CONFIDENTIALITY: KEY ISSUES (PART I)

Hypotheticals and Analyses*

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

TABLE OF CONTENTS

Strength of the Ethics Duty

Hypothetical 1

Last week a young man called you to discuss the possibility of your representing him in a matter that he said over the phone was tremendously important. You met with the prospective client for about two hours in your office. The prospective client told you that he formerly worked at a large company that deliberately adds radioactive raw material to a widely-sold consumer product. He knows firsthand about this practice, although he was not personally involved in it. You quickly agreed to help him determine how best to "blow the whistle" on this wrongdoing. However, this morning he called to say that he had decided not to "go public" with his former employer's practice -- because his wife worries that his former employer might target him for retribution.

What do you do?

(A) You must disclose the public health hazard.

(B) You may disclose the public health hazard, but you don't have to.

(C) You may not disclose the public health hazard.

(C) YOU MAY NOT DISCLOSE THE PUBLIC HEALTH HAZARD (PROBABLY)

Analysis

No profession enforces as strong a confidentiality duty as the legal profession. Although the ethics rules and the parallel evidentiary attorney-client privilege contain some exceptions, both doctrines take an otherwise absolutist approach.

Societal Benefit and Cost

The 1969 ABA Model Code of Professional Responsibility articulated the societal purpose of the confidentiality duty.

> Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information

> beyond that volunteered by his client. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.

ABA Model Code of Professional Responsibility, Canon 4, EC 4-1 (emphasis added) (footnotes omitted).

The 1983 ABA Model Rules contain essentially the same explanation.

> A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. . . . . This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

ABA Model Rule 1.6 cmt. [2] (emphases added).

Case Law and Ethics Opinions

Case law and ethics opinions provide other examples of the confidentiality duty's strength.

A 1962 Minnesota case addressed defense lawyers' obligation upon learning from a doctor that the plaintiff suffered from an aorta aneurysm possibly caused by the

accident underlying plaintiff's lawsuit.[1] Although allowing the plaintiff to rescind a settlement agreement he made without knowing of the aneurysm, the court could not have been any clearer about the defense lawyers' ethics duty.

> [N]o canon of ethics or legal obligation may have required them [defense lawyers] to inform plaintiff or his counsel with respect thereto, or to advise the court therein.

Spaulding v. Zimmerman, 116 N.W.2d 704, 710 (Minn. 1962).

About 20 years later, the California Bar dealt with a lawyer's obligation upon learning from his retained engineer that a non-client's structure "may be unstable in the event of an earthquake."[2] The Bar acknowledged that it was not dealing with a situation in which the lawyer was "satisfied beyond a reasonable doubt" that there was an immediate danger to human life. Nevertheless, the Bar noted the lawyer's moral dilemma -- and emphasized the lawyer's duty of confidentiality.

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[1] Spaulding v. Zimmerman, 116 N.W.2d 704, 706, 710 (Minn. 1962) (addressing the following situation: "On appeal defendants contend that the court was without jurisdiction to vacate the settlement solely because their counsel then possessed information, unknown to plaintiff herein, that at the time he was suffering from an aorta aneurysm which may have resulted from the accident, because (1) no mutual mistake of fact was involved; (2) no duty rested upon them to disclose information to plaintiff which they could assume had been disclosed to him by his own physicians."; explaining that the injured passenger filed a lawsuit, and filed another lawsuit after learning about the diagnosis; explaining that the court could essentially void the settlement; "The court may vacate such a settlement for mistake even though the mistake was not mutual in the sense that both parties were similarly mistaken as to the nature and extent of the minor's injuries, but where it is shown that one of the parties had additional knowledge with respect thereto and was aware that neither the court nor the adversary party possessed such knowledge when the settlement was approved."; "It is undisputed that neither he nor his counsel nor his medical attendants were aware that at the time settlement was made he was suffering from an aorta aneurysm which may have resulted from the accident. The seriousness of this disability is indicated by Dr. Hannah's report indicating the imminent danger of death therefrom. This was known by counsel for both defendants but was not disclosed to the court at the time it was petitioned to approve the settlement. While no canon of ethics or legal obligation may have required them to inform plaintiff or his counsel with respect thereto, or to advise the court therein, it did become obvious to them at the time that the settlement then made did not contemplate or take into consideration the disability described. This fact opened the way for the court to later exercise its discretion in vacating the settlement and under the circumstances described we cannot say that there was any abuse of discretion on the part of the court in so doing under Rule 60.02(6) of the Civil Procedure.").

[2] California LEO 1981-58 (1981).

> The attorneys here are in a difficult position. Morally, they may want to warn third parties of potential risks. Personally, they may want to protect themselves against future claims. Professionally, however, the standards of professional ethics and Business and Professions Code section 6068, subdivision (e), both require that the attorneys' primary responsibility is to maintain their own loyalty to their client and to protect the client's secret. This responsibility may not ultimately give the attorneys a safe harbor from liability to third parties, but their duty is to safeguard the client's secret regardless of the risk to themselves. . . . If the nondisclosure of the information ultimately results in the attorneys becoming liable to third parties, that is a risk of practicing law. The primary responsibility of the attorneys here is to their client, and not to third parties. Being the recipient of the client's secrets, the attorneys must safeguard those secrets, even if they ultimately incur liability to third parties because they fulfill their ethical and statutory duties.

California LEO 1981-58 (1981) (emphases added).

The Virginia Bar dealt with a particularly acute situation in a 1994 legal ethics opinion.[3] The lawyer's question to the Virginia Bar described an alarming situation.

> A former employee of a major [redacted] company visits an attorney's office, and advises counsel that he wishes assistance in making public certain information he has about irregular, and possibly illegal actions of his former employer. The client alleges that, following the melt down of a nuclear reactor in a major Eurasian nation, his former employer purchases large quantities of fallout-tainted product [redacted] with highly elevated radiation levels, and despite the company's own awareness of the product [redacted] was so contaminated, inserted a portion of their purchase into a [redacted] brand, and sold the rest to other companies for possible consumer use. The client is completely innocent of complicity of any sort in the

[3] Virginia LEO 1607 (9/16/94) (explaining that a former employee hired a lawyer to assist in disclosing "irregular, and possibly illegal actions of his former employer" involving the company's knowing use of radioactive materials in consumer products; noting that former employee learned of this conduct inadvertently, and was not involved in the company's wrongful actions; concluding that when the former employee later decided not to disclose the company's wrongful conduct, the lawyer must follow the client's direction to keep the information confidential despite the public health risk, because none of the exceptions to the confidentiality rule apply.).

> company's decisions or actions in this matter, having gained knowledge of the circumstances inadvertently.
>
> Several days later, the client's wife prevails on the client not to risk his new employment situation (the former employer may have some leverage with the current employer) by making public his knowledge of these events, and the client advises counsel not to go forward in making the information public.
>
> Counsel is now [redacted] deeply concerned about his obligation to society, as opposed to his obligation to the client. There may be hundreds of thousands [redacted] who should be made aware of the fact that they may have consumed products with high radiation levels, such that they can consider having physical checkups [redacted] more often than they might have had otherwise, to detect early any illness which might have been caused by the product. [redacted] Stated another way, the release of this information to the public now has the hypothetical potential to save many lives later. Yet, to release the information without the original client's permission could be viewed as a breach of confidentiality, and could conceivably result in him losing his present employment.

Request for Legal Ethics Opinion to the Va. State Bar Standing Comm. On Legal Ethics, June 23, 1994 (emphases added).

The lawyer clearly sought the Bar's permission to disclose the possibility that hundreds of thousands of consumers may be harmed by radiation poisoning.

> The future health effects to large numbers of persons morally outweighs the possible effects the release of this information may have on the client's job. Had counsel been told the client's employer planted small nuclear devices in locations all over the country which might 'go off' at any point in the future, counsel believes that he should be obligated to reveal such information, even if his client was not criminally liable, and counsel believes that the analogy is apt.
>
> Lives currently at risk should be more important than attorney-client privilege.

Id. (emphases added).

The Virginia Bar bluntly rejected the lawyer's plea, emphasizing the lawyer's absolute duty of confidentiality.

> You have asked the committee to opine whether, under the facts of the inquiry, counsel may make public the information he was provided by the client, in the absence of the client's permission.
>
> The appropriate and controlling Disciplinary Rule related to your inquiry is DR 4-101, which provides for the preservation of client confidences and secrets.
>
> The information possessed by counsel is confidential, received within the attorney-client relationship. Canon 4 provides, with few exceptions, for the preservation of such client confidences and secrets.
>
> The facts indicate that the client is innocent of any complicity in the company's decisions or actions in the matter. The facts do not indicate that the client has perpetrated a fraud upon a tribunal, or that he intends to commit a crime, related to this matter. Therefore, the exceptions to maintaining confidentiality, Under DR 4-101(D) do not apply.
>
> Thus, the committee opines that counsel may not reveal the information provided by the client, regardless of counsel's motivation, absent the client's permission.

Letter from Va. State Bar Standing Comm. on Legal Ethics Opinion No. 1607 (9/16/94) (emphasis added).

It is difficult to imagine a more appropriate scenario for recognizing that public health trumps lawyers' confidentiality duty. However, the Virginia Bar's holding highlighted lawyers' absolute confidentiality duty.

Best Answer

The best answer to this hypothetical is **(C) YOU MAY NOT DISCLOSE THE PUBLIC HEALTH HAZARD (PROBABLY)**.

b 2/14

Source of the Information

Hypothetical 2

Your state's chief justice just appointed you to a Commission charged with examining and possibly amending your state's ethics rules. You start tackling the confidentiality issues first, because every Commission member recognizes that duty's importance.

Your Commission must first decide whether lawyers' confidentiality duty extends to information from various sources.

Should lawyers' ethics confidentiality duty protect information relating to the client that the lawyer obtains:

(a) From the client, even if the client does not ask the lawyer to maintain its confidentiality?

(A) YES

(b) From sources other than the client?

(A) YES

(c) From the client or other sources, even if the information is "generally known"?

MAYBE

(d) From the client or other sources, even if the information is in the public record?

MAYBE

Analysis

Ethics rules and other authorities defining the scope of client-related information lawyers must protect focus on three variables: (1) the information's source; (2) the time at which the lawyer obtained the information; and (3) the information's content (judged by whether disclosure would harm the client). The first two variables involve what could

be seen as the information's input to lawyers, and the third variable involves lawyers' output.

This hypothetical addresses the first element -- the information's source.

The 1983 ABA Model Rules of Professional Conduct contain a remarkably broad view of information subject to lawyers' confidentiality duty.

> A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent [or] the disclosure is impliedly authorized [by the Rule's exceptions].

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

Two comments provide guidance.

> The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only 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.
>
> Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

ABA Model Rule 1.6 cmt. [3], [4] (emphases added).

Best Answer

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

b 2/14

Timing of the Information

Hypothetical 3

You frequently socialize with real estate developers -- some of whom hire you to handle discrete short-term projects. A few recent incidents have prompted questions about whether your confidentiality duty extends to information you learn before or after representing a client.

(a) If you begin to represent a developer in a shopping center project, does your confidentiality duty cover information you learned from the developer at a wine tasting event six month before the developer approached you to represent him?

MAYBE

(b) Two years ago, you represented a local landowner in winning a breach of contract action, but have not represented her since then. Yesterday, you received a letter from one of the jurors in that case, who accused your client of improper contacts with the juror during the trial. Does your confidentiality duty cover that information?

MAYBE

Analysis

Ethics rules and other authorities defining the scope of client-related information lawyers must protect focus on three variables: (1) the information's source; (2) the time at which the lawyer obtained the information; and (3) the information's content (judged by whether disclosure would harm the client). The first two variables involve what could be seen as the information's input to lawyers, and the third variable involves lawyers' output.

The issue here involves information lawyers learn before a client approaches the lawyer to raise the possibility of an attorney-client relationship.

Most states follow the ABA Model Rules approach, which seems to have no temporal limitation.

However, some states still follow a variation of the ABA Model Code approach.

- North Carolina Rule 1.6(a) ("A lawyer shall not reveal information acquired during the professional relationship of the client." (emphasis added); otherwise following the general ABA Model Rules formulation).

- Virginia Rule 1.6(a) ("A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or 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 unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation." (emphasis added)).

- District of Columbia Rule 1.6(b) ("'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." (emphasis added)).

- Georgia Rule 1.6(a) ("A lawyer shall maintain in confidence all information gained in the professional relationship with a client, including information which the client has requested to be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client." (emphasis added)).

New York follows its own unique approach, using both the ABA Model Code and the ABA Model Rules approach -- which presumably has the effect of taking the latter's broad view.

- New York Rule 1.6(a) (b) ("A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person . . . . 'Confidential information' consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. 'Confidential information' does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates." (emphasis added)).

A 2010 Indiana case held that information a lawyer acquired from a social acquaintance became retroactively covered by the lawyer's confidentiality duty when one of the lawyer's partners began to represent the acquaintance.

- In re Anonymous, 932 N.E.2d 671, 672, 673, 673-74, 674 (Ind. 2010) (issuing a private reprimand of a lawyer for disclosing confidences that the lawyer learned from a social acquaintance before anyone at the lawyer's firm represented the social acquaintance as a client; explaining that "Respondent [lawyer] represented an organization that employed 'AB.' Respondent became acquainted with AB though this connection. In December 2007, AB and her husband were involved in an altercation to which the police were called, during which, AB's husband asserted, she threatened to harm him. In January 2008, AB phoned Respondent and told her about her husband's allegation and that she and her husband had separated."; noting that AB later hired a lawyer in the same firm to represent her; "In a second phone call that month, AB asked Respondent for a referral to a family law attorney. Respondent gave AB the name of an attorney in Respondent's firm."; noting that AB and her husband later reconciled; relating that the respondent lawyer later disclosed in a social setting what he had learned from AB during their conversation before AB hired the lawyer's firm; "In March or April 2008, Respondent was socializing with two friends, one of whom was also a friend of AB's. Unaware of AB's reconciliation with her husband, Respondent told her two friends about AB's filing for divorce and about her husband's accusation. Respondent encouraged AB's friend to contact AB because the friend expressed concern for her. When AB's friend called AB and told her what Respondent had told him, AB became upset about the revelation of the information and filed a grievance against Respondent."; rejecting the respondent lawyer's argument that he had learned the information from AB outside a professional relationship, which meant that the information was not covered by the respondent lawyer's ethics duty of confidentiality; "Respondent's revelation of the information at issue was a violation of Rule 1.9(c)(2). Respondent argued to the hearing officer that AB initially gave her the information at issue for the purpose of seeking *personal* rather than professional advice and only later phoned her again to ask for an attorney referral. Thus, she argued, the information was not confidential when AB first disclosed it to her, subsequent events did not change its nature, and she violated no ethical obligation in later revealing it." (emphasis added indicated by underscore); holding that the information became subject to the respondent lawyer's ethics duty of confidentiality when AB hired a lawyer in his firm; "The information at issue, however, was disclosed to Respondent not long before the second call in which AB asked for an attorney referral and Respondent recommended an attorney from her firm. At that point, if not before, AB became a prospective client under Rule 1.18. The formation of an attorney-client relationship with Respondent's firm followed immediately

> thereafter, and the information at issue was highly relevant to the representation. Respondent then revealed the information with knowledge that her firm had been retained to represent AB in the matter. Under these circumstances, we conclude that once AB became a prospective client, the information became subject to the confidentiality protections of the Rules." (emphases added); also rejecting the respondent lawyer's argument that the information must not have been confidential because AB shared it with others; "Respondent presented evidence that AB disclosed the information at issue to others, including some of AB's co-workers. Respondent argued to the hearing officer that AB's disclosure of the information to others indicated that AB's disclosure to Respondent in the first phone conversation was personal rather than professional in nature and not intended to be confidential. However, the fact that a client may chose [sic] to confide to others information relating to a representation does not waive or negate the confidentiality protections of the Rules, which we have found apply to the information at issue."; also rejecting the lawyer's argument that the information was not confidential because it was in the public record; "There is no evidence that this information was contained in any public record. Moreover, the Rules contain no exception allowing revelation of information relating to a representation even if a diligent researcher could unearth it through public sources.").

As in other areas, the ABA Model Rules take a far broader approach than the ABA Model Code. The ABA Model Rules seem to place no temporal limitation on the information lawyers must maintain as confidential. The Restatement agrees with the ABA Model Rules approach on this issue.

Best Answer

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

b 2/14

Content of the Information

Hypothetical 4

Your law firm recently hosted a cocktail party for members of your local bar association. Some of the guests seemed to be a bit tipsy by the end of the party, and you wonder whether some of them violated their confidentiality duty.

(a) Did one of your guests violate the ethics rules by identifying one of her clients, and telling you that the client is secretly planning to divorce his socialite wife next year?

(A) YES

(b) Did one of your guests violate the ethics rules by identifying one of his clients, and telling you that the client was born in Nebraska (after you tell him that you were born in Nebraska)?

MAYBE

(c) Did one of your guests violate the ethics rules by identifying one of his clients, and telling you that the client's picture was on the front page of the morning newspaper -- cheering for the Green Bay Packers at a subzero game being played at Lambeau Field?

MAYBE

Analysis

Ethics rules and other authorities defining the scope of client-related information lawyers must protect focus on three variables: (1) the information's source; (2) the time at which the lawyer obtained the information; and (3) the information's content (judged by whether disclosure would harm the client). The first two variables involve what could be seen as the information's input to lawyers, and the third variable involves lawyers' output.

(a)-(c) This hypothetical addresses the third element -- the information's content (judged by whether disclosure would harm the client).

This factor can act independently of the others. For instance, a lawyer might harm her client by disclosing information that is generally known or on the public record. On the other hand, a lawyer might not harm her client by disclosing private information that no one else knows.

The 1969 ABA Model Code of Professional Responsibility prohibited disclosure of "confidences" or "secrets."

> 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) (emphasis added).

Although the term "confidence" did not explicitly include information whose disclosure would harm the client, that term covered a very narrow range of privileged communications between clients and lawyers. It would be easy to presume in nearly every situation that disclosing privileged communications would harm the client. After all, the privilege arose in Roman times and continues to exist today mainly to encourage clients' complete and totally frank disclosure of facts to their lawyers -- which enables the lawyers to provide helpful and socially beneficial advice to the clients.

