AN ETHICS GUIDE TO HIRING LAWYERS AND OTHERS

<u>Hypotheticals and Analyses</u>*

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* These analyses primarily rely on the ABA Model Rules, which represent a voluntary organization's suggested guidelines. Every state has adopted its own unique set of mandatory ethics rules, and you should check those when seeking ethics guidance. For ease of use, these analyses and citations use the generic term "legal ethics opinion" rather than the formal categories of the ABA's and state authorities' opinions -- including advisory, formal and informal.

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Hypothetical 1

Your firm's chairman asked you to meet with a potential lateral hire to discuss the possibility of her joining your firm. You have conducted some independent research about the lateral hire, but a few question cross your mind as you prepare for your lunch together.

(a) Without your clients' consent, may you identify some of your law firm's clients during your lunch conversations?

YES (PROBABLY)

(b) Without your clients' consent, may you describe your work for some of your law firm's clients during your lunch conversations?

YES (PROBABLY)

(c) Without her clients' consent, may the potential lateral hire identify some of her clients during your lunch conversation?

YES (PROBABLY)

(d) Without her clients' consent, may the potential lateral hire describe her work for some of her clients during your lunch conversation?

YES (PROBABLY)

Analysis

(a)-(d) The process of law firms hiring currently practicing laterals implicates a number of basic conflicts principles -- including the ethics rules' emphasis on mobility, lawyers' fiduciary duties to their employers, and lawyers' ethics and fiduciary duties to their clients -- including the confidentiality duty.

Every states' ethics rules encourage job-hopping, by (among other things) prohibiting restrictions on lawyers' right to practice when they leave their current position.

> A lawyer shall not participate in offering or making . . . a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement.

ABA Model Rule 5.6(a). A comment describes the societal benefit of such lawyer mobility.

> An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

ABA Model Rule 5.6 cmt. [1].

Despite the ethics rules' undeniable encouragement of lawyer mobility, such moves necessarily require disclosure of protected client information.

Without disclosing protected client information, lawyers could not move from firm to firm. The hiring law firm needs to know information about such a lateral hire -- to avoid bringing on board a "Typhoid Mary" whose presence might disqualify the firm from current representations, or prevent the firm from taking on future representations. On a more mundane level, the law firm needs to know about the lateral hire's experience and rainmaking skills, and what clients the lateral hire might bring with him or her. On the other side of the coin, the lateral hire needs to know about the law firm's client base and practice focus.

The 1908 ABA Canons of Professional Ethics did not deal with this issue. Perhaps the absence of any guidance reflected the unlikelihood of most lawyers facing conflicts of interest on a frequent basis, or the rarity at that time of lawyers moving from firm to firm.

The 1969 ABA Model Code of Professional Responsibility contained a fairly limited, but very logical, confidentiality duty. Absent client consent or some other exception, ABA Model Code DR 4-101(B) prohibited lawyers from knowingly disclosing client confidences or secrets. The ABA Model Code defined those protected types of client information.

> "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

ABA Model Code of Professional Responsibility, DR 4-101(A).

In most situations, lawyers operating under this approach could freely make the types of disclosures required to clear conflicts. For instance, lawyers' disclosure of a client's identity or even the general nature of the lawyers' work for the client normally would not harm that client. On the other hand, the ABA Model Code prohibited lawyers from disclosing certain types of client information -- thus preventing lawyers from undertaking some work because they could not clear conflicts. For example, a lawyer representing a wife in secretly preparing to divorce her husband would not be able to disclose that representation, the client's identity, or her plans if the lawyer interviewed for a new job. The ban presumably would apply regardless of the firm at which the lawyer interviewed -- because any firm could conceivably be secretly representing the husband in planning to divorce his wife.

It might be possible for such a lawyer to simply list the clients for whom the lawyer has worked or was then working -- unless disclosing an individual client's identity (such as the wife's identity) might somehow tip off the interviewing law firm about the wife's plans. For instance, if the lawyer was a matrimonial lawyer, disclosing the identities of his or her clients would clearly signal the nature of the representation. Absent unusual circumstances such as this, lawyers operating under the ABA Model Code provisions normally could make the type of limited disclosure necessary to interview and then join another law firm. Similarly, law firms normally could interview and then hire laterals without violating the ABA Model Code confidentiality provisions.

In 1983, the ABA adopted its Model Rules of Professional Conduct, with a dramatically wider scope of lawyers' confidentiality duties. Under ABA Model Rule 1.6,

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

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

Lateral hires and law firms interested in hiring them might be tempted to rely on the "impliedly authorized" exception. However, the accompanying ABA Model Rule Comment takes a very limited view of that exception.

> Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, <u>a lawyer may be impliedly authorized</u>

> to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

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

And of course, neither the hiring law firm's nor the lateral hire's disclosure of protected client information during the hiring process meets the "in order to carry out the representation" requirement. Instead, the disclosures serve the law firm's and lateral hire's interests, not any client's interests. The law firm and lateral hire might half-heartedly contend that the lateral lawyer must move to a new law firm to "carry out" a client's representation, but that would be a stretch.

Thus, law firms interested in hiring a lateral and laterals interested in moving to another law firm presumably must solely rely on client consent before disclosing to the other any "information relating to the representation of a client."

In principle, hiring law firms presumably could often meet this standard -- their clients normally would not object to disclosing certain information as part of the law firms' interview process.

But obtaining client consent could be a logistical nightmare for law firms. And the consent requirement would frequently preclude the sort of informal discussions with potential hires that may come up at unexpected times. Absent every law firm clients' consent to the disclosure, no law firm lawyer could have the sort of wide-ranging discussion of the law firm's practice and client base. The law firms' lawyers probably would not know in advance where the conversation with a possible lateral hire might go, and would be stymied (absent client consent) from discussing with the lateral hire current business opportunities that might come from the hiring, or how to avoid conflicts because of some portable representations that the lateral hire discloses for the first time during the conversation.

Furthermore, obtaining a client's informed consent might require specific disclosure to the client about the potential lateral hire. For instance, a client might acquiesce in disclosure of limited information to a second-year associate, but balk at similar disclosure to a senior partner at a law firm which represents its adversary (given the chance that the senior partner might decide not to move from his or her firm).

These logistical roadblocks could effectively prevent law firm lawyers from having any meaningful discussions with lateral hires, absent every law firm clients' standing consent to disclose essentially every non-damaging piece of information about it.

The potential lateral hire has all of these logistical problems, and even a more fundamental dilemma. Unless the lateral has firmly committed to leaving her current firm, she often would not want to reveal to firm clients that she is looking elsewhere -- because the news almost surely would work its way back to the law firm and could cause obvious tension between the firm and the lawyer exploring even at the earliest stages the possibility of leaving the law firm.

Astoundingly, until just a few years ago the ABA simply never addressed the seemingly irreconcilable tension between the immovable object of confidentiality and the irresistible force of lateral lawyer movement.

In the absence of any ABA Model Rule dealing with this issue, states had to fend for themselves.

Of course, the states following the ABA Model Code formulation had a much easier time in pointing to their rules' provisions permitting such disclosures.

- Virginia LEO 1712 (7/22/98) (addressing rules governing both the hiring and handling of "temp" lawyers; pointing to ABA LEOs 356 and 400 as providing some guidance, but acknowledging the irreconcilable nature of the ABA Model Rules' confidentiality duty and the necessary conflict-clearing disclosures; "Exactly how the ABA opinions expect 'an appropriate inquiry' and 'screening for conflicts' to occur in all situations is unclear. Even the identity of clients and the subject of their legal matters may be entitled to confidentiality under DR: 4-101 as client secrets. Virginia Legal Ethics Op. 1300 (1989). This Committee has previously opined, however, that it would not be improper to reveal the identity of a former client in order to cure a possible conflict of interest where the former client is the opposing counsel in a pending matter and such information needed to be disclosed to the current client to obtain consent. Virginia Legal Ethics Op. 1147 . . . (1989). The Committee has also opined that once the fact of representation of a client is a matter of public record, then disclosure of the mere fact of such representation would not violate DR: 4-101 unless the client has requested such information to remain confidential or the disclosure of such information would be detrimental or embarrassing to the client. . . . Hence, the Lawyer Temp's disclosure of his/her current or former clients on assignments with other law firms is tested by DR: 4-101(A)'s definition of a 'secret.' It is 'information gained in the professional relationship [which includes the fact of the representation] that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.' If the Lawyer Temp's current or former client does not request him/her or the law firm to hold the fact of representation in confidence, and if the Lawyer Temp reasonably determines that disclosure of the fact of representation would not be embarrassing to the client or would not likely be detrimental to the client's interests, then the Lawyer Temp may include such clients in his/her client log for disclosure to another hiring law firm without client consent. The committee cautions, however, that a client's request that information gained 'be held inviolate' is a function of inquiry of the client. The broad public perception is that information gained by lawyers is confidential. Indeed, lawyers foster that perception. Thus, the client's failure to exact an affirmation of confidentiality, or to instruct the lawyer to hold information inviolate, does not permit the lawyer to assume without inquiry that the client consents to disclosure of the fact of representation to third persons. Client consent permits disclosure of confidences and secrets under DR: 4-101(C)(1), but the consent contemplated is a meaningful one that entails the lawyer's disclosure to the client of the significance and ramifications of revealing confidences and secrets. There are two practical considerations for Lawyer Temps. First, if the Lawyer Temp concludes that client consent to disclosure is not necessary under DR: 4-101(B), the Lawyer Temp should confirm his conclusion with the law firm with which he/she worked or works for those clients. It seems fair to say that the client would have a more intimate relationship with the law firm than with the Lawyer Temp assigned to work on the client's matter. The Lawyer Temp thus can be guided by the law firm's perception or informed judgment of the client's desires as to disclosure of the fact of the Lawyer Temp's representation. The second practical consideration is that whether the Lawyer Temp is permitted to disclose the fact of representation of a client should be addressed at the outset of the placement with the law firm. The risk of wrongful disclosure could be minimized if each of the Lawyer Temp's hiring law firms made a disclosure to clients for whom he/she would work, explained that the nature of transitory placement with law firms required the Legal Temp to maintain a client log, and requested consent to inclusion of the client's name in the Lawyer Temp's log. If a client objects to disclosure of the fact of the Lawyer Temp's representation, the Lawyer Temp acts at his/her peril under DR: 4-101 in disclosing the fact of the client's representation. Likewise, the hiring law firm acts at its peril under DR 5-105 if it fails to assess the possibility of conflicts of interests between clients. In those situations where an exchange of information between the Lawyer Temp and the hiring firm is not permitted with respect to identification of current or former clients of the Lawyer Temp, the Lawyer Temp must be cognizant of conflicts of interest and decline employment when required to do so under the applicable rules. In effect, the personal conflicts of a Lawyer Temp are to be analyzed and resolved in the same manner as the personal conflicts of any lawyer switching firms. LE Op. 1419, LE Op. 1428, LE Op. 1430 and LE Op. 1629. Both the Lawyer Temp and the lawyers hiring the Lawyer Temp would be barred from representing any party adverse to any client in whose legal matter the Lawyer Temp has 'actively participated,' or from whom the Lawyer Temp gained confidences and secrets, unless the clients consent after full disclosure. DR: 5-105; Legal Ethics Opinion . . . 1428." (emphases added)).

- New York LEO 720 (8/27/99) ("<u>When a lawyer moves from Firm A to Firm B, Firm B must seek the names of clients represented by the Moving Lawyer and, depending upon the size of Firm A, the names of all clients of Firm A for a reasonable period of time, and the Moving Lawyer may provide this information, except to the extent that (a) this information is protected as a confidence or secret of the clients of Firm A or (b) the Moving Lawyer has a contractual or fiduciary duty to Firm A that forbids disclosing this information.</u> If the information is protected from disclosure, then the Moving Lawyer may disclose only general information, not protected as a client confidence or secret, about the nature of his or her representations at Firm A." (emphasis added); "A law firm's database with information about its own clients will usually include information as to the full name of each client and a brief description of the matter for which the firm was engaged. It may not, however, be possible for a Moving Lawyer to give such information, since the name of the client of Firm A and the fact and nature of the representation may constitute a confidence or secret of the client. DR 4-101 generally requires a lawyer to preserve the confidentiality of both 'confidences' (i.e., attorney-client privileged information) and 'secrets' (i.e., other information 'gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client'). Although the fact that the client consulted a lawyer and the general nature of the consultation will not usually be privileged, see, e.g., Colton v. United States, 306 F.2d 633 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963), the client's name, the fact that the client consulted a lawyer and the general nature of the consultation may nevertheless constitute 'secrets' of the client which the lawyer may not disclose. Firm B should admonish a prospective hire not to disclose client confidences or secrets in responding to its conflicts questionnaire. Where information identifying a client or the client's matter constitutes a confidence or secret that the Moving Lawyer may not ethically disclose, Firm B may be limited to obtaining more general information about the nature of the Moving Lawyer's prior work. General information will enable Firm B to identify some possible conflicts of interest. See, e.g., Evans [Evans, Ethical Issues and Financial Data, 1004 PLI/Corp 229 (1997)], supra, at 239. Additionally, the Moving Lawyer may make personal efforts to ascertain whether there are or may be conflicts of interest in light of any information that may not be disclosed. The Moving Lawyer may also seek to obtain the consent of the former client to the disclosure of additional information, where it is needed. Firm A may believe that information about the names of Firm A's clients is proprietary to Firm A. If the information is not protected as a confidence or secret of Firm A's clients, then whether Firm A may prevent the disclosure by Moving Lawyer of such information which is known to Moving Lawyer is a matter of contract and fiduciary law governing the relationship between Firm A and Moving Lawyer, and not a matter of legal ethics on which this Committee may opine." (emphasis added)).

- District of Columbia LEO 312 (4/2002) (explaining that lawyers withdrawing from a law firm may disclose to other law firms from which they might seek a job information about their clients that is not a client confidence or secret; "Typically, when a lawyer contemplates joining a new firm, the lawyer provides information to that firm indicating the clients, adversaries, and an indication of the subject matter on which the lawyer has worked at the lawyer's existing firm so that the potential new firm may check to see whether the lawyer's joining it would create a conflict of interest with any of that firm's clients."; explaining that a representation that is "generally known" does not fall into the "secret" category; explaining that in most cases this type of disclosure will be permissible, and will allow the lawyer to work with a potential new firm in identifying conflicts; "Without the former client's consent, therefore, a lawyer may, in checking conflicts at a new firm, reveal information about representations that is not privileged and is not a secret because it has not been requested by that client to be held inviolate and the revelation of which would not be harmful or embarrassing to that client or has become generally known. In the great majority of cases, we believe, this leaves lawyers free to reveal sufficient information to carry out a reliable conflict check. Information about many representations would not harm or embarrass the client where the basic facts of the representation are unexceptionable or already known to opponents or others who are not the client, including, for example, regulatory agencies or other government bodies." (emphasis added); also explaining that in some situations the withdrawing lawyer will not be able to disclose information allowing the new law firm to check conflicts; "There are, of course, many instances in which the facts surrounding a representation (such as that client X is contemplating a takeover of another business or has consulted a divorce lawyer or a criminal defense lawyer) may be extremely sensitive and so fraught with the possibility of injury or embarrassment to that client that absent a waiver that information is not subject to disclosure even for the purpose of checking conflicts. . . . There is no specific exemption to the confidentiality rules in Rule 1.6 or elsewhere that permits a lawyer to reveal confidential information for the purpose of checking or seeking waiver of a conflict."; explaining that lawyers and hiring law firms in that situation might be able to simply exchange lists of names (without explaining whether the names are of clients or adversaries) or make other limited disclosures in an effort to identify and clear conflicts).

States following the new ABA Model Rules confidentiality approach had a much more difficult time dealing with this issue.

- Pennsylvania and Philadelphia LEO 2007-300 (6/2007) ("This Opinion does not attempt to resolve definitively the difficult question of what information, if any, relating to a client might be disclosed by a lawyer in discussions with another firm regarding a potential new association, prior to the lawyer's joining the new firm, in the absence of client consent. On a practical level, we perceive a need, for conflicts checking purposes, to disclose pre-departure at least some limited information regarding the identity of the lawyer's clients, both those who might, and those might not, join the lawyer at the new firm, as well as the nature of the work done for those clients, and the parties opposite those clients in current matters that may become matters of the new firm. We also recognize that, as a practical matter, this type of exchange of client information and conflicts checking is routinely done in connection with lawyer's changing law firms. In Formal Opinion No. 99-414, the ABA Committee recognized the need for limited disclosure of otherwise confidential client information in this context and seemed to assume that such disclosure is permissible under the Rules. Formal Opinion No. 99-414 at 6

n. 12 ('The departing lawyer must ensure that her new firm would have no disqualifying conflict of interest in representing the client in a matter under Rule 1.7, or other Rules, and has the competence to undertake the representation. In order to do so, she may need to disclose to the new firm certain limited information relating to this representation.'). The ABA Committee, however, cited no authority in the Rules or otherwise to support this assumption. We note the apparent absence of any express authorization in the Rules of Professional Conduct or elsewhere for a lawyer's making these types of pre-departure disclosures to another law firm without client consent. See Tremblay, Migrating Lawyers and the Ethics of Conflicts Checking, 14 Geo. J. Legal Ethics 489 (Spring 2006). Of course, where client consent is obtained, there can be no ethical issue regarding the propriety of disclosures under Rule 1.6. Thus, obtaining client consent would insulate the lawyer from allegations of ethical improprieties in making such disclosures. Moreover, where such client consent is sought prior to departure, the lawyer may be obligated to disclose the fact of the discussions and the communication with the client regarding the same, to the old firm. . . . Further, when a lawyer involved in discussions with another firm regarding a new association discloses client information without client consent, such disclosures should go no further than necessary to insure the new firm's ability to comply with its own ethical obligations, e.g., to avoid conflicts and ensure the ability to competently and diligently represent a prospective client." (emphases added)).

- Kansas LEO 07-01 (3/1/07) (analyzing the following issue: "Requesting attorney (Lawyer A) has recently left a law firm and asks the following question: May law firm formerly employing Lawyer A (Firm 1) refuse to disclose a list of the parties to all suits filed by Lawyer A during A's tenure at Law Firm 1 for the purpose of checking on conflict of interest with prospective law firm (Firm 2)."; "The rule of client-lawyer confidentiality applies in all situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. First, while Law Firm 1 may rightfully refuse to reveal confidential matters under Rule 1.6, it is difficult to see how the mere identity of Law Firm 1's clients who are potential adverse parties to those of Law Firm 2 would be entitled to specific protection, particularly where public records are involved, i.e., pleadings filed on their behalf. On the other hand, there may be instances where a law firm's practice is so sensitive and so specialized that the release of a clients [sic] name may be a breach of confidentiality. Firms that predominantly represent impaired lawyers, or take only insider trading cases spring to mind; however, the Committee is unaware of any such firms, at least in Kansas. Second, clients of Firm 1 were also clients of Lawyer A during the term of employment, so disclosure to Lawyer A is not a breach of confidentiality but merely a refreshing of confidential knowledge previously held. Third, conflicts checking are imperative in today's legal climate of law firm mergers, breakups and lateral hiring. To refuse disclosure of a client list exposes Lawyer A not only subjects Lawyer A and Firm 2 to disciplinary complaints for conflict of interest, but also legal malpractice charges. Disqualification of Firm 2 from a case after thousands of billable hours for a conflict of interest due to its hiring of Lawyer A is almost a prima facie case, not to mention the possible forfeiture of fees. Furthermore, if it developed that Lawyer A had exclusive knowledge of cases assigned while at . . . Firm 1, it is likely that Firm 1 could also be disqualified from those cases. And Firm 1 also has a duty to its clients to avoid conflicts of interest regarding their cases." (footnotes omitted) (emphasis added); "Therefore the Committee concludes that a law firm may not refuse to disclose a list of clients previously assigned to a departing attorney for the purpose of conflict checking by the attorney's new firm. The Kansas Comments to KRPC 1.6 seem to support this conclusion when it states that an exception to nondisclosure is '. . . required by the Model Rules of Professional Conduct. . . .' The answer raises a second question: Given the concerns by Firm 1 of confidentiality and possible loss of clients to Attorney A and Firm 2, how is such disclosure of a client list best accomplished? Use of an intermediary appears to be the most obvious method. In discussing a similar fact scenario, the Boston Bar Association Ethics Committee proposed that Firm 2 institute procedures to limit access to the information, such as a retired partner who is not otherwise privy to client information in the firm, or a paralegal employed in a separate conflict-checking unit. Professor Tremblay, while favoring this approach, which he labels 'middle counsel', also suggests that Firm 2 share its entire client list with Attorney A, a solution perhaps more plausible if it involves a younger associate, with fewer cases and better memory than a middle-aged partner may have. A third solution also seems plausible. Since Firm 2 appears to have a greater risk for conflicts than Firm 1, perhaps sharing its entire client list with a 'middle counsel' of Firm 1 would solve the problem." (footnote omitted) (emphases added)).

Some of those states adopted explicit provisions dealing with this scenario.

- Colorado Rule 1.6 cmt. [5A] ("A lawyer moving (or contemplating a move) from one firm to another is impliedly authorized to disclose certain limited non-privileged information protected by Rule 1.6 in order to conduct a conflicts check to determine whether the lawyer or the new firm is or would be disqualified. Thus, for conflicts checking purposes, a lawyer usually may disclose, without express client consent, the identity of the client and the basic nature of the representation to insure compliance with Rules such as Rules 1.7, 1.8, 1.9, 1.10, 1.11 and 1.12. Under unusual circumstances, even this basic disclosure may materially prejudice the interests of the client or

> former client. In those circumstances, disclosure is prohibited without client consent. In all cases, the disclosures must be limited to the information essential to conduct the conflicts check, and the confidentiality of this information must be agreed to in advance by all lawyers who receive the information." (emphasis added)).

In 1996, the ABA issued an ethics opinion dealing with a subset of this issue -- lawyers interviewing for a job with a law firm representing an adversary.

In ABA LEO 400 (1/24/96), the ABA dealt almost exclusively with the conflicts of interest ramifications of discussions between a law firm and a possible lateral hire who was currently working on a matter adverse to the potential hiring law firm's client. The legal ethics opinion's conclusion focused on the conflicts issues.

> In sum, <u>we conclude that, for the protection of clients, Rule 1.7(b) requires a lawyer who is actively representing a client in a matter, and who is considering an association with a firm or party to whom he is opposed in the matter, to consult with his client and obtain the client's consent to his continuing to work on the matter while the lawyer explores such association.</u> Generally, the required consultation should occur before the lawyer engages in a substantive discussion of his experience, clients, or business potential with the opposing firm or party. If the client consents, the lawyer may continue the representation. If the client does not consent, the lawyer must either discontinue the job search that created the conflict, or withdraw from participation in the representation and transfer his work to others in the firm, if withdrawal can be accomplished properly under Rule 1.16. Where the lawyer has had a limited role in a matter or has had limited client contact, it will ordinarily be more appropriate for him to inform his supervisor. The supervisor can then determine whether to relieve the lawyer of responsibility, or to seek the client's consent for the lawyer to continue to work on the matter. While the negotiating lawyer's conflict of interest is not imputed to other lawyers in his firm, those other lawyers must each evaluate whether they may themselves have a conflict by virtue of their own interest in their colleague's negotiations. The lawyers in a law firm seeking to employ a lawyer who is involved in a

> matter adverse to the firm have similar obligations to their client.
>
> This Committee regularly addresses, as in this Opinion, important issues relating to conflicts of interest. We recognize that among all of the issues this Committee confronts, conflicts of interest decisions generate much attention from the bar because of the possibilities they present for the disqualification of counsel. While there are, undoubtedly, many situations in which disqualification on grounds of conflict is warranted if not compelled, the opportunities for mischief presented by disqualification motions are numerous as well. Thus, we conclude this Opinion with a cautionary note. We do not intend, by this Opinion, to provide additional opportunities for merely tactical or dilatory motions to disqualify where the role of the negotiating lawyer has been such that no real harm can arise by permitting the lawyer to secure a new position of employment. As stated in the Rules themselves, 'the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons.' Scope para. [18]. It is our hope that members of the profession will approach motions to disqualify in this context, as in any other context, responsibly and with prudence.

ABA LEO 400 (emphasis added).

ABA LEO 400 mentioned the confidentiality duty almost as an afterthought -- identifying it as the third of four duties requiring some attention.

> A third duty is the preservation of confidentiality under Rule 1.6. <u>Job-seeking lawyers must guard against the risk that in the course of the interviews to determine the compatibility of the lawyer with the opposing firm, or the discussions between the lawyer and the firm about the lawyer's clients and business potential, the lawyer might inadvertently reveal 'information relating to the representation' in violation of Rule 1.6.</u>

<u>Id.</u> (emphasis added).

This paragraph reflects a remarkably naïve approach or (more likely) an implicit acknowledgement that lateral hiring simply could not occur if lateral hire candidates and the hiring law firms' lawyers complied with the black letter of ABA Model Rule 1.6. The lawyers involved in this process do not risk "inadvertently" disclosing protected client information. The discussion simply cannot take place without disclosing such information. Lawyers on either side of the employment discussion must "reveal 'information relating to the representation' in violation of Rule 1.6."

Under the ABA Model Rule scope of the confidentiality duty, the potential lateral hire could not even disclose to the potential hiring law firm that the lawyer represents the client on the other side of a matter the hiring law firm is handling -- even if the lateral hire and the interviewing law firm lawyer argued against each other that morning in court. After all, ABA Model Rule 1.6 "applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." ABA Model Rule 1.6 cmt. [3]. Even information in the public record falls within the ABA Model Rules' confidentiality duty.

ABA LEO 400's glancing mention of the confidentiality rule almost surely represents the legal ethics opinion authors' inability to reconcile the ABA Model Rules' encouragement of mobility and the ludicrously overbroad confidentiality duty.

Less than four years later, the ABA returned to the general issue, and issued another opinion that implicitly acknowledged the inability of lawyers following the ABA Model Rules to know what they can and cannot disclose during a lateral interview or hiring process.

In ABA LEO 414 (9/8/99),[1] the ABA dealt mostly with lawyers' need to balance their fiduciary duties to their law firms and their primary duties to clients. Amazingly, the legal ethics opinion did not address the process that would necessarily have occurred before lawyers changing firms had to deal with balancing these duties. For instance, the opinion does not address lawyers' ability to tell their potential new colleagues at another firm what clients the lateral lawyer represents. And, of course, many if not most lawyers would engage in at least preliminary discussions with a number of potential new hiring law firms. The legal ethics opinion's silence is understandable, because there is nothing the ABA could have said about it. Having adopted an overly broad definition of protected client information in 1983, the ABA would not be able to point to any rules

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1 ABA LEO 415 (9/8/99) (explaining that a lawyer planning to leave a firm has an ethical obligation to inform the pertinent clients in a timely manner, but must comply with applicable restrictions on solicitation; noting that any notice before the lawyer leaves the firm should be "limited to clients whose active matters the lawyer has direct professional responsibility at the time of the notice"; should "not urge the client to sever its relationship with the firm, but may indicate the lawyer's willingness and ability to continue her responsibility for the matters upon which she currently is working"; and should emphasize that the client may choose to stay with the firm or hire the withdrawing lawyer; explaining that despite implications to the contrary in earlier informal opinions [1457 and 1466], "we reject any implication . . . that the notices to current clients and discussions as a matter of ethics must await departure from the firm;" warning that the departing lawyer "must ensure that her new law firm would have no disqualifying conflicts of interest" preventing the new firm from representing the client; noting that although it would be best for the firm and the departing lawyer to provide joint notice to the clients, the firm's failure to cooperate entitles the departing lawyer to send a separate notice; acknowledging that legal rules govern a departing lawyer's actions before the firm receives notice of the departure; assuring that "the departing lawyer may avoid charges of engaging in unfair competition and appropriation of trade secrets if she does not use any client lists or other proprietary information in advising clients of her new association, but uses instead only publicly available information and what she personally knows about the clients' matters"; citing the case of Graubard Mollen v. Moskovitz, 653 N.E.2d 1179 (N.Y. 1995) and providing helpful guidance on a departing lawyer's fiduciary duties, including the fact that "informing firm clients with whom the departing lawyer has a prior professional relationship about his impending withdrawal and reminding them of their right to retain counsel of their choice is permissible"; also assuring that a withdrawing lawyer generally may retain documents the lawyer prepared or which are in the public domain, although "principles of property law and trade secret law" govern these issues; noting that a lawyer "does not violate any Model Rule in notifying the current clients of her impending departure by in-person or live telephone contact before advising the firm of her intentions to resign, so long as the lawyer also advises the client of the client's right to choose counsel and does not disparage her law firm or engage in conduct that involves dishonesty, fraud, deceit, or misrepresentation. After her departure, she also may send written notice of her new affiliation to any firm clients regardless of whether she has a family or prior professional relationship with them.").

permitting disclosure of protected client information by the lateral lawyer or any law firm who was interviewing such a lawyer.

The ABA finally tiptoed directly into this issue in a 2009 ethics opinion. Interestingly, much of the opinion addressed the lack of rules justification for what every lawyer knows happens every day.

In ABA LEO 455 (10/8/09),[2] the ABA acknowledged the obvious need for lateral hires and for hiring law firms to analyze conflicts issues -- and then acknowledged the ABA Model Rules inexplicable failure to deal with that scenario.

