoing;<sup>32</sup> receipt of a

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<sup>25</sup> Kansas City S. Ry. v. Nichols Constr. Co., Civ. A. No. 05-1182 & cons. cases SECTION "C" (4), 2007 U.S. Dist. LEXIS 53898, at \*15 (E.D. La. July 24, 2007).

<sup>26</sup> Carson v. Mar-Tee, Inc., 165 F.R.D. 48, 50 (E.D. Pa. 1996).

<sup>27</sup> Cade v. Monica Lee Tugs, Inc., Civ. A. No. 03-2380 c/w 2474 SECTION "D" (3), 2004 U.S. Dist. LEXIS 21422 (E.D. La. Oct. 22, 2004).

<sup>28</sup> Thuma v. PolyMedica Corp. (In re PolyMedica Corp. Sec. Litig.), 235 F.R.D. 28, 31 (D. Mass. 2006).

<sup>29</sup> Allied Irish Banks, p.l.c. v. Bank of America, N.A., 240 F.R.D. 96 (S.D.N.Y. 2007).

<sup>30</sup> Wikel v. Wal-Mart Stores, Inc., 197 F.R.D. 493 (N.D. Okla. 2000).

<sup>31</sup> Blumenthal v. Kimber Mfg., Inc., 826 A.2d 1088 (Conn. 2003).

<sup>32</sup> United States v. Torf (In re Grand Jury Subpoena), 357 F.3d 900, 909 (9th Cir. 2003) (as amended 2004).

subpoena from a government agency;<sup>33</sup> adversary's consultation with a lawyer;<sup>34</sup> adversary's retention of a lawyer<sup>35</sup> (some courts find this event "highly relevant" but not dispositive<sup>36</sup>); receipt of an adversary's communication claiming constructive discharge and intentional infliction of emotional distress;<sup>37</sup> receipt of an adversary's severe accusation<sup>38</sup> or threat to sue;<sup>39</sup> communication from an adversary discussing liability;<sup>40</sup> company's receipt of notification that another company planned to market a generic drug that competed with the company's drug;<sup>41</sup> state attorney general's receipt of a notice of claim against the state;<sup>42</sup> receipt of communication from the adversary's lawyer;<sup>43</sup> notice of an IRS audit;<sup>44</sup> receipt of an IRS notice disputing a taxpayer's valuation;<sup>45</sup> receipt of an OSHA complaint filed by an adversary;<sup>46</sup> notice from the

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<sup>33</sup> Silverman v. Hidden Villa Ranch (In re Suprema Specialties, Inc.), Ch. 7 Case No. 02-10823 (JMP), Adv. No. 04-01078 (JMP), 2007 Bankr. LEXIS 2304, at \*14-15 (Bankr. S.D.N.Y. July 2, 2007); In re Grand Jury Proceedings, 2001 U.S. Dist. LEXIS 15646, at \*61.

<sup>34</sup> In re Grand Jury Subpoena, 220 F.R.D. 130, 151 (D. Mass. 2004).

<sup>35</sup> In re Weeks Marine, Inc., 31 S.W.3d 389, 391 (Tex. App. 2000).

<sup>36</sup> Kidwiler v. Progressive Paloverde Ins. Co., 192 F.R.D. 536, 542 & n.41 (N.D.W. Va. 2000).

<sup>37</sup> Hayles v. Advanced Travel Mgmt. Corp., No. 01 Civ. 10017 (BSJ) (DFE), 2002 U.S. Dist. LEXIS 7192, at \*3 (S.D.N.Y. Apr. 10, 2002).

<sup>38</sup> Ex parte Ala. Dep't of Youth Servs., 927 So. 2d 805, 808 (Ala. 2005).

<sup>39</sup> Western United Life Assurance Co. v. Fifth Third Bank, No. 02 C 7315, 2004 U.S. Dist. LEXIS 23072, at \*8 (N.D. Ill. Nov. 10, 2004).

<sup>40</sup> Seneca Foods Corp. v. Starbucks Corp., No. 21860-1-III, 2005 Wash. App. LEXIS 211, at \*53 (Wash. Ct. App. Feb. 3, 2005) (unpublished opinion).

