Virtually every communication a lawyer makes – in person, in writing, or over the phone or through email – is a negotiation, a statement about the facts of a case or transaction or a statement about the law, with the intent of gaining an advantage for his or her client. Often the instinct is to go right up to the line in these communications, never stating a falsehood or even actively misleading an adversary, but casting the lawyer’s case in the most favorable light possible. Though there are some bright lines involved in the application of ethics rules to negotiations, most of the lines are fine and sometimes difficult to discern in active conversations. This program will provide you with a practical guide to how ethics rules apply in transactional and litigation negotiations, crucial distinctions between affirmative statements and mere silence about the facts of a case and the law, and when attorneys have an affirmative obligation to correct errors by adversaries.

- Practical ethics for negotiations in litigation and in transactional practice
- Statements of fact versus mere silence about facts, including about intent and value
- Statements about the law and whether you are required to correct adversaries’ mistakes
- Silence about errors in settlement agreements
- Negotiating in other jurisdictions, including in ADR and in transactional negotiations
- Negotiations with represented parties

Speakers:

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"Ethics in Negotiations"

Hypotheticals and Analyses*

Material Submitted By:

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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 ethics rules, and you should check those when looking for ethics guidance.
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Affirmative Statements of Fact

Hypothetical 1

You are preparing for settlement negotiations in an important case, and you have several questions about the type of statements that you may ethically make.

(a) If your client's medical bills total $35,000, may you tell the other side that the medical bills actually total $50,000?

**NO**

(b) May you tell the other side that another defendant has agreed to a stipulated judgment of $50,000 (which is literally true, although you also agreed with the other defendant that it can satisfy that judgment by paying only $100)?

**NO (PROBABLY)**

Analysis

The analysis for this hypothetical begins with ABA Model Rule 4.1.

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.


A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for
misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

ABA Model Rule 4.1 cmt. [1].

Academics have debated the essential nature of settlement negotiations. A thoughtful article published by the American Bar Foundation bluntly states that all settlement negotiations involve deception.

On the one hand the negotiator must be fair and truthful; on the other he must mislead his opponent. Like the poker player, a negotiator hopes that his opponent will overestimate the value of his hand. Like the poker player, in a variety of ways he must facilitate his opponent's inaccurate assessment. The critical difference between those who are successful negotiators and those who are not lies in this capacity both to mislead and not to be misled.


Some authorities take what only can be described as a "goofy" approach to how lawyers should approach settlement negotiations.

In my opinion, the solution to finding a more truthful course in negotiation may lie in the practice of mindfulness.

Mindfulness is an ancient Buddhist practice which has profound relevance for our present-day lives. This relevance has nothing to do with Buddhism per se or with becoming a Buddhist, but it has everything to do with waking up and living in harmony with oneself and with the world. It has to do with examining who we are, with questioning our view of the world and our place in it, and with cultivating some appreciation for the fullness of each moment we are alive. Most of all, it has to do with being in touch.

. . . To the extent that mindfulness frees the lawyer from limiting mindsets that tend to obfuscate opportunities to
...create value, it provides the lawyer with the opportunity to find greater truth and harmony within herself and, in turn, within her negotiation practices.


(a) Lawyers clearly may not affirmatively misrepresent facts during settlement negotiations.

For instance, several courts have sanctioned lawyers for affirmatively misrepresenting the extent of insurance coverage. Slotkin v. Citizens Cas. Co., 614 F.2d 301 (2d Cir. 1979) (finding such deception actionable); In re McGrath, 468 N.Y.S.2d 349 (N.Y. App. Div. 1983) (suspending a lawyer for such misconduct).

The ABA has recently explained what type of statement amounts to a representation of fact that cannot be inaccurate.

An example of a false statement or material fact would be a lawyer representing an employer in labor negotiations stating to union lawyers that adding a particular employee benefit will cost the company an additional $100 per employee, when the lawyer knows that it actually will cost only $20 per employee. Similarly, it cannot be considered "posturing" for a lawyer representing a defendant to declare that documentary evidence will be submitted at trial in support of a defense when the lawyer knows that such documents do not exist or will be inadmissible. In the same vein, neither a prosecutor nor a criminal defense lawyer can tell the other party during a plea negotiation that they are aware of an eyewitness to the alleged crime when that is not the case.

ABA LEO 439 (4/12/06).

Surprisingly, California recognizes an absolute litigation privilege even for deceptive communications. Home Ins. Co. v. Zurich Ins. Co., 116 Cal. Rptr. 2d 583,

Under Civil Code section 47, subdivision (b), "A privileged publication or broadcast is one made: . . . (b) In any . . . judicial proceeding, . . ." "Despite its explicit wording, the privilege described by section 47(b) has been given expansive application by California courts. Although originally enacted with reference to defamation actions alone . . ., the privilege has been extended to any communication, whether or not it is a publication, and to all torts other than malicious prosecution. . . . Thus, the privilege has been applied to suits for fraud . . ., negligence and negligent misrepresentation . . ., and interference with contract . . . ."

Id. at 587. Although the court acknowledged that "[t]here is an exception to the litigation privilege for concealing the existence of insurance policies," the court also found that the exception did not apply because "[t]he alleged misrepresentation did not conceal the existence of any insurance policy; it concealed only the terms of the policy." Id. at 588. Similarly, the court acknowledged that "[t]he litigation privilege does not apply to an equitable action to set aside a settlement agreement for extrinsic fraud," but found that the extrinsic fraud exception did not apply either. Id. at 590. The court therefore affirmed dismissal of a complaint based on a litigant's misrepresentation of an insurance policy.

Home Insurance Company appeals from a judgment of dismissal in favor of Zurich Insurance Company after a demurrer to its first amended complaint for fraud, declaratory relief, and subrogation or indemnity was granted without leave to amend. Home's action is premised on an alleged misrepresentation by counsel for Zurich's predecessor. Counsel allegedly misrepresented the available insurance policy limits to induce settlement of a lawsuit. Since any such statement is absolutely privileged under the litigation privilege of Civil Code section 47, subdivision (b), it will not support a direct fraud action for damages. In addition, such
a misrepresentation constitutes intrinsic, not extrinsic, fraud and provides no basis for equitable relief. We affirm the judgment.

Id. at 585.

(b) It can be much more difficult to analyze the ethical propriety of statements that might mislead the other side, even if literally true.

For instance, the Restatement explains that

A statement can also be false because only partially true. If constrained from conveying specific information to a nonclient, for example due to confidentiality obligations to the lawyer’s client, the lawyer must either make no representation or make a representation that is not false.


This hypothetical comes from a First Circuit case.

In Sheppard v. River Valley Fitness One, L.P., 428 F.3d 1 (1st Cir. 2005), the issue came to the lower court when the lawyer un成功fully resisted discovery of the true nature of the settlement he had negotiated with the other defendant. The lower court found that the lawyer had engaged in discovery misconduct, and issued an order assessing approximately $6,500 in attorney’s fees as sanctions. The First Circuit affirmed.

It is evident from the letter, read in its entirety, that Whittington wanted Sheppard to believe that the Aubin case had settled for a payment of $50,000. True, Whittington did not say so explicitly. However, he managed to convey that impression anyway by selecting certain words and omitting certain details with studied precision. As the district court wrote: "The words used (and not used) by Whittington seem carefully chosen, and, if dissected and construed from a minimalist point of view, are defensible as literally true. But it is likewise plainly apparent that those words were meant to convey more." After all, the letter’s purpose -- to encourage Sheppard to pay $50,000 to settle her case -- depended
considerably on leaving the impression that Aubin, in a similar position, had already committed to doing the same thing.

We are not saying that Whittington had a general obligation to disclose the full terms of the Aubin settlement just by mentioning the fact of the settlement. However, Whittington did more than that. He chose to disclose the face dollar value of the judgment against Sheppard without disclosing the real dollar value of the settlement, in an attempt to induce Sheppard to settle on terms comparable to the Aubin judgment. Having made that choice, Whittington had an obligation not to misrepresent, affirmatively or by omission, the true value of the settlement. In other words, Whittington's overall conduct created the very circumstances under which his failure to act, i.e. his failure to inform Sheppard's counsel of the real dollar value of the settlement, became a misrepresentation. Therefore, the magistrate judge correctly concluded that Whittington's too-artful words "intentionally misled the plaintiffs into believing that Aubin did commit to a $50,000 payment in order to intimidate them into a $50,000 settlement in this case."

Id. at 10.

Although a different standard might apply to a witness's statements during trial or (especially) deposition testimony, it is worth noting courts' analyses of statements in that setting.

The United States Supreme Court dealt with a perjury case involving a literally true statement that clearly mislead the questioner. In Bronston v. United States, 409 U.S. 352 (1973), a creditor's lawyer engaged in the following exchange with a bankrupt company's owner:

"Q. Do you have any bank accounts in Swiss banks, Mr. Bronston?

"A. No, sir.

"Q. Have you ever?
"A. The company had an account there for about six months, in Zurich.

"Q. Have you any nominees who have bank accounts in Swiss banks?

"A. No, Sir.

"Q. Have you ever?

"A. No, sir."

Id. at 354. As it turns out, Bronston had a personal bank account in Geneva, Switzerland for several years. The government argued that Bronston answered the second question with literal truthfulness but unresponsively addressed his answer to the company’s assets and not to his own -- thereby implying that he had no personal Swiss bank account at the relevant time.

Id. Bronston argued that his answer to the "have you ever" issue was whether Bronston’s non-responsive but accurate answer amounted to a perjurious deception. The Supreme Court held that it did not, and reversed his perjury conviction.

Perhaps the most famous recent example of such linguistic fine-tuning was President Clinton's response to a question by a Deputy Independent Counsel at an August 17, 1998 deposition.

The Deputy Independent Counsel asked President Clinton why he had not corrected a statement that President Clinton's lawyer Robert Bennett had made in front of Federal District Court Judge Wright at an earlier deposition in the Paula Jones case. During that deposition, Robert Bennett had stated to Judge Wright that Ms. Lewinsky had filed an affidavit "saying that there is absolutely no sex of any kind in any manner,
shape or form, with President Clinton.¹ When the Deputy Independent Counsel later asked President Clinton at his deposition to confirm that Robert Bennett's statement was incorrect, President Clinton answered as follows:

> It depends on what the meaning of the word "is" is. If the -- if he -- if "is" means is and never has been, that is not -- that is one thing. If it means that there is none, that was a completely true statement.


The Deputy Independent Counsel later posed a question that put President Clinton's answer in perspective.

> I just want to make sure I understand, Mr. President. Do you mean today that because you were not engaging in sexual activity with Ms. Lewinsky during the deposition that the statement that Mr. Bennett made might be literally true?

Id. at 60. President Clinton explained that his improper relationship with Ms. Lewinsky had ended several months earlier, so that "the present tense encompass[ed] many months." ¹ Id. at 61.

A later Georgetown Journal of Legal Ethics article quoted President Clinton's lawyer David Kendall explaining President Clinton's deposition answering technique.

> "[H]e answered the questions narrowly, but truthfully. There was no perjury there. Was he trying to mislead the Paula Jones lawyers, absolutely." He added: "You ought not if asked your name to give your name and address. The trick is to try to answer questions and any lawyer will tell you this."


**Best Answer**

The best answer to (a) is **NO**; the best answer to (b) is **PROBABLY NO**.
Affirmative Statements of Value or Intent

Hypothetical 2

You are preparing for settlement negotiations, and have posed several questions to a partner whose judgment you trust.

(a) May you advise the adversary that you think that your case is worth $250,000, although you really believe that your case is worth only $175,000?

YES

(b) May you argue to the adversary that a recent case decided by your state's supreme court supports your position, although you honestly believe that it does not?

YES (MAYBE)

(c) Your client (the defendant) has instructed you to accept any settlement demand that is less than $100,000. If the plaintiff's lawyer asks "will your client give $90,000?", may you answer "no"?

MAYBE

Analysis

Under ABA Model Rule 4.1 and its state counterparts,

[]In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts.
ABA Model Rule 4.1 & cmt. [1].

Comment [2] addresses the distinction between factual statements and what many call "puffing."

This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except when nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.


Not surprisingly, it can be very difficult to distinguish between ethical statements of fact and ethically permissible "puffing."

Perhaps because of this difficulty in drawing the lines of acceptable conduct, the ABA explained in one legal ethics opinion that judges should not ask litigants' lawyers about the extent of their authority.¹

The Restatement takes the same necessarily vague approach -- although focusing more than the ABA Model Rules on the specific context of the statements.

A knowing misrepresentation may relate to a proposition of fact or law. Certain statements, such as some statements relating to price or value, are considered nonactionable hyperbole or a reflection of the state of mind of the speaker and not misstatements of fact or law . . . . Whether a

¹ ABA LEO 370 (2/5/93) (unless the client consents, a lawyer may not reveal to a judge the limits of his settlement authority or advice to the client regarding settlement; the judge may not require the disclosure of such information; a lawyer may not lie in response to a direct question about his settlement authority, although "a certain amount of posturing or puffery in settlement negotiations may be an acceptable convention between opposing counsel.")
misstatement should be so characterized depends on whether it is reasonably apparent that the person to whom the statement is addressed would regard the statement as one of fact or based on the speaker's knowledge of facts reasonably implied by the statement or as merely an expression of the speaker's state of mind. **Assessment depends on the circumstances in which the statement is made**, including the past relationship of the negotiating persons, their apparent sophistication, the plausibility of the statement on its face, the phrasing of the statement, related communication between the persons involved, the known negotiating practices of the community in which both are negotiating, and similar circumstances. In general, a lawyer who is known to represent a person in a negotiation will be understood by nonclients to be making nonimpartial statements, in the same manner as would the lawyer's client. Subject to such an understanding, the lawyer is not privileged to make misrepresentations described in this Section.


(a) A 1980 American Bar Foundation article explains that this type of tactic does not violate the ethics rules.

It is a standard negotiating technique in collective bargaining negotiation and in some other multiple-issue negotiations for one side to include a series of demands about which it cares little or not at all. The purpose of including these demands is to increase one's supply of negotiating currency. One hopes to convince the other party that one or more of these false demands is important and thus successfully to trade it for some significant concession. The assertion of and argument for a false demand involves the same kind of distortion that is involved in puffing or in arguing the merits of cases or statutes that are not really controlling. The proponent of a false demand implicitly or explicitly states his interest in the demand and his estimation of it. Such behavior is untruthful in the broadest sense; yet at least in collective bargaining its use is a standard part of the process and is not thought to be inappropriate by any experienced bargainer.

A recent ABA legal ethics opinion defines this type of statement as harmless puffery rather than material misstatement of fact.