> Despite the need for both a lawyer considering a move and the prospective new firm to detect and resolve conflicts of interest, <u>some commentators have expressed concern that the Model Rules do not specifically permit disclosure of the</u>

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[2] ABA LEO 455 (10/8/09) (explaining that lawyers moving from one firm to another and law firms that hire them cannot rely on any specific rule allowing the exchange of information about clients necessary for a conflicts analysis, but may exchange such otherwise protected information -- although the disclosure "should be no greater than reasonably necessary to accomplish the purpose of detection and resolution of conflicts of interest"; noting that the exception in Rule 1.6 for disclosure "impliedly authorized" to represent a client does not apply, because the disclosures by the moving lawyer and the hiring law firm do not serve the client's interests; also pointing out that the exception in Rule 1.6 for disclosures necessary to "comply with other law" does not apply, because the exception refers to law, not ethics rules; acknowledging that although client consent would resolve any issue, obtaining the consent normally is impractical; emphasizing that the ethics rules are "rules of reason," and the recent rule change allowing the screening of lateral hires to avoid imputed disqualification highlights the permissibility of basic conflicts data disclosure that necessarily precedes such a lateral hire; explaining that in some situations, neither the moving lawyer nor the firm can disclose privileged information when the disclosure would "prejudice a client or former client" -- as with a planned hostile takeover, contemplated divorce, etc.; also noting that in other situations, it will quickly become apparent that conflicts will prevent the firm from hiring the moving lawyer -- such as situations in which there are "numerous existing matters" involving conflicts, or the law firm and the potential lateral hire "regularly represent[s] commonly antagonistic groups"; explaining that "conflicts information normally should not be disclosed when conversations concerning potential employment are initiated, but only after substantive discussions have taken place"; further explaining that if checking for conflicts will require a "fact-intensive analysis of information beyond just the persons and issues involved in a representation" (as when analyzing the "substantial relationship" between a current and former representation), the law firm might be able to analyze conflicts by obtaining information other than from the moving lawyer -- if not, the moving lawyer must seek the client's consent to disclose such detailed information, or rely on the new Rule 1.10 provision permitting screening of lateral hires to avoid imputed disqualification; concluding that the law firm receiving any confidential information as part of the conflicts analysis should limit use of the information "to the detection and resolution of conflicts of interest, and dissemination of conflicts information should be restricted to those persons assigned to or involved in the conflicts analysis with respect to a particular lawyer.").

> information required for conflicts analysis. This concern arises from the definition of information covered by Rule 1.6(a), which is "all information relating to the representation, whatever its source." Thus, the persons and issues involved in a matter generally are protected by Rule 1.6 and ordinarily may not be disclosed unless an exception to the Rule applies or the affected client gives informed consent.

ABA LEO 455 (10/8/09) (footnotes omitted) (emphasis added).

ABA LEO 455 then candidly explained that none of the black letter exceptions to ABA Model Rule 1.6 applied when lawyers and law firms are really serving their own interests rather than their clients' interests in discussing a possible employment arrangement.

> Disclosure of conflicts information does not fit neatly into the stated exceptions to Rule 1.6. The exception in Rule 1.6(a) for disclosures "impliedly authorized in order to carry out the representation" typically is limited to disclosures that serve the interests of the client.

Id.

Similarly, ABA LEO 455 acknowledged the inapplicability of one of the other ABA Model Rule 1.6 exceptions.

> A second stated exception to Rule 1.6(a) that might arguably allow disclosure of conflicts information incident to lawyers moving between firms is Rule 1.6(b)(6), which permits disclosure of information "the lawyer reasonably believes necessary . . . to comply with other law." However, Comment [12] to Rule 1.6 seems to limit "other law" to law other than the Rules.

Id.

ABA LEO 455 also recognized the practical difficulties of seeking client consent to the inevitable disclosure of protected client information during the interviewing process.

> Obtaining clients' informed consent, as defined in Rule 1.0(e), before a lawyer explores a potential move could resolve the tension between the broad scope of Rule 1.6(a) and the need to disclose conflicts information, but there are serious practical difficulties in doing so. Many contemplated moves are never consummated. In the common situation where a lawyer interviews more than one prospective new firm, multiple consents would be required. Consent of all former clients, as well as all current clients, also would be necessary. Further, seeking prior informed consent likely would involve giving notice to the lawyer's current firm, with unpredictable and possibly adverse consequences.

Id. (footnotes omitted) (emphasis added).

ABA LEO 455 eventually relied on a general, ambiguous, and essentially meaningless phrase in the Scope section of the ABA Model Rules.

> In most situations involving lawyers moving between firms, however, lawyers should be permitted to disclose the persons and issues involved in a matter, the basic information needed for conflicts analysis. The Model Rules are "rules of reason" to be "interpreted with reference to the purposes of legal representation and of the law itself." Interpreting Rule 1.6(a) to prohibit any disclosure of the information needed to detect and resolve conflicts of interest when lawyers move between firms would render impossible compliance with Rules 1.7, 1.9, and 1.10, and prejudice clients by failing to avoid conflicts of interest. Such an interpretation would preclude lawyers moving between firms from conforming with the conflicts rules.

Id. (footnote omitted) (emphasis added).

The ethics opinion then noted the obvious -- in a sentence that implicitly condemned the ABA Model Rules' overbroad definition of protected client information.

> Opinions from jurisdictions that did not adopt the Model Rules definition of protected information, but rather retained the 1969 Model Code of Professional Responsibility formulation of confidences and secrets, reached similar results.

Id. The legal ethics opinion could have, and perhaps should have, pointed to those other states' rules, not just their opinions. Of course, the other states' opinions take the common sense approach that ABA LEO 455 ultimately adopted -- because those states rejected the 1983 ABA Model Rules undeniably overbroad definition of protected client information. So it is not just those states' opinions that took the only practical approach, it is their ethics rules.

Not surprisingly, ABA LEO 455 warned that the inevitable disclosure of protected client information during the interviewing and hiring process should not exceed that which is reasonably necessary.

> Permissive disclosure of conflicts information otherwise protected by Rule 1.6(a) incident to the process of lawyers moving between firms is limited in scope. Consistent with Comment [14] to Rule 1.6, any disclosure of conflicts information when lawyers move between firms should be no greater than reasonably necessary to accomplish the purpose of detection and resolution of conflicts of interest.

Id. The legal ethics opinion later provided some examples.

> Another important limitation is that disclosing conflicts information must not compromise the attorney-client privilege or otherwise prejudice a client or former client. There are matters, albeit rare, in which the identity of the client or the nature of the representation or both are protected by the attorney-client privilege. There are also situations (e.g., clients planning a hostile takeover, contemplating a divorce, or appearing before a grand jury) in which disclosure of non-privileged information to the prospective new firm of the persons and issues involved would likely prejudice the client or former client.

Id. (footnotes omitted).

Finally, ABA LEO 455 took the only logical and reasonable approach to the timing of disclosures during this interviewing and hiring process.

> Timing is also important. Conflicts information should not be disclosed until reasonably necessary, but the process by which firms decide to offer lateral lawyers positions varies widely among firms and usually differs within firms according to the age and experience level of the lawyer under consideration. Many firms might not ask conflicts information of younger lawyers until making an offer of employment, which will be contingent on resolution of conflicts. For partner-level lawyers, the process is more complicated. As a consequence, conflicts issues may need to be detected and resolved at a relatively early stage. In any event, <u>negotiations between the moving lawyer and the prospective new firm should have moved beyond the initial phase and progressed to the stage where a conflicts analysis is reasonably necessary, which typically will not occur until the moving lawyer and the prospective new firm have engaged in substantive discussions regarding a possible new association.</u>

<u>Id.</u> (footnote omitted) (emphasis added).

All in all, ABA LEO 455 could not avoid the implications of the ABA Model Rules' broad confidentiality duty -- and thus simply ignored it. The reference to the ABA Model Rules as "rules of reason" seems particularly ironic. In 1983, the ABA explicitly abandoned the much more common-sense driven ABA Model Code confidentiality formulation, which generally would have permitted such hiring discussions. In fact, ABA LEO 455 essentially represented a justifiable abandonment of the black letter ABA Model Rules confidentiality duty, and an acknowledgment that hundreds of thousands of lawyers may have violated the ABA Model Rules' technical provisions.

The ABA addressed this issue again several years later.

In 2011, the ABA Ethics 20/20 Commission issued a Report explaining its approach to what was really an age-old dilemma.

> The ABA Commission on Ethics 20/20 has examined various ways in which globalization and technology are changing the

legal profession, including increased lawyer mobility. The Commission found that this increased mobility has produced a number of ethics-related issues and that one question in particular commonly arises: Before a lawyer becomes associated with a firm, to what extent can the lawyer disclose to the firm confidential information about current and former clients to permit the lawyer and the firm to identify possible conflicts of interest arising from the lawyer's potential association? <u>The Commission concluded that the Model Rules of Professional Conduct are not clear in this regard</u> and that lawyers and firms would benefit from more guidance. . . . <u>Formal Opinion 09-455 from the ABA Standing Committee on Ethics and Professional Responsibility recently recognized that, before becoming associated with a firm, a lawyer must have some discretion to disclose confidential information</u> about current and former clients to permit the lawyer and the firm to determine if a conflict would arise from the lawyer's association. Despite the reasonableness of this conclusion, <u>the Formal Opinion concluded that '[d]isclosure of conflicts information does not fit neatly into the stated exceptions to Rule 1.6.</u>' The Commission reached the same conclusion and determined that, given the importance of the issue and the increasing frequency with which it arises, the Commission should propose an amendment to Model Rule 1.6 that provides a firmer doctrinal basis for these disclosures and more guidance on the limitations on such disclosures. The Commission considered a number of ways to address this issue, but concluded that the most effective way to do so is to propose the creation of Model Rule 1.6(b)(7). In particular, the proposed amendment would permit a lawyer to disclose confidential information to the extent that it is reasonably necessary to determine if a conflict of interest would arise from the lawyer's association with a firm. Any disclosure, however, is subject to several important exceptions. First, the lawyer must determine that the disclosure is reasonably necessary to permit the lawyer and the firm to determine if a conflict of interest would arise from the lawyer's association with the firm. As the proposed new Comment [14] explains, this condition means that a lawyer can reveal only limited information, typically a client's identity and the general nature of the work that the lawyer performed for that client. Even this limited disclosure, however, is not permissible if it will adversely affect the client. For example, the Comment explains that, if a lawyer knows that a

> particular corporate client is seeking advice on a corporate takeover that has not yet been publicly announced or if an individual consults a lawyer about the possibility of a divorce before the spouse is aware of such an intention, it may be impossible for that lawyer to disclose sufficient information to permit another firm to ensure compliance with the conflict of interest rules. Under those circumstances, the lawyer may have to postpone any association with the firm until the information, if disclosed to that firm, will no longer prejudice the client. Second, the discussions between the lawyer and the firm must be such that there is a reasonable possibility that the lawyer may become associated with the firm. Typically, this moment occurs before a formal offer of employment is made or is imminent. For example, the disclosure can occur once the lawyer and the firm begin to engage in substantive discussions regarding the lawyer's possible association with the firm. The last sentence of the proposed new paragraph is intended to remind firms that they must not use or reveal the information that they receive from a potential lateral lawyer, except to determine whether a conflict would arise from that lawyer's possible association with the firm.

ABA Commission on Ethics 20/20 Report, Sept. 7, 2011 (emphasis added).

Along with its Report, the ABA Ethics 20/20 Commission issued its proposed addition to ABA Model Rule 1.6. The Commission's proposed rule would allow lawyers to

> reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to determine if a conflict of interest would arise from the lawyer's association with a firm, but only when there is a reasonable possibility of such an association and the revealed information would not adversely affect the lawyer's client. Information revealed under this paragraph may not be used or revealed by the lawyers receiving the information for any purpose except the identification and resolution of potential conflicts of interest.

Proposed ABA Model Rule 1.6(b)(7) (9/7/11).

The ABA Ethics 20/20 Commission also proposed an explanatory comment.

> Paragraph (b)(7) recognizes that, before a lawyer becomes associated with a firm, it may be necessary for the lawyer to reveal limited information about the lawyer's current and former clients to permit the lawyer and the firm to identify conflicts of interest that would arise from the lawyer's association with the firm. A lawyer is permitted to reveal this limited information, typically no more than the client's identity and the general nature of the work that the lawyer performed for that client, but only to the extent reasonably necessary to permit the lawyer and the firm to determine if a conflict of interest would arise from the lawyer's association with the firm. In no event may disclosure prejudice a client or former client. In most cases, prejudice will not occur from the mere disclosure of a client's or former client's identity or a brief summary of the type of work that the lawyer performed for that client or former client. In certain cases, however, such a disclosure could adversely affect the client's interests (e.g., the lawyer reveals that a particular corporate client is seeking advice on a corporate takeover that has not yet been publicly announced or that a person has consulted with a lawyer about the possibility of seeking a divorce before the person's intentions are known to the person's spouse). If disclosure could prejudice a client or former client, the lawyer must obtain the client's consent before disclosing any information or delay the association with the firm until the disclosure of the information would no longer adversely affect the client's interests. Moreover, information revealed under paragraph (b)(7) may not be used or revealed by the lawyers receiving the information for any purpose except the identification and resolution of potential conflicts of interest. This prohibition does not apply to other lawyers in the same firm who have obtained the information from an independent source.

Proposed ABA Model Rule 1.6 cmt. [14] (9/7/11).

After some public input, the ABA Ethics 20/20 Commission issued an amended proposed addition to ABA Model Rule 1.6, which the ABA House of Delegates adopted on September 6, 2012.

> A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to detect and resolve conflicts of

> interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, <u>but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.</u>

ABA Model Rule 1.6(b)(7) (emphasis added).

Several as-adopted comments provide guidance.

> Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [7]. <u>Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated.</u> Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, <u>the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client</u> (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.
>
> Any information disclosed pursuant to paragraph (b)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(7) does not restrict the use of information acquired by means

> independent of any disclosure pursuant to paragraph (b)(7). Paragraph (b)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

ABA Model Rule 1.6 cmt. [13], [14] (emphases added).

This new rule presumably has had little impact, because lawyers have always been doing this. In fact, this provision represents a vindication of the ABA Model Code confidentiality formulation, and a repudiation of the 1983 overbroad ABA Model Rules formulation. Just like the ABA Model Code, this provision permits disclosure of non-privileged client information, as long as it would not harm the client. That is precisely what the ABA Model Code permitted.

Unfortunately, the ABA did not extend this approach to lawyers' day-to-day conflicts clearing process. Although perhaps not as starkly as lateral hire conversations, that process also normally requires disclosure of client information protected by the ABA Model Rules. Lawyers presumably can take some comfort in the ABA's recognition of reality in connection with the lateral hiring process. This is not to say that lawyers practicing in ABA Model Rules states have worried about this -- since 1983 they have been violating the ABA Model Rules in their day-to-day conflicts clearing, and undoubtedly will continue to do so even in the absence of a black letter rule permitting the necessary disclosures in that process.

Best Answer

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

b 10/14

Clearing Conflicts in Hiring Adverse Lawyers

Hypothetical 2

As a mid-level associate working on a large litigation matter, you must frequently deal with the law firm representing your client's adversary. You have really grown to admire that other firm, and its associates seem much more satisfied with their salaries and responsibility than associates at your firm. You have actually considered seeking a job at that other firm, and you wonder about the confidentiality and conflicts ramifications of taking such a step.

(a) Without advising your law firm and its client whom you are representing in the current litigation, may you mention to one of that other law firm's partners that you might be interested in applying for a job there at some point?

YES (PROBABLY)

(b) Without advising your law firm and its client whom you are representing in the current litigation, may you meet with one of the other firm's partners to discuss possible salary and job assignments?

NO (PROBABLY)

(c) If one of the other firm's partners senses your interest without your having said anything about it, must you advise your firm and its client if the partner offers you a job?

MAYBE

Analysis

Clearing conflicts when hiring lawyers from other firms primarily involves confidentiality issues. However, conflicts issues can arise as well.

(a)-(b) Unless and until the lateral hire actually moves to another firm, the potential conflict involves the amorphous principle focusing on any material effect on lawyers' judgment based on some other interest.

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

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

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

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

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

For instance, in the hiring context, an associate is not likely to "pull punches" when dealing with the adversary's lawyer just because the associate and the other lawyer had a fleeting conversation about the associate possibly joining the adversary's law firm at some point in the future. However, the associate might be less aggressive on behalf of her client when dealing with one of the adversary's lawyers who just offered the associate a partnership at the other law firm, accompanied by a huge pay increase. Thus, this second type of conflict requires a far more subtle analysis than a "light switch" type of conflict arising from direct adversity to another client.

As with the first of type of conflict, a lawyer dealing with a "rheostat" conflict may represent a client only if the lawyer "reasonably believes" that she can "provide competent and diligent representation," the representation does not violate the law, and each client provide "informed consent." ABA Model Rule 1.7(b)(1). Perhaps the possible lateral hire can talk himself into thinking that he can continue providing competent and diligent representation to the existing client after receiving a solid job offer from the adversary's law firm, but making the necessary disclosures and obtaining the necessary consents could be a logistical nightmare.

As lawyers' lateral moves became more common, the ABA dealt with this issue in 1996.

In ABA LEO 400 (1/24/96), the ABA addressed the conflicts of interest ramifications of discussions between a law firm and a possible lateral hire who was currently working on a matter adverse to the potential hiring law firm's client. ABA LEO 400's conclusion primarily focused on the conflicts issues.[1]

> In sum, <u>we conclude that, for the protection of clients, Rule 1.7(b) requires a lawyer who is actively representing a client in a matter, and who is considering an association with a firm or party to whom he is opposed in the matter, to consult with his client and obtain the client's consent to his continuing to</u>

[1] Interestingly, ABA LEO 400 mentioned the confidentiality duty almost as an afterthought -- identifying it as the third of four duties requiring some attention. ABA LEO 400 (1/24/96) ("A third duty is the preservation of confidentiality under Rule 1.6. Job-seeking lawyers must guard against the risk that in the course of the interviews to determine the compatibility of the lawyer with the opposing firm, or the discussions between the lawyer and the firm about the lawyer's clients and business potential, the lawyer might inadvertently reveal 'information relating to the representation' in violation of Rule 1.6.").

work on the matter while the lawyer explores such association. Generally, the required consultation should occur before the lawyer engages in a substantive discussion of his experience, clients, or business potential with the opposing firm or party. If the client consents, the lawyer may continue the representation. If the client does not consent, the lawyer must either discontinue the job search that created the conflict, or withdraw from participation in the representation and transfer his work to others in the firm, if withdrawal can be accomplished properly under Rule 1.16. Where the lawyer has had a limited role in a matter or has had limited client contact, it will ordinarily be more appropriate for him to inform his supervisor. The supervisor can then determine whether to relieve the lawyer of responsibility, or to seek the client's consent for the lawyer to continue to work on the matter. While the negotiating lawyer's conflict of interest is not imputed to other lawyers in his firm, those other lawyers must each evaluate whether they may themselves have a conflict by virtue of their own interest in their colleague's negotiations. The lawyers in a law firm seeking to employ a lawyer who is involved in a matter adverse to the firm have similar obligations to their client.

This Committee regularly addresses, as in this Opinion, important issues relating to conflicts of interest. We recognize that among all of the issues this Committee confronts, conflicts of interest decisions generate much attention from the bar because of the possibilities they present for the disqualification of counsel. While there are, undoubtedly, many situations in which disqualification on grounds of conflict is warranted if not compelled, the opportunities for mischief presented by disqualification motions are numerous as well. Thus, we conclude this Opinion with a cautionary note. We do not intend, by this Opinion, to provide additional opportunities for merely tactical or dilatory motions to disqualify where the role of the negotiating lawyer has been such that no real harm can arise by permitting the lawyer to secure a new position of employment. As stated in the Rules themselves, 'the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons.' Scope para. [18]. It is our hope that members of the profession will approach motions to disqualify in this context, as in any other context, responsibly and with prudence.

ABA LEO 400 (1/24/96) (emphases added).

The Restatement also deals with this issue -- and follows the ABA legal ethics opinion in recognizing an increasing duty by the lawyer as the job negotiations become "concrete."

> This Section applies when a lawyer seeks to discuss the possibility of the lawyer's future employment with an adversary or an adversary's law firm. The conflict arises whether the discussions about future employment are initiated by the lawyer or by the other side. If discussion of employment has become concrete and the interest in such employment is mutual, the lawyer must promptly inform the client. Without effective client consent, the lawyer must terminate all further discussions concerning the employment, or withdraw from representing the client. The same protocol is required with respect to a merger of law firms or similar change. . . .

Restatement (Third) of Law Governing Lawyers § 125 cmt. d (2000). The Restatement offers a helpful illustration of how this principle works.

> Lawyer has been employed by Law Firm ABC for three years. For the last two of those years, Lawyer has worked on a case on behalf of Client against a company represented by Law Firm DEF. Lawyer decided to explore leaving Law Firm ABC. Lawyer wrote letters to 10 firms, including Law Firm DEF, to determine if they had any openings. Law Firm DEF indicated that it has an opening and encouraged Lawyer to come for an interview. This Section does not require Lawyer, at the time of sending the initial letters, to inform Client of the possible relationship to Law Firm DEF. However, when Firm DEF responded favorably, the possibility of employment became both concrete and mutual. At that point, Lawyer must promptly notify Client, fully inform Client of the nature and consequences of the conflict, and obtain Client's voluntary consent before continuing the representation.

Restatement (Third) of Law Governing Lawyers § 125 cmt. d, illus. 4 (2000).

States have also issued legal ethics opinions addressing this scenario. As with ABA LEO 400, these opinions almost apologetically acknowledge there can be no "bright-line" rule, as much as lateral hires and hiring law firms might wish for one.

- District of Columbia LEO 367 (7/2014) ("When a lawyer is seeking employment with an entity or person adverse to his client, or with the adversary's lawyer, a conflict of interest may arise under Rule 1.7(b)(4) if the lawyer's professional judgment on behalf of the client will be, or reasonably may be, adversely affected by the lawyer's own financial, business, property, or personal interests (for purposes of this Opinion, a lawyer's own financial, business, property, or personal interests are collectively referred to as a 'personal interest conflict'). Both subjective and objective tests must be applied to determine whether a personal interest conflict exists. There is no 'bright line' test for determining the point during the employment process when a personal interest conflict arises, and that point may vary. There are a number of factors to consider in determining whether a personal interest conflict exists, including whether the individual lawyer is materially and actively involved in representing the client and, if so, whether the lawyer's interest in the prospective employer is targeted and specific, and/or has been communicated to, and reciprocated by, the prospective employer. Where the prospective employer is affiliated with, but separate and distinct from, the entity adverse to the job-seeking lawyer's client, there may be no personal interest conflict in the first instance, because the adversary and the prospective employer may be separate entities for conflicts purposes. If a personal interest conflict arises, there are three possible courses of action that may be available to the individual lawyer, each of which is subject to applicable requirements of the D.C. Rules of Professional Conduct: (a) disclosing to the client the existence and nature of the personal interest conflict and the possible adverse consequences of the lawyer's representation of the client and obtaining the client's informed consent to the representation; (b) withdrawing from the representation; or, (c) discontinuing seeking employment with the client's adversary or the adversary's lawyer until all pending matters relating to that potential new employment have been completed. The personal interest conflict of an individual lawyer in a law firm, nonprofit, or corporate legal department is not imputed to the other lawyers in the law firm, nonprofit, or corporate legal department, so long as the personal interest conflict does not present a significant risk of adversely affecting the representation of the client by such other lawyers. The imputation rule does not apply to a government agency. A subordinate lawyer who discusses a potential personal interest conflict with his supervisory lawyer, and acts in accordance with the supervisory lawyer's reasonable determination of whether the subordinate lawyer has a personal interest conflict and follows the supervisory lawyer's recommended course of action, will not be held professionally responsible even if it is subsequently determined that the supervisory lawyer's determination of whether there was a personal interest conflict, and/or the recommended course of action, were incorrect under the Rules." (footnote omitted) (emphasis added)).

- Kentucky LEO E-399 (5/1997) ("Question: When law firms represent adverse parties in a matter, may a lawyer in one of the law firms negotiate for employment with the other law firm? If so must disclosure of the fact of the negotiations be made to the firms' client who is involved in the adverse representation?"; "Answer: <u>If there is an appearance of side-switching by a lawyer who is actually working on the case, the negotiations should not be initiated without the client's consent.</u> If the lawyer is involved in the case or has actual knowledge of protected client information within the meaning of KRPC 1.9 and 1.10, then the lawyer should not negotiate for employment with the law firm representing the adverse party without the client's consent. If the lawyer seeking employment is not involved in the case, the negotiations are not necessarily violative of the Rules, but disclosure to the firm's client may be appropriate and prudent in specific cases." (emphasis added)).

(c) In 1991, the New York City Bar indicated that a lawyer must advise her client about such a job offer <u>unless</u> she promptly declines it.

- New York City LEO 1991-1 (1991) ("This Opinion addresses whether and under what circumstances a lawyer has a duty to disclose to a current or prospective client that the lawyer is seeking or is considering whether to accept future employment with a person or entity having interests that are adverse to the interests of that current or prospective client."; "<u>A serious issue arises as to when, in the process of looking for and deciding to accept new employment, the lawyer's interest in such employment becomes sufficiently concrete and serious to require disclosure under DR 5-101(A).</u> The Committee is quite aware of the desirability of a 'bright-line' rule that would be easy to apply and would provide unambiguous guidance. However, <u>we have concluded that no such 'bright-line' test can adequately accommodate the variety of circumstances in which the issues addressed herein might arise.</u>" (emphases added); "Nevertheless, the Committee believes that <u>disclosure would be required under DR 5-101(A) in any case no later than when an offer of conflicting employment is extended to the lawyer, which offer is not promptly declined.</u> Therefore, disclosure would always be necessary at least where an offer of future employment is outstanding and being considered (or has been accepted). This rule, however, is not sufficient. Although disclosure at the point an offer is extended would protect against certain of the types of conflict identified above; it is not sufficient as to others. In particular, it does not deal at all with the potential conflicting influences that may arise in connection with the process of securing the offer of employment.

> Therefore, the Committee notes that, in many cases, the disclosure obligations under DR 5-101(A) may arise as soon as the lawyer either (i) has taken clear affirmative steps to seek to obtain specific conflicting employment (e.g., applied for such a position) or (ii) is seriously considering the pursuit of such employment in response to some expression of interest by the potential employer. Both situations can raise the ethical problems identified above. We are not prepared, however, to opine that in all cases the obligation to decline proffered representation or make disclosure will arise at these earlier identified points in the process." (emphasis added)).

This approach seems to allow for a "wink and a nod" offer that probably should be disclosed if the lateral hire recognizes that the hiring law firm is essentially making a standing offer that will remain open until the litigation ends. But perhaps New York intended to avoid the mischief that would come from a disclosure duty automatically arising from a job offer. An automatic disclosure approach would allow law firms to sow dissention in the adversary's ranks by offering jobs to its associates -- triggering their law firms' doubts about the associates' loyalty.

Best Answer

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

b 10/14

Focus On Individual Lawyer's Experience and Knowledge

Hypothetical 3

Your firm is thinking of hiring a mid-level associate from another large law firm in your city. You and your colleagues are representing a client in very contentious litigation against a company represented by that other law firm. You worry that your litigation adversary would do anything to "knock out" your firm. However, as far as you know the associate has never worked on that matter.

Given this situation, is the mid-level associate practicing at the other law firm totally off-limits as a lateral hire?

NO

Analysis

Interestingly, an entire law firm's knowledge and loyalty duties are imputed to every lawyer in the firm (including the newest associate) while the lawyer practices at the firm -- but generally evaporate when the lawyer leaves the firm. Thus, lawyers withdrawing from a firm only carry with them the knowledge that is in their brain. This is the knowledge that defines their ability to take matters adverse to the old firm's clients -- which of course have become the withdrawing lawyer's former clients.

To be sure, lawyers can obtain material confidential information without working on a matter. They might talk to a colleague about the matter that she is handling, attend partnership meetings at which matters are widely discussed, or receive internal email news updates about firm's matters. Therefore, it would be a mistake to focus solely on matters in which a lawyer represents a client. Instead, the analysis must examine the lawyer's receipt of confidential information in any setting.

Having said that, it seems clear that lawyers leaving a law firm do not face individual disqualification from adversity to their former firm's client as long as the lawyers did not acquire material confidential information that could be used to the former client's disadvantage. Of course, the lack of any individual grounds for disqualification means that the hiring law firm does not risk an imputed disqualification to the entire firm from adversity to a client represented by the lateral's now-former firm.

A comment to ABA Model Rule 1.9 addresses the competing interests involved in analyzing lawyers' adversity of clients represented by a lawyer's former firm.

> When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

ABA Model Rule 1.9 cmt. [4]. The next comment focuses on the lateral hire's actual personal knowledge.

> Paragraph (b) ["A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client"] operates to disqualify the

> lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

ABA Model Rule 1.9 cmt. [5].

The comment after that acknowledges law firms' lawyers' normal exchange of information.

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

ABA Model Rule 1.9 cmt. [6].

The <u>Restatement</u> takes the same approach.

