Real estate transactions are rife with significant ethics issues. In the normal course of their practices, over time real estate attorneys represent developers, lenders, investors, contractors and others involved in complex deals that can easily give rise to conflicts of interest. There is also the ethical challenge of effectively advocating for a client and pushing a deal toward a closing without engaging in improper ex parte communications with non-attorneys on the other side of a transaction or with unrepresented parties. The inadvertent disclosure of confidential information in what can often be an industry where everyone knows everyone else is not uncommon. These and other ethical issues are daily concerns for real estate attorneys. This program will provide you with a framework of ethical issues for real estate lawyers and discuss best practices for avoiding ethical complaint and liability.

- Conflicts of interest in representing investors, developers, lenders and others in real estate transactions
- Representations of real estate entrepreneurs and their entities
- Ex parte communications with non-attorney parties in real estate transactions and with unrepresented parties
- Inadvertent disclosure of confidential deal terms
- Imputation of confidential knowledge of a deal terms among lawyers of a firm

Speakers:

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AN ETHICS PRIMER FOR TRANSACTIONAL LAWYERS

By: Bill Freivogel
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Introduction

The author, while Chair of the Professional Responsibility Committee of the ABA Section of Business Law, wrote for the Section’s electronic newsletter, “eSource,” a series of short articles geared for lawyers who practice business law but who are not legal ethics experts. This guide incorporates much of that material.

Topics below are: I. Conflicts of Interest; II. Negotiation Ethics; III. Client Fraud/Confidentiality; IV. Confidentiality and Attorney-Client Privilege; and V. Communications with Represented Persons.

I. Conflicts of Interest

A. Current Clients

The basic rule is ABA Model Rule 1.7(a)(1), of which all states have a version. It provides that a lawyer, or law firm, may not take on a matter that is directly adverse to a current client. The rule does not care whether the new matter against the client has any relationship whatever to the other matter being handled for the client. In the blink of an eye we have glossed over two important concepts: (1) what is “directly” adverse; and (2) what is a “current” versus “former” client. Before getting to those concepts, let’s discuss the relationship point.

No relationship. Law Firm’s Newport Beach office represents Ajax Corp. in a property tax dispute with Orange County, and that matter is pending. Now NJ Bancorp asks Law Firm’s Newark office to represent it in a major loan transaction in which Ajax Corp. is the borrower. The matters could not be more unrelated. Yet, Law Firm would have a current client conflict that could only be cured with a waiver. Many fine lawyers think that rule is silly. Tough; that’s the rule.

Current client. As we will discuss in the next section, the above rule changes if the client is a former one instead of a current one. Then, relationship, or the lack thereof, matters. So, is the client current or former? Suppose the Orange County tax dispute was resolved a few months before the NJ Bancorp loan came in, and Law Firm has no other matters pending for Ajax Corp. We would love to give you some guidelines for this, but we cannot. State and federal courts around the country have wildly disparate views of what is “current” and what is “former.” For example, in Oxford Systems, Inc. v. CellPro, Inc., 45 F. Supp. 2d 1055 (W.D. Wash. 1999), the law firm had done nothing for the client for a year. Yet, because the client pretty much limited what it did have to that law firm, the court held the client was current. In contrast, in Artromick Int’l Inc. v. Drustar, Inc., 134 F.R.D. 226 (S.D. Ohio 1991), about a year had elapsed since the law firm had done any
work for the client. A small invoice remained outstanding. The firm sent at least one
piece of promotional material to the client during that year. Nevertheless, the court
refused to disqualify the firm when it showed up on the other side of a case.

Direct adversity. Handling a lawsuit on behalf of Client A against Client B is obviously
direct adversity. Likewise, sitting across the table from a current client in a major and
contentious workout negotiation is direct adversity. Beyond those clear examples, things
can be fuzzy. For example, Law Firm represents Family Patriarch in a variety of matters,
including his estate plan. At the same time Law Firm represents the Patriarch’s son on a
variety of matters, some of which are pending. Patriarch, disgusted with his son over
something, asks Law Firm to remove the son from his will. That seems “direct,” doesn’t
it? Yet, the influential ABA Standing Committee on Ethics and Professional
Responsibility (“ABA Ethics Committee”), in its Formal Opinion 05-434 (December
2004), held that in that precise situation Law Firm would not have a conflict and would
not need a waiver from the son.

Lesson: “don’t try this at home.” This is about issue spotting. Hopefully, when you are
confronted with these issues you will have access to personnel who have a better handle
than you on the nuances of conflict-of-interest law.

B. Former Clients

As we saw above, the most important rule with respect to current clients is that a lawyer
may not be directly adverse to a current client even though the adverse matter bears no
relationship to matters the lawyer handles for that client. The rules shift subtly when the
lawyer is asked to take a position adverse to a former client. When does a current client
become a former client? We discussed that above. What we learned is that courts vary
dramatically in their analysis of the current-vs.-former client issue.

Let us assume that the client in question is clearly former rather than current. That takes
us to ABA Model Rule 1.9(a), which provides that a lawyer may take a position
“materially adverse” to a former client if the matter is not “substantially related” to what
the lawyer had done for the former client. More has been written about what is
“substantially related” than just about any issue under the ethics rules. While it is easy to
oversimplify, let us just say that the substantial relationship test is about information. Did
the lawyer learn something from, or about, the former client in the earlier representation
that would give the lawyer an advantage in opposing the former client in a current
matter?

A clear case: Lawyer is representing Client in a contentious merger negotiation with
Opponent. After many weeks of wrangling, Client becomes fed up with Lawyer and fires
Lawyer, saying, in effect, “I never want to see you again. Here is your fee. Goodbye.”
A month later Lawyer shows up on Opponent’s legal team in that same negotiation.
Lawyer obviously learned much information from, and about, Client in the earlier phase
of the negotiation that would be enormously useful to Opponent. That is precisely what
Model Rule 1.9(a) was designed to prevent.
A less clear case: Lawyer has handled dozens of acquisitions for Mammoth Corp. The most recent one was 18 months ago. After the last closing, Mammoth Corp. dismissed Lawyer and her law firm. Mammoth recently commenced a new series of acquisitions with a new law firm. One of Mammoth Corp.’s new acquisition targets is Small Corp. Small Corp. wants to hire Lawyer to handle the Mammoth Corp. transaction. Lawyer’s earlier work for Mammoth did not involve Small Corp., but rather a number of different targets. However, the in-house lawyers and corporate executives at Mammoth working on the Small Corp. acquisition are the same people that Lawyer worked with while Lawyer was representing Mammoth. Lawyer knows how they think and knows their negotiating strategies very well. Lawyer, in effect, has their “playbook.” Courts are inconsistent about whether playbook information should disqualify a lawyer from being adverse to a former client. A recent case holding it should disqualify the lawyer is Hurley v. Hurley, 923 A.2d 908 (Me. 2007). However, in Vincent v. Essent Healthcare of Conn., 465 F. Supp. 2d 142 (D. Conn. 2006) the court refused to disqualify a lawyer in the face of playbook arguments. There are many cases on both sides of this issue. For a superb discussion of the “playbook” view of the substantial relationship test, see Charles W. Wolfram, Former-Client Conflicts, 10 Geo. J. Legal Ethics 677 (1997).

A word about waivers: We discuss them immediately below. However, we should make one observation about waivers in the former client context. Do not assume that a waiver is feasible in such a case. Suppose a lawyer has doubts about whether a matter is substantially related to an earlier matter. She asks the former client for a waiver. The former client refuses. The request for a waiver could be construed as an admission that one was required. Or, suppose that the former client asks whom the lawyer plans to represent and all the details of the new matter, which an astute former client would do. Can the lawyer provide that information, or would doing so violate the lawyer’s duty of confidentiality to her new client? We have just scratched the surface of the issues raised by conflict waivers in former client situations.

C. Waivers/Consents

“Waiver” vs. “Consent.” We are not aware of any distinction between these two terms in the legal ethics literature. We prefer “waiver,” and that is what we will use.

Are some conflicts un-waivable? Yes. Model Rule 1.7(b)(3) specifically prohibits a waiver for a lawyer to be on both sides of “the same litigation or other proceeding before a tribunal.” We are not aware of a state with a contrary rule. As to all other situations, Model Rule 1.7(b)(1) provides that a waiver will work if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; . . . .

What does that mean? It is mostly a common-sense test because there is not much guidance in the literature. Certainly, some clients lack the sophistication to understand how a conflict might affect them. Even as to sophisticated clients, good transactional lawyers know that some deals require resolution of so many complex and contentious issues that the same lawyer would be foolish to attempt to represent more than one party.
Need for written waiver. Some states have always required that conflict waivers be in writing. Some have not. The ABA added a requirement for writings at Model Rule 1.7(b)(4) in 2002. All it requires is that the waiver be “confirmed in writing.” The Comment explains that the writing need not be signed by the party waiving and that the writing need not occur prior to the representation but “within a reasonable time” after the client waives orally.

Joint representations and confidences. When a lawyer attempts to represent more than one client in litigation or in a transaction, there is always a tension between the lawyer’s duty to keep all clients informed and the duty to protect each client’s confidences. Suppose two individuals ask a lawyer to represent them in the formation of partnership and the purchase of a business. One day one of the clients calls the lawyer and reveals that he has been prosecuted for fraud in two earlier matters, but does not want his partner to know about it. The lawyer’s dilemma is clear. That is why ethics experts recommend that any waiver or joint representation agreement contain a clause that the lawyer will not keep a secret of one client from the other(s), where the secret is related to the representation.

Advance waivers. Law Firm has been adverse to HugeBank in loan transactions and litigation on many occasions and will be in the future. HugeBank wants to retain Law Firm on one highly specialized advertising matter. Almost certainly, Law Firm can obtain effective waivers from HugeBank for existing, identifiable, matters. But, Law Firm is reluctant to take on the advertising matter, because it will prevent Law Firm from taking on future, unknown, matters adverse to HugeBank. Can law firm obtain from HugeBank a waiver for future matters, including matters that come in while the advertising representation continues? Probably yes. Comment [22] to Model Rule 1.7 generally favors such waivers, particularly if the party waiving is “an experienced user” of “legal services.” The Comment’s suggestion, and the suggestion of most courts addressing the issue is that the less sophisticated the client, the more specific the advance waiver has to be regarding the nature of the future matters. All agree that if the law firm wants to take on litigation against the waiving party, the waiver must specifically mention litigation. Caution: a small minority of courts may never approve an advance waiver. See, e.g., Worldspan L.P. v. The Sabre Group Holdings, Inc., 5 F. Supp. 2d 1356 (N.D. Ga. 1998).

D. The Underlying Work Problem

Law Firm handles a transaction, including negotiating for Client, preparing the important documents, and the like. The closing is uneventful, and the parties begin performing their respective obligations. The sea is calm. Then, when the parties reach a major milestone, they find that they are in substantial disagreement about who owes what to whom. Client returns to Law Firm, says that only litigation will resolve the issues, and asks Law Firm to handle the litigation.

Should Law Firm have second thoughts about the litigation engagement? For much of history law firms did this all the time. But, times have changed. Malpractice insurance
professionals have been concerned about this scenario for the past 20 years, or so. The concern is that if Law Firm loses the case, Client will claim the law firm had a conflict of interest and handled the case in a way to deflect attention from Law Firm’s own work on the transaction. Indeed, we are aware of a number of cases in which this conflict appeared to make the malpractice case impossible to try. The conflicts were just too dangerous, and the cases were quietly settled. That explains, in part, why, until recently, there were no reported malpractice cases with this scenario.

Several cases illustrate this phenomenon. One was *Veras Investment Partners, LLC v. Akin Gump Strauss Hauer & Field LLP*, 2007 N.Y. Misc. LEXIS 6543 (N.Y. Misc. Sept. 27, 2007). The reader should keep in mind that the opinion only addresses a motion to dismiss, and the court was required to accept the allegations of the complaint as true. The facts, when developed, may tell a very different story. Nevertheless, according to the complaint Law Firm advised and assisted Clients in setting up hedge funds to engage in certain trading strategies. Eventually, during the “late trading” imbroglio, the hedge funds captured the attention of the SEC, the New York Attorney General, and other agencies. The agencies conducted investigations, and Law Firm represented Clients during the investigations. The investigations went badly, and Clients were forced out of business costing them millions of dollars. Clients sued Law Firm, and in this opinion the court granted most of Law Firm’s motion to dismiss. However, the court denied the motion as to Law Firm’s alleged conflict of interest. Here is the court’s characterization of Law Firm’s conduct, which the court held stated a cause of action:

Plaintiffs allege that [Law Firm] fraudulently failed to advise plaintiffs of the inherent and unwaivable nature of the conflicts of interest, and intentionally and purposefully acted to place its own interests above those of plaintiffs by, among other things, purposefully omitting to present and “sweep[ing] . . . under the rug” the advice of counsel defense, withholding evidence, waiving plaintiffs’ privilege, and advising plaintiffs to do things, and make compromises that were not in plaintiffs’ best interest, all in order to avoid being brought into question for its own participation in the underlying transactions.

*Here is another: Brodie v. U.S. Dept. of Justice*, 2007 U.S. Dist. LEXIS 75191 (E.D. Pa. Oct. 4, 2007). This opinion really dealt with whether litigants could compel attendance at a deposition of an Assistant United States Attorney in a state court legal malpractice action, so the underlying facts are not at all well developed in the opinion. Certainly, no facts had been developed that the law firm in question (“Law Firm”) did anything at all improper. According to this opinion, Law Firm had advised Clients on the Trading with the Enemy Act (“the Act”). Later, the United States Attorney charged Clients with violating the Act and regulations under the Act. Law Firm commenced defending the criminal case and remained in that case until two weeks before trial. A jury convicted three of the Clients. One was ultimately exonerated, and two pleaded guilty to one count each.