For example, parties to a settlement negotiation often understate their willingness to make concessions to resolve the dispute. A plaintiff might insist that it will not agree to resolve a dispute for less than $200, when, in reality, it is willing to accept as little as $150 to put an end to the matter. Similarly, a defendant manufacturer in patent infringement litigation might repeatedly reject the plaintiff’s demand that a license be part of any settlement agreement, when in reality, the manufacturer has no genuine interest in the patented product and, once a new patent is issued, intends to introduce a new product that will render the old one obsolete. In the criminal law context, a prosecutor might not reveal an ultimate willingness to grant immunity to a witness as part of a cooperation agreement in order to retain influence over the witness.

A party in a negotiation also might exaggerate or emphasize the strengths, and minimize or deemphasize the weaknesses, of its factual or legal position. A buyer of products or services, for example, might overstate its confidence in the availability of alternate sources of supply to reduce the appearance of dependence upon the supplier with which it is negotiating. Such remarks, often characterized as "posturing" or "puffing," are statements upon which parties to a negotiation ordinarily would not be expected justifiably to rely, and must be distinguished from false statements of material fact.

ABA LEO 439 (4/12/06) (emphases added). The opinion makes essentially the same point a few pages later.

[S]tatements regarding negotiating goals or willingness to compromise, whether in the civil or criminal context, ordinarily are not considered statements of material fact within the meaning of the Rules. Thus, a lawyer may downplay a client’s willingness to compromise, or present a client’s bargaining position without disclosing the client’s "bottom line" position, in an effort to reach a more favorable resolution. Of the same nature are overstatements or understatements of the strengths or weaknesses of a client's position in litigation or otherwise, or expressions of opinion
as to the value or worth of the subject matter of the negotiation. Such statements generally are not considered material facts subject to Rule 4.1.

Id. (emphases added). This sort of statement represents the classic type of settlement "bluffing" that the authorities seem to condone, and most lawyers expect during settlement discussions.

(b) As explained above, courts and bars anticipate that lawyers will exaggerate the strength of their factual and legal positions.

For instance, the 1980 American Bar Foundation article explains this common practice.

In writing his briefs, arguing his case, and attempting to persuade the opposing party in negotiating, it is the lawyer's right and probably his responsibility to argue for plausible interpretations of cases and statutes which favor his client's interest, even in circumstances where privately he has advised his client that those are not his true interpretations of the cases and statutes.


(c) The American Bar Foundation article poses this question, but has a difficult time answering it.

Assume that the defendant has instructed his lawyer to accept any settlement offer under $100,000. Having received that instruction, how does the defendant's lawyer respond to the plaintiff's question, "I think $90,000 will settle this case. Will your client give $90,000?" Do you see the dilemma that question poses for the defense lawyer? It calls for information that would not have to be disclosed. A truthful answer to it concludes the negotiation and dashes any possibility of negotiating a lower settlement even in circumstances in which the plaintiff might be willing to accept half of $90,000. Even a moment's hesitation in response to the question may be a nonverbal communication to a clever plaintiff's lawyer that the defendant has given such authority. Yet a negative response is a lie.
Id. at 932-33 (emphasis added).

Some ethicists providing advice to lawyers in this situation might advise those lawyers to plan ahead -- by foregoing such settlement authority or otherwise telling the adversary at the very beginning of the settlement negotiations about how the lawyer might or might not respond to questions during the negotiations. The article describes this "solution" as unrealistic.

It is no answer that a clever lawyer will answer all such questions about authority by refusing to answer them, nor is it an answer that some lawyers will be clever enough to tell their clients not to grant them authority to accept a given sum until the final stages in negotiation. Most of us are not that careful or that clever. Few will routinely refuse to answer such questions in cases in which the client has granted a much lower limit than that discussed by the other party, for in that case an honest answer about the absence of authority is a quick and effective method of changing the opponent's settling point, and it is one that few of us will forego when our authority is far below that requested by the other party. Thus despite the fact that a clever negotiator can avoid having to lie or to reveal his settling point, many lawyers, perhaps most, will sometime be forced by such a question either to lie or to reveal that they have been granted such authority by saying so or by their silence in response to a direct question.

Id. at 933 (emphases added).

It would be easy to reach the opposite conclusion in this setting -- arguing that the adversary could not reasonably expect an honest answer to such a question. Instead, the adversary might be hoping to gain some insight into the possible outcome of negotiations by examining both the verbal and non-verbal responses to such a question.
The article's author ultimately concludes that lying is not permissible in this setting, but concedes that "I am not nearly as comfortable with that conclusion" as in situations involving more direct deception. \textit{Id.} at 934.

**Best Answer**

The best answer to (a) is \textbf{YES}; the best answer to (b) is \textbf{MAYBE YES}; the best answer to (c) is \textbf{MAYBE}.
Silence about the Law

Hypothetical 3

You are preparing to begin serious settlement negotiations with a plaintiff's lawyer, and you have several questions about whether you can stay silent in certain circumstances that you expect might arise.

May you remain silent if the plaintiff's lawyer tells you that he realizes that the plaintiff's available damages are capped at $250,000 by a state statute -- which you know the legislature to have raised just last week to $500,000?

MAYBE

Analysis

Several authorities have dealt with this issue.

For instance, the Rhode Island Bar has indicated that a lawyer does not have to disclose such changes in the law.

The inquiring attorney represents a plaintiff in a personal injury matter. The attorney believes that his/her client's claim may be barred by a recent development in Rhode Island case law. Notwithstanding this information, an out-of-state insurance company made an offer of settlement. The attorney asks if the continuation of negotiations regarding a settlement with the insurance company would violate any ethical rules in light of the change in case law.

. . . [a] lawyer generally has no affirmative duty to inform an opposing party of statutory or case law adverse to his/her client's case. Since the inquiring attorney is not making false representations in this matter, Rule 4.1 is not being violated.

Rhode Island LEO 94-40 (7/27/94) (emphasis added).

Courts have also dealt with a litigant's silence about the law. To be sure, the courts examining such conduct review a much broader set of considerations than a
bar’s more narrow analysis of whether silence in this setting falls short of a lawyer’s ethical duty.

The West Virginia Supreme Court invalidated a settlement agreement in a similar situation -- in which plaintiff’s lawyer accepted a $100,000 settlement from Nationwide without advising the insurance company that a federal court had recently granted Nationwide a summary judgment in a declaratory judgment case which had eliminated Nationwide’s possible liability.

While we do not dispose of this case on the grounds of misrepresentation or fraud, we take a particularly dim view of the Hamiltons’ attorney’s failure to disclose his knowledge regarding the action taken by the federal court. The preferred course of action for the Hamiltons’ counsel, in our opinion, would have required him to voluntarily disclose that information to Nationwide in the spirit of encouraging truthfulness among counsel and avoiding the consequences of his failure to disclose, e.g. this appeal.

Hamilton v. Harper, 404 S.E.2d 540, 542 n.3 (W. Va. 1991). The court found that the settlement agreement was unenforceable for "failure of consideration," rather than concluding that the plaintiff’s lawyer had engaged in fraudulent conduct. Id. at 544.

Best Answer

The best answer to this hypothetical is MAYBE.
Silence about Facts

Hypothetical 4

You are preparing for settlement negotiations with several lawyers who have been less than diligent in pursuing their clients’ cases. You expect your adversaries to make mistakes, and you wonder about your right to remain silent in certain circumstances.

(a) May you remain silent if an adversary demands the full amount of what it understands to be your client’s insurance coverage (based on statements that your client made to the adversary before hiring you, but which your client has since admitted to you were incorrect)?

NO

(b) May you remain silent if an adversary demands the full amount of what it has determined to be the available insurance coverage -- when you know that there is an additional policy that the adversary could have discovered by checking available documents?

MAYBE

(c) May you remain silent when an adversary makes a $100,000 settlement demand -- which you take as a clear indication that the other side must not know that your client also has a $1,000,000 umbrella liability policy?

MAYBE

Analysis

As in other settlement contexts, the analysis begins with ABA Model Rule 4.1.

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.
ABA Model Rule 4.1.

Comment [1] provides some explanation.

A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

ABA Model Rule 4.1 cmt. [1] (emphasis added).

This hypothetical deals with silence rather than affirmative statements. Not surprisingly, bars and courts often have a very difficult time determining whether a lawyer may ethically remain silent during settlement negotiations.

(a) The issue here is whether a lawyer must correct a client's misrepresentation to an adversary.

A lawyer must correct such misstatements. For instance, an ABA Section of Litigation article explained that a lawyer learning that her client had lied to the other side must correct the client's lie before consummating a settlement. Edward M. Waller, Jr., There are Limits: Ethical Issues in Settlement Negotiations, Litigation Ethics (ABA Section of Litig., Ethics & Professionalism Comm.), Summer 2005, 1.

(b) In this scenario, the adversary has investigated your client's insurance coverage on its own, and failed to discover an insurance policy. Neither you nor your client has misstated anything.
Bars and courts have taken differing positions about a lawyer’s duty in this setting.

For instance, the New York County Bar has indicated that a litigant’s lawyer did not have to disclose the existence of an insurance policy during settlement negotiations, unless the dispute was in litigation and the pertinent rules required such disclosure. The New York County Bar provided its review of lawyers’ duties during negotiations.

A lawyer has no duty in the course of settlement negotiations to volunteer factual representations not required by principle of substantive law or court rule. Nor is the lawyer obliged to correct an adversary’s misunderstanding of the client's resources gleaned from independent, unrelated sources. However, while the lawyer has no affirmative obligation to make factual representations in settlement negotiations, once the topic is introduced the lawyer may not intentionally mislead.

If a lawyer believes that an adversary is relying on a materially misleading representation attributable to the lawyer or the lawyer's client, or a third person acting at the direction of either, regarding insurance coverage, the lawyer should take such steps as may be necessary to disabuse the adversary from continued reliance on the misimpression created by the prior material misrepresentation. This is not to say that the lawyer must provide detailed corrective information; only that the lawyer may not permit the adversary to continue to rely on a materially inaccurate representation presented by the lawyer, his or her client or another acting at their direction.

N.Y. County Law. Ass’n LEO 731 (9/1/03) (emphases added).

On the other hand, in Pennsylvania LEO 97-107, a settlement agreement was premised on a client’s inability to convey a time share by deed. After negotiating the settlement agreement but before consummating the settlement, the client's lawyer learned that his client could convey the time share by deed. The bar held that the lawyer must disclose the fact that the parties’ mutual premise was incorrect.
Based on my review of these rules, and most importantly that the opposing lawyer by letter to you has expressly stated that the settlement is conditioned on the inability of your client to convey the first time share unit, I am of the opinion that you do have the duty to apprise the opposing lawyer that your client may now be able to convey her interest in her time sharing unit to the second development company. Under the circumstances, to remain silent may be a representation of a material fact by the affirmation of a statement of another person that you know is false.

Pennsylvania LEO 97-107 (8/21/97) (emphasis added).

Courts also disagree about what a lawyer must do in this setting.

In Brown v. County of Genesse, 872 F.2d 169 (6th Cir. 1989), the Sixth Circuit reversed a trial court's conclusion that a county had acted improperly in failing to disclose the highest pay level to which a plaintiff might have risen (which was an important element in a settlement). The court first noted that "counsel for Brown [plaintiff] could have requested this information from the County, but neglected to do so. The failure of Brown's counsel to inform himself of the highest pay rate available to his client cannot be imputed to the County as unethical or fraudulent conduct." Id. at 175. The circuit court then criticized the lower court's analysis.

[T]he district court erred in its alternative finding that the consent agreement should be vacated because of fraudulent and unethical conduct by the County. The district court concluded that the appellant had both a legal and ethical duty to have disclosed to the appellee its factual error, which the appellant may have suspected had occurred. However, absent some misrepresentation or fraudulent conduct, the appellant had no duty to advise the appellee of any such factual error, whether unknown or suspected. "An attorney is to be expected to responsibly present his client's case in the light most favorable to the client, and it is not fraudulent for him to do so. . . . We need only cite the well-settled rule that the mere nondisclosure to an adverse party and to the court of facts pertinent to a controversy before the court.
does not add up to 'fraud upon the court' for purposes of vacating a judgment under Rule 60(b). "

Id. (emphasis added).

The Sixth Circuit decision noted that the county's lawyer was not certain that the claimant misunderstood the facts.

The district court, in the case at bar, concluded that since counsel for the appellant knew that appellee's counsel misunderstood the existing pay scales available to Brown and knew that she could have been eligible for a level "D" promotion at the time the July 9, 1985 settlement had been executed, the consent judgment should be vacated. This conclusion, however, is in conflict with the facts as stipulated, which specified with particularity that appellant and its counsel had not known of appellee's misunderstanding and/or misinterpretation of the County's pay scales, although believing it to be probable.

Id. at 173. It is unclear whether the court would have reached a different conclusion if the county was certain rather than simply suspicious of the other side's misunderstanding.

On the other hand, at least one court had punished a lawyer who did not disclose the existence of an additional insurance policy when learning that the other side was not aware of its existence. State ex rel. Neb. State Bar Ass'n v. Addison, 412 N.W.2d 855, 856 (Neb. 1987) (suspending for six months a lawyer who "became aware" at a meeting with a hospital that the hospital was unaware of a third liability insurance policy from which it might seek reimbursement for medical expenses that it paid to the lawyer's client; noting that "[r]ather than disclose the third policy, [the lawyer] negotiated for a release of the hospital's lien based upon [the hospital executive's] limited knowledge"; agreeing that the lawyer "had a duty to disclose . . . the material fact of the [insurance] policy").
(c) In this scenario, the lawyer reasonably believes that the other side misunderstands the extent of insurance coverage (based on the size of its demand), but does not know for sure that the other side is unaware of the insurance coverage.

One would think that the lawyer's duty in this setting would be somewhat lower than the scenario in which the lawyer knows for sure that the other side is relying on inaccurate factual information.

The New York County Legal Ethics Opinion discussed above apparently would apply the general rule (not requiring disclosure) to a situation in which the adversary's settlement demand was so low that the adversary must not be aware of a large insurance policy.

It is the opinion of the Committee that it is not necessary to disclose the existence of insurance coverage in every situation in which there is an issue as to the available assets to satisfy a claim or pay a judgment. While an attorney has a duty not to mislead intentionally, either directly or indirectly, we believe that an attorney is not ethically obligated to prevent an adversary from relying upon incorrect information which emanated from another source. Under those circumstances, we conclude that the lawyer may refrain from confirming or denying the exogenous information, provided that in so doing he or she refrains from intentionally adopting or promoting a misrepresentation.

N.Y. County Law. Ass’n LEO 731 (9/1/03).

As explained above, in Brown v. County of Genessee, 872 F.2d 169 (6th Cir. 1989), the Sixth Circuit noted that the county's lawyer assumed (but did not know for sure) that a claimant's lawyer misunderstood an important fact. The Sixth Circuit did not indicate whether it would have reached a different conclusion in the case had the county's lawyer known for certain that the claimant's lawyer misunderstood the important fact.
**Best Answer**

The best answer to (a) is **NO**; the best answer to (b) is **MAYBE**; the best answer to (c) is **MAYBE**.
Silence about Errors in the Settlement Agreement

Hypothetical 5

You and your client have been furiously negotiating settlement documents with the other side in a big case -- frequently working well into the early morning. Late last night you and the other side agreed to add a certain indemnity provision into the documents, but you realize this morning that the other side had not included the agreed-upon provision in the draft they sent you at 3 a.m.