> When a lawyer leaves a firm or other organization whose lawyers were subject to imputed prohibition owing to presence in the firm of another lawyer, <u>the departed lawyer becomes free of imputation so long as that lawyer obtained no material confidential client information relevant to the matter.</u> Similarly, lawyers in the new affiliation are free of imputed prohibition if they can carry the burden of persuading the finder of fact that the arriving lawyer did not

> obtain confidential client information about a questioned representation by another lawyer in the former affiliation.

Restatement (Third) of Law Governing Lawyers § 124 cmt. c(ii) (2000) (emphasis added). An illustration provides further support for this general approach.

> Client X has sought to retain Lawyer A, a partner in the firm of ABC, to represent X in a suit against Y. The suit has not yet been filed. Lawyer A is required to decline the representation because Y is also a client of Lawyer B in ABC. Lawyer A resigns from the ABC firm without having learned material confidential information of Y relevant to X's claim. The imputed disqualification is thereby removed, and Lawyer A may now represent Client X.

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

The case law also unanimously agrees with this rule.

- Kennedy v. MindPrint, 587 F.3d 296, 300, 394 (5th Cir. 2009) (confirming that an individual lawyer's disqualification when a lawyer moves to a new firm must be based only on the individual lawyer's personal involvement and knowledge; "Regardless of linguistic differences, the two codes produce the same result in application -- they both require that a departing lawyer must have actually acquired confidential information about the former firm's client or personally represented the former client to remain under imputed disqualification."; "Under both the Texas Rules and the ABA Model Rules, Kennedy should have had the opportunity to demonstrate that he did not obtain confidential information regarding MindPrint during his time at Jackson Walker. Kennedy presented uncontradicted evidence that he was unaware of MindPrint's existence -- let alone Schooler's representation of MindPrint -- during his affiliation with Jackson Walker."; reversing a district court's disqualification of the new firm).

- District of Columbia LEO 312 (4/2002) (explaining that a lawyer withdrawing from a law firm only carries to his or her new firm conflicts that arise from the lawyer's personal knowledge, rather than any imputed knowledge; "But when that lawyer moves to firm B the only conflicts that the lawyer carries along from firm A are those caused by client representations in which the lawyer actually participated. Conflicts that applied to the lawyer while in firm A only because of the imputation required by Rule 1.10(a) do not apply when the lawyer is moving to another firm.").

- Adams v. Aerojet-General Corp., 104 Cal. Rptr. 2d 116, 125, 2001 Cal. App. LEXIS 89 (Cal. Ct. App. 2001) ("We conclude that a rule which disqualifies an

> attorney based on imputed knowledge derived solely from his membership in the former firm and without inquiry into his actual exposure to the former client's secrets sweeps with too broad a brush, is inconsistent with the language and core purpose of rule 3-310(E), and unnecessarily restricts both the client's right to chosen counsel and the attorney's freedom of association. It also clashes with the principle that applying the remedy of disqualification 'when there is no realistic chance that confidences were disclosed [to counsel] would go far beyond the purpose' of the substantial relationship test.'" (citation omitted)).

If the lateral hire faces an individual disqualification based on ABA Model Rule 1.9 standard, another ABA Model Rule imputes that disqualification to the entire firm -- although the ABA Model Rules allow the hiring law firm to screen the individually disqualified lawyer and avoid such an imputed disqualification. ABA Model Rule 1.10(a).

It is also worth noting that if the lateral hire brings any clients with him or her to the new firm, the firm cannot be adverse to those former clients on <u>any</u> matter without the client's consent. This total duty of loyalty does not focus on the lawyer's information, but rather on the total prohibition or adversity to current clients. ABA Model Rule 1.7(a)(1).

In most situations, lawyers leaving a law firm withdraw from representing the clients they worked for at the firm -- except for those clients that they carefully select for possible solicitation to move with them to the new firm. Withdrawal might require court approval if the lateral hire has appeared as counsel of record -- although most courts consider the law firm to be the litigant's lawyer, rather than the individual lawyer within the law firm. In any event, it usually makes sense for lawyers leaving law firms to explicitly or implicitly sever their attorney-client relationships with clients that they do not want to try to bring with them to the new firm. This turns the old firm's clients into the individual lawyer's former clients -- thus allowing both the individual lawyer and every other lawyer at the hiring firm to take unrelated matters adverse to those former clients.

A 2012 Montana case highlighted what can go wrong with some logistical snafus. In that case, a lawyer did not adequately advise his former clients that he was withdrawing from representing them. In fact, the lateral hire sent a letter to all or most of the clients with whom he had worked at the old firm, touting his new firm's ability to represent those clients. This apparent widely-sent form letter had the unfortunate effect of maintaining an attorney-client relationship with clients that the lateral hire undoubtedly did not want to continue representing at the new firm.

- Krutzfeldt Ranch, LLC v. Pinnacle Bank, 272 P.3d 635, 641, 642, 643, 644 (Mont. 2012) (finding that a lawyer's individual disqualification was imputed to his new law firm, because he was not screened in a timely fashion under the Montana rules; explaining that the lawyer had been retained by one of the law firm's adversaries, but was essentially on "stand by" to assist at a later time; holding that the lawyer had not officially terminated his representation of the client when he moved to the adversary's law firm, and instead had sent what seemed to be a form letter to all of his clients announcing the move and indicating that he could assist them in the future; "The attorney-client relationship is not automatically terminated when a lawyer joins another firm." (emphasis added); "The critical fact here is that, even if grounds for withdrawal existed under the terms of his engagement letter, Hoskins did not withdraw from his representation of the Krutzfeldts prior to accepting his new position. He never informed the Krutzfeldts that his work for them had concluded, never terminated his representation of them, and never advised them he was contemplating joining Crowley. The 'Dear Client' letter gave no indication the Krutzfeldts were no longer Hoskins's client. To the contrary, the letter contemplated future legal services: 'We feel we will be more responsive and efficient to your needs and the ever changing tax and regulatory world by utilizing the resources that Crowley Fleck has to offer.' 'Withdrawal is effective to render a representation 'former' for the purposes of this Section if it occurs at a point that the client and lawyer had contemplated as the end of the representation.' Restatement (Third) of the Law Governing Lawyers § 132 cmt. c (2000) (emphasis added). In the absence of any affirmative steps by Hoskins prior to his transition, if the Krutzfeldts were Hoskins's current clients on December 31, 2010, they remained in an attorney-client relationship at the time he signed on as a member of the Crowley team."

(emphasis added); "[W]e conclude Hoskins had a concurrent conflict of interest at the time he took the job with Crowley. After the July 19 meeting, Hoskins sent Harris a formal engagement letter indicating the prospective nature of his services. Hoskins's bill for his services did not indicate it was a 'final' bill nor did he take any steps to conclude his relationship with the Krutzfeldts. That he was not consulted for the next several months was simply a matter of timing. Consistent with Harris's previous engagement of Hoskins, Hoskins's services only would be needed for particular components of the case. Following Harris's call to advise Hoskins of the upcoming settlement conference, Hoskins did nothing until sending Harris the form letter that advised all of Hoskins's clients he had joined Crowley. At no time did Hoskins advise Harris of any notice or intent to withdraw as counsel."; "An attorney's duty to his client, however, is not dependent on the purpose for which he has been engaged. '[T]he mere fortuity that [the client] did not require more extensive or frequent services than he did cannot be the [attorney's] escape hatch[.]' Manoir-Electroalloys Corp. v. Amalloy Corp., 711 F. Supp. 188, 194 (D.N.J. 1989). Hoskins was retained for his expertise in tax matters. Although the specific tasks in which a lawyer was engaged might make the access to confidential client information insignificant in subsequent representation of an adverse party, the lawyer bears the burden of persuasion on that issue. Restatement (Third) of the Law Governing Lawyers § 132 cmt. h. No one contends Hoskins was not privy to confidential information. His limited specific role in the case does not diminish his professional obligations to the Krutzfeldts."; "The Krutzfeldts have made a sufficient showing of prejudice in this case. They lost the time and money they invested in Hoskins. They lost their trial date because Hoskins's abrupt move rendered them without expert assistance just weeks before trial and prompted the need for their motion to disqualify. Without prior notice of Hoskins's move, they did not have an opportunity to elect to seek new tax counsel or to determine how to address the impending conflict. Aside from these setbacks, the Krutzfeldts assert the most damaging loss was that of their attorney's loyalty. They argue that to ignore a lawyer's duty of loyalty in this case effectively would sanction the opportunistic hiring of an adverse party's attorney to weaken and derail the adverse party's claim against the hiring client.").

Best Answer

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

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Imputation of a Lateral Hire's Individual Disqualification: Strict Approach

Hypothetical 4

For several years, you have had your eye on a rising associate who works at a relatively small firm with offices in your building. Unfortunately, the associate has been working on a team of lawyers at her firm which represents an adversary in a very lengthy high-stakes litigation in which your firm represents your largest client.

If your firm hired the associate, is there a chance that your firm could be disqualified from continuing to represent your largest client in the pending litigation?

YES

Analysis

Under the traditional ABA Model Rules' approach and most states' approach to this issue, an individual lawyer's obvious disqualification would be imputed to the new law firm.

The ABA Model Rules disqualify an individual lawyer from adversity to a former client.

> 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.

ABA Model Rule 1.9(a).

Until fairly recently, this individual disqualification was automatically imputed to the entire hiring law firm.

> While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them

> practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless . . . .

ABA Model Rule 1.10(a).

Many states still follow this traditional approach -- automatically disqualifying the hiring law firm in most situations.

- H & C Corp. v. Puka Creations, LLC, Case No. 4:12-cv-00013-RBH, 2013 U.S. Dist. LEXIS 147174, at *5-6 (D.S.C. Oct. 11, 2013) (holding that South Carolina had not adopted the ABA Model Rules approach, which allows screening of a lateral hire to avoid imputed disqualification; "Nexsen Pruet [plaintiff's lawyers] contends that it has put in place a screen between Mr. St. Clair and the rest of the firm. However, South Carolina's ethical rules do not provide for a screen in this situation. While Rule 1.10 allows programs providing legal services to avoid imputed disqualification by screening lawyers from conflicting matters within the office, this rule however applies only to public defenders, legal services organizations, and similar programs.").

- In re Columbia Valley Healthcare Sys., L.P., 320 S.W.3d 819, 824 (Tex. 2010) ("If the lawyer works on a matter, there is an irrebuttable presumption that the lawyer obtained confidential information during representation. . . . When the lawyer moves to another firm and the second firm is representing an opposing party in ongoing litigation, a second irrebuttable presumption arises; it is presumed that the lawyer will share the confidences with members of the second firm, requiring imputed disqualification of the firm.").

Interestingly, in 2012 a California federal court bluntly rejected the possibility of an ethics screen preventing an individual lawyer's imputed disqualification to the hiring firm.

- Beltran v. Avon Prods., Inc., 867 F. Supp. 2d 1068, 1078, 1083, 1083-84, 1084 (C.D. Cal. 2012) (finding that an individual lawyer's disqualification was imputed to his new law firm, despite an ethics screen; explaining that the lawyer spent over 300 hours working on matters for Avon while at Paul Hastings, and then moved to a law firm representing a plaintiff suing Avon; "The instant case presents an unfortunate and awkward set of circumstances in which two former colleagues and long-time friends who previously worked together in representing a major corporate client now find themselves on opposite sides in a case involving that same client."; "Plaintiff claims that disqualification is not warranted because an ethical wall was immediately imposed to cordon off Mr. Frank from the instant case after Mr. Frank spoke with Mr. Ellis on March 12, 2012. . . . As a matter of law, however, an ethical wall is insufficient to overcome the possession of confidential information by the segregated attorney, except in very limited situations involving former government attorneys now in private practice."; noting the individually disqualified lawyer had assisted his new firm in attempting to avoid disqualification; "Even if an ethical wall were legally sufficient, it was untimely because it was not imposed until March 12, 2012, two weeks after Plaintiff filed her complaint against Avon in Estee Lauder on February 28, 2012. Nor did Plaintiff's counsel send written notice to Avon regarding the implementation of an ethical wall as required under the Rules of Professional Conduct. See ABA Model Rules of Prof'l Conduct 1.10(a)(ii)&(iii). The effectiveness of an ethical wall is further compromised by the close proximity of attorneys working together in one office at Eagan Avenatti, which consists of less than ten attorneys, and by Mr. Frank's co-representation of parties with Mr. Avenatti and Mr. Sims in several concurrent class actions. . . . The Court also notes that Mr. Frank has already actively participated in the current litigation by speaking with Mr. Ellis about the case and the instant motion (as early as February 28, 2012), submitting a declaration in support of Plaintiff's opposition to the disqualification motion, reviewing Avon's motion, and even seeking to participate telephonically at the May 21, 2012 hearing. Mr. Frank's behavior casts doubt as to whether an ethical wall can be successfully implemented and maintained in this case."; "The Court also finds that, although there is no direct California authority regarding vicarious disqualification of an associated law firm, disqualification of the X-Law Group is warranted under the circumstances of this case. The X-Law Group consists of four attorneys, two of whom have already collaborated with Eagan Avenatti in the filing of the complaint against Avon in Estee Lauder and this case. It is also reasonable to assume that the two law firms engaged in fairly extensive discussions about the case and Plaintiff's litigation strategy before filing their complaint and prior to the erection of an [sic] wall ethical[ly] segregating Mr. Frank from the case. Even if the X-Law Group did not, in fact, acquire confidential information, their involvement in the case would taint the appearance of probity and fairness of the proceeding.").

This strict approach contrasted sharply with a 2010 California appellate court decision recognizing the possibility that the hiring law firm could screen a lateral hire to avoid such an imputed disqualification.

- Kirk v. First Am. Title Ins. Co., 108 Cal. Rptr. 3d 620, 631 (Cal. Ct. App. 2010) (analyzing in great detail the California rule requiring imputation of an individual lawyer's (Cohen) disqualification, and rejecting a per se imputation approach; explaining that an individual lawyer who had several communications with plaintiff's counsel about a case moved to the

> Sonnenschein firm, which was later joined by lawyers from Bryan Cave -- who represented the other side of the case in which the lawyer had spoke to the plaintiff; noting that Sonnenschein screened the individual lawyer immediately upon learning of the individual lawyer's disqualification; noting that "[g]enerally speaking, the California State Bar's Rules of Professional Conduct govern attorney discipline; they do not create standards for disqualification in the courts. . . . Nonetheless, as will be seen in our discussion, courts analyzing questions of disqualification often look to the Rules of Professional Conduct for guidance."; reversing the disqualification of the Sonnenschein firm and remanding an analysis on whether the firm had rebutted the presumption that the individual lawyer had disclosed confidences to colleagues).

Of course, the lawyer can seek the former client's consent to the hiring law firm's continuing representation of the former client's adversary. The former client could even consent to the lawyer's participation on the matter for the other side, but is extremely unlikely to do so. Instead, the normal scenario involves the former client consenting to the hiring law firm's continued representation of the adversary on the condition that it effectively screen the lawyer from any participation in the case, or disclosure of confidential information to lawyers at the hiring law firm working on the case.

As a matter of courtesy and professionalism, most law firms work with their clients to grant such a consent -- especially when a young associate wants to move to another firm. However, even then the logistics can be frightening to the lawyer interested in moving from one firm to another. The associate normally does not want to announce that he or she is leaving the current firm without locking in a job somewhere else. But the hiring law firm often cannot guarantee a job without knowing that it can obtain consents allowing it to continue representing clients adverse to the lateral hire's former firm's clients. This "chicken and egg" dilemma can be excruciating for young associates. If they advise their current firm that they are interested in leaving, they may burn bridges there. And if their current firm's clients do not grant the consent that the hiring firm requires (either because of the clients' intransigence or the current firm's spiteful response to the associate's desire to leave), the associate can be left without a job.

If anything, the issue becomes even more acute for more experienced lawyers. In those situations, the current firm might be less inclined to grant consents that the hiring law firm justifiably requires -- worrying that they are not only losing one of their important team members, but also that the more experienced lawyer has more critical strategic knowledge that might conceivably be disclosed to the adversary's law firm.

Best Answer

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

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Imputation of a Lateral Hire's Individual Disqualification: Other Approaches

Hypothetical 5

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

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

NO (PROBABLY)

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

MAYBE

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

YES (PROBABLY)

Analysis

(a)-(c) Traditionally, a hiring law firm could not avoid imputation of an individually disqualified lateral hire's taint. In a sense, a lateral hire came to the firm as a "Typhoid Mary" -- and the firm could avoid imputed disqualification only by successfully obtaining the lawyer's consent of former clients to allow its continued representation of the former clients' adversaries. Former clients asked for such consent inevitably demanded that the individually disqualified lateral hire be screened. However, law firms under this traditional approach could not erect what could be called "self-help" screens and avoid the imputed disqualification without the former clients' consent.

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

ABA

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

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

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

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

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

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

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

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

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

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

Id.

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

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

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

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

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

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

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

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

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

Another comment deals with the financial screening.

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

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

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

> comment upon the effectiveness of the screening procedures.

ABA Model Rule 1.10 cmt. [9].

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

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

ABA Model Rule 1.10 cmt. [10].

Restatement

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

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

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

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

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

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

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

A comment explains the justification for allowing such limited self-help screening. In essence, the Restatement justifies self-help screening for private lateral hires by pointing to the longstanding rule permitting such self-help screening when lawyers hire former government lawyers.

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

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

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

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

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

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

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

A comment describes a spectrum of possible scenarios.

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

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

The Restatement provides three useful illustrations providing more details.

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

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

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

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

> The same facts as Illustration 3, except that Lawyer while representing Bank in Firm ABC was principally in charge of developing factual information about the underlying dispute. The dispute involved a loan Bank made to Developer on Tract A in the city in which both conduct business. The dispute was resolved after extensive discovery and a full trial

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

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

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

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

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

State Rules

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

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

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

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

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

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

> We do not doubt that vicarious disqualification is the *general* rule, and that we should presume knowledge is imputed to all members of a tainted attorney's law firm. However, we

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

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

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

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

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

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

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

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

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

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

Id. at 640.

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

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

Id. at 639.

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

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

- Beltran v. Avon Prods., Inc., 867 F. Supp. 2d 1068, 1078, 1083, 1083-84, 1084 (C.D. Cal. 2012) (finding that an individual lawyer's disqualification was imputed to his new law firm, despite an ethics screen; explaining that the lawyer spent over 300 hours working on matters for Avon while at Paul Hastings, and then moved to a law firm representing a plaintiff suing Avon; "The instant case presents an unfortunate and awkward set of circumstances in which two former colleagues and long-time friends who previously worked together in representing a major corporate client now find themselves on opposite sides in a case involving that same client."; "Plaintiff claims that disqualification is not warranted because an ethical wall was immediately imposed to cordon off Mr. Frank from the instant case after Mr. Frank spoke with Mr. Ellis on March 12, 2012. . . . As a matter of law, however, an ethical wall is insufficient to overcome the possession of confidential information by the segregated attorney, except in very limited situations involving former government attorneys now in private practice."; noting the individually disqualified lawyer had assisted his new firm in attempting to avoid disqualification; "Even if an ethical wall were legally sufficient, it was untimely because it was not imposed until March 12, 2012, two weeks after Plaintiff filed her complaint against Avon in Estee Lauder on February 28, 2012. Nor did Plaintiff's counsel send written notice to Avon regarding the implementation of an ethical wall as required under the Rules of Professional Conduct. See ABA Model Rules of Prof'l Conduct 1.10(a)(ii)&(iii). The effectiveness of an ethical wall is further compromised by the close proximity of attorneys working together in one office at Eagan Avenatti, which consists of less than ten attorneys, and by Mr. Frank's co-representation of parties with Mr. Avenatti and Mr. Sims in several concurrent class actions. . . . The Court also notes that Mr. Frank has already actively participated in the current litigation by speaking with Mr. Ellis about the case and the instant motion (as early as February 28, 2012), submitting a declaration in support of Plaintiff's opposition to the disqualification motion, reviewing Avon's motion, and even seeking to participate telephonically at the May 21, 2012 hearing. Mr. Frank's behavior casts doubt as to whether an ethical wall can be successfully implemented and maintained in this case."; "The Court also finds that, although there is no direct California authority regarding vicarious disqualification of an associated law firm, disqualification of the X-Law Group is warranted under the circumstances of this case. The X-Law Group consists of four attorneys, two of whom have already collaborated with Eagan Avenatti in the filing of the complaint against Avon in Estee Lauder and this case. It is also reasonable to assume that the two law firms engaged in fairly extensive discussions about the case and Plaintiff's litigation strategy before filing their complaint and prior to the erection of an [sic] wall ethical[ly] segregating Mr. Frank from the case. Even if the X-Law Group did not, in fact, acquire confidential information, their involvement in the case would taint the appearance of probity and fairness of the proceeding.").

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

- Silicon Graphics, Inc. v. ATI Techs., Inc., 741 F. Supp. 2d 970, 977, 979-80 (W.D. Wis. 2010) (denying a disqualification motion based on a law firm's hiring of an individually disqualified lateral; finding that the hiring law firm's screen was adequate; explaining that "[a]t least 12 states have a rule of imputed disqualification similar to th[e] ABA model rule that allows for screening regardless of the scope of the work conducted by the lawyer for the former client. Kirk, 183 Cal. App. 4th at 802-803. [Kirk v. First Am. Title Ins. Co., 183 Cal. App. 4th 776 (Cal. Ct. App. 2010)] About the same number of states allow for screening under more limited circumstances. Id. In adopting the new rule, the ABA relied on the experience of these states, concluding that history has 'established [that] screens are effective to protect confidentiality' and 'that courts have exhibited no difficulty in reviewing and, where screening was found to have been effective, approving screening mechanisms.' Committee Report at 11. See also Robert A. Creamer, 'Three Myths about Lateral Screening,' Professional Lawyer 20 (Winter 2002) ('[T]he experience of about 70,000 Illinois lawyers over nearly nine years has been no formal cases involving charges that an effort to screen under Rule 1.10 was inadequate to protect confidential information.') (internal quotations omitted)."; "This leaves about half of the states that require automatic disqualification. However, some predict that, '[w]ith the passage of amended Model Rule 1.10, more states will likely follow suit' to allow screening under more circumstances. Kathy L. Yeatter, 'Ethical Considerations of the Mobile Lawyer,' American Bankruptcy Institute Journal 22 (May 2009). See, e.g., Mark Fucile, 'Screening: An Idea Whose Time Has Come?' Advocate 21 (Jan. 2010) (arguing that Idaho should adopt model rule)."; "Despite the lack of a clear holding in this circuit, I agree with defendants that federal law is controlling. As a general matter, federal courts apply state law to 'substantive' questions when state law created the underlying cause of action. . . . In addition, federal courts may 'borrow' state law principles when federal law is silent on a particular question. . . . However, the Supreme Court has held that '[t]he state code of professional responsibility does not by its own terms apply to sanctions in the federal courts.' In re Snyder, 472 U.S. 634, 645, 105 S. Ct. 2874, 86 L. Ed. 2d 504 (1985). This is because a federal court's authority to regulate lawyer conduct in its own cases comes from its inherent power, not from a particular state rule. . . . If decisions whether to sanction a lawyer for misconduct are decided under federal law, it follows that '[m]otions to disqualify are . . . decided under federal law' as well." (citation omitted))

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

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

- Martin v. AtlantiCare, Civ. No. 10-6793 (JHR/JS), 2011 U.S. Dist. LEXIS 122987, at *9, *15-17, *19 (D.N.J. Oct. 25, 2011) (disqualifying a lawyer who had worked at Morgan Lewis in defending a case, and then switched to join the plaintiff's law firm; explaining that under New Jersey ethics rules the hiring law firm can avoid imputed disqualification (among other things) if the "matter does not involve a proceeding in which the personally disqualified lawyer had primary responsibility" despite the lawyer's argument to the contrary; "Plaintiff's characterization of LG's [attorney in question] role at Morgan as 'limited' does not comport with the evidence. This is illustrated by the fact that from November 2010 to March 2011 LG worked 108.2 hours on the case, almost twice as many hours as the combined total of the other two members of the Morgan defense team. Further, LG's Certification supports defendants' argument that she played an integral role while at Morgan. LG acknowledges that she prepared all or part of defendants' removal papers and motion to dismiss, reviewed client documents for relevancy, consulted with defendants' in-house counsel, prepared witness outlines, interviewed defendants' witnesses, prepared witness summaries, and spoke with plaintiffs' counsel. LG's contemporaneous time billing entries also contradict her allegation that she only performed 'limited tasks.'. . . According to her billing entries LG researched relevant legal issues, prepared legal papers, analyzed plaintiffs' complaints, reviewed background investigation materials about plaintiffs by the client, exchanged e-mails with the client, reviewed client documents, prepared representation letters, analyzed plaintiffs' discovery directed to defendants, reviewed and analyzed plaintiffs' personnel files with regard to the defense of their discrimination claims, prepared witness outlines, interviewed witnesses, prepared witness summaries, communicated with her clients about plaintiffs, and identified relevant and responsive documents. These are hardly 'limited' roles. LG's descriptions evidence that she played a substantial and substantive role in AtlantiCare's defense."; "The foregoing evidence demonstrates to the Court that LG's actions fit squarely within the meaning of the term 'primary responsibility' as the term is defined in the RPC's. In order to have primary responsibility it was not necessary for LG to be the supervising attorney on the file or the partner in charge of the file. This is evident by the fact that the applicable definition merely requires 'participation" in the 'management and direction of the matter at the policy-making level.' LG plainly 'participated' in the management of the case as she took the 'laboring oar' in AtlantiCare's defense and she regularly consulted with the Morgan defense team about defense strategy.").

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

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

- Nevada LEO 39 (4/24/08) (explaining Nevada's Rule allowing the screening of lateral hires; noting that in 2006 Nevada adopted a new version of Rule 1.10 that authorizes "limited screening" to avoid imputed disqualification; "[S]creening is allowed to avoid imputed disqualification without the consent of the former client -- even if the laterally moving lawyer possesses confidential information from the former firm so as to be personally disqualified under Rule 1.9(b) -- but only if the laterally moving lawyer did not have a <u>substantial role in</u>, <u>or primary responsibility for</u>, the matter. When the laterally moving lawyer did have a substantial role in, or primary responsibility for, the matter, the ABA rule prohibiting screening applies."; providing several examples: "For example, suppose the lawyer who was the lead or '2nd chair' counsel for Client A in case <u>A v. B</u> while the lawyer was with former firm, White & Brown, moves to firm Red & Green, which represents Client B in the same or a related case. In that situation, the lawyer's new firm, Red & Green, cannot continue to represent Client B. In that situation, screening could not eliminate the imputed disqualification. However, even if screening did not remove the imputed disqualification, both the laterally moving lawyer and the new firm, Red & Green, could continue to represent Client B if Client A waives the conflict under Rule 1.7. Rule 1.10(c)."; "On the other hand, suppose the laterally moving lawyer had no direct role in case <u>A v. B</u> while the lawyer was with former firm, White & Brown -- but did possess confidential information from the former firm so as to be personally disqualified under Rule 1.9(b) -- and then moves to firm Red & Green, which represents Client B in the same or a related case. In that situation, the lawyer's new firm, Red & Green, could continue to represent Client B without Client A consent if the personally disqualified lawyer is ethically screened from the case."; "Finally, if the lawyer changing firms had neither a role in the case A v. B, nor the possession of confidential information about the case, then neither screening nor client consent is required for the lawyer and the new firm to represent the opposite party in the case.").

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

- O'Donnell v. Robert Half Int'l, Inc., 641 F. Supp. 2d 84, 86, 89. 88 n.3 (D. Mass. 2009) (disqualifying a plaintiff's law firm which had hired a lawyer from defense counsel Seyfarth Shaw despite being warned that the lawyer had spent some time working with the defense in the same case that the plaintiff's law firm was handling against Seyfarth Shaw's client; explaining that Massachusetts Rule 1.10 allows a hiring law firm to avoid imputed disqualification if it hires a lawyer who "had neither substantial involvement nor substantial material information relating to the matter" and is screened from the matter; explaining that lawyer did not have "substantial involvement" in the matter, because she spent 7.2 hours over two days writing a one and a half page memorandum summarizing research; however, finding that the lawyer did have "substantial material information" about the matter, because she learned about the defendant's legal strategy and "a single fact clearly relevant to the issue being researched"; considering in its analysis only information disclosed to the court in camera; "The Court does not consider any assertions by defendants' counsel that there were other revelations to Attorney Getchell which were so sensitive that defendants determined not to include them in the in camera record for fear that the Court, in considering the matter, or the Court hearing an objection to the undersigned's ruling, might order the material disclosed to counsel for the plaintiffs. The Court shall decide the motion to disqualify solely on the record which has been put before it and shall not consider any hints of juicier aspects of Attorney Getchell's involvement in or knowledge of the case while at the Seyfarth firm which defendants choose not to reveal to the Court.").

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

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

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

Best Answer

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

B 11/14; B 12/16

Elements of an Effective Screen

Hypothetical 6

Having just been "burned" by hiring a young associate in your New York office that ended up being "Typhoid Mary," you now take every step to screen lateral hires before they come on board. However, you just received a motion to disqualify your firm in a large matter, based on your timing of a lateral associate. The motion acknowledges that you imposed a screen before hiring the lateral associate, but claims that the screen was not effective -- because it did not mention that lawyers violating the screen would be punished, and did not include an assurance that the lateral associate would not share in any fees generated by your firm's representation of your client in the litigation.