The ABA Code's definition of "secret" included information the client asked the lawyer not to disclose, as well as information whose disclosure would harm the client.

The former presumably covered information that the client believed would cause him or her harm if disclosed -- which is why the client would request the lawyer not to

disclose it. Although it is possible that a client might have an idiosyncratic desire to avoid even harmless facts about the client being disclosed, it generally would seem safe to conclude that clients would only ask lawyers to keep confidential information that would cause some harm if the lawyer disclosed it.

Of course, most tellingly, the ABA Model Code applied lawyers' confidentiality duty to any information whose disclosure "would be embarrassing or would be likely to be detrimental to the client." This included information that the client did not specifically ask the lawyer to keep confidential, thus requiring the lawyer's judgment about the information's content and the likely effect of its disclosure.

In contrast to the ABA Model Rules (discussed below), the ABA Model Code covered information completely unrelated to the representation -- if the lawyer gained the information "in the professional relationship" and the client either asked the lawyer not to disclose it or the disclosure "would be embarrassing or would be likely to be detrimental to the client." ABA Model Code DR 4-101(A). This presumably included personal information not related to the representation.

All in all, the ABA Model Code generally took the position that the ethics rules mostly prohibited disclosure that would harm the client in some way.

The ABA Model Rules approach to the content issue seems ludicrously overinclusive and underinclusive at the same time.

The ABA Model Rules seem overinclusive because the main confidentiality rule says nothing about the content of the information that might or might not be disclosed, or any possible ill effects on the client.

> A lawyer shall not reveal <u>information relating to the representation of a client</u> unless the client gives informed

> consent [or] the disclosure is impliedly authorized [by the Rule's exceptions].

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

Similarly, the two pertinent comments do not address the information's content or the effect of its disclosure.

> The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only 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. See also Scope.
>
> Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

ABA Model Rule 1.6 cmt. [3], [4].

Thus, the ABA Model Rules prohibit disclosure of "information relating to the representation of a client" regardless of its content, and regardless of any harm that the disclosure might cause the client.

A lawyer would therefore face punishment under the ABA Model Rules for disclosing some harmless fact about the client, such as her hometown.

At the same time, the ABA Model Rules' definition of protected information seems grossly underinclusive. The definition covers "information relating to the representation of a client" -- which presumably excludes from confidential treatment information not related to the representation. This could include the client's confession of some personal wrongdoing, prejudice, or other embarrassing information unrelated to the representation. For instance, a transactional lawyer assisting a dentist in incorporating the dentist's practice might hear the dentist use the "N" word when referring to someone walking by the office, or see the dentist later checking into a cheap hotel with someone who is not his wife. That sort of information does not seem "relat[ed] to the representation," and therefore presumably falls outside the ABA Model Rules' definition of protected information.

If the ABA Model Rules definition of protected information intended to capture that type of embarrassing information in its definition, it would have used the phrase "information relating to a client" -- rather than the narrower phrase "information relating to the representation of a client." Or the Rules could have used the ABA Model Code formulation -- including within the definition "information gained in a professional relationship." Or the Rules could have used a formulation similar to the New York rule formulation -- including within the definition "information gained during or relating to the representation of a client." New York Rule 1.6(a) (emphasis added).

A 2009 Nevada legal ethics opinion provided an excellent description of the ABA Model Rules' expansion of lawyers' confidentiality duty over that imposed by the earlier ABA Model Code.

> In contrast to predecessor Rule DR-4-101, the language of Rule 1.6(a) has three remarkable omissions from the historical rule of confidentiality.; The first is the omission of the qualifier "confidential" between "reveal" and "information." As a result, all information relating to the representation of the client is thereby made confidential. Rule DR 4-101 protected the client from the lawyer's disclosure of "secrets," defined as: (1) information that the client "has requested to be held inviolate" . . . and (2) information that would be "embarrassing" or "likely to be detrimental" if revealed.; The second remarkable aspect of Rule 1.6(a) is that the confidential information need not be information that is "adverse" to the client. Rule DR 4-101(B)(3) did not prohibit the disclosure of nonadverse client information.; The final remarkable omission from Rule 1.6 is an exception for information already generally known or public. This element is contained in the Restatement's definition of "confidential client information," but omitted from Rule 1.6.; Thus, the language of Rule 1.6(a) is so broad that it is -- at least on its face -- without limitation. Rule 1.6(a) requires that ALL information relating to the representation of a client is confidential and protected from disclosure.

Nevada LEO 41 (6/24/09) (emphasis added).

The Nevada legal ethics opinion explained the practical consequences of the ABA Model Rules' more expansive definition.

> The Rule applies: (1) Even if the client has not requested that the information be held in confidence or does not consider it confidential. Thus, it operates automatically; (2) Even though the information is not protected by the attorney-client privilege; (3) Regardless of *when* the lawyer learned of the information -- even before or after the representation; (4) Even if the information is *not* embarrassing or detrimental to client; (5) Whatever the *source* of the information; i.e., whether the lawyer acquired the information in a confidential communication from the client or from a third person or accidentally; and (6) (In

> contrast to the attorney-client privilege) even if the information is already generally known -- or even public information.

Id. (emphasis added indicated by underscore).

The Nevada legal ethics opinion also provided numerous examples of harmless disclosures of "information relating to the representation of a client," concluding that

> [t]he Committee suggests that common sense should be part of Rule 1.6 and that lawyers should not be disciplined for a harmless disclosure.

Id.

A 2012 article in the ABA publication Litigation stressed the same theme as the 2009 Nevada legal ethics opinion, essentially concluding that the expansive ABA Model Rules' confidentiality duty could never be enforced as it is written.

> Most lawyers know that they owe a duty of confidentiality to their clients, and they think about the duty as encompassing two concepts. They have a good working knowledge of the attorney-client privilege, and they know that they are not supposed to reveal privileged communications. They also understand, but in a vaguer way, that a client may have confidences or secrets that are not privileged but that a lawyer should not reveal. For example, a lawyer may learn via a non-privileged communication that a client is quietly working on an invention or planning to leave her employment. The lawyer would understand that the client may not want to reveal such nonpublic information, and the lawyer would guard the secret.
>
> Most lawyers think that their duties end with such confidences and secrets. If you were to ask lawyers if they could talk freely about the identities of clients they are publicly representing (e.g., in a lawsuit) or about the facts of a case as described in open court or published opinions, most would say they could share anything that was in the public record without violating Rule. 1.6.

Edward W. Feldman, Be Careful What You Reveal, Model Rule of Professional Conduct 1.6, Litigation, Summer/Fall 2012, at 35 (emphasis added).

The Litigation article concluded with a prediction that bars' disciplinary authorities would not punish lawyers' disclosures that would plainly violate the ABA Model Rules -- but not cause the client any harm.

> "Stop, think, and use common sense" is hardly a clear standard. But the advice highlights how the breadth of the rule bumps into the natural gregariousness of lawyers. They want to share their stories, both to learn and to socialize. As a practical matter, it is unlikely that most such stories would lead to discipline unless the lawyer revealed some secret or other information that led to harm to a client (essentially the position of the Restatement). Yet, most lawyers want to comport with government ethical standards and steer clear of violations, even ones that fly below the disciplinary radar. Individual lawyers will need to make their own decisions about how much information they feel comfortable 'revealing' about their cases.
>
> In the end, there is a benefit to increasing circumspection within the profession. If lawyers spend less time talking about their cases and more time talking about subjects like politics, art, or sports, Model Rule 1.6 might have the unintended consequence of making lawyers more interesting to their friends and relative, and maybe even to one another.

Id. at 34 (emphasis added) It seems remarkable that a profession dedicated to writing specific and clearly articulated rules governing people's conduct could not draft rules that can be applied literally to its own members' own conduct.

Most states have moved to the ABA Model Rules formulation, which prevents disclosure of any protected client information, even if the disclosure would not harm the client.

Some states continue to use the old ABA Code formulation, or a variation of that approach.

New York takes such an approach.

- New York Rule 1.6(a) (b) ("A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person . . . . 'Confidential information' consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. 'Confidential information' does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates." (emphasis added)).

An interesting 2013 Virginia Supreme Court case added a constitutional dimension to the issue. Virginia follows the ABA Model Code approach.

- Virginia Rule 1.6(a) ("A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or 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 unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation." (emphasis added)).

In 2013, the Virginia Supreme Court dealt with a Richmond lawyer who blogged about criminal cases, including his own cases. The Virginia Supreme Court concluded that the lawyer had a First Amendment right to disclose what was on the public record -- even if it would embarrass his former criminal clients.

- Hunter v. Va. State Bar ex rel. Third Dist. Comm., 285 Va. 485, 501, 502, 502-03, 503 (Va. 2013) (holding that a lawyer who published a blog about criminal cases, including his own successful cases, must include a disclaimer required of lawyers' advertisement of their own successes, but was not prohibited by Virginia's Rule 1.6 from including in the blog information in the public record, despite the lawyer's former clients' complaint that the publication was embarrassing; noting that the Virginia State Bar held that the lawyer had violated Rule 1.6 by "'disseminating client confidences'" without

> the clients' consent, but that the three-judge panel of the circuit court had found that the Bar's interpretation of Rule 1.6 violated the First Amendment; quoting Virginia's Rule 1.6(a), which prohibits lawyers from revealing information protected by the attorney-client privilege "'or 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'" absent the client's consent; noting that "Hunter argues that the VBS's interpretation of Rule 1.6 is unconstitutional because the matters discussed in his blogs had previously been revealed in public judicial proceedings and, therefore, as concluded matters, were protected by the First Amendment. Thus, we are called upon to answer whether the state may prohibit an attorney from discussing information about a client or former client that is not protected by attorney-client privilege without express consent from that client. We agree with Hunter that it may not." (emphasis added); "It is settled that attorney speech about public information from cases is protected by the First Amendment, but it may be regulated if it poses a substantial likelihood of materially prejudicing a pending case."; "All of Hunter's blog posts involved cases that had been concluded. Moreover, the VSB concedes that all of the information that was contained within Hunter's blog was public information and would have been protected speech had the news media or others disseminated it."; "State action that punishes the publication of truthful information can rarely survive constitutional scrutiny. . . . The VSB argues that it can prohibit an attorney from repeating truthful information made in a public judicial proceeding even though others can disseminate this information because an attorney repeating it could inhibit clients from freely communicating with their attorneys or because it would undermine public confidence in the legal profession. Such concerns, however, are unsupported by the evidence. To the extent that the information is aired in a public forum, privacy considerations must yield to First Amendment protections. In that respect, a lawyer is no more prohibited than any other citizen from reporting what transpired in the courtroom. Thus, the circuit court did not err in concluding that the VSB's interpretation of Rule 1.6 violated the First Amendment." (emphasis added); upholding the three-judge panel's finding that the Bar's interpretation of Rule 1.6 violated the First Amendment).

Thus, under the ABA Model Rules a lawyer could be sanctioned for disclosing the identity of her client without the client's consent, even if the disclosure would not harm the client in any way. In fact, given the ABA Model Rules' astoundingly broad approach, that lawyer could face professional discipline for disclosing the client's identity

even if the lawyer's representation of the client had been widely publicized in the local newspaper's headlines every day for a month.

And the ABA Model Rules' failure to focus on a disclosure's detrimental impact results in an apparently deliberate but perverse possibility -- allowing lawyers to disclose embarrassing information about clients, as long as it is not information "relating to representation" of that client.

Best Answer

The best answer to **(a)** is **(A) YES**; the best answer to **(b)** is **MAYBE**; the best answer to **(c)** is **MAYBE**. b 2/14

Use of the Information

Hypothetical 5

For the past two years, you have represented a company which locates and develops cell phone tower sites. Not surprisingly, you have learned quite a bit about your city's zoning laws and real estate market.

Of course, you know that you cannot use such information to your client's disadvantage -- such as advising another client of prime real estate that has just come on the market and which your client would want to purchase.

However, you wonder whether you can use such information to assist another client or to your own advantage -- if that use would not disadvantage your client.

(a) If you discovered what appears to be a "loophole" in your city's zoning laws while working for the cell phone tower client, may you use that "loophole" to assist a client who builds nursing homes?

MAYBE

(b) If you found a prime cell phone tower site that your client tells you it has no interest in purchasing (because it will never need that site), may you purchase the site yourself -- with the hopes of earning a profit on its resale to a retailer?

MAYBE

Analysis

As with the issues of source, timing and content of protected client information, the various permutations of the ABA's ethics principles and the Restatement governing the use of client information reflect an amazing variation.

In sum: (1) the pertinent 1908 ABA Canon did not deal with use of client information; (2) the 1937 ABA Canon indicated that lawyers could not use client information to the client's disadvantage or to their own advantage, but did not deal with using the information to help another client; (3) the ABA Model Code flatly prohibited lawyers from using client information to the client's disadvantage, to a third person's

advantage or to their own advantage; (4) the ABA Model Rules prohibit lawyers from using client information to the client's disadvantage, but allow lawyers to use client information to a third person's advantage or to their own advantage; (5) the Restatement prohibits lawyers from using client information to the client's disadvantage or to their own advantage, but allow lawyers to use the information to assist a third party.

The ABA Model Rules follow the ABA Model Code's obvious prohibition on lawyers using (not just disclosing) client information to the client's disadvantage. The 1908 ABA Canon did not contain such a restriction, but the 1937 Canon added that concept.

But the ABA Model Rules differ dramatically from the ABA Model Code in dealing with lawyers' use of client information to help a third person or to help themselves.

Under the ABA Model Code approach, lawyers could not use client information to help third persons or themselves under any circumstances -- even if that use would not disadvantage the client.

The ABA Model Rules prohibit lawyers' use of client information only if it would disadvantage the client. In other words, under the ABA Model Rules approach, lawyers apparently can use client information to assist other clients or enrich themselves -- as long that does not harm the client. To this extent, the ABA Model Rules are more liberal than the ABA Model Code.

One might think that the ABA Model Rules' more liberal approach to lawyers' use of information to help a third party or themselves might result from the Rules' more expansive definition of protected client information than that found in the ABA Model

Code. That might account for some difference. For instance, the ABA Model Rules' broad definition of protected client information includes information that is "generally known" or even in the public record. It would be nonsensical to prohibit lawyers from using such information to assist third persons or themselves.

But the ABA Model Rules' liberal provision governing lawyers' use of protected client information does not just cover such widely known information. Under the ABA Model Rules, lawyers presumably can also use to a third person's advantage or their own advantage even the most intimate client confidential information -- as long as such use does not disadvantage the client. So the ABA Model Rules' expansive definition of protected client information does not seem to fully account for the Rules' expansive approach to lawyers' use of protected client information.

Most states have now adopted the ABA Model Rules approach, which prohibits lawyers' use of client information to the client's disadvantage, but allows such use to the advantage of third persons or to the lawyer's own advantage.

However, some states retaining all or some of the ABA Model Code's formulation have also kept the same approach as the ABA Model Code.

- District of Columbia Rule 1.6(a) ("[A] lawyer shall not knowingly: (1) reveal a confidence or secret of the lawyer's client; (2) use a confidence or secret of the lawyer's client to the disadvantage of the client; (3) use a confidence or secret of the lawyer's client for the advantage of the lawyer or of a third person." (emphasis added)).

Some states which take a hybrid approach have ended up with an odd combination of ABA Model Code and ABA Model Rules principles.

New York typifies this approach. It deals with the use of protected client information in both its Rule 1.6 and its Rule 1.8. Under New York Rule 1.6(a)

> A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person.

New York Rule 1.6(a) (emphasis added).

Virginia takes essentially the same approach. Virginia's definition of protected information parallels the ABA Model Code approach.

- Virginia Rule 1.6(a) ("A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or 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 unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation." (emphasis added)).

Virginia's Rule 1.8 uses the ABA Model Rule "information relating to representation of a client" language, but contains the ABA Model Code prohibition on lawyers using such information.

- Virginia Rule 1.8(b) ("A lawyer shall not use information relating to representation of a client for the advantage of the lawyer or of a third person or to the disadvantage of the client unless the client consents after consultation.").

Best Answer

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

b 2/14

Unsolicited Communications from Would-Be Clients

Hypothetical 6

Your law firm website bio has a link allowing visitors to send you an email. This morning you opened an email from someone seeking a lawyer to file a wrongful discharge case against a local company. You instantly recognized the company's name -- because your firm handles all of its employment work.

What do you do with the information you gained by reading the email?

(A) You must tell your client about what you read.

(B) You may tell your client about what you read, but you don't have to.

(C) You cannot tell your client about what you read, but instead must maintain its confidentiality.

(B) YOU MAY TELL YOUR CLIENT WHAT YOU READ, BUT YOU DON'T HAVE TO (PROBABLY)

Analysis

The ethics rules deal with lawyers' confidentiality duty in three phases of a relationship between a would-be client and a lawyer: (1) when a would-be client communicates unilaterally to the lawyer, and the lawyer has not responded; (2) when the would-be client and the lawyer consult about the possibility of the former retaining the latter; and (3) after the would-be client and the lawyer agree to create an attorney-client relationship.

ABA Model Rules 1.18 addresses the first two scenarios. In the third setting, the lawyer must comply with all the ethics rules, including the duty of confidentiality.

This hypothetical addresses the first phase.

In trying to deal with lawyers' duties in this context, the ABA added a Model Rule in 2002.

ABA Model Rule 1.18 (called "Duties to Prospective Client") now starts with the bedrock principle: lawyers owe duties only to someone who is a "prospective client." And a would-be client will be considered a "prospective client" only if he or she

> consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter.

ABA Model Rule 1.18(a).

The rule formerly used the word "discusses" rather than "consults." On August 6, 2012, the House of Delegates adopted the ABA 20/20 Commission's recommendation to change the word to "consults." ABA, House of Delegates Resolution 105B (amending Model Rules 1.18 and 7.3, and 7.1, 7.2 and 5.5). Interestingly, this change undoubtedly reflects would-be clients' increasing (if not nearly universal) use of electronic communications rather than telephonic or in-person communications. The word "discusses" implies the latter, while the word "consults" can include both electronic or in-person/telephonic communications.

A revised comment provides more guidance.

> A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. . . . In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. Such a person

> communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client lawyer relationship, and is thus not a "prospective client." Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client."