(a) Must you tell the adversary of its oversight?

YES

(b) Must you advise your client of the adversary's oversight?

NO (PROBABLY)

Analysis

The issue here is whether you must disclose what amounts to a typographical error by the adversary.

(a) The first question is whether a lawyer in this situation must advise the adversary of the error.

The ABA dealt with this situation in ABA Informal Op. 1518 (2/9/86). The ABA ultimately concluded that "the omission of the provision from the document is a 'material fact' which . . . must be disclosed to [the other side's] lawyer." Id.

The more recent Ethical Guidelines for Settlement Negotiations similarly indicates that lawyers "should identify changes from draft to draft or otherwise bring them explicitly to the other counsel's attention." ABA, Ethical Guidelines for Settlement Negotiations 57 (Aug. 2002). The Guidelines explain that "[i]t would be unprofessional,
if not unethical, knowingly to exploit a drafting error or similar error concerning the contents of the settlement agreement.” Id.

Other authorities agree. See, e.g., Patrick E. Longan, Ethics in Settlement Negotiations: Foreword, 52 Mercer L. Rev. 807, 815 (2000-2001) (“the lawyer has the duty to correct the mistakes” if the lawyer notices typographical or calculation errors in a settlement agreement).

Several courts have dealt with this situation. In Stare v. Tate, 98 Cal. Rptr. 264 (Cal. Ct. App. 1971), a husband negotiating a property settlement with his former wife noticed two calculation errors in the agreement. The husband nevertheless signed the settlement without notifying his former wife of the errors. The court explained the predictable way in which the issue arose:

The mistake might never have come to light had not Tim desired to have that exquisite last word. A few days after Joan had obtained the divorce he mailed her a copy of the offer which contained the errant computation. On top of the page he wrote with evident satisfaction: "PLEASE NOTE $100,000.00 MISTAKE IN YOUR FIGURES..." The present action was filed exactly one month later.” Id. at 266. The court pointed to a California statute allowing lawyers to revise written contracts that contain a "mistake of one party, which the other at the time knew or suspected." Id. at 267. The court reformed the property settlement agreement to match the parties' agreement.

(b) In some ways, the more difficult question is whether the lawyer must advise her client of the adversary's mistake, and how the lawyer must or should react to the client's possible direction to keep the mistake secret.
In ABA Informal Op. 1518 (2/9/86), the ABA "conclude[d] that the error is appropriate for correction between the lawyers without client consultation." The ABA indicated that a lawyer's obligation under ABA Model Rule 1.4 to keep the client adequately informed does not require disclosure of a typographical error, because the client does not need to make an "informed decision" in connection with the matter. As the ABA explained it, "the decision on the contract has already been made by the client.” The ABA also pointed to a comment to ABA Model Rule 1.2 (now Comment [2]) indicating that lawyers generally have responsibility for "technical" matters involving the representation.

"Assuming for purposes of discussion" that the error was protected by the general confidentiality rule in ABA Model Rule 1.6, the ABA concluded that the lawyer would have "implied authority" to disclose the other side's error, in order to complete the "commercial contract already agreed upon and left to the lawyers to memorialize."

Interestingly, the ABA indicated that "[w]e do not here reach the issue of the lawyer's duty if the client wishes to exploit the error." A lawyer presumably will never face this issue if she discloses the error to the adversary without disclosing it to her own client.

**Best Answer**

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

Hypothetical 6

You just received an email with an attached settlement proposal from an adversary. Coincidentally, last evening you read an article about the "metadata" that accompanies many electronic documents, and which might allow you to see who made changes to the settlement proposal, when they made the changes, and even what changes they made (such as including a higher settlement demand in an earlier version of the proposal).

May you try to review whatever "metadata" accompanied your adversary's settlement proposal?

MAYBE

Analysis

This hypothetical situation involves "metadata," which is essentially data about data. The situation involves the same basic issue as the inadvertent transmission of documents, but is even more tricky because the person sending the document might not even know that the "metadata" is being transmitted and can be read.

Ethics Opinions

New York. In 2001, the New York State Bar held that the general ethics prohibition on deceptive conduct prohibits New York lawyers from "get[ting] behind" electronic documents sent by adversaries who failed to disable the "tracking" software. New York LEO 749 (12/14/01).

Interestingly, the New York State Bar followed up this legal ethics opinion with New York LEO 782 (12/8/04), indicating that lawyers have an ethical duty to "use reasonable care when transmitting documents by e-mail to prevent the disclosure of metadata containing client confidences or secrets."
Florida. The Florida Bar followed the New York approach -- warning lawyers to be careful when they send metadata, but prohibiting the receiving lawyer from examining the metadata. Florida LEO 06-2 (9/15/06) (lawyers must take "reasonable steps" to protect the confidentiality of any information they transmit, including metadata; "It is the recipient lawyer’s concomitant obligation, upon receiving an electronic communication or document from another lawyer, not to try to obtain from metadata information relating to the representation of the sender’s client that the recipient knows or should know is not intended for the recipient. Any such metadata is to be considered by the receiving lawyer as confidential information which the sending lawyer did not intend to transmit."); not reconciling these positions with Florida Rule 4-4.4(b), under which the receiving lawyer must "promptly notify the sender" if the receiving lawyer "inadvertently obtains information from metadata that the recipient knows or should know was not intended for the recipient" but not preventing the recipient from reading or relying upon the inadvertently transmitted communication; explicitly avoiding any discussion of metadata "in the context of documents that are subject to discovery under applicable rules of court or law").

ABA. In 2006, the ABA took exactly the opposite position -- holding that the receiving lawyer may freely examine metadata. ABA LEO 442 (8/5/06) (as long as the receiving lawyer did not obtain an electronic document in an improper manner, the lawyer may ethically examine the document’s metadata, including even using "more thorough or extraordinary investigative measures" that might "permit the retrieval of embedded information that the provider of electronic documents either did not know existed, or thought was deleted"; the opinion does not analyze whether the transmission
of such metadata is "inadvertent," but at most such an inadvertent transmission would require the receiving lawyer to notify the sending lawyer of the metadata's receipt; lawyers "sending or producing" electronic documents can take steps to avoid transmitting metadata (through new means such as scrubbing software, or more traditional means such as faxing the document); lawyers can also negotiate confidentiality agreements or protective orders allowing the client "to 'pull back,' or prevent the introduction of evidence based upon, the document that contains that embedded information or the information itself").

Maryland. Maryland then followed this ABA approach. Maryland LEO 2007-09 (2007) (absent some agreement with the receiving lawyer, the sending lawyer "has an ethical obligation to take reasonable measures to avoid the disclosure of confidential or work product materials imbedded in the electronic discovery" (although not every inadvertent disclosure constitutes an ethics violation); there is no ethical violation if a lawyer or the lawyer's assistant "reviews or makes use of the metadata [received from

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1 In 2011, the ABA explained its definition of the term "inadvertent" in a legal ethics opinion indicating that an employee's electronic communication with his or her own personal lawyer was not "inadvertently" transmitted to an employer who searches for and discovers such personal communications in the company's computer system. ABA LEO 460 (8/4/11) (despite some case law to the contrary, holding that a lawyer's Rule 4.4(b) duty to advise the sender if the lawyer receives "inadvertently sent" documents does not arise if the lawyer's client gives the lawyer documents the client has retrieved "from a public or private place where [the document] is stored or left"; explaining that a document is "inadvertently sent" when it is "accidentally transmitted to an unintended recipient, as occurs when an e-mail or letter is misaddressed or when a document is accidentally attached to an e-mail or accidentally included among other documents produced in discovery"; concluding that a lawyer representing an employer does not have such a disclosure duty if the employer retrieves and gives the lawyer privileged emails between an employee and the employee's lawyer that are stored on the employer's computer system; noting that such lawyers might face some duty or even punishment under civil procedure rules or court decisions, but the ethics rules "do not independently impose an ethical duty to notify opposing counsel" in such situations; holding that the employer client's possession of such employee documents is a confidence that the employer's lawyer must keep, absent some other duty or discretion to disclose it; concluding that if there is no law requiring such disclosure, the employer-client must decide whether to disclose its possession of such documents, although "it often will be in the employer-client's best interest to give notice and obtain a judicial ruling" on the admissibility of the employee's privileged communications before the employer's lawyer reviews the documents).
another person] without first ascertaining whether the sender intended to include such metadata”; pointing to the absence in the Maryland Rules of any provision requiring the recipient of inadvertently transmitted privileged material to notify the sender; a receiving lawyer "can, and probably should, communicate with his or her client concerning the pros and cons of whether to notify the sending attorney and/or to take such other action which they believe is appropriate”; noting that the 2006 Amendments to the Federal Rules will supersede the Maryland ethics provisions at least in federal litigation, and that violating that new provision would likely constitute a violation of Rule 8.4(b) as being "prejudicial to the administration of justice”).

Alabama. In early 2007, the Alabama Bar lined up with the bars prohibiting the mining of metadata. In Alabama LEO 2007-02 (3/14/07), the Alabama Bar first indicated that "an attorney has an ethical duty to exercise reasonable care when transmitting electronic documents to ensure that he or she does not disclose his or her client's secrets and confidences." The Alabama Bar then dealt with the ethical duties of a lawyer receiving an electronic document from another person. The Bar only cited New York LEO 749 (2001), and did not discuss ABA LEO 442. Citing Alabama Rule 8.4 (which is the same as ABA Model Rule 8.4), the Alabama Bar concluded that

[t]he mining of metadata constitutes a knowing and deliberate attempt by the recipient attorney to acquire confidential and privileged information in order to obtain an unfair advantage against an opposing party.

Alabama LEO 2007-02 (3/14/07).

The Alabama Bar did not address Alabama's approach to inadvertently transmitted communications (Alabama does not have a corollary to ABA Model Rule 4.4(b)). The Bar acknowledged that "[o]ne possible exception" to the prohibition
on mining metadata involves electronic discovery, because "metadata evidence may be relevant and material to the issues at hand" in litigation. \textit{Id.}

**District of Columbia.** The D.C. Bar dealt with the metadata issue in late 2007. The D.C. Bar generally agreed with the New York and Alabama approach, but noted that as of February 1, 2007, D.C. Rule 4.4(b) is "more expansive than the ABA version," because it prohibits the lawyer from examining an inadvertently transmitted writing if the lawyer "knows, before examining the writing, that it has been inadvertently sent." District of Columbia LEO 341 (9/2007).

The D.C. Bar held that

\begin{quote}
[a] receiving lawyer is prohibited from reviewing metadata sent by an adversary only where he has actual knowledge that the metadata was inadvertently sent. In such instances, the receiving lawyer should not review the metadata before consulting with the sending lawyer to determine whether the metadata includes work product of the sending lawyer or confidences or secrets of the sending lawyer's client.
\end{quote}

\textit{Id.} (emphases added).

After having explicitly selected the "actual knowledge" standard, the D.C. Bar then proceeded to abandon it.

First, the D.C. Bar indicated that lawyers could not use "a system to mine all incoming electronic documents in the hope of uncovering a confidence or secret, the disclosure of which was unintended by some hapless sender." \textit{Id.} n.3. The Bar warned that "a lawyer engaging in such a practice with such intent cannot escape accountability solely because he lacks 'actual knowledge' in an individual case." \textit{Id.}

Second, in discussing the "actual knowledge" requirement, the D.C. Bar noted the obvious example of the sending lawyer advising the receiving lawyer of the
inadvertence "before the receiving lawyer reviews the document." District of Columbia

LEO 341. However, the D.C. Bar then gave another example that appears much closer
to a negligence standard.

Such actual knowledge may also exist where a receiving
lawyer immediately notices upon review of the metadata that it is clear that protected information was unintentionally
included. These situations will be fact-dependent, but can
arise, for example, where the metadata includes a candid
exchange between an adverse party and his lawyer such
that it is "readily apparent on its face," . . . that it was not
intended to be disclosed.

Id.

The D.C. Bar indicated that "a prudent receiving lawyer" should contact the
sending lawyer in such a circumstance -- although the effect of District of Columbia LEO
341 is to allow ethics sanctions against an imprudent lawyer. Id.

Third, the Bar also abandoned the "actual knowledge" requirement by using a
"patently clear" standard. The D.C. Bar analogized inadvertently transmitted metadata
to a situation in which a lawyer "inadvertently leaves his briefcase in opposing counsel's
office following a meeting or a deposition." Id. n.4.

The one lawyer's negligence in leaving the briefcase does
not relieve the other lawyer from the duty to refrain from
going through that briefcase, at least when it is patently clear
from the circumstances that the lawyer was not invited to do
so.

Id.

After describing situations in which the receiving lawyer cannot review metadata,
the Bar emphasized that even a lawyer who is free to examine the metadata is not
obligated to do so.
Whether as a matter of courtesy, reciprocity, or efficiency, "a lawyer may decline to retain or use documents that the lawyer might otherwise be entitled to use, although (depending on the significance of the documents) this might be a matter on which consultation with the client may be necessary."

Id. n.9 (citation omitted).

Unlike some of the other bars which have dealt with metadata, the D.C. Bar also explicitly addressed metadata included in responsive documents being produced in litigation. Interestingly, the D.C. Bar noted that other rules might prohibit the removal of metadata during the production of electronic documents during discovery. Thus,

[in view of the obligations of a sending lawyer in providing electronic documents in response to a discovery request or subpoena, a receiving lawyer is generally justified in assuming that metadata was provided intentionally.

District of Columbia LEO 341. Even in the discovery context, however, a receiving lawyer must comply with D.C. Rule 4.4(b) if she has "actual knowledge" that metadata containing protected information has been inadvertently included in the production.

Arizona. In Arizona LEO 07-03, the Arizona Bar first indicated that lawyers transmitting electronic documents had a duty to take "reasonable precautions" to prevent the disclosure of confidential information.