Is your firm likely to be disqualified based on these alleged deficiency of the screen?

MAYBE

Analysis

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

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

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

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

The ABA Model Rules describe a valid screen as follows:

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

ABA Model Rule 1.0 cmt. [9].

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

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

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

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

The Restatement also discusses a screen's timing.

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

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

Many state rules have their own variations.

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

- Ryan's Express Transp. Servs., Inc. v. Amador Stage Lines, Inc., 279 P.3d 166, 168, 172, 171 & nn.4 & 5, 172 (Nev. 2012) (analyzing appropriate steps for an ethics screen; "Although the Nevada Rules of Professional Conduct (RPC) permit the screening of disqualified attorneys to prevent an associated law firm's imputed disqualification in some cases, RPC 1.10(e); 1.11(b); 1.12(c), we have never considered whether screening is appropriate with regard to a settlement judge acting under this court's settlement conference program or how to determine the sufficiency of any screening measures utilized. We take this opportunity to consider the practice of attorney screening to cure imputed disqualification."; "When considering whether the screening measures implemented are adequate, courts are to be guided by the following non-exhaustive list of factors: (1) instructions given to ban the exchange of information between the disqualified attorney and other members of the firm; (2) restricted access to files and other information about the case; (3) the size of the law firm and its structural divisions; (4) the likelihood of contact between the quarantined lawyer and other members of the firm; and (5) the timing of the screening."; also citing Pappas V. Waggoner's Heating & Air, Inc., 108 P.3d 9, 14 (Okla. Civ. App. 2004)], which stated as follows: "'(1) instructions given to ban the exchange of information between the disqualified attorney and other members of the firm; (2) restricted access to files and other information about the case; (3) prohibited sharing in fees derived from the litigation; (4) the size of the law firm and its structural divisions; and (5) the likelihood of contact between the quarantined lawyer and other members of the firm.'"; also citing Leibowitz v. Eight Judicial Dist. Court of Nev., 78 P.3d 515, 522 (Nev. 2003), which stated as follows: "'To determine whether screening has been or may be effective, the district court should consider: (1) 'the substantiality of the relationship between the former and current matters,' (2) 'the time elapsed between the matters,' (3) 'the size of the firm,' (4) 'the number of individuals presumed to have confidential information,' (5) 'the nature of their involvement in the former matter,' (6) 'the timing and features of any measures taken to reduce the danger of disclosure,' and (7) whether the 'old firm and the new firm represent adverse parties in the same proceeding, rather than in different proceedings' because inadvertent disclosure by the non-lawyer employee is more likely in the former situation.'"; also citing "Marc I. Steinberg & Timothy U. Sharpe, Attorney Conflict of Interest: The Need for a Coherent Framework, 66 Notre Dame L. Rev. 1, 20 (1990)," which stated as follows: "'Chinese Walls are specific institutional mechanisms which prevent contact between the tainted attorney and members of the firm working on the related matter. Such mechanisms may be structural, such as departmentalization, procedural, as in restricting access to files, pecuniary, by denying the tainted attorney any remuneration from fees derived from the representation, or educational, such as providing programs that make firm members aware of the ban on exchange of information. Usually, effective screening procedures involve all of the above components.'"; "Today, we adopt an analysis similar to the approaches taken by the courts discussed above. When presented with a dispute over whether a lawyer has been properly screened, Nevada courts should conduct an evidentiary hearing to determine the adequacy and timeliness of the screening measures on a case-by-case basis. The burden of proof is upon the party seeking to cure an imputed disqualification with screening to demonstrate that the use of screening is appropriate for the situation and that the disqualified attorney is timely and properly screened.").

- Kirk v. First Am. Title Ins. Co., 108 Cal. Rptr. 3d 620, 627, 645 n.29, 645-46, 647, 650 (Cal. Ct. App. 2010) (analyzing in great detail the California rule requiring imputation of an individual lawyer's (Cohen) disqualification, and rejecting a per se imputation approach; explaining that an individual lawyer who had several communications with plaintiff's counsel about a case moved to the Sonnenschein firm, which was later joined by lawyers from Bryan Cave -- who represented the other side of the case in which the lawyer had spoke to the plaintiff; noting that Sonnenschein screened the individual lawyer immediately upon learning of the individual lawyer's disqualification; "The screening memorandum recites that it was created to 'formalize and memorialize the procedures necessary to assure that no confidences or secrets relating to the [related class actions] will be disclosed, even inadvertently, to [the First American team] or any other Sonnenschein lawyer who may be asked to work on the [related class actions].' The memorandum indicated that the failure to observe the procedures would subject the offender to discipline. The memorandum provided that (1) Cohen could not work on the related class actions; (2) no attorney or paralegal who may work on the related class actions may discuss them with Cohen; (3) Cohen may not be given non-public documents pertaining to the related class actions; (4) Cohen shall not access any documents on Sonnenschein's computer network pertaining to the related class actions; and (5) no fees from any work related to the related class actions would be apportioned to Cohen."; ultimately allowing Sonnenschein to rebut the presumption that the lawyer had disclosed confidences to colleagues at that firm; reiterating that "the presumption is not rebuttable in those cases" in which a lawyer switches sides in the same case; also discussing the elements of a an effective screen; "The specific elements of an effective screen will vary from case to case, although two elements are necessary: First, the screen must be timely imposed; a firm must impose screening measures when the conflict first arises. It is not sufficient to wait until the trial court imposes screening measures as part of its order on the disqualification motion. . . . Second, it is not sufficient to simply produce declarations stating that confidential information was not conveyed or that the disqualified attorney did not work on the case; an effective wall involves the imposition of <u>preventive measures</u> to guarantee that information will not be conveyed." (footnote omitted); "As with the other factors, we do not hold that any particular method of preventing access to confidential information and files is necessary—indeed, a trial court might conclude that a simple directive not to access the information is sufficient. The more steps a firm has taken to prevent any disclosure, however, the more likely it is that a court will find the ethical wall to be sufficient."; noting also that the individual lawyer had left Sonnenschein; "Cohen was present at the Sonnenschein firm for approximately one year. On remand, the trial court must determine whether Cohen's activities at the firm actually resulted in the improper transmission, directly or indirectly, of confidential information from Cohen to the First American team, or any other member of the Sonnenschein firm who may have worked on the related class actions."; reversing the disqualification of the Sonnenschein firm and remanding an analysis on whether the firm had rebutted the presumption that the individual lawyer had disclosed confidences to colleagues).

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

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

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

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

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

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

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

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

- Rella v. N. Atl. Marine, Ltd., No. 02 Civ. 8573 (GEL), 2004 U.S. Dist. LEXIS 22309, at *17-18 (S.D.N.Y. Nov. 3, 2004) (disqualifying a two lawyer firm based on the firm's hiring of an individually disqualified lawyer from another firm; "While recent caselaw has questioned whether the total disqualification rule is without exception in an era of large law firms or legal departments, in which firewall procedures to insulate conflicted lawyers from matters in which they may not participate may perhaps be effective barriers to the exchange of confidential information . . . no such exception applies here. The Friedrich firm is not a large institution in which a nominal 'partner' of a conflicted lawyer may be one of hundreds of members of a mega-law firm, located in another city and perhaps having only a nodding acquaintance with other members of the firm, and which has regular established procedures for dealing with such conflict situations. Rather, the Friedrich firm is a two-member firm, the partners in which are father and son who evidently share the same offices. Under these circumstances, the inference that the partners cannot effectively avoid sharing information is strong.").

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

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

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

- Rippon v. Rippon, No. 2012 CV 4412 DV, 2014 Pa. Dist. & Cnty. Dec. LEXIS 1, at *1, *14-15, *16-17, *21-22, *22-23, *23 (C.P. Dauphin Jan. 29, 2014) (acknowledging that Pennsylvania allows screening of lateral hires to avoid imputed disqualification, but relying on the "appearance of impropriety" standard, the inadequacy of the screen, and other factors in disqualifying a law firm from representing the husband in a divorce case after the wife's lawyer joined that firm; "The issue presented is if Wife's lawyer, along with her secretary, leaves Law Firm A to work for Law Firm B, during the parties' hotly contested divorce litigation, may another lawyer in Law Firm B represent Husband in those matters. Legal ethical experts and others may answer with a resounding 'No.' Other legal ethical experts may answer 'Yes,' if Law Firm B establishes a proper screen, or 'Chinese Wall.' In this case, under the facts presented, I held 'no.'"; "[E]ven though a lawyer changes law firms, disqualification can be avoided when a proper screen, or 'Chinese Wall' is established prior to the arrival of the new attorney at the firm and when it is a formal, written screening procedure. . . . The burden of proving compliance with the screening exceptions of Rule 1.10(b) is on the law firm whose disqualification is sought. . . . A law firm whose disqualification is sought may still avoid a disqualifying conflict by demonstrating an adequate screen in compliance with Rule 1.10(b)."; "Wife's concern is not about Levin [Wife's lawyer] accessing information in the files or the cloud she or her secretary have been barred from obtaining through McNees' [Levin's new law firm, also representing Husband] screen. Wife's concern is that her private confidential information, trial strategies and other related matters which Levin and her secretary knew or had access to over the past fifteen years could inadvertently, accidentally and unintentionally be revealed to one of the other attorneys or staff in the small family law group at McNees now representing her Husband in these same legal matters. The narrow issue presented was the adequacy of the McNees' screen or if any screen could be deemed adequate in this case, disqualifying all McNees lawyers."; "<u>In this case, the 'new firm' really consists not of the entire McNees law firm but actually the 'Family Law Section.' It is housed together in adjoining offices on the west side of their building's 5th floor, in a separate, 'Family Law suite' . . . where Levin and her secretary's offices are located, together with five (5) other family law lawyers, two (2) paralegals and secretarial staff.</u> The family law lawyers and support staff at McNees provides coverage and assistance to each other in any matter as needed or requested." (emphasis added); "Although, the McNees attorneys and staff have been advised to insure no discussions of the Rippon case occur in front of Levin or Thomas, and that all discussions of the case must take place behind closed doors, discussions, facial expressions or other unintended unanticipated exchanges will inevitably, however, unintentionally, occur within the small confines and relationships of a small environment among family law lawyers, paralegals and secretaries about this case. <u>There is presumably much more contact between attorneys and support staff that interact in a small setting rather than in a large one.</u>" (emphasis added); "Wife points out none of McNees' Screen Memoranda contain any sanctions for violations of the screen, which failure alone is sufficient to warrant disqualification.").

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

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

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

- Norfolk S. Ry. v. Reading Blue Mountain & N. R.R., 397 F. Supp. 2d 551, 555, 554 (M.D. Pa. 2005) (assessing the efficacy of a screen imposed by a ten-lawyer firm which had hired a lawyer who had been working for the adversary in litigation; noting that Pennsylvania allowed a law firm hiring a disqualified lawyer from avoiding imputed disqualification by imposing a screen, but finding the screen ineffective; among other things, noting that "screen does not include the prospect of termination or disciplinary proceedings for violators. This is significant because it is imperative that all Janssen & Keenan [new law firm] employees understand the importance of compliance and that Reading be assured that non-compliance will be severely punished. Additionally, . . . Janssen & Keenan's screen fails to expressly prohibit discussing sensitive matters around, near, or in the presence of Howard [lawyer moving to the law firm], and merely prohibits discussing them with Howard. This is no small distinction, as Janssen & Keenan has only ten attorneys in a single office, and the close working environment presents the distinct possibility that Howard could be nearby and overhear a sensitive discussion." (emphasis added); also noting that "nowhere in the affidavits opposing disqualification does it assert that Howard will receive no part of the fee from its representation in this case. This failure alone warrants disqualification."; pointing to Pennsylvania rule allowing a law firm to avoid imputed disqualification if the disqualified lawyer "is apportioned no part of the fee therefrom").

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

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

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

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

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

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

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

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

- Arista Records LLC v. Lime Grp. LLC, No. 06 CV 5935 (KMW), 2011 U.S. Dist. LEXIS 17434, at *7, *11, *22 & n.11, *23, *23-24, *27, *27-28 (S.D.N.Y. Feb. 18, 2011) (declining to disqualify a law firm which hired an individually disqualified lawyer, despite the law firm's sloppy positioning of a screen; noting that the individually disqualified lawyer "Korn testified that, although [lawyers at the new firm] discussed the status of the LimeWire litigation, they did not discuss anything substantive about the case."; explaining that "[o]n June 18, 2010, Willkie submitted a new matter form for the Tower/LimeWire Matter. . . . The form has a box asking whether there are any conflict concerns. Notwithstanding that the firm was aware of a Korn's LimeWire conflict, the box is checked 'no.'"; "On July 1, 2010, one month after being approached by Tower about the Tower/LimeWire matter, Willkie circulated an internal firm-wide email asking attorneys to comment on possible conflicts related to the Tower/LimeWire Matter. . . . Korn responded, stated that, '[a]s [I] mentioned to Tariq Mundya, I previously represented Plaintiffs in the Limewire litigation.' . . . In response, Mundiya wrote, 'we will have to have a wall placed so that Mr. Korn is not involved in the matter.'"; [W]hen finally implemented, Willkie's screening procedures were, to some extent, flawed. First, the screening memo drafted by Mundiya was sent only to those lawyers who had worked on the LimeWire or the Tower/LimeWire matter within the preceding year; it was not sent to the entire firm. . . . Second, Korn was still able to view an electronic LimeWire folder icon on his computer months after the electronic wall was purportedly put in place, although he was not able to view any documents contained within that folder."; "As a result, a lawyer not working on the LimeWire matter who talked to a lawyer working on the LimeWire matter may not have been instructed to refrain from later speaking to Korn about what he or she learned during that conversation."; "Notwithstanding these shortcomings, the Court finds that disqualification is not warranted, because there is no 'real risk that the trial will be tainted.'"; "First, Defendants have submitted a declaration from Korn attesting to the fact that he has never disclosed Plaintiffs' confidential information to anyone. . . . The Court asked Plaintiffs' counsel whether they challenge the truth of any of the statements in Korn's declaration; Plaintiffs' counsel responded no. . . . Plaintiffs have also submitted (1) declarations from every member of Willkie's LimeWire team who has billed 50 hours or more to the LimeWire matter attesting to the fact that Korn has not disclosed confidential information to them; and (2) a declaration from Menton attesting to the fact that he has confirmed with every other member of the LimeWire team that Korn has never disclosed confidential information to them." (emphasis added); "Second, Defendants are not relying solely on attorney affidavits, but are also relying on electronic audits showing that Korn has never accessed any LimeWire documents. Specifically, Defendants have submitted a declaration stating that Willkie has audited all documents ever created in Willkie's document management system under either the Tower/LimeWire matter or the LimeWire matter. . . . The resulting report from the audit shows every user who has ever accessed any version of those documents. Korn is not listed included in that report." (emphasis added); "Third, Willkie is a large firm, with more than 600 lawyers worldwide, more than 200 lawyers in its litigation department, and approximately 136 litigation lawyers in its New York office. . . . Willkie's large size makes the risk of inadvertent disclosures of confidences less likely.").

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

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

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

- SK Handtool Corp. v. Dresser Indus., Inc., 619 N.E.2d 1282, 1285, 1290, 1292, 1294 (Ill. App. Ct. 1993) (noting that Illinois ethics rules permit screening of an individually disqualified new hire to avoid imputed disqualification; holding that the law firm of Winston & Strawn had not timely screened a lateral hire; acknowledging that Winston & Strawn put an ethics screen in place the day that it realized that it should have done so, but noting that the lawyer had been at the firm for five weeks; also acknowledging sworn testimony that the new hire had not shared any confidences with the Winston & Strawn lawyers working on the case for the new hire's adversary, and disqualifying Winston & Strawn -- although the litigation had been going on for nine years, Winston & Strawn lawyers had taken eighty-five days of depositions, and had spent 10,000 hours on the case as of that time; explaining that on August 1, 1989, Winston & Strawn hired a former Sidley & Austin lawyer (Durchslag) who had worked on that firm's representation of Corcoran Partners since litigation began between Corcoran and Winston & Strawn's client dresser in May 1984; "According to a legal assistant employed at Winston & Strawn, the firm has devoted over 10,000 hours to the litigation, including over 85 days spent depositing over 44 persons. More than 70,000 pages of documents have been produced in the litigation."; noting that Durchslag's former client notified Winston & Strawn on August 7, 1989, of the conflict, but that Winston & Strawn declined to acknowledge the conflict; "The record indicates that in addition to contemnor, Winston & Strawn attorneys directly representation Dresser in the litigation were Jane McCullough and Kimball Anderson. An affidavit by Ms. McCullough states that she also received a copy of Brace's letter and has not discussed the case with Durchslag. An affidavit by Mr. Anderson states that he has not discussed the case with Durchslag, but does not indicate whether he received a copy of Brace's letter."; noting that on September 7, 1989, Corcoran filed a motion to disqualify Winston & Strawn, the same day that Winston & Strawn proposed an ethics screen between Durchslag and the lawyers representing the Winston & Strawn client; "[I]t appears that the trend of Illinois and federal case law, as well as the adoption of the Illinois Rules, is toward allowing the existence of effective screening to rebut the presumption of shared confidences between a newly associated attorney and his new firm. Accordingly, we hold that the presumption of shared confidences at the new firm may be rebutted by effective screening of a newly associated attorney."; "[T]he record indicates that a screening memorandum was not circulated within Winston & Strawn until September 7, 1989 -- five weeks after Durchslag joined the firm."; "[T]his court does not need to determine whether any factual determination in this regard would be an abuse of discretion. Nor does this court need to decide today whether screening must be in place on the day an attorney joins a firm to prevent disqualification as a matter of law. The record indicates that contemnor and other Winston & Strawn personnel had <u>actual</u> knowledge of the problem on August 7 and 8, 1989, when contemnor was informed by Brace of the problem."; "Defendant and contemnor note that it is uncontroverted that Durchslag did not share Corcoran Partners' confidences with Winston & Strawn and will not do so in the future. Defendant and contemnor's reliance on the affidavits of Durchslag and the Winston & Strawn personnel representing Dresser, all of which state that no confidences were or will be disclosed, is misplaced.").

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

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

<u>Best Answer</u>

The best answer to this hypothetical is **MAYBE.**B 11/14; B 12/16

Timing of an Effective Screen

Hypothetical 7

Two weeks ago, you hired a young associate in your New York office from another large Los Angeles-based law firm. This morning, you received a frantic call from one of your partners, who said that he just learned that the young associate had worked at his old firm on a litigation matter in which your firm represents your largest client. Your partner wants you to screen the young associate immediately, and asks whether the immediate imposition of a screen will eliminate the risk that your firm might be disqualified from that litigation matter.

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

NO

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

NO (PROBABLY)

Analysis

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

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

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

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

For conflicts that cannot be identified when the lateral hire joins the firm, the analysis can become much more complicated. For instance, suppose that a lateral hire represented Acme in a case against Baker. If the hiring firm has had no involvement in that case, it will not identify any conflict or require any screening when hiring the lateral. However, what if Baker later hires the law firm to replace its existing law firm? It obviously is too late to screen the lateral hire at the time the firm hires him or her. In that situation, the firm must act as soon as it learns of the need for the screen.

ABA Model Rules and Restatement

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

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

ABA Model Rule 1.0 cmt. [10].

The Restatement takes the same approach.

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

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

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

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

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

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

Case Law

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

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

- Arista Records LLC v. Lime Grp. LLC, No. 06 CV 5935 (KMW), 2011 U.S. Dist. LEXIS 17434, at *7, *11, *21-22 (S.D.N.Y. Feb. 18, 2011) (declining to disqualify a law firm which hired an individually disqualified lawyer, despite the law firm's sloppy positioning of a screen; noting that the individually disqualified lawyer "Korn testified that, although they [lawyers at the new firm] discussed the status of the LimeWire litigation, they did not discuss anything substantive about the case."; explaining that "[o]n June 18, 2010, Willkie submitted a new matter form for the Tower/LimeWire Matter. . . . The form has a box asking whether there are any conflict concerns. Notwithstanding that the firm was aware of a Korn's LimeWire conflict, the box is checked 'no.'"; "On July 1, 2010, one month after being approached by Tower about the Tower/LimeWire matter, Willkie circulated an internal firm-wide email asking attorneys to comment on possible conflicts related to the Tower/LimeWire Matter. . . . Korn responded, stated that, '[a]s [I] mentioned to Tariq Mundya, I previously represented Plaintiffs in the Limewire litigation.' . . . In response, Mundiya wrote, 'we will have to have a wall placed so that Mr. Korn is not involved in the matter.'"; "As a technical matter, Willkie's screening procedures were imperfect. First, Willkie repeatedly failed to enter Korn's LimeWire conflict into its conflicts database, as the firm says should have happened. . . . Second, <u>after undertaking representation of Tower in LimeWire matter, Willkie waited approximately seven weeks to implement an electronic screen, and approximately three months to circulate an internal screening memorandum.</u> . . . Defendants argue that a screen was in place from 'the get go' because, in early June 2010, Mundiya informed Cosenza that he should not communicate with talk to Jeff Korn.'. . . However, Cosenza testified that four other Willkie lawyers were working on Tower/LimeWire Matter. Cosenza also testified that he told those four lawyers that they should not discuss the case with Korn, but he did not do so with at least one of those lawyers until the end of August." (emphasis added)).

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

- <u>SK Handtool Corp. v. Dresser Indus., Inc.</u>, 619 N.E.2d 1282. 1285, 1290, 1292, 1294 (Ill. App. Ct. 1993) (noting that Illinois ethics rules permit screening of an individually disqualified new hire to avoid imputed disqualification; holding that the law firm of Winston & Strawn had not timely screened a lateral hire; acknowledging that Winston & Strawn put an ethics screen in place the day that it realized that it should have done so, but noting that the lawyer had been at the firm for five weeks; also acknowledging sworn testimony that the new hire had not shared any confidences with the Winston & Strawn lawyers working on the case for the new hire's adversary, and disqualifying Winston & Strawn -- although the litigation had been going on for nine years, Winston & Strawn lawyers had taken eighty-five days of depositions, and had spent 10,000 hours on the case as of that time; explaining that on August 1, 1989, Winston & Strawn hired a former Sidley & Austin lawyer (Durchslag) who had worked on that firm's representation of Corcoran Partners since litigation began between Corcoran and Winston & Strawn's client dresser in May 1984; "According to a legal assistant employed at Winston & Strawn, the firm has devoted over 10,000 hours to the litigation, including over 85 days spent depositing over 44 persons. More than 70,000 pages of documents have been produced in the litigation."; noting that Durchslag's former client notified Winston & Strawn on August 7, 1989, of the conflict, but that Winston & Strawn declined to acknowledge the conflict; "The record indicates that in addition to contemnor, Winston & Strawn attorneys directly representation Dresser in the litigation were Jane McCullough and Kimball Anderson. An affidavit by Ms. McCullough states that she also received a copy of Brace's letter and has not discussed the case with Durchslag. An affidavit by Mr. Anderson states that he has not discussed the case with Durchslag, but does not indicate whether he received a copy of Brace's letter."; noting that on September 7, 1989, Corcoran filed a motion to disqualify Winston & Strawn, the same day that Winston & Strawn proposed an ethics screen between Durchslag and the lawyers representing the Winston & Strawn client; "[I]t appears that the trend of Illinois and federal case law, as well as the adoption of the Illinois Rules, is toward allowing the existence of effective screening to rebut the presumption of shared confidences between a newly associated attorney and his new firm. Accordingly, we hold that the presumption of shared confidences at the new firm may be rebutted by effective screening of a newly associated attorney."; "[T]he record indicates that a screening memorandum was not circulated within Winston & Strawn until September 7, 1989 -- five weeks after Durchslag joined the firm."; "[T]his court does not need to determine whether any factual determination in this regard would be an abuse of discretion. Nor does this court need to decide today whether screening must be in place on the day an attorney joins a firm to prevent disqualification as a matter of law. The record indicates that contemnor and other Winston & Strawn personnel had actual knowledge of the problem on August 7 and 8, 1989, when contemnor was informed by Brace of the problem."; "Defendant and contemnor note that it is uncontroverted that Durchslag did not share Corcoran Partners' confidences with Winston & Strawn and will not do so in the future. Defendant and contemnor's reliance on the affidavits of Durchslag and the Winston & Strawn personnel representing Dresser, all of which state that no confidences were or will be disclosed, is misplaced.").

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

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

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

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

Morgan Lewis is sufficient to overcome the presumption that confidential information has been or will be shared.").

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

- Lutron Elecs. Co. v. Crestron Elecs., Inc., Case No. 2:09-CV-707, 2010 U.S. Dist. LEXIS 120864, at *8, *17-18 (D. Utah Nov. 12, 2010) (denying a motion by Kaye Scholer to disqualify Quinn Emanuel, who had hired a young associate from Kaye Scholer who had worked on the opposite side of litigation; noting that Quinn Emanuel had screened the young associate upon receiving notice from Kay Scholer of the issue; "Mr. Reisberg was advised that an 'ethical wall' had been put in place, and he was instructed not to discuss or share any information or materials with anyone at Quinn Emanuel that related in any way to his prior work at Kaye Scholer on behalf of Lutron. . . . Similarly, Quinn Emanuel personnel were directed not to share with Mr. Reisberg any information or materials relating in any way to Lutron. . . . In addition, Mr. DeFranco personally spoke with each attorney and staff member working on the Crestron case and confirmed that these individuals understood the precautions that had been put in place and would follow them. Mr. DeFranco also confirmed that nothing inconsistent with the ethical wall had occurred since Mr. Reisberg joined Quinn Emanuel."; noting that Utah rules allow the law firm to avoid imputed disqualification if it "timely" screened the individually disqualified lawyer; "In this case, the facts make clear that the Quinn Emanuel lawyers representing Crestron were unaware of any possible imputed conflict resulting from the representation until they received notice from Lutron on August 5, 2010. Although Lutron vigorously asserts that Crestron violated the rule because they 'should have known' of the conflict, the Utah Rules of Professional Conduct expressly states that actual knowledge is what is required. Moreover, because the Rule requires actual knowledge, the court finds that the ethical screen was timely under the circumstances. As soon as counsel for Crestron received notice of the conflict from Lutron's counsel, they immediately established an effective ethical screen in full compliance with the rules. While it certainly would have been preferable for Quinn Emanuel to conduct an effective conflicts check and discover the conflict initially, once it had the requisite knowledge, it acted in accord with the rules. Finally, although Lutron claims that counsel for Crestron failed to give 'notice' as required by the rule, given that counsel for Crestron learned of the conflict from Lutron, there was no opportunity to 'notify' Lutron and doing so would have been pointless. Moreover, even though counsel for Crestron was initially unaware and therefore could not 'notify' Lutron of the conflict, it did thereafter notify Lutron of the measures it had taken to screen Mr. Reisberg and to ensure that Lutron's confidential information would be protected. (P1.'s Ex. 7.) Given these facts, the court finds that Quinn Emanuel's conduct was not egregious.").

Most courts are not that flexible.

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

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

This hypothetical comes from a 2007 case. In Lucent Techs., Inc. v. Dell, Inc., Civ. No. 02CV2060-B(CAB) c/w 03CV-0699-B(CAB) & 03CV1108(CAB), 2007 U.S. Dist. LEXIS 35502 (S.D. Cal. May 15, 2007), an associate moved from Kirkland & Ellis to Gibson Dunn's New York office. While at Kirkland and Ellis, the associate had worked for about 2,300 hours for Lucent in a patent case against Microsoft.

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

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

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

Id. at *28-29.[1]

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1 Lucent Techs., Inc. v. Dell, Inc., Civ. No. 02CV2060-B(CAB) c/w 03CV-0699-B(CAB) & 03CV1108(CAB), 2007 U.S. Dist. LEXIS 35502, at *18, *19, *28, *28-29 (S.D. Cal. May 15, 2007) (assessing plaintiff Lucent's motion to disqualify the law firm of Gibson, Dunn & Crutcher from representing defendant Microsoft in what the court labeled a "high profile" patent case; explaining that on February 12, 2007 a lawyer formerly employed by Lucent's law firm Kirkland & Ellis (and who had billed 2,300 hours for Lucent in the patent case) moved to Gibson Dunn's New York office; noting that defendant Microsoft retained Gibson Dunn some time after a February 22, 2007 jury verdict on the first set of patents to be tried, and that three lawyers from Gibson Dunn's Washington, D.C. office entered an

Best Answer

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

B 11/14; B 12/16;

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

Different Rules for Hiring Former Government Lawyers

Hypothetical 8

You have been serving for several months on a commission examining whether to revise your state's ethics rules. The next item on the agenda involves the conflicts rules governing private law firms hiring lawyers from the government.

Should the same ethics rules governing conflicts apply when private law firms hire from the government that apply when private law firms hire from other private law firms?

MAYBE

Analysis

At first blush, one might think that rules governing the disqualification of former government lawyers (and firms who hire them) should be stricter than the rules governing private lawyers. After all, this conduct by a former government lawyer could harm the public interest.

However, the ethics rules have always taken a much more permissive view of a former government lawyer's disqualification.

The ABA Model Rules explain why.

> This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from

> <u>the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service.</u> The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

ABA Model Rule 1.11 cmt. 4 (emphasis added).