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

The timing of the ABA Model Rules' 2002 adoption of Rule 1.18 seems to reinforce the conclusion that new forms of electronic communication required a relatively new approach. The ABA's 2012 switch from the term "discusses" to "consults" clearly reflects the ubiquitous use of impersonal electronic communication.

The ABA Model Rules' rejection of any confidentiality (or loyalty) duty in this initial phase of dealings between a would-be client and a lawyer might seem counterintuitive, but also unavoidable -- given the possibility of mischief. If a would-be client could burden the recipient with a confidentiality duty (and perhaps a loyalty duty), clever would-be clients could try to "knock out" numerous lawyers in a single widely-sent email. The ease of transmitting electronic communications increases that possibility.

The same Rule provides limited confidentiality protection during the next phase of the relationship -- when would-be clients and lawyers begin to consult about a possible attorney-client relationship. And all of the ethics rules apply if an attorney-client relationship actually ensues.

Best Answer

The best answer to this hypothetical is **(B) YOU MAY TELL YOUR CLIENT WHAT YOU READ, BUT YOU DON'T HAVE TO (PROBABLY)**.

b 2/14

Information from Prospective Clients

Hypothetical 7

You and several of your colleagues recently met with executives from a company planning to move its headquarters to your city. It was obvious that the executives were interviewing a number of law firms before deciding which firm to hire for several projects. The company ended up hiring another firm, and you wonder about your duty to keep confidential what the executives told you -- and the possible effect on your ability to represent the company's adversaries once it moves to town.

(a) Does your ethics confidentiality duty extend to information you learned during the interview?

(A) YES

(b) May you and your colleagues represent the company's adversaries in matters unrelated to those you discussed during the interview?

(A) YES

(c) May you and your colleagues represent the company's adversary in a specific matter the executives described during the interview?

MAYBE

(d) If you and your colleagues would be disqualified from representing the company's adversary in the specific matter, may other lawyers at your firm represent the adversary?

(A) YES

Analysis

The ethics rules deal with lawyers' confidentiality duty in three phases of a relationship between a would-be client and a lawyer: (1) when a would-be client communicates unilaterally to the lawyer, and the lawyer has not responded; (2) when the would-be client and the lawyer consult about the possibility of the former retaining

the latter; and (3) after the would-be client and the lawyer agree to create an attorney-client relationship.

ABA Model Rules 1.18 addresses the first two scenarios. In the third setting, the lawyer must comply with all the ethics rules, including the duty of confidentiality.

This hypothetical addresses the second phase.

In addressing the second phase, ABA Model Rule 1.18(a) -- adopted in 2002 -- indicates that

> A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

ABA Model Rule 1.18(a). ABA Model Rule 1.18 cmt. [2] explicitly indicates that absent such consultation a lawyer does not owe any duties (of confidentiality, loyalty or anything else) to the would-be client.

The rule formerly used the word "discusses" rather than "consults." On August 6, 2012, the House of Delegates adopted the ABA 20/20 Commission's recommendation to change the word to "consults." ABA, House of Delegates Resolution 105B (amending Model Rules 1.18 and 7.3, and 7.1, 7.2 and 5.5). Interestingly, this change undoubtedly reflects would-be clients' increasing (if not nearly universal) use of electronic communications rather than telephonic or in-person communications. The word "discusses" implies the latter, while the word "consults" can include both electronic or telephonic/in-person communications.

If such a consultation occurs, the rest of ABA Model Rule 1.18 applies.

If a prospective client passes that hurdle, lawyers who have acquired information must treat the prospective client as a former client -- because the lawyers clearly do not currently represent him or her.

> Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

ABA Model Rule 1.18(b) (emphasis added).

The individual lawyer might be individually disqualified from representing the prospective client's adversary -- but only if that individual lawyer received "significantly harmful" information from the prospective client.

> A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

ABA Model Rule 1.18(c) (emphasis added). In that situation, the individual lawyer may represent the adversary only with informed consent of the prospective client and the adversary, confirmed in writing. ABA Model Rule 1.18(d)(1).

Absent such informed written consent, other lawyers in the individually disqualified lawyer's law firm may represent the adversary -- under three conditions.

> [T]he lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

> [T]he disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
>
> [W]ritten notice is promptly given to the prospective client.

ABA Model Rule 1.18(d)(2)(i), (ii) (emphases added).

As tempting as it might be for a prospective client to interview several lawyers in an effort to disqualify them from representing the prospective client's adversary, such a tactic generally does not work.

ABA Model Rule 1.18 cmt. [2] explicitly indicates that "a person who communicates with a lawyer for the purpose of disqualifying a lawyer is not a 'prospective client.'"

A number of ethics opinions have found such tricky tactics unsuccessful, and sometimes found unethical a lawyer's suggestion that a client engage in such a strategy.

The bars taking this common sense approach do not deal with a fascinating logistical dilemma. Because the lawyers who have been approached by such an unscrupulous prospective client must generally maintain the confidentiality of their discussions, how can the wronged adversary ever discover the prospective client's shenanigans? Presumably, the adversary would grow suspicious if every lawyer in town advised that he or she had a conflict. But the adversary would still have to point to a legal theory under which he or she could discover the substance of communications that created the conflict. Bars seem not to have dealt with this.

Best Answer

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

b 2/14

Duty to Former Clients

Hypothetical 8

Having very recently attended a magnificent ethics program on the duty of confidentiality, you now know the strength and scope of the ABA Model Rules' and most states' confidentiality duty. For instance, you know that under the ABA Model Rules the duty covers all "information relating to the representation," even if that information is generally known or in the public record.

Now you are wondering about your confidentiality duty to former clients. You recognize that your duty extends beyond the attorney-client relationship, but have questions about the possible disclosure or use of client information after the relationship ends.

(a) May you disclose a former client's information to assist a new client, as long as that disclosure does not harm the former client?

(B) NO

(b) Can you ever use a former client's information to the disadvantage of the former client?

(A) YES (IF THE INFORMATION IS "GENERALLY KNOWN")

Analysis

Every ABA ethics rules' variation and every state's ethics rules confirm that lawyers' confidentiality duty lasts beyond the attorney-client relationship. After that, the issue becomes more subtle.

ABA Model Rule 1.9(c) describes lawyers' confidentiality duty to former clients.

> A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

> (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

ABA Model Rule 1.9(c) (emphases added). One might have expected the Rule to deal first with disclosure and then with use, but the order is not material.

Thus, under ABA Model Rule 1.9 (absent consent), lawyers may never disclose a former client's information (absent some rule exception) -- but may use a former client's information except if the use would disadvantage the former client. And lawyers can use information adverse to a former client if it has become generally known.

A comment provides some explanation.

> Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

ABA Model Rule 1.9 cmt. [8] (emphasis added).

In 2000, the ABA issued an ethics opinion addressing lawyers' confidentiality duty to former clients.

- ABA LEO 417 (4/7/00) (addressing the following question: "The Committee has been asked whether, under the ABA Model Rules of Professional Conduct, a lawyer representing a party in a controversy may agree to a proposal by opposing counsel that settlement of the matter be conditioned on the lawyer not using any of the information learned during the current representation in any future representation against the same opposing party. The proposed settlement would be favorable to the lawyer's client. The Committee notes that, while this particular situation is most likely to arise in litigation, it could also arise in transactional matters."; explaining that the proposed limitation would amount to a restriction on the lawyer's practice; "In this case, the proposed settlement provision would not be a direct ban on any future representation. Rather, it would forbid the lawyer from using information learned during the representation of the current client in any future representations against this defendant. As a practical matter, however,

this proposed limitation effectively would bar the lawyer from future representations because the lawyer's inability to use certain information may materially limit his representation of the future client and, further, may adversely affect that representation."; explaining the difference between a permissible restriction on the lawyer's disclosure of client confidences and an impermissible restriction on the lawyer's use of client confidences; "A proposed settlement provision, agreed to by the client, that prohibits the lawyer from disclosing information relating to the representation is no more than what is required by the Model Rules absent client consent, and does not necessarily limit the lawyer's future practice in the matter accomplished by a restriction on the use of information relating to the opposing party in the matter. Thus, Rule 5.6(b) would not proscribe offering or agreeing to a nondisclosure provision."; "Although the Model Rules also place a restraint on the 'use' of information relating to the former client's representation, it applied only to use of the information to the disadvantage of the former client. Even in this circumstance, the prohibition does not apply when the information has become generally known or when the limited exceptions of Rule 1.6 or 3.3 (Candor Towards the Tribunal) apply. This prohibition has been interpreted to mean that a lawyer may not use confidential information against a former client to advance the lawyer's own interests, or advance the interests of another client adverse to the interests of the former client. If these circumstances are not applicable, using information acquired in a former representation in a later representation is not a violation of Rule 1.9(c). Thus, from a policy point of view, the subsequent use of information relating to the representation of a former client is treated quite liberally as compared to restrictions regarding disclosure of client information." (footnotes omitted) (emphases added); concluding that "[a]lthough a lawyer may participate in a settlement agreement that prohibits him from revealing information relating to the representation of his client, the lawyer may not participate or comply with a settlement agreement that would prevent him from using information gained during the representation in later representations against the opposing party, or a related party, except to the limited extent described above. An agreement not to use information learned during the representation would effectively restrict the lawyer's right to practice and hence would violate Rule 5.6(b).").

The ABA Code treated lawyers' duty of confidentiality to current and former clients exactly the same way. The ABA Model Rules cannot take that approach, given the remarkable breadth of lawyers' confidentiality duty in the Model Rules. However, it seems strange that the ABA Model Rules did not adopt the ABA Model Code's approach -- prohibiting lawyers' use of former clients' information to their disadvantage.

Instead, the ABA Model Rules allows such adverse use, but only if the information is "generally known." That concept appears in the Restatement, but inexplicably focuses on the type of information rather than on the use's effect on former clients. That approach seems inconsistent with the otherwise client-centric (and in some provisions the unjustifiably extreme client-centric) approach found elsewhere in the ABA Model Rules. Like the ABA Model Code, the Restatement treats lawyers' confidentiality duty to current and former clients the same, which seems more intellectually consistent than the ABA Model Rules' differing standards.

Best Answer

The best answer to **(a)** is **(B) NO**; the best answer to **(b)** is **(A) YES (IF INFORMATION IS "GENERALLY KNOWN")**.

b 2/14

Confidentiality Duties in a Joint Representation

Hypothetical 9

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

What do you do?

(A) You must tell your other client (the second wife) about the husband's illegitimate child.

(B) You may tell your other client about the illegitimate child, but you don't have to.

(C) You may not tell your other client about the illegitimate child.

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

Analysis

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

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

The issue of information flow can be far more complicated. It makes sense to analyze the information flow issue in three different scenarios: (1) when the lawyer has

not raised the issue with the clients at the start of the representation, so there is no agreement among them about the information flow -- which necessarily involves the law supplying a "default rule"; (2) when the lawyer has arranged for the jointly represented clients to agree in advance that the lawyer will share secrets between or among the jointly represented clients; (3) when the lawyer has arranged for the jointly represented clients to agree in advance that the lawyer will not share secrets between or among the jointly represented clients.

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

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

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

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

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

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

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

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

Id. (emphasis added).

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

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

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

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

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

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

In ABA LEO 450, the ABA articulated the dilemma that a lawyer faces if one client provides confidential information -- in the absence of some agreement on

information flow. Such a lawyer faces a dilemma if he learns confidential information from one client that will cause that client damage if disclosed to the other client.

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

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

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

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

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

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

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

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

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

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

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

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

The Restatement takes this contrary approach.

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

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

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

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

But mandatory language shows up in the Restatement provision dealing with attorney-client privilege issues.

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

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

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

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

Id. (emphasis added).

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

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

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

Thus, several authorities emphasize the wisdom of lawyers explaining the information flow to their clients at the beginning of any joint representation, and arranging for the clients' consent to the desired information flow. Whether the clients

agree to a "keep secrets" or "no secrets" approach, at least an explicit agreement provides guidance to the clients and to the lawyer.

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

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

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

A 2005 District of Columbia legal ethics opinion indicates that a lawyer in this setting must disclose the confidential information to the other jointly represented client.[1]

New York has also dealt with this issue, and concluded that a lawyer in this circumstance must share material information if the clients have agreed in advance that the lawyer will do so.[2]

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

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

[1] District of Columbia LEO 327 (2/2005).

[2] New York LEO 555 (1/17/84).

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

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

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

Best Answer

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

B 11/4

Compliance with Court Orders

Hypothetical 10

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

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

MAYBE

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

(B) NO (PROBABLY)

Analysis

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

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

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

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

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

ABA Model Rule 1.6 former cmt. [20].

In 1994, the ABA Standing Committee on Ethics and Professionalism essentially recognized the same safe harbor, despite the absence of a black letter rule. ABA LEO 385 (7/5/94) noted the absence of a specific rule, but pointed to narrow comment language in finding one anyway. ABA LEO 385 explained that lawyers must resist such court orders, and certainly implied that lawyers must seek interlocutory relief if it was available.

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

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

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

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

seek an interlocutory appeal. Thus, the comment indicates that lawyers "should" assert nonfrivolous claims resisting a court order. The comment requires that lawyers consult with their clients about an appeal, but does not clearly require that lawyers comply with a client's direction to appeal an adverse ruling. However, the comment recognizes that the lawyer might appeal a court order requiring disclosure of protected client information.

The ABA dealt with this issue again in 2010. ABA LEO 456 (7/14/10) addressed lawyers' right to defend themselves from criminal clients' ineffective assistance of counsel claims. In addressing lawyers' response to an order compelling disclosure of arguably protected client information, the ABA indicated that a lawyer may appeal such an order -- but did not indicate whether the lawyer had to do so.

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

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

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

Some legal ethics opinions parallel the 1994 ABA legal ethics opinion that seemed to require lawyers to file an interlocutory appeal if such a remedy is available -- but follow the current version of the ABA Model Rules in declining to require lawyers to suffer a contempt citation.

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

Best Answer

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

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

Dealing with Service Providers Outside the Office

Hypothetical 11

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

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

(A) YES (PROBABLY)

Analysis

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

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

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

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

> Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a

> matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

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

Although most states follow the ABA Model Rules in recognizing lawyers' implied authorization to disclose protected client information in certain circumstances, not all states have adopted that ABA Model Rules provision.

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

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

At the dawn of the electronic age, the ABA issued an ethics opinion explaining that lawyers could give third parties access to protected client information as long as they were careful.[1]

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

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

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

Given the fragility of the attorney-client privilege, lawyers must also remember the risk of jeopardizing that protection if they disclose protected client information to third parties. In nearly every situation, third-party service providers fall within the narrow group of non-clients considered necessary for the lawyers' communications with their clients or otherwise necessary for the lawyers to do their job. A classic example is an outside copy service whose workers read highly confidential privileged communications as they copy. Even as fragile as the law considers it, the privilege survives such disclosure if lawyers take care to select the copier.

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

Best Answer

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

B 11/14

Clearing Conflicts on a Daily Basis

Hypothetical 12

One of your partners just received a call from a potentially lucrative new client, which wants to hire your firm to pursue a trademark action against Acme (one of your firm's smaller clients). You are rarely involved in the "conflicts clearance" process, and you wonder what to do next.

(a) Without Acme's consent, may you tell the potential new client that your firm represents Acme?

(B) NO (PROBABLY)

(b) Without Acme's consent, may you tell the potential new client what matters your firm is handling for Acme?

(B) NO (PROBABLY)

(c) Without the potential new client's consent, may you ask Acme for a consent to represent the potential new client adverse to Acme in the trademark matter?

(B) NO

Analysis

Despite nearly every law firm's need to clear conflicts when beginning representations (and sometimes during the course of representations), the ethics rules do not contain an explicit exception allowing the disclosure of protected client information when doing so.

In sharp contrast to the ABA Model Code and the Restatement, the ABA Model Rules contain an expansive definition of protected client information.

Because nearly every lawyer must clear conflicts, one might have expected that the ABA Model Rules would have used that scenario as an example if it meant to approve such disclosure under the "impliedly authorized" general provision.

And of course, disclosing an existing client's identity to a prospective new client to start the conflicts clearance process does not assist in "carrying out the representation" of the existing client. And disclosing the prospective client's identity to an existing client does not meet that standard either -- because the representation has not yet begun.

Thus, lawyers are left to rely on some unstated but universally recognized implied exception.

In some situations, lawyers will immediately know that they cannot undertake a representation because of an inherent conflict. For instance, lawyers would have to immediately decline a husband's request to represent him in planning a divorce if the law firm already represents the wife. In other situations, lawyers cannot possibly clear conflicts -- because making the necessary disclosure would prejudice the prospective new client. For instance, a company seeking to hire a law firm to represent it in initiating a hostile takeover effort would never consent to the law firm's disclosure of that still-secret plan to the target company which the law firm represents on unrelated matters.

However, in normal situations, lawyers routinely disclose protected client information to clear conflicts, although such disclosure seems to clearly violate the black letter ABA Model Rules. For instance, a lawyer asked to represent a new client in a fairly friendly transaction with Baker might find that her law firm already represents Baker in unrelated matters. Disclosing that fact to the potential new client violates the black letter ABA Model Rule confidentiality provision. Yet, lawyers do that every day.

Such lawyers would then ask the new client if it wishes the lawyer to seek consent from Baker to represent the new client in the transactional matter adverse to

Baker. The new client might decide to retain another lawyer without any "baggage," but in non-litigation settings usually authorizes the lawyer to make such a disclosure and seek Baker's consent. Ironically, giving the prospective new client this option actually honors the confidentiality of its information more than the information of the lawyer's existing client Baker -- whose identity the lawyer has already disclosed to the prospective new client.

Alternatively, the lawyer could first turn to Baker, and disclose the request from the prospective new client (without its consent). In doing so, the lawyer would be violating his or her confidentiality duty to the prospective new client.

In the more frequent scenario, the lawyer then discloses to Baker the identity and request of the prospective new client, and requests a consent to represent the new client in the transactional matter adverse to Baker. At this point, both Baker and the prospective new client know about each other's identity and the general nature of the issue -- thanks to the lawyer's violation of his or her confidentiality duty to either Baker or the prospective new client, or both.

Lawyers rarely if ever face disciplinary troubles by undertaking this everyday process. This provides yet another example of how the ABA Model Rules have adopted a completely unworkable confidentiality duty.