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2 Arizona LEO 07-03 (11/2007) (a lawyer sending electronic documents must take "reasonable precautions" to prevent the disclosure of client confidential information; also explicitly endorsing the approach of New York, Florida and Alabama in holding that "a lawyer who receives an electronic communication may not examine it for the purpose of discovering the metadata embedded in it"; noting that Arizona's version of Rule 4.4(b) requires a lawyer receiving an inadvertently sent document to "promptly notify the sender and preserve the status quo for a reasonable period of time in order to permit the sender to take protective measures"; finding that any client confidential metadata was inadvertently transmitted, and thus fell under this rule; "respectfully" declining to adopt the ABA approach, under which lawyers "might conclude that the only ethically safe course of action is to forego the use of electronic document transmission entirely"; also disagreeing with District of Columbia LEO 341 (9/2007), although misreading that LEO as generally allowing receiving lawyers to examine metadata).
The Arizona Bar nevertheless agreed with those states prohibiting the receiving lawyer from mining metadata — noting that Arizona’s Ethical Rule 4.4(b) requires a lawyer receiving an inadvertently sent document to “promptly notify the sender and preserve the status quo for a reasonable period of time in order to permit the sender to take protective measures.” The Arizona Bar acknowledged that the sending lawyer might not have inadvertently sent the document, but explained that the lawyer did not intend to transmit metadata — thus triggering Rule 4.4(b). The Arizona Bar specifically rejected the ABA approach, because sending lawyers worried about receiving lawyers reading their metadata “might conclude that the only ethically safe course of action is to forego the use of electronic document transmission entirely.”

Pennsylvania. In Pennsylvania LEO 2007-500, the Pennsylvania Bar promised that its opinion “provides ethical guidance to lawyers on the subject of metadata received from opposing counsel in electronic materials” — but then offered a totally useless standard.

[I]t is the opinion of this Committee that each attorney must, as the Preamble to the Rules of Professional Conduct states, "resolve [the issue] through the exercise of sensitive and moral judgment guided by the basic principles of the Rules" and determine for himself or herself whether to utilize the metadata contained in documents and other electronic files based upon the lawyer's judgment and the particular factual situation.

Pennsylvania LEO 2007-500 (2007). The Pennsylvania Bar’s conclusion was equally useless.

Therefore, this Committee concludes that, under the Pennsylvania Rules of Professional Conduct, each attorney must determine for himself or herself whether to utilize the metadata contained in documents and other electronic files based upon the lawyer's judgment and the particular factual
situation. This determination should be based upon the nature of the information received, how and from whom the information was received, attorney-client privilege and work product rules, and common sense, reciprocity and professional courtesy.

**Id.** As explained below, the Pennsylvania Bar returned to this topic two years later.

**New York County.** Another legal ethics opinion on this issue came from the New York County Lawyers' Association Committee on Professional Ethics in 2008.

In N.Y. County Law. Ass’n LEO 738, the Committee specifically rejected the ABA approach, and found that mining an adversary’s electronic documents for metadata amounts to unethical conduct that "is deceitful and prejudicial to the administration of justice."³

**Colorado.** Colorado dealt with this issue in mid-2008.

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³ New York County Law. Ass’n LEO 738 (3/24/08) (holding that a lawyer “has the burden to take due care” in scrubbing metadata before sending an electronic document, but that the receiving lawyer may not seek to discover the metadata; “By actively mining an adversary's correspondence or documents for metadata under the guise of zealous representation, a lawyer could be searching only for attorney work product or client confidences or secrets that opposing counsel did not intend to be viewed. An adversary does not have the duty of preserving the confidences and secrets of the opposing side under DR 4-101 and EC 4-1. Yet, by searching for privileged information, a lawyer crosses the lines drawn by DR 1-102(A)(4) and DR 1-102(A)(5) by acting in a manner that is deceitful and prejudicial to the administration of justice. Further, the lawyer who searches an adversary's correspondence for metadata is intentionally attempting to discover an inadvertent disclosure by the opposing counsel, which the Committee has previously opined must be reported to opposing counsel without further review in certain circumstances. See NYCLA Op. 730 (2002). Thus, a lawyer who seeks to discover inadvertent disclosures of attorney work product or client confidences or secrets or is likely to find such privileged material violates DR 1-102(A)(4) and DR 1-102(A)(5)."; specifically excluding from its analysis electronic documents produced during litigation discovery; specifically rejecting the ABA approach, and instead agreeing with New York LEO 749 (12/14/01); "While this Committee agrees that every attorney has the obligation to prevent disclosing client confidences and secrets by properly scrubbing or otherwise protecting electronic data sent to opposing counsel, mistakes occur and an attorney may neglect on occasion to scrub or properly send an electronic document. The question here is whether opposing counsel is permitted to take advantage of the sending attorney's mistake and hunt for the metadata that was improperly left in the document. This Committee finds that the NYSBA rule is a better interpretation of the Code's disciplinary rules and ethical considerations and New York precedents than the ABA's opinion on this issue. Thus, this Committee concludes that when a lawyer sends opposing counsel correspondence or other material with metadata, the receiving attorney may not ethically search the metadata in those electronic documents with the intent to find privileged material or if finding privileged material is likely to occur from the search.”).
Relying on a unique Colorado rule, the Colorado Bar explained that a receiving lawyer may freely examine any metadata unless the lawyer received an actual notice from the sending lawyer that the metadata was inadvertently included in the transmitted document. In addition, the Colorado Bar explicitly rejected the conclusion reached by jurisdictions prohibiting receiving lawyers from examining metadata. For instance, the Colorado Bar explained that "there is nothing inherently deceitful or surreptitious about searching for metadata." The Colorado Bar also concluded that "an absolute ethical bar on even reviewing metadata ignores the fact that, in many circumstances, metadata do not contain Confidential Information."

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4 Colorado LEO 119 (5/17/08) (addressing a receiving lawyer's right to review metadata in an electronic document received from a third party; explaining that the receiving lawyer should assume that any confidential or privileged information in the metadata was sent inadvertently; noting that Colorado ethics rules require the receiving lawyer to notify the sending lawyer of such inadvertent transmission of privileged communications; "The Receiving Lawyer must promptly notify the Sending Lawyer. Once the Receiving Lawyer has notified the Sending Lawyer, the lawyers may, as a matter of professionalism, discuss whether a waiver of privilege or confidentiality has occurred. In some instances, the lawyers may be able to agree on how to handle the matter. If this is not possible, then the Sending Lawyer or the Receiving Lawyer may seek a determination from a court or other tribunal as to the proper disposition of the electronic documents or files, based on the substantive law of waiver."); relying on a unique Colorado ethics rule to conclude that "[i]f, before examining metadata in an electronic document or file, the Receiving Lawyer receives notice from the sender that Confidential Information was inadvertently included in metadata in that electronic document or file, the Receiving Lawyer must not examine the metadata and must abide by the sender's instructions regarding the disposition of the metadata"; rejecting the conclusion of jurisdictions which have forbidden receiving lawyers from reviewing metadata; "First, there is nothing inherently deceitful or surreptitious about searching for metadata. Some metadata can be revealed by simply passing a computer cursor over a document on the screen or right-clicking on a computer mouse to open a drop-down menu that includes the option to review certain metadata. . . . Second, an absolute ethical bar on even reviewing metadata ignores the fact that, in many circumstances, metadata do not contain Confidential Information."; concluding that "where the Receiving Lawyer has no prior notice from the sender, the Receiving Lawyer's only duty upon viewing confidential metadata is to notify the Sending Lawyer. See RPC 4.4(b). There is no rule that prohibits the Receiving Lawyer from continuing to review the electronic document or file and its associated metadata in that circumstance.").
Maine. The next state to vote on metadata was Maine. In Maine LEO 196, the Maine Bar reviewed most of the other opinions on metadata, and ultimately concluded that

an attorney may not ethically take steps to uncover metadata, embedded in an electronic document sent by counsel for another party, in an effort to detect information that is legally confidential and is or should be reasonably known not to have been intentionally communicated.

Maine LEO 196 (10/21/08). The Maine Bar explained that "[n]ot only is the attorney's conduct dishonest in purposefully seeking by this method to uncover confidential information of another party, that conduct strikes at the foundational principles that protect attorney-client confidences, and in doing so it clearly prejudices the administration of justice."

Not surprisingly, the Maine Bar also held that

the sending attorney has an ethical duty to use reasonable care when transmitting an electronic document to prevent the disclosure of metadata containing confidential information. Undertaking this duty requires the attorney to reasonably apply a basic understanding of the existence of metadata embedded in electronic documents, the features of the software used by the attorney to generate the document and practical measures that may be taken to purge documents of sensitive metadata where appropriate to prevent the disclosure of confidential information."

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5 Maine LEO 196 (10/21/08) (reviewing most of the other opinions on metadata, and concluding that "an attorney may not ethically take steps to uncover metadata, embedded in an electronic document sent by counsel for another party, in an effort to detect information that is legally confidential and is or should be reasonably known not to have been intentionally communicated"; explaining that "[n]ot only is the attorney's conduct dishonest in purposefully seeking by this method to uncover confidential information of another party, that conduct strikes at the foundational principles that protect attorney-client confidences, and in doing so it clearly prejudices the administration of justice"; also explaining that "the sending attorney has an ethical duty to use reasonable care when transmitting an electronic document to prevent the disclosure of metadata containing confidential information. Undertaking this duty requires the attorney to reasonably apply a basic understanding of the existence of metadata embedded in electronic documents, the features of the software used by the attorney to generate the document and practical measures that may be taken to purge documents of sensitive metadata where appropriate to prevent the disclosure of confidential information.").
documents of sensitive metadata where appropriate to prevent the disclosure of confidential information.

Id.

**Pennsylvania.** Early in 2009, the Pennsylvania Bar issued another opinion dealing with metadata -- acknowledging that its 2007 opinion (discussed above) "provided insufficient guidance" to lawyers.6

Unlike other legal ethics opinions, the Pennsylvania Bar reminded the receiving lawyer that his client might be harmed by the lawyer's review of the adversary's metadata -- depending on the court's attitude. However, the Bar reminded lawyers that the receiving lawyer must undertake this analysis, because

an attorney who receives such inadvertently transmitted information from opposing counsel may generally examine

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6 Pennsylvania LEO 2009-100 (2009) (revisiting the issue of metadata following a 2007 opinion that "provided insufficient guidance" to lawyers; emphasizing the sending lawyer's duty to preserve client confidences when transmitting electronic documents; explaining that Pennsylvania's Rule 4.4(b) required a lawyer receiving an inadvertent document to "promptly notify the sender"; "When applied to metadata, Rule 4.4(b) requires that a lawyer accessing metadata evaluate whether the extra-textual information was intended to be deleted or scrubbed from the document prior to transmittal. In many instances, the process may be relatively simple, such as where the information does not appear on the face of the document sent but is accessible only by means such as viewing tracked changes or other mining techniques, or, in the alternative, where a covering document may advert to the intentional inclusion of metadata. The resulting conclusion or state of knowledge determines the course of action required. The foregoing again presumes that the mere existence of metadata confirms inadvertence, which is not warranted. This conclusion taken to its logical conclusion would mean that the existence of any and all metadata be reported to opposing counsel in every instance."; explaining that despite the possible ethics freedom to review metadata, the client might be harmed if the pertinent court would find such reading improper; describing the duty of the receiving lawyer as follows: "The receiving lawyer: 'a) must then determine whether he or she may use the data received as a matter of substantive law; (b) must consider the potential effect on the client's matter should the lawyer do so; and (c) should advise and consult with the client about the appropriate course of action under the circumstances.'"; "If the attorney determines that disclosure of the substance of the metadata to the client may negatively affect the process or outcome of the case, there will in most instances remain a duty to advise the client of the receipt of the metadata and the reason for nondisclosure. The client may then make an informed decision whether the advantages of examining or utilizing the metadata outweigh the disadvantages of so doing."; ultimately concluding "that an attorney has an obligation to avoid sending electronic materials containing metadata, where the disclosure of such metadata would harm the client's interests. In addition, an attorney who receives such inadvertently transmitted information from opposing counsel may generally examine and use the metadata for the client's benefit without violating the Rules of Professional Conduct.").
and use the metadata for the client's benefit without violating the Rules of Professional Conduct.


**New Hampshire.** New Hampshire dealt with metadata in early 2009. In an April 16, 2009 legal ethics opinion, the New Hampshire Bar indicated that receiving lawyers may not ethically review an adversary's metadata. The New Hampshire Bar pointed to the state's version of Rule 4.4(b), which indicates that lawyers receiving materials inadvertently sent by a sender "shall not examine the materials," but instead should notify the sender and "abide by the sender's instructions or seek determination by a tribunal."

Interestingly, although the New Hampshire Bar could have ended the analysis with this reliance on New Hampshire Rule 4.4(b), it went on to analogize the review of an adversary's metadata to clearly improper eavesdropping.

Because metadata is simply another form of information that can include client confidences, the Committee sees little difference between a receiving lawyer uncovering an opponent's metadata and that same lawyer peeking at

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7 New Hampshire LEO 2008-2009/4 (4/16/09) ("Receiving lawyers have an ethical obligation not to search for, review or use metadata containing confidential information that is associated with transmission of electronic materials from opposing counsel. Receiving lawyers necessarily know that any confidential information contained in the electronic material is inadvertently sent, triggering the obligation under Rule 4.4(b) not to examine the material. To the extent that metadata is mistakenly reviewed, receiving lawyers should abide by the directives in Rule 4.4(b)."; noting that under New Hampshire Rule 4.4(b), a lawyer receiving "materials" inadvertently sent by a sender "shall not examine the materials," but instead should notify the sender and "abide by the sender's instructions or seek determination by a tribunal"; finding that this Rule applies to metadata; "The Committee believes that all circumstances, with the exception of express waiver and mutual agreement on review of metadata, lead to a necessary conclusion that metadata is 'inadvertently sent' as that term is used in Rule 4.4(b)."; analogizing the reading of metadata to clearly improper eavesdropping; "Because metadata is simply another form of information that can include client confidences, the Committee sees little difference between a receiving lawyer uncovering an opponent's metadata and that same lawyer peeking at opposing counsel's notes during a deposition or purposely eavesdropping on a conversation between counsel and client. There is a general expectation of honesty, integrity, mutual courtesy and professionalism in the New Hampshire bar. Lawyers should be able to reasonably assume that confidential information will not be sought out by their opponents and used against their clients, regardless of the ease in uncovering the information.")
opposing counsel’s notes during a deposition or purposely eavesdropping on a conversation between counsel and client. There is a general expectation of honesty, integrity, mutual courtesy and professionalism in the New Hampshire bar. Lawyers should be able to reasonably assume that confidential information will not be sought out by their opponents and used against their clients, regardless of the ease in uncovering the information.


**West Virginia.** In West Virginia LEO 2009-01, the West Virginia Bar warned sending lawyers that they might violate the ethics rules by not removing confidential metadata before sending an electronic document.