<u>Best Answer</u>

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

Requirement for the Government's Consent for Matters Not Adverse to the Government

Hypothetical 9

In your role as your law firm's hiring partner, you have tried to hire lateral associates without any individual conflicts to avoid the possibility of imputed disqualification. You are now considering hiring a lawyer from a local city attorney's office. Your partners represent several developers who are allied with the city attorney's office in litigation brought by some local environmental groups. You wonder whether you will need the city's consent to the lateral associate's involvement on behalf of the developers in litigation that is not adverse to the city.

Will you need the city's consent to the lateral associate's involvement in the litigation?

YES

Analysis

In a number of ways, government lawyers may more easily than private lawyers take matters adverse to their former clients. Among other things, government lawyers may take such matters unless they were "personally and substantially" involved in a related matter while representing the government. Law firms which hire former government lawyers may avoid any imputed disqualification by screening the former government lawyer.

However, in one significant way former government lawyers pay a great limitation on their ability to take matters after leaving the government. Under ABA Model Rule 1.11(a)(2), a lawyer "who has formerly served as a public officer or employee of the government"

> shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the

> appropriate government agency gives its informed consent, confirmed in writing, to the representation.

ABA Model Rule 1.11(a)(2). That rule is not limited to former government lawyers' representations adverse to the government. At least on its face, the rule also applies to a former government lawyer's representation in matters that are not adverse to the government. In other words, the ethics rules require former government lawyers to seek the government's consent to represent any client "in connection with a matter" in which the government lawyer was "personally and substantially" involved while representing the government -- whether the new representation is adverse to the government or not.

A comment to the ABA Model Rules explains the basis for this approach

> Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.

ABA Model Rule 1.11 cmt. [3].

Best Answer

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

Meeting Application of the "Personally and Substantially" Standard

Hypothetical 10

Your firm wants to expand its government regulatory practice, and one of your partners wants to hire a lawyer who now practices in your state's government. The lawyer has supervised approximately 25 other lawyers in the government, and has signed off on several litigation matters in which you represent large corporate clients adverse to the state government.

If you hire the government lawyer, will he be individually disqualified from working on your law firm's representations of the corporate clients in those matters?

MAYBE

Analysis

ABA Model Rules

Unlike lawyers moving from one private practice to another, former government lawyers can take matters adverse to the government without consent unless the lawyer was "personally and substantially" involved in the matter while in the government.

ABA Model Rule 1.11 governs this scenario.

> Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government: . . . (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

ABA Model Rule 1.11(a)(2).

Surprisingly, the term "personal and substantial" is not defined in the ABA Model Rules, although the term "substantial" is defined elsewhere in a way that does not necessarily apply.

> "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

ABA Model Rule 1.0(l).

In addition to analyzing whether a former government lawyer's participation was "personal and substantial," determining the conflicts implication of hiring a former government lawyer requires an analysis of the "matter" in which the former government lawyer was involved. That term is defined quite narrowly in the ABA Model Rules.

> As used in this Rule, the term "matter" includes:
>
> (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and
>
> (2) any other matter covered by the conflict of interest rules of the appropriate government agency.

ABA Model Rule 1.11(e). A comment provides some additional explanation.

> For purposes of paragraph (e) of this Rule, a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.

ABA Model Rule 1.11 cmt. [10].

An ABA Model Rule comment explains that

> The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function. [described as preventing "the disqualification rule from imposing too severe a deterrent against entering public service"].

ABA Model Rule 1.11 cmt. [4].

Restatement

State Ethics Rules

Most states follow the ABA Model Rules approach. Not surprisingly, Washington, D.C.'s ethics rules have provided additional details.

[USE D.C. ETHICS RULES HERE]

Several Washington, D.C. legal ethics opinions provide additional detail.

- **[E-1453]** D.C. LEO 315 (6/02) ("A former lawyer with the Environmental Protection Agency ('EPA') may represent a private client in challenging the EPA's final rules, notwithstanding the fact that he was involved in substantially related litigation by drafting status reports and participating in discussions regarding the timing of the ongoing rulemaking proceedings. Because his participation in the prior matter did not involve him in the merits of the litigation and consisted of no more than official responsibility or participation on administrative and peripheral issues, he did not participate 'substantially' in the prior litigation within the meaning of Rule 1.11.").

Best Answer

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

Disqualification Based On Confidential Information

Hypothetical 11

You are considering hiring a lawyer who current serves in the government. However, you worry that hiring her might prevent you from continuing a fairly lucrative debt collection practice -- because while in the government the lawyer has had access to confidential financial records of thousands of local residents from whom your firm might want to collect debts.

Will the former government lawyer be disqualified from participating in debt collection cases if she had access to the debtor's confidential financial records while working for the government?

NO

Analysis

As with private practice lawyers, government lawyers might be individually disqualified from handling matters as a result of confidential information they obtained about third parties while working for the government.

In the private world, lawyers clearly cannot be adverse to former clients about whom the lawyer acquired material confidential information that could be used against the former client. However, the information ban extends beyond former clients, and can include third parties whom the lawyer has never represented. For instance, a lawyer who acquires confidential information about a borrower while representing a bank generally cannot later take matters adverse to that borrower, even though the lawyer never represented the borrower. The lawyer's acquired information about the borrower in a confidential setting, and the lawyer's disclosure or use of the information would jeopardize the bank -- which has independent duties of confidentiality.

It can be difficult to discern this rule in the private setting, but the ethics rule covering former government lawyers explicitly describes it.

ABA Model Rules

> Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public.

ABA Model Rule 1.11(c).

Just as a private lawyer leaving a law firm only carries the information that is contained in her brain (not any information imputed to her while she was practicing at the firm), so

> Paragraph (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

ABA Model Rule 1.11 cmt. [8].

Hiring a lawyer individually disqualified under this provision can avoid imputed disqualification by screening the lawyer. ABA Model Rule 1.11(c); ABA Model Rule 1.11 cmt. [6].

Restatement

Best Answer

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

Ability to Screen Former Government Lawyers

Hypothetical 12

Your law firm has offices in several states, some of which follow the traditional approach to imputed disqualification of a firm which hires an individually disqualified lawyer from another private law firm. You are trying to "beef up" your firm's environmental practice, and you are considering hiring several lawyers from your state's attorney general's office -- who would be individually disqualified from several matters you are currently handling adverse to the state.

Is it likely that you can avoid your firm's imputed disqualification if you screen such lateral hires from the matters in which you are representing clients adverse to the state?

YES

Analysis

The ABA Model Rules have always allowed a law firm hiring an individually disqualified former government lawyer to avoid imputation of that disqualification by screening the former government lawyer. Traditionally, this represented a dramatic distinction from the principles governing law firms' hiring of other private practice lawyers -- who came to the firm as a "Typhoid Mary" and would taint the entire firm without the possibility of a self-help screen. The ABA Model Rules' 2009 adoption of screening for private practice lawyers (which about half of the states have also followed) has decreased this distinction, but in many states the difference continues to be very important.

The once-dramatic difference in the ABA Model Rules between law firms' ability to avoid imputed disqualification when hiring former government lawyers and other private practice lawyers was based on public policy.

> The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service.

ABA Rule 1.11 cmt. [4].

The ABA Model Rule allowing screening of former government lawyers differs somewhat from the 2009 rule change governing private practice lawyers. In the case of government lawyers,

> When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
>
> (1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
>
> (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

ABA Model Rule 1.11(b). A comment provides additional details.

> Paragraphs (b) and (c) contemplate a screening arrangement. See Rule 1.0(k) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

ABA Model Rule 1.11 cmt. [6]. The next comment explains the notice requirement.

> Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

ABA Model Rule 1.11 cmt. [7].

[COMPARE TO SCREENING IN PRIVATE PRACTICE SITUATION]

> **[m 59]** Imputation specified in § 123 does not restrict a lawyer affiliated with a former government lawyer with respect to a conflict under § 133 if:
>
> (a) the personally prohibited lawyer is subject to screening measures adequate to eliminate involvement by that lawyer in the representation; and
>
> (b) timely and adequate notice of the screening has been provided to the appropriate government agency and to affected clients.

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

> **[m 71]** [A]voidance of imputation by screening of former government lawyers is permitted in most lawyer codes. If hiring a former government lawyer would disqualify an entire firm from cases arising before that lawyer's agency, the lawyer would not likely be hired. That, in turn, would make it more difficult for the government to hire able lawyers at the outset.
>
> The personally prohibited lawyer must be screened from any participation in the matter and should receive no direct financial benefit from the firm's representation as stated in Comment d(ii). Written notice must be given to the appropriate government agency so that it can ascertain compliance with the screening requirement. Those precautions prevent imputation even if the confidential information communicated to the lawyer in the prior matter is significant. . . .

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

> **[m 72]** In appropriate cases, the government may challenge screening as inadequate to protect the government's interest. For example, where a former prosecutor who personally knows the strengths and weaknesses of a criminal case has become affiliated with defense counsel, disqualification of defense counsel may be required despite screening. Similarly, where the lawyer acquires while in the government highly confidential information about a person whom an affiliated lawyer's client now opposes in a substantially related matter, a court has discretion to disqualify the entire firm to protect the confidentiality of the information.

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

Best Answer

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

Government Hiring Lawyers From the Private Sector

Hypothetical 13

You recently began serving on a state bar commission looking into possible changes in your state's ethics rules. The first agenda item has you stumped: deciding whether private practitioners entering government service should be governed by the same disqualification standards governing private practitioners moving to other firms, or instead by the more forgiving standards of government lawyers leaving government service.

Should practitioners entering government service be governed by the same disqualification standards governing private practitioners moving to other firms, or instead by the more forgiving standards of government lawyers leaving government service?

??

Analysis

Although it would be easy to see why the ethics rules would apply a different standard, the ABA Model Rules and most (if not all) state ethics rules apply a forgiving standard for analyzing disqualification of individual lawyers leaving the private sector and entering government service.

ABA Model Rules

For private sector lawyers, ABA Model Rule 1.9 generally disqualifies a lawyer from taking a matter adverse to a former client if the lawyer had represented that client in the "same or substantially related matter" or if the lawyer acquired any confidential information that the lawyer could now use against the former client. ABA Model Rule 1.9(a). The latter standard arises from the ABA Model Rules' definition of "substantially related," which essentially incorporates an information component.

> 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. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

ABA Model Rule 1.9 cmt. [3].

In contrast, the ABA Model Rules do not apply that strict disqualification standard to private lawyers entering public service.

> The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function. [described as preventing "the disqualification rule from imposing too severe a deterrent against entering public service"].

ABA Model Rule 1.11 cmt. [4].

Interestingly, the specific rule covering such lawyers both incorporates Model Rule 1.9 and articulates the more forgiving standard applicable to lawyers leaving public service and entering private practice.

> Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:
>
> (1) is subject to Rules 1.7 and 1.9; and
>
> (2) shall not:
>
> (i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing.

ABA Model Rule 1.11(d)(1), (2)(i).

Thus, on its face this rule says a private practice lawyer entering government service will not be automatically disqualified because he or she was involved in a "substantially related" matter -- but instead will be disqualified only if the lawyer "participated personally and substantially" in that matter. The ABA Model Rules do not explain the contradiction between this rule's incorporation of the fairly harsh Model Rule 1.9 standard and the more forgiving explicit standard for lawyers entering public service -- although presumably the more specific standard trumps any contrary provision of Model Rule 1.9.

This rule on its face refers to "matters" -- whose definition in the next part of the rule does not seem to match up with private practice.

> As used in this Rule, the term "matter" includes:
>
> (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and
>
> (2) any other matter covered by the conflict of interest rules of the appropriate government agency.

ABA Model Rule 1.11(e).[1]

Best Answer

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

[1] See also ABA Model Rule 1.11 cmt. [10] ("For purposes of paragraph (e) of this Rule, a 'matter' may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.").

Imputation of an Individually Disqualified New Government Lawyer

Hypothetical 14

After several years in private practice, you are interested in joining with the government. You are somewhat worried about your prospects, because you have been personally and substantially involved in several high profile matters against the government agency you would like to join -- most of which will continue for many years. Your private clients are virulently anti-government, and might use any opportunity they can to "knock out" the government lawyer from these matters.

Will the government lawyer you hope to join be able to avoid the imputation of your individual disqualification by imposing a self-help screen (rather than obtaining your former clients' consent)?

MAYBE

Analysis

The ABA Model Rules do not explicitly deal with the possible imputation of an individually disqualified new government lawyer's disqualification to whatever government office the lawyer has joined. In contrast, ABA Model Rule 1.11(d) explicitly permits private law firms hiring former government lawyers to avoid such imputation of an individually disqualified lawyer's "taint." ABA Model Rule 1.11(b).

Elsewhere, the ABA Model Rules Terminology essentially equates law firms and corporate law departments or the "legal department" of an "other organization." ABA Model Rule 1.10(c).[1] The apparent absence of an explicit provision covering this issue undoubtedly creates uncertainty. To make matters worse, it can be very difficult to

[1] ABA Model Rule 1.10(c) ("A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.").

analyze to what extent government agencies are separate for any purpose -- including determining the extent of any imputed disqualification.

Restatement

Some states have dealt with this on their own. For instance, Virginia Rule **[DESCRIBE]**.

In other states, the analysis has resulted in mixed determinations. In 2006, a California court held that an individually disqualified new government lawyer's "taint" was imputed to the entire San Francisco city attorney's office.

- **[E-28** N 12/06**]** City & County of San Francisco v. Cobra Solutions, Inc., 135 P.3d 20 (Cal. 2006) (holding that the San Francisco city attorney's office cannot avoid imputed disqualification by screening the new City Attorney from a case filed against the City 15 months after the City Attorney took the post, and which was substantially related to a matter that the City Attorney had handled while in private practice).

Several years later, a Michigan court reached the opposite conclusion -- permitting the screening of a new government lawyer to avoid such imputed disqualification.

- **[E-1048** B 2/10**]** People v. Davenport, No. 271366, 2009 Mich. App. LEXIS 2290, at *4-5 (Mich. Ct. App. Nov. 3, 2009) (finding that a prosecutor's office had properly screened from the prosecutor another lawyer in the office who had formerly represented the defendant in the case; finding that the prosecutor's office had properly screened the individually disqualified lawyer, even though there were only two prosecutors in the office; "On remand, the trial court conducted a lengthy evidentiary hearing during which the assistant attorney general presented testimony from the staff members employed by the Presque Isle County prosecutor's office when Davenport's case was pending. We hold that the trial court ruled that the prosecutor, through the assistant attorney general, established 'that it implemented measures to prevent improper communications and that it consistently followed through with these measures.' After reviewing the factors set forth in our prior opinion, the court ruled that, based on the procedures employed by the office, Steiger exchanged no information with McLennan about any aspect of Davenport's case. Though the office maintained no written procedures about how to handle a potential conflict or the Davenport file in particular, it is abundantly clear that both attorneys and all staff members were informed, and understood that Steiger was to have no contact with the Davenport file and that he would not participate in any discussions, interviews or meetings about the case. Members of the staff all testified that, to their knowledge, Steiger had no contact with the case file and was not present for and did not participate in any discussions about the case. Both Steiger and McLennan testified that, after an initial discussion about the potential conflict in Davenport if Steiger joined the prosecutor's office, they exchanged no information about the case.").

Best Answer

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

Prohibition On Negotiating for Hiring of a Judge Who Is Handling a Matter in Which a Law Firm Represents a Litigant

Hypothetical 15

One of your well-respected local federal judges has indicated that she plans to leave the bench for a more lucrative private job, because her children are nearing college age. Your partners are urging you to see whether the judge would be interested in joining your firm.

May you negotiate with the judge about a job while she is handling cases in which your firm represents litigants?

NO

Analysis

The ABA Model Rules contain an explicit provision governing judges (as well as arbitrators, mediators, and other third-party neutrals) leaving their posts and entering some other job.

As with former government lawyers, judges and these others cannot participate in their new role in any matter in which they participated "personally and substantially" as a judge (or in a similar role) -- unless "all parties to the proceeding give informed consent, confirmed in writing." ABA Model Rule 1.12(a).[1] In another similarity to government lawyers, law firms (or law departments) hiring an individually disqualified judge may avoid imputed disqualification by screening the individually disqualified new

[1] A comment explains how the "personal and substantial" standard applies to judges. ABA Model Rule 1.12 cmt. [1] ("The term 'personally and substantially' signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits.").

hire. ABA Model Rule 1.12(c).[2] Another provision contains a common sense principle that also applies to government lawyers.

> A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral.

ABA Model Rule 1.12(b).[3]

Interestingly, this rule applies to the judge (or arbitrator, mediator, etc.) rather than to the lawyer interested in hiring the judge. One would have thought that the provision would therefore appear in the Judicial Ethics Code rather than the rules that apply to the hiring lawyer.

Not surprisingly, the ABA Model Rules to not contain any comments dealing with this issue.

Lawyers thinking of hiring a judge are essentially bound by the same provision, because they cannot assist another lawyer (even when acting as a judge) in violating any ethics rules governing the judge's conduct.

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[2] A comment about the effect of screening parallels the comment applicable to former government lawyers. ABA Model Rule 1.12 cmt. [4] ("Requirements for screening procedures are stated in Rule 1.0(k). Paragraph (c)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.").

[3] This provision applies to any lawyer "currently serving as a public officer or employee." ABA Model Rule 1.11(d)(2)(ii) ("negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).").

So as a practical matter, a law firm interested in hiring a judge must wait until the judge is not handling any matters in which the law firm represents a party, or arrange for the judge to hand off all of the matters in which the law firm represents a party.

This creates difficulties for any judge who wants to negotiate with more than one local law firm -- because the judge essentially has to give up all matters handled by any lawyers in any of the firms.

Restatement

Best Answer

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

Hiring Judges' Law Clerks

<u>Hypothetical 16</u>

As part of your firm's strategic plan, you want to dramatically expand your litigation presence in your state's capital. Among other things, you would like to bring on some lateral partners and also hire some local federal judges' law clerks. You wonder whether the two plans are incompatible.

If you hire a local federal judges' law clerk, will your firm be disqualified from handling any cases on which the law clerk worked?

<u>NO</u>

<u>Analysis</u>

<u>ABA Model Rules</u>

Surprisingly, specific ethics rules provision govern law clerks looking for jobs.

Unlike judges who cannot negotiate for a job with a party or a lawyer in a matter the judge is overseeing personally and substantially, law clerks may conduct such negotiations under certain conditions.

> A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.

ABA Model Rule 1.12(b).[1]

The ethics rules on their face do not indicate that the law clerks must stop working on any matter being handled by the law firm from whom they are seeking

[1] The more general rule governing former government lawyers specifically refers to this provision. ABA Model Rule 1.11(d)(2)(ii) (containing an explicit exception for law clerks from the general prohibition from lawyer "currently serving as a public officer or employee" from negotiating for private employment "with any person or lawyer with a matter in which the government lawyer is personally and substantially involved.").

employment -- although presumably judges are free to impose their own such requirements (or any other requirements).

Law clerks are specifically mentioned in the ethics rule disqualifying former government lawyers (or judges) from representing anyone in a matter "in which the lawyer participated personally and substantially as a judge" -- absent written consent from "all parties to the proceeding." ABA Model Rule 1.12(a).

Although not explicitly mentioned in the rule, law clerks are also covered by the ethics rule allowing whatever law firm which hires them to avoid any imputation of the law clerk's individual disqualification. ABA Model Rule 1.12(c).

Restatement

State Ethics Rules and Opinions

Most states follow the ABA Model Rules and the Restatement approach.

Interestingly, several opinions (coming from the judicial side rather than the lawyer side) have dealt with lawyers working for courts without compensation -- presumably because they have had difficulty finding paying jobs.

- Massachusetts Comm. on Judicial Ethics Op. 2009-4 (6/8/09) ("The volunteer interns would never disclose that a law firm is paying their stipend to anyone in the courts, including judges, law clerks, and other volunteer interns. The volunteer interns would also understand that they are to have no involvement in matters in which their law firms are involved. In the event of a conflict on a particular case, the volunteer intern would simply tell the department's designated individual -- e.g., the Manager and Assistant Manager of Legal Research Services in the Superior Court -- that the intern has a conflict without identifying the nature of the conflict. Upon such an occurrence, the case would be reassigned. The volunteer interns would keep a log of all cases they work on, as well as all cases on which they have a conflict and have requested reassignment, and the judges of the Trial Court would preserve the logs for a set period of years."; "The Committee would add to this suggested procedure the following: that the volunteer interns not disclose their deferred law firm affiliation in print or electronically, including on social networking sites such as Facebook and Twitter, during the period they work for the judges of the Trial Court; that the volunteer intern's law firm's involvement in a case in any capacity -- whether as counsel, witness, or party -- trigger the intern's recusal; that the law firms not engage in any type of public acknowledgment of their 'sponsorship' of volunteer interns, whether orally, electronically, or in print; and, finally, that Flaschner communicate all of these requirements -- both yours and the Committee's -- to the law firms, to the volunteer interns, and to the Chief Justices of the Trial Court departments in writing prior to the commencement of the volunteer internships and every three months thereafter. This Committee is of the opinion that the judges' suggested procedure, as amplified by the Committee, will administer the program consistent with the Code; if the judges of the Trial Court fail to take these precautions, however, accepting these volunteer interns would violate the Code.").

- N.Y. Advisory Comm. on Judicial Ethics Op. 09-111(A) (4/28/09) ("An appellate court may engage attorneys, whose prior employers terminated their employment, or recent law school graduates, who are unemployed, to perform work for the court without compensation on a temporary basis. The court must insulate any such attorney assigned to the Law Department from cases involving any law firm or other legal service provider that employed the attorney during the two years immediately preceding the date the attorney begins working for the appellate court; and an appellate judge, to whose chambers an attorney is assigned to work under these circumstances, is disqualified from presiding in any matter involving a law firm or other legal service provider that employed the attorney during such two year period.").

Best Answer

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

"Of Counsel" Relationship

Hypothetical 17

One of your law firm's largest competitors has a fairly draconian "out at 65" policy. You are interested in hiring a retired partner from that firm, who you envision as having an "of counsel" relationship with your firm.

Will a lawyer with an "of counsel" relationship with your firm be considered part of your firm for conflicts of interest purposes?

YES

Analysis

Courts and bars generally treat a lawyer who is "of counsel" as a member of the firm for conflicts purposes. The ABA Model Rules do not address this issue, but the Restatement takes this position.

> The rule of imputation of this Section ordinarily applies due to the association of lawyers who are "of counsel." A lawyer is of counsel if designated as having that relationship with a firm or when the relationship is regular and continuing although the lawyer is neither a partner in the firm nor employed by it on a full-time basis. A lawyer who is of counsel to a firm often has more limited access to confidential client information than firm partners and associates and usually a smaller financial stake in the firm. Nonetheless, the incentive to misuse confidential information, the difficulty of determining when it has been misused, the ostensible professional relationship, as well as the administrative ease of a definite rule, justify extending imputation to lawyers having an of-counsel status. In unusual situations, the relationship between an "of counsel" lawyer and the firm may be shown to be so attenuated, despite typical connotations of the term, that there is no significant risk of comprising client confidentiality or otherwise providing a basis for imputation.

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

States takes the same approach. See, e.g., Va. LEO 1544 (10/22/93) (a retired lawyer may be listed as "of counsel" to a firm even though the retired lawyer is not actively practicing law, as long as the lawyer "remains associated with the firm and available for occasional consultations."; the designation would be improper if the retired lawyer's association "was limited to a pure business affiliation" or to "either the development of business or the management of the firm's business activities."; the Bar quoted earlier LEOs as indicating that the "of counsel" relationship "turns on the actual practice of law and is not satisfied by a mere business or financial relationship with the firm, a sporadic affiliation over time, or the status of a forwarder or receiver of legal business.").

There is a certain "rough justice" aspect to this debate. Law firms sometimes confer the "of counsel" title as a way to highlight a lawyer's involvement in a firm for marketing purposes. In a sense, imputation of that lawyer's individual disqualification is the price the law firm pays for this marketing advantage.

Best Answer

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

Lawyer With an "Of Counsel" Relationship With More Than One Firm

Hypothetical 18

You just received a call from a well-connected local legislator, who also practices law as much as he can. He is interested in arranging for an "of counsel" relationship with your firm because your largest office is in your state's capital. The legislator wants to also establish an "of counsel" relationship with another law firm based where he lives, in the southwestern part of your state.

(a) Can a lawyer establish an "of counsel" relationship with more than one firm?

YES

(b) What are the conflicts of his interest ramifications of a lawyer having an "of counsel" relationship with more than one firm?

THE FIRMS WILL BE CONSIDERED ONE FIRM FOR CONFLICTS OF INTEREST PURPOSES (PROBABLY)

Analysis

(a)

(b)

Best Answer

The best answer to **(a)** is **YES**; the best answer to **(b)** is **THE FIRMS WILL BE CONSDERED ONE FIRM FOR CONFLICTS OF INTEREST PURPOSES (PROBABLY)**.

Temporary Lawyers

Hypothetical 19

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

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

YES (PROBABLY)

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

NO (PROBABLY)

Analysis

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

ABA Model Rules

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

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

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

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

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

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

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

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

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

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

> Code of Professional Responsibility (1969, amended 1980) will govern the lawyer and the firm and their relationship as with any associate of the firm. Similarly, "temporary lawyer" does not include a lawyer who has an "of counsel" relationship with a law firm or who is retained in a matter as independent associated counsel.

Id.

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

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

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

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

> The basic question is under what circumstances a temporary lawyer should be treated as "associated in a firm" or "associated with a firm." The question whether a temporary lawyer is associated with a firm at any time must be

> determined by a functional analysis of the facts and circumstances involved in the relationship between the temporary lawyer and the firm consistent with the purposes for the Rule.

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

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

Id. (emphasis added).

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

> Ultimately, whether a temporary lawyer is treated as being "associated with a firm" while working on a matter for the firm depends on whether the nature of the relationship is such that the temporary lawyer has access to information relating to the representation of firm clients other than the client on whose matters the lawyer is working and the consequent risk of improper disclosure of misuse of information relating to

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

Id. (emphases added).

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

> For the reasons discussed above, in order to minimize the risk of disqualification, firms should, to the extent practicable, screen each temporary lawyer from all information relating to the clients for which the temporary lawyer does no work. All

> law firms employing temporary lawyers also should maintain a complete and accurate record of all matters which each temporary lawyer works. A temporary lawyer working with several firms should make every effort to avoid exposure within those firms to any information relating to clients on whose matters the temporary lawyer is not working. Since a temporary lawyer has a coequal interest in avoiding future imputed disqualification, the temporary lawyer should also maintain a record of clients and matters worked on.

Id. (emphasis added).

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

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

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

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

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

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

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

Id. (emphasis added).

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

ABA LEO 356 later introduced yet another standard.

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

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

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

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

> actual fee paid by the client to the firm, the client need not be informed of the financial arrangement with the temporary lawyer under the Model Code since it does not involve a division of the gross fee between lawyers.

Id. (emphasis added).

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

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

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

Restatement

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

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

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

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

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

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

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

> The rule of imputation applies to both owner-employer and associate-employees of a sole-proprietorship law practice, to partners and associates in a partnership for the practice of law, and to shareholder-principals and non-equity lawyer employees of a professional corporation or similar

> organization conducting a law practice. The lawyers in all such organizations typically have similar access to confidential client information. Owners, partners, and shareholder-principals have a shared economic interest. Associates and non-equity lawyer employees have both a stake in the continued viability of their employer and an incentive to keep the employer's good will.

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

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

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

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

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

State Ethics Opinions

State ethics opinions generally follow this approach as well.

In 2010, the District of Columbia Bar dealt with this issue in some detail. In District of Columbia LEO 352 (2/2010).[1] The Bar explained that a temp lawyer's individual disqualification's imputation to a hiring firm depended on the temp lawyer's role in the new firm.

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

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

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

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

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

Id.

In 1999, the Colorado Bar dealt with the issue in more detail. In Colorado LEO 105 (5/22/99), the Colorado Bar followed the ABA in confirming that a temp lawyer will be individually disqualified based on client confidences that the temp lawyer obtains during a representation -- just like a permanent firm employee.

The Colorado Bar then recognized that:

> The more difficult conflict question involves other clients of the engaging firm or lawyer for whom the temporary lawyer

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

Colorado LEO 105 (5/22/99).

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

> This Committee concurs with the ABA opinion's "functional analysis." . . . The Committee agrees with the ABA opinion that the temporary lawyer's access to information regarding the firm's other clients is the key factor in determining whether the temporary lawyer is associated with the firm under Colo. RPC 1.10(a).
>
> Temporary lawyer and firms that wish to avoid imputation of conflicts, and minimize the risk of disqualification, should screen temporary lawyers from all information relating to other firm clients for whom the temporary lawyer is not working. In particular, the temporary lawyer should not have access to the firm's files for other clients, should not have access to the firm's computer network unless documents related to other clients are password-protected, and should not be exposed to meetings, discussions or other communications where matters or other clients are discussed. To position themselves to defend claims of imputed disqualification, temporary lawyers and firms should maintain accurate records of all clients for whom the temporary lawyer has performed work, and of the measures taken to ensure that the temporary lawyer has not had access to information relating to other clients of the firm.

Id.

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

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

Id. (footnote omitted).