<sup>41</sup> SmithKline Beecham Corp. v. Apotex Corp., 232 F.R.D. 467, 484 (E.D. Pa. 2005).

<sup>42</sup> Ott v. Indiana Dep't of Corrections, Cause No. 3:05-CV-059 AS, 2005 U.S. Dist. LEXIS 11315, at \*8 (N.D. Ind. June 7, 2005).

<sup>43</sup> In re Grand Jury Subpoena, 220 F.R.D. 130, 151 (D. Mass. 2004).

<sup>44</sup> Bodega Investments, LLC v. United States, No. 08 Civ. 4065 (RMB) (MHD), 2009 U.S. Dist. LEXIS 48513, at \*31 (S.D.N.Y. May 14, 2009).

<sup>45</sup> Bernardo v. Comm'r, 104 T.C. 677, 688 (1995).

<sup>46</sup> Herman v. Crescent Publ'g Group, No. 00 Civ. 1665 (SAS), 2000 U.S. Dist. LEXIS 13738, at \*13-14 (S.D.N.Y. Sept. 21, 2000).



government that the litigant is not in compliance with a legal obligation;<sup>47</sup> receipt of an SEC subpoena;<sup>48</sup> receipt of a federal grand jury subpoena;<sup>49</sup> receipt of a letter from an adversary that took a litigious tone;<sup>50</sup> litigation by the adversary against the litigant on slightly different grounds;<sup>51</sup> the receipt of an EPA order relating to an environmental cleanup, and identification of potentially responsible parties;<sup>52</sup> litigation by the adversary against other companies taking the same action;<sup>53</sup> litigation by another adversary against a litigant;<sup>54</sup> receipt of a former employee's threat to sue;<sup>55</sup> an employer's hiring of someone other than plaintiff;<sup>56</sup> notice of an imminent federal government investigation;<sup>57</sup> notice of an informal SEC investigation;<sup>58</sup> notice of a formal SEC investigation;<sup>59</sup> SEC inquiry;<sup>60</sup> notice of states' formal inquiries into possible corporate misconduct.<sup>61</sup>

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<sup>47</sup> In re Grand Jury Subpoena, 220 F.R.D. 130, 151 (D. Mass. 2004).

<sup>48</sup> In re LTV Sec. Litig., 89 F.R.D. 595, 612 (N.D. Tex. 1981).

<sup>49</sup> Wsol v. Fiduciary Mgmt. Assocs., Inc., No. 99 C 1719, 1999 U.S. Dist. LEXIS 19002, at \*6 (N.D. Ill. Dec. 7, 1999).

<sup>50</sup> Caremark, Inc. v. Affiliated Computer Servs., Inc., 195 F.R.D. 610, 617-18 (N.D. Ill. 2000).

<sup>51</sup> United States v. Gericare Med. Supply, Inc., No. 99-0366-CB-L, 2000 U.S. Dist. LEXIS 19662, at \*10 (S.D. Ala. Dec. 11, 2000).

<sup>52</sup> Briggs & Stratton Corp. v. Concrete Sales & Servs., 174 F.R.D. 506, 509 (M.D. Ga. 1997).

<sup>53</sup> United States v. Roxworthy, 457 F.3d 590, 596-97 (6th Cir. 2006).

<sup>54</sup> Int'l Design Concepts, Inc. v. Saks Inc., No. 05 Civ. 4754 (PKC), 2006 U.S. Dist. LEXIS 36695, at \*4 (S.D.N.Y. June 5, 2006).

<sup>55</sup> SEC v. Brady, 238 F.R.D. 429, 441-42 (N.D. Tex. 2006).

<sup>56</sup> Rexford v. Olczak, 176 F.R.D. 90, 92 (W.D.N.Y. 1997).

<sup>57</sup> United States v. Reyes, 239 F.R.D. 591, 602 (N.D. Cal. 2006).

<sup>58</sup> SEC v. Brady, 238 F.R.D. 429, 444 (N.D. Tex. 2006).

<sup>59</sup> Lawrence E. Jaffee Pension Plan v. Household Int'l, Inc., 244 F.R.D. 412 (N.D. Ill. 2006).