On the other hand,

> [w]here a lawyer knows that privileged information was inadvertently sent, it could be a violation of Rule 8.4(c) for the receiving lawyer to review and use it without consulting with the sender. Therefore, if a lawyer has received electronic documents and has actual knowledge that metadata was inadvertently sent, the receiving lawyer should not review the metadata before consulting with the sending

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8 West Virginia LEO 2009-01 (6/10/09) (warning lawyers that “it is important to be familiar with the types of metadata contained in computer documents and to take steps to protect or remove it whenever necessary. Failure to do so could be viewed as a violation of the Rules of Professional Conduct. Additionally, searching for or viewing metadata in documents received from others after an attorney has taken steps to protect such could also be reviewed as a violation of the Rules of Professional Conduct.”; also explaining that “[w]here a lawyer knows that privileged information was inadvertently sent, it could be a violation of Rule 8.4(c) [which prohibits ‘conduct involving dishonesty, fraud, deceit or misrepresentation’] for the receiving lawyer to review and use it without consulting with the sender. Therefore, if a lawyer has received electronic documents and has actual knowledge that metadata was inadvertently sent, the receiving lawyer should not review the metadata before consulting with the sending lawyer to determine whether the metadata includes work-product or confidences.”; noting that lawyers producing electronic document in “a discovery or a subpoena context” might have to deal with metadata differently, including asserting privilege for protected metadata; “In many situations, it may not be clear whether the disclosure was inadvertent. In order to avoid misunderstandings, it is always safer to notify the sender before searching electronic documents for metadata. If attorneys cannot agree on how to handle the matter, either lawyer may seek a ruling from a court or other tribunal on the issue.”; ultimately concluding that “[t]he Board finds that there is a burden on an attorney to take reasonable steps to protect metadata in transmitted documents, and there is a burden on a lawyer receiving inadvertently provided metadata to consult with the sender and abide by the sender's instructions before reviewing such metadata”).
lawyer to determine whether the metadata includes work-product or confidences.

West Virginia LEO 2009-01 (6/10/09). West Virginia Rule 8.4(c) prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation." The West Virginia Bar also explained that

[i]n many situations, it may not be clear whether the disclosure was inadvertent. In order to avoid misunderstandings, it is always safer to notify the sender before searching electronic documents for metadata. If attorneys cannot agree on how to handle the matter, either lawyer may seek a ruling from a court or other tribunal on the issue.

West Virginia LEO 2009-01 (6/10/09).

**Vermont.** In Vermont LEO 2009-1, the Bar pointed to its version of Rule 4.4(b) -- which takes the ABA approach -- in allowing lawyers to search for any hidden metadata in electronic documents they receive.\(^9\)

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\(^9\) Vermont LEO 2009-1 (9/2009) (holding that lawyers must take reasonable steps to avoid sending documents that contain client confidential metadata; also holding that lawyers who receive electronic documents may search for metadata; "The Bar Associations that have examined the duty of the sending lawyer with respect to metadata have been virtually unanimous in concluding that lawyers who send documents in electronic form to opposing counsel have a duty to exercise reasonable care to ensure that metadata containing confidential information protected by the attorney-client privilege and the work product doctrine is not disclosed during the transmission process."; "This Opinion agrees that, based upon the language of the VRPC, a lawyer has a duty to exercise reasonable care to ensure that confidential information protected by the attorney client privilege and the work product doctrine is not disclosed. This duty extends to all forms of information handled by an attorney, including documents transmitted to opposing counsel electronically that may contain metadata embedded in the electronic file."; noting that Vermont Rule 4.4(b) follows the ABA approach, and was effective as of September 1, 2009; declining to use the word "mine" in describing the search for metadata, because of its "pejorative characterization"; "[T]he Vermont Bar Association Professional Responsibility Section finds nothing to compel the conclusion that a lawyer who receives an electronic file from opposing counsel would be ethically prohibited from reviewing that file using any available tools to expose the file's content, including metadata. A rule prohibiting a search for metadata in the context of electronically transmitted documents would, in essence, represent a limit on the ability of a lawyer diligently and thoroughly to analyze material received from opposing counsel." (footnote omitted); "The existence of metadata is an unavoidable aspect of rapidly changing technologies and information data processing tools. It is not within the scope of this Section's authority to insert an obligation into the Vermont Rules of Professional Conduct that would prohibit a lawyer from thoroughly reviewing documents provided by opposing counsel, using whatever tools are available to the lawyer to conduct this review."; also explaining that Federal Rule of Evidence 502 provides the substantive law that governs waiver issues, and that documents produced in
North Carolina. In early January 2010, the North Carolina Bar joined other bars in warning lawyers to take "reasonable precautions" to avoid disclosure of confidential metadata in documents they send.

The Bar also prohibited receiving lawyers from searching for any confidential information in metadata, or using any confidential metadata the receiving lawyer "unintentionally views."\(^{10}\)

The North Carolina Bar analogized the situation to a lawyer who receives "a faxed pleading that inadvertently includes a page of notes from opposing counsel." The North Carolina Bar concluded that a lawyer searching for metadata in an electronic document received from another lawyer would violate Rule 8.4(d)'s prohibition on conduct that is "prejudicial to the administration of justice" -- because such a search discovery (which may contain metadata) must be handled in the same way as other documents being produced).

\(^{10}\) North Carolina LEO 2009-1 (1/15/10) (in an opinion issued sua sponte, concluding that a lawyer "who sends an electronic communication must take reasonable precautions to prevent the disclosure of confidential information, including information in metadata, to unintended recipients."; also concluding that "a lawyer may not search for confidential information embedded in metadata of an electronic communication from another party or a lawyer for another party. By actively searching for such information, a lawyer interferes with the client-lawyer relationship of another lawyer and undermines the confidentiality that is the bedrock of the relationship. Rule 1.6. Additionally, if a lawyer unintentionally views confidential information within metadata, the lawyer must notify the sender and may not subsequently use the information revealed without the consent of the other lawyer or party."; analogizing the presence of embedded confidential metadata in a document received by the lawyer to "a faxed pleading that inadvertently includes a page of notes from opposing counsel"; noting that under North Carolina Rule 4.4(b), the receiving lawyer in that situation must "promptly notify the sender," and not explaining why the receiving lawyer must do anything more than comply with this rule when receiving an electronic document and discovering any metadata that the sender appears to have inadvertently included; later reiterating that "a lawyer who intentionally or unintentionally discovers confidential information embedded within the metadata of an electronic communication may not use the information revealed without the consent of the other lawyer or party."; explaining that a lawyer searching for metadata would violate Rule 8.4(d)'s prohibition on conduct that is "prejudicial to the administration of justice"; concluding that "a lawyer may not search for and use confidential information embedded in the metadata of an electronic communication sent to him or her by another lawyer or party unless the lawyer is authorized to do so by law, rule, court order or procedure, or the consent of the other lawyer or party. If a lawyer unintentionally views metadata, the lawyer must notify the sender and may not subsequently use the information revealed without the consent of the other lawyer or party.").
"interferes with the client-lawyer relationship of another lawyer and undermines the confidentiality that is the bedrock of the relationship."

The North Carolina Bar did not explain why the receiving lawyer must do anything more than notify the sending lawyer of the inadvertently included confidential metadata -- which is all that is required in the North Carolina Rule 4.4(b). Like other parallels to ABA Model Rule 4.4(b), the North Carolina Rule does not prohibit receiving lawyers from searching for confidential information in a document or documents received from an adversary, and likewise does not address the receiving lawyer's use of any confidential information the receiving lawyer discovers.

**Minnesota.** In March 2010, Minnesota issued an opinion dealing with metadata. Minnesota LEO 22 (3/26/10).¹¹

The court pointed to some examples of the type of metadata that a receiving lawyer could find useful.

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¹¹ Minnesota LEO 22 (3/26/10) (analyzing the ethics issues raised by lawyers' use of metadata; warning the sending lawyer to avoid inadvertently including metadata, and pointing to Minnesota's Rule 4.4(b) (which matches the ABA version) in simply advising the receiving lawyer to notify the sending lawyer; providing some examples of the type of metadata that could provide useful information; "Other metadata may contain confidential information the disclosure of which can have serious adverse consequences to a client. For example, a lawyer may use a template for pleadings, discovery and affidavits which contain metadata within the document with names and other important information about a particular matter which should not be disclosed to another party in another action. Also as an example, a lawyer may circulate within the lawyer's firm a draft pleading or legal memorandum on which other lawyers may add comments about the strengths and weaknesses of a client's position which are embedded in the document but not apparent in the document's printed form. Similarly, documents used in negotiating a price to pay in a transaction or in the settlement of a lawsuit may contain metadata about how much or how little one side or the other may be willing to pay or to accept."; concluding that "a lawyer is ethically required to act competently to avoid improper disclosure of confidential and privileged information in metadata in electronic documents."; pointing to Minnesota's Rule 4.4(b) in holding that "[i]f a lawyer receives a document which the lawyer knows or reasonably should know inadvertently contains confidential or privileged metadata, the lawyer shall promptly notify the document's sender as required by Rule 4.4(b), MRPC."; not pointing to any other state's approach to the receiving lawyer's ethics duty; explicitly indicating that "Opinion 22 is not meant to suggest there is an ethical obligation on a receiving lawyer to look or not to look for metadata in an electronic document. Whether and when a lawyer may be advised to look or not to look for such metadata is a fact specific question beyond the scope of this Opinion.").
Other metadata may contain confidential information the disclosure of which can have serious adverse consequences to a client. For example, a lawyer may use a template for pleadings, discovery and affidavits which contain metadata within the document with names and other important information about a particular matter which should not be disclosed to another party in another action. Also as an example, a lawyer may circulate within the lawyer's firm a draft pleading or legal memorandum on which other lawyers may add comments about the strengths and weaknesses of a client's position which are embedded in the document but not apparent in the document's printed form. Similarly, documents used in negotiating a price to pay in a transaction or in the settlement of a lawsuit may contain metadata about how much or how little one side or the other may be willing to pay or to accept.

Id. The Minnesota Bar then emphasized the sending lawyer's responsibility to "scrub" metadata.

In discussing the receiving lawyer's ethics duty, the Minnesota Bar essentially punted. It cited Minnesota's version of Rule 4.4(b) (which matches the ABA Model Rule version) -- which simply requires the receiving lawyer to notify the sending lawyer of any inadvertently transmitted document. In fact, the Minnesota Bar went out of its way to avoid taking any position on the receiving lawyer's ethics duty.

Opinion 22 is not meant to suggest there is an ethical obligation on a receiving lawyer to look or not to look for metadata in an electronic document. Whether and when a lawyer may be advised to look or not to look for such metadata is a fact specific question beyond the scope of this Opinion.

Id. It is difficult to imagine how the receiving lawyer's decision is "fact specific." The Minnesota Bar did not even indicate where the receiving lawyer should look for ethics guidance.
Amazingly, the Minnesota Bar did not point to any other state’s opinion on metadata, or even acknowledge the national debate.

**Oregon.** In November 2011, Oregon took a novel approach to the metadata issue, articulating an ethics standard that varies with technology.

In Oregon LEO 2011-187 (11/2011), the bar started with three scenarios. The first scenario involved a lawyer receiving a draft agreement from another lawyer. The receiving lawyer was “able to use a standard word processing feature” to reveal the document’s metadata. That process showed that the sending lawyer had made a number of revisions to the draft, and later deleted some of them.

The next scenario started with the same facts, but then added a twist. In that scenario, "shortly after opening the document and displaying the changes" the receiving lawyer received an "urgent request" from the sending lawyer asking the receiving lawyer

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12 Oregon LEO 2011-187 (11/2011) (holding that lawyers may use a “standard word processing feature” to find metadata in documents they receive, but that using “special software” to thwart metadata scrubbing is unethical; explaining that lawyers’ duties of competence and confidentiality require them to take “reasonable care” to prevent the inadvertent disclosure of metadata; noting that Oregon’s Rule 4.4(b) at most requires a lawyer to notify the sender if the receiving lawyer “knows or should have known” that the document contains inadvertently transmitted metadata; concluding that the receiving lawyer (1) may use “a standard word processing feature” to find metadata; (2) does not have to comply with the sender’s “urgent request” asking that the receiving lawyer delete a document without reading it because the sender “had mistakenly not removed the metadata” -- even if the lawyer receives the request "shortly after opening the document and displaying the changes" using such a “standard word processing feature”; (3) "should consult with the client" about "the risks of returning a document versus the risks of retaining and reading the document and its metadata"; (4) may not use special software "designed to thwart the metadata removal tools of common word processing software"; acknowledging that it is "not clear" whether the receiving lawyer has a duty to notify the sender if the receiving lawyer uncovers metadata using such "special software"; although answering "No" to the short question “[May the receiving lawyer] use special software to reveal the metadata in the document,” describing that prohibition elsewhere as conditioned on it being "apparent" that the sending lawyer attempted to scrub the metadata; "Searching for metadata using special software when it is apparent that the sender has made reasonable efforts to remove the metadata may be analogous to surreptitiously entering the other lawyer's office to obtain client information and may constitute ‘conduct involving dishonesty, fraud, deceit or misrepresentation’ in violation of Oregon RPC 8.4(a)(3).”).

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to delete the document because the sending lawyer had "mistakenly not removed the metadata."

In the third scenario, the receiving lawyer wanted to search for metadata using "software designed to thwart the metadata removal tools of common word processing software."

In sum, the Oregon Bar concluded that the receiving lawyer (1) could use "a standard word processing feature" to search for metadata, and at most must notify the sending lawyer of the metadata's existence; (2) could ignore the sending lawyer's request to delete the document; and (3) could not use "special software" to find the metadata that the sending lawyer intended to remove before sending the document.

The Oregon Bar started its analysis by emphasizing the sending lawyer's duty to take "reasonable care" to avoid inadvertently including metadata in an electronic document. The Oregon Bar relied on both competence and confidentiality duties.

The Oregon Bar next pointed to its version of Rule 4.4(b), which matches the ABA’s Model Rule 4.4(b).

In turning to the receiving lawyer's duties, the Oregon Bar presented another scenario -- involving a sending lawyer's inadvertent inclusion of notes on yellow paper with a hardcopy of a document sent to an adversary. The Oregon Bar explained that the receiving lawyer in that scenario "may reasonably conclude" that the sending lawyer inadvertently included the yellow note pages, and therefore would have a duty to notify the sending lawyer. The same would not be true of a "redline" draft transmitted by the sending lawyer, given the fact that "it is not uncommon for lawyers to share marked-up drafts."
If the receiving lawyer "knows or reasonably should know" that a document contains inadvertently transmitted metadata, the receiving lawyer at most has a duty to notify the sending lawyer. The Oregon Bar bluntly explained that Rule 4.4(b) does not require the receiving lawyer to return the document unread or to comply with the request by the sender to return the document.

Id. (emphasis added). In fact, the receiving lawyer's duty to consult with the client means that the receiving lawyer should consult with the client about the risks of returning the document versus the risks of retaining and reading the document and its metadata.

Id. Other bars have also emphasized the client's right to participate in the decision-making of how to treat an inadvertently transmitted document. The Oregon Bar acknowledged the language in Comment [3] to ABA Model Rule 4.4(b) that such a decision is "a matter of professional judgment reserved to the lawyer," but also pointed to other ethics rules requiring lawyers to consult with their clients.