In 2012, another bar took the same approach.

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

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

- Georgia LEO 05-9 (4/13/06) (analyzing a lawyer's retention of a temporary lawyer; "One of the most difficult issues involving conflict of interest in the employment of temporary lawyers is imputed disqualification issues. In other words, when would the firm or legal department be vicariously disqualified due to conflict of interest with respect to the temporary lawyer? Since a temporary attorney is considered to be an associate of the particular firm or

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

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

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

Best Answer

The best answer to **(a)** is **PROBABLY YES**; and the best answer to **(b)** is **PROBABLY NO**.B 11/14; B 12/16

Outsourcing

Hypothetical 20

You are considering outsourcing some of your firm's discovery work to an overseas operation suggested by one of your largest clients. You wonder about the conflicts of interest ramifications of such a step.

Will the lawyers at the overseas privilege review operation be considered part of your firm for conflicts of interest purposes?

NO (PROBABLY)

Analysis

For domestic outsourcing, it makes sense to apply the same standards for imputed disqualification as most bars follow in the case of temp lawyers. That standard looks at whether a temp lawyer is "associated" with the firm -- which in turn depends on whether the temp lawyer has general access to the firm's other clients' confidential information.

In 2012, a court applied this standard -- declining to impute to an entire law firm the individual disqualification of a lawyer working out of her home on specific matters for a law firm.

- Brown v. Fla. Dep't of Highway Safety & Motor Vehicles, Case No. 4:09-cv-171-RS-CAS, 2012 U.S. Dist. LEXIS 145159, at *3-4, *6-7, *7-8, *7-9, *9 (N.D. Fla. Oct. 5, 2012) (because a lawyer's individual disqualification is only imputed to a law firm if the lawyer is "associated" with the law firm, individual disqualification of a lawyer working for the law firm in an outsourcing arrangement is not imputed to the whole firm; explaining the factual context; "Ms. Moore left employment at the OAG to work at Sniffen & Spellman, P.A. For personal and family reasons, Ms. Moore resigned her associate position with the Sniffen firm and went to work instead for the firm of Marie A. Mattox, P.A. The relationship was not a typical associate relationship. Ms. Moore was to work from home preparing summary-judgment responses on specific cases as assigned. There was some prospect that in the future Ms. Moore might also draft complaints. Ms. Moore was to be paid a set hourly rate without the health and retirement benefits available to attorneys employed at the firm's offices. The firm and Ms. Moore did not address how long the relationship would last and did not define the relationship with precision. This was a relationship of indefinite duration, terminable at will by either side, with no exception that Ms. Moore would ever have client contact or responsibility for cases beyond drafting papers for review by another attorney. There was no expectation that Ms. Moore would advance to a different or higher position with the firm."; "Under the plain language of Rule 4-1.10(b), the Mattox firm is disqualified if Ms. Moore became 'associated' with the firm. The meaning of 'associated' is not completely clear. But one thing *is* clear: not every lawyer who is paid by a law firm to do work of a legal nature is 'associated' with the firm. Thus, for example, a firm can outsource research or other support services so long as the firm complies with any applicable requirements on billing and on disclosures to the client. . . . An attorney to whom work is outsourced -- for example, an attorney who contracts to do research or draft pleadings from the attorney's own premises on the attorney's own schedule -- ordinarily is not an associate."; "Determining whether an attorney is associated or unassociated requires an analysis of all the circumstances. No one factor is determinative in every case. Here Ms. Moore works only from home, does only work for review by another attorney of a kind that can properly be outsourced, has no client contact or expectation of advancement, and does not receive the health and retirement benefits the firm makes available to associates. Ms. Moore works only for the Mattox firm -- it can provide as much work as she currently wishes to do so -- but Ms. Moore is free to do contract work for others as well, if at any time she chooses to do so. In substance, this is an outsourcing relationship. The Rule 4-1.10 imputed-disqualification provision does not apply."; "In reaching this conclusion, I have not overlooked two additional considerations. First, some superficial indicia cut the other way. Ms. Moore obtained a Mattox-firm email address, called herself an associate and used the firm's physical address when she updated her Florida Bar filing, and received a first paycheck that treated her as an employee, not as an independent contractor."; "Second, Defendant's lay representation are concerned that Ms. Moore sat in on confidential discussions and now has a relationship with the plaintiff's law firm. The concern is understandable. But Ms. Moore has an obligation to maintain the defendant's confidences. For all that appears in this record, Ms. Moore has complied with her obligation and will continue to do so. This order mandates it.").

In another domestic outsourcing situations, a court declined to disqualify a vendor working for both sides of a case.

- Victor Li, Judge Refuses to Disqualify Electronic Data Discovery Vendor for Playing Both Sides, Law Tech. News, July 16, 2013 ("Kaleida Health isn't taking a May decision by United States Magistrate Judge Leslie Foschio (Western District, New York) lying down. Foschio refused to disqualify e-discovery vendor D4 Discovery."; "On Friday, Kaleida, the largest non-profit health care provider in Western New York, filed papers with the United States District Court in Buffalo reaffirming its stance that Foschio erred and D4 should have been disqualified. Kaleida had originally hired D4 in 2010 after Kaleida was sued by a group of employees in a wage-and-hour class action alleging that they were owed regular and overtime wages. According to Foschio's opinion, Kaleida did not retain D4 for its e-discovery consulting services. Instead, Kaleida's attorneys at Nixon Peabody had decided to use predictive coding to go through its gigantic cache of 300,000 to 400,000 emails, and had hired D4 to provide scanning and coding services. In 2011, D4 entered into a contract to provide e-discovery consulting services to the plaintiffs. Despite D4's representation that its consultants had not been involved in the project for Nixon Peabody, Kaleida and Nixon Peabody objected."; "According to Foschio, there was no conflict of interest because D4's involvement with Kaleida was limited to scanning and coding documents and that Kaleida failed to show that D4 had access to any confidential information. Foschio drew a distinction between D4's duties to Kaleida, which he called 'a routine clerical function' and similar to photocopying documents, and the consulting services D4 provided to the plaintiffs, which Foschio described as 'requiring expert knowledge or skills.' Foschio held that D4 had not provided expert services to Kaleida, merely routine clerical work. As such, Foschio ruled that there was no conflict of interest when its consultants signed up to provide expert services to the plaintiffs."; "Foschio also found that Nixon Peabody's exposure to D4 was extremely limited. D4 had only been hired to code objective information into assigned fields and was not asked to identify substantive case issues or make subjective decisions about the documents. Foschio also noted that D4's was even more minimal since it had actually subcontracted its work for Kaleida to Infovision 21, Law 360's interface in Ohio. Additionally, Foschio pointed out that Nixon Peabody had utilized other companies, such as the Ricoh Company and Pangea 3 to provide other e-discovery services, as well as its own in-house e-discovery services."; "E-discovery consultant George Socha told Law Technology News that it is extremely rare to see an e-discovery vendor on both sides of the same case. Socha says that the Electronic Discovery Reference Model Code of Conduct, which he helped draft, encourages vendors to avoid these types of situations. 'It's never been my view that that's appropriate,' says Socha. 'If you are working for me on a matter as a e-discovery provider, what I'm looking for from your is your advice and counsel. That means you're on my team.'").

Both of these fact-intensive analyses presumably would apply to overseas outsourcing as well -- with the almost inevitable result that the overseas outsourcing arrangement involves a much more tenuous relationship with the hiring law firm.

Surprisingly, the several ethics opinions dealing with outsourcing do not extensively address conflicts of interest. All of them address the lawyer's duty of diligence in selecting the service provider, obligation to assure that the service provider provides confidentiality, and (with differing results) the lawyer's possible duty to disclose to the client that the lawyer has engaged in offshore outsourcing. However, the ethics opinions do not address a basic question -- does a lawyer arranging for offshore outsourcing have to confirm that the service provider is not simultaneously (1) working for the other side on the same matter, or (2) not working for one of the lawyer's client's other adversaries in an unrelated matter.

New York City LEO 2006-3 (8/2006) contained the following discussion under the heading "The Duty to Check Conflicts when Outsourcing Overseas."

> DR 5-105(E) requires a law firm to maintain contemporaneous records of prior engagements and to have a system for checking proposed engagements against current and prior engagements. N.Y. State Opinion 720 (1999) concluded that a law firm must add information to its conflicts-checking system about the prior engagements of lawyers who join the firm. In N.Y. State Opinion 774 (2004), that Committee subsequently concluded that this same obligation does not apply when non-lawyers join a firm, but noted that there are circumstances under which it is nonetheless advisable for a law firm to check conflicts when hiring a non-lawyer, such as when the non-lawyer may be expected to have learned confidences or secrets of a client's adversary.
>
> As 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 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.

New York City LEO 2006-3 (8/2006) (emphasis added).

Unfortunately, the legal ethics opinion did not explain what the lawyer should do with the information once the lawyer has obtained it.

It seems very unlikely that lawyers working for an overseas service provider would be considered "associated" with the law firm that hired them. When applied to temp lawyers, that status normally requires that the temporary lawyer have access to other law firm clients' confidences. ABA Model Rule 1.10(a); ABA LEO 356 (12/16/88).

Treating the lawyers working overseas as temp lawyers, it would seem that the lawyers would not be "associated" with the law firm that arranged for their involvement.

In contrast, to the extent that an overseas service provider is considered a "law firm" -- rather than a collection of temp lawyers -- for conflicts analysis, any individual lawyer's disqualification might be imputed to the entire operation overseas. That would prevent the service provider from assisting both sides of the same case.

Of course, every bar recognizes that a temporary lawyer's own involvement in a matter might result in the temp lawyer's acquisition of client confidences -- resulting in his or her individual disqualification. That would prevent the same overseas lawyer from working on both sides of the same case. However, it would seem that the overseas service provider could establish a screen between two groups of lawyers working on opposite sides of the same case. However, such a tactic could would create an enormous risk, because a court or bar might find it almost inevitable that such an internal screen would not be effective (especially with no daily oversight from the lawyers in the United States handling the matter).

Best Answer

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

B 11/14

Application of General Imputed Disqualification Rules to Law Departments

Hypothetical 21

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

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

YES

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

YES

Analysis

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

ABA Model Rules and Restatement

The ABA Model Rules could not be any clearer:

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

ABA Model Rule 1.0 cmt. [3].

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

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

ABA Model Rule 1.10(a).

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

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

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

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

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

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

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

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

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

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

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

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

Case Law

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

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

- Dynamic 3D Geosolutions LLC v. Acacia Research Corp., 837 F.3d 1280, 1282, 1283, 1286, 1288-89, 1289, 1290 (Fed. Cir. 2016) (disqualifying an in-house lawyer representing plaintiff, because she had earlier worked on substantially related patent matters at defendant Schlumberger, before moving to plaintiff's parent; also imputing her disqualification to the entire law department for plaintiff's corporate organization, and also imputing her disqualification to plaintiff's outside law firm with which she had communicated about the current litigation; "In 2006, Schlumberger hired Charlotte Rutherford in a senior counsel position as Manager of Intellectual Property Enforcement, in licensing and litigation; promoted her to Director of Intellectual Property in 2009; and then promoted her again to Deputy General Counsel for Intellectual Property. Her job duties included 'developing and implementing the worldwide IP strategy,' 'protecting and preserving [Schlumberger's] IP assets including patents, trademarks and trade secrets,' and 'advis[ing] senior [Schlumberger] executives regarding risk issues relating to IP.' . . . She was also responsible for the company's worldwide program for enforcing intellectual property, including litigation, and directed and supervised outside counsel on intellectual property legal matters."; "In mid-2013, after seven years at Schlumberger, Rutherford left Schlumberger and soon thereafter began working as Senior Vice President and Associate General Counsel at Acacia Research Group LLC. Acacia Research Group LLC is a wholly-owned subsidiary of Acacia Research Corporation, the parent company of various patent-holding entities, including Dynamic 3D."; "Shortly after joining Acacia, Rutherford twice met with the inventors of the '319 patent to discuss Acacia's acquisition of the patent and possible future litigation. . . . Schlumberger's Petrel product was discussed as a potential target of patent infringement litigation, at the meetings and in the call."; "<u>The district court in this case first found that Rutherford's work at Schlumberger was substantially related to her current work at Acacia</u>. The court found that because the accused features of Petrel existed in the older versions that Rutherford was exposed to, and because she was involved at Schlumberger in efforts to license Petrel to other companies, the evidence created an irrebuttable presumption that she acquired confidential information requiring her disqualification."; "<u>The district court then determined that the acquired knowledge should be imputed to all Acacia attorneys for purposes of participating in Dynamic 3D's suit against Schulmberger. The court noted that conflict rules for 'firms' also apply to corporate legal departments, and that Dynamic 3D depended entirely on Acacia's legal department for its strategy and litigation conduct</u>."; "The district court lastly extended the disqualification to CEP [outside counsel], interpreting Fifth Circuit case law on disqualifying co-counsel as shifting the evidentiary burden to Dynamic 3D to prove non-disclosure after Schlumberger met its burden to create a rebuttable presumption of disclosure."; "We agree with Schlumberger that the district court did not clearly err in finding that Rutherford's work for Schlumberger, and for Acacia and Dynamic 3D, were substantially related. Rutherford occupied senior counsel, director, and deputy general counsel positions in a large company's intellectual property department. The record documents her involvement at Schlumberger in a project specifically evaluating a product later accused of infringement by Acacia, and the risks of such an infringement suit. Rutherford's representation at Schlumberger included efforts to license Petrel when the later-accused features of the product existed in the older versions with which Rutherford was involved.

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

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

- Ullrich v. Hearst Corp., 809 F. Supp. 229, 235-36 (S.D.N.Y. 1992) (upholding the disqualification of a former Hearst in-house lawyer from representing plaintiffs suing Hearst in employment and other related cases; noting that the in-house lawyer had represented Hearst in similar cases for many years, and that the lawyer would be in a position to use all of the confidential Hearst information that the lawyer had acquired over the years even if he did not disclose it; "Bernbach [former Hearst in-house lawyer] also exhibits an incorrect perception of the legal standard in suggesting that the matter should be resolved based on his assertion that he will not disclose any confidential fact that was communicated to him. The rule is not designed merely to prevent the disclosure of confidences by the lawyer. It concerns itself as much with the lawyer's use of confidential information in a manner adverse to the interests of the former client that trusted the lawyer with its confidences. . . . Adverse use of confidential information is not limited to disclosure. It includes knowing what to ask for in discovery, which witnesses to seek to depose, what questions to ask them, what lines of attack to abandon and what lines to pursue, what settlements to accept and what offers to reject, and innumerable other uses. The rule concerns itself with the unfair advantage that a lawyer can take of his former client in using adversely . . . that client information communicated in confidence in the course of the representation. It concerns itself also with the importance of protecting the confidential relationship between client and attorney; if clients withheld information from their lawyers out of fear that the lawyers might use the information against the client in a subsequent adverse representation, the ability of the legal profession to render valuable advise to its clients would suffer.").

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

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

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

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

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

Schlumberger to the hiring company's law department worked with that company's outside counsel on the same patent issues she had handled for her new company's now adversary Schlumberger.

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

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

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

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

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

The Restatement provides an example of this approach.

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

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

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

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

- Derivi Constr. & Architecture, Inc. v. Wong, 118 Cal. App. 4th 1268, 1270, 1277 (Cal. App. 2004) ("Derivi Construction & Architecture, Inc., Linda Derivi, and Steve Castellanos (collectively DCA) appeal from denial of their motion to disqualify attorney Peter Whipple and his law firm on the basis that Whipple is married to an attorney at another law firm that had previously been disqualified in this lawsuit. DCA contends the trial court abused its discretion in denying the motion by failing to consider circumstantial evidence and by following unpersuasive dicta in DCH Health Services Corp. v. Waite (2002) 95 Cal. App.4th 829 [115 Cal. Rptr. 2d 847]. DCA's theory of disqualification goes beyond precedent in two regards. First, it bases the disqualification solely on a marital relationship and, second, it requires double imputation of confidential knowledge for vicarious disqualification. We decline to adopt this expanded theory of disqualification and affirm the judgment."; "We agree with the Frazier [Frazier v. Superior Court, 97 Cal. App. 4th 23 (Cal. App. 2002)] court that imputing Brown's access to DCA's confidential information to Doherty and then to Whipple carries the concept of vicarious disqualification too far. The trial court did not abuse its discretion in denying the motion to disqualify Whipple and his firm.").

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

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

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

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

- Advanced Messaging Techs., Inc. v. Easylink Servs. Int'l Corp., 913 F. Supp. 2d 900, 913, 909, 910, 911, 912 (C.D. Cal. 2012) (analyzing the disqualification impact of Crowell & Moring's assigning one of its lawyers to be "outside in-house counsel" in the law department of its client Open Text, based on the lawyer's previous work while at Kenyon & Kenyon for the plaintiff j2 Global; finding that the lawyer's previous work at Kenyon & Kenyon was substantially related to his work while in the law department of Open Text; screening "internal or external counsel" from working on the matter unless they confirm under oath that they have not had any "substantive communications with the [individually disqualified lawyer] or with any one [sic] else whom they reasonably believe may have received information from the [lawyer] concerning this action;" also imputing his individual disqualification to defendant's outside counsel Perkins Coie, although concluding that Perkins Coie did not do anything wrong; "The Attorney, however, does not work at Perkins. Rather, he was outside in-house counsel for Open Text on intellectual property matters. . . . This court is not aware of any case analyzing whether the Vicarious Presumption Rule applies to such a situation. However, some cases have analyzed whether presuming an attorney at one law firm has confidential information requires making the same presumption about another firm that is co-counsel with the tainted attorney. These cases come out different ways, but the cases applying the Vicarious Presumption Rule to co-counsel have the better argument."; "The Attorney served as Open Text's outside in-house counsel for intellectual property matters, and the Three Current Cases are high-stakes, complex patent matters. The importance of in-house counsel effectively cooperating, coordinating, and communicating with their company's attorneys is self-evident."; "In the Three Current Cases, the Attorney was not screened until after Dr. Farber's deposition, approximately eight months after he began serving as Open Text's outside in-house counsel. . . . Since Perkins was unaware of the Attorney's conflict, it did not initiate a timely screen."; "The court finds that none of Perkins' attorneys had knowledge of the Attorney's prior j2 representation. Indeed, during oral argument the argument the court characterized Perkins as a victim of

> Crowell's inexplicable decision to approve the Attorney to work for Open Text. The court affirms Perkins' innocence in this matter, and appreciate the professionalism its attorneys have exhibited. Perkins' innocence though, does not prevent its disqualification.").

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

Best Answer

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

"Secondments"

Hypothetical 22

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

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

YES

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

NO (PROBABLY)

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

YES

Analysis

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

Both the monetary arrangements and the seconded lawyer's links to the law firm are infinitely variable. In some situations, a law firm supplies the seconded lawyer to an important client without charging anything for the lawyer's time or presence there. In other situations, the outside law firm bills either a set amount or an hourly amount for the seconded lawyer's efforts during the secondment. In most "secondment" arrangements, the seconded lawyers intend to return to the law firm, and sometimes maintain certain ties with the law firm (healthcare coverage, attending social events, etc.). Some law firms seconding their lawyers to a client guarantee the lawyer's return to the firm, and some even give credit for the years spent at the clients' law department toward the lawyer's partnership track.

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

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

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

ABA Model Rule 1.0 cmt. [3].

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

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

ABA Model Rule 1.10(a).

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

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

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

One might think that the law department to whom an outside lawyer is seconded would not face any conflict risk by bringing on board a lawyer from a firm that already represents that corporate client. But the seconded lawyer might have worked at a previous firm or law department on a matter adverse to the corporation to which the lawyer will be seconded. Once on board in the corporation's law department, that lawyer could not individually represent the corporation against her former client in any matter substantially related to what the lawyer handled adverse to that corporation in her previous job.

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

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

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

New York City LEO 2007-2 (2007).

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

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

- Advanced Messaging Techs., Inc. v. Easylink Servs. Int'l Corp., 913 F. Supp. 2d 900, 913, 909, 910, 911, 912 (C.D. Cal. 2012) (analyzing the disqualification impact of Crowell & Moring's assigning one of its lawyers to be "outside in-house counsel" in the law department of its client Open Text, based on the lawyer's previous work while at Kenyon & Kenyon for the plaintiff j2 Global; finding that the lawyer's previous work at Kenyon & Kenyon was substantially related to his work while in the law department of Open Text; screening "internal or external counsel" from working on the matter unless they confirm under oath that they have not had any "substantive communications with the [individually disqualified lawyer] or with any one [sic] else whom they reasonably believe may have received information from the [lawyer] concerning this action;" also imputing his individual disqualification to defendant's outside counsel Perkins Coie, although concluding that Perkins Coie did not do anything wrong; "The Attorney, however, does not work at Perkins. Rather, he was outside in-house counsel for Open Text on intellectual property matters. . . . This court is not aware of any case analyzing whether the Vicarious Presumption Rule applies to such a situation. However, some cases have analyzed whether presuming an attorney at one law firm has confidential information requires making the same presumption about another firm that is co-counsel with the tainted attorney. These cases come out different ways, but the cases applying the Vicarious Presumption Rule to co-counsel have the better argument."; "The Attorney served as Open Text's outside in-house counsel for intellectual property matters, and the Three Current Cases are high-stakes, complex patent matters. The importance of in-house counsel effectively cooperating, coordinating, and communicating with their company's attorneys is self-evident."; "In the Three Current Cases, the Attorney was not screened until after Dr. Farber's deposition, approximately eight months after he began serving as Open Text's outside in-house counsel. . . . Since Perkins was unaware of the Attorney's conflict, it did not initiate a timely screen."; "The court finds that none of Perkins' attorneys had knowledge of the Attorney's prior j2 representation. Indeed, during oral argument the argument the court characterized Perkins as a victim of Crowell's inexplicable decision to approve the Attorney to work for Open Text. The court affirms Perkins' innocence in this matter, and appreciate the professionalism its attorneys have exhibited. Perkins' innocence though, does not prevent its disqualification.").

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

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

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

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

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

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

> A law firm may second a lawyer to a host organization without subjecting the law firm to the imputation of conflicts under DR 5-105(D) if, during the secondment, the lawyer

> does not remain 'associated' with the firm. The seconded lawyer will not remain associated with the firm if any ongoing relationship between them is narrowly limited, and if the lawyer is securely and effectively screened from the confidences and secrets of the firm's clients.

New York City LEO 2007-2 (2007).[1] The New York City Bar explained that as long as the seconded lawyer is "securely and effectively screened from the confidences and secrets of the law firm's clients" while away from the firm:

> [o]ur conclusion is not altered by the mere fact, for example, that the seconded lawyer (a) is expected to return to the firm at the end of the secondment, (b) retains the lawyer's 'class rank' at the firm, (c) retains the lawyer's benefits under the firm's pension plan, or (d) can send and receive e-mails

[1] N.Y. City LEO 2007-2 (2007) (assessing the conflicts implications of a law firm loaning ("seconding") a law firm to client or other organization; "A law firm may second a lawyer to a host organization without subjecting the law firm to the imputation of conflicts under DR 5-105(D) if, during the secondment, the lawyer does not remain 'associated' with the firm. The seconded lawyer will not remain associated with the firm if any ongoing relationship between them is narrowly limited, and if the lawyer is securely and effectively screened from the confidences and secrets of the firm's clients."; "We therefore conclude that when (i) any ongoing relationship between the seconded lawyer and the law firm is narrowly limited, including that the seconded lawyer works solely under the direction of the host organization, and (ii) the seconded lawyer is securely and effectively screened from the confidences and secrets of the law firm's clients, the seconded lawyer should not be considered associated with the law firm, and conflicts should not be imputed to the law firm. Our conclusion is not altered by the mere fact, for example, that the seconded lawyer (a) is expected to return to the firm at the end of the secondment, (b) retains the lawyer's 'class rank' at the firm, (c) retains the lawyer's benefits under the firm's pension plan, or (d) can send and receive e-mails through the firm's e-mail servers (but without access to confidences and secrets of the firm's clients)."; "If the law firm pays the seconded lawyer during the secondment, this alone does not result in the imputation of conflicts to the firm, or make the lawyer associated with the firm, so long as the seconded lawyer's professional judgment is not directed by the firm and the lawyer lacks access to the confidences and secrets of the firm's clients."; "It is advisable in this situation to record in writing that the firm will not be directing the professional judgment of the seconded lawyer."; "[T]he lawyer must recommend that the client consult with independent counsel in connection with the arrangement, and the client must consent in writing. In all these cases, a written contract clearly explaining the terms of the secondment is essential."; "It also bears reminding that if the seconded lawyer is associated with the legal department of the host organization, no lawyer in that legal department may act adversely to the interests of the seconded lawyer's former clients on substantially related matters, without the former clients' consent."; "But conflicts may arise even when the host organization is a current client because of the returning lawyer's access to confidential information while seconded. In the example discussed above, the seconded lawyer learned that the host organization had been approached to extend critical financing to an acquisition target of Client Z. Even if the seconded lawyer was not associated with the firm during the secondment, when the seconded lawyer returns to the firm, if that information is still material to Client Z, the provisions of DR 5-105(D) will nonetheless apply, and the firm may then be disqualified from representing Client Z unless informed consent can be obtained.").

> through the firm's e-mail servers (but without access to confidences and secrets of the firm's clients).

Id.

Moreover:

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

Id.

Thus, New York explained that the key for outside law firms seconding lawyers to a corporate client is to end the seconded lawyer's access to the law firm's information about all of its clients other than the client to whom the lawyer has been seconded. All of the other financial ties and the law firm's guarantee to allow the seconded lawyer to return to the law firm does not mean that the seconded lawyer is still associated with the law firm.

More recently, the Ohio bar[2] reached the same conclusion.

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[2] Ohio Bar Informal LEO 2015-01 (1/16/15) (dealing with secondments; "In a 'secondment,' a law firm sends a firm lawyer to work temporarily as inside counsel for one of the firm's organizational clients. Firms may identify several advantages to these arrangements: they can help cement the firm's relationship with the client; if a firm has excess lawyer personnel, a secondment can address the over-capacity issue in a flexible way; and secondments broaden the range of experiences that firms can offer their lawyers." (footnote omitted); "One key fact in determining whether lawyers are 'associated in a firm' for purposes of conflict analysis is whether they have 'mutual access to information regarding the clients they serve.' Adv. Opinion 2008-1 at 5 (Ohio Bd. of Comm'rs on Griev. & Discip. Feb. 8, 2008). See also Op. 853, 5 (N.Y. St. Bar Ass'n Comm. on Prof'l Ethics Mar. 1, 2011) (when a law firm partner becomes inside counsel to a corporation while continuing to be 'associated' with the law firm, conflicts of the firm and the corporation's legal department 'will generally be shared and must become part of both of their conflict-checking systems' under analogous Rule 1.10(e) of the New York Rules of Professional Conduct). 'Mutual access' to client information is available to lawyers 'associated' in a firm even when they are in geographically-separate offices. On the other hand, the absence of such 'mutual access' is an important factor signifying that lawyers should not be deemed to be 'associated' with each other for purposes of conflict analysis."; "The Committee concludes that there is a limited safe harbor for avoiding imputed conflicts when a lawyer, during the term of the secondment: (a) works exclusively for and under the

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

> There is some risk that during the secondment the seconded lawyer could learn information from the host-client that would be adverse to the lawyer's firm. For instance, the seconded lawyer might learn that the host-client is preparing to terminate its relationship with the firm, or even that it is contemplating legal action against the firm. Returning to the firm at the end of the secondment with information of the host-client that is adverse to the lawyer's firm raises perplexing problem for the seconded lawyer: she owes duties of loyalty to the firm that would otherwise suggest the need to disclose to the firm the information obtained from the host-client. . . . [T]he seconded lawyer would be barred from revealing the host-client's information, notwithstanding the duty of loyalty owed to her 'home' firm.").

Ohio Bar Informal LEO 2015-01 (2015).

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

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<u>direction of the host-client without supervision of members of the firm; (b) is securely screened from access to the firm's clients, client files and document system; and (c) does not participate in the firm's consideration of client matters. If these requirements are met, conflicts will not be imputed, even though the seconded lawyer and the firm may intend that the lawyer will return to the firm, the firm continues to pay the seconded lawyer salary and benefits, and the seconded lawyer retains her firm seniority</u>." (emphases added)).

once and future law firm. However, law departments and law firms must be careful to sufficiently separate the "seconded" lawyer from the once and future law firm.