<sup>60</sup> In re OM Group Sec. Litig., 226 F.R.D. 579, 585 (N.D. Ohio 2005).

<sup>61</sup> Lawrence E. Jaffee Pension Plan, 244 F.R.D. 412.

Third, an action by the litigant as part of its ordinary course of conduct might trigger a reasonable anticipation of litigation. Examples include: a company's termination of its employee;<sup>62</sup> a large corporate transaction that involves substantial tax savings;<sup>63</sup> a former employee's report of corporate misconduct.<sup>64</sup>

Fourth, an action by the litigant outside the ordinary course of business might trigger a reasonable anticipation of litigation. Examples include: lawyer's involvement;<sup>65</sup> creation of a memorandum mentioning the possibility of litigation;<sup>66</sup> correspondence remarking on the adversary's litigious nature;<sup>67</sup> preparation for an EEOC proceeding after suspending an employee;<sup>68</sup> retention of a litigation consultant;<sup>69</sup> creation of a non-routine document in response to particular circumstances.<sup>70</sup>

For any lawyer who deals with taxes or the IRS, one major issue is determining when "litigation" with the IRS (or some other tax authority) can be reasonably "anticipated." This can be a critical inquiry, because such lawyers normally would want to assert the work product protection in addition to any available attorney-client privilege protection -- thus allowing the disclosure of work product (but not privileged

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<sup>62</sup> Long v. Anderson Univ., 204 F.R.D. 129, 137-38 (S.D. Ind. 2001).

<sup>63</sup> United States v. Roxworthy, 457 F.3d at 600.

<sup>64</sup> United States v. Reyes, 239 F.R.D. 591 (N.D. Cal. 2006).

<sup>65</sup> In re Grand Jury Subpoena, 220 F.R.D. 130, 151 (D. Mass. 2004).

<sup>66</sup> Caremark, Inc. v. Affiliated Computer Servs., Inc., 195 F.R.D. 610 (N.D. Ill. 2000).

<sup>67</sup> Ocean Atl. Dev. Corp. v. Willow Tree Farm, L.L.C., No. 01 C 5014, 2002 U.S. Dist. LEXIS 15841, at \*14 (N.D. Ill. Aug. 22, 2002).

<sup>68</sup> Willingham v. Ashcroft, Civ. A. No. 02-1972 (ESH/JMF), 2005 U.S. Dist. LEXIS 22258, at \*9-10 (D.D.C. Oct. 4, 2005).

<sup>69</sup> Fru-Con Constr. Corp. v. Sacramento Mun. Util. Dist., CIV. NO. S-05-0583 LKK GGH, 2006 U.S. Dist. LEXIS 53763, at \*17 (E.D. Cal. July 20, 2006).

<sup>70</sup> Elevating Boats, LLC v. Perf-O-Log, Inc., Civ. A. No. 05-3311 SECTION: "S" (4), 2006 U.S. Dist. LEXIS 55256, at \*10 (E.D. La. Aug. 8, 2006).

communications) to third parties such as accountants, financial advisers, etc. without waiving the work product protection.

The Sixth Circuit dealt with this issue in a 2006 case. In United States v. Roxworthy, 457 F.3d 590 (6th Cir. 2006), the Sixth Circuit held that the taxpayer (Yum) had articulated a sufficiently specific claim for purposes of asserting work product protection -- noting the debate among the circuits. Perhaps more significantly, the Sixth Circuit agreed with the taxpayer (Yum) that it could have reasonably anticipated litigation with the IRS over the tax treatment of a large corporate transaction, because the IRS had targeted other companies who had entered into similar transactions.