The Oregon Bar then turned to a situation in which the sending lawyer has taken "reasonable efforts" to "remove or screen metadata from the receiving lawyer." The Oregon Bar explained that the receiving lawyer might be able to "thwart the sender's efforts through software designed for that purpose." The Oregon Bar conceded that it is "not clear" whether the receiving lawyer learning of the metadata's existence has a duty to notify the sending lawyer in that circumstance. However, the Oregon Bar concluded with a warning about the use of such "special software."

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13 Interestingly, the Oregon Bar did not fully quote ABA Model Rule 4.4(b), cmt. [3], which indicates that the decision is "a matter of professional judgment ordinarily reserved to the lawyer" (emphasis added).
Searching for metadata using special software when it is apparent that the sender has made reasonable efforts to remove the metadata may be analogous to surreptitiously entering the other lawyer's office to obtain client information and may constitute "conduct involving dishonesty, fraud, deceit or misrepresentation" in violation in Oregon RPC 8.4(a)(3).

Id.

Although this conclusion indicated that such conduct "may be" analogous to improper conduct, the Oregon Bar offered a blunt "No" to the question: "May Lawyer B use special software to reveal the metadata in the document?" The short answer to that question did not include the premise that it be "apparent" that the sending lawyer tried to scrub the metadata. Thus, the simple "No" answer seemed to indicate that in that circumstance it would clearly be improper (rather than "may be" improper) for a receiving lawyer to use the "special software."

The Oregon Bar's analysis seems sensible in some ways, but nearly impossible to apply. First, it assumes that any metadata might have been "inadvertently" transmitted, and thus trigger a Rule 4.4(b) analysis. It is equally plausible to consider the metadata as having been intentionally sent. Perhaps the sending lawyer did not intend that the receiving lawyer read the metadata, but the sending lawyer surely directed the document to the receiving lawyer, unlike an errant fax or even the notes on yellow paper that the sending lawyer did not mean to include. The metadata is part of the document that was intentionally sent -- it is just that the sending lawyer might not know it is there. Considering that to be an "inadvertent" transmission might let someone argue that a sending lawyer "inadvertently" made some admission in a letter, or "inadvertently" relied on a case that actually helps the adversary, etc.
Second, if someone could use "special software" to discover metadata, it would be easy to think that the sending lawyer has almost by definition not taken "reasonable effort" to avoid disclosure of the metadata. The sending lawyer could just send a scanned PDF of the document, a fax, a hard copy, etc.

Third, the Oregon Bar makes quite an assumption in its conclusion about the receiving lawyer's use of "special software" that not only finds the metadata, but also renders it "apparent that the sender has made reasonable efforts to remove the metadata." The Oregon Bar did not describe any such "special software," so it is unclear whether it even exists. However, the Oregon Bar's conclusion rested (at least in part of the opinion) on the receiving lawyer discovering that the sending lawyer has attempted to remove the metadata. As explained above, however, the short question and answer at the beginning of the legal ethics opinion seems to prohibit the use of such "special software" regardless of the receiving lawyer's awareness that the sending lawyer had attempted to scrub the software.

Fourth, it is frightening to think that some lawyer using "a standard word processing feature" to search for metadata is acting ethically, but a lawyer using "special software designed to thwart the metadata removal tools of common word processing software" might lose his or her license. It is difficult to imagine that the line between ethical and unethical conduct is currently defined by whether a word processing feature is "standard" or "special." And of course that type of technological characterization changes every day.
Washington. The Washington State Bar Association dealt with metadata in a 2012 opinion. Washington LEO 2216 (2012). In essence, Washington followed Oregon's lead in distinguishing between a receiving lawyer's permissible use of "standard" software to search for metadata and the unethical use of "special forensic software" designed to thwart the sending lawyer's scrubbing efforts.

The Washington LEO opinion posed three scenarios. In the first, a sending lawyer did not scrub metadata, so the receiving lawyer was able to use "standard word processing features" to find metadata in a proposed settlement document. Id.

Washington state began its analysis of this scenario by noting that the sending lawyer has an ethical duty to "act competently" to protect from disclosure the confidential information that may be reflected in a document's metadata, including making reasonable efforts to "scrub" metadata reflecting any protected information from the document before sending it electronically. . . .

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14 Washington LEO 2216 (2012) (analyzing both the sending and the receiving lawyers' responsibilities in connection with metadata; analyzing three hypotheticals: (1) a receiving lawyer uses "standard word processing features" to view metadata; concluding that the receiving lawyer's sole duty is to notify the sending lawyer of the metadata's presence; (2) "shortly after opening the document and discovering the readily accessible metadata, [receiving lawyer] receives an urgent email from [sending lawyer] stating that the metadata had been inadvertently disclosed and asking [receiving lawyer] to immediately delete the document without reading it"; concluding that the receiving lawyer "is not required to refrain from reading the document, nor is [receiving lawyer] required to return the document to [sending lawyer]. . . . [Receiving lawyer] may, however, be under a legal duty separate and apart from the ethical rules to take additional steps with respect to the document."; explaining that absent a legal duty governing the situation, the receiving lawyer must consult with the client about what steps to take; (3) a sending lawyer makes "reasonable efforts to 'scrub' the document" of metadata, and believes that he has successfully scrubbed the metadata; concluding that the receiving lawyer's use of "special forensic software designed to circumvent metadata removal tools" would be improper; "The ethical rules do not expressly prohibit [receiving lawyer] from utilizing special forensic software to recover metadata that is not readily accessible or has otherwise been 'scrubbed' from the document. . . . Such efforts would, however, in the opinion of this committee, contravene the prohibition in RPC 4.4(a) against 'us[ing] methods of obtaining evidence that violate the legal rights of [third persons]' and would constitute 'conduct that is prejudicial to the administration of justice' in contravention of RPC 8.4(d). To the extent that efforts to mine metadata yield information that intrudes on the attorney-client relationship, such efforts would also violate the public policy of preserving confidentiality as the foundation of the attorney-client relationship. . . . As such, it is the opinion of this committee that the use of special software to recover, from electronic documents, metadata that is not readily accessible does violate the ethical rules.").
Id. The Bar pointed to the Washington version of Rule 4.4(b) in explaining that the receiving lawyer could read the metadata. The Bar indicated that the receiving lawyer in that scenario simply had a duty to notify the sending lawyer "that the disclosed document contains readily accessible metadata." Id.

In the second scenario,

shortly after opening the document and discovering the readily accessible metadata, [the receiving lawyer] receives an urgent e-mail from [the sending lawyer] stating that the metadata had been inadvertently disclosed and asking [the receiving lawyer] to immediately delete the document without reading it.

Id. Somewhat surprisingly, the Washington Bar indicated that in that scenario the receiving lawyer is not required to refrain from reading the document, nor is [the receiving lawyer] required to return the document to [the sending lawyer]. . . . [The receiving lawyer] may, however, be under a legal duty separate and apart from the ethical rules to take additional steps with respect the document.

Id. The Bar explained that if there were no such separate legal duty applicable, the receiving lawyer would have to decide what steps to take in a consultation with the client.

In the third scenario, the sending lawyer had taken "reasonable efforts to 'scrub' the document" of metadata and believed that he had done so. Id. However, the receiving lawyer "possesses special forensic software designed to circumvent metadata removal tools." Id. The Washington Bar found that a receiving lawyer's use of such "special forensic software" violated Rule 8.4.

The ethical rules do not expressly prohibit [the receiving lawyer] from utilizing special forensic software to recover metadata that is not readily accessible or has otherwise
been 'scrubbed' from the document. Such efforts would, however, in the opinion of this committee, contravene the prohibition in RPC 4.4(a) against 'us[ing] methods of obtaining evidence that violate the legal rights of [third persons]' and would constitute 'conduct that is prejudicial to the administration of justice' in contravention of RPC 8.4(d).

To the extent that efforts to mine metadata yield information that intrudes on the attorney-client relationship, such efforts would also violate the public policy of preserving confidentiality as the foundation of the attorney-client relationship. . . . As such, it is the opinion of this committee that the use of special software to recover, from electronic documents, metadata that is not readily accessible does violate the ethical rules.

Id.

Current "Scorecard"

A chronological list of state ethics opinions dealing with metadata highlights the states' widely varying approaches.

The following is a chronological list of state ethics opinions, and indication of whether receiving lawyers can examine an adversary's electronic document for metadata.

**2001**

New York LEO 749 (12/14/01) -- **NO**

**2004**

New York LEO 782 (12/18/04) -- **NO**

**2006**

Florida LEO 06-2 (9/5/06) -- **NO**

ABA LEO 442 (8/5/06) -- **YES**
2007
Maryland LEO 2007-9 (2007) -- YES
Alabama LEO 2007-02 (3/14/07) -- NO
District of Columbia LEO 341 (9/2007) -- NO
Arizona LEO 07-3 (11/2007) -- NO

2008
N.Y. County Law. Ass’n LEO 738 (3/24/08 )-- NO
Colorado LEO 119 (5/17/08) -- YES
Maine LEO 196 (10/21/08) -- NO

2009
Pennsylvania LEO 2009-100 (2009) -- YES
New Hampshire LEO 2008-2009/4 (4/16/09) -- NO
West Virginia LEO 2009-01 (6/10/09) -- NO
Vermont LEO 2009-1 (10/2009) -- YES

2010
North Carolina LEO 2009-1 (1/15/10) -- NO
Minnesota LEO 22 (3/26/10) -- MAYBE

2011
Oregon LEO 2011-187 (11/2011) -- YES (using "standard word processing features") and NO (using "special software" designed to thwart metadata scrubbing).
2012

Washington LEO 2216 (2012) -- **YES** (using "standard word processing features") and **NO** (using "special forensic software" designed to thwart metadata scrubbing).

Thus, states take widely varying approaches to the ethical propriety of mining an adversary's electronic documents for metadata.

Interestingly, neighboring states have taken totally different positions. For instance, in late 2008, the Maine Bar prohibited such mining -- finding it "dishonest" and prejudicial to the administration of justice -- because it "strikes at the foundational principles that protect attorney-client confidences." Maine LEO 196 (10/21/08).

About six months later, New Hampshire took the same basic approach (relying on its version of Rule 4.4(b)), and even went further than Maine in condemning a receiving lawyer's mining of metadata -- analogizing it to a lawyer "peeking at opposing counsel's notes during a deposition or purposely eavesdropping on a conversation between counsel and client." New Hampshire LEO 2008-2009/4 (4/16/09).

However, another New England state (Vermont) reached exactly the opposite conclusion in 2009. Pointing to its version of Rule 4.4(b), Vermont even declined to use the term "mine" in determining the search, because of its "pejorative characterization." Vermont LEO 2009-1 (9/2009).

**Basis for States' Differing Positions**

In some situations, the bars' rulings obviously rest on the jurisdiction's ethics rules. For instance, the District of Columbia Bar pointed to its version of Rule 4.4(b), which the bar explained is "more expansive than the ABA version," because it prohibits the lawyer from examining an inadvertently transmitted writing if the lawyer "knows,
before examining the writing, that it has been inadvertently sent." District of Columbia LEO 341 (9/2007).

On the other hand, some of these bars' rulings seem to contradict their own ethics rules. For instance, Florida has adopted ABA Model Rule 4.4(b)'s approach to inadvertent transmissions (requiring only notice to the sending lawyer), but the Florida Bar nevertheless found unethical the receiving lawyer's "mining" of metadata.  

Other jurisdictions have not adopted any version of Rule 4.4(b), and therefore were free to judge the metadata issue without reference to a specific rule. See, e.g., Alabama LEO 2007-02 (3/14/07).

On the other hand, some states examining the issue of metadata focus on the basic nature of the receiving lawyer's conduct in attempting to "mine" metadata. Such conclusions obviously do not rest on a particular state's ethics rules. Instead, the different bars' characterization of the "mining" reflects a fascinating dichotomy resting on each state's view of the conduct.

- On March 24, 2008, the New York County Bar explained that mining an adversary's electronic documents for metadata amounted to unethical conduct that "is deceitful and prejudicial to the administration of justice." N.Y. County Law. Ass'n LEO 738 (3/24/08).

- Less than two months later, the Colorado Bar explained that "there is nothing inherently deceitful or surreptitious about searching for metadata." Colorado LEO 119 (5/17/08).

- A little over five months after that, the Maine Bar explained that "[n]ot only is the attorney's conduct dishonest in purposefully seeking by this method to uncover confidential information of another party, that conduct strikes at the foundational principles that protect attorney-client confidences, and in doing so it clearly prejudices the administration of justice." Maine LEO 196 (10/21/08).

15 Florida LEO 06-2 (9/16/06).
Thus, in less than seven months, two states held that mining an adversary's electronic document for metadata was deceitful, and one state held that it was not.

**Best Answer**

The best answer to this hypothetical is **MAYBE**.
Ex Parte Communications with a Corporate Adversary's In-House Lawyer

Hypothetical 7

You represent the defendant in a large patent infringement case. The plaintiff company hired a bombastic trial lawyer to handle its lawsuit against your client. The other side's Assistant General Counsel for Litigation is a law school classmate with whom you have been on friendly terms for years. You think there might be some merit in calling your friend in an effort to resolve the case.

(a) Without the outside lawyer's consent, may you call the other side's in-house lawyer -- if she has been listed as "counsel of record" on the pleadings?

**YES (PROBABLY)**

(b) Without the outside lawyer's consent, may you call the other side's in-house lawyer -- if she has not been listed as "counsel of record" on the pleadings?

**MAYBE**

Analysis

Introduction

It is difficult enough in a case of individual lawyers to properly characterize them as "clients" or as "lawyers" for purposes of analyzing Rule 4.2, but trying to assess the role of in-house lawyers complicates the analysis even more.

The ABA Model Rules and Comments are silent on the issue of in-house lawyers. However, the ABA recently issued a legal ethics opinion generally permitting ex parte contacts with the corporate adversary's in-house lawyers. ABA LEO 443 (8/5/06). (Rule 4.2 is designed to protect a person "against possible overreaching by adverse lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounseled disclosure of information regarding
the representation."; the protections of Rule 4.2 "are not needed when the constituent of an organization is a lawyer employee of that organization who is acting as a lawyer for that organization," so "inside counsel ordinarily are available for contact by counsel for the opposing party"; adverse counsel can freely contact an in house lawyer unless the in-house lawyer is "part of a constituent group of the organization as described in Rule 4.2 Comment [7] as, for example, when the lawyer participated in giving business advice or in making decisions which gave rise to the issues which are in dispute" or the in-house lawyer "is in fact a party in the matter and represented by the same counsel as the organization"; "in a rare case adverse counsel is asked not to communicate about a matter with inside counsel"; the opinion does not analyze the circumstance in which an in-house lawyer is "simultaneously serving as counsel for an organization in a matter while also being a party to, or having their own independent counsel in, that matter.").

The Restatement explains that

[i]Inside legal counsel for a corporation is not generally within Subsection (2) [those off limits to ex parte communications], and contact with such counsel is generally not limited by § 99.