Clients sued Law Firm for malpractice in state court, including Law Firm’s conduct up until it withdrew from the criminal case. The complaint was not fully described in this
opinion, but one might infer that Clients are complaining that Law Firm first advised
Clients that they were not violating the Act, and then chose to defend the criminal
proceeding that related to their advice.

Another event may also explain the conflict-of-interest claim. During the criminal
proceeding an Assistant United States Attorney assigned to the case had an allegedly
improper conversation with her husband, a lawyer at Law Firm, about the case. As a
result of that conversation the court removed the wife from the case. It was shortly after
that ruling that Law Firm withdrew from the criminal case.

**Conclusion:** Do these cases, and the unnamed cases mentioned above, which settled
under the radar screen, mean that Law Firm should never take on the litigation arising out
of its earlier work? Not at all. Malpractice insurance professionals recommend that, in
this scenario, objective partners (not the partners involved in the underlying work) do a
careful analysis of what the law firm might have done in the underlying work. At one
extreme, in some cases they will conclude that the firm simply cannot proceed. At the
other extreme the dispute may have nothing whatever to do with the law firm’s
underlying work, and the law firm may proceed. In between the extremes other measures
may be appropriate, such as sending the client to other counsel for advice as to whether
the law firm can continue. Of course, law firms in these situations must also be mindful
of their possible duty of disclosure to their clients under their state’s version of Model
Rule 1.4.

### E. Representing Both Sides in Transaction

A wants to sell his business to B. A and B happen to have the same lawyer (“Lawyer”).
They ask Lawyer to handle both sides of the sale because they trust Lawyer and they
want to save legal fees. May Lawyer proceed?

**The Rules.** ABA Model Rule 1.7, the principal conflict of interest rule, does not address
this in specific terms but suggests that if Lawyer believes she can do a good job for both
parties and gets a waiver from both parties, Lawyer can proceed. Comments [26]-[33] to
Rule 1.7 attempt to be more specific about multiple representations, but do not help
much. The Committee on Professional and Judicial Ethics of the Association of the Bar
of the City of New York, in its Opinion 2001-2 (April 2001) discusses the issue in
considerably more detail, but it concludes that whether the lawyer can proceed depends
on the circumstances.

**Waivers.** Some transaction conflicts simply cannot be waived. The average good
business lawyer will have a pretty good nose for transactions that are simply too difficult
for joint representation. There may be too many contentious issues to be negotiated,
which the parties cannot resolve without their own lawyers. In a few states, rules have
evolved regarding certain types of transactions. For example, in New Jersey the same
lawyer cannot be on both sides of a commercial real estate sale, even with waivers, if the
states have decisions or rules that specific, but lawyers wishing to represent both sides of
a transaction had better know what is expected in relevant jurisdictions.

Client Confidences. A lawyer representing more than one client in a transaction should obtain a written understanding up front, typically in the waiver document, as to the lawyer’s rights and obligations regarding client confidences. On the one hand the lawyer must protect each client’s confidences (Model Rule 1.6). On the other hand, the lawyer must keep each client informed about what the client needs to know to make decisions regarding the transaction (Model Rule 1.4). As mentioned in the above discussion on waivers, most ethics experts believe that a waiver or joint representation agreement should provide that the lawyer will not keep one client’s secret from other clients if the secret is relevant to the representation.

F. Corporate Families

A lawyer represents corporation A in a small matter. Corporation A is a wholly-owned subsidiary of Corporation AA. While that matter is pending, Corporation B comes to the lawyer and asks the lawyer to bring a multi-million dollar suit against Corporation AA. May the lawyer take the case? Are Corporations A and AA one for conflict of interest purposes? That will depend upon the tribunal or the facts or both. As shown below, some courts and writers have said that this is always a conflict of interest (the "bright line" rule). Others have said that the answer depends upon the facts (for lack of a better phrase, the "weighing" rule).

ABA Op. 95-390 (1995). Any careful study of this issue should begin with a reading of this opinion. The majority concluded that a parent-subsidiary relationship should not automatically disqualify a lawyer from a representation such as that described in the opening paragraph. Two members of the Committee wrote eloquent dissents. They took the bright line position that this would always be a conflict for which a consent would be required. A third member joined in those dissents. Thus, the Committee was deeply split. Nevertheless, the opinion is highly instructive.

Cmt. [34] to ABA Model Rule 1.7 was added by the House of Delegates in February 2002. It adopts the weighing test and provides as follows:

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

A number of states have adopted, or are considering adoption of, the "Ethics 2000" changes. So, you should check the rules for the state in question.


G. Contractual Limitations on Lawyer Liability

As transactions get ever bigger, law firms are concerned that their potential liability could far exceed their insurance coverage. For example, it would not be unusual for a U.S. law firm with insurance coverage of $150 million per occurrence to handle transactions worth billions of dollars. This exposure is complicated by the increasing practice of clients asking for “due diligence reports” on certain aspects of transactions. These reports may be relied upon by other parties to the transaction, who that are not clients, including the myriad of people and entities providing financing for the transaction. We will first discuss liability to clients, followed by a brief discussion of non-clients.

Clients. One thought is that a law firm might ask its client to agree to a cap on the law firm’s liability in a given transaction. Presumably, the cap would be equal to, or within, the law firm’s malpractice coverage.

ABA Model Rule 1.8(h) provides as follows:

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless the client is independently represented in making the agreement; . . . (Italics, ours. We shall refer to the italicized clause as the “unless clause.”)

Thus, in a state with this rule, if the law firm asks the client to consult with other counsel about signing such an agreement, the agreement should not be unethical. Presumably, the client’s inside counsel, where available, could serve this function. Approximately forty states have the “unless clause,” or something close to it. Approximately ten states have an outright prohibition - that is, no “unless clause.” Unfortunately for national law firms, among the ten are California, the District of Columbia, and New York. Some believe that the choice of law rules are complex enough that a law firm with lawyers admitted in those three jurisdictions could never be sure that the limitation on liability would be effective.
Non-Client. Let’s discuss a transaction in which the law firm is asked to provide its client with a “due diligence report” on some aspect of the transaction. We are told that other parties to the transaction, including institutions providing financing, regularly require that they be provided such reports, in part so that they do not have to hire counsel to do the same due diligence. That raises at least two issues: (1) can the law firm ethically obtain a limitation of liability (or cap) from these non-clients,?; and (2) assuming such an agreement is ethical, as a contractual matter, how can the law firm do this?

We will dispense with the second question first, by saying that we do not know. Certainly obtaining a signed, written agreement from a non-client specifying a cap on the law firm’s liability would seem to do the trick. Some have suggested that merely stating in the report that anyone other than the client relying on the report is deemed to have agreed to a cap would be effective. We have no confidence that such a “self-executing” cap would be effective. Nor, do we believe that a law firm can, with confidence, rely upon a statement within the report that only the client can rely on the report.

What we can say with some confidence is that a lawyer may ethically ask a non-client to agree to a limitation of liability. First, note that the prohibition contained in Model Rule 1.8(h) pertains to clients. It says nothing about non-clients. Nor, are we aware of any other ethics rule that prohibits an agreement limiting a lawyer’s liability to a non-client. Thus, one is left with contract (and other) issues, including those mentioned in the prior paragraph.

Disclaimer: one or more states may have prohibitions in their ethics rules or laws that of which we are not aware; and, this discussion does not cover other laws or regulations that may impact affect the validity of liability caps, including, but not limited to, tort law.

H. Serving on Boards of Clients

There can be obvious advantages for a lawyer to sit on the board of a corporate client, particularly if the client is a large, successful, respected entity. In such a case it is likely the other board members are successful and powerful people who can be sources of much business for the lawyer/director’s law firm.

Legal ethics rules contain no general prohibition of the practice of serving on clients’ boards. Comment [35] to ABA Model Rule 1.7 discusses the practice in the most general way. It includes the following:

If there is a material risk that the dual role will compromise the lawyer’s independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation’s lawyer when conflicts of interest arise.

We are not aware of any state ethics rule that is more restrictive than the Model Rules on the practice of lawyers sitting on boards of clients. The Restatement (Third) of the Law

Attorney-Client Privilege. The privilege is important in this context. There will always be a danger that a court will hold that the lawyer’s communications with other board members or management were while she was wearing her “director hat” and not her “lawyer hat,” and that the communications are discoverable in litigation. See, e.g., Deutsch v. Cogan, 580 A.2d 100 (Del. Ch. 1990). At least one state bar ethics committee has opined that a lawyer asked to be a director must fully advise the client of this danger. New York State Bar Association, Committee on Professional Ethics, Op. 589 (1988).

Lawyer Malpractice Insurance Coverage. Insurance underwriters look askance at lawyers serving on boards of clients, and insurance policies vary wildly in how they treat the practice. At one extreme, policies provide that whenever a lawyer sits on a board, the lawyer and the lawyer’s firm have no coverage whatsoever in connection with that client. Less restrictive policies will provide coverage where the lawyer was acting as a lawyer (but not as a director). Determining whether a lawyer is acting as a lawyer or as a director can be highly contentious. Lawyers who wish to serve on boards (and their firms) must review their policies with great care to know what is covered and what is not. ABA Model Rule 1.4 provides that lawyers must keep clients informed about what they need to know to make decisions about the representation. The possibility that board service could deprive the law firm of coverage is something the client needs to know. In recognition of the coverage issues and some of the problems firms have had with lawyer/directors, law firms are regulating (in some cases, prohibiting) the practice as never before. Susan Kostal, Board to Pieces, A.B.A.J. 12 (June 2006).


Other “Unintended Consequences.” A lawyer/director may not be able to try a case on behalf of the client, especially where he may be a witness. Harrison v. Keystone Coca-Cola Bottling Co., 428 F. Supp. 149 (M.D. Pa. 1977). In a trade secret context, a lawyer/director handling case may not be able to see certain of the other side’s confidential documents. Norbrook Laboratories, Ltd. v. G.C. Hanford Mfg. Co., 2003 U.S. Dist. LEXIS 6851 (N.D.N.Y. April 24, 2003). A law firm cannot be adverse to an
entity where a lawyer in the firm had been on the board. See e.g., Berry Saline Mem. Hosp., 907 S.W.2d 736 (Ark. 1995).


I. Doing Business with Clients; Taking Securities in Lieu of Fees

Suppose a lawyer wishes to purchase a house from a client or wants to start a non-law business in partnership with a client – a saloon, perhaps. Or, suppose a lawyer wants to take securities from a client in lieu of fees. The analysis starts with ABA Model Rule 1.8(a), of which every state has a version. That rule has three important provisions. First, it provides that the transaction must be “fair and reasonable” to the client. Second, the lawyer must tell the client in writing that it would be a good idea for the client to check with another lawyer on the advisability of the transaction. Third, the client must sign a written consent containing the essential terms of the transaction and the lawyer’s role in it.

Probably the most dramatic illustration of a lawyer’s failure to follow Rule 1.8(a) was in Passante v. McWilliams, 62 Cal. Rptr. 2d 298 (Cal. App. 1997). A corporate client, promised to give a lawyer a small percentage of its stock in return for the lawyer having just found badly needed financing for the corporation. At that time the stock was worth very little. Several years later, when the lawyer attempted to obtain the stock, it had become worth some $32 million. The California Appellate Court ruled that the lawyer was not entitled to the stock because of, in part, the lawyer’s violation of California’s version of Model Rule 1.8(a) (Cal. Rule 3-300).

More recently, in Goldston v. Bandwidth Tech. Corp., 2008 WL 2445496 (N.Y. App. June 19, 2008), the lawyer fared better. He had a retainer agreement to provide corporate services to a high tech company in exchange for 2% of the company’s stock, then worth, perhaps, some $40,000. According to press reports, one of the appellate briefs disclosed that the 2% had become worth more than $7 million. In the above opinion the Appellate Division affirmed the trial court’s finding that the lawyer was entitled to the stock. A principal issue was whether the company’s president had authority to make the agreement (he did). There were other issues as well. There was no discussion whatever of New York’s version of Model Rule 1.8(a) (N.Y. DR 5-104).

Note that in Passante the promise of stock came during the lawyer-client relationship. In Goldston the retainer agreement was negotiated at the outset of the representation. While the court in Goldston did not discuss that distinction, the different treatment in the two cases comports with those cases that deal with fee changes that occur after the representation has commenced (sometimes referred to as “mid-stream fee changes”). Courts are generally hostile to mid-stream fee changes, and they increasingly invoke
Model Rule 1.8(a) specifically in evaluating whether such changes are enforceable. See, e.g., Valley/50th Ave., L.L.C. v. Stewart, 153 P.3d 186 (Wash. 2007).

What about taking securities from clients in lieu of fees? The ABA Ethics Committee has addressed this issue in its Formal Opinion 00-418 (2000) (hereinafter, “ABA Op. 00-418”), "Acquiring Ownership in a Client in Connection with Performing Legal Services.” It says that such arrangements are not per se unethical, but says that lawyers taking client securities must comply with Model Rule 1.8(a). That means the arrangement must be in writing, the client be afforded a reasonable opportunity to consult with other counsel, the client's consent to the arrangement be in writing, and the terms be “fair and reasonable” to the client. The opinion discusses the interplay of the "fair and reasonable" requirement of Rule 1.8(a) and the requirement of Model Rule 1.5(a) that fees be "reasonable.” It also deals with the need to disclose possible conflicts to the client and the role of Model Rule 1.7(b) (now 1.7(a)(2)), which relates to conflicts of interest and the lawyer’s interests.