- United States v. Roxworthy, 457 F.3d 590, 591, 599, 600 (6th Cir. 2006) (holding that Yum could protect as work product two memoranda prepared by KPMG "analyzing the tax consequences of certain transactions entered by Yum pertaining to the creation of a captive insurance company and related stock transfers"; analyzing the courts' articulation of "various tests for determining when anticipation of litigation is too speculative to be objectively reasonable"; noting that the D.C. Circuit required that the document be prepared "with a specific claim supported by concrete facts, which would likely lead to litigation, " but that even in the absence of a "specific claim" the work product doctrine can protect a document if litigation is possible "about a particular transaction" (citation omitted); also noting that the Fourth Circuit applies the work product doctrine only when the preparer "faces an actual claim or a potential claim following an actual event or series of events that reasonably could result in litigation" (citation omitted); "Here, Yum argues that it anticipated litigation because a yearly IRS audit of Yum was a certainty due to the company's size, the transaction at issue involved a \$112 million discrepancy between tax loss and book loss, and the company had been advised by KPMG that the area of law was unsettled and that the IRS had recently targeted this type of transaction." (emphasis added); quoting United States v. Adlman, 68 F.3d 1495, 1501 (2d Cir. 1995) for the proposition that litigation might be expected "notwithstanding that the events giving rise to it have not yet occurred"; "We find these factually analogous cases persuasive. As contemplated by Adlman I, Yum has demonstrated that the 'expected litigation' here is 'quite concrete' despite the absence of any overt indication from the IRS that it intends to pursue litigation against Yum. Yum has identified a specific transaction that could precipitate litigation, the specific legal controversy that would be at issue in the litigation, the opposing party's opportunity to discover the facts that would give rise to the litigation, and the

opposing party's general inclination to pursue this sort of litigation. We believe that Yum has established that the memoranda at issue sought to protect Yum 'from future litigation about a particular transaction . . .").

The Sixth Circuit also provides a very useful discussion of the type of evidence Yum presented in support of this successful argument.<sup>71</sup>

This Sixth Circuit decision provides a useful roadmap for lawyers hoping to claim work product when assisting their clients in transactions (or, presumably, estate

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<sup>71</sup> United States v. Roxworthy, 457 F.3d 590, 593, 594, 595, 596-97, 598-99 (6th Cir. 2006) (assessing a work product claim by Yum! Brands, Inc., for memoranda prepared by KPMG, which was acting as a tax consultant and not as Yum's outside auditor; adopting the "because of" standard and citing Adlman; noting that the memoranda "bear a designation of attorney-client privilege but do not bear any work-product designation"; also explaining that "the key issue in determining whether a document should be withheld is the function that the document serves"; noting that the magistrate judge had rejected what he called Yum's "'bare, conclusory affidavit allegations'" about why it obtained a recommendation from KPMG; holding that a revised affidavit was sufficient in explaining why Yum anticipated litigation: because "'the tax treatment of captive insurance companies, including the treatment of premium payments to captive insurance companies, was very unsettled and had been the subject of considerable litigation between the Internal Revenue Service . . . and other large corporate tax payers like Yum'" (internal citation omitted); also noting that Yum's in-house lawyer and addressee of the KPMG memorandum stated in his affidavit that he expected litigation over Yum's \$112 million loss "because the loss was recognized for tax purposes but not book purposes and because he 'was informed that the IRS had a history of attacking transactions and litigating cases where a loss was only recognized for tax purposes'" (internal citation omitted); also pointing to the fact that KPMG did not assist Yum in preparing the actual tax return, and that "the memoranda at issue were not prepared to assist in the preparation of tax returns"; concluding that "[i]n the absence of any evidence to the contrary, the affidavits and deposition testimony supplied by Yum are adequate to demonstrate that Yum did not commission the memoranda as part of the ordinary course of business of completing the transactions and that Yum in fact anticipated litigation because of the certainty of an IRS audit, the conspicuousness of the \$112 million discrepancy between tax and book loss, and the unsettled law surrounding captive insurance company transactions"; rejecting the dispositive nature of the memoranda's timing; "Although Yum's supplemental affidavits do not clarify why the memoranda were not submitted until after the transactions were complete, we find error in the magistrate judge's speculation that the timing decreases the likelihood that the memoranda were completed in anticipation of litigation. The company's decision to obtain a legal opinion only after it had completed a series of transactions could easily lead to the conclusion that the opinion was more likely to be in anticipation of litigation as opposed to being used for ordinary business purposes. Yum's uncontroverted assertions that it anticipated litigation because of the uncertainty surrounding the area of tax law at issue are also corroborated by the memoranda's highly detailed discussions of hypothetical legal arguments."; rejecting a test that would require "that the primary or sole purpose of the KPMG memoranda be in preparation of litigation"; "We are persuaded by Yum's argument that even if the KPMG memoranda were prepared in part to assist Yum in avoiding underpayment penalties during an audit, the documents do not lose their work product privilege 'merely because [they were] created in order to assist with a business decision,' unless the documents 'would have been created in essentially similar form irrespective of the litigation.'" (citations omitted); holding that the district court committed "clear error" in holding that Yum did not anticipate litigation; reversing and remanding with instructions to protect the KPMG memoranda as work product).

planning steps) that have drawn the attention of the IRS and other tax authorities in similar circumstances.