Restatement (Third) of Law Governing Lawyers § 100 cmt. c (2000).

Of course, in-house counsel can be on the initiating or receiving side of ex parte contacts.

States take widely varying approaches to this issue.

For instance, Illinois LEO 04-02 (4/2005) explained that a company’s general counsel may not initiate ex parte contacts prohibited by Rule 4.2. Virginia has taken the same approach. Virginia LEO 1820 (1/27/06) (holding that an in-house lawyer "is not a party to the dispute but instead is counsel for a party").
On the receiving end, the D.C. Bar has indicated that "in general, a lawyer may communicate with in-house counsel of a represented entity about the subject of the representation without obtaining the prior consent of the entity’s other counsel." D.C. LEO 331 (10/2005) (noting that "if the in-house counsel is represented personally in a matter, Rule 4.2 would not permit a lawyer to communicate with that in-house counsel regarding that matter, without the consent of the in-house counsel’s personal lawyer"). In contrast, the Rhode Island Bar has indicated that a lawyer may not communicate a settlement offer to in-house counsel with a copy to outside counsel, unless outside counsel consents. Rhode Island LEO 94-81 (2/9/95).

Of course, ethics is not the only issue. In-house lawyers hoping to avoid the ex parte prohibition rules by characterizing themselves as clients rather than lawyers might jeopardize their ability to have communications protected by the attorney-client privilege.

(a) Although the answer might differ from state to state, it seems likely that ex parte contacts would be appropriate with an in-house lawyer who has signed on as "counsel of record" on the pleadings -- because that lawyer should appropriately be seen as representing the corporation.

(b) This scenario presents a more difficult analysis, because the in-house lawyer has not signed on as the corporation’s representative in the lawsuit. Therefore, the answer to this hypothetical would depend on the state’s approach.

The North Carolina Bar has indicated that "a lawyer may not communicate with an adverse corporate party’s house counsel, who appears in the case as a corporate
manager, without the consent of the corporation’s independent counsel.” North Carolina LEO 128 (4/16/93).

**Best Answer**

The best answer to (a) is **PROBABLY YES**; the best answer to (b) is **MAYBE**.
Lawyers Representing Their Clients in Arbitrations Where the Lawyers Are Not Licensed

Hypothetical 8

Over the years, you have shifted from being a trial lawyer to primarily representing your clients in employment arbitrations. One of your clients just asked if you could represent it in an arbitration scheduled to take place in a state where you are not licensed.

May you represent a client in an arbitration taking place in a state where you are not licensed?

YES (PROBABLY)

Analysis

The ABA Model Rules permit out-of-state lawyers to participate in arbitrations.

A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that . . . are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission.

ABA Model Rule 5.5(c)(3) (emphasis added). A comment provides additional explanation.

Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of
a court-annexed arbitration or otherwise if court rules or law so require.

ABA Model Rule 5.5 cmt. [12] (emphasis added).

The Restatement takes a more wary approach, which recognizes that some states might require pro hac admission by out-of-state lawyers, but do not include any pro hac process for arbitrations.

Transactional and similar out-of-court representation of clients may raise similar issues, yet there is no equivalent of temporary admission pro hac vice for such representation, as there is in litigation. Even activities that bear close resemblance to in-court litigation, such as representation of clients in arbitration or in administrative hearings, may not include measures for pro hac vice appearance.


Most bars take the same approach.¹ Not surprisingly, however, lawyers who repeatedly participate in arbitrations might find themselves running afoul of that state’s multijurisdictional practice rule.²

¹ See, e.g., Virginia UPL Opinion 200 (1/22/01) (permitting a lawyer licensed only in Maryland to represent a client in an arbitration in Virginia: “The committee is of the opinion that the foreign attorney is authorized to represent his client in an arbitration proceeding in Virginia if it would be incidental to the foreign attorney's representation of the client whom the attorney represents elsewhere.”); Virginia UPL Opinion 92 (5/2/86) (“It is not the unauthorized practice of law for a non-Virginia licensed attorney to present evidence and argue matters of law before an arbitration panel of the American Association in Virginia in order to represent a client from the attorney's jurisdiction in a franchise contract dispute.”).

² See, e.g., Illinois LEO 94-5 (7/1994) (“Regular representation of Illinois parties to arbitration proceedings by lawyer not licensed in Illinois constitutes unauthorized practice of law. If a lawyer not licensed in Illinois seeks to advertise for or solicit Illinois clients, the lawyer should disclose the lack of an Illinois license in any advertising and solicitation materials.”); explaining that “[t]he threshold issue presented is whether the representation of a party to an arbitration proceeding is the practice of law. In general, the courts have held that a person practices law when the person applies the law to the facts of a particular case. Rotunda, Professional Responsibility 123 (3d ed. 1992). The Illinois position is consistent with the general rule. The Supreme Court has held that the practice of law involves more than the representation of parties in litigation and includes the giving of advice or the rendering of any services requiring the use of legal skill or knowledge. People v. Schafer, 404 Ill. 45, 87 N.E.2d 773, 776 (1949). In a case directly relevant to the present inquiry, the Supreme Court held that the representation of parties in contested workers’ compensation matters before an arbitrator of the Illinois Industrial Commission constituted the practice of law. People v. Goodman, 366 Ill. 346, 8 N.E.2d 941, (1937). The respondent in Goodman had argued that he was not practicing law because he was representing parties before an
Some courts allow out-of-state lawyers to arbitrate in their state, but require those lawyers to follow a procedure involving certification that the lawyer has not been disbarred in any state, etc.³

The issue sometimes comes up in court when the losing party in an arbitration challenges the award, by arguing that an out-of-state lawyer impermissibly represented one of the arbitration parties. These arguments normally fail.

- **Superaudio Ltd. P’ship v. Winstar Radio Prods., LLC**, 844 N.E.2d 246 (Mass. 2006) (upholding an arbitration award despite the fact that a non-Massachusetts lawyer had represented a party in the arbitration proceeding; declining to decide whether the lawyer's participation in the arbitration constituted unauthorized practice of law; concluding that the arbitration should be upheld even if the lawyer had engaged in the unauthorized practice of law in Massachusetts);

- **Colmar, Ltd. v. Fremantlemedia N. Am., Inc.**, 801 N.E.2d 1017, 1022, 1022-23, 1026 (Ill. App. Ct. 2003) (affirming an arbitration award; "We are called upon to determine for the first time what effect, if any, an out-of-state attorney's representation of an out-of-state client during arbitration in Illinois has on an arbitration award. We find that, for the reasons that follow, Anderson's representation has no effect on the arbitration award in this case."); "No Illinois decision has considered whether the general voidance rule applies to cases where the representation occurred strictly during arbitration proceedings. After considering the applicable Illinois cases, the modern trend in the jurisprudence of multijurisdictional practice, and the public policy reasons promoting both the rule prohibiting unauthorized practice and the general voidance rule, we find that the harsh general rule should not be applied in the instant case."); "Though the ABA Model Rule 5.5 has not been adopted by the Illinois Supreme Court at the time that we decide this case, we find it persuasive in that it reflects the modern trend in the law of multijurisdictional practice and is also in keeping with well-reasoned decisions from other jurisdictions that have found that an out-of-
state attorney’s representation of a client during arbitration does not violate the rules prohibiting the unauthorized practice of the law.

Although these decisions arise in a different context (attacks on an existing arbitration award rather than a pre-arbitration analysis of the lawyer’s role), the decisions reflect most states’ liberal approach to out-of-state lawyers engaging in arbitrations.

**Best Answer**

The best answer to this hypothetical is **PROBABLY YES**.
Non-Litigation Legal Work in Other States

Hypothetical 9

Your largest client (a company headquartered across the street from your law firm) just asked you to represent it in a major acquisition. The work will involve extended negotiations in the other side’s offices -- located in a state where you are not licensed to practice law.

May you represent your client in negotiating a transaction in a state where you are not licensed to practice?

YES

Analysis

As long as out-of-state lawyers undertake legal services on a "temporary basis," the ABA Model Rules take a surprisingly broad approach.

Even if the services are not related to proceedings before a tribunal or some alternative dispute resolution proceedings, lawyers may cross state lines to undertake services that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

ABA Model Rule 5.5(c)(4).

A comment shows just how broadly the ABA interprets this provision.

Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that non-lawyers may perform but that are considered the practice of law when performed by lawyers.

ABA Model Rule 5.5 cmt. [13].
The next comment takes a remarkably broad view of what type of "relation" to the lawyer's home state suffices under this catch-all provision.

Paragraph (c)(3) (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law. Lawyers desiring to provide pro bono legal services on a temporary basis in a jurisdiction that has been affected by a major disaster, but in which they are not otherwise authorized to practice law, as well as lawyers from the affected jurisdiction who seek to practice law temporarily in another jurisdiction, but in which they are not otherwise authorized to practice law, should consult the [Model Court Rule on Provision of Legal Services Following Determination of Major Disaster.]

ABA Model Rule 5.5 cmt. [14]. Thus, the client does not have to be based in the lawyer's home jurisdiction -- as long as the client has "substantial contacts" with that jurisdiction.

In fact, the client does not have to have any connection to the lawyer's home jurisdiction -- it is enough that the "matter" has a "significant connection" to the home jurisdiction, even if it involves other jurisdictions. All in all, the ABA's catch-all provision
permits nearly any conceivable type of "temporary" provision of legal services in other states.

The Restatement takes a similarly broad approach.

A lawyer currently admitted to practice in a jurisdiction may provide legal services to a client . . . at a place within a jurisdiction in which the lawyer is not admitted to the extent that the lawyer's activities arise out of or are otherwise reasonably related to the lawyer's practice [where the lawyer is admitted].

Restatement (Third) of Law Governing Lawyers §3(3) (2000). Thus, the Restatement uses the same basic "reasonably related to" standard as the ABA Model Rules.

The Restatement's comments mirror the ABA's expansive comments.

When other activities of a lawyer in a non-home state are challenged as impermissible for lack of admission to the state's bar, the context in which and purposes for which the lawyer acts should be carefully assessed. Beyond home-state activities, proper representation of clients often requires a lawyer to conduct activities while physically present in one or more other states. Such practice is customary in many areas of legal representation. As stated in Subsection (3), such activities should be recognized as permissible so long as they arise out of or otherwise reasonably relate to the lawyer's practice in a state of admission. In determining that issue, several factors are relevant, including the following: whether the lawyer's client is a regular client of the lawyer or, if a new client, is from the lawyer's home state, has extensive contacts with that state, or contacted the lawyer there; whether a multistate transaction has other significant connections with the lawyer's home state; whether significant aspects of the lawyer's activities are conducted in the lawyer's home state; whether a significant aspect of the matter involves the law of the lawyer's home state; and whether either the activities of the client involve multiple jurisdictions or the legal issues involved are primarily either multistate or federal in nature.
Restatement (Third) of Law Governing Lawyers §3 cmt e (2000). The Restatement also deals with lawyers engaged in multistate type practices -- paralleling the ABA Model Rules approach.

Particularly in the situation of a lawyer representing a multistate or multinational organization, the question of geographical connection may be difficult to assess or establish. Thus, a multinational corporation wishing to select a location in the United States to build a new facility may engage a lawyer to accompany officers of the corporation to survey possible sites in several states, perhaps holding discussions with local governmental officers about such topics as zoning, taxation, environmental requirements, and the like. Such occasional, temporary in-state services, when reasonable and appropriate in performing the lawyer's functions for the client, are a proper aspect of practice and do not constitute impermissible practice in the other state.

Id.

Not every state takes such a broad approach, but most states have adopted the ABA Model Rule 5.5 approach, or else are moving in that direction.

**Best Answer**

The best answer to this hypothetical is **YES**.
Non-Litigation Work in Another State -- Definition of "Temporary" Presence

Hypothetical 10

Your client has asked you to handle an incredibly complex transaction with a company in a neighboring state where you are not licensed. You expect to spend as much as 18 months at the other company's headquarters negotiating and consummating the transaction.

May you spend 18 months working on a transaction in another state where you are not licensed?

YES

Analysis

As in every other aspect of the multijurisdictional practice issue, the ABA takes a surprisingly broad approach to the meaning of the term "temporary basis."

There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

ABA Model Rule 5.5 cmt. [6] (emphasis added).

The ABA Model Rules do not stop with that expansive definition. They also explain the purpose of the unauthorized practice of law rules, and explicitly indicate that an out-of-state lawyer's actions in the state might be permissible even if they do fall into one of the indicated categories.

There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under
circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

ABA Model Rule 5.5 cmt. [5].

However, not all states take such a liberal approach.¹

Best Answer

The best answer to this hypothetical is YES.

¹ See, e.g., In re Kingsley, No. 138, 2008 Del. LEXIS 255, at *5 (Del. June 4, 2008) (holding that a lawyer licensed in Pennsylvania and New Jersey committed the unauthorized practice of law in Delaware by accepting a monthly retainer to draft estate planning documents for clients of a Delaware accountant; concluding that the lawyer established a "systematic and continuous legal presence" in Delaware by engaging in these activities; excluding the lawyer from practicing law in Delaware); Philadelphia LEO 2007-4 (8/07) (addressing a request by a Pennsylvania lawyer about how to respond to a request by someone outside Pennsylvania that the lawyer provide legal services; directing the lawyer to research the UPL laws of the other jurisdiction; explaining that the other jurisdiction's UPL rules would also govern the permissibility of the lawyer providing "advice and consultation on matters of federal law, general legal principles and common law"; explaining that the other pertinent state might find that actions taken in Pennsylvania violated the UPL laws of that other state; "The inquirer also specifically asks if it makes a difference whether he performs legal services in Pennsylvania or in the subject jurisdiction. The answer to this question again depends on the law of that jurisdiction. See, e.g., Comment 4 to ABA Model Rule 5.5, which states that a lawyer may violate Model Rule 5.5(b) (which proscribes a lawyer who is not admitted in a jurisdiction from systematic and continuous presence in that jurisdiction) even if the lawyer is not physically present in the jurisdiction. Most recently the Delaware Supreme Court took action against an attorney not even admitted in Delaware see In Re Tonwe, Del., No. 584, 2006, 5/25/07.").
Non-Litigation Work Without Connection to a Lawyer's Home State

Hypothetical 11

You have gained a national reputation in representing kidney dialysis centers. You just received a call from a small kidney dialysis center who would like to hire you to negotiate an acquisition for it. The prospective client is located in a state where you are not licensed to practice law.

May you represent the kidney dialysis center in handling its acquisition, although you are not licensed to practice law in that state?

YES (PROBABLY)

Analysis

Under the broad ABA Model Rule and Restatement approach, this type of national expertise normally would satisfy the requirement that the out-of-state lawyer's provision of legal services in the state be "reasonably related" to the lawyer's home jurisdiction.

For instance, a comment to the ABA Model Rules states that

the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law.