Opinion 2000-3 (2000) of the Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York (hereinafter, “N.Y. City Bar Op. 2000-3), which was rendered soon after ABA Op. 00-418, basically tracks that opinion. In brief summary, it is slightly more lenient than ABA Op. 00-418. It says that the lawyer does not have to comply with N.Y. DR 5-104(A) (N.Y.’s version of Model Rule 1.8(a)), unless the client is relying upon the advice of the lawyer with respect to the fee transaction itself. Thus, the Committee concludes, there may be instances in which a lawyer takes stock in lieu of fees where it would be appropriate to treat the arrangement as any other fee arrangement. The sophistication of the client and complexity of the transaction will obviously play a role in whether this is the case. In other respects, N.Y. City Bar Op. 2000-3 is comparable to ABA Op. 00-418.

The District of Columbia Bar Legal Ethics Committee Opinion 300 (2000) mentions ABA Op. 00-418 and N.Y. City Bar Op. 2000-3, only in a footnote, but states that Op. 300 reaches the same conclusions as those two opinions. Actually, unlike N.Y. City Bar Op. 2000-3, Op. 300 does not discuss situations in which such an arrangement might not be subject to Rule 1.8(a) or its New York counterpart, DR 5-104.

II. Negotiation Ethics

We will limit this discussion to the American Bar Association (“ABA”) Model Rules of Professional Conduct. In most cases the states have rules identical to, or very similar to, the Model Rules. Where there is disparity, we will point it out.

In April 2006 the ABA Ethics Committee issued its Formal Opinion 06-439, entitled, “Lawyer’s Obligation of Truthfulness When Representing a Client in Negotiation: Application to Caucused Mediation.” It repeats the obvious that a lawyer may not lie. The opinion does recognize that lawyers may be expected to “puff” as to certain issues. For example, a lawyer may say that his witnesses are more credible than the other side's. What the lawyer may not say is that he has five witnesses to an event when he really only has one.

Client Conduct. The situation gets trickier when, during negotiations, it is the client who is lying. Model Rule 1.2(d) provides that a lawyer may not assist the client in committing a crime or fraud. All states have such a rule. Moreover, Model Rule 1.16(a)(1) provides that the lawyer must withdraw from the representation where to continue would cause a violation of a rule.

Suppose a lawyer is aware that her client is lying to the other side in a negotiation. We have just seen that the lawyer cannot continue if the client persists. Under what circumstances may or must the lawyer warn others of the client’s intentions? Model Rule 1.6, the confidentiality rule, plays a role. Rule 1.6(b)(2)&(3) now allows a lawyer to “blow the whistle” to prevent the client from committing a fraud on another or to rectify a fraud that has already occurred. Most states have comparable exceptions to their confidentiality rules. A few states provide that a lawyer must report client fraud.

Now return to Rule 4.1. Recall that Rule 4.1(a) says that a lawyer may not lie. Rule 4.1(b), however, says a lawyer must disclose a client’s lie when it is “necessary to avoid assisting a criminal or fraudulent act by a client.” That sentence ends with “unless disclosure is prohibited by Rule 1.6.” Recall, though, that most states have provisions in their versions of Rule 1.6 that permit disclosure. Thus, in many states, the lawyer may have the obligation to blow the whistle on a client.

Caution: the interplay of these rules is extraordinarily complex, and the consequences of acting under them can be enormous. The average good lawyer needs to consult with an ethics expert before deciding on a strategy to deal with suspected client fraud.

Conduct within an Organization. Where the client is an organization, Model Rule 1.13 (“Organization as Client”) is implicated. Assume that the lawyer and an officer of the client are negotiating a transaction with another party. Assume further that the officer is making claims that the lawyer knows (or strongly suspects) are not true. The lawyer should first attempt to straighten out the officer. Failing that, Rule 1.13(b) provides that the lawyer must go over the officer’s head (“climb the ladder”) even to the board of directors, if necessary. Prior to 2003 Model Rule 1.13 did not make climbing the ladder mandatory, nor did the rules of most states. Subsequent to the ABA changes in 2003 many states have amended their versions of Rule 1.13 to make climbing the ladder mandatory.
As to public companies, the SEC has adopted 17 C.F.R Part 205, which, among other things, requires, under some circumstances, the lawyer to climb the organizational ladder. To illustrate the complexity of the SEC requirements, many well-run law firms have committees of lawyers devoted to seeing that the regulation is followed and providing training to securities lawyers on the regulation.


III. Confidentiality and Client Fraud

Model Rule 1.2(d) provides as follows:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer
may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

What is knowledge? Model Rule 1.0(f) provides that knowledge can be “inferred from the circumstances.” The vagueness of the definition should be a red flag to a lawyer who “smells a rat” in connection with what a client is telling the lawyer or other parties to a transaction.

Example: a lawyer learns that a client is not being truthful in transaction documents or in statements to other parties. The lawyer confronts the client and instructs the client to “knock it off.” The client refuses. Model Rule 1.2(d) provides the lawyer cannot continue. Model Rule 1.16(a)(1) provides that the lawyer must withdraw from the representation.

Disclosure of client fraud to others. Rules 1.6(b)(2)&(3) provide as follows:

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

* * * *

2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

Most states have an exception to confidentiality that is the same or nearly the same as the provisions quoted just above, see the chart with state-by-state analysis at Thomas D. Morgan & Ronald D. Rotunda, 2008 Selected Standards on Professional Responsibility 149-164 (2008).

Most states’ rules do not command the lawyer to reveal client fraud to others; they permit disclosure. One must, however, be wary of Model Rule 4.1(b), which provides:

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

* * * *

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

Suppose a lawyer is sitting in on a negotiation with her client and the lawyer and client on the other side. The lawyer hears the client make a misrepresentation. The lawyer drags the client out of the meeting room and privately admonishes the client to set the
record straight – however that can gracefully be done. The client refuses. We know that Model Rules 1.2(d) and 1.16(a)(1) require the lawyer to withdraw. But, what about telling the other side about the misrepresentation? Model Rule 4.1(b) would seem to convert permissive disclosure under the exceptions to Model Rule 1.6 to mandatory disclosure. While we are not aware of any case citing Model Rule 4.1(b) in exactly this context, we have long been intrigued by the reach of that rule in connection with misrepresentations being made by clients leading up to the closing of transactions.

Role of privilege. The attorney-client privilege can be lost where a party to a transaction can show that during lawyer-client communications the client was committing, or planning, a crime or fraud. The mischief to lawyers or law firms that the loss of privilege can cause is enormous. Not only will the misconduct of clients be documented, but also the complicity (or seeming complicity) of the law firm in the misconduct. Every memorandum and E-mail within the law firm will be fair game for prosecutors, regulators, and plaintiffs’ class action lawyers.

IV. Confidentiality vs. Attorney-Client Privilege

Model Rule 1.6 provides in part:

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

Note that the rule protects information whether or not the lawyer got it from the client or some other source. The rule also provides that a lawyer may reveal client information where the client impliedly agrees. Thus, where it is obvious that a lawyer must make certain disclosures in an opinion to the other side in order to comply with transaction documents, the lawyer may do so.

Attorney-Client Privilege. The privilege is different from the duty of confidentiality in several important respects. First, the privilege only applies to whether one side in litigation can compel a lawyer for a party to reveal the lawyer’s communications with the lawyer’s client. The privilege does not “seal the lawyer’s lips,” in this respect; Model Rule 1.6 does. Adams v. Franklin, 924 A.2d 993 (D.C. App. 2007). Model Rule 1.6 seals the lawyer’s lips whether or not there is litigation. Thus, whether a lawyer can reveal client information in an opinion depends not upon the privilege but upon the lawyer’s duties of confidentiality under the ethics rules.

A. Attorney-Client Privilege/Work Product – Recent Developments

Courts have been busy issuing opinions on the attorney-client privilege (“privilege”) and
work product immunity ("work product") that impact the work of business lawyers. Below we discuss several that are both recent and significant.

Waiver of Privilege by Special Committee of Board. One recent such opinion is Chancellor Chandler’s letter ruling at Ryan v. Gifford, No. 2213-CC, 2007 Del. Ch. LEXIS 168 (Del. Ch. Nov. 30, 2007). This is a shareholders’ derivative action alleging backdating of options by management of Maxim Integrated Products, Inc. ("Maxim"). While the letter contains a number of unremarkable discovery rulings, one that stands out is the court’s ruling on the communications between a special committee of the board of Maxim, appointed to investigate the backdating allegations, and the law firm representing the special committee ("Law Firm"). The court acknowledged that the special committee was a client of Law Firm for privilege purposes, but because Law Firm presented the report of its investigation to the full board of Maxim, that privilege was waived. The court said the scope of the waiver was broad and ordered that almost all material developed by Law Firm during the investigation be turned over to the plaintiffs.

Waiver by Sharing with Non-Lawyer Corporate Employees. In re Vioxx Products Liab. Lit., 501 F. Supp. 2d 789 (E.D. La. 2007), is a multidistrict proceeding involving drug product liability claims. The opinion deals with manufacturers’ claims that approximately 30,000 documents sought in discovery were protected by privilege, work product, or both. The court appointed a special master, a law professor who is an expert in evidence and privilege/work product. The master issued a report, and in this opinion the court affirmed the master. Much of the master’s report dealt with memoranda and E-mails that were shared with in-house lawyers, outside lawyers, and significantly, with non-lawyer employees of the manufacturers. We will not set forth the master’s analysis of each type of communication, which are lengthy and quoted in the opinion. We do suggest that any lawyer concerned about the distribution of legal-related documents by, or to, non-lawyer employees will find this opinion educational.

Privilege, Work Product, and Corporate Families. In re Teleglobe Communications Corp., 493 F.3d 345 (3d Cir. 2007) is a thirty-three page “mini-treatise,” complete with Table of Contents, on the application of privilege and work product in the corporate family context, where members of the family fall out of alignment. Included are discussions of the co-client rule, the adverse litigation exception to that rule, the distinction between joint representation and common interest, and much more. It is easy to read and a must for corporate lawyers representing multiple corporate family members.

Selective Waiver Rejected. Courts are almost uniform in holding that if a person reveals privileged material to an administrative agency, even under a confidentiality agreement, that person waives the privilege as to law enforcement personnel and civil litigants. A recent such case is In re Initial Pub. Offering Securities Lit., 2008 U.S. Dist. LEXIS 11058 (S.D.N.Y. Feb. 14, 2008).

V. Communicating with Represented Persons
ABA Model Rule 4.2 says that a lawyer may not communicate with the client on the other side without the permission of the other side’s lawyer. Generally speaking, the “party,” in the case of organizations is a relatively high-ranking employee or an employee whose conduct was the subject of the controversy. In the case of litigation, violation of the rule could get a lawyer disqualified. In the context of a transaction, the consequences of a violation seem to be less severe.

Suppose, during a negotiation, that you strongly suspect that the opposing lawyer is not conveying your offers. May you call the other party directly to find out? No. May you prompt your client to do so? There is no rule prohibiting clients from contacting one another directly. Older wisdom was that lawyers could not discuss with their clients the possibility of such communications. That has softened. For example in Formal Opinion 92-362 (2002) the ABA Ethics Committee held that a lawyer could ethically discuss with her client the possibility of talking to the other party in just such a circumstance. More recently, the Committee held that a lawyer could communicate with an in-house lawyer for a party, even though the party was represented by an outside lawyer, Formal Opinion 06-443 (2006).

Most recently, in Formal Opinion 11-461 (2011), the ABA Ethics Committee has expanded the permissible range of conduct of lawyers in such situations. Among other things, the Committee opined that a lawyer may even draft an agreement, give it to her client with instructions on getting the other party to sign it – all without permission of the lawyer on the other side. This opinion is controversial, and some ethics experts have argued that the opinion should be withdrawn.

These opinions do not have the force of law, so you should consult with the rules and opinions in your jurisdiction before conducting either type of communication.

We understand that Rule 4.2 is almost routinely violated in some major cities in the transactional context, particularly where the person contacted, or, just as frequently, doing the contacting, is highly sophisticated. We have not done the research, but in following ethics developments closely over the past twenty years we have not heard of a disciplinary proceeding against a lawyer who contacted a sophisticated corporate employee of the other side in a transactional (i.e., non-litigation) context.
ETHICS ISSUES FACING IN-HOUSE LAWYERS WHO REPRESENT COMPANIES IN JOINT VENTURES

Hypotheticals and Analyses

Thomas E. Spahn
McGuireWoods LLP

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Ethics and Privilege Issues for a Lawyer Representing a Joint Venture

**Hypothetical 1**

Recently your company and another large chemical company formed an LLC to operate a joint venture that shows great promise. The management team from both members of the joint venture LLC has asked you whether the LLC can hire one law firm to represent the joint venture. Although the potential cost savings are attractive, the firm and you (as inside counsel) have a number of questions to consider.

(a) Must the firm disclose to the other company that it represents your company on a totally unrelated matter?

**YES**

(b) Will the privilege protect the firm’s communications with joint venture employees assigned by either of the members to the joint venture?

**YES**

(c) If adversity develops between the two members, may the firm be adverse to your company?

**NO**

(d) If adversity develops between the two members, may the firm be adverse to the other company?

**NO**

(e) If adversity develops between the two members, may the firm be adverse to the joint venture itself?

**NO**
Analysis

(a) A lawyer representing a joint venture should, and probably must, advise all members of the joint venture about any unrelated representations of any of the members. This is because the other members have the right to worry that the lawyer will somehow favor his or her other clients while representing the joint venture in dealing with third parties.