Best Answer

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

B 12/14

Clearing Conflicts when Hiring Laterals

Hypothetical 13

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?

(A) YES (PROBABLY)

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

(A) YES (PROBABLY)

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

(A) YES (PROBABLY)

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

(A) YES (PROBABLY)

Analysis

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.

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

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

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

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

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.

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.

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

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

Id. (emphasis added).

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

information. Lawyers on either side of the employment discussion must "reveal 'information relating to the representation' in violation of Rule 1.6."

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

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

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

In ABA LEO 414 (9/8/99), 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 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), 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. 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. 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</u>

> prospective new firm should have moved beyond the initial phase and progressed to the stage where a conflicts analysis is reasonably necessary, which typically will not occur until the moving lawyer and the prospective new firm have engaged in substantive discussions regarding a possible new association.

Id. (footnote omitted) (emphasis added).

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

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

> A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

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

This new rule presumably has had little impact, because lawyers have always been doing this. In fact, this provision represents a vindication of the ABA Model Code confidentiality formulation, and a repudiation of the 1983 overbroad ABA Model Rules

formulation. Just like the ABA Model Code, this provision permits disclosure of non-privileged client information, as long as it would not harm the client. That is precisely what the ABA Model Code permitted.

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

Best Answer

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

b 10/14

Defending Against Clients' Attacks

Hypothetical 14

One of your former clients unexpectedly sued your firm for malpractice, claiming that it mishandled a real estate transaction. Your firm's outside defense lawyer needs your input into the firm's response, because you led your firm's team on the real estate transaction. When you see the proposed response, you worry about some of the protected client information your firm's outside defense lawyer has included.

Without your former client's consent, may you disclose protected client information in your law firm's answer to the former client's malpractice claim?

(A) YES

Analysis

Basic fairness principles should allow lawyers to defend themselves from a client's attacks, even if that would require disclosing some protected client information.

The 1983 ABA Model Rules provide a somewhat narrower provision permitting the disclosure of protected client information under this self-defense principle.

> A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

ABA Model Rule 1.6(b)(5) (emphasis added). A comment provides further guidance.[1]

[1] ABA Model Rule 1.6 cmt. [10] ("Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to

Not surprisingly, the ABA Model Rules permit such disclosure in this setting only to the extent reasonably necessary.

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

ABA Model Rule 1.6 cmt. [16].

The current ABA Model Rule self-defense exception thus covers three separate but normally related situations.

First, lawyers may disclose protected client information "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client." ABA Model Rule 1.6(b)(5). This first scenario thus requires a dispute between the lawyer and the client. The phrase "claim or defense" sounds like this part of the Rule applies only in official proceedings. The term "controversy" clearly takes a broader approach.

Second, lawyers may disclose protected client information "to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in

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respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.").

which the client was involved." Id. This scenario apparently involves something more formal than a "controversy." The phrase "criminal charge or civil claim" should be fairly easy to define, and would seem to require some official action in a judicial setting. This scenario must also involve lawyers' "conduct in which the client was involved." This is a strange phrase, which seems to limit the scope of this self-defense principle. It is also difficult to know what the word "involved" means here. That phrase seems to require more direct client involvement than the phrase "conduct involving the client," or similar formulations. Instead, it seems to require some direct client action.

Third, lawyers may disclose protected client information "to respond to allegations in any proceeding concerning the lawyer's representation of the client." Id. As with the second scenario, this Rule seems to apply only if there is a "proceeding" -- although it might encompass non-tribunal "proceedings" such as disciplinary proceedings against the lawyer, disqualification motions, etc. This scenario also seems to involve less direct client involvement than the previous scenario. Here the allegations must concern "the lawyer's representation of the client" -- not "conduct in which the client was involved."

However, the second portion of the comment inexplicably seems limited to certain types of allegations against the lawyer -- without explaining whether the significant discussion of lawyers' self-defense timing applies just to that subset of situations, or to all three of the black letter rule scenarios.

> Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

ABA Model Rules 1.6 cmt. [10]. Thus, it is unclear when a lawyer may freely rely on the self-defense exception in a scenario that does not involve "an action or proceeding that charges . . . complicity" with the client. As explained above, the first of the three Rule 1.6 black letter scenarios does not involve an "action or proceeding" -- it focuses on a "controversy" between lawyer and client.

Various state rules, ethics opinions, and bar groups have assessed lawyers' self-defense justifications for disclosing protected client information. Predictably, the key issue is whether lawyers must wait for some formal client accusation or instead may disclose protected client information preemptively.

In the run-up to the ABA's 1983 adoption of its Model Rules, the American Trial Lawyers took a very restrictive view of lawyers' self-defense exception.

> A lawyer may reveal a client's confidence to the extent necessary to defend the lawyer or the lawyer's associate or employee against charges of criminal, civil, or professional misconduct asserted by the client, or against formally instituted charges of such conduct in which the client is implicated.

Monroe H. Freedman and Thomas Lumbard, The American Lawyer's Code of Conduct, Including A Proposed Revision of the Code of Professional Responsibility, Commission on Professional Responsibility, Roscoe Pound-American Trial Lawyers Foundation, Revised Draft (May 1982) (emphasis added).

Every state's ethics rules permit lawyers to disclose protected client information to defend themselves against clients' allegations against the lawyer.

Even jurisdictions which do not allow such disclosure to support lawyers' affirmative claims against clients permit such self-defense use.

Best Answer

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

B 12/14, 1/15

Defending Against Clients' Criticism

Hypothetical 15

One of your partners just sent you an email linked to a front-page article in this morning's newspaper containing an ugly statement about you by a former client. One of your former clients called you "a sleazy lawyer who billed too much for doing too little." Right after you read the article, you receive a call from the reporter who wrote the story. She wants your "on the record" response to your former client's criticism.

Without your former client's consent, may you disclose protected client information in talking with the reporter?

(B) NO (PROBABLY)

Analysis

Clients have always criticized their lawyers or former lawyers, but the increasing ubiquity of social media has dramatically expanded the possible adverse effects of such allegations -- and tempted lawyers to respond in kind.

The 1983 ABA Model Rules provide a somewhat narrower provision permitting the disclosure of protected client information under this self-defense principle.

> A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

ABA Model Rule 1.6(b)(5) (emphasis added).

The second and third scenarios would not apply to clients' non-judicial criticism of lawyers. Such a criticism obviously does not include a "criminal charge or civil claim," and similarly does not involve a "proceeding." Therefore, lawyers wishing to respond to

such criticism must look to the self-defense exception applicable to lawyers "establish[ing] a claim or defense on behalf of the lawyer in a controversy between the lawyer and client." In the case of an extra-judicial criticism, the client clearly has created a "controversy" -- so the issue focuses on whether the lawyer's response made "to establish a . . . defense on behalf of the lawyer" in the controversy.

Although ABA Model Rule 1.6(b)(5) would seem to allow lawyers' limited disclosure of protected client information to "establish a . . . defense" in a "controversy" with a client or former client, courts have dealt very harshly with such extrajudicial disclosure of protected client information.

In nondisciplinary contexts, bars have similarly rejected the self-defense exception's applicability in this setting.

Not surprisingly, this issue has increasingly arisen in the context of clients' or former clients' criticisms posted on lawyer-rating websites or expressed in social media.

In states emphasizing confidentiality even more than the ABA Model Rules do, bars have a fairly easy time prohibiting lawyers from responding to clients' public criticism. For instance, a District of Columbia ethics rule comment specifically precludes lawyers from disclosing protected client information to defend themselves against clients' or former clients' general criticism.[1] In 2012, the Los Angeles Bar noted differences between the ABA Model Rules and the California ethics rules in finding that lawyers in this position could not disclose protected client information.[2] More recently, the San Francisco Bar similarly noted California's unique rule in concluding that lawyers

[1] District of Columbia Rule 1.6 cmt. [25].

[2] Los Angeles County LEO 525 (12/6/12).

may respond to a former client's unfavorable online review, but cannot disclose any protected client information.[3]

Best Answer

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

B 12/14

[3] San Francisco LEO 2014-1 (1/2014).

Defending Against Non-Clients' Claims

Hypothetical 16

You were just served with a lawsuit claiming that your firm and one of its clients defrauded the plaintiff in a transaction. You and the client had a falling out after that transaction, and you doubt that the former client will be very cooperative in allowing you to defend your firm.

Without your former client's consent, may you disclose protected client information in defending yourself?

(A) YES

Analysis

Common sense and fairness justify lawyers' disclosure of protected client information to defend themselves against a client's attack.

However, it is not as intuitive to permit lawyers' disclosure of protected client information to defend themselves from non-clients' attacks. Given the importance of confidentiality, one might expect the ethics rules to demand that lawyers essentially "take a bullet" for the client.

The 1937 ABA Canons of Professional Ethics explicitly limited the self-defense exception to clients' accusations.

> If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation.

ABA Canons of Professional Ethics, Canon 37, amended Sept. 30, 1937 (emphasis added).

In 1940, an ABA legal ethic opinion implicitly limited a lawyer's self-defense disclosure discretion to a client's (or presumably former client's) accusation against the lawyer.[1]

The 1969 ABA Model Code of Professional Responsibility did not contain that limitation.

The 1983 ABA Model Rules permit self-defense disclosure in a wider range of scenarios.

> A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

ABA Model Rule 1.6(b)(5) (emphasis added).

ABA Model Rule 1.6 cmt. [10] clearly envisions such third parties' claims against lawyers, and acknowledges lawyers' right to defend themselves.[2]

In fact, lawyers arguably enjoy even greater freedom to disclose protected client information if a third party attacks them than if a client or former client attacks them.

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[1] ABA LEO 202 (5/25/40).

[2] ABA Model Rule 1.6 cmt. [10] ("Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.) (emphasis added).

The last sentence of comment [10] explicitly indicates that lawyers do not have to wait for a proceeding to begin before disclosing protected client information to defend themselves from charges of "complicity" -- which presumably involves some third party's allegations of "complicity" between the lawyer and the client.

The 2010 ABA legal ethics opinion addressing the self-defense exception in the context of a former client's ineffective assistance of counsel claim adopts this view.[3]

As with other disclosure issues, bars have taken different positions on lawyers' ability to disclose protected client information in defending themselves from nonclients' charges.

This has been a long-running issue. In the run-up to the ABA's 1983 adoption of its Model Rules, the American Trial Lawyers took a very narrow view of this self-defense exception.

> A lawyer may reveal a client's confidence to the extent necessary to defend the lawyer or the lawyer's associate or employee against charges of criminal, civil, or professional misconduct asserted by the client, or against formally instituted charges of such conduct in which the client is implicated.

Monroe H. Freedman and Thomas Lumbard, Am. Lawyer's Code of Conduct, Proposed Revision of the Code of Prof'l Responsibility, Rule 1.5, Comm'n on Prof'l Responsibility, Roscoe Pound-Am. Trial Lawyers Found., Revised Draft (May 1982) (emphasis added).

Bars have generally taken a broad approach when addressing the self-defense exception in the context of formal allegations. Some jurisdictions recognize such a self-defense exception only when lawyers face formal accusations, rather than informal non-

[3] ABA LEO 456 (7/14/10).

client criticism. As in other areas, California follows a different rule. In 2007, the Los Angeles County Bar explained that the self-defense provision in California's attorney-client privilege law did not appear in the parallel confidentiality duty statute. The Los Angeles Bar thus concluded that a lawyer sued by a non-client may not disclose protected client information to defend himself or herself.[4]

Case law has recognized a self-defense exception for over 150 years. More recent case law on this issue tends to recognize a trio of 1970s and 1980s cases from New York as articulating the self-defense case law on both the ethics front and the attorney-client privilege front.

Courts began to develop this expanded self-defense exception over thirty years ago. In Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190 (2d Cir.), cert. denied, 419 U.S. 998 (1974), a law firm associate believed that his firm was not properly insisting that its client Empire Fire and Marine Insurance make a full and complete disclosure in public offering documents. The associate left the firm, but was nevertheless named as a defendant in several lawsuits based on the offering documents. The Second Circuit held that the lawyer could disclose his role in the offering documents' preparation -- reversing the district court's finding that the lawyer had violated his ethics duty of confidentiality.

A few years later, two other New York federal court cases took a narrower view of lawyers' self-defense rights.[5] However, several years after those fairly narrow decisions, the Southern District of New York recognized a broader self-defense

[4] Los Angeles County LEO 519 (2/26/07).

[5] Housler v. First Nat'l Bank of East Islip, 484 F. Supp. 1321, 1323 (E.D.N.Y. 1980); Morin v. Trupin, 728 F. Supp. 952, 955, 956 (S.D.N.Y. 1989).

exception.[6] The year after that, the same court applied the exception even before the lawyer had been named as defendant in any proceedings.[7] In the meantime, courts also began to adopt a broad view of the self-defense exception's application to nonclients' attack. Cases decided since Meyerhofer and the other early cases demonstrate that their broad view carried the day.

Best Answer

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

B 12/14, 1/15

[6] First Fed. Sav. & Loan Ass'n v. Oppenheim, Appel, Dixon & Co., 110 F.R.D. 557, 559, 560 n.3, 560-61, 561-62, 566, 567 (S.D.N.Y. 1986).

[7] SEC v. Forma, 117 F.R.D. 516, 524, 524-25, 525, 525-26, 526 (S.D.N.Y. 1987).

Lawyers' Claims Against Former Clients for Unpaid Fees

Hypothetical 17

After several months of trying to collect your fee from a troublesome ex-client, you have taken the matter to your firm's management with the suggestion that you file a lawsuit against your former client. One of your partners who serves on your firm's executive committee just attended a seminar on the importance of confidentiality, and wonders whether your firm can disclose protected client information in such a lawsuit.

Without your former client's consent, may you disclose protected client information in a lawsuit to collect your fees.

(A) YES

Analysis

It seems fair to permit lawyers' disclosure of protected client information to defend themselves from client attacks. It seems less intuitive to permit such disclosures when lawyers defend themselves from non-clients' attacks. But even then, lawyers should have the right to protect themselves in a defensive posture.

If lawyers are in an offensive position, their use of protected client information seems more troublesome. However, if a lawyer's claim is simply to recover fees or costs from a former client who refuses to pay those, such disclosure seems appropriate.

The 1983 ABA Model Rules contain a potentially broader provision.

> A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client.

ABA Model Rule 1.6(b)(5) (emphasis added). A comment explains that the "claim" reference includes a claim for payment of fees.[1]

Best Answer

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

B 12/14, 1/15

[1] ABA Model Rule 1.6 cmt. [11] ("A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.") (emphasis added).

Disclosure when Seeking to Withdraw as Counsel of Record

Hypothetical 18

You need to withdraw as counsel of record for a client who has become increasingly hostile and uncooperative. Among other things, the client stopped paying you three month ago, and this morning refused to send you non-privileged responsive documents you must produce in an upcoming document production.

(a) In your motion to withdraw as counsel of record, or during the resulting hearing, may you disclose that you are withdrawing because the client has not paid your bill?

MAYBE

(b) In your motion to withdraw as counsel of record, or during the resulting hearing, may you disclose that you are withdrawing because the client has refused to provide non-privileged responsive documents that must be produced?

MAYBE

Analysis

Lawyers' motions to withdraw as counsel of record involve complicated confidentiality issues.

The 1983 ABA Model Rules provide a narrow provision permitting the disclosure of protected client information under this self-defense principle.

> A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

ABA Model Rule 1.6(b)(5) (emphasis added). A comment provides further guidance.[19]

Unfortunately, only a few courts follow the ABA Model Rules comment's suggestion that they essentially take at face value lawyers' explanation that an ethics issue makes it impossible for the lawyers to continue representing their clients.

In other courts, the stakes can be remarkably high. Lawyers might justifiably think that they must be fairly explicit in explaining why they seek a court order permitting their withdrawal. After all, the judicial system favors transparency and openness.

However, courts have severely sanctioned lawyers who disclose too much protected client information when seeking to withdraw.[20] One well-respected ethics counsel has described the dilemma lawyers face in jurisdictions that prohibit or discourage disclosure of protected client information in withdrawal motions.[21]

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[19] ABA Model Rule 1.6 cmt. [10].

[20] In re Ponds, 876 A.2d 636 (D.D.C. 2005); In re Gonzalez, 773 A.2d 1026, 1030, 1031-32 (D.D.C. 2001).

[21] Saul Jay Singer, Speaking of Ethics: Going Through "Withdrawal," Wash. Lawyer, Jan. 2011 (in an article by the Washington, D.C., Bar's ethics counsel, addressing the confidentiality rule's application to lawyers seeking to withdraw from representing a client in court; "Another minefield in motions to withdraw, an issue of which some lawyers seem dangerously unaware, is the applicability of Rule 1.6 (Confidentiality of Information), which includes not only the lawyer's duty to protect attorney–client communications, but extends broadly to any information which the lawyer learns in the course of the representation, whether directly from the client or from any other source, the disclosure of which would prove to be either embarrassing or detrimental to the client. What this effectively means is that the lawyer cannot write in his or her motion to withdraw, or otherwise represent to the tribunal, that 'client won't pay me; I have no idea where client is; client refuses to cooperate; client is psycho;' etc., all of which are protected as client secrets under Rule 1.6. Rather, the lawyer must employ the ultimate 'vanilla' language, i.e., 'a situation has arisen such that continued representation under the circumstances has been rendered impossible.'" (emphasis added); "Most judges understand very well the ethical limitations imposed by Rule 1.6, but that by no means prevents occasional calls from lawyers asking in sheer panic: 'The court won't grant my motion to withdraw unless I provide necessary facts sufficient to support my motion; what do I do?' The terrible answer is: you are stuck; you must not provide Rule 1.6-protected information to the court. The only solution to this monumental problem that this writer can think of is for tribunals to make the adjudication of motions to withdraw a procedural priority so that lawyers are not left hanging in the ethical twilight zone -- and, of course, that judges carefully consider the confidentiality restrictions imposed by Rule 1.6 in this context." (footnote omitted) (emphases added)).

Unfortunately for lawyers in this position, there is no generally applicable rule for what disclosures they can make. If they disclose too much, a bar or even a court might find that they have acted improperly. If they disclose too little, a court might not allow them to withdraw as counsel of record.