**Best Answer**

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

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## Creating Protected Work Product

### Hypothetical 75

You just received a call from a client who has been working with her accountant in dealing with threatened litigation by the IRS over her mother's estate. Due either to her naiveté or her unwillingness to spend money, the new client told you that she has never spoken to a lawyer about the threatened litigation, but was hoping to just "deal with it" through her accountant. Both the new client and the accountant prepared documents relating to this threatened IRS litigation, and you wonder about what protections you can assert if the IRS seeks the documents in discovery during the inevitable litigation.

- (a) May you assert attorney-client privilege protection for documents the client and the accountant prepared?

**NO**

- (b) May you assert work product protection for documents the client and the accountant prepared?

**YES**

### Analysis

Lawyers and their clients considering both the attorney-client privilege and the work product doctrine should remember that both, either or none may apply in certain circumstances. Communications between lawyers and their clients occurring when no one anticipates litigation can never be work product -- but may deserve privilege protection. Materials reflecting lawyers' communications with those other than clients (or the lawyers' own agents), or lawyers' own uncommunicated work, can rarely if ever

be privileged -- but may deserve work product protection. Litigation-related communications between clients and lawyers might deserve both protections.<sup>1</sup>

Lawyers seeking maximum protection for their clients' communications should always examine both possible protections. In one concrete example, Martha Stewart was found to have waived the attorney-client privilege covering one of her emails by sharing the email with her daughter, but was found not to have waived the work product protection -- Stewart could not have resisted discovery if she had relied only on the privilege, and had not also asserted the work product protection.<sup>2</sup>

**(a)** The attorney-client privilege only protects communications between lawyers and clients (or their agents, in certain limited circumstances). Without a lawyer's involvement in some way, the attorney-client privilege cannot protect communications.

**(b)** One of the major differences between the attorney-client privilege and the work product doctrine is the availability of the latter protection without any lawyer involvement.

On its face, the work product doctrine allows clients themselves to prepare work product.<sup>3</sup>

Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer,

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<sup>1</sup> Adams v. United States, Case No. CV-03-49-E-BLW, 2008 U.S. Dist. LEXIS 3106 (D. Idaho Jan. 10, 2008); General Elec. Co. v. Johnson, Civ. A. No. 00-2855 (JDB), 2006 U.S. Dist. LEXIS 64907, at \*103 (D.D.C. Sept. 12, 2006).

<sup>2</sup> United States v. Stewart, 287 F. Supp. 2d 461 (S.D.N.Y. 2003).

<sup>3</sup> Mack v. GlobalSantaFe Drilling Co., Civ. A. No. 04-3461 SECTION "S" (2), 2006 U.S. Dist. LEXIS 18437, at \*7 (E.D. La. Apr. 11, 2006).

or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

Fed. R. Civ. P. 26(b)(3)(A) (emphasis added).

Some courts inexplicably continue to insist that lawyers be involved in the preparation of materials before they may deserve work product protection.<sup>4</sup>

Thus, the work product doctrine can protect materials created without a lawyer's involvement. One court held that the work product doctrine protected a factual chronology prepared in anticipation of litigation by an individual who "was not represented by counsel at the time he created the chronology; he was between lawyers as his previous counsel had been disqualified."<sup>5</sup>

Still, it often is wise to have a lawyer involved. There are several reasons: some courts do not understand the doctrine, and look for a lawyer's involvement; having a lawyer involved might also support an attorney-client privilege claim; a lawyer's role might rebut an adversary's argument that the documents were created in the "ordinary course of business" and therefore undeserving of work product protection;<sup>6</sup> a lawyer's

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<sup>4</sup> Colgan Air, Inc. v. Aircraft Serv. Int'l, Inc., Civ. No. 3:06CV444 (WWE), 2007 U.S. Dist. LEXIS 84858, at \*5 (D. Conn. Nov. 15, 2007); O'Bar v. Lowe's Home Ctrs., Inc., Civ. No. 5:04-cv-00019-W, 2006 U.S. Dist. LEXIS 82081, at \*4-5 (W.D.N.C. Nov. 8, 2006).