(b) Under the Upjohn standard or control group principles, a lawyer representing a joint venture should be able to engage in privileged communications with employees of the joint venture as long as the communications meet all of the requirements of privileged communications.

(c)-(e) A number of courts have indicated that a lawyer representing a joint venture is essentially deemed to also represent its members, because of the likelihood that the lawyer will acquire confidential information from the members.

Several courts have reached that conclusion, based on the relatively intimate relationship between the joint venture and its members.

- Funding Grp. v. Estate of Deen, No. 2 CA-CV 2010-0029, 2010 Ariz. App. Unpub. LEXIS 229, at *4-5, *5 n.4, *11-12, *14 (Ariz. Ct. App. Nov. 19, 2010) (disqualifying a lawyer who had represented a joint venture and one of its members, and later began to represent one of the members against another; explaining the situation: "Silver King then filed a notice to the court, stating that Ronald Deen and San Felice would not be appearing for the depositions scheduled for the next day, as they 'adamantly object[ed] to being deposed by their former counsel, Mr. Strojnik.' The notice also stated that Silver King had filed a complaint with the Arizona State Bar Association against Strojnik and would 'refrain from being subjected to depositions until the ethical matters have been resolved.' A few days later, TFG [plaintiff] filed a motion to compel discovery, specifying the instances in which Silver King had failed to comply with discovery rules." (footnote omitted); explaining that "Strojnik was general counsel for both APM and the joint venture, and until he was disqualified by the trial court, he was also counsel for TFG in this case.")
trial court erred by disqualifying its counsel, Peter Strojnik. Specifically, it contends 'counsel never represented any of the adverse parties at any time' because Strojnik never individually represented San Felice, Deen, or SKMC. Strojnik was general counsel for both APM and the joint venture. He was also a permanent member of the joint venture's policy committee. Silver King moved to disqualify Strojnik based primarily on the conflict of interest between his representation of San Felice and Deen as part of the joint venture and his representation of TFG in the lawsuit against Silver King."; noting that TFG "nonetheless concedes 'there are difficulties in determining the existence of an attorney-client relationship when a lawyer represents a small entity with 'extensive common ownership and management,' such as a limited partnership.'").

- Hakimian Mgmt. Corp. v. Richard C. Flore, Inc., No. 600472/02, 2007 N.Y. Misc. LEXIS 4844, at *14-15, *15-16, *19-21, *23-24 (N.Y. Sup. Ct. Jul. 9, 2007) (disqualifying a law firm under both a conflict of interest and the witness/advocate rule; noting that the firm had represented one joint venture participant in creating the joint venture, and then had represented the joint venture in dealing with third parties; disqualifying the lawyer from representing one of the participants against the other; "Kessler admits that he had discussions with Fiore and Sullivan with respect to the parameters of the deal with the EDC and his comments on the proposed draft contracts submitted by the EDC, yet he denies that he received confidential information from Fiore and Sullivan . . . . Kessler then asserts that he was 'never made privy to any proprietary information' by either Fiore and Sullivan 'that would be adverse to their interests in relation to the Hakimians', and that 'the Hakimian group and the RCF group were, for purposes of the negotiations of the contract of sale, united in interest as members of the LLC.'" (internal citation omitted); "The submissions of the parties establish that Kessler assumed a lead role in drafting the Joint Venture Agreement and the Operating Agreement for the LLC; however, Fiore and RCF were represented by the Schwartz in reviewing the drafts of these documents. Kessler was, however, the only attorney representing Fiore, RCF, as well as the other members of the LLC, including the Hakimians and Sullivan, in the negotiations with the EDC concerning the contract of sale for the Seaport properties, and related matters. Therefore, Fiore and RCF have established that they had a prior attorney-client relationship with Kessler. Further, the negotiations with the EDC regarding the contract of sale for the Seaport Project is a matter which is substantially related to the instant action, in which R&E is representing HMC and the Hakimians, whose position in this litigation is materially adverse to that of Fiore and RCF. Accordingly, Fiore and RCF have established all of the three criteria for disqualifying Kessler from representing the HMC and the Hakimians in this action."; "In the instant case, HMC and the Hakimians did not rebut the presumption that all of the attorneys in the law firm of R&E should be disqualified from representing them in the instant action. They
have failed to demonstrate that any confidential information Kessler acquired from Fiore and RCF in the course of representing them, as members of the LLC, in the negotiations and drafting of the contract of sale with the EDC, is unlikely to be significant or material in this litigation. Given Kessler’s extensive involvement in setting up the joint venture (the LLC), in the negotiations with the EDC and the drafting of the contract of sale on behalf of the parties, R&E’s ‘burden in rebutting the presumption’ that Kessler ‘acquired material confidences is especially heavy’. . . . Kessler’s conclusory denials that he acquired confidential information from Fiore and RCF are insufficient to rebut the presumption of disqualification of the entire R&E law firm. Moreover, in view of the fact that R&E is a medium sized ‘boutique’ law firm of only 41 attorneys, similar to the law firm at issue in Kassis, it is highly likely that any information Kessler acquired from Fiore and RCF will be shared with other attorneys in the firm. Accordingly, Kessler’s conclusory statement that none of the other attorneys at R&E have ‘asked me any questions about the negotiations, other than the bare bones facts, as set forth above, regarding my role as an attorney’. . . is insufficient to rebut the presumption that the entire firm should be disqualified.”; “R&E should be disqualified from representing HMC and the Hakimians in the present action, which is substantially related to the work performed by firm partner Robert Kessler, Esq. in representing the LLC and all of its members, including Fiore and RCF, in the formation of the parties’ joint venture and in the negotiation and drafting of the contract of sale in the ultimately unsuccessful deal with the EDC.”).

- Al-Yusr Townsend & Bottum Co., Ltd. v. United Mid East Co., Inc., Civ. A. No. 95-1168, 1995 U.S. Dist. LEXIS 14622. at *9, *9-10, *11, *11-12, *12 (E.D. Pa. Oct. 3, 1995) (disqualifying a lawyer who had represented a joint venture from representing one participant against another participant; "The threshold inquiry under the Rule is whether defendant is a 'former client,' the answer to which depends on whether there exists an attorney-client relationship between an attorney representing a joint venture and the individual members of that joint venture. Plaintiff contends that there is no such relationship. Plaintiff relies on Rule 1.13 in support of that position, which states that a 'lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents' (emphasis added). Plaintiff's attempt to draw a technical distinction between representing the joint venture and representing the constituents of that joint venture, however, fails."; "While no Pennsylvania law addresses the issue of whether an attorney-client relationship exists between an attorney representing a joint venture and the individual members of that joint venture, the nature of a joint venture compels this Court to conclude that such a relationship does exist. "To constitute a joint venture certain factors are essential: (1) each party to the venture must make a contribution, not necessarily of capital, but by way of services, skill, knowledge, materials or money; (2) profits must be shared among the parties; (3) there must be a 'joint proprietary interest and right of mutual control over
the subject matter of the enterprise; (4) usually, there is a single business transaction rather than a general and continuous transaction.' McRoberts v. Phelps, 391 Pa. 591, 599, 138 A.2d 439, 443-444 (1958). This description of a joint venture highlights the import of the members' individual interests. So intertwined are these interests with those of the joint venture as a whole that it certainly would be reasonable for a member to expect of the attorney representative the whole that the attorney is representing the individual member as well. Under Pennsylvania law, such an expectation is sufficient to form the basis of an implied attorney-client relationship.; 

"It was reasonable for the defendants to believe that Mr. Blackburn was representing them because of his characterizations of their communications as privileged and confidential and his references to them as his 'clients.'"; 

"[W]hile there is no Pennsylvania case law directly on point, analogous authority in the context of associations provides support for the conclusion that an attorney-client relationship does not exist between the attorney representing a joint venture and the individual members of that joint venture. In Philadelphia Housing Authority v. Am. Radiator & Standard Sanitary Corp., 294 F. Supp. 1148, 1150 (E.D. Pa. 1969), the court held that each individual member of an unincorporated association is a client of the association's lawyer. A joint venture has been characterized as an association, specifically as an 'association of parties -- of rather recent origin -- to engage in a single business enterprise for profit.' McRoberts, 391 Pa. at 600. As such, Philadelphia Housing is apposite, and provides support for the conclusion that there exists an attorney-client relationship between an attorney representing a joint venture and the individual members of that joint venture."

In conclusion then, defendants are 'former clients' under Rule 1.9. Having so concluded, the next inquiry under Rule 1.9 is whether at issue in the instant action is "the same or a substantially related matter" as that at issue during Mr. Blackburn's representation of the Joint Venture.

On the other hand, a lawyer who carefully defines the client might be able to take matters adverse to a principal of one of the joint venture members.

- Spiniello Cos. v. Metra Indus., Inc., Civ. A. No. 05-5075 (SRC), 2006 U.S. Dist. LEXIS 72961, at *11-12 (D.N.J. Oct. 6, 2006) (declining to disqualify a lawyer from adversity to a principal in one of the joint venture participants the lawyer represented; "The magistrate judge correctly found, based on the evidence presented, that Spiniello Companies -- and not its president Mr. Stivaly -- was Mr. Riordan's client in the CEPS litigation and that Mr. Riordan's communications with Mr. Stivaly were conducted in the context of Mr. Stivaly's position as president of Spiniello Companies. The magistrate judge concluded that this contact between Mr. Riordan and Mr. Stivaly, who was also president of Metra Industries, did not give rise to an attorney-client relationship between Mr. Riordan and Mr. Stivaly or between Mr. Riordan and
Metro Industries. Mr. Stivaly's communications with Mr. Riordan, the court below reasoned, were for the benefit of Spiniello Companies, Mr. Riordan's client and Mr. Stivaly's employer. This Court holds that those findings are supported by the record. Defendants have not presented any evidence to this Court that suggests that an attorney-client relationship existed between Mr. Stivaly and Mr. Riordan or between Metra Industries and Mr. Riordan with regard to the CEPS litigation.

Although not directly on point, it is worth considering a similar issue courts address in connection with corporate "families."

When representing a corporation, the entity is the client. However, it is unclear whether all members of the corporate "family" are also clients for conflicts purposes.

**ABA Model Rules.** The ABA's Ethics 2000 Task Force added the following language to the ABA Model Rules, which weighs in favor of permitting a lawyer to take positions adverse to a corporate client's affiliate -- but without creating any bright-line rules.

A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

ABA Model Rule 1.7 cmt. [34].

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1. ABA Model Rule 1.13(a).
2. When this issue arises in the context of the attorney-client privilege, most courts have held that all members of the corporate family are within the scope of the privilege. See, e.g., Admiral Ins. Co. v. United States Dist. Court, 881 F.2d 1486, 1493 n.6 (9th Cir. 1989): United States v. AT&T, 86 F.R.D. 603, 616-17 (D.D. C. 1979); Weil Ceramics & Glass, Inc. v. Work, 110 F.R.D. 500, 503 (E.D.N.Y. 1986).
ABA LEO 390 (1/25/95) ("A lawyer who represents a corporate client is not by that fact alone necessarily barred from a representation that is adverse to a corporate affiliate of that client in an unrelated matter. However, a lawyer may not accept such a representation without consent of the corporate client if the circumstances are such that the affiliate should also be considered a client of the lawyer; or if there is an understanding between the lawyer and the corporate client that the lawyer will avoid representations adverse to the client's corporate affiliates; or if the lawyer's obligations to either the corporate client or the new, adverse client, will materially limit the lawyer's representation of the other client. Even if the circumstances are such that client consent is not ethically required, as a matter of prudence and good practice a lawyer who contemplates undertaking a representation adverse to a corporate affiliate of a client will be well advised to discuss the matter with the client before undertaking the representation."); explaining that "[c]learly, the best solution to the problems that may arise by reason of clients' corporate affiliations is to have a clear understanding between lawyer and client, at the very start of the representation, as to which entity or entities in the corporate family are to be the lawyer's clients, or are to be so treated for conflicts purposes"; noting that "considerations of client relations will ordinarily dictate the lawyer's course of conduct" without addressing ethics issues; noting that "circumstance of only partial ownership . . . is a variable that might affect the result in a particular case," but does not fundamentally change the analysis; holding that "in the absence of a clear understanding otherwise, the better course is for a lawyer to obtain the corporate client's consent before the lawyer undertakes a representation adverse to its affiliate"; also noting that lawyers must follow whatever retainer contract they enter into with clients, but that "a client that has such an expectation [that its lawyer will not be adverse to its affiliate] has an obligation to keep the lawyer apprised of changes in the composition of the corporate family"; addressing various factors in determining the propriety of a lawyer taking matters adverse to the affiliate of a corporate client; "[T]he nature of the lawyer's dealings with affiliates of the corporate client may be such that they have become clients as well. This may be the case, for example, where the lawyer's work for the corporate parent -- say, on a stock issue or bank financing -- is intended to benefit all subsidiaries, and involves collecting confidential information from all of them. Even if the subject matter of the lawyer's representation of the corporate client does not involve the affiliate at all, however, the lawyer's relationship with the corporate affiliate may lead the affiliate reasonably to believe that it is a client of the lawyer. For example, the fact that a lawyer for a subsidiary was engaged by and reports to an officer or general counsel for its parent may support the inference that the corporate parent reasonably expects to be treated as a client. . . . A client-lawyer relationship with the affiliate may also arise because the affiliate imparted confidential information to the lawyer with the expectation that the lawyer would use it in representing the affiliate. . . . Additionally, even if the affiliate confiding information does not expect that the lawyer will be representing the affiliate, there may well be a reasonable view on the part of the client that the information was imparted in furtherance of the representation, creating an ethically binding obligation that the lawyer will not use the information against the interests of any member of the corporate family. Finally, the relationship of the corporate client to its affiliate may be such that the lawyer is required to regard the affiliate as his client. This would clearly be true where one corporation is the alter ego of the other. It is not necessary, however, for one corporation to be the alter ego of the other as a matter of law in order for both to be considered clients. A disregard of corporate formalities and/or a complete identity of managements and boards of directors could call for treating the two corporations as one. . . . The fact that the corporate client wholly owns, or is wholly owned by, its affiliate does not in itself make them alter egos. However, whole ownership may well entail not merely a shared legal department but a management so intertwined that all members of the corporate family effectively operate as a single entity; and in those circumstances representing one member of the family may effectively mean representing all others as well. Conversely, where two corporations are related only through stock ownership, the ownership is less than a controlling interest and the lawyer has had no dealing whatever with the affiliate, there will rarely be any reason to conclude that the affiliate is the lawyer's client"; also
corporate affiliate and adversity to another automatically creates a conflict. The ABA indicated that the existence of a conflict depends on: the lawyer's and client's understanding of which corporate entities are clients; the client's expectations about an attorney-client relationship with the affiliated corporation; the facts of the representation (such as whether the lawyer actually performs work for a corporate affiliate, reports to the general counsel of a parent when working for a subsidiary, etc.); the nature of the corporate affiliation (such as any alter ego relationships among corporate affiliates); and whether the lawyer has acquired any confidential information from the corporate affiliate. The ABA indicated that adversity to a corporation generally amounts only to "indirect" adversity to an affiliated corporation, because the adversity only derivatively affects the affiliate.