Compounding the absence of any generally applicable approach, it seems that courts often have an unstated approach or "lore" about this issue. In fact, even within the same court different judges sometimes take differing positions on what disclosure they require or expect.

There are several options apart from disclosing protected client information in a pleading or in open court. For instance, lawyers seeking to withdraw might refer generically to their state's Rule 1.16, but either (1) ask to approach the court ex parte during the hearing, to provide more background information; or (2) invite the court to ask for such an ex parte discussion if the court requires it before permitting the lawyers' withdrawal.

Best Answer

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

B 12/14

Non-Client Employees' Serious Misconduct

Hypothetical 19

Your firm's largest client's executive vice president is both your closest friend and the source of nearly all your firm's work for the client. When your friend recently invited you to lunch to discuss an antitrust issue, you assumed it involved one of the cases you are handling. However, your friend instead tearfully confessed that he has been fixing prices with several competitors. He begs you not to tell anyone else about it.

What do you do?

(A) You must disclose the vice president's wrongdoing "up the ladder" within the corporation.

(B) You may disclose the vice president's wrongdoing "up the ladder" within the corporation, but you don't have to.

(C) You may not disclose the vice president's wrongdoing "up the ladder" within the corporation, unless the vice president consents.

(A) YOU MUST DISCLOSE THE VICE PRESIDENT'S WRONGDOING "UP THE LADDER" WITHIN THE CORPORATION

Analysis

Under both the ethics rules and common law principles, lawyers who represent organizations have an attorney-client relationship with the incorporeal institution.

ABA Model Rule 1.13 puts it this way:

> A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

ABA Model Rule 1.13(a). ABA Model Rule 1.13(g) recognizes that:

> A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7 [which addresses conflicts of interest].

ABA Model Rule 1.13(g).

The parallel comment does not provide any additional useful guidance. ABA Model Rule 1.13 cmt. [12] ("Paragraph (g) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder."). Actually, the comment describes a subset of an organization's constituents that the organization's lawyer may also represent in the appropriate circumstances.

In any event, lawyers who limit their representation to the organization itself may discover constituent wrongdoing. Although it may seem counterintuitive at first, that scenario involves lawyers reporting non-clients' wrongdoing to a client.

Pre-Enron ABA Model Rules

The ABA rarely dealt with corporate lawyers' intra-corporate disclosure obligations before the Enron scandal.

Nearly 30 years before the ABA adopted its 1969 ABA Model Code, the ABA recognized a common-sense notion that an institution's lawyer should disclose a constituent's misconduct to the institution's leadership.

- ABA LEO 202 (5/25/40) (analyzing the ethics implications of a trust company's lawyer who has learned that a manager hired by trust beneficiaries to oversee property transactions and pay the proceeds to the trust company has embezzled money -- creating a liability for the trust company to the beneficiaries; explaining that a trust company officer requests the lawyer to draft a contract under which the embezzling manager will purchase the beneficial interest in the trust -- which the lawyer advises will be proper only if the trust company discloses the embezzlement to the beneficiaries; further explaining that the lawyer later learns that a manager has purchased the beneficiaries' interest at nominal prices, and without the disclosure of the embezzlement "with the apparent purpose of eliminating the beneficiaries and concealing from them [the manager's] embezzlements in the trust company's liability"; noting that the lawyer then learns that the trust company's general counsel knew of this action; concluding that the lawyer may not disclose the manager's embezzlement to the beneficiaries without the trust company's consent, because the purchase transaction has already

been conseminated; also concluding that the lawyer may advise the trust company's board of directors of the situation, but may not start disciplinary proceedings against trust company officers acting as lawyers without the trust company's consent -- although the lawyer may disclose confidential client information if the trust company makes a false accusation against the lawyer; "Knowledge of the facts respecting B's defalcations, the trust company's liability therefor, and the plan to purchase the outstanding certificates was imparted to A as attorney for the trust company, and was acquired during the existence of his confidential relations with the trust company. He may not divulge confidential communications, information, and secrets imparted to him by the client or acquired during their professional relations, unless he is authorized to do so by the client."; "Had A been advised that the trust company intended to carry out the plan to purchase the outstanding certificates without making the disclosures which he advised should be made, and if such transaction would have constituted an offense against criminal law when carried out, he might have made disclosure at that time."; "But, since it does not appear that A was advised of such intention on the part of the trust company, and since the transaction has been consummated, we conclude the exception is not applicable and that A must keep the confidences of his client inviolate."; "Since, however, the board of directors of the trust company is its governing body, we think A, with propriety, may and should make disclosures to the board of directors in order that they make take such action as they deem necessary to protect the trust company from the wrongful acts of its executive officers. Such a disclosure would be to the client itself and not to a third person." (emphasis added); "We are of the opinion that A may not, without consent of the trust company, institute disciplinary action against the officers of the trust company who are members of the Bar, if to do so would involve a disclosure of confidential communications to A."; "Neither do we think A may initiate, without consent of the trust company, any proceeding to protect himself which would involve a disclosure of such confidential communications. He would be justified in making disclosure only if he should be subject to false accusation by the trust company.").

The 1983 ABA Model Rules of Professional Conduct finally addressed corporations' lawyers' obligation to undertake what is frequently called "up-the-ladder" reporting or "reporting up" of corporate constituents' misconduct. This internal reporting obligation contrasts with such lawyers' possible duty or discretion to report corporate constituents' misconduct outside the corporation. Not surprisingly, that is called "reporting out."

Because such lawyers represent the corporate entity, such disclosure to third parties often involves disclosing the client's possible wrongdoing (based on the respondeat superior doctrine or some other imputed theory liability). This is far different from the "up-the-ladder" reporting, which involves lawyers' disclosure of non-clients' (corporate employees) wrongdoing to the corporate client.

Under the long-standing version of ABA Model Rule 1.13, lawyers were required to take some action if they "knew" of any action by company employees that (1) violated the employees' legal obligation to the corporation or was a "violation of law" which could be imputed to the corporation; (2) was related to the lawyer's representation; and (3) could subject the company to "substantial injury."

When deciding how to proceed, lawyers had to consider a number of factors listed in the Rule. ABA Model Rule 1.13 offered suggested courses of conduct, including reporting up the corporate ladder all the way to the board of directors (if necessary). The lawyer could resign if the corporation's "highest authority" insisted upon action (or "a refusal to act") that was "clearly" a legal violation and was likely to result in "substantial injury" to the company. ABA Model Rule 1.13(c).

The ABA debated dramatic changes to ABA Model Rule 1.13 after Enron, but ended up passing fairly modest changes. That is discussed below.

Sarbanes-Oxley

After the Enron scandal (which was quickly followed by other similar corporate meltdowns), Congress moved quickly to impose an additional layer of government regulation. Led by Maryland Senator Sarbanes and Ohio Congressman Oxley, Congress moved with remarkable speed.

Near the very end of the congressional legislative process, North Carolina Senator John Edwards noted lawyers' role in corporate failures.

> In recent weeks we have learned about high-flying corporations that came crashing to the ground after top executives played fast and loose with the law. And we have heard how ordinary employees and shareholders can lose their life savings when millionaire managers break the rules.
>
> . . .
>
> The Securities and Exchange Commission has an essential part to play as well. For some time, the SEC promoted the basic responsibility of lawyers to take steps in order to step corporate managers from breaking the law. The rule for lawyers that the SEC promoted was simple: If you find out managers are breaking the law, you tell them to stop. And if they won't stop, you go to the board of directors, the people who represent the shareholders, and you tell them what is going on.
>
> After promoting the simple principle that lawyers must "go up the ladder" when they learn about misconduct, the SEC gave up the fight. They gave up the fight in part because the American Bar Association opposed their efforts.

Congressional Record, Proceedings and Debates of the 107th Congress, Second Session, Vol. 148, No. 81, *S5652, June 18, 2002 (emphasis added).

About three weeks later, Senator Edwards spoke about an amendment that he and two other senators (including New Jersey's Senator Jon Corzine) intended to introduce.

> For some time, the SEC actually tried to do that in the late 1970s and early 1980s. They brought legal actions to enforce this basic responsibility of lawyers -- the responsibility to take steps to make sure corporate managers didn't break the law and harm shareholders in the process. If you find out that the managers are breaking the law, you must tell them to stop. If they won't stop, you go to the board of directors, which represents the shareholders, and tell them what is going on. If they won't act responsibility and in compliance with the law, then you go to

> the board and say something has to be done; there is a violation of the law occurring. It is basically going up the ladder, up the chain of command.
>
> For years, the SEC recognized the principle that lawyers had a legal responsibility to go up the ladder if they saw wrongdoing occurring. But then they stopped. One of the reasons they stopped is because there were a lot of protests coming from the organized bar.
>
> . . .
>
> The time has come for Congress to act. This amendment acts in a very simple way. It basically instructs the SEC to start doing exactly what they were doing 20 years ago, to start enforcing this up-the-ladder principle.

Congressional Record, Proceedings and Debates of the 107th Congress, Second Session, Vol. 148, No. 92, *S6552, July 10, 2002 (emphasis added).

Senator Edwards' suggestion quickly became part of the fast-moving legislative process.

In 2003, George Washington University Law School Professor Thomas Morgan discussed the Sarbanes-Oxley statute and regulations. Thomas D. Morgan, Sarbanes-Oxley: A Complication, Not a Contribution, in the Effort to Improve Corporate Lawyers' Professional Conduct, 17 Geo. J. Legal Ethics 1 (Fall 2003). Among other things, Professor Morgan described how Sarbanes-Oxley came to include a provision applying to lawyers.

> [O]n June 25, 2002, when Senator Sarbanes introduced Senate Bill 2673 -- the Senate version of the bill that ultimately became Sarbanes-Oxley -- there was no special provision for regulation of lawyers. On July 10, 2002, however, Senator Edwards changed that. Announcing that Chairman Pitt had not even deigned to reply to his own letter at all, Senator Edwards proposed an amendment ("Edwards Amendment") that became Section 307 of the Act and that required the SEC, not later than 180 days after passage of the Act, to "establish rules, in the public interest and for the

> protection of investors, setting forth minimum standards of professional conduct for attorney appearing and practicing before the Commission in any way in the representation of public companies, including a rule requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof) and, if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors [of the issuer] or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the company, or to the board of directors."
>
> Debate on the amendment was brief, and on July 15, it was adopted by the Senate by a vote of 97-0. The entire S. 2673, as amended, passed shortly thereafter by the same margin.

Id. at 15-16 (footnotes omitted). Professor Morgan noted how quickly the final version passed Congress.

> The Act passed the House . . . on July 25, 2002, by the overwhelming vote of 423-3. It passed the Senate 99-0 on July 30. The whole legislative process had taken less than eight months from the time of the Enron bankruptcy.

Id. at 18 (footnoted omitted).

For lawyers, the most important Sarbanes-Oxley provision contained just 171 words, but generated a vigorous debate among bars, scholars, and practitioners.

> Not later than 180 days after the date of enactment of this Act, the Commission shall issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule -- (1) requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the

> equivalent thereof); and (2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.

15 U.S.C. § 307 (2002).

Thus, Section 307 of Sarbanes-Oxley directed the Securities and Exchange Commission ("SEC") to issue regulations requiring lawyers "appearing and practicing" before the SEC who possess any "evidence" of a "material" securities law violation, breach of fiduciary duty, or "similar violation" to (1) report the evidence to the company's chief legal or executive officer; and (2) if that officer does not "appropriately respond," report the evidence to the company's audit committee, independent directors, or the full board.

The SEC's original proposed regulations would have covered a large number of lawyers (many of whom would not even know that they were "appearing and practicing" before the SEC), demanded extensive record-keeping, and sometimes required lawyers whose corporate clients engaged in misconduct to withdraw, and disavow tainted work product. After a flurry of criticism, the SEC dropped most of these dramatic proposals.

The final rules only cover lawyers transacting business with the SEC; representing parties or witnesses in connection with an SEC investigation or proceeding; providing securities law advice about any document that the lawyer has notice will be filed with or submitted to the SEC; or providing advice about whether an issuer must make such a filing. The new regulations explicitly exclude lawyers who engage in activities other than providing legal services.

The rules require covered lawyers to report "up the ladder" if they have "evidence of a material violation" of particular corporate wrongdoing. For obvious reasons, the linchpin of the entire regulatory scheme is the meaning of "evidence of a material violation."

On December 2, 2002, the SEC issued its proposed regulations. Among other things, the proposed regulations defined "evidence of material violation" as follows:

> Evidence of a material violation means information that would lead an attorney reasonably to believe that a material violation has occurred, is occurring, or is about to occur.

Federal Register, Vol. 67, No. 231, Proposed Rules, at 71678(e), December 2, 2002 (second emphasis added).

The proposed regulation defined "reasonably believes" as follows:

> Reasonably believes means that an attorney, acting reasonably, would believe the matter in question.

Id. at 71680(l) (second emphasis added).

The proposed regulations wisely invited comments about these proposed regulations.

> Interested persons are invited to comment on whether this definition is sufficiently clear and whether alternative language would be an improvement.

Id.

The SEC issued its final regulations about two months later.

The final regulation's definition of "evidence of a material violation" contains a confusing series of negatives:

> Evidence of a material violation means credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to

> conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur.

68 Fed. Reg. 6296, 6301(e) (Feb. 6, 2003) (emphasis added; first emphasis in original).

The final definition of "reasonably believes" is about as useless as the proposed definition:

> Reasonably believes means that an attorney believes the matter in question and that the circumstances are such that the belief is not unreasonable.

Id. at 6305(m) (second emphasis added).

Interestingly, five years before the SEC issued these tortured definitions, the agency promulgated clear writing guidelines -- including the following recommendations:

> Write in the "positive"
>
> Positive sentences are shorter and easier to understand than their negative counterparts.
>
> . . .
>
> Also, your sentences will be shorter and easier to understand if you replace a negative phrase with a single word that means the same thing.
>
> . . .
>
> Use short sentences:
>
> The longer and more complex a sentence, the harder it is for readers to understand any single portion of it.

U.S. Sec. & Exch. Comm'n, Office of Investor Educ. & Assistance, A Plain English Handbook: How to create clear SEC disclosure documents, at 27-28, Aug. 1998.

Not surprisingly, the SEC's definition has drawn academic criticism.

> The SEC rules define "evidence of a material violation" in Section 205.2(e) as "credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is

> reasonably likely that a material violation has occurred, is occurring, or is about to occur."
>
> . . .
>
> In deciding whether to act -- whether to report what Congress wanted to encourage lawyers to report up the corporate ladder -- the lawyer confronting the definition of "evidence of a material violation" in Section 205.2(e) must ask herself whether it would be unreasonable not to conclude that the evidence before her demonstrates a reasonable likelihood of a material violation of law. This definition, which triggers the up-the-ladder reporting duty, is troublesome because its use of a double-negative formulation makes the standard difficult to understand, interpret or apply.
>
> Law is intended to guide action in the world. Yet it is barely possible to read the SEC's definition out loud without tripping (or, as we have discovered when presenting this definition in various fora, chuckling) over the words, let alone trying to remember the definition without reading it or trying to work out its "logic." Indeed, the provision is a gross violation of the SEC's own "plain English" rules applicable to SEC filings intended for investors. Similar language in a prospectus would not fare well.

Roger C. Cramton, George M. Cohen, and Susan P. Koniak, Legal and Ethics Duties of Lawyers After Sarbanes-Oxley, 49 Vill. L. Rev. 725, 752-53 (2004) (emphases added).

In contrast, widely-respected Professor Thomas Morgan defended the SEC's definition.

> The definition of "evidence of a material violation" is not a model of clarity. It is written in a double-negative and says the term "evidence" consists of all "credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur. The wording of the definition is clumsy but not accidental. Saying that a lawyer must report everything that *any* reasonably prudent and competent attorney *could* think might violate the law would leave companies awash in such reports. This definition says more nearly that a lawyer must report only

> such information as *no* reasonably prudent and competent attorney would *fail* to report.

Thomas D. Morgan, Sarbanes-Oxley: A Complication, Not a Contribution, in the Effort to Improve Corporate Lawyers' Professional Conduct, 17 Geo. J. Legal Ethics1, 20 (Fall 2003) (footnote omitted) (emphases added; emphases in original indicated by italics).

As soon as Congress passed Sarbanes-Oxley, and the SEC began considering regulations, bar groups, academicians, and practicing lawyers started a drumbeat of criticism. These attacks intensified after the SEC issued its proposed regulations, and reached a crescendo as the SEC was considering scaling back some of its proposed regulations.

The lawyers critical of Sarbanes-Oxley and the SEC's regulations focused on both process and substance.

First, the critics worried that Section 307 would begin the "federalization" of lawyer ethics rules. Lawyers are not only one of the last self-regulated professions -- they also look almost exclusively to state rather than federal law in determining their ethics obligations. There are no nationwide ethics rules. The widely quoted ABA Model Rules do not govern a single lawyer's conduct -- they merely reflect a voluntary bar association's suggested guidelines. The ABA Model Rules mean nothing unless a state bar adopts them in whole or in part to guide lawyers within that state. The critics of Section 307 worried that having a nationwide ethics obligation would start down a slippery slope. They also fretted because Congress had imposed this new obligation by statute -- in most states, courts take the primary responsibility for adopting ethics rules.

These worries might have made sense in general, but not in the context of Sarbanes-Oxley. Government agencies, commissions, and other entities before whom lawyers practice have always prescribed rules for those lawyers. The Internal Revenue Service, the United States Patent and Trademark Office, the Securities and Exchange Commission itself, and other agencies regulate lawyers appearing before them, and Section 307 simply followed that tradition.

Second, critics of Section 307 argued that the reporting requirement would "chill" lawyers' relationship with corporate clients' employees. They reasoned that company employees would not share information with the company's lawyer, for fear that the lawyer would reveal their conversations up the corporate ladder.

On this issue, some lawyers' blasts at Sarbanes-Oxley became remarkably shrill. For instance, a New York lawyer started a column appearing in the March 23, 2003 Washington Times with the following paragraph:

> April may well be the cruelest month for lawyers practicing before the Securities and Exchange Commission; that is, if the Commission has its way with a new rule, set for adoption for April 7, that many believe would strike a dagger to the heart of the attorney client relationship.