<sup>5</sup> In re Grand Jury Subpoenas Dated June 5, 2008, 329 F. App'x 302, 303 (2d Cir. 2009) (unpublished opinion).

<sup>6</sup> Scott v. Litton Avondale Indus., Civ. A. No. 01-3334 SECTION: "E" (4), 2003 U.S. Dist. LEXIS 6696, at \*8-9 (E.D. La. Apr. 16, 2003).



involvement may help establish anticipation of litigation;<sup>7</sup> a lawyer's opinion deserves greater protection than mere fact work product.

Interestingly, at least one court has acknowledged that lawyers can create protected work product even if they are not acting as legal advisors (and thus would not be entitled to privilege protection).<sup>8</sup> Of course, lawyers would still have to establish that the work product was primarily motivated by litigation rather than some other purpose.

### **Best Answer**

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

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<sup>7</sup> Admiral Ins. Co. v. R.A. Jakelis & Co., Nos. 99-2270, 99-2676, 99-3281, 00-1485 SECTION A(1), 2000 U.S. Dist. LEXIS 14151, at \*17-18 (E.D. La. Sept. 21, 2000).

<sup>8</sup> General Elec. Co. v. Johnson, Civ. A. No. 00-2855 (JDB), 2006 U.S. Dist. LEXIS 64907, at \*54 (D.D.C. Sept. 12, 2006).

## Waiver of the Work Product Protection

### Hypothetical 76

You have been working with a client referred to you by a financial planner. As awkward as it has been, you have convinced the financial planner not to attend several meetings with your client, and not to ask for copies of a privileged memorandum you sent the client -- which assessed various legal issues. Unfortunately, you are now litigating with the IRS, and the financial planner is becoming increasingly concerned about how things are going. He just called to ask whether he can see your "IRS Litigation Assessment" memorandum, in which you outline your litigation strategy.

Will disclosure of work product to the client's financial planner waive the work product protection?

**NO**

### Analysis

One of the main distinctions between the attorney-client privilege and the work product doctrine is the former's fragility, and the resulting inability to safely share privileged communications even with friendly third parties. Because the work product doctrine does not rest on notions of confidentiality, disclosing work product to friendly third parties does not waive that separate protection.<sup>1</sup> In the trust and estate context, this principle could become very important when lawyers and their clients deal with certain types of third parties.

Of course, disclosing work product to an adversary waives the protection. But disclosing work product to other third parties usually waives the protection only if the

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<sup>1</sup> Merrill Lynch & Co. v. Allegheny Energy, Inc., 229 F.R.D. 441, 447 (S.D.N.Y. 2004).

disclosure increases the chances that the work product will essentially "fall into enemy hands."<sup>2</sup>

Thus, disclosure to other client-agents usually does not waive the work product protection. Examples include: insurance broker;<sup>3</sup> public relations consultant;<sup>4</sup> political ally;<sup>5</sup> consultant;<sup>6</sup> accountant acting as a consultant;<sup>7</sup> prospective consultant;<sup>8</sup> advertising agency.<sup>9</sup>

Courts have identified other third parties to whom work product can be disclosed without waiving the protection. Examples include: another company;<sup>10</sup> third party "aligned in interest";<sup>11</sup> liability insurance company by an insured;<sup>12</sup> reinsurance company;<sup>13</sup> investment banker;<sup>14</sup> co-defendants;<sup>15</sup> joint defense agreement participant.<sup>16</sup>

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<sup>2</sup> Stanley v. Trinchard, Civ. A. No. 02-1235 Section "E" (1), 2005 U.S. Dist. LEXIS 2445, at \*8 (E.D. La. Feb. 15, 2005).