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

- United States ex rel. Bahsen v. Boston Sci. Neuromodulation Corp., 147 F. Supp. 3d 239, 242, 245, 246, 256-47, 247 & n2 (D.N.J. 2015) (holding that a lawyer should be considered "associated" with a law firm for imputed disqualification purposes even though the lawyer had been seconded to a client's law department; explaining that the lawyer Ritu Hasan was employed as an in-house lawyer with Boston Scientific, but moved to the Blank Rome law firm; "Blank Rome hired Ms. Hasan and immediately 'seconded' her back to the client. . . . Blank Rome and the Client executed a Secondment Agreement, which provided that Ms. Hasan 'shall not continue to work on behalf of the Firm during the Term' of the secondment."; explaining that Boston Scientific sought to disqualify Blank Rome representing a plaintiff suing the company, based on Ms. Hasan's individual disqualification, which had argued that it was imputed to the entire Blank Rome law firm; "The Court does so now, and finds that Ms. Hasan is not a temporary attorney. Blank Rome repeatedly held out Ms. Hasan as a lawyer with a general and continuing relationship with the firm; it cannot now avoid that implication for conflicts purposes."; "[A] firm cannot hold out a lawyer as one of its own and then later hide behind a functional analysis of that lawyer's duties to avoid ethical conflicts. Where a firm holds out an attorney as having a general and continuing relationship with it, that attorney is 'associated with' the firm."; "Blank Rome also argues that it did not describe Ms. Hasan as 'Of Counsel,' but rather as an 'Associate,' so these decisions do not apply. The Court is not persuaded. The term 'associate' conveys 'a junior non-partner lawyer, regularly employed by the firm.' . . . It also conveys a continuing relationship, unless it is cabined by meaningful language. . . . [A] firm's public characterizations may bind it. Here, Blank Rome publicly characterized Ms. Hasan as having a general and continuing relationship with the firm."; "Blank Rome repeatedly held out Ms. Hasan as an associate of the firm, with no caveats or provisos concerning her secondment or transient status. She was listed as an 'Associate' on the Blank Rome website. . . . The listing recites that 'Ritu Hasan is a member of the Consumer Finance Litigation group.'"; "These characterizations were not accidental. Blank Rome's Client insisted that Ms. Hasan be publicly marketed as a firm associate on the firm's website, and Blank Rome complied. . . . Blank Rome benefited from this arrangement; the Client agreed to refer additional business to the firm."; "The firm also reported Ms. Hasan as an associate to NALP, enhancing diversity numbers for marketing and recruiting purposes . . . and included Ms. Hasan's firm biography when pitching a potential client on additional work in the Consumer Finance Litigation."; "The public esteem and trust in the integrity of the legal system remain important. Where a firm holds out an attorney as having a general and continuing relationship with it, that attorney is 'associated with' the firm for conflicts purposes as well."; "Blank Rome did not include any provisos or caveats to Ms. Hasan's associateship when it held her out as one of its lawyers. It cannot now conveniently eschew that relationship for the purposes of conflicts analysis. Ms. Hasan is associated with Blank Rome. The appearance of impropriety standard -- where an attorney's creation of the appearance of a conflict alone was sufficient to constitute an ethical violation -- as been removed from the New Jersey ethics rules. . . . The Court does not revive it. . . . The appearance of impropriety standard rendered ethical violations occasionally impossible to discern until after a court or ethical commission had ruled. . . . The Court is sensitive to those concerns. However, holding a firm to its public representations as to a lawyer's status, as the Court does here, does not raise concerns of unpredictability. It simply means that a firm cannot have it both ways. It cannot hold out an associate as its own for diversity and client recruitment purposes, while insisting there is no association for conflict purposes.").

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

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

> Conflicts may arise even when the host organization is a current client because of the returning lawyer's access to confidential information while seconded. In the example discussed above, the seconded lawyer learned that the host organization had been approached to extend critical financing to an acquisition target of Client Z. Even if the seconded lawyer was not associated with the firm during the

> secondment, when the seconded lawyer returns to the firm, if that information is still material to Client Z, the provisions of DR 5-105(D) will nonetheless apply, and the firm may then be disqualified from representing Client Z unless informed consent can be obtained."

New York City LEO 2007-2 (2007).

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

Best Answer

The best answer to **(a)** is **YES**; the best answer to **(b)** is **PROBABLY NO;** and the best answer to **(c)** is **YES**. B 11/14

Imputation Rules When Hiring Non-Lawyers

Hypothetical 23

You have been advising one of your firm's offices in a state that does not allow screening of lawyers to avoid imputed disqualification of an individually disqualified lawyer. That office is considering hiring several paralegals who previously worked at your law firm's largest competitor.

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

YES

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

MAYBE

Analysis

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

Introduction

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

At first blush, one would think that firms would face greater risks when hiring non-lawyers than when hiring lawyers. After all, non-lawyers at law firms clearly have as much (if not more) material confidential information about clients than lawyers possess.

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

ABA Model Rules and Restatement

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

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

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

ABA Model Rule 1.10 cmt. [4] (emphases added). The comment's reference to paralegals and legal secretaries makes it clear that this general principle applies even to folks who have as much (if not more) confidential information about clients than lawyers possess. In other words, this approach does not apply just to mail clerks, accounts receivable folks, etc. -- who might not possess material client confidences.

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

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

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

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

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

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

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

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

A comment next provides a lengthy explanation of this difference.

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

<u>Id.</u> (emphasis added).

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

State Approaches

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

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

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

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

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

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

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

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

Despite this uncertainty, the stakes can be high.

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

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

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

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

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

- <u>USA Recycling Inc. v. Baldwin Endico Realty</u>, No. 305816-2013, slip op. at 2-3, 12, 13, 15, 15-16 (N.Y. Sup. Ct. July 2, 2015) (disqualifying a lawyer based on his hiring of a paralegal who had previously worked for the adversary; "This motion was brought on by [an] order to show cause by Baldwin on November 3, 2014 seeking a stay of this proceeding, including a stay of the stipulation of settlement, and consolidation of this proceeding with three other proceedings pending in the Supreme Courts of Bronx County and Westchester County. Defendants also seek disqualification of the plaintiff's counsel Rocco F. D'Agostino Esq. upon the grounds that he had access to confidential information from a newly-hired paralegal, one James Monteleon, who had formerly been employed by, or concerned in the affairs of, attorneys representing Baldwin, its principals, and related entities controlled by the late Michael Endico. Defendant contends that Mr. Monteleon's familiarity with the affairs of the late Mr. Endico, and his attorneys, was subject to being improperly utilized in Mr. D'Agostino's prosecution and settlement of this action."; "<u>Where the employer firm takes appropriate measures to isolate the new employee from the case in issue, disqualification will not lie. For example, the retention of a legal secretary/paralegal by plaintiff's counsel, who had worked on 'scores' of cases while employed by the defendant's firm including the case at bar, did not provide grounds for disqualification where plaintiff's counsel demonstrated that it did a satisfactory job of ensuring that its employee was and continued to be isolated from the former employer's case.</u>"; "<u>A law firm which hires a secretary, paralegal or other non-lawyer employee who has previously worked at another firm must adequately supervise the non-lawyer not to disclose protected information obtained at the former law firm. This supervision may include instructing the non-lawyer not to disclose protected information or not to exploit such information</u>. It is advisable that the firm conduct an inquiry, or comprehensive conflict check based on the non-lawyer's prior employment."; "There is simply no excuse for the failure of Mr. D'Agostino to make inquiry of his new employee and ascertain whether he should be shielded from participation in this suit, or whether, in the alternative, the consent of his adversary could be obtained to Mr. Monteleon's participation."; "The Court finds that Mr. Monteleon's extensive and unusual involvement in the affairs of the defendants, and his employment by attorneys representing the defendants, their corporations, and Mr. Endico's Estate necessitates disqualification. Although the distinction between a law school graduate awaiting admission and an attorney admitted to practice is not without significance, under the unusual circumstances of this case, given the extraordinary nature and extent of Mr. Monteleon's involvement, the impact on the defendant's expectation of confidentiality is real and substantial. Due to this appearance of impropriety, the disqualification of Mr. D'Agostino as the counsel for plaintiff USA Recycling Inc. is mandated." (emphases added)).

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

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

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

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

- Hodge v. Urfa-Sexton, LP, 758 S.E.2d 314, 317, 319, 321-22, 322, 323 (Ga. 2014) (holding that a law firm hiring a non-lawyer can avoid disqualification by screening the non-lawyer, but remanding for determination whether the law firm followed the proper procedures; "We granted certiorari in this case to determine whether the Court of Appeals correctly held that a conflict of interest involving a non-lawyer can be remedied by implementing proper screening measures in order to avoid disqualification of the entire law firm. For the reasons set forth below, we hold that a non-lawyer's conflict of interest can be remedied by implementing proper screening measures so as to avoid disqualification of an entire law firm. In this particular case, we find that the screening measures implemented by the non-lawyer's new law firm were effective and appropriate to protect against the non-lawyer's disclosure of confidential information. However, we remand this case to the trial court for a hearing to determine whether the new law firm promptly disclosed the conflict." (emphasis added) (footnote omitted); "There is a split of authority among the courts on this issue. The minority approach, which is what Hodge argues we should apply here, is to treat non-lawyers the same way we treat lawyers. Under this approach, when a non-lawyer moves to another firm to work for opposing counsel, the non-lawyer's conflict of interest is imputed to the rest of the firm, thereby disqualifying opposing counsel. . . . URFA-Sexton argues that we should adopt the majority approach and treat non-lawyers differently from lawyers. Under this approach, rather than automatic imputation and disqualification of the new firm, lawyers hiring the non-lawyer can implement screening measures to protect any client confidences that the non-lawyer gained from prior employment. . . . After reviewing both approaches, <u>we join today with 'the majority of professional legal ethics commentators, ethics tribunals, and courts[, which] have concluded that non-lawyer screening is a permissible method to protect confidences held by non-lawyer employees who change employment.'</u>" (emphasis added) (citation omitted); "Accordingly, as a matter of first impression, we set forth the following guidance for disqualification of a law firm based on a non-lawyer's conflict of interest. <u>Once the new firm knows of the non-lawyer's conflict of interest, the new firm must give prompt written notice to any affected adversarial party or their counsel, stating the conflict and the screening measures utilized.</u> . . . The adversarial party may give written consent to the new firm's continued representation of its client with screening measures in place." (emphasis added); "Absent written consent, the adversarial party may move to disqualify the new firm. The adversarial party must show that the non-lawyer actually worked on a same or substantially related matter involving the adversarial party while the non-lawyer was employed at the former firm. If the moving party can show this, it will be presumed that the non-lawyer learned confidential information about the matter. . . . This prevents the non-lawyer from having to disclose the very information that should be protected." (footnote omitted); "Once this showing has been made, <u>a rebuttable presumption arises that the non-lawyer has used or disclosed, or will use or disclose, the confidential information to the new firm.</u> . . . <u>The new firm may rebut this by showing that it has properly taken effective screening measures to protect against the non-lawyer's disclosure of the former client's confidential information.</u> . . . If the new firm can sufficiently rebut the presumption and show that it promptly gave written notice of the non-lawyer's conflict, then disqualification is not required." (emphasis added); "The firm administrator immediately implemented and confirmed electronic screening measures with Bussey, including taking steps to restrict Bussey's access to any information about the Williams case, implementing security measures to prevent Bussey from accessing any computerized information maintained by Insley & Race regarding the Williams case, and testing the security measures he implemented to ensure their success. Since October 5, Bussey has been unable to access the case management system used by Insley & Race for the

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

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

- Mississippi LEO 258 (12/1/11) (allowing screening of a paralegal hiree to avoid imputed disqualification; "The Ethics Committee of the Mississippi Bar has been asked to render an opinion on the following question: A paralegal worked for approximately six years at Firm 1. Corporation A was one of numerous Defendants in a lawsuit in which Firm 1 represented Corporation A as local counsel. The paralegal's involvement in the lawsuit was minimal with the total time spent being approximately fifteen (15) hours and consisting primarily of filing documents with the Court for Corporation A's national counsel. The paralegal never met with representatives of Corporation A. Corporation A settled the lawsuit with the Plaintiff approximately two years ago. Firm 2 and other firms represent the Plaintiff in the lawsuit against the remaining Defendants. The paralegal has now joined Firm 2. Under the Mississippi Rules of Professional Conduct, does the paralegal's employment at Firm 2, wherein she would assist counsel for the Plaintiff in the lawsuit against the remaining Defendants, constitute an ethical violation due to her involvement with Firm 1, who defended Corporation A in the same lawsuit."; "It is the opinion of the Ethics Committee that disqualification of a paralegal is not imputed to the firm so long as the non-lawyer is screened to protect confidential information. The screening process of a non-lawyer should involve the supervisory lawyer cautioning the non-lawyer (1) not to disclose any information relating to the representation of a client of the former employer; and (2) that the employee should not work on any matter in which the employee worked for the prior employer or respecting which the employee has information relating to the representation of the client of the former employer. When the new firm becomes aware of such matters, the employing firm must also take reasonable steps to ensure that the employee takes no action and does no work in relation to matters on which the non-lawyer worked in the prior employment absent written consent from the prior client." (emphasis added); "Sometimes a firm may be disqualified from representing a client when the firm employs a non-lawyer who formerly was employed by another firm. These circumstances are present either (1) where information relating to the representation of an adverse party gained by the non-lawyer while employed in another firm has been revealed to lawyers or other personnel in the new firm; or (2) where screening would be ineffective or the non-lawyer necessarily would be required to work on the other side of the same or a substantially related matter on which the non-lawyer or respecting which the non-lawyer has gained information relating to the representation of the opponent while in the former employment.").

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

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

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

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

- New York LEO 774 (3/23/04) ("When a law firm hires a secretary, paralegal, or other non-lawyer who has previously worked at another law firm, the law firm must adequately supervise the conduct of the non-lawyer. Supervisory measures may include i) instructing the non-lawyer not to disclose protected information acquired at the former law firm and ii) instructing lawyers not to exploit such information if proffered. In some circumstances, it is advisable that the law firm inquire whether the non-lawyer acquired confidential information from the former law firm about a current representation of the new firm or conduct a more comprehensive conflict check based on the non-lawyer's prior work. The results of such an inquiry will help determine whether the new firm should take further steps, such as seeking the opposing party's consent and/or screening the non-lawyer."; "Occasionally, however, a law firm will conclude that screening the non-lawyer will not adequately protect an opposing party's confidences and secrets. For example, if the non-lawyer had substantial exposure to relevant confidential information at the old firm and will now be working closely with the lawyers who are handling the opposite side of the same matter, or where the structure and practices of the firm make it difficult to isolate a non-lawyer from confidential conversations or documents pertaining to a given matter, a law firm may be obliged to adopt measures more radical than screening" such as "[o]btaining consent from the opposing law firm's client," "[t]erminating the non-lawyer," or "[w]ithdrawing from the matter in question. Concluding that ("[w]hen a New York law firm hires a non-lawyer who has previously worked at another law firm, the hiring firm must, as part of its supervisory responsibilities under DR 1-104(C) and DR 4-101(D), exercise adequate supervision to ensure that the non-lawyer does not reveal any confidences or secrets that the non-lawyer acquired while working at the other law firm. . . . If a law firm learns that a non-lawyer did acquire information protected by DR 4-101(B) that is material to a matter in which the adversary is represented by the non-lawyer's former employer, the law firm should adopt appropriate measures to guard against improper disclosure of protected information.").New York LEO 774 (3/23/04) ("When a New York law firm hires a non-lawyer who has previously worked at another law firm, the hiring firm must, as part of its supervisory responsibilities under DR 1-104(C) and DR 4-101(D), exercise adequate supervision to ensure that the non-lawyer does not reveal any confidences or secrets that the non-lawyer acquired while working at the other law firm. . . . If a law firm learns that a non-lawyer did acquire information protected by DR 4-101(B) that is material to a matter in which the adversary is represented by the non-lawyer's former employer, the law firm should adopt appropriate measures to guard against improper disclosure of protected information."; explaining that the appropriate steps the law firm might take include screening of the non-lawyer or "measures more radical than screening" such as: "[o]btaining consent from the opposing law firm's client," "[t]erminating the non-lawyer," or "[w]ithdrawing from the matter in question").

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

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

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

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

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

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

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

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

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

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

Fourth, at least one bar indicated that paralegals should be treated like lawyers under that state's imputed disqualification rules, while non-lawyers other than paralegals should be treated differently (implicitly allowing their screening to avoid any imputed disqualification).

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

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

- Hodge v. Urfa-Sexton, LP, 758 S.E.2d 314, 317, 319, 321-22, 322, 323 (Ga. 2014) (holding that a law firm hiring a non-lawyer can avoid disqualification by screening the non-lawyer, but remanding for determination whether the law firm followed the proper procedures; "We granted certiorari in this case to determine whether the Court of Appeals correctly held that a conflict of interest involving a non-lawyer can be remedied by implementing proper screening measures in order to avoid disqualification of the entire law firm. For the reasons set forth below, we hold that a non-lawyer's conflict of interest can be remedied by implementing proper screening measures so as to avoid disqualification of an entire law firm. In this particular case, we find that the screening measures implemented by the non-lawyer's new law firm were effective and appropriate to protect against the non-lawyer's disclosure of confidential information. However, we remand this case to the trial court for a hearing to determine whether the new law firm promptly disclosed the conflict." (footnote omitted); "There is a split of authority among the courts on this issue. The minority approach, which is what Hodge argues we should apply here, is to treat non-lawyers the same way we treat lawyers. Under this approach, when a non-lawyer moves to another firm to work for opposing counsel, the non-lawyer's conflict of interest is imputed to the rest of the firm, thereby disqualifying opposing counsel. . . . URFA-Sexton argues that we should adopt the majority approach and treat non-lawyers differently from lawyers. Under this approach, rather than automatic imputation and disqualification of the new firm, lawyers hiring the non-lawyer can implement screening measures to protect any client confidences that the non-lawyer gained from prior employment. . . . After reviewing both approaches, we join today with 'the majority of professional legal ethics commentators, ethics tribunals, and courts[, which] have concluded that non-lawyer screening is a permissible method to protect confidences held by non-lawyer employees who change employment.'" (citation omitted); "Accordingly, as a matter of first impression, we set forth the following guidance for disqualification of a law firm based on a non-lawyer's conflict of interest. <u>Once the new firm knows of the non-lawyer's conflict of interest, the new firm must give prompt written notice to any affected adversarial party or their counsel, stating the conflict and the screening measures utilized.</u> . . . The adversarial party may give written consent to the new firm's continued representation of its client with screening measures in place." (emphasis added); "Absent written consent, the adversarial party may move to disqualify the new firm. The adversarial party must show that the non-lawyer actually worked on a same or substantially related matter involving the adversarial party while the non-lawyer was employed at the former firm. If the moving party can show this, it will be presumed that the non-lawyer learned confidential information about the matter. . . . This prevents the non-lawyer from having to disclose the very information that should be protected."; "Once this showing has been made, a rebuttable presumption arises that the non-lawyer has used or disclosed, or will use or disclose, the confidential information to the new firm. . . . The new firm may rebut this by showing that it has properly taken effective screening measures to protect against the non-lawyer's disclosure of the former client's confidential information. . . . If the new firm can sufficiently rebut the presumption and show that it promptly gave written notice of the non-lawyer's conflict, then disqualification is not required."; "The firm administrator immediately implemented and confirmed electronic screening measures with

Bussey, including taking steps to restrict Bussey's access to any information about the Williams case, implementing security measures to prevent Bussey from accessing any computerized information maintained by Insley & Race regarding the Williams case, and testing the security measures he implemented to ensure their success. Since October 5, Bussey has been unable to access the case management system used by Insley & Race for the Williams matter, including any calendar events, contact information, documents, and billing information for the Williams case. Additionally, the physical file was removed from the general file room and securely placed in the office of an associate.").

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

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

Best Answer

The best answer to **(a)** is **YES**; and the best answer to **(b)** is **MAYBE.** B 11/14; B 12/16

Previous Non-Lawyer Hired as a Lawyer

Hypothetical 24

You have always been cautious about hiring laterally, because you work in a state that does not allow the screening of lawyers to avoid imputed disqualification of an individually disqualified lawyer. Several questions have arisen as you have begun to ramp up your hiring.

(a) Can you avoid imputed disqualification by screening someone who had acted as a paralegal at another law firm (despite having a law degree) but would practice as a lawyer at your firm?

MAYBE

(b) Can you avoid imputed disqualification by screening a former summer clerk at another law firm who had practiced as a lawyer at a firm after graduating from law school?

MAYBE

Analysis

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

ABA Model Rule 1.10 cmt. [4].

> **[m 56]** Law students who clerk in firms, like other nonlawyer employees, typically have limited responsibilities

> and thus might acquire little sensitive confidential information about matters. Absent special circumstances, they should be considered nonlawyer employees for the purposes of this Section. Persons who have completed their legal education and are awaiting admission to practice at the time of providing services to a client of a law firm typically have duties comparable to admitted lawyers and accordingly should ordinarily be treated as lawyers for purposes of imputation.

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

(a)

(b)

Best Answer

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

Previous Lawyer Hired as a Non-Lawyer

Hypothetical 25

You just received a call from a mid-level associate that practices in a neighboring state. He sounds like he would be a great addition to one of your trial teams, but you quickly learn that he has been working at his current firm in litigation in which your firm represents the adversary. However, you also learn that the associate plans to work in your state only for several years (while his wife is a resident at a nearby hospital) -- and that he is applying for a paralegal position because he cannot waive into your state's bar.

Can your firm avoid imputed disqualification by screening a paralegal who previously worked as a lawyer on the other side of a case from your firm?

MAYBE

Analysis

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

ABA Model Rule 1.10 cmt. [4].

Best Answer

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

Office Sharing with Non-Lawyers

Hypothetical 26

Some demographic changes and internal office problems have substantially reduced your income, and you are trying to figure out how to save some expenses. One of your associates suggested that perhaps you could share office space with an insurance agency. Her brother works at the agency, and just told your associate that the agency is also looking for a way to save expenses in a new location.

May lawyers share office space with nonlawyers?

YES

Analysis

Although lawyers may share office space with nonlawyers, they must be very vigilant to avoid violating their confidentiality duties and to avoid public confusion about the relationship.

Despite the obvious risks, there appears to be no per se prohibition on lawyers sharing office space with nonlawyers.

- Florida LEO 88-15 (10/1/88) ("Lawyers may practice two professions from the same premises. Lawyers also may share office space with nonlawyers. In both cases, certain ethical limitations apply.").

Not surprisingly, bars and courts focus primarily on such office arrangements' confidentiality risks. Among other things, some bars have specifically warned against the same administrative folks having access to lawyers' and the office-sharing nonlawyers' documents.

- Louisiana LEO 08-RPCC-017 (6/30/08) (analyzling the ethics implications of lawyers sharing office space with nonlawyers; "Lawyers are sometimes presented with opportunities to share office space with nonlawyers. For example, the opportunity may be based upon an offer — innocently generous or calculatingly mercenary — from a non-lawyer in response to the need of the lawyer for office space. A similar but different opportunity might also present itself as a result of extra space in the lawyer's office and a desire to offer that space to others, whether for extra income or simply gratis. Regardless of the circumstances, while the Louisiana Rules of Professional Conduct do not specifically prohibit a lawyer from sharing office space with a non-lawyer, there are a number of serious ethical concerns present in the scenario that should prompt a lawyer to be very cautious whenever contemplating such an office-sharing arrangement."; "Sharing office equipment, such as computers, printers, fax machines, telephones, copiers, etc., may also unintentionally lead to an easy opportunity to share the confidential information of clients in violation of Rule 1.6 -- through careless stewardship of client information and/or through the curious eyes of others not directly associated with or employed by the lawyer. Close monitoring of these potential 'leak points' is critical to maintaining the confidentiality of client information and thereby avoiding infraction of Rule 1.6. Similarly, <u>the offer/opportunity to share file storage areas (either digital or hard-copy) and/or other common areas within the office (e.g., a waiting room, kitchen, conference room, etc.) also would be a possible weak point in maintaining client confidentiality.</u> While there is nothing <u>per se</u> improper with sharing these things, the risk of loss of client confidential information is increased every time something office-related is shared with the non-lawyer." (emphasis added); "<u>Sharing office staff -- such as a receptionist, administrative assistant or bookkeeper -- would pose additional risks for compromise of client confidentiality.</u> A person employed primarily by a nonlawyer may not realize, understand or have had the opportunity to be educated regarding the special ethical limitations that apply to a law practice. At the very least, a lawyer contemplating use of such shared support staff should ensure that those staff persons are educated, trained and instructed by the lawyer regarding the lawyer's ethical obligations -- and, therefore, those of a lawyer's staff -- under the Louisiana Rules of Professional Conduct. If the lawyer does not take the time to make a commitment to ensure the education and training of non-lawyer support staff, the lawyer should endeavor to avoid using the services of non-lawyer support staff rather than risk harm to clients and/or incur disciplinary consequences that might occur as a result of the loss of client confidential information." (footnote omitted) (emphasis added); "The lawyer facing a generous offer of office space with a non-lawyer, therefore, should consider whether the opportunity presented might be or later become a 'wolf in sheep's clothing' -- if it looks like the offer will have a variety of 'strings' attached, those 'strings' may result in serious ethical problems for the lawyer, particularly if the lawyer will be expected to help out with or contribute legal services in some accessory fashion to the non-lawyer's business and/or clientele."; "Equally relevant, the lawyer who might be faced with this 'golden opportunity' may also naively aid in or even be unknowingly expected in some fashion to facilitate the non-lawyer's unauthorized practice of law."; "Another 'red flag' to be considered, in addition to worrying about professional independence and unauthorized practice of law, would be offers of referrals of clients with some vague discussion and/or expectation of compensation or reciprocation."; "Even if all of the other ethical concerns as noted above are anticipated and carefully managed, the lawyer should also consider and be careful about the non-lawyer benefactor/landlord who also happens to be or becomes the lawyer's client, given the potential conflict of interest that might arise whenever a lawyer engages in business transactions with a client outside of the scope of the matter which is the basis for the lawyer-client relationship. Rule 1.8 of the Louisiana Rules of Professional Conduct covers a variety of situations in which a lawyer might become involved financially with a client and wherein the lawyer might face disciplinary consequences if not careful in observing the limitations set forth within the rule.").

- Kentucky LEO E-417 (07/2001) (analyzing the implications of lawyers sharing office space with nonlawyers; " A lawyer may <u>not</u> share office space with persons or organizations engaged in such other activities <u>unless</u> the office-sharing arrangement, in its physical layout and its functional operation, will: (a) safeguard confidential information of the lawyer's clients, by preventing unauthorized access; (b) preserve the lawyer's professional independence, by keeping the law practice separate and distinct from other activities and by avoiding impermissible conflicts of interest; <u>and</u> (c) conform to rules governing information about legal services, by avoiding improper advertising and referral or solicitation of prospective clients. Ordinarily, office sharing arrangements will satisfy these requirements if they: (i) provide exclusive and secure facilities for the lawyer to meet clients, communicate with them, and store information relating to their representation; (ii) establish the distinct identity of the law practice by furnishing clearly differentiated signage and entry to the law office and by avoiding uses of common employees or facilities in ways that suggest the practice and other activities are somehow affiliated; <u>and</u> (iii) allow no misleading communications on the premises regarding legal services, no communications suggesting that the law practice is affiliated with another activity, no improper advertising or contacts by the lawyer with prospective clients, and no scheme by which the law practice and other activities give or receive anything of value in return for client referrals."; "Experience with office-sharing in jurisdictions outside Kentucky has revealed the kinds of safeguards ordinarily needed to demonstrate compliance with these ethical requirements. Confidentiality must be protected by providing space in which lawyer-client conversations cannot be seen or overheard; by providing separate and secure computer systems and files for client-related records, including client-related billing and accounting information; and by providing separate telephone service to the lawyer's office as well as a means of safeguarding the confidentiality of any information sent or received by facsimile machine. . . . In order further to protect confidentiality and to assure the lawyer's professional independence, any shared staff must be trained and supervised in preserving the separateness of law office work and the confidentiality of client records and communications. . . . Common receptionists ordinarily should be avoided; if one is used, however, the lawyer's telephone line must be separate and exclusive; incoming calls must be answered in a way that identifies the lawyer or law office without reference to the other activities. Neither a shared receptionist nor any other shared staff may handle confidential client information. Moreover, if the lawyer's clients have interests adverse to the other professionals or businesspersons sharing office space on the premises, staff must not be shared at all." (emphasis added)).

- New York County LEO 692 (3/21/93) (analyzing the implications of lawyers sharing office space with nonlawyers; "ABC may lease space in its office suite to, and share office services with, a non-lawyer insurance salesman provided that (1) ABC sets up the office-sharing arrangement and conducts business so as to ensure that the two businesses operate separately and there is no implication that they are in any way affiliated, (2) adequate measures are undertaken to protect client confidences and secrets and (3) ABC does not pay for or request referrals from the insurance salesman."; "The proposed arrangement heightens the risk of improper disclosure of confidential information because of the regular contact which would occur between ABC and the insurance business. This is similar to the concern raised when unaffiliated lawyers share office space. See N.Y. County 680 (1990) (group of lawyers who share office space may be treated as partners for conflict of interest purposes if they have access to each others' client files)." (emphasis added); "Even inadvertent disclosures to the insurance salesman, would be improper, and potentially damaging to ABC clients, and it would be ABC's responsibility to ensure that this does not occur. Therefore, ABC members and employees would have to implement appropriate safeguards to prevent the salesman from overhearing or viewing confidential communications. Such precautions in any case should include restricting access to client files and ensuring that documents are not left in shared areas such as conference rooms and hallways, as well as using discretion when discussing client matters in open areas within the office.").

Bars and courts have also warned lawyers that they risk misleading the public if they do not adequately distinguish between lawyers' practice at the same physical location as nonlawyers conducting business.