Finally, the ABA explained that even in the absence of a conflict lawyers might be prohibited from taking positions adverse to a corporate client's affiliate if their diligence or judgment on behalf of the corporate client might be adversely affected (if, for instance, the corporate client would "resent" the lawyer undertaking the representation).
As might be expected, the ABA advised lawyers to resolve any doubts in favor of withdrawal, and suggested that a lawyer should discuss matters with the existing client even if consent is not required.

**Restatement.** The Restatement takes the same basic approach.

For purposes of identifying conflicts of interest, a lawyer's client is ordinarily the person or entity that consents to the formation of the client-lawyer relationship, see § 14. For example, when a lawyer is retained by Corporation A, Corporation A is ordinarily the lawyer's client; neither individual officers of Corporation A nor other corporations in which Corporation A has an ownership interest, that hold an ownership interest in Corporation A, or in which a major shareholder in Corporation A has an ownership interest, are thereby considered to be the lawyer's client.

Restatement (Third) of Law Governing Lawyers § 121 cmt. d.

The Restatement includes two illustrations (Illustrations 6 and 7) which distinguish between: (1) a lawyer taking a litigation matter against a client's wholly owned subsidiary, when the lawsuit might materially affect the client's value; and (2) a lawyer taking a litigation matter against a company that is 60% owned by the client's parent, in a matter that will not materially affect either the defendant's or the parent's financial position -- the former is unacceptable, while the latter is acceptable.

**State Ethics Rules.** Nationwide, states have struggled with this issue. Florida⁴ and Washington, D.C.,⁵ have explicit ethics rules that recognize the separate identity of corporate clients, and generally allow a lawyer representing one member of a corporate family to take positions adverse to another member of the corporate family. Most states' ethics rules provide no specific guidance.

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⁴ Fla. Rules of Prof'l Conduct R.4-1.7 Comment; Fla. Rules of Prof'l Conduct R. 4-1.13 Comment.
⁵ D.C. Rules of Prof'l Conduct R.1.7 Comment 17.
State Bar Opinions. State bars also take differing approaches.

Not surprisingly, New York’s new ethics rules effective April 1, 2009 deal with this issue. One of the comments to New York Rule 1.7 essentially follows the ABA approach -- without coming to a definitive conclusion.

A lawyer who represents a corporation or other organization does not, simply by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Although a desire to preserve good relationships with clients may strongly suggest that the lawyer should always seek informed consent of the client organization before undertaking any representation that is adverse to its affiliates, Rule 1.7 does not require the lawyer to obtain such consent unless: (i) the lawyer has an understanding with the organizational client that the lawyer will avoid representation adverse to the client's affiliates, (ii) the lawyer's obligations to either the organizational client or the new client are likely to adversely affect the lawyer's exercise of professional judgment on behalf of the other client, or (iii) the circumstances are such that the affiliate should also be considered a client of the lawyer. Whether the affiliate should be considered a client will depend on the nature of the lawyer's relationship with the affiliate or on the nature of the relationship between the client and its affiliate. For example, the lawyer's work for the client organization may be intended to benefit its affiliates. The overlap or identity of the officers and boards of directors, and the client's overall mode of doing business, may be so extensive that the entities would be viewed as "alter egos." Under such circumstances, the lawyer may conclude that the affiliate is the lawyer's client despite the lack of any formal agreement to represent the affiliate.

New York Rule 1.7 cmt. [34]. The New York Bar adopted two other comments not found in the ABA Model Rules. The first provides helpful guidance to lawyers attempting to analyze the conflict of interest situation (although without providing
absolute certainty), and the second reminds lawyers of the economic impact of their analysis.

Whether the affiliate should be considered a client of the lawyer may also depend on: (i) whether the affiliate has imparted confidential information to the lawyer in furtherance of the representation, (ii) whether the affiliated entities share a legal department and general counsel, and (iii) other factors relating to the legitimate expectations of the client as to whether the lawyer also represents the affiliate. Where the entities are related only through stock ownership, the ownership is less than a controlling interest, and the lawyer has had no significant dealings with the affiliate or access to its confidences, the lawyer may reasonably conclude that the affiliate is not the lawyer’s client.

New York Rule 1.7 cmt. [34A].

Finally, before accepting a representation adverse to an affiliate of a corporate client, a lawyer should consider whether the extent of the possible adverse economic impact of the representation on the entire corporate family might be of such a magnitude that it would materially limit the lawyer’s ability to represent the client opposing the affiliate. In those circumstances, Rule 1.7 will ordinarily require the lawyer to decline representation adverse to a member of the same corporate family, absent the informed consent of the client opposing the affiliate of the lawyer’s corporate client.

New York Rule 1.7 cmt. [34B].

Predictably, the New York City Bar has also frequently analyzed this issue.

Unfortunately, the New York City Bar’s most recent analysis adopts the sort of fact-intensive standard that lacks predictability.  

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6 New York City LEO 2005-05 (6/2005) (addressing what are called "thrust upon" conflicts; among other factors, analyzing the ethics rules governing a lawyer's adversity to a corporate client; "Previous opinions have articulated the circumstances under which an apparent conflict involving a member of a current client's corporate family will be considered an actual conflict of interest requiring consent to continue representing both parties. This determination is based on several factors, including the relationship between the two corporate entities, and the relationship between the work the law firm is doing for the current client and the work the law firm wishes to undertake in opposition to the client's corporate family member. See Eastman Kodak Co. v. Sony Corp., 2004 WL 2984297 at *3 (W.D.N.Y."

[39772178.2]
The Illinois Bar has taken essentially the same fact-laden approach.\(^7\)

In California LEO 1989-113, the California Bar concluded that...
[a] parent corporation, even one which owns 100 percent of the stock of a subsidiary, is still, for purposes of rule 3-600, a shareholder and constituent of the corporation. Rule 3-600 makes clear that in the representation of corporations, it is the corporate entity actually represented, rather than any affiliated corporation, which is the client.

California LEO 1989-113 (1989). Furthermore, "[t]he fact of total ownership does not change the parent corporation's status as a constituent of the subsidiary." The parent corporation argued that a successful action against its subsidiary would adversely affect its finances. The Bar rejected this argument:

[H]ere, the parent is not a party to the suit against the subsidiary, and there is no prospect that it will be made a party. The representation against the subsidiary can therefore have no direct consequences on the parent; the only adversity can be that indirect adversity which might result from the diminution in the value of the parent's stock in the subsidiary if the attorney's suit against the subsidiary is ultimately successful. This possible indirect impact is insufficient to give rise to a breach of the duty of loyalty owed to the parent.

Id. The California Bar recognized only one exception to this rule -- if corporate form is disregarded and a parent is considered its subsidiary's "alter ego."

Case Law. Courts also take differing positions. Some courts hold that the representation of one member of the corporate family makes other members "clients"
for conflicts purposes.\textsuperscript{8} Other courts have found that the representation of one member of the corporate family does not have that effect.\textsuperscript{9}

The case law has generally looked at the same factors as the legal ethics opinions, and has often resulted in law firms' disqualification.

- GSI Commerce Solutions, Inc. v. Babycenter, L.L.C., 618 F.3d 204, 211, 213, 210, 210-11, 211, 211-12, 212 n.3 (2nd Cir. 2010) (disqualifying the law firm of Blank Rome from handling a matter adverse to BabyCenter, a wholly owned subsidiary of Blank Rome's client Johnson & Johnson; ultimately adopting a "operationally integrated" standard for determining what a law firm's corporate client's affiliate should be regarded as a law firm "client" for conflict purposes; noting that the Blank Rome retainer letter contained the following provision: ""Unless otherwise agreed to in writing or we specifically undertake such additional representation at your request, we represent only the client named in the engagement letter and not its affiliates, subsidiaries, partners, joint venturers, employees, directors, officers, shareholders, members, owners, agencies, departments or divisions.'"; noting that Johnson & Johnson complained about Blank Rome's role only after the mediation failed; "Although the American Bar Association ('ABA') and state disciplinary codes provide valuable guidance, a violation of those rules may not warrant disqualification. . . . Instead, disqualification is warranted only if 'an attorney's conduct tends to taint the underlying trial.'" (citation omitted); "The factors relevant to whether a corporate affiliate conflict exists are of a general nature. Courts have generally focused on: (i) the degree of operational commonality between affiliated entities, and (ii) the extent to which one depends financially on the other. As to operational commonality, courts have considered the extent to which entities rely on a common infrastructure. . . . Courts have also focused on the extent to which the affiliated entities rely on or otherwise share common personnel such as managers, officers, and directors.'; "This focus on shared or dependent control over legal and management issues reflects the view that neither management nor in-house legal counsel should, without


their consent, have to place their trust in outside counsel in one matter while opposing the same counsel in another.; "[W]e agree with the ABA that affiliates should not be considered a single entity for conflicts purposes based solely on the fact that one entity is a wholly-owned subsidiary of the other, at least when the subsidiary is not otherwise operationally integrated with the parent company." (emphasis added); "First, Babycenter substantially relies on J&J for accounting, audit, cash management, employee benefits, finance, human resources, information technology, insurance, payroll, and travel services and systems. Second, both entities rely on the same in-house legal department to handle their legal affairs. The member of J&J's in-house legal department who serves as 'board lawyer' for BabyCenter helped to negotiate the E-Commerce Agreement between BabyCenter and GSI that is the subject of the present dispute. Moreover, J&J's legal department has been involved in the dispute between GSI and BabyCenter since it first arose, participating in mediation efforts and securing outside counsel for BabyCenter. Finally, BabyCenter is a wholly-owned subsidiary of J&J, and there is at least some overlap in management control."; "GSI argues that BabyCenter and J&J have forfeited any right to contest Blank Rome's representation. It focuses on the fact that J&J and BabyCenter waited several months before objecting to Blank Rome as counsel. We reject GSI's argument because a party's delay in raising a conflict-of-interest objection does not prohibit a court from deciding whether a conflict of interest exists."; ultimately holding that Blank & Rome's retainer letter was insufficient to allow the law firm to represent a party adverse to the Johnson & Johnson affiliate; noting among other things that the retainer letter purported to allow Blank Rome to sue even departments and divisions of Johnson & Johnson, which would clearly be unethical).

- Honeywell Int'l Inc. v. Philips Lumileds Lighting Co., Case No. 2:07-CV-463-CE, 2009 U.S. Dist. LEXIS 12496, at *7 (E.D. Tex. Jan. 6, 2009) (disqualifying Paul Hastings from adversity to Philips Lumileds while simultaneously representing one of its corporate affiliates; noting that courts follow a fact-specific analysis in determining a lawyer's ability to take a matter adverse to a corporate affiliate; noting that the two Philips affiliates share a common legal department, "common management, computer networks, and marketing designs"); also noting that the two companies use the same logo in advertisements).

- Board of Managers v. Wabash Loftominium, L.L.C., 876 N.E.2d 65, 74 (Ill. App. Ct. 2007) (assessing the conflict of interests involved in litigation brought by a lawyer who moved from the Chicago law firm of Michael Best & Friedrich to the firm of Arnstein & Lehr, which was then representing related corporations; describing the connection between the defendants and the law firm's clients, most of which involved indirect ownership through LLCs; upholding the trial court's reliance on Illinois LEO 95-15, which points to
related corporations’ "same management group" as a factor demonstrating that the related companies should be considered as the same client for conflicts purposes; "The particular circumstances of this case indicate Arnstein [law firm] was engaged by and reports to a management group that runs parent, subsidiary, and affiliated corporations that own, manage, and develop residential condominium properties in Chicago. The particular circumstances of this case would lead the management group and the Ambelos corporations [the holding company which developed residential condominium projects in Chicago] to reasonably believe they were Arnstein's existing clients."; noting that the law firm had represented "this management group" on sixty different matters between 1999 and 2005; explaining that any the doubt about the existence of a lawyer-client relationship be clarified by the lawyer; "Significantly, there is no indication that Arnstein took any affirmative action to inform the Ambelos management group that it was ending their long-term attorney-client relationship regarding the ownership, management, and development of residential condominium properties in Chicago."; also rejecting the law firm’s effort to avoid disqualification by imposing an internal screen; disagreeing with the law firm that the clients had waived their right to complain about the conflict by not raising it for six or seven months after learning that the lawyer had moved to the new law firm).