<sup>3</sup> Bovis Lend Lease, LMB, Inc. v. Seasons Contracting Corp., No. 00 Civ. 9212(Df), 2002 U.S. Dist. LEXIS 23322, at \*27 (S.D.N.Y. Dec. 4, 2002).

<sup>4</sup> Viacom, Inc. v. Sumitomo Corp. (In re Copper Mkt. Antitrust Litig.), 200 F.R.D. 213, 221 n.6 (S.D.N.Y. 2001); Calvin Klein Trademark Trust v. Wachner, 198 F.R.D. 53 (S.D.N.Y. 2000).

<sup>5</sup> Federal Election Comm'n v. Christian Coalition, 178 F.R.D. 61, 76 (E.D. Va.), aff'd in part, modified in part, 178 F.R.D. 456 (E.D. Va. 1998).

<sup>6</sup> Visa U.S.A., Inc. v. First Data Corp., No. C-02-1786 JSW (EMC), 2004 U.S. Dist. LEXIS 17117, at \*36 (N.D. Cal. Aug. 23, 2004).

<sup>7</sup> Samuels v. Mitchell, 155 F.R.D. 195, 201 (N.D. Cal. 1994).

<sup>8</sup> United States Info. Sys., Inc. v. IBEW Local Union No. 3, No. 00 Civ. 4763 (RMB)(JCF), 2002 U.S. Dist. LEXIS 19363 (S.D.N.Y. Oct. 10, 2002).

<sup>9</sup> Cellco P'ship v. Nextel Commc'n, Inc., No. M8-85(RO), 2004 U.S. LEXIS 12717, at \*4-5 (S.D.N.Y. July 7, 2004).

<sup>10</sup> Smithkline Beecham Corp. v. Pentech Pharms., Inc., No. 00 C 2855, 2001 U.S. Dist. LEXIS 18281, at \*15-16 (N.D. Ill. Nov. 5, 2001).

<sup>11</sup> RLS Assocs., LLC v. United Bank of Kuwait, PLC, No. 01 Civ. 1290 (CSH)(DF), 2003 U.S. Dist. LEXIS 4539, at \*7 (S.D.N.Y. Mar. 24, 2003).

<sup>12</sup> State ex rel. Med. Assurance of W. Va., Inc. v. Recht, 583 S.E.2d 80 (W. Va. 2003).

<sup>13</sup> Gulf Ins. Co. v. Transatlantic Reinsurance Co., 788 N.Y.S.2d 44, 45-46 (N.Y. App. Div. 2004).

Courts have also dealt with the waiver implications of disclosing work product to outside auditors. One post-Enron case held that a company disclosing work product to its outside auditor waived the protection.<sup>17</sup> Fortunately, a long string of decisions after that case held that companies do not waive the work product protection by sharing work product with their outside auditors.<sup>18</sup>

Given the dramatic difference in waiver principles governing the attorney-client privilege and the work product doctrine, courts analyzing the waiver effect of disclosing documents protected by both doctrines frequently find that the disclosure to certain third parties waived the privilege but not the work product protection. Examples include: independent contractor;<sup>19</sup> advertising agency;<sup>20</sup> public relationship consultant;<sup>21</sup> independent accountant;<sup>22</sup> accountant acting as consultant;<sup>23</sup> investment banker;<sup>24</sup>

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<sup>14</sup> Blanchard v. Edgemark Fin. Corp., 192 F.R.D. 233, 237-38 (N.D. Ill. 2000).

<sup>15</sup> Pascuiti v. New York Yankees, No. 98 Civ. 8186 (SAS), 1999 U.S. Dist. LEXIS 16747, at \*5 n.3 (S.D.N.Y. Oct. 28, 1999).

<sup>16</sup> LaSalle Bank Nat'l Ass'n v. Lehman Bros. Holdings, Inc., 209 F.R.D. 112 (D. Md. 2002).

<sup>17</sup> Medinol, Ltd. v. Boston Scientific Corp., 214 F.R.D. 113 (S.D.N.Y. 2002).