James D. Zirin, Op-Ed, Risky SEC Rule for Noisy Withdrawal?, Wash. Times, Mar. 23, 2003, at B4 (emphasis added). This is pretty harsh language -- even for a lawyer.

This criticism ignored a basic tenet of all ethics rules. When a lawyer represents an organization, the organization itself -- the institution -- is the lawyer's client. ABA Model Rule 1.13(a). A corporation's employees merely act as agents for the institutional client. In fact, when lawyers deal with a company employee in situations where the lawyer "knows or reasonably should know" that the employee's interests are adverse to

the organization's interests, the lawyer must explain the "identity of the client." ABA Model Rule 1.13(f).

Thus, lawyers sharing information they learned from company employees with company management are merely serving the institutional client -- as they must. If the critics of Section 307 believed that the reporting requirement would deter corporate employees from sharing secrets with company lawyers, they must have been advocating a system in which a company lawyer may keep secret from management any material information that the lawyer learns from company employees. This is not only contrary to well-settled ethics and agency principles, it is both inconceivable to a lawyer owing a duty of loyalty to the institution, and unworkable on a day-to-day basis.

Post-Enron ABA Task Force Initial Proposals

In the post-Enron reevaluation that many American institutions undertook, the ABA appointed a Task Force on Corporate Responsibility to examine possible revisions to Model Rule 1.13. As with the SEC's watering down of the Sarbanes-Oxley regulations, the ABA Task Force came in like a lion and went out largely like a lamb.

The Task Force's initial July 16, 2002, proposals suggested three dramatic changes in Model Rule 1.13.

First, the Task Force wanted to change the knowledge standard triggering a lawyer's up-the-ladder disclosure requirements from "know" to "reasonably should know."

> [T]he mandate of Rule 1.13 applies only if the lawyer "knows" that a person associated with an organization is engaging in or intends to engage in misconduct. The Model Rules define "knows" as "actual knowledge of the fact in question." While a person's knowledge "may be inferred from the circumstances," this term presumably does not

> reach conduct covered by the term "reasonably should know," which is also defined in the Model Rules.
>
> . . .
>
> There has also been criticism of corporate lawyers for turning a blind eye to the natural consequences of what they observe and claiming that they did not 'know' that the corporate officers they were advising were engaged in misconduct. The Task Force believes that, while lawyers should not be subject to discipline for simple negligence, they should not be permitted to ignore the obvious. Instead, lawyers should be held to the 'reasonably should know' standard, defined in the Model Rules as denoting 'that a lawyer of reasonable prudence and competence would ascertain the matter in question.'

Preliminary Report of the ABA Task Force on Corporate Responsibility July 16, 2002, 58 Bus. Law. 189, 207-08 (Nov. 2002) (footnote omitted) (emphasis added).

That would have moved away from a requirement of actual knowledge toward a negligence standard, which of course would have created a duty to investigate. The final Task Force proposal (April 29, 2003) dropped that change, and kept the "know" standard.

Second, the Task Force's initial proposal would have required lawyers to report the specified wrongdoing even it was unrelated to the lawyer's representation -- again widening the lawyer's duties of investigation and disclosure.

> The Task Force therefore recommends that Rule 1.13 be amended to make clear that it requires the lawyer to pursue the measures outlined in Rule 1.13(c)(1) through (3) (including referring the matter to higher corporate authority), in a matter either related to the lawyer's representation (as currently provided) or that has come to the lawyer's attention through the representation, where the misconduct by a corporate officer, employee or agent involves crime or fraud, including violations of federal securities laws and regulations. Rule 1.13(b) could also be amended to emphasize in the text of the Rule itself that the list of potential remedial measures need not be pursued in

> sequential order, and that in circumstances involving potentially serious misconduct with significant risk to the corporation, an effort to seek reconsideration by a particular officer or employee that is unlikely to succeed should be bypassed in favor of referral to a higher authority in the corporation. Finally, the Task Force recommends that both the text of and Comments to Rule 1.13 should be revised to avoid unduly discouraging action by counsel to prevent or rectify corporate misconduct, and to encourage lawyers to take the action required by the rule.

Id. at 204 (footnotes omitted) (emphasis added). The final Task Force proposal retained the current "related to the representation" standard.

The third material change in the Task Force's initial proposal was the only one to survive. That proposal allows (but does not require) a lawyer to reveal (outside the company) violations by one of the corporation's constituents of a "legal obligation to the organization" or a "violation of law" that might be imputed to the organization -- if the lawyer believes the violation is "reasonably certain to result in substantial injury to the organization." Model Rule 1.13 (b), (c).

In addition to this important change, the final Task Force report recommended some fine-tuning to Model Rule 1.13.

For instance, the Task Force recommended changing some language in Model Rule 1.13 to reiterate that lawyers must take some action upon learning of reportable wrongdoing. The Task Force also suggested that parts of Model Rule 1.13 be rewritten to eliminate comments that could be interpreted as diminishing the duty of disclosure. For instance, old Model Rule 1.13 Comment [3] formerly explained that a lawyer needed "clear justification" to go over the head of a corporate constituent with whom the lawyer deals. The Task Force's final proposal eliminated such discouraging language.

The ABA Task Force also recommended that corporations adopt policies in which general counsel periodically meet with independent board members (to discuss possible corporate wrongdoing), and that outside counsel should likewise establish a direct line of communication with the general counsel to discuss possible corporate wrongdoing.

Perhaps the most remarkable portion of the ABA Task Force's initial proposal involved changes to ABA Model Rule 1.6 -- which deals with confidentiality.

The Task Force's report noted that the ABA has just rejected two Ethics 2000 proposals that would have expanded the scope of lawyers' discretionary disclosure of client wrongdoing.

> The ABA Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000") proposed in February of this year, consistent with the Restatement (Third) of the Law Governing Lawyers, that three exceptions be added to Model Rule 1.6 to permit the lawyer to disclose client confidences to third parties. The ABA House of Delegates approved one of those exceptions, permitting disclosure when necessary to prevent reasonably certain death or substantial bodily harm. It rejected the other two Ethics 2000 proposals to expand permissive disclosure under Rule 1.6. Those proposals would have permitted disclosure to prevent or rectify the consequences of a crime or fraud in which the client had used or was using the lawyer's services and that was reasonably certain to result, or had resulted, in substantial injury to the financial interests or property of another.
>
> The Task Force recommends that the House of Delegates reconsider and adopt these Ethics 2000 proposals.

Preliminary Report of the ABA Task Force, 58 Bus. Law. at 205.

The Task Force also noted that most states had rejected the ABA's very narrow approach to a lawyer's disclosure of client wrongdoing.

> Forty-one states either permit or require disclosure to prevent a client from perpetrating a fraud that constitutes a crime, and eighteen states permit or require disclosure to rectify substantial loss resulting from client crime or fraud in which the client used the lawyer's services. If existing Rule 1.6 was "out of step with public policy" a year ago, as Ethics 2000 concluded, it is even more out of step today, when public demand that lawyers play a greater role in promoting corporate responsibility is almost certainly much stronger. The Ethics 2000 proposals are an important part of an effective response to the problems that have provoked public criticism of the bar.

Id. at 206-07(footnotes omitted).

The Task Force recommended that the ABA revisit and approve these Rule 1.6 changes.

But then the Task Force went even further -- suggesting mandatory rather than discretionary disclosure.

> The Task Force further recommends amendment to Rule 1.6 to make disclosure mandatory, rather than permissive, in order to prevent client conduct known to the lawyer to involve a crime, including violations of federal securities laws and regulations, in furtherance of which the client has used or is using the lawyer's services, and which is reasonably certain to result in substantial injury to the financial interests or property of another.

Id. at 206 (emphasis added).

This would have been an astonishing change, if it had been included in the ABA Task Force's final recommendations, and adopted by the ABA House of Delegates.

The ABA has never recognized a mandatory duty to report even a client's unequivocal intent to kill someone. That has always been a discretionary provision, not mandatory. See ABA Model Code DR 4-101(C); ABA Model Rule 1.6(b)(1). If it had been adopted, the ABA Task Force's recommended provision would have required

lawyers to report clients' intent to violate the federal securities laws and regulations, but not the clients' intent to murder someone. That would have been so obviously embarrassing to the ABA that one must wonder why the ABA Task Force even hinted at it, let alone included such a provision in its initial proposal.

A number of commentators have noted that during June and July of 2002 (when the ABA Task Force on Corporate Responsibility was formulating its preliminary report), Senator John Edwards and Jon Corzine were pushing for lawyer regulation in the Sarbanes-Oxley law, and Congress was debating Sarbanes-Oxley. Senator Edwards proposed the amendment that became Sarbanes-Oxley Section 307 just six days before the ABA Task Force's preliminary report, and the Senate unanimously adopted the Edwards Amendment just one day before the ABA Task Force's preliminary report. A number of commentators have surmised that the ABA Task Force floated its mandatory reporting proposal as a way to forestall more onerous congressional action.

In any event, the proposed mandatory reporting provision was not only excluded from the ABA Task Force's final report, it wasn't even mentioned in the ABA Task Force's April 29, 2003, final report.

ABA Task Force Final Report

Continuing in its back-and-forth interaction with Congress and the SEC, the ABA's Task Force on Corporate Responsibility issued its final report less than two months after the SEC's February 6, 2003, issuance of final regulations (and "reporting out" proposal).

The Task Force's final Report did not even mention its earlier outlandish suggestion that lawyers be required to report certain past client misconduct that might

cause financial damage to a third person. If the Task Force's proposal of a mandatory disclosure obligation of clients' financial crimes or frauds was designed to deter the SEC from immediately adopting its own disclosure obligation in the corporate context or more widely, the tactic worked.

The final Report also abandoned (but at least mentioned) the Preliminary Report's suggestion that lawyers' "reporting up" requirement involve sufficiently egregious corporate constituent misconduct even if unrelated to the lawyer's representation. The final Report described the reason for this shift.

> In its deliberations, the Task Force considered whether the lawyer's duties under the Rule should continue to be triggered only by matters that are "related to the representation." The Task Force's Preliminary Report recommended that the Rule require the lawyer to act with respect to any known violation, even if not related to the representation. Others point out, however, that it would be unfair to hold responsible a lawyer working in one field of the law to understand that facts of which he was aware should have led to a conclusion of law violation in a field with which he was unfamiliar. The Task Force is persuaded by this analysis and recommends that this qualification be retained in the Rule.

Report of the ABA Task Force on Corporate Responsibility, 59 Bus. Law. 145, 168 (Nov. 2003) (emphasis added) (footnotes omitted).

2003 ABA Model Rules Changes

The ABA House of Delegates adopted the final Task Force Rule 1.13 recommendation in August, 2003. Although the vote was not very close (unlike the vote on the changes to Model Rule 1.6), some lawyers continued to resist any provision allowing lawyers to reveal information outside their organizational client. Judah Best of the well-known Washington, D.C., law firm of Debevoise & Plimpton reportedly labeled

the new provision as "utterly wicked." ABA Amends Ethics Rules on Confidentiality, Corporate Clients, to Allow More Disclosures, 19 ABA/BNA Law. Manual on Prof'l Conduct 467, 469 (Aug. 13, 2003).

One academic commentator coming from a different direction has also criticized ABA Model Rule 1.13 -- but for a completely different reason.

Hostra University Law School Professor Monroe Freedman complained that corporate lawyers cannot "report up" unless doing so is in the "best interest of the organization." Professor Freedman has condemned the rule's focus on injury to the corporate client -- rather than on injury to the victims of a corporate client's wrongdoing.

> [T]he lawyer is not required by MR 1.13 to go up the ladder. Indeed, she is not even permitted to refer the matter to higher authority unless the fraud is "likely to result in substantial injury to the organization." In our hypothetical case, the fraud is not likely to be detected, so there is no likely to be substantial injury to the corporation if the lawyer remains silent. Accordingly, the lawyer is forbidden to go up the ladder.
>
> [T]he lawyer is expressly directed to act "in the best interest of the organization," and she is further told not to go up the ladder if she reasonably believes that doing so it not "necessary in the best interest of the organization." (Note again that there is not a word here about the best interests -- or any interest -- of those who are being defrauded.) Since the CEO's fraud is not likely to be detected, the lawyer could reasonably believe it to be in the best interest of the corporation not to report it to the board, on the grounds that the fewer people who know about the fraud, the better for the corporation. (This would be of particular concern whenever there are independent directors on the board.) In that event, it would not be "necessary in the best interest of the organization" to go up the ladder to the board of directors, and the lawyer would be forbidden to do so.

Monroe Freedman, The "Corporate Watch Dogs" That Can't Bark: How The New ABA Ethics Rules Protect Corporate Fraud, 8 UDC-DCSL L. Rev. 225, 229-30 (2004).

It is unclear why Professor Freedman concluded that corporations' lawyers may not "report up" in the scenario he outlined. If a lawyer jointly represents the corporate entity and the confessing constituent, there might be joint representation issues. But if the corporation's lawyer learns of some material fact from a non-client within the corporation, nothing should prevent the lawyer from disclosing the material fact to higher authorities within the corporation. ABA Model Rule 1.13 requires such disclosure under the specified circumstances, but does not seem to ever prohibit it -- even in the absence of those circumstances.

Post-Enron ABA Rules

Under current ABA Model Rule 1.13:

> If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

ABA Model Rule 1.13(b). A comment provides further guidance.

> In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person

> involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

Id. cmt. [4]. Another comment describes the scope of such lawyers' duty to go "up the ladder."

> Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Id. cmt. [5].

The next comment explicitly indicates that lawyers who represent corporations must follow all of the other applicable ethics rules.

> The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.8, 1.16, 3.3 or 4.1. Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b)(1) - (6). Under paragraph (c) the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rules 1.6(b)(2) and 1.6(b)(3) may permit the lawyer to disclose confidential information. In such circumstances Rule 1.2(d) may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.

Id. cmt. [6].

Significantly, ABA Model Rule 1.13 extends such lawyers' duty beyond the lawyer's termination -- thus preventing the organization from firing the lawyer to cover-up the wrongdoing.

> A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

ABA Model Rule 1.13(e). For some reason, the comment dealing with this duty is exactly the same as the black letter rule, except it uses the word "must" rather than "shall."

> A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of these paragraphs, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

ABA Model Rule 1.13 cmt. [8].

ABA Model Rule 1.13's duty is surprisingly narrow. First, a lawyer has no duty to report "up the ladder" a constituent's wrongdoing that is not "related to the representation." ABA Model Rule 1.13(b). Second, the lawyer has no duty to take such a step unless the misconduct is "likely to result in substantial injury to the organization." Id. Third, a lawyer's obligation to go "up the ladder" does not arise if the lawyer "reasonably believes that it is not necessary in the best interest of the organization to do so." Id.

Perhaps most significantly, ABA Model Rule 1.13 focuses on "substantial injury to the organization." It does not deal at all with injury to those who might have been, are being, or might in the future be, victimized by corporate employees' misconduct. Other ethics rules address the limited circumstances in which lawyers may have disclosure or remedial duties that focus on the victims rather than the perpetrators.

Conclusion

Lawyers representing organizations must report "up the ladder" under a fairly narrow range of circumstances. Lawyers must undertake the drastic step if (1) they

have not established a separate representation of the constituent; (2) they have not established a joint representation of the constituent and the organization (which would trigger a different set of confidentiality and possible permissible or mandatory disclosure issues under the ethics rules; (3) the wrongdoing is "related to" the lawyer's representation of the organization; (4) the wrongdoing is "likely to result in substantial injury to the organization"; (5) the lawyer does not "reasonably believe[ ] that it is not necessary in the best interest of the organization" to go "up the ladder."

Of course, lawyers in this circumstance may face many other statutory, regulatory, contractual or common law duties. For instance, Sarbanes-Oxley might apply. Other federal or state regulations could also affect the lawyer's obligations. Lawyers and an organizational client might have entered into a retainer agreement or other contractual relationships creating such a duty. Other common law duties, such as the lawyer's fiduciary duty to the organizational client might well require "up the ladder" reporting in a broader range of circumstances than the ethics rules.

Best Answer

The best answer to this hypothetical is **(A) YOU MUST DISCLOSE THE VICE PRESIDENT'S WRONGDOING "UP THE LADDER" WITHIN THE CORPORATION**.

Misprision of Felonies

Hypothetical 20

For years, you have been among your small town's most-respected lawyers. You have always tried to act with the utmost integrity and honesty, but an incident that occurred this evening has triggered an agonizing moral dilemma for you.

A despicable man was killed in a knife fight near your house. You initially thought that your young son had killed the man, defending himself and your daughter from his attack. When the sheriff arrived on the scene, he immediately told you that the attacker fell on his own knife, but you know that didn't happen. When the sheriff kept repeating what you know is a lie, you push back -- telling the sheriff that perpetuating such a falsehood would contradict the way you've raised your children.

The increasingly frustrated sheriff finally admitted that one of your neighbors killed the man to save your children's lives. However, the sheriff bluntly told you that he intends to protect the heroic neighbor from the inevitable publicity, and that he will report that the attacker fell on his own knife. You therefore know that the sheriff will knowingly lie on any official reports that he must file, and deliberately mislead the public.

Your young daughter overheard your tense confrontation with the sheriff. She knew that your heroic neighbor killed the attacker -- thus saving her and her brother. You lamely turned to your daughter and asked if she "can possibly understand" that the despicable man who attacked her and her brother died when he fell on his own knife. She assured you that she understands -- but you know that she realized that story is false.

Does your failure to report the sheriff's inevitable official and public falsehoods violate the ethics rules?

MAYBE

Analysis

Like all citizens, lawyers may have the responsibility to report a non-client's intentional sufficiently egregious wrongdoing, even if it does not occur before a tribunal (where the ethics rules create special disclosure duties).

Background of this Scenario

This scenario comes from the famous novel To Kill a Mockingbird.

Atticus Finch had insulted Bob Ewell in defending innocent Tom Robinson -- who had been wrongly accused of raping Ewell's daughter. Robinson had predictably been found guilty, and later shot while trying to escape from jail.

The vengeful Bob Ewell later assaulted Atticus' daughter Scout and son Jem while they walked home one evening. They were saved by their mysterious neighbor Boo Radley -- who killed Ewell and carried the seriously wounded Jem back to Atticus' house.