**Best Answer**

The best answer to (a) is YES; the best answer to (b) is YES; the best answer to (c) is NO; the best answer to (d) is NO; the best answer to (e) is NO.
Waiver Danger during Joint Venture Creation Negotiations

Hypothetical 2

You are representing your company in negotiations with another company over the creation of a joint venture.

You just read a memorandum that one of your company’s vice presidents sent to the other company -- under a strict confidentiality agreement. The memorandum included the following three sentences:

Our anti-trust attorney has reviewed the current and proposed language and has found that we are at risk and should not proceed. This finding is based, in part, on a review of the case facts from a recent case in Oregon. We strongly believe it is in your and our best interests to avoid the increased possibility of a similar situation ever happening here.

You wonder about the effect of the vice president including those sentences in the memorandum to the other company.

(a) Has your company’s vice president waived the attorney-client privilege by including those three sentences in its memorandum to the other company?

YES (PROBABLY)

(b) If your company has waived the privilege, will the waiver extend to other internal corporate communications on the antitrust issue?

MAYBE

Analysis

This scenario comes from a recent case that provides a frightening reminder of how fragile the attorney-client privilege can be.
(a) As in similar situations, the scenario involves attorney-client issues, although it also clearly implicates corporate lawyers’ ethics duty of maintaining their clients’ confidences under ABA Model Rule 1.6.

In Heartland Surgical Specialty Hospital, LLC v. Midwest Div., Inc., Case No. 05-2164-MLB-DWB, 2007 U.S. Dist. LEXIS 8690, at *9-10 (D. Kan. Feb. 6, 2007), CIGNA sent a memorandum to HCA while the two companies were negotiating a business transaction. In addressing one issue being negotiated, the CIGNA memorandum contained the following three sentences:

‘Our anti-trust attorney has reviewed the current and proposed language and has found that CIGNA is at risk and should not proceed. This finding in [sic] based, in part, on a review of the case facts from a recent case in Oregon. We strongly believe it is in HCA’s and CIGNA’s best interests to avoid the increased possibility of a similar situation ever happening here.’

Id. at *9-10.

Another company eventually sued both CIGNA and HCA. HCA produced the memorandum to the plaintiff, who then argued that CIGNA had waived the privilege, and triggered a subject matter waiver.

(b) The court agreed that there had been a waiver, and then required CIGNA to produce additional internal CIGNA memoranda and e-mail chains regarding the antitrust issue. Most courts would not find a subject matter waiver in these circumstances, but this case highlights the tremendous risk that corporations face whenever they disclose privileged communications to a third party -- even under a confidentiality agreement.
Best Answer

The best answer to (a) is PROBABLY YES; the best answer to (b) is MAYBE.
Possibility of a Common Interest Agreement Protecting Communications during Joint Venture Creation Negotiations

Hypothetical 3

Having been "burned" in previous joint venture creation negotiations by a privilege waiver problem, you are trying to figure out a way to preserve privilege protection for communications between your company and another proposed joint venture member. The in-house lawyer representing the other member has suggested a common interest agreement as a way to preserve privilege from third parties' waiver claims.

May your company avoid waiving privilege protection during joint venture creation negotiations by entering into a common interest agreement with the other proposed member?

NO (PROBABLY)

Analysis

Many lawyers are tempted to arrange for common interest agreements between their respective clients, in an effort to contractually assure privilege protection in a scenario that would otherwise result in waiver of the privilege. However, the enormous variations in courts' recognition of and application of the common interest doctrine create uncertainties that should give clients and their lawyers great pause before entering into such agreements.
Necessity for Litigation or Anticipated Litigation. One of the most profound variations among courts’ attitudes involves the role of litigation or anticipated litigation in the common interest doctrine. A recent trend makes this issue even more uncertain.

Courts have adopted essentially five approaches in analyzing the role of litigation or anticipated litigation in connection with a common interest doctrine claim.

First, some courts do not recognize the common interest doctrine, and thus presumably do not apply the desired protection even in the midst of litigation.

Second, some courts apply the common interest doctrine only to participants already involved in active litigation.

For instance, in 2009 a court explained that under Hawaii law, “the joint litigant common interest privilege is limited to co-parties and their counsel in pending litigation.”\(^1\) Similarly, the Northern District of Mississippi explained in 2006 that “the party asserting the [common interest] privilege must have been, at the time of the communication, a co-party to pending litigation with the party to whom it bears a relationship of common interest.”\(^2\) That court acknowledged that “[t]he same-action, pending-litigation requirement drastically differs state from federal common interest privilege law.”\(^3\)

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\(^1\) In re Sandwich Islands Distilling Corp., Ch. 7, Case No. 07-01029, 2009 Bankr. LEXIS 3009, at *6 (D. Bankr. Haw. Sept. 21, 2009) (“Pre-litigation communications among multiple parties and their counsel are not privileged.”).


\(^3\) Id. at 488.
Some courts have articulated a confusing standard that seems to require that a participant be involved in actual litigation.⁴

**Third**, some courts require that each of the participants demonstrate that it either was already involved in litigation or anticipated (to some degree) involvement in litigation. In other words, involvement in or anticipated involvement in litigation is a requirement for each participant.

For instance, in *American Legacy Foundation v. Lorillard Tobacco Co.*,⁵ the court arrived at two different conclusions based on differing facts. The court held that an anti-smoking foundation could enter into an effective common interest arrangement with its advertising agency, because that agency was at risk of litigation from cigarette manufacturers. In contrast, the foundation could not enter into a common interest arrangement with its public relations agency, which had not been threatened with litigation.⁶

More recently, a Virginia state court held that the common interest doctrine could not apply to a company and a recently employed doctor working for the company because they were "not co-defendants" or "potential parties in this civil action."⁷ Other

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⁴ *Ayers Oil Co. v. Am. Bus. Brokers, Inc.*, No. 2:09 CV 02 DDN, 2009 U.S. Dist. LEXIS 111928, at *6 (E.D. Mo. Dec. 2, 2009) (declining to apply the common interest doctrine to communications to and from a company who "is not a party to this litigation").


⁶ *Id.* at *18-19.*

⁷ *Campbell v. Dastoor*, 79 Va. Cir. 569, 572 (Va. Cir. Ct. 2009) ("Defendant and Dr. Polverino are not co-defendants. Additionally, PCA and Dr. Polverino are not potential parties in this civil action because this suit is covered by a claims made policy issued to PCA. Thus, the ‘common interest’ doctrine does not apply.").
courts have undertaken the same analysis for each participant in a claimed common interest agreement.\(^8\)

This approach creates enormous uncertainty, because if one participant in a common interest agreement falls short of meeting whatever standard that court sets, presumably no participant in the common interest arrangement can successfully claim privilege.

In essence, this involves what could be called a "weakest link" concept. If ten participants enter into a common interest agreement and begin to exchange privileged communications, such a disclosure presumably would destroy the privilege if any of the ten participants fell short of meeting the exacting standards of the common interest doctrine. That "weakest link" would be a stranger to the privilege, just like any other third party. Sharing work product among the participants normally would not have this ill effect. This is because even though the participant falling short of the common interest doctrine standard would be a third party, he or she would not be an unfriendly third party.

Unfortunately, some courts applying this standard use ambiguous language. Courts applying the common interest doctrine to participants who only anticipate litigation frequently use phrases such as the following in analyzing the protection:

\(^8\) Square D Co. v. E.I. Elecs., Inc., 264 F.r.D. 385, 391 (N.D. Ill. 2009) (explaining that common interest "must relate to a litigation interest," and "there is no indication that Siemens is facing any threat of suit."); FTC v. Think All Pub'lgs, L.L.C., Case No. 4:07-cv-011, 2008 U.S. Dist. LEXIS 18623, at *3-4 (E.D. Tex. Mar. 11, 2008) ("The FTC states 'all that matters is that there is the potential for an action to have been brought' against one of these Defendants involving issues common to both the instant and hypothetical lawsuits. . . . Under this view, the joint defense doctrine would potentially be as expansive as the imagination of the lawyer who asserts it. Moreover, and more importantly, the FTC's invocation of the joint defense privilege is inadequate under the rubric enunciated by the Fifth Circuit Court of Appeals. The FTC has not even stated that a third party from which it received documents requested by the Defendants anticipates or could potentially anticipate litigation against the Defendants on issues surrounding this lawsuit.").
The weight of authority does not require that there be actual litigation in progress for the common interest doctrine to apply.\textsuperscript{9}

This type of statement makes sense, but could be easily overread. It is one thing for a court to state that a participant in a valid common interest agreement does not need to be an actual party in ongoing litigation, but it is another to provide protection for communications to and from a participant who does not anticipate being involved in litigation.

Courts demanding that each participant establish involvement in, or anticipated involvement in, litigation must obviously then determine what level of "anticipation" will suffice. Variations in courts' standards create uncertainty, which is compounded by the fact that common interest participants who are not already in litigation will have a difficult time predicting where litigation might begin. Thus, they probably will not know what court will ultimately analyze whether each participant has established the necessary anticipation of litigation, and therefore will have no certainty about whether each participant will meet that standard.

Courts have articulated the following degree of anticipation required before participants in a common interest arrangement may have protected communications:

- Substantial possibility of litigation;\textsuperscript{10}
- Strong possibility of future litigation;\textsuperscript{11}

\begin{itemize}
  \item \textsuperscript{9} FSP Stallion 1, LLC v. Luce, Case No. 2:08-cv-01155-PMP-PAL, 2010 U.S. Dist. LEXIS 110617, at *58 (D. Nev. Sept. 30, 2010).
  \item \textsuperscript{10} Niagara Mohawk Power Corp. v. Megan-Racine Assocs, Inc. (In re Megan-Racine Assocs., Inc.), 189 B.R. 562, 574 (Bankr. N.D.N.Y. 1995) ("[T]he parties asserting the [joint defense] privilege must demonstrate that a substantial probability of litigation existed at the time the material sought to be protected was created.").
  \item \textsuperscript{11} Metro Wastewater Reclamation Dist. v. Cont'l Cas. Co., 142 F.R.D. 471, 479 (D. Colo. 1992).
\end{itemize}
• Palpable threat of litigation;\textsuperscript{12}

• Realistic basis for believing that the participant will be a party;\textsuperscript{13}

• Threatened litigation;\textsuperscript{14}

• Anticipated litigation;\textsuperscript{15}

• More than a "fear" of a lawsuit (which the court said was a "concern shared by most -- if not all -- corporations.");\textsuperscript{16}

• Some prospect of litigation;\textsuperscript{17}

\textsuperscript{12} Power-One, Inc. v. Artesyn Techs., Inc., Civ. A. No. 2:05cv463, 2007 U.S. Dist. LEXIS 28630, at *5 (E.D. Tex. Apr. 18, 2007) ("[T]he Fifth Circuit appears to generally require a 'palpable threat of litigation at the time of the communication.'" (citation omitted)); \textit{In re Santa Fe Int'l Corp.}, 272 F.3d 705, 714 (5th Cir. 2001) ("[W]hen the threat of litigation is merely a thought rather than a palpable reality, the joint discussion is more properly characterized as a common business undertaking, which is unprivileged, and certainly not a common legal interest" (internal citation omitted)).

\textsuperscript{13} Chan v. City of Chicago, 162 F.R.D. 344, 346 (N.D. Ill. 1995) ("The rule is well established that parties facing a common litigation opponent may share privileged communications without waiving the privilege that each would hold . . . . It would seem, however, that there must be some realistic basis for believing that someone will become a joint defendant before a joint defense privilege can arise.").

\textsuperscript{14} Stenovich v. Wachtell, Lipton, Rosen & Katz, 756 N.Y.S.2d 367, 378 (N.Y. Sup. Ct. 2003) ("The common interest privilege applies to parties facing common problems in pending or threatened civil litigation. However, the privilege is limited to communications between counsel and parties with respect to legal advice in pending or reasonably anticipated litigation in which the joint consulting parties have a common legal interest. It does not protect business or personal communications.").

\textsuperscript{15} Allied Irish Banks, p.l.c. v. Bank of Am., N.A., 252 F.R.D. 163, 175 (S.D.N.Y. 2008) ("New York law appears to restrict the doctrine to communications with respect to legal advice in pending or reasonably anticipated litigation." (citation omitted)); Coachmen Indus. Inc. v. Kemlite, Cause No. 3:06-CV-160 CAN, 2007 U.S. Dist. LEXIS 82196, at *11-12 (N.D. Ind. Nov. 2, 2007) ("This Court finds that the better approach to determine whether there is a common interest is to evaluate the totality of the circumstances between the parties. A non-exhaustive list of factors this Court will consider are: 1) whether the interest is actually a legal interest, 2) whether the parties are or anticipate being engaged in litigation"); Am. Legacy Found. v. Lorillard Tobacco Co., C. A. No. 19406, 2004 Del. Ch. LEXIS 157, at *11 (Del. Ch. Nov. 3, 2004).

\textsuperscript{16} LG Elecs. U.S.A., Inc. v. Whirlpool Corp., 661 F. Supp. 2d 958, 966 (N.D. Ill. 2009) ("Whirlpool's position that fear of lawsuit, alone, justifies a common legal interest has no cognizable boundaries and runs the risk of allowing the common interest exception to swallow the rule. Fear of lawsuit is a concern shared by most -- if not all -- corporations, and it is not clear that this fear justifies the common interest exception articulated by the Seventh Circuit.").