<sup>18</sup> United States v. Deloitte & Touche USA LLP, 623 F. Supp. 2d 39 (D.D.C. 2009); Sherman v. Ryan, 911 N.E.2d 378 (Ill. App. Ct. 2009); SEC v. Schroeder, No. C07-03798 JW (HRL), 2009 U.S. Dist. LEXIS 39378 (N.D. Cal. Apr. 27, 2009) (not for citation); Westernbank P.R. v. Kachkar, Civ. No. 07-1606 (ADC/BJM), 2009 U.S. Dist. LEXIS 16356 (D.P.R. Feb. 9, 2009); SEC v. Roberts, 254 F.R.D. 371, 382 (N.D. Cal. 2008); In re Nature's Sunshine Prods. Sec. Litig., Case No. 2:06-CV-267 TS, 2008 U.S. Dist. LEXIS 73069 (D. Utah Sept. 23, 2008); Regions Fin. Corp. & Subsidiaries v. United States, Case No. 2:06-CV-00895-RDP, 2008 U.S. Dist. LEXIS 41940 (N.D. Ala. May 8, 2008); In re JDS Uniphase Corp. Sec. Litig., No. C-02-1486 CW (EDL), 2006 U.S. Dist. LEXIS 76169 (N.D. Cal. Oct. 5, 2006); Lawrence E. Jaffee Pension Plan v. Household Int'l, Inc., No. 02 C 5893, 2006 U.S. Dist. LEXIS 49319, at \*21, \*25-26 (N.D. Ill. July 6, 2006); International Design Concepts, Inc. v. Saks Inc., No. 05 Civ. 4754 (PKC), 2006 U.S. Dist. LEXIS 36695, at \*8-9 (S.D.N.Y. June 5, 2006); Merrill Lynch & Co., 229 F.R.D. at 448-49.

<sup>19</sup> Cooper Health Sys. v. Virtua Health, Inc., 259 F.R.D. 208 (D.N.J. 2009).

<sup>20</sup> Cellco P'ship v. Nextel Commc'n, Inc., 2004 U.S. LEXIS 12717, at \*4, \*5.

<sup>21</sup> Calvin Klein Trademark Trust v. Wachner, 198 F.R.D. 53 (S.D.N.Y. 2000) (law firm did not waive the work product protection covering documents by sharing them with a public relations firm).

<sup>22</sup> Westernbank v. Kachkar, 2009 U.S. Dist. LEXIS 16356, at \*27; Gramm v. Horsehead Indus., Inc., No. 87 CIV. 5122 (MJL), 1990 WL 142404, at \*4-5 (S.D.N.Y. Jan. 25, 1990).

<sup>23</sup> Samuels v. Mitchell, 155 F.R.D. at 197, 201.

corporate employee outside the control group (which would otherwise cause a waiver in Illinois);<sup>25</sup> daughter (by Martha Stewart);<sup>26</sup> sister.<sup>27</sup>

Although a confidentiality agreement generally does not prevent waiver of the attorney-client privilege covering communications disclosed to third parties, such an agreement can be critical in determining the waiver effect of disclosing work product.<sup>28</sup>

A confidentiality agreement might demonstrate that the party disclosing work product did not increase the chance that the adversary would obtain access to the work product.<sup>29</sup>

### **Best Answer**

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

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<sup>24</sup> National Educ. Training Group, Inc. v. Skillsoft Corp., No. M8-85(WHP), 1999 U.S. Dist. LEXIS 8680, at \*17-18 (S.D.N.Y. June 9, 1999).

<sup>25</sup> Ocean Atl. Dev. Corp. v. Willow Tree Farm, L.L.C., No. 01 C 5014, 2002 U.S. Dist. LEXIS 15841, at \*15 (N.D. Ill. Aug. 22, 2002).

<sup>26</sup> United States v. Stewart, 287 F. Supp. 2d 461 (S.D.N.Y. 2003).

<sup>27</sup> Schanfield v. Sojitz Corp. of Am., 258 F.R.D. 211 (S.D.N.Y. 2009).

<sup>28</sup> BASF Aktiengesellschaft v. Reilly Indus., Inc., 224 F.R.D. 438, 442, 443 (S.D. Ind. 2004).

<sup>29</sup> Smithkline Beecham Corp. v. Pentech Pharms., Inc., 2001 U.S. Dist. LEXIS 18281, at \*15.