When questioned by Sheriff "Heck" Tate shortly after the incident, Atticus' young daughter Scout describes what she remembered of the attack. She initially thought that perhaps her brother Jem had pulled Ewell off her. However, Scout then confirms that their reclusive neighbor Boo Radley had saved her and Jem.

> 'Anyway, Jem hollered and I didn't hear him any more an' the next thing -- Mr. Ewell was tryin' to squeeze me to death, I reckon. . . then somebody yanked Mr. Ewell down. Jem must have got up, I guess. That's all I know. . . ."
>
> 'And then?' Mr. Tate was looking at me sharply.
>
> 'Somebody was staggerin' around and pantin' and -- coughing fit to die. I thought it was Jem at first, but it didn't sound like him, so I went lookin' for Jem on the ground. I thought Atticus had come to help us and had got wore out -- '
>
> 'Who was it?'
>
> 'Why there he is, Mr. Tate, he can tell you his name.'
>
> As I said it, I half pointed to the man in the corner [Boo Radley], but brought my arm down quickly lest Atticus reprimand me for pointing. It was impolite to point.

Harper Lee, To Kill a Mockingbird, 270 (Warner Books 1982) (1960) (emphases added).

Atticus apparently had not listened carefully enough to his daughter Scout's story, because he initially assumed that his son Jem had killed Ewell.

Atticus starts thinking out loud about what comes next.

> 'Well, Heck,' [Tate, the sheriff] Atticus was saying, 'I guess the thing to do -- good Lord, I'm losing my memory . . .' Atticus pushed up his glasses and pressed his fingers to his eyes. 'Jem's not quite thirteen . . . no he's already thirteen -- I can't remember. Anyway, it'll come before county court --'
>
> 'What will, Mr. Finch?' Mr. Tate uncrossed his legs and leaned forward.
>
> 'Of course it was clear-cut self defense, but I'll have to go to the office and hunt up --'
>
> 'Mr. Finch, do you think Jem killed Bob Ewell? Do you think that?'
>
> 'You heard what Scout said, there's no doubt about it. She said Jem got up and yanked him off her -- he probably got hold of Ewell's knife somehow in the dark . . . we'll find out tomorrow.'

Id. at 272 (emphasis added). Interestingly, Scout had clearly explained that she initially thought Jem might have pulled Ewell off her, but ultimately realized that Boo Radley had done so.

Sheriff Tate tells Atticus that Jem had not killed Ewell -- but Atticus quickly pushes back.

> Atticus was silent for a moment. He looked at Mr. Tate as if he appreciated what he said. But Atticus shook his head.
>
> 'Heck, it's mighty kind of you and I know you're doing it from that good heart of yours, but don't start anything like that.'
>
> . . .
>
> 'I'm sorry if I spoke sharply, Heck,' Atticus said simply, 'but nobody's hushing this us. I don't live that way.'

> 'Nobody's gonna hush anything up, Mr. Finch.'

Id. at 272-73 (emphases added).

Atticus reiterates his intent to help build his son Jem's defense.

> 'Thank you from the bottom of my heart,' but I don't want my boy starting out with something like this over his head. Best way to clear the air is to have it all out in the open. Let the county come and bring sandwiches. I don't want him growing up with a whisper about him, I don't want anybody saying, "Jem Finch . . . his daddy paid a mint to get him out of that." Sooner we get this over with the better.'

Id. at 273 (emphases added).

Sheriff Tate interrupts Atticus.

> 'Mr. Finch,' Mr. Tate said stolidly, 'Bob Ewell fell on his knife. He killed himself.'

Id. Atticus reiterates his refusal to allow Sheriff Tate to concoct a false story.

> 'Heck,' Atticus's back was turned. 'If this thing's hushed up it'll be a simple denial to Jem of the way I've tried to raise him. Sometimes I think I'm a total failure as a parent, but I'm all they've got. Before Jem looks at anyone else he looks at me, and I've tried to live so I can look squarely back at him . . . if I connived at something like this, frankly I couldn't meet his eye, and the day I can't do that I'll know I've lost him. I don't want to lose him and Scout, because they're all I've got.'

Id. (emphases added). Atticus refuses to acquiesce in Sheriff Tate's false story.

When Sheriff Tate again tells Atticus that Ewell fell on his knife, Atticus is even more determined.

> Atticus wheeled around. His hands dug into his pockets, 'Heck, can't you even try to see it my way? You've got children of your own, but I'm older than you. When mine are grown I'll be an old man if I'm still around, but right now I'm -- if they don't trust me they won't trust anybody. Jem and Scout know what happened. If they hear of me saying downtown something different happened -- Heck, I won't

> have them any more. I can't live one way in town and another way in my home.'

Id. at 274 (emphasis added). Ironically, Atticus' daughter Scout knew what happened -- Boo Radley had saved her and her brother Jem.

Sheriff Tate tries to demonstrate how Ewell might have fallen on his knife. When Atticus says "I won't have it," Sheriff says, "God damn it, I'm not thinking of Jem!" Id. At that point, Sheriff Tate kicks the floorboard so hard that it wakes up the neighbors.

Sheriff Tate then quietly tries to make Atticus understand what he is saying.

> When Mr. Tate spoke again his voice was barely audible. 'Mr. Finch, I hate to fight you when you're like this. You've been under a strain tonight no man should ever have to go through. Why you ain't in the bed from it I don't know, but I do know that for once you haven't been able to put two and two together, and we've got to settle this tonight because tomorrow'll be too late. Bob Ewell's got a kitchen knife in his craw.'
>
> Mr. Tate added that Atticus wasn't going to stand there and maintain that any boy Jem's size with a busted arm had fight enough left in him to tackle and kill a grown man in the pitch dark.

Id. at 275 (emphasis added).

As the truth begins to dawn on Atticus, he asks where Sheriff Tate obtained the switchblade he had just used to demonstrate how Ewell might have fallen on his own knife. Sheriff Tate answers coolly that he "took it off a drunk man downtown tonight." Id. Sheriff Tate had already told Atticus that Ewell was killed by a kitchen knife -- and surmises that Ewell "probably found that kitchen knife in the dump somewhere." Id.

Although the book does not explicitly state as much, it must have finally occurred to Atticus that Boo Radley had used a kitchen knife to kill Ewell, who himself had been armed with the switchblade.

Atticus finally realizes that Sheriff Tate intends to lie about Ewell's death to avoid thrusting Boo Radley into the inevitable limelight.

> Atticus made his way to the swing and sat down. His hands dangled limply between his knees. He was looking at the floor. He had moved with the same slowness that night in front of the jail, when I thought it took him forever to fold his newspaper and toss it in his chair.

Id. at 275.

Sheriff Tate repeats his intention to falsely report that Ewell fell on his own knife.

> 'It ain't your decision, Mr. Finch, it's all mine. It's my decision and my responsibility. For once, if you don't see it my way, there's not much you can do about it. If you wanta try, I'll call you a liar to your face.'

Id. at 275 (emphasis added).

Just before leaving, Sheriff Tate explains the reason for his deliberate public deception.

> 'I never heard tell that it's against the law for a citizen to do his utmost to prevent a crime from being committed, which is exactly what he [Boo Radley] did, but maybe you'll say it's my duty to tell the town all about it and not hush it up. Know what'd happen then? All the ladies in Maycomb includin' my wife'd be knocking on his door bringing angel food cakes. To my way of thinkin', Mr. Finch, taking the one man who's done you and this town a great service an' draggin' him with his shy ways into the limelight -- to me, that's a sin. It's a sin and I'm not about to have it on my head. If it was any other man it's be different. But not this man, Mr. Finch.

Id. at 276 (emphases added).

Atticus had to decide what to do. He had earlier refused to acquiesce in Sheriff Tate's false story when he thought it was intended to save his own son from prosecution.

However, Atticus eventually agrees to acquiesce in Sheriff Tate's false story -- to save the reclusive Boo Radley from a grateful town's attention.

Atticus then enlists his daughter Scout's cooperation in confirming Sheriff Tate's knowingly false story of what had happened.

> Atticus sat looking at the floor for a long time. Finally he raised his head. 'Scout,' he said, 'Mr. Ewell fell on his knife. Can you possibly understand?'

Id. (emphasis added). Scout quickly cooperates.

Obviously sensing her father's implicit request that she also agree to Sheriff Tate's false narrative about the attack, Scout offers the central line echoing the novel's title.

> Atticus looked like he needed cheering up. I ran to him and hugged him and kissed him with all my might. 'Yes sir, I understand,' I reassured him. 'Mr. Tate was right.'
>
> Atticus disengaged himself and looked at me. 'What do you mean?'
>
> 'Well, it'd be sort of like shootin' a mockingbird, wouldn't it?'

Id. (emphases added)

Earlier in the novel, Atticus had explained that no one should ever kill a mockingbird.

> When he gave us our air-rifles Atticus wouldn't teach us to shoot. Uncle Jack instructed us in the rudiments thereof; he said Atticus wasn't interested in guns. Atticus said to Jem one day, 'I'd rather you shot at tin cans in the back yard, but I know you'll go after birds. Shoot all the bluejays you want, if you can hit 'em, but remember it's a sin to kill a mockingbird.'
>
> That was the only time I ever heard Atticus say it was a sin to do something, and I asked Miss Maudie about it.
>
> 'Your father's right,' she said. 'Mockingbirds don't do one thing but make music for us to enjoy. They don't eat up

> people's gardens, don't nest in corncribs, they don't do one thing but sing their hearts out for us. That's why it's a sin to kill a mockingbird.'

Id. at 90 (emphases added).

Boo Radley is like the mockingbird -- completely harmless to others, and deserving of protection. Although some have also analogized the falsely accused and wrongly murdered Tom Robinson as another example of a mockingbird, there is no direct reference to analogizing him to a mockingbird[22] -- as there is with Boo Radley.

Atticus seems relieved that Scout will go along with Sheriff Tate's false story, and then thanks Boo Radley.

> Atticus put his face in my hair and rubbed. When he got up and walked across the porch into the shadows, his youthful step had returned. Before he went inside the house, he stopped in front of Boo Radley. 'Thank you for my children, Arthur,' he said.

Id. at 276 (emphasis added).

Interestingly, Atticus Finch remains by far America's favorite fictional lawyer. In 2010, the ABA Journal ran a story on the 25 greatest American fictional lawyers -- but put Atticus Finch in a class by himself.

- The 25 Greatest Fictional Lawyers (Who Are Not Atticus Finch), ABA Journal, Aug. 2010 ("Hollywood loves lawyers. Television loves lawyers. And literature? Well, from Shakespeare to Dickens to Grisham, there is no shortage of fictional lawyers for us to admire, disdain or, above all, simply remember. We wondered how the fictional lawyers of film, television and literature would stack up against each other. Of course, in some cases they

[22] Harper Lee, To Kill a Mockingbird, 240-41 (Warner Books 1982) (1960) ("Mr. B. B. Underwood was at his most bitter, and he couldn't have cared less who canceled advertising and subscriptions. (But Maycomb didn't play that way: Mr. Underwood could holler till he sweated and write whatever he wanted to, he'd still get his advertising and subscriptions. If he wanted to make a fool of himself in his paper that was his business.) Mr. Underwood didn't talk about miscarriages of justice, he was writing so children could understand. Mr. Underwood simply figured it was a sin to kill cripples, be they standing, sitting, or escaping. He likened Tom's death to the senseless slaughter of songbirds by hunters and children, and Maycomb thought he was trying to write an editorial poetical enough to be reprinted in The Montgomery Advertiser.").

are the same. The Perry Mason of Erle Stanley Gardner's popular novels is lost in Raymond Burr's television portrayal. John Mortimer's Horace Rumpole will forever have the face of actor Leo McKern. But whatever the medium, it is the character we come to love or loathe -- whether as a lawyer, a detective, a hero or a human being. In our survey of this literature of lawyers, however, we feel obliged to recognize a great divide -- ante-Atticus and post-Atticus. From Dick the Butcher's famous pronouncement to Jack Cade in Shakespeare's Henry VI, Part 2 -- 'First thing we do, let's kill all the lawyers.' -- through Dickens' Mr. Tulkinghorn and Galsworthy's Soames Forsyte, literature (with a few exceptions) treated lawyers poorly. That all changed with Harper Lee's unflappable, unforgettable Atticus Finch. With Atticus, the lawyer -- once the criminal mouthpiece, the country club charlatan, the ambulance-chasing buffoon -- was now an instrument of truth, an advocate of justice, the epitome of reason. Finch was comfortable in his own skin and reasonably respectful of the frailties in others. To lawyers, he was the lawyer they wanted to be. To non-lawyers, he fostered the desire to become one. So for this, and other reasons, we've withdrawn Atticus Finch from this particular literary comparison, allowing our panel of experts to rank their favorite fictional lawyers without the heavy lifting required by a demigod. So here are our panel's choices for the 25 greatest fictional lawyers (none of whom are named you-know-who)." (emphases added)).

Many lawyers decided to join the profession after reading or seeing To Kill a Mockingbird.

- Carmen Germaine, Harper Lee's Atticus Finch Leaves Enduring Mark On The Law, Law360, Feb. 19, 2016 ("Novelist Harper Lee, who died Friday at the age of 89, has left abiding inspiration for generations of lawyers in the figure of her beloved character Atticus Finch, who attorneys say continues to impart lessons about the importance of respect, empathy and courage."; "Lee's 1960 novel 'To Kill A Mockingbird' continues to resonate in the minds of readers who encounter Scout, her brother Jem, their father Atticus and the story of his dedication to the case of Tom Robinson, a black man accused of raping a white woman in Jim Crow-era Alabama. In the 65 years since the novel's publication, attorneys have continued to find themselves moved by Lee's tale to not only become better lawyers, but also better people."; "As Atticus himself says in the novel, 'Real courage . . . is when you know you're licked before you begin but you begin anyway and you see it through no matter what. You rarely win, but sometimes you do.'"; "The impact of Nelle Harper Lee's first novel on the legal profession is difficult to overstate, as Atticus' courageous stand before a judicial system stacked against his client inspired generations of youngsters to enter the legal profession."; "'When I start a class, or talk to people in an audience about it, I say how many of you decided to go to law school based on 'To Kill A Mockingbird,' and at least half the people raise their hands,' said Marc R. Kadish, a pro bono adviser at

Mayer Brown LLP who teaches at Northwestern University."; "Dave Carothers, a partner at Carothers DiSante & Freudenberger LLP, said he knew he wanted be a lawyer at the age of 8 after reading the novel."; "'I thought Atticus Finch was so honorable and brave to defend Tom Robinson even though there was no way he would win -- and he did it because it was the right thing to do,' Carothers said in an email. 'I knew that was what I was going to do.'"; "Joe R. Whatley Jr. of Whatley Kallas LLP, who grew up down the street from Lee and frequently saw the novelist when she dropped by to watch Alabama football games on the Whatleys' television, said 'To Kill A Mockingbird' was a 'major reason' he became a lawyer."; "'The kind of respect, the kind of things that the Atticus Finch character did and tried to do, is something that makes us all want to be lawyers and live up to Atticus Finch as a lawyer,' Whatley said."; "To many readers, Atticus presents a rare image of a lawyer as a champion for the disadvantaged and dispossessed, showing how an attorney can be a hero to those in need." (emphasis added)).

- G. Michael Pace, Jr., Strengthening the Rule of Law, 35 VBA News J. 4, 5-6 (June/July 2008) ("I was recently invited to speak to the 8th grade students at St. Stephens and St. Agnes School in Alexandria by Mrs. Sherley Keith, their literature teacher. Ms. Keith is a student of To Kill a Mockingbird, and she had heard from my good friend and former VBA president, Ted Ellett, about my interest in the book and its characters. She had her students read the book and study it intensely for two months. Mrs. Keith asked me to share my thoughts with the students about To Kill a Mockingbird and what Atticus Finch means to me. When I arrived, the auditorium was filled with students, teachers and administrators. We talked about Nelle Harper Lee, the characters, the times in which they lived, life lessons and the role of lawyers in society. We also talked about the Rule of Law as the only real protection we have to ensure all people are treated equally. These young women and men were clearly engaged and understood that Atticus Finch believed in the Rule of Law. That is why he represented Tom Robinson . . . . Atticus had hoped the men of the jury would consider the evidence in the case and acquit Tom Robinson of a crime he did not commit. But he also knew the darkness in some people's hearts that allowed their prejudices to ignore right and do wrong. Atticus believed in the Rule of Law, and he knew that if they found Tom Robinson guilty, a higher court would overrule their decision on appeal. Unfortunately, Tom Robinson lost hope. But Atticus didn't, because he knew the greatness of our country is as a nation of laws, not of men, and that the law would ultimately protect Tom Robinson. For that, Atticus received the ultimate compliment, 'Miss Jean Louise, stand up. Your father's passin'.' That is what being a citizen lawyer is all about. Making sure there is justice for all, under fair laws, equally applied to everyone regardless of race, sex, nationality or economic place. A nation of laws, not of men. Amen.").

After author Harper Lee's death on February 19, 2016, her book triggered a renewed outpouring of praise for her book's main characters.

- Anna Russell, WSJ Book Club: To Kill a Mockingbird: Why 'Mockingbird' Still Resonates, Wall St. J., June 12, 2015 ("The first time James McBride, author of the best-selling books 'The Good Lord Bird' and 'The Color of Water,' read 'To Kill a Mockingbird' by Harper Lee, he was sitting in a closet. 'There was so much activity in the house,' he said. 'It was a book that was passed between my brothers and sisters, and I just got ahold of it and buried myself in it.'"; "Perhaps no American classic this year has generated as much discussion as the Pulitzer-Prize winner first published in 1960. The discovery of a quasi-sequel, 'Go Set A Watchman,' to be published in July, has prompted a return for many to the fictional town of Maycomb, Alabama. Mr. McBride calls the book 'from the top of the gene pool.' 'In terms of craft, I don't think there's a better novel,' he said. 'It's simply a great story.'"; "Graceful and unhurried, 'To Kill a Mockingbird' begins in the 1930s on a deceptively simple note -- with a broken arm. The narrator, a young girl named Scout, recalls, 'When he was nearly thirteen, my brother Jem got his arm badly broken at the elbow.' From there, the story of the highly public trial of an African-American man accused of raping a white woman unfolds, with Scout's father, defense attorney Atticus Finch, at the center. In sleepy Maycomb, where 'fine folks' are those who 'did the best they could with the sense they had,' the events capture everyone's attention -- and force racial tensions to the surface."; "Atticus Finch is almost the archetype of a wonderful protagonist. He's just an extraordinary character. He's the kind of American that we'd all like to be and to meet." (emphasis added).