\textsuperscript{17} Gonzales v. United States, No. C-08-03189 SBA (EDL), 2010 U.S. Dist. LEXIS 52950 (N.D. Cal. May 4, 2010) ("The joint defense doctrine protects communications between the parties where they are 'part of an on-going and joint effort to set up a common defense strategy' in connection with actual or prospective litigation." (citation omitted)); \textit{Fed. Election Comm'n v. Christian Coal.}, 178 F.R.D. 61, 73 (E.D. Va.) ("In every case cited by the Fourth Circuit to support its broad reading of the privilege in \textit{Under Seal}, both parties claiming the common interest privilege were involved in some type of litigation. It is true that the prospect for litigation could be so remote that it involved 'potential co-parties to prospective
• Potential litigation;\(^{18}\)
• Contemplated litigation;\(^{19}\)
• Facing no immediate threat of litigation.\(^{20}\)

At least one court has applied the same "anticipation of litigation" standard in analyzing a common interest agreement that it would use in analyzing a work product claim.\(^{21}\) Requiring the same "anticipation of litigation" for a viable common interest agreement as that required for the work product doctrine protection removes one variable as clients and their lawyers contemplate the possibility of a common interest agreement. Although courts vary dramatically on the type of "anticipation" required for the work product protection, at least tying the common interest doctrine analysis into that case law makes it somewhat easier for litigants and those who fear litigation.

On the other hand, equating the anticipation of litigation requirement in the context of the work product doctrine and the common interest doctrine might trigger the litigation, but the prospect of litigation still had to be there." (citation omitted); finding the common interest doctrine inapplicable), aff'd in part, modified in part, 178 F.R.D. 456 (E.D. Va. 1998).

\(^{18}\) United States v. Dose, No. CR04-4082-MWB, 2005 U.S. Dist. LEXIS 526, at *47, *49 (N.D. Iowa Jan. 12, 2005) ("Such an agreement is present only when parties to actual or potential litigation enter into an agreement to exchange information for the purpose of advancing their common interest."); finding no joint defense agreement, "either express or implied"); In re Grand Jury Subpoena, 274 F.3d 563, 575 (1st Cir. 2001) ("[A] joint defense agreement may be formed only with respect to the subject of potential or actual litigation").

\(^{19}\) Beyond Sys., Inc. v. Kraft Foods, Inc., Civ. A. No. PJM-08-409, 2010 U.S. Dist. LEXIS 40423 (D. Md. April 23, 2010) ("Lithigation under a common interest agreement may be actual, pending or contemplated against a common adversary."); United States v. Under Seal (In re Grand Jury Subpoenas 89-3 & 89-4, John Doe 89-129), 902 F.2d 244, 249 (4th Cir. 1990) ("Whether an action is ongoing or contemplated, whether the jointly interested persons are defendants or plaintiffs, and whether the litigation or potential litigation is civil or criminal, the rationale for the joint defense rule remains unchanged: persons who share a common interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims.").

\(^{20}\) United States v. Zolin, 809 F.2d 1411, 1417 (9th Cir. 1987) ("Even where the non-party who is privy to the attorney-client communications has never been sued on the matter of common interest and faces no immediate liability, it can still be found to have a common interest with the party seeking to protect the communications.").

frightening prospect that participants in a common interest agreement must start preserving pertinent documents if they claim that they anticipated litigation at the time.

Fourth, some courts hold that the common interest doctrine can protect communications to and from a participant who itself might not be involved in or anticipate being involved in litigation, but who has a common interest with another participant who is in litigation or anticipates being in litigation. This is a significantly different standard from the approach described immediately above, in which each common interest participant must itself anticipate being in litigation. If a court insists on some connection between litigation and the common interest agreement, this approach makes the most sense.

In some situations, courts have applied this approach to protect communications between a party and a non-party who never had a realistic fear of being sued. For instance, the Fourth Circuit recognized that the United States Government could enter into a valid common interest agreement with the maker of smartphones whose

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22 In some situations, it can be difficult to analyze whether courts really mean what they say. For instance, in 2009 the Eastern District of New York explained that the common interest doctrine “may also cover non-parties after an action has been commenced.” Am. Eagle Outfitters, Inc. v. Payless Shoesource, Inc., No. CV 07-1675 (ERK) (VVP), 2009 U.S. Dist. LEXIS 105608, at *5 (E.D.N.Y. Nov. 12, 2009). That court cited an earlier Northern District case. Lugosch v. Congel, 219 F.R.D. 220 (N.D.N.Y. 2003). That earlier decision answered with “an unreserved affirmative” the question of whether “a non-party to the litigation can join a joint defense agreement, receive all of the benefit inured under such agreement, and be obligated to the same degree as the co-parties.” Id. at 238. However, that 2003 decision’s analysis explained what it meant.

[T]he joint defense privilege should not be so narrowly construed to be limited solely to co-parties as long as the parties sharing the information have the same reasonable expectation of a shared legal bond and the anticipation of litigation is present.

Id. (emphasis added).

The 2003 decision then explained that “the real prospect of litigation may be a sufficient basis to form a joint defense agreement almost at any stage where litigation is feared,” and then used the “palpable likelihood of litigation” standard. Id. Given this analysis, the 2009 American Eagle conclusion presumably rests on at least some of the common interest participants’ anticipation of litigation to a certain degree.
shutdown could dramatically affect the government, even though the government showed no signs of entering the litigation as plaintiff and certainly would not have been a defendant.23

Interestingly, in a two-week period, different courts explained the logic for this approach as it involves plaintiffs and defendants. In one case, the Central District of California analyzed a common interest agreement between a copyright owner and a royalty income recipient. The court found that they could share a common interest, even though one of them did not expect to be a plaintiff in the action that the other brought.

There may be all sorts of reasons, however, why one party and not another chooses to pursue litigation, even if they share common legal interests: one party may be willing to front expenses, and another not; one party may have a different assessment from another of the likelihood of a positive result, or the extent, or enforceability of any recovery; one party, but not another, may have other business relationships with third parties which, in its judgment, counsel against pursuing litigation; one party may find settlement terms palatable, while another party does not. The fact that different considerations may animate different strategies does not gainsay that the legal interests align. . . . [T]he fact that parties may have inchoate adverse interests does not mean that they do not share legal interests. The fact that Plaintiffs have chosen to sue and, so far, UPIP has not, does not itself establish an adverse interest, because, among other things, Plaintiffs are not dependent upon UPIP’s suing in order to seek recovery; the statute gives them standing to sue by themselves, and therefore they can seek recovery without UPIP’s having done so.24

23 Hunton & Williams v. United States DOJ, 590 F.3d 272 (4th Cir. 2010).
In the other case, the Southern District of Florida explained why a possible defendant could participate in a common interest agreement even if it was not ultimately sued.

[D]espite Plaintiff's arguments to the contrary, the fact that Tabyana was not ultimately named in this suit, and the fact that NCL has asserted that Tabyana bears full responsibility, does not change their common interest at the time the report was shared with NCL. If the position Plaintiff urges is adopted, then litigants could always obtain joint defense materials that were shared confidentiality between aligned potential or actual parties by either dismissing one party from the case, or not naming all of the possible defendants to a particular action. Similarly, the fact that Tabyana Tours arguably cannot now be named as a defendant in this litigation because the statute of limitations has elapsed does not lift the work product protection veil from the Tabyana Incident Report.\(^{25}\)

Other courts have also taken this common-sense approach.\(^{26}\) This analysis makes great sense, because it would prevent the sort of mischief several courts have warned against.

**Fifth**, some courts apply the common interest doctrine in the absence of any litigation or anticipated litigation.

\(^{25}\) Fojtasek v. NCL (Bahamas) Ltd., 262 F.R.D. 650, 656 (S.D. Fla. 2009).

\(^{26}\) Cooev v. Strickland, 269 F.R.D. 643, 652 (S.D. Ohio 2010) (“It is not necessary that a common legal interest be derived from legal action; it is possible for two or more parties to share a common interest without becoming parties to the same litigation.”); Pampered Chef v. Alexanian, 737 F. Supp. 2d 958, 965 & n.5 (N.D. Ill. 2010) (“Although originally limited in application to co-defendants, the Seventh Circuit permits both potential parties and parties who are not otherwise joined in litigation to assert the ‘common legal interest’ privilege, even where it is not anticipated that the party will be sued in the future.”); “The privilege does not require that the interest be in litigation or that litigation be actual or imminent for communications to be privileged. . . . So, the fact that Ms. Salela is not a defendant in this case – which plaintiff suggests scotches the common interest doctrine . . . – does not matter.”); Am. Eagle Outfitters, Inc. v. Payless Shoesource, Inc., No. CV 07-1675 (ERK)(VVP), 2009 U.S. Dist. LEXIS 105608, at *5 (E.D.N.Y. Nov. 12, 2009) (“The rule may be invoked whether or not an action has been commenced . . . and may also cover non-parties after an action has been commenced.”).
The common interest doctrine developed in criminal litigation and eventually spread to civil litigation. However, nearly every court requires there to be some litigation or anticipated litigation.

This was not always easy to tell, because courts recognizing that participants could enjoy the common interest doctrine protection in the absence of pending litigation often stated that principle in a somewhat ambiguous way. Some courts indicating that a common interest agreement can be effective in the absence of any litigation do not really mean that, but instead mean that the agreement can be effective in the absence of current ongoing litigation. In other words, these courts simply state that anticipated rather than ongoing litigation can support a common interest agreement. However, their shorthand way of explaining this might seem to offer common interest agreement protection in the absence even of anticipated litigation.

As it frequently does, the Restatement takes an extremely broad view of the availability of the common interest doctrine protection.

If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged . . . that relates to the matter is privileged as against third persons. Any such client may invoke the privilege, unless it has been waived by the client who made the communication.27

The phrase "nonlitigated matter" certainly sounds like a situation in which none of the participants anticipates being in litigation, rather than just a situation where there was no current ongoing litigation.

Some courts have articulated a standard that does not seem to require even anticipated litigation. In 2007, the Seventh Circuit was the first to take this position.

[C]ommunications need not be made in anticipation of litigation to fall within the common interest doctrine. . . . The weight of authority favors our conclusion that litigation need not be actual or imminent for communications to be within the common interest doctrine. At least five of our sister circuits have recognized that the threat of litigation is not a prerequisite to the common interest doctrine.28

A quick look at these “five of our sister circuits” shows that the court’s reliance on them is shaky at best.29

Approximately two weeks later, the Third Circuit was even more explicit.

[T]he community-of-interest privilege allows attorneys representing different clients with similar legal interests to share information without having to disclose it to others. It applies in civil and criminal litigation and, even in purely transactional contexts.30

Since then, a number of other courts have taken the same position.31

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28 United States v. BDO Seidman, LLP, 492 F.3d 806, 816 & n.6 (7th Cir. 2007).
29 In re Grand Jury Subpoena (Custodian of Records, Newparent, Inc.), 274 F.3d 563, 572 (1st Cir. 2001) simply says that the common interest “privilege sometimes may apply outside the context of actual litigation.” In re Regents of Univ. of Cal., 101 F.3d 1386, 1390-91 (Fed. Cir. 1996) talks about “pre-litigation advice” that might be sought and obtained outside the “shadow of litigation.” United States v. Schwimmer, 892 F.2d 237, 244 (2d Cir. 1989) simply states that it is “unnecessary that there be actual litigation in progress for the common interest rule” to apply. United States v. Aramony, 88 F.3d 1369, 1392 (4th Cir. 1996) says essentially the same thing -- “it is unnecessary that there be actual litigation in progress for this privilege to apply.” United States v. Zolin, 809 F.2d 1411, 1417 (9th Cir. 1987), aff’d in part and vacated in part on other grounds explains that a common interest participant does not need to face “immediate liability,” although the case discusses the “paradigm” as involving participants facing “possible indictment.”
30 Teleglobe Commc’ns Corp. v. BCE (In re Teleglobe Commc’ns Corp.), Inc., 493 F.3d 345, 364 (3d Cir. 2007).
31 Leslie Controls, Inc., 437 B.R. 493, 496 (Bankr. D. Del. 2010) (“T]he common interest doctrine ‘applies whenever the communication is made in order to facilitate the rendition of legal services to each of the clients involved in the conference.’” (citation omitted)); Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., Inc., 870 N.E.2d 1105, 1110 (Mass. 2007) (“Courts have said that the common interest doctrine is not limited to litigation or impending litigation.”); quoting the Restatement, which recognizes the applicability of the common interest doctrine in a “nonlitigated matter”); Baden Sports, Inc. v. Kabushiki Kaisha Molten, No. CV06-0210 MJP, 2007 U.S. Dist. LEXIS 29334, at *3 (W.D. Wash. Apr. 20, 2007)
In 2010, the Southern District of New York indicated that the Department of Treasury and the New York Federal Reserve Board could share a common interest, noting that "[a]lthough the doctrine is most frequently applied in the context of litigation, it also has been successfully invoked with respect to joint legal strategies in non-litigation settings." \(^{32}\)

Interestingly, few courts seem to have precisely articulated the type of common interest that will successfully support a common interest agreement in a transactional setting. In 2010, a Delaware court found that the common interest doctrine applied in what the court called a "transactional context," explaining that in such a context "'common interest' has been defined 'so parallel and non-adverse that, at least with respect to the transaction involved, [the two parties] may be regarded as acting as joint venturers." \(^{33}\) The court then explained what interests the two transactional parties had in the case pending before the court.