ABA Model Rule 5.5 cmt. [14].

The Restatement similarly notes that the pertinent factors include whether "the legal issues involved are primarily either multistate or federal in nature." Restatement (Third) of Law Governing Lawyers §3 cmt. e (2000). The Restatement also indicates that the permissibility of a lawyer's action in another state depends in part on whether a

Not surprisingly, the American College of Trust and Estate Counsel Commentaries emphasize this MJP rule.

Where the lawyer has developed a recognized expertise in federal, nationally-uniform, foreign or international law, Comment 14 suggests that the lawyer’s practice in non-admitted jurisdictions will be considered reasonably related to the lawyer’s practice in the lawyer’s admitted jurisdiction. For example, a lawyer with recognized expertise in retirement planning, charitable planning, estate and gift tax planning, or international estate planning may be able to practice in non-admitted jurisdictions.


Not all states would take such a liberal approach,¹ but the ABA’s and Restatement's attitude reflects a trend in the direction of permitting such activity in other states.

**Best Answer**

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

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¹ See, e.g., Maryland LEO 00-05 (2000) (deciding that Maryland courts rather than the Maryland Bar must decide whether a Washington, D.C., lawyer commits the unauthorized practice of law in Maryland by “drafting wills and other estate planning documents on an isolated basis for Maryland residents”).
Non-Litigation Work in Another State -- Broad View

Hypothetical 12

You handle the trust and estate work for several wealthy individuals who spend summers in your state but winters in Florida (where you are not licensed). Several multijurisdictional questions have just arisen in connection with your practice.

(a) May you travel to Florida in February and meet with one of your clients to go over her estate plan?

YES

(b) May you represent your client's neighbor in preparing her estate plan (she lives permanently in Florida, but heard glowing reports about you from your client who lives next door)?

MAYBE

Analysis

This hypothetical comes directly from a Restatement (Third) of Law Governing Lawyers illustration -- and highlights the surprisingly broad approach that the Restatement takes.

(a) The ABA Model Rules would clearly allow a lawyer to temporarily follow a client from her home state to another state to provide legal services.

For instance, ABA Model Rule 5.5 cmt. [14] recognizes that the "reasonable relationship" that permits an out-of-state lawyer to perform legal services in a state can include such factors as:

The lawyer’s client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with this jurisdiction in which the lawyer is admitted.
ABA Model Rule 5.5 cmt. [14] (emphasis added). As explained immediately below, the Restatement takes even a broader approach, and thus would clearly permit this conduct.

(b) The ABA might permit a lawyer to assist the neighbor in this setting, but probably not because of the neighbor's contact with the lawyer's home state.

Instead, the lawyer presumably would have to rely on such factors as the lawyer's expertise in "a particular body of federal, nationally-uniform" law. ABA Model Rule 5.5 cmt. [14]. That factor could presumably justify the lawyer's assistance in federal tax law questions, but not state tax law questions.

This hypothetical comes from a Restatement illustration -- which represents perhaps the most liberal view of multijurisdictional practice.

Lawyer is admitted to practice and has an office in Illinois, where Lawyer practices in the area of trusts and estates, an area involving, among other things, both the law of wills, property, taxation, and trusts of a particular state and federal income, estate, and gift tax law. Client A, whom Lawyer has represented in estate-planning matters, has recently moved to Florida and calls Lawyer from there with a request that leads to Lawyer's preparation of a codicil to A's will, which Lawyer takes to Florida to obtain the necessary signatures. While there, A introduces Lawyer to B, a friend of A, who, after learning of A's estate-planning arrangements from A, wishes Lawyer to prepare a similar estate arrangement for B. Lawyer prepares the necessary documents and conducts legal research in Lawyer's office in Illinois, frequently conferring by telephone and letter with B in Florida. Lawyer then takes the documents to Florida for execution by B and necessary witnesses. Lawyer's activities in Florida on behalf of both A and B were permissible.

Restatement (Third) of Law Governing Lawyers §3 illus. 5 (2000). Thus, the Restatement would even allow this type of out-of-state activity.
Presumably, the Restatement deliberately picked Florida as the jurisdiction in which this question arose. Undoubtedly driven by Florida lawyers' worry that northern lawyers will follow their wealthy "snowbirds" south (or work part-time themselves in Florida during the winter months), Florida seems more concerned than any other state with out-of-state lawyers impermissibly providing legal services within its borders. The Restatement illustration represents an explicit challenge to this type of parochial turf-protection.

**Best Answer**

The best answer to (a) is **YES**; the best answer to (b) is **MAYBE**.
Providing Advice about Another State's Law

Hypothetical 13

One of your clients conducts operations in ten Midwestern states. Your client's general counsel just asked you to analyze the franchise laws in all ten of the states in which it has operations. You quickly check your firm's roster, and realize that you have lawyers licensed in some of the states, but not all of the states.

(a) May you provide advice about the law of a state in which one of your lawyers is licensed -- although that lawyer knows nothing about franchise law, and will not be involved in analyzing that state's law?

YES

(b) May you provide advice about the law of a state in which none of your lawyers are licensed?

YES (PROBABLY)

Analysis

This hypothetical deals with a common situation facing transactional lawyers, who often find themselves asked to give opinions about other states' laws.

Of course, both transactional lawyers and litigators dealing with issues involving other states might be called upon to provide informal advice about other states' laws. In fact, a litigator who has never left her home state and is litigating a case in her home state might have to deal with another state's laws -- if her state's choice of laws principles require that the court handling the litigation apply another state's substantive law.

(a) The ABA Model Rules provide somewhat mixed signals about the general issue.
ABA Model Rule 5.5(b)(1) prohibits an out-of-state lawyer (other than an in-house lawyer) from establishing an office or other systematic and continuous presence in this jurisdiction for the practice of law.

ABA Model Rule 5.5(b)(1). Comment [4] indicates that such a presence "may be systemic and continuous even if the lawyer is not physically present here" (emphasis added).

Although the ABA Model Rules do not explain this, presumably the comment refers to communications in and out of the state -- an issue which has become much more acute in recent years as lawyers have been able to establish a "virtual" presence in other states through electronic communications. Thus, the ABA Model Rules recognize that a lawyer may impermissibly engage in the "systematic and continuous" unauthorized practice of law in another state without ever traveling there.

On the other hand, ABA Model Rule 5.5 cmt. [14] recognizes that the type of "reasonable relationship" with the state upon which the out-of-state lawyer may rely in undertaking legal services in that state can include such factors as "a significant aspect of the matter may involve the law of that jurisdiction" and the lawyer's "recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally uniform, foreign or international law."

ABA Model Rule 5.5 cmt. [14]. Of course, these factors only allow the out-of-state lawyer to engage in the practice of law on a "temporary basis" in that other state.

Thus, ABA Model Rule 5.5 permits lawyers to provide advice about another state's law if they do not provide that advice on a "systematic and continuous" basis -- by virtue of their physical or virtual presence in that other state.
The same ABA Comment provides an example of permissible activity that undoubtedly involves the lawyer providing advice about various states in which the lawyer is not licensed. ABA Model Rule 5.5 cmt. [14] indicates that a lawyer may assist a corporate client when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each.

ABA Model Rule 5.5 cmt. [14].

The Restatement takes an even more liberal approach, and includes an explicit provision permitting lawyers to provide opinions about other states' laws.

Restatement (Third) of Law Governing Lawyers §3 (2000) does not contain the explicit dichotomy between an impermissible "systematic and continuous presence" and the permissible "temporary" presence that appears in ABA Model Rule 5.5. In fact, the Restatement specifically indicates that lawyers can communicate electronically into other states.

It is also clearly permissible for a lawyer from a home-state office to direct communications to persons and organizations in other states (in which the lawyer is not separately admitted), by letter, telephone, telex, or other forms of electronic communication.

Restatement (Third) of Law Governing Lawyers §3 cmt. e (2000). The Restatement also explicitly approves lawyers' providing opinions about the laws of states in which they are not licensed.

Some activities are clearly permissible. Thus, a lawyer conducting activities in the lawyer's home state may advise a client about the law of another state, a proceeding in another state, or a transaction there, including conducting research.
in the law of the other state, advising the client about the application of that law, and drafting legal documents intended to have legal effect there. There is no per se bar against such a lawyer giving a formal opinion based in whole or in part on the law of another jurisdiction, but a lawyer should do so only if the lawyer has adequate familiarity with the relevant law.

Id. (emphases added).

In what almost surely is not a coincidence, the Restatement provides exactly the same example as the ABA Model Rules of a lawyer's permissible activity that undoubtedly involves the lawyer providing advice about states other than those in which the lawyer is licensed. Restatement §3 cmt. e mentions

a multinational corporation wishing to select a location in the United States to build a new facility [which] may engage a lawyer to accompany officers of the corporation to survey possible sites in several states, perhaps holding discussions with local governmental officers about such topics as zoning, taxation, environmental requirements, and the like.


Some states take this broad approach.

- See, e.g., Virginia UPL Op. 215 (3/18/08) (holding that in-house lawyers who work for a financial institution and are based outside of Virginia and not licensed in Virginia may provide advice to Virginia employees; "When these lawyers provide advice and counsel regarding Virginia law to employees of the financial institution employer located in branches in Virginia, they are not engaged in unauthorized practice. When they are providing the advice either from their offices outside of Virginia or when they visit the branches in-person in Virginia, this constitutes advising their regular employer which is permitted under Part 6, §1 (B)(1) of the Rules of the Virginia Supreme Court. Should they have to prepare documents in either situation, again, these lawyers are providing this legal service only to their regular employer which is permitted under Part 6, §1 (B)(2). These lawyers also fall within the scope of the temporary practice provisions of Part 6, §1 (C). They represent the employer elsewhere and have occasion to have to come into Virginia in relation to that representation. This occurs only on a temporary or occasional basis. Nothing in this inquiry suggested that these lawyers were attempting to appear before any tribunal in Virginia on behalf of the employer, which would
require association with Virginia-licensed counsel. Finally, two earlier opinions from the Committee, UPL Opinions 93 and 99 are also instructive on the issues presented in this inquiry. In these opinions the Committee found that it was not the unauthorized practice of law for a non-Virginia-licensed attorney to prepare legal documents for a Virginia client relating to a Virginia matter when the attorney did so from his/her office in the jurisdiction where he/she is licensed. Similarly, if any attorney is providing legal advice to or on behalf of a Virginia client while located in his/her licensing jurisdiction, this will not be the unauthorized practice of law in Virginia. The Committee cautions that an attorney licensed other than in Virginia must also be aware of any applicable rules and/or limitations of his/her licensing jurisdiction and/or the jurisdiction where he/she is practicing regarding the practice of another jurisdiction's law where the attorney is not licensed.”

(emphasizes in italics added).

Some state legal ethics opinions seem to implicitly allow such activities.

- **See, e.g.,** Illinois LEO 02-04 (4/2003) (”An attorney licensed in State X who negotiates, from his office in State X, his clients’ claim for medical matters in State Y, where no lawsuit has been filed and where the attorney is not licensed, does not engage in the unauthorized practice of law, and need not associate with an attorney in State Y to conduct this negotiation.”; ”[I]t is the Committee’s opinion that while the attorney may be engaging in the practice of law, it is not the ‘unauthorized’ practice of law in State Y because the attorney is conducting the negotiation from State X, where he is licensed to practice law.”; ”To the extent the attorney leaves State X, where he is licensed, and enters State Y to conduct the negotiation, the issue becomes less clear. See Lozoff v. Shore Heights, Ltd., 66 Ill.2d 398, 362 N.E.2d 1047 (1977) (holding that a lawyer licensed only in Wisconsin who had rendered legal services in connection with an Illinois real estate transaction had engaged in the unauthorized practice of law and could not recover fees).”).

However, some states seem to take a narrow approach.

- **Philadelphia LEO 2007-4 (8/07)** (addressing a request by a Pennsylvania lawyer about how to respond to a request by someone outside Pennsylvania that the lawyer provide legal services; directing the lawyer to research the UPL laws of the other jurisdiction; explaining that the other jurisdiction's UPL rules would also govern the permissibility of the lawyer providing “advice and consultation on matters of federal law, general legal principles and common law”; also explaining that the other pertinent state might find that actions taken in Pennsylvania violated the UPL laws of that other state; ”The inquirer also specifically asks if it makes a difference whether he performs legal services in Pennsylvania or in the subject jurisdiction. The answer to this question again depends on the law of that jurisdiction. See, e.g., Comment 4 to ABA Model Rule 5.5, which states that a lawyer may violate Model Rule..."
5.5(b) (which proscribes a lawyer who is not admitted in a jurisdiction from systematic and continuous presence in that jurisdiction) even if the lawyer is not physically present in the jurisdiction. Most recently the Delaware Supreme Court took action against an attorney not even admitted in Delaware see In Re Tonwe, Del., No. 584, 2006, 5/25/07.

• See, e.g., Pennsylvania LEO 90-02 (3/2/90) (explaining that a lawyer licensed only in Washington, D.C., may generally provide opinions about other states’ laws while assisting in a transaction from the Washington, D.C. office; "There would appear to be no difficulty in the preparation of loan documentation for your lender clients at your offices to the extent such instruments are by their terms governed by the law of a jurisdiction in which you are admitted to practice. If that is not the case, the usual convention consistent with Rule 5.5 is to specify that any legal opinion rendered in respect of these instruments covers only the laws of the jurisdiction in which the lawyer is admitted to practice, . . . Whatever limiting language is used, rule 1.1 requires that the lawyer possess the requisite level of competence to render the opinion given."); "It also is fairly common practice for competent corporate counsel to opine on [B]lue Sky law issues in foreign jurisdictions and on certain issues concerning perfection of security interests upon review of standard compilations, such as the CCH services, again informing the client that the scope of the inquiry has not been exhaustive. There is, however, no identifiable standard which in all instances will provide guidance as to whether it is necessary, or simply wise, to secure the opinion of local counsel in such matters. Moreover, the form of the opinion that the client may find satisfactory may determine the need for local counsel. By way of illustration, an opinion clearly denoting a lack of expertise may state the following[:]

["We are qualified to practice law in the State of New York and we do not purport to be experts on, or to express any opinion herein concerning, any law other than the law of the State of New York and the federal law of the United States."] (emphases added)).

A lawyer whose colleague is licensed in the other state might arrange for the colleague to participate in the transaction -- which presumably would satisfy any state’s requirement that only lawyers licensed in a state can provide opinions about that state’s law.

(b) Although malpractice issues might deter lawyers from providing such advice, the ABA Model Rules, the Restatement and most states’ approaches would permit such activity.
Best Answer

The best answer to (a) is YES; the best answer to (b) is PROBABLY YES.
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Sponsor: Vermont Bar Association

Date: May 15, 2013

Seminar Title: Ethics in Negotiations

Location: Teleseminar

Credits: 1.0 Ethics MCLE

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