Misprision of Felony

Failure to report another person's felony itself can constitute a crime, called "misprision of felony."

The United States Code still contains a provision making such silence a crime.

> Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.

18 USCS § 4 Misprision of Felony (LexisNexis 2014).

A 2003 Alabama Law Review article described the history and current status of the federal misprision statute.

- Christopher Mark Curenton, The Past, Present, and Future of 18 U.S.C. § 4: An Exploration of the Federal Misprision of Felony Statute, 55 Ala. L. Rev. 183, 184, 185, 186 (Fall 2003) ("Today, the law generally places no affirmative duty on citizens to report criminal activity. However, this has not always been the case. Historically, English citizens were expected to fully and actively participate in law enforcement. As the policing function became more of a state responsibility, the expected level of private citizen participation correspondingly decreased. Despite the diminished expectation for citizen involvement, the onus on citizens to act in response to criminality still exists in some limited circumstances. The federal misprision of felony statute is one remnant of this responsibility." (footnotes omitted) (emphasis added); "The offense of failure to report a felony was eventually branded as 'misprision of felony' in 1557. However, there were so few prosecutions for misprision of felony after that point that 'the continued existence of misprision as a crime in England was eventually questioned by both judges and commentators.' It fell into so much disuse that in 1866 it was claimed that the crime had disappeared from England altogether. The commentators were apparently in error, as several prosecutions for misprision of felony did take place in the twentieth century in England." (footnotes omitted); "Despite questions about the continued existence of misprision of felony in England, there is no refuting its existence in the United States. Since 1790, the United States has recognized some form of misprision of felony as an offense." (emphasis added); "[U]nlike its English counterpart, the phrasing 'conceals and does not as soon as possible make known' has been uniformly construed to require both active concealment and a failure to disclose. Thus, the elements of American misprision of felony are that: '(1) the principal committed and completed the felony alleged; (2) the defendant had knowledge of the fact; (3) the defendant failed to notify the authorities; and (4) the defendant took affirmative steps to conceal the crime of the principal.'" (emphasis added); "In order for a conviction to be sustained, there must be a concealment -- not merely an omission of failure to report criminal activity. Concealment under the statute comes in two varieties: Physical acts of concealment and verbal acts of concealment." (footnote omitted); "Verbal concealment is harder to prove. Mere silence is insufficient to support a conviction for misprision." (emphasis added); "Thus, the modern misprision of felony cases differ from their historical counterparts. The historical versions started with the assumption that an ordinary citizen had a duty to control crime, and they questioned whether the citizen failed in that duty. The modern cases assume the duty rests with law enforcement, and they question whether the citizen interfered with that duty.").

Thus, the law now conditions criminal liability for misprision of felony on some "affirmative steps to conceal the crime of the principal."

The United States Supreme Court mentioned the crime in its 1972 decision requiring a reporter to testify before a grand jury.

- Branzburg v. Hayes, 408 U/S/ 665, 695, 695-96, 697 (1972) (holding that a newspaper staff reporter would have to appear before a grand jury; rejecting the reporter's argument that he was shielded by Kentucky's reporters' privilege statute; "Accepting the fact, however, that an undetermined number of informants not themselves implicated in crime will nevertheless, for whatever reason, refuse to talk to newsmen if they fear identification by a reporter in an official investigation, we cannot accept the argument that the public interest in possible future news about crime from undisclosed, unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future."; "We note first that the privilege claimed is that of the reporter, not the informant, and that if the authorities independently identify the informant, neither his own reluctance to testify nor the objection of the newsman would shield him from grand jury inquiry, whatever the impact on the flow of news or on his future usefulness as a secret source of information. More important, it is obvious that agreements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy. Historically, the common law recognized a duty to raise the 'hue and cry' and report felonies to the authorities. Misprision of a felony – that is, the concealment of a felony 'which a man knows, but never assented to . . . [so as to become] either principal or accessory,' 4 W. Blackstone, Commentaries *121, was often said to be a common-law crime. The first Congress passed a statute, 1 Stat. 113, § 6, as amended, 35 Stat. 1114, § 146,62 Stat. 684, which is still in effect, defining a federal crime of misprision: 'Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be [guilty of misprision].' 18 U.S.C. § 4." (emphasis added; footnotes omitted); "It is apparent from this statute, as well as from our history and that of England, that concealment of crime and agreements to do so are not looked upon with favor. Such conduct deserves no encomium, and we decline now to afford it First Amendment protection by denigrating the duty of a citizen, whether reporter or informer, to respond to grand jury subpoena and answer relevant questions put to him." (emphasis added)).

Lawyers occasionally face punishment under the federal misprision statute.

- Sue Reisinger, South Carolina State Ex-General Counsel Pleads Guilty; Knew About Kickbacks, Corporate Counsel, May 15, 2014 ("South Carolina State University's former general counsel and chief of staff Edwin Givens has pleaded guilty to a felony after being involved in a kickback scheme with university officials. In a statement released to the local press Tuesday after his plea hearing, Givens said, 'This has been a long ordeal for me and my family. I regret being a part of some phone conversations entailing improper activities, but it is important to stress that I never profited in any way for these illegal activities. Not one single dime.' He declined further comment. The federal criminal charge was brought under an obscure 'misprision of felony' statute that involves knowing about a crime, failing to report it and taking steps to cover it up. Misprision of felony, under 18 U.S.C. § 4, carries a maximum of three years in prison and a maximum fine of $250,000. The crime rarely has been prosecuted on the federal level, and most states have abolished it. Only South Carolina has prosecuted the crime on a state level, according to an online legal dictionary." (emphasis added)).

- Sheri Qualters, Lawyer Gets Home Confinement For Failing To Report Boss's Mortgage Fraud, Nat'l L. J., Jan. 29, 2013 ("A federal judge has sentenced a lawyer who used to practice in Massachusetts to eight months of home confinement for not reporting a mortgage fraud scheme at his former firm."; "On January 28, Chief Judge Patti Saris of the District of Massachusetts sentenced Sean Robbins, 39, who now lives in New York, to that period of home confinement as part of three years of probation. Saris also ordered Robbins to pay $300,000 in restitution."; "Last September, Robbins pleaded guilty to 24 counts of misprision of felony -- the failure to report knowledge of a felony to authorities."; "Robbins knew about and concealed mortgage fraud cooked up by his former employer, Marc Foley, who had a law firm in Needham, Massachusetts."; "Also in September, a jury convicted Foley of 33 counts of wire fraud and five counts of money laundering. According to the evidence, Foley defrauded six mortgage lenders who provided a collective $4.9 million in real estate loans for condominium units in a building in Dorchester, Massachusetts, in December 2006 and January 2007."; "In December 2012, Judge Richard Stearns of the District of Massachusetts sentenced Foley to 72 months in prison and three years of supervised release. He also issued a special assessment of $3,800 and ordered Foley to pay nearly $2.2 million restitution. Foley's appeal is pending."; "Robbins' criminal actions took place in December 2006 and January 2007, while he was an associate at Foley's firm."; "Robbins knew Foley fraudulently led lenders to believe the firm collected $449,000 in down payments and other expenses from buyers who bought condominiums. He conducted some of the closings, hid the crimes and failed to report Foley's firm." (emphasis added)).

- Bailey Somers, Scruggs' Ex-Partner Wants $15M Fee Case Reopened, Law360, Apr. 25, 2008 ("Though Mississippi attorney Richard 'Dickie'

Scruggs has already pled guilty to attempting to bribe a judge, his legal troubles are far from over, now that his former law partner has asked a court to reopen a $15 million fee dispute between the two attorneys."; "Last week, Roberts Wilson asked a Mississippi county court to reopen a case involving $15 million in legal fees that he and Scruggs earned in the asbestos litigation that made them famous. Wilson claims that the case was tainted, as evidenced by the recent suspension of Hinds County Court Judge Bobby DeLaughter, who eventually awarded the $15 million to Scruggs."; "DeLaughter has been suspended from the bench and is under investigation by the United States Department of Justice. Wilson has alleged that Scruggs paid a bribe to DeLaughter to rule in his favor, an allegation that has been corroborated by two of Scruggs' former attorneys, who have admitted to aiding Scruggs in the scheme."; "In exchange for a favorable ruling in the fee dispute, Scruggs allegedly promised DeLaughter a federal judgeship. Senator Trent Lott (R-Mississippi), Scruggs' brother-in-law, allegedly recommended DeLaughter for the judgeship, though he was never appointed."; "In asking the court to reopen the fee dispute, Wilson claims that Scruggs' scheme tainted the entire court proceeding. He has asked the court to strike all pleadings after January 2006. He has also asked the court to award him $15 million in damages."; "Scruggs pled guilty in mid-March to a charge of conspiracy to bribe another judge, Judge Henry Lackey, just weeks before his trial was to start."; "Scruggs made a name for himself -- and millions of dollars -- through lawsuits against tobacco and insurance companies. He was also involved in insurance company suits in the wake of Hurricane Katrina."; "Scruggs' co-defendant and law partner, Sydney Backstrom, pled guilty to conspiracy. Backstrom's plea agreement calls for the government to recommend a sentence not to exceed half of the sentence imposed on Scruggs. If the court doesn't accept the agreement, he can withdraw his plea."; "Scruggs' son, Zachary, pled guilty to misprision of a felony -- having known about a felony but failing to report it. He faces at maximum a three-year prison term, a $250,000 fine and a one-year supervised release, the plea agreement states. Prosecutors are recommending probation for the younger Scruggs." (emphasis added); "The trio and two others were charged with offering Mississippi state Judge Henry Lackey at least $40,000 in exchange for a favorable ruling in a $26.5 million fee dispute in the Hurricane Katrina insurance litigation." (emphasis added); "The indictment alleges that Scruggs purportedly gave attorney Timothy Balducci the go-ahead in March 2007 to proceed with the bribery scheme. Scruggs attempted to cover his tracks by creating false documents indicating that Balducci was performing jury selection work for a different case, the indictment alleges."; "After the initial payout offer, Judge Lackey reported the bribery attempt to the Federal Bureau of Investigation, which launched a sting operation to catch the co-conspirators. Judge Lackey played along with the bribery scheme and wore a wire to aid investigators.").

- State ex rel. Okla. Bar Ass'n v. Golden, 201 P.3d 862, 863, 864 (Okla. 2008) (disbarring a lawyer who was convicted of misprision of a felony; "The federal misprision of a felony statute provides: 'Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.'"; explaining that Golden [lawyer] "actively participated in health care fraud cover-up. According to the plea agreement, Golden knew that Floyd W. Seibert, Golden's client and a codefendant in the underlying criminal case, engaged in a fraudulent scheme to transfer money from his employees' benefit trust (pension fund) to Seibert's companies, some of which provide Medicare services."; "Golden actively participated in Seibert's [defendant's former client] scheme by concealing Seibert's fraudulent transactions when he wrote letters to Seibert addressed to his alias and when he prepared documents memorializing the bonds and transfers. The sentencing judge characterized Golden's participation in the fraudulent scheme in this way: 'It means that I am assessing conduct that assists in covering up the fraudulent conduct and that assists in creating vehicles that allow the fraudulent conduct to proceed and particularly creating vehicles that allow Mr. Seibert to do things that place people that have trusted him in peril.'"; "By pleading guilty to misprision of a felony, Golden has admitted his participation in the fraud was more than passive. He has admitted his affirmative acts to conceal the fraudulent scheme. Golden's admissions state that he knew about the pension fund transfers, that he knew the transfers were used to defraud the government, and that he concealed the transfers by writing letters addressed to Seibert's alias and by preparing paperwork memorializing the transfers." (emphasis added)).

Although the federal misprision statute may not technically be a dead letter, prosecutors rarely rely on it. Some states have likewise largely abandoned the misprision concept, although many if not most states' laws still contain misprision provisions.

Absent the prerequisites for a misprision of felony charge, lawyers generally have no duty to report non-clients' crimes or frauds.

- Utah LEO 03-02 (4/23/03) (assessing the following facts: "An attorney ('Attorney') represents tort plaintiffs. A health-care provider ('Provider') regularly treats patients with injuries arising from motor vehicle accidents, including some of Attorney's clients. Attorney expects to encounter Provider repeatedly as she maintains her practice in this area."; "A client ('Client')

engages Attorney to represent him in connection with injuries suffered in an auto accident. In the course of the representation, Client complains about Provider's bills, adamant that they were for services never rendered. Attorney reasonably believes Client's claims."; "In reviewing Client's case with Provider in preparation for trial or settlement discussions, Attorney questions the bills. Provider readily admits that the bills include amounts for work not actually performed."; finding that the lawyer could not disclose the client's past misconduct; "In the case here, the statements made by Provider to Attorney are confidential information as to Client and are protected by Rule1.6. Absent Client's consent, these communications may not be revealed. Because the information obtained does not pertain to Client's future commission of a criminal or fraudulent act, to Client's engaging in past criminal conduct in which Attorney was complicit, or to Attorney's establishing a claim or defense in a controversy with Client, there is no basis under Rule1.6 for Attorney to breach the confidentiality of Client, absent Client's informed consent." (emphasis added); "The fact that the information obtained by Attorney may reveal past criminal conduct by a third party, or even possibly of an ongoing criminal fraud scheme in which the client is not participating, is immaterial. The lawyer is bound to the obligation of confidentiality under Rule1.6 and may not reveal the information she has received in the course of representing Client to anyone, including insurance carriers or law enforcement authorities, without Client's consent." (emphasis added); "Of course, Client may choose to authorize Attorney, after consultation, to reveal what she had learned in the course of the representation. In that case, Attorney could reveal the information to third parties to the extent Client's waiver would allow. Client can control the breadth of the waiver, limiting it to time, persons or incident, for example. Further, nothing prohibits Attorney from asking Client for permission to disclose Provider's conduct to authorities, so long as there is proper consultation about the ramifications of the disclosure."; "The foregoing analysis does not prohibit an attorney who has gained experience about human behavior or human nature in the course of her practice from using the general knowledge and information for the benefit of other clients at a later time. Thus, although Attorney could not specifically advise future clients about the exact information she has learned about this particular Provider, the lawyer may warn all clients who are patients of health-care providers to review their bills carefully and to be vigilant in assuring that their health-care providers submit proper bills.").

Application of the Misprision Concept to "To Kill a Mockingbird"

In the incident in which Atticus Finch finds himself, there are two possible crimes.

First, Boo Radley killed Bob Ewell. The killing was not in self-defense, but obviously was intended to save Scout and Jem.

Second, Sheriff Tate intends to knowingly lie about Ewell's killing. Some, and perhaps all, states require law enforcement officials to file accurate crime reports. For instance, a California statute indicates that a peace officer filing a knowingly false crime report faces up to three years in prison.

> Every peace officer who files any report with the agency which employs him or her regarding the commission of any crime or any investigation of any crime, if he or she knowingly and intentionally makes any statement regarding any material matter in the report which the officer knows to be false, whether or not the statement is certified or otherwise expressly reported as true, is guilty of filing a false report punishable by imprisonment in the county jail for up to one year, or in the state prison for one, two, or three years. This section shall not apply to the contents of any statement that the peace officer attributes in the report to any other person.

California Penal Code § 118.1 (2014).

Numerous articles describe police officers facing punishment for filing false reports.

- Gregg MacDonald, Fairfax Police Officer Charged With Filing False Report, Fairfax Times, July 19, 2013 ("A Fairfax County police officer who initially asked for the public's assistance in locating a car that he said hit him, causing him to crash into a utility pole before leaving the scene of the accident, has now been accused of fabricating the incident.").

- Leslie Parrilla, Corona: Officer convicted of filing false police report, The Press-Enterprise (Riverside, California), Aug. 3, 2012 ("A Corona police officer was accused of lying in court to cover up a drugs-for-sex exchange sting operation he and another officer were running on Craigslist against department orders, court documents state.").

- Gabriella Deluca, Former Newport News Police Officer Pleads Guilty To Filing A False Police Report, WTKR NewsChannel 3 (Hampton Roads Virginia), Nov. 7, 2013 ("A record-setting Newport News police officer pleaded guilty to filing a false police report.").

- Brian Day, Ex-Baldwin Park cop charged with filing false report on drug arrest, San Gabriel Valley Tribune, Feb. 20, 2014 ("Prosecutors Thursday filed a felony charge against a former Baldwin Park police officer accused of

> filing a false police report related to a drug arrest last year. Matthew DeHoog, 29, pleaded not guilty to a count of filing a false report in Los Angeles Superior Court, Los Angeles County District Attorney's officials said in a written statement. Judge Renee Korn ordered him released on his own recognizance pending his next court appearance. 'DeHoog wrote a false police report about a July 31, 2013 incident where a man was arrested for investigation of possession of methamphetamine,' according to the district attorney's office statement. The criminal complaint filed against DeHoog alleges that, while working as a police officer, he filed a report regarding the commission and investigation of a crime, 'and knowingly and intentionally included a statement and statements regarding a material matter which the defendant knew to be false.'").

It is unclear whether Boo Radley's killing of Bob Ewell would amount to a felony, and whether Sheriff Tate's knowingly false statements or reports would be criminal under Alabama law (and if so, whether they would amount to a felony).

To the extent that any misprision charge against Atticus Finch would require that he "took affirmative steps to conceal the crime of the principal,"[23] it would seem that he took such an affirmative step by encouraging his daughter Scout to acquiesce in Sheriff Tate's false story -- even though both Scout and Atticus knew it to be untrue. Atticus Finch must have known that Sheriff Tate would knowingly lie to the public and in any official reports, and that Scout would also provide a false narrative about the attack if she was ever interviewed officially or unofficially.

Best Answer

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

B 4/15, 8/15, 2/17

[23] Christopher Mark Curenton, The Past, Present, and Future of 18 U.S.C. § 4: An Exploration of the Federal Misprision of Felony Statute, 55 Ala. L. Rev. 183, 185 (Fall 2003) (quoting United States v. Goldberg, 862 F.2d 101, 104 (6th Cir. 1988)).