- Michigan LEO RI-355 (10/26/12) (analyzing the implications of a law firm maintaining an office in another county, which would not be permanently staffed; "A Michigan lawyer contemplates having a law office address in a county other than the county where her principal law firm office is located, in an office suite that would be shared with nonlawyers and not staffed during normal business hours. The office suite contains a main reception area and office space, some of which is leased and some of which is available for short-term rental. The conference rooms near the main reception area are not dedicated to any single user but can be rented on an as-needed basis. A telephone number for the office suite with a local area code would ring to the lawyer's principal law firm office situated in a different area code. The fax number would remain the same. The inquiring lawyer indicates that, although the physical address would have mail service, and the distinct local telephone number would be regularly utilized, the lawyer's access to and usage of office space and conference rooms would be sporadic, facilitated by short-term rental on an as-needed basis."; "No signage indicating the lawyer's office would be affixed to the building's exterior or interior, nor would the address be listed on law firm letterhead. Mail received at the location would be sorted unopened and placed in a mailbox designated for the lawyer's principal office. Upon request, the mail would be opened, scanned, and emailed. Any materials, such as business cards, that advertise the location and local telephone number for the secondary office would indicate 'By Appointment Only.' For discussion purposes in this opinion, this office arrangement will be referred to as an 'alternate law office arrangement.'"; "[L]awyers seeking to add an alternate law office to their law practice must comply with the applicable Rules of Professional Conduct, which includes disseminating any information about their practice in a manner that is not false, fraudulent, misleading, or deceptive contrary to MRPC 7.1. A lawyer cannot communicate the existence of a physical office location unless the lawyer maintains dedicated office space, appropriately separate and distinct from other businesses. In addition, lawyers must ensure the alternate law office arrangement does not violate MRPC 5.4(b) and MRPC 5.5 by facilitating the unauthorized practice of law or the appearance of impermissible multidisciplinary practice. Lawyers having an alternate law office are held to the same ethical standards as lawyers who maintain one or more permanent physical locations, including but not limited to obligations with regard to competence (MRPC 1.1), diligence (MRPC 1.3), communication (MRPC 1.4), and confidentiality (MRPC 1.6)."; "The potential for the concerns . . . to arise in an alternative law office arrangement may be heightened by the fact that the lawyer's presence in the location is sporadic, rendering what transpires in her absence largely unobserved. The fact that no signage is planned by the inquirer may offset the possibility that members of the public will misidentify persons who share office space with the lawyer as affiliated with her law firm; however, other businesses sharing the suite may advertise the location by exterior signage and other means not within the inquirer's control, thereby creating the possibility or perhaps even likelihood that the lawyer's affiliation with the other businesses is misconstrued. The potential for that signage, coupled with the fact that the office space the inquirer intends to use for meetings with clients is not dedicated for use solely by the lawyer may be problematic. <u>Potential clients or clients could be misled into thinking that the</u>

lawyer is affiliated with nonlawyers based on the items stored in the office space, internal signage, and intermittent use of the office space by nonlawyers." (emphasis added); "It appears that the inquiring lawyer intends to use the mail sorting services in lieu of the mail-opening services also available at the alternate law office. It is unclear whether the receptionist or other clerical personnel located at the secondary office location would perform clerical tasks regarding the lawyer's files in common areas that may expose the contents to other businesses sharing the office space or their customers and clients. If the mail-opening services were utilized by the inquiring lawyer, the same concern would apply to these clerical duties. . . . [P]erformance of clerical duties involving file handling and other client administrative matters in a common area is improper when a lawyer shares office space with nonlawyers or other lawyers not associated with her law firm." (emphasis added)).

- Medina Cty. Bar Ass'n v. Baker, 809 N.E.2d 659, 659-60, 660 (Ohio 2004) ("Respondent, in his private law practice, shared office space in Medina and North Ridgeville, Ohio, with a credit-counseling company, Confidential Credit Counselors ('CCC'). Respondent, who continues to serve as CCC's vice-president of legal affairs, provided services to CCC at these locations, including accepting referrals of customers experiencing credit or other problems and answering CCC credit counselors' legal questions. In exchange, CCC paid respondent's rental, secretarial, and telephone expenses at both locations. CCC also paid for respondent's signage and telephone directory advertisements."; "For a few years before relator's investigation, three separate signs publicized CCC's business and respondent's law practice at 775 West Smith Road in Medina. At the street in front of their offices, one sign displayed CCC's name and logo and immediately below identified. 'Baker and Baker, Attorneys at Law.' Another sign on the glass entryway to the offices displayed CCC's name and logo and immediately below identified 'Martin Baker, Attorney at Law.' A third sign over the office entrance identified a single telephone number preceded by the following: 'CONFIDENTIAL CREDIT COUNSELORS, BAKER & BAKER, ATTORNEYS AT LAW, A FULL SERVICE CREDIT CENTER.'"; "Upon review, we find that the preceding signage and advertisements failed to distinguish for the public between CCC's credit counseling company and respondent's law firm. Both forms of publicity misled clients as to whether respondent or his law firm was practicing law under the trade name 'Confidential Credit Counselors,' whether his law practice was offering credit counseling, and the identity, responsibility, and status of those who might be associated with him. See EC 2-10. Because respondent tacitly approved of the signage and advertisements and should have realized their misleading effect, we find that respondent violated DR 102(B)." (emphasis added)).

Best Answer

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

B 7/17

Office Sharing with Other Lawyers

Hypothetical 27

In your effort to reduce expenses, you have considered the possibility of sharing an office suite with other non-associated lawyers. You worry about the ethics risks of such an arrangement.

May lawyers share office space with other lawyers with whom they have no partner or associate relationship?

YES

Analysis

Although there appears to be no per se prohibition on lawyers sharing office space with other lawyers, there are obvious risks.

First, the lawyers must avoid holding themselves out to the public in a confusing way which implies some formal relationship if one does not exist.

The stakes are high -- because any confusion could result in the lawyers' liability for their officemates' malpractice -- perhaps without any malpractice insurance coverage for such liability.

- Gosselin v. Webb, 242 F.3d 412, 415 (1st Cir. 2001) (reversing a trial court's grant of summary judgment in a malpractice action brought against a lawyer for a malpractice committed by a lawyer with whom the defendant shared office space; "We begin our review by noting, as did the district court, that the individual Appellees were not in fact partners in a law firm. They shared office space and certain expenses and practiced under the 'trade name Field, Hurley, Webb & Sullivan (collectively, 'the group').'. . . Gosselin, therefore, relies on the doctrine of partnership by estoppel to hold Apellees liable for O'Dea's alleged malpractice. To prevail under this doctrine, a plaintiff must prove four elements: '(1) that the would-be partner has held himself out as a partner; (2) that such holding out was done by the defendant directly or with his consent; (3) that the plaintiff had knowledge of such holding out; and (4) that the plaintiff relied on the ostensible partnership to his prejudice.'" (citation omitted)).

- Atlas Tack Corp. v. DiMasi, 637 N.E.2d 230, 231, 233 (Mass. App. Ct. 1994) (reversing a trial court's grant of summary judgment in a malpractice action brought against a lawyer for a malpractice committed by a lawyer with whom the defendant shared office space; "The plaintiff sought to recover damages against the defendants, both lawyers, on the ground that they were vicariously liable for the alleged malpractice of another attorney, Ralph Donabed, with whom they shared office space. Both defendants filed motions to dismiss supported by affidavits in which they averred that they were not partners of Donabed and had never held themselves out to be partners."; "[T]he defendants not only knew that Donabed was using stationery with the legend 'DiMasi, Donabed & Karll' but the also knew and consented to his use of stationery that bore the legent after their names, 'a professional association' and listed in the margin a roll of attorneys including themselves, Donabed, and two attorneys not named in the letterhead title of DiMasi, Donabed & Karll. In addition, the bills forwarded to the plaintiffs from Donabed came on stationery with this letterhead instead of Donabed's personal stationery. There is no indication on the bills that payment should be made to Donabed or that the bill was submitted by Donabed instead of the law office of DiMasi, Donabed & Karll. While the committee on professional ethics of the Massachusetts Bar Association has declined to rule whether the use of the term 'professional association' to describe lawyers who are not partners, but share office space, is deceptive, it has stated that the term is ambiguous and may well imply a partnership arrangement.").

From an ethics standpoint, lawyers improperly describing their relationship might violate ethics rules as well.

- New York City LEO 1995-8 (5/31/95) (addressing ethics issues implicated by lawyers who were not in the same firm sharing office space; "Firm F and attorneys L and M may not advertise or employ letterhead using the trade name 'the Law Offices at X Square.' However, if Firm F becomes 'of counsel' to L and M and vice versa, and the group maintains the requisite relationship to support that designation, the three entities will be able to advertise jointly and indicate an 'of counsel' affiliation with each other. Those entries will also be able to identify themselves as 'associated' or 'affiliated' with each other, provided that the requisites for an 'of counsel' relationship are met.") (emphasis added).

- New York County LEO 680 (9/14/90) ("May a group of lawyers who practice individually in a single office building form a 'lawyers' cooperative,' using the 'logo' 'Able, Baker & Charles'? What rules govern lawyers who share office space?"; "Several lawyers maintain individual practices in a single office building. They wish to know whether they may ethically form a 'lawyers' cooperative' in which each would continue to practice alone and bill his or her clients separately, but would use the same stationery and practice under the name of 'Able, Baker & Charles,' which are the names of three members of the 'cooperative.' They do not want to form a firm or have professional liability for the other members of the 'cooperative.' If work were done for a client by more than one attorney in the office, it would be done pursuant to a retainer agreement in which the client would acknowledge that the attorneys are being retained separately in connection with the matter."; "Although lawyers who share office space but are not partners may not use a name that looks like a partnership name, in certain cases they may share legal fees."; "Even though lawyers who share office space are not partners, they may be treated as if they were partners for some purposes under the Code (particularly the provisions for vicarious disqualification in the event of a conflict of interest) if their office sharing arrangements give them access to each other's files and, thus, to the confidences and secrets of each other's clients."; "Lawyers who merely share office space and who do not share joint responsibility and liability for their cases are not partners and may not practice under a firm name. They must comply with the provisions of DR 2-107(A) with respect to division of fees from client referrals. Nevertheless, they may be treated as if they were a firm for some purposes, such as conflicts of interest and vicarious disqualification.") (emphases added).

- Utah LEO 86 (1/27/89) ("It is unethical for solo practitioners who office share but are not partners to use common letterhead that in any way implies that they are partners. Letterhead that reads 'A, B, and C, An Association of Solo Practitioners,' or 'A, B, and C, Independent Practitioners,' without disclaimer of partnership status, is ethically improper."; "The use of common letterhead by attorneys who share offices but are not partners is therefore ethically improper when it does not clearly state that the individuals listed are independent, solo practitioners and that the office sharers are not a partnership or a professional association. Letterhead that reads 'A, B, and C, An Association of Sole Practitioners,' or 'A, B, and C, Independent Practitioners' does not clearly state that the office sharers are not a partnership or a professional association, and is therefore ethically improper.") (emphasis added).

Second, lawyers must protect the confidentiality of their clients' information.

- District of Columbia LEO 303 (02/01) ("Unaffiliated lawyers may share office space and related services so long as the arrangements for such sharing do not compromise the confidentiality of each attorney's client information, the independence of each attorney, and the separate obligations of each attorney to comply with the Rules of Professional Conduct. In addition, the sharing arrangements must be structured in a way that does not suggest to the public that the lawyers are affiliated when they are not."; "It has become increasingly common, especially in high cost metropolitan areas like the District of

Columbia, for attorneys to practice law in shared office suites, often utilizing shared office staff and facilities. Through such sharing arrangements, an individual attorney's overhead expenses for receptionists, support staff, meeting rooms, libraries, copy and fax machines, and the like can be proportionately reduced by the financial contributions of the other attorneys participating in the arrangement. These economic benefits, in turn, help attorneys to deliver cost-effective legal services to their clients."; "As other jurisdictions have recognized, and we confirm, nothing in the rules of professional conduct prohibits attorneys from sharing office space, personnel, equipment, or expenses. However, while such sharing arrangements may provide undeniable economic benefits, they also have the potential to create ethical problems that must be recognized and avoided by all attorneys participating in the arrangement."; "Another source of public confusion about office-sharing arrangements is the manner in which shared office telephones are answered. A receptionist answering a shared office telephone with the greeting 'Good morning, Law Offices of A, B and C' disseminates the same misleading message to the public as the letterhead example discussed above. It would be preferable, of course, for the sharing attorneys to have separate telephone lines that could be answered individually in the name of each attorney by the shared receptionist, but this may not always be practical. When it is not, the shared receptionist must be circumspect in implying an association of the unaffiliated attorneys by the manner in which the office telephone is answered or by any other acts suggesting relationships between the attorneys when none exist. To avoid any implication of affiliation between the individual attorneys, the proper greeting in answering the common telephone line is simply 'Law Offices.'"; "<u>There are myriad logistical possibilities in office-sharing arrangements that could conceivably threaten client confidentiality. Individual attorney files and storage space in common or shared office areas must be treated in a way that preserves client confidentiality. An attorney in an office-sharing arrangement should not leave confidential client files in any unlocked file cabinets or storage areas within shared office space where they might be accessed and confidentiality compromised by unauthorized individuals.</u>" (emphasis added); "The issue of professional independence is more than a mere aspirational concern, since it directly affects the treatment of potential conflicts of interest among clients represented by office-sharing attorneys. The requirements of D.C. Rule 1.7, dealing with general conflicts of interest, and the other conflict of interest rules are imputed to other lawyers 'associated with a firm' under D.C. Rule 1.10. Comment [1] to Rule 1.10 provides that '[T]wo practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules.' The commentary goes on to recognize that in making this determination, it is important to take into account not only the terms of any formal agreement between the lawyers but also whether 'they have mutual access to confidential information concerning the clients they serve.' Id.; see also D.C. Bar Op. 247 (1994) (imputed disqualification under Rule 1.10 appropriately found where office-sharer was listed as 'of counsel' to disqualified attorney)."; "This is an inherently factual inquiry turning upon the unique facts and circumstances of particular office-sharing relationship. But it is important to recognize that office-sharing arrangements can, in certain circumstances, create conflict issues potentially disqualifying the attorneys participating in those arrangements." (emphasis added)).

- California LEO 1997-150 (1997) (analyzing the ethics implications of lawyers not in the same law firm sharing office space; "The Committee has been requested to opine on the following facts. Attorney A and Attorney B enter into a space-sharing agreement. They have not formed a law firm, but they share a receptionist and reception area, and common library and conference room facilities. Their names are listed separately in the building directory and each has her own stationery, business cards, retainer agreements and bank accounts. Each attorney only works on matters for her own clients. They are considering hiring a paralegal and a secretary." (footnote omitted); "Attorneys sharing space must take reasonable steps under the circumstances to ensure that their clients and potential clients are not deceived, misled or confused regarding the nature of their relationship. Attorneys who share office space or services also must take reasonable steps under the circumstances to protect each client's confidence and secrets. If attorneys do not address these issues sufficiently, they may violate their obligation to maintain clients' confidential information."; "The nature of the protective steps which must be undertaken to maintain the clients' confidential information will depend on all of the circumstances including, for example: the identity of the client and the nature of the confidential information; the ease of access others would have to that information; the experience and apparent professionalism of the other attorneys and staff and their demonstrated sensitivity to the confidence and secrets of their own clients; the need to communicate particular information to shared personnel; and the existence of known conflicts between clients of different attorneys." (emphasis added); "As in any law office, careful supervision of office personnel and maintenance of proper office procedures help fulfill the attorney's obligation to maintain the clients' confidential information and duty to represent the client competently. Attorneys who share personnel or space should agree upon a clear delineation of responsibility for tracking correspondence, calendaring, filing, client communications and the handling of funds -- separately, and with due regard for clients' confidential information. Each attorney has the obligation to supervise his or her subordinates and employees."; "This opinion does not address how the requirements of rule 3-310 (Avoiding the Representation of Adverse Interests) might apply to a shared office or staff arrangement. The Committee recognizes, however, that conflict of interest rules might apply to

> shared office or staff situations, depending on the facts, particularly if the attorneys have created a partnership by estoppel by holding themselves out as a partnership, or otherwise have led a client or potential client reasonably to believe that the attorneys are functioning as a law firm." (emphasis added)).

Third, several bars have explained that lawyers sharing offices in an arrangement that might compromise this important confidentiality duty may be considered one firm for conflicts of interest purposes.

For instance, the Restatement takes the position that a lack of strict confidentiality guidelines among those sharing office space will result in imputation of one lawyer's individual disqualification to all of the lawyers sharing the office.

> Unless all affected clients consent to the representation under the limitations and conditions provided in § 122 or unless imputation hereunder is removed as provided in § 124, the restrictions upon a lawyer imposed by §§ 125-135 also restrict other affiliated lawyers who . . . share office facilities without reasonably adequate measures to protect confidential client information so that it will not be available to other lawyers in the shared office (emphasis added).

Restatement (Third) of Law Governing Lawyers § 123(3) (2000) (emphasis added). A short comment provides some explanation.

> When lawyers share office space, they typically share some common costs such as rent, library, and office salaries, but not income from work on cases. Subsection (3) governs imputation of conflicts in such arrangements. The key inquiry is whether the physical organization and actual operation of the office space is such that the confidential client information of each lawyer is secure from the others. Where such security is provided and where no other plausible risks to confidentiality and loyalty are presented, the conflicts of the lawyers are not imputed to each other by reason of their office-sharing arrangement. On the other hand, lawyers who do associate in a matter, share fee income, or hold themselves out as partners or members of a

professional corporation (even if that is not a fact) are held to the stricter rule applicable to members of a firm.

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

Bars take the same approach.

- Oregon LEO 2005-50 (revised 4/2014) ("Lawyer A and Lawyer B, who maintain independent practices, share office space. Both lawyers handle personal injury litigation."; "May Lawyer A represent the plaintiff in a lawsuit in which Lawyer B represents the defendant?"; "[A]s long as Lawyer A and Lawyer B (1) do not hold themselves out to the public as members of the same firm through joint advertising, a joint letterhead, or otherwise; (2) respect the confidentiality of information relating to the representation of their respective clients and cause their employees to do so; and (3) keep their respective files separately, there is no reason why Lawyer A and Lawyer B cannot represent opposite parties. See also Oregon RPC 1.0(d)."; "Would the answer be different if Lawyer A and Lawyer B share a common employee who is in possession of confidences and secrets of both Lawyer A's clients and Lawyer B's clients?"; "We do not believe that these requirements prohibit office sharers from using the same telephone system or the same file room as long as the files are physically separated and the appropriate limitations on access to files are made clear to, and are observed by, the lawyers and their employees. If a common telephone system is used, however, office sharers may not represent adverse parties unless they have taken steps to assure that telephone messages that contain confidential client information or legal advice (i.e., information relating to the representation of a client) are not given to or transmitted by shared personnel. Similarly, mail must be not opened by shared personnel."; "If, on the other hand, Lawyer A and Lawyer B share a secretary or other employee who is in possession of the confidences or secrets of both Lawyer A's clients and Lawyer B's clients, or if any of the other steps outlined above are not taken, the simultaneous representations of the plaintiff and the defendant would be prohibited by either if not both Oregon RPC 1.6 and Oregon RPC 1.7.") (emphasis added).

- Kansas LEO 99-1 (3/9/99) (analyzing the implications of lawyers who are not in the same firm sharing office space; "A law firm with six partners dissolves the partnership, and two new firms are formed, one with two lawyers from the former firm and the remainder in the second firm. The two new firms desire to remain in the same location and share office space, the telephone number and the receptionist and runners. The firms are in a bank building, and the directory of the bank identifies the two firms by new names. In the future, the new firm names will be placed in the reception area too. The firms share reception areas, conference rooms, central filing storage areas, copiers and fax machines."; "The firms do not share computer networks and have different software. Accounting programs are separate, as are the financial records."; "The use of a common reception area by two law firms which formerly was a single partnership does not, by itself, create confidentiality problems for a lawyer, so long as counsel refrains from discussing client matters in front of other clients or third parties, files are segregated, personnel are not shared, and the firms take reasonable steps to insure clients are apprised of the arrangement. The firms cannot imply through their firm names or other documents that they are a 'partnership' of any sort. Fee sharing is permissible, and conflicts on future clients where different sides of the same controversy are represented do not automatically occur if appropriate separation is maintained."; "Receptionists common to both firms, if any, should be careful to use the generic greeting, 'law office' rather than firm names. This is common when multiple solo practice lawyers office together, and is even more important in a multiple firm setting. It is especially true if associating solo practice lawyers used a common telephone number. However, since we are discussing firms here, we assume the firms will use different main phone numbers." (footnote omitted); "The use of a common reception area does not, by itself, create confidentiality problems for a firm. It may present to confusion for client[s] of both firms sitting in the same area." (emphasis added); "As to the receptionist taking calls and announcing the client to the lawyer, technology may best sole that problem of screening calls while maintaining client confidences in a multiple firm situation." (emphasis added); "If the firms share a common file room, the argument can be made that clients cannot be assured of confidentiality. At the least, the firms are barred from representing conflicting interests. Arguably, staff and members of each law firm could access each other's client information. The firms might be able to mitigate this fact if files involving conflicting adversaries are filed separately from the common area. File security should be covering in engagement letters and initial interviews." (emphasis added); "Having a common receptionist is one thing. Common support staff is another, according to many ethics treatises. There is a line of thinking that says there must be more than a mere showing that lawyers worked in close proximity or shared an office and secretary in order to conflict out. However, the question of conflict is avoided altogether is office staff other than reception are not shared between the two firms." (footnotes omitted); "The facts indicate the two firms have separate computers. That is appropriate. Computers are electronic file holders and unless the security systems are first rate, there is no difference between a computer file and a paper file in a file cabinet."; "Office sharers should use secure password-protected computers and this is especially the case when a firm is sharing office space with a nonlawyer."; "Faxes require either restricted access by the two firms, or make it clear to all clients through engagement letters that fax machines are not secure and that one one never knows who is the first to read the incoming fax."; "Office sharing and personnel sharing gives rise to potential conflict situations between adversarial clients of the two firms. Rule 1.10 provides that lawyers associated in a 'firm' may be disqualified from knowingly representing a client if any other lawyer in the firm is prohibited from doing so. Two firms working together have even more difficult and surmountable problems. Generally, lawyers in the same office can represent conflicting sides but the main rule is that the client understands the situation and from the client's perspective, there is no adverse effect on the duty to zealously represent the client; however, lawyers who share common secretarial and filing facilities may not qualify from the client's perspective for this interpretation. Obviously, caution must be used and judgment exercised in a sound manner. Some conflicts cannot be resolved by client consent." (footnote omitted) (emphasis added)).

- Rhode Island LEO 93-66 (9/14/93) ("Attorneys A, B, C and D share office space and operate four (4) separate practices. Each attorney maintains a separate client account and has separate business cards, stationery, files and telephone directory listings. They do, however, share secretarial and office expenses. The attorneys display a sign in front of their office which states 'Law Offices' and lists vertically each attorney's name. Beneath their names, the sign states the phrase 'An Association of Independent Attorneys.' From time to time, they also place an advertisement in a local newspaper which contains the same phrase after their names."; "In this situation, the Panel is of the opinion that the inquiring attorneys are not stating or implying that they are a partnership. <u>The phrase 'an association of independent attorneys,' as stated on the attorneys' office sign and in their advertisement, does not violate the above stated Rules [7.1 & 7.5]. However, for the purpose of Rule 1.10, entitled 'Imputed Disqualification,' they will be regarded as a firm</u>. The comment to Rule 1.10 indicates that any two (2) or more lawyers who list their names successively in any form of advertising will be regarded as a firm for the purposes of Rule 1.10, notwithstanding disclaimers such as 'an association of independent attorneys.'"; "With respect to the propriety of the attorneys sharing secretarial services, the Panel believes that such an arrangement is not directly addressed by the Rules. The Panel cautions, however, that there is a potential risk of compromising client confidences under this practice. Whether confidentiality is preserved depends on the attorneys' access to information and is a question of fact depending on the particular circumstances.") (emphasis added).

- Colorado LEO 89 (9/21/91) (applying the ethics implications of lawyers not in the same firm sharing office space; "Office sharing is a common way for lawyers to share facilities, to reduce operating overhead and to create collegiality among lawyers. However, lawyers should be aware of the ethical issues inherent in office sharing situations, particularly conflicts of interest, protection of client confidences and secrets, and proper letterheads and names in order not to mislead clients and others. Because of the variety of office sharing relationships, the different client interests at stake in each instance, and the interplay of the several ethical duties, determining the proper course of conduct for the lawyers to follow will depend upon a thorough analysis of the facts in each situation."; "[O]ffice sharing attorneys should avoid representing clients with actual or potential conflicting interests to each other since this practice is rife with ethical problems."; "Although office sharing lawyers generally are not considered 'a firm,' analysis under DR 5-105(D) and Proposed Model Rule 1.10 is helpful in determining whether a lawyer should disqualify himself or herself by declining the representation of a potential client. <u>The vicarious disqualification provisions of DR 5-105(D) apply to a partner or associate or 'any other lawyer affiliated with' the lawyer who is required to decline employment. For purposes of imputed disqualification, this latter phrase reasonably may be interpreted to apply to office sharing attorneys in some circumstances.</u>" (emphasis added); "<u>Ethics opinions issued by other states have relied upon rules of imputed disqualification to disqualify one office sharing lawyer from representing a particular client when the adverse party is represented by another lawyer in the same suite of offices.</u> <u>See</u>, Wisconsin Bar Opinion E-86-2 (3- 86); Alabama Bar Opinion 83-178 (12/21/83) (lawyer may not represent a wife in action related to divorce in which lawyer sharing office represented husband); Illinois Bar Opinion 783 (6/28/82) (criminal defense attorneys are precluded from representing defendants being prosecuted by space sharing municipal prosecutor)." (emphasis added); "In order to avoid ethically impermissible conflicts of interest, lawyers in office sharing situations may wish to take several precautionary steps. First, they should ascertain, to the extent possible, the nature of the practices of other office sharing attorneys in the same suite to determine whether any actual or potential conflicts are likely to arise. In some office sharing situations, the attorneys represent clients in completely different areas of practice and there is little if any chance of a conflict arising. If the office sharing lawyer determines areas of conflict may exist, the lawyer can either decline employment in all cases of possible conflict or take certain precautions to ensure that his or her office sharing arrangement will not be considered an 'affiliation' or 'firm' for purposes of imputed disqualification. The more lawyers in an office sharing arrangement present themselves to the public in a way suggesting they are a firm, the more likely the vicarious disqualification rules will apply."; "To reduce the likelihood of being viewed as a firm, the office sharing attorney should take various measures to ensure that his or her practice is completely separate and distinct from that of other office sharing attorneys and that there are no unnecessary financial entanglements. A lawyer must restrict access to client files and information from other office sharing lawyers. If, however, the lawyer wants another lawyer in the suite to provide coverage, then the clients should consent to such arrangement and restricted access may not be necessary. *. . .* Additionally, the lawyers should further protect the client by restricting computer, telephone, fax machine and copier access. When there is a reasonable possibility of a conflict of interest arising, the lawyer may also wish to discuss the office sharing situation with the client and inform the client in writing of specific procedures he or she has taken to ensure there will be no actual conflict of interest."; "Notwithstanding these precautions, the lawyer should be aware that there is a substantial risk of disqualification if in fact he or she is 'too closely involved with' the other office sharing attorneys or their clients." (emphasis added); "To ensure confidentiality, the office sharing lawyer may need to take certain measures in addition to restricting access to files, such as restricting access between the telephone systems of the separate practices; arranging the reception area such that one lawyer's secretary is not able to overhear confidences from another lawyer's clients; not leaving confidential materials in the copier area or library for inspection by other lawyers; using security devices to restrict access to computers; avoiding sharing of staff to the extent possible, particularly secretaries and paralegals; and informing clients of the space sharing arrangement and of measures undertaken to avoid any compromise of confidentiality." (emphasis added)).

- New York County LEO 680 (9/14/90) ("May a group of lawyers who practice individually in a single office building form a 'lawyers' cooperative,' using the 'logo' 'Able, Baker & Charles'? What rules govern lawyers who share office space?"; "Several lawyers maintain individual practices in a single office building. They wish to know whether they may ethically form a 'lawyers' cooperative' in which each would continue to practice alone and bill his or her clients separately, but would use the same stationery and practice under the name of 'Able, Baker & Charles,' which are the names of three members of the 'cooperative.' They do not want to form a firm or have professional liability for the other members of the 'cooperative.' If work were done for a client by more than one attorney in the office, it would be done pursuant to a retainer agreement in which the client would acknowledge that the attorneys are being retained separately in connection with the matter."; "Although lawyers who share office space but are not partners may not use a name that looks like a partnership name, in certain cases they may share legal fees."; "Even though lawyers who share office space are not partners, they may be treated as if they were partners for some purposes under the Code (particularly the provisions for vicarious disqualification in the event of a conflict of interest) if their office sharing arrangements give them access to each other's files and, thus, to the confidences and secrets of each other's clients."; "Lawyers who merely share office space and who do not share joint responsibility and liability for their cases are not partners and may not practice under a firm name. They must comply with the provisions of DR 2-107(A) with respect to division of fees from client referrals. Nevertheless, they may be treated as if they were a firm for some purposes, such as conflicts of interest and vicarious disqualification.") (emphases added).

Best Answer

The best answer to this hypothetical is **YES**. **B 7/17**