Newco and Huawei appear to have had a common interest in obtaining CFIUS [Committee on Foreign Investment in the U.S.] approval and seeing the merger to its completion. The two companies, however, had adverse interests both in negotiating the Side Letter and in determining, if necessary, responsibility for the Merger Agreement's termination.

("The common interest extension of the privilege is available irrespective of litigation, begun or contemplated."); Zolin, 809 F.2d at 1417 ("Even where the non-party who is privy to the attorney-client communications has never been sued on the matter of common interest and faces no immediate liability, it can still be found to have a common interest with the party seeking to protect the communications."); finding that the common interest doctrine protected from disclosure communications between the defendant and representatives of a co-defendant church); Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1172 (D.S.C. 1974) ("The third parties receiving copies of the communication and claiming a community of interest may be distinct legal entities from the client receiving the legal advice and may be a non-party to any anticipated or pending litigation.").


Because of their potentially conflicted relationship, the Court will review the challenged communications in camera to determine Newco and Huawei’s position vis-à-vis one another at the time each challenged communication was made. If the parties were in common interest with respect to the matters addressed, the communication will remain privileged.34

Despite the clarity of this language, it still seems too early to see this as a trend. It certainly makes sense to apply common interest protection to parties in a transaction who anticipate some litigation with a third party over the transaction. Similarly, it seems logical to apply the doctrine to communications between transactional parties if one of the parties will essentially "inherit" the other party's litigation or litigation risk. Of course, in that case, the common interest doctrine might not be necessary because the parties would almost surely be exchanging work product.

However, applying common interest protection in other purely transactional contexts seems to create a privilege protection without limits. Parties to a transaction always share a common interest in consummating the transaction, but it is difficult to imagine that such a common interest would satisfy the fairly exacting requirements of a common interest doctrine. In fact, that sort of common interest often fails to satisfy courts’ standards.

In any event, it will be interesting to see if other courts follow the two circuits and several other courts’ approach in expanding the common interest doctrine so that it includes purely transactional settings in the absence of anticipated litigation.

34 Id. at *32-33 (footnote omitted).
Type of Common Interest that Can Support a Common Interest Agreement.

As with other areas of the common interest doctrine, courts disagree about the type of common interest that justifies the privilege protection.

The Restatement takes a predictably liberal approach, indicating that the common interest "may be either legal, factual, or strategic in character." A few courts seem to take an equally broad view. For instance, one court held that the common interest doctrine covered communications between a patent developer and a patent licensee, because "[b]oth parties had the same interest in obtaining strong and enforceable patents."

Most courts are far more restrictive.

First, it is clear that the interest must be legal rather than primarily business or financial. For instance, the District of Nevada explained in 2010 that "for the common interest doctrine to apply, the parties must share a common legal interest, rather than a commercial or a financial interest."

Courts have used various terms to describe the type of common legal interest that must underlie a common interest arrangement:

- Common legal strategy,
- Common legal interest,

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36 In re Regents of Univ. of Cal., 101 F.3d 1386, 1390 (Fed. Cir. 1996).

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• Coordinated legal strategy.\textsuperscript{40}

Common interest participants nearly always define (or at least mention) their common legal interest when entering into a common interest agreement, so this requirement is fairly easy to articulate. It is also so ambiguous as to be difficult for an adversary to challenge. Therefore, this requirement usually creates problems only for common interest participants who are not careful enough to use those terms in the agreement itself.

Second, the majority view focuses on the litigation element. Many courts recognize the common interest doctrine only when the participants are in or anticipate litigation. In those courts, common interest participants who are not already in litigation must obviously try to fit themselves within the courts' doctrine. Not surprisingly, lawyers frequently try to mention litigation as they articulate the common interest, but courts often reject such efforts. For instance, in 2010 the District of Nevada explained the approach that most courts take.

\textit{[T]he common interest doctrine does not apply simply because the parties are interested in developing a business deal that complies with the law, and a common goal to avoid litigation. A desire to comply with applicable laws and to avoid litigation does not transform their common interest and enterprise into a legal, as opposed to a commercial, matter.}\textsuperscript{41}

\textsuperscript{41} FSP Stallion 1, 2010 U.S. Dist. LEXIS 110617, at *67-68.
Thus, common interest participants usually cannot assure success by pointing to a common desire to avoid litigation or a concern about possible litigation. This is similar to the general inapplicability of the work product doctrine to documents created in an effort to avoid litigation. This element obviously mirrors the pertinent court’s insistence on some connection to litigation. Essentially, it can prevent those hoping to arrange a common interest agreement from obtaining the desired protection merely by mentioning “litigation” in some way.

Third, even if the common interest participants can point to litigation or anticipated litigation underlying their agreement, they must also explain how their common interest relates to that litigation. As one court put it, common interest agreements must be based on more than simply the participants’ “desire to succeed in an action.” Instead, the participants generally must prove that they were engaged in joint strategizing about the litigation or anticipated litigation.

Because most courts have not abandoned the litigation requirement for common interest agreements, it is difficult to know what interest will successfully support a common interest agreement. It would seem remarkably easy to articulate some common legal interest in connect with a transaction, which perhaps is one reason why other courts have not rushed to drop the litigation requirement.

To the extent that common interest participants try to satisfy whatever standard they think a court will apply, the case law at least provides some of the “magic words”

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42. TIFD III-E Inc. v. United States, 223 F.R.D. 47, 50 (D. Conn. 2004) (“The rule does not encompass a joint business strategy that merely happens to include as one of its elements a concern about litigation.”).

that the participants can add to their common interest agreement. However, even that does not bring any certainty. First, the participants usually do not know what court ultimately will judge the efficacy of their agreement. Unless they can identify a likely adversary who would challenge their privilege assertions in some later litigation, the participants will probably have no way of knowing where the challenge will come. Second, courts’ terminology is so vague that even using a court’s own language is not likely to absolutely assure the desired protection. All of this points to the great risks of relying on a common interest agreement in seeking privilege protection, and the wisdom of also considering a joint representation.

Clients and their lawyers must assess the common interest doctrine in light of many courts’ insistence that the doctrine applies only when the participants are in or anticipate litigation. To the extent that the court requires the participants to demonstrate that they are either in or anticipate litigation, it should not be necessary to also require an exact correlation between the participants’ interests. Courts should be able to rely on litigants’ own enlightened self-interest in disclosing protected communications or materials to others. As a practical matter, a litigant will not share protected communications or materials with someone who does not share at least some common strategic interest. Thus, it might have made sense to examine the commonality of interests when the participants did not also have to demonstrate that they were in or reasonably anticipated litigation, but the majority of courts’ application of the litigation element essentially moots the commonality issue.
Courts disagree about the required degree of commonality of interests among the participants. As with other areas of this doctrine, courts’ different approaches are on a continuum.

At one end of the spectrum, some courts articulate the requirement that the common interest participants’ interests be identical. Many courts take this approach. For obvious reasons, this is a very difficult standard to meet. Even joint clients’ interests are not always “identical.” If common interest participants’ interests came close to meeting that exacting standard, presumably the same lawyer would represent all of them in a joint representation, with no need for the riskier common interest arrangement.

These courts probably mean that the participants’ interests must be identical in the areas in which they are common. In other words, there must be at least some interests that are exactly the same among the participants, even if they disagree about other interests. This is a more logical meaning of the term “identical.”

Other courts explicitly reject the need for common interest participants to have an identical interest. For instance, in 2010 the Western District of Oklahoma applied New York law in explaining that

\[
\text{[w]hile some courts require that the legal interest between the parties be identical rather than simply similar . . ., other}
\]

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courts have found that "a total identity of interest among the participants is not required under New York law. Rather, the privilege applies where an 'interlocking relationship' or a 'limited common purpose' necessitates disclosure to certain parties."\(^{45}\)

Similarly, the Fourth Circuit's application of the common interest agreement in the context of the United States Government's desire to avoid shutdown of its employees' BlackBerries found that the government's interest was not exactly the same as the manufacturer's interests.

It does not matter that RIM was motivated by the commercial benefit that would accrue to it if it succeeded in opposing the BlackBerry injunction while the government was motivated by concern for the public interest. What matters is that there was a unity of interest in preserving a non-disruptive pattern of governmental BlackBerry use, and RIM and DOJ could rely on one another's advice, secure in the knowledge that privileged communications would remain just that.\(^{46}\)

At the other end of the spectrum, some courts hold that actual current adversaries can engage in a common interest agreement.

Such a broad approach makes sense in the case of transactional adversaries facing some litigation threat. For instance, one court applied the common interest doctrine in protecting communications between opposite sides of a corporate acquisition because the companies shared a common interest in dealing with the acquired company's asbestos litigation liabilities.\(^{47}\)

Thus, some courts have honored common interest agreements between participants facing a common adversary while disagreeing about their relative liability.


\(^{46}\) Hunton & Williams v. United States DOJ, 590 F.3d 272, 282-83 (4th Cir. 2010).

In 2009, the Eastern District of New York indicated that co-defendants could enter into a common interest agreement despite the inherent adversity caused by their disagreement about one's indemnity obligation to the other.

Given their mutual interest in the overall outcome of the litigation, it serves the purpose of the common interest rule to permit Payless and Jimlar to obtain its protection notwithstanding that they may disagree about a collateral matter, i.e., the scope of their respective obligations under the indemnity provision. 48

Similarly, in 2010 the Eastern District of Wisconsin held that two defendants being sued by a plaintiff could enter into a common interest agreement despite the defendants' simultaneously entering into arbitration "to determine the relative fault between themselves." 49

In advance of the arbitration, Defendants signed a joint defense agreement and agreed to share confidential and privileged materials between each other so that an arbitrator could determine relative fault between the two parties. This agreement was made with the understanding that the information disclosed would not lose any privileges and would not be subject to discovery by the Plaintiffs. The Defendants argue that this agreement to privately arbitrate a dispute between themselves entitles them to what is known as a 'community of interest' privilege. 50

In another case, a debtor which had not yet declared bankruptcy negotiated with a creditor in an effort to determine how to maximize recovery from insurance companies. The court rejected the insurance companies' argument that the debtor and the creditor could never enter into a common interest agreement.

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50 Id. at *4.
The Insurers argue, in effect, for establishment of a per se rule that parties engaged in negotiations can never share a common interest. While there are cases that support this argument, they are not universal. For example, the Third Circuit has held that parties engaged in merger negotiations may share a common interest. This Court believes that the imposition of a black-line rule is inappropriate. Rather, commonality must be measured on a case by case basis. \(^{51}\)

Interestingly, the court used several dinner analogies in describing how the debtor and the creditor had a common interest, despite the fact that they were clearly direct adversaries.

In this case, the question is, regardless of the fact that there were ongoing plan negotiations, whether the Debtor shared information with the Ad Hoc Committee and the Pre-Petition FCR that was related to the parties['] common legal interest against their 'common enemy,' the Insurers? The Court finds that they did. The Debtor, the Ad Hoc Committee and the Pre-Petition FCR had a conflicting interest relating to the distribution of the Debtor's assets. Each of those parties clearly desired to obtain the largest share of those assets as possible. However, the parties shared a common interest in maximizing the asset pool, which would include insurance proceeds. To return to the pie analogy, the size of the pie and the size of the pieces are two separate questions. The parties are in accord as to the former and adversaries as to the latter. The information contained in the documents that were shared with the Ad Hoc Committee and the Pre-Petition FCR goes to the size of the asset pool – a matter of common interest. Think of Thanksgiving. Everyone wants the biggest turkey possible (except, perhaps, the chef) but all bets are off when it's time to wrestle over who gets a leg. \(^{52}\)

Courts that do not require an identical interest have articulated the following standards required to support a common interest agreement (moving toward the other

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\(^{52}\) *Id.* at 501-02 & n.37.
end of the spectrum, which permits quite a bit of adversity among the common interest participants).

- When the participants have interests that are nearly identical,\(^{53}\)
- When the participants have a strong identity of interests;\(^{54}\)
- When the participants have "at least a substantially similar legal interest";\(^{55}\)
- When the participants' interests are not entirely congruent;\(^{56}\)
- When the participants do not have interests that are in all respects compatible;\(^{57}\)
- When the participants "may have inchoate adverse interests;"\(^{58}\)
- When the participants might "one day become adversaries";\(^{59}\)
- When participants have "different and potentially adverse interests";\(^{60}\)
- When the participants "are in conflict on some points," as long as they "have agreed to work toward a mutually beneficial goal".\(^{61}\)


\(^{56}\) Restatement (Third) of Law Governing Lawyers § 76 cmt. e (2000) ("The communication must relate to the common interest, which may be either legal, factual, or strategic in character. The interests of the separately represented clients need not be entirely congruent.").

\(^{57}\) United States v. McPartlin, 595 F.2d 1321, 1336 (7th Cir. 1979).


\(^{59}\) Pampered Chef v. Alexanian, 737 F. Supp. 2d 958, 966-67 (N.D. Ill. Sept. 14, 2010) ("The plaintiff contends that the parties to the agreement might one day become adversaries. And so they might. . . . However, the potential for adversity adheres in many situations. It is one that the common interest agreement in this case recognizes, . . ., as does the common interest doctrine, itself. Hence the rule that communications are not privileged in a subsequent controversy between the original parties. . . . More importantly, the possibility of future discord between the parties is analytically irrelevant to the current alignment of their interests. It is enough that the parties presently share a common interest.").


• When the participants have interests that "may even be adverse in some respects".\(^{62}\)

• When the participants have some adverse interests;\(^{63}\)

• When the participants interests are not identical, and even when the parties' interests are adverse in substantial respects;\(^{64}\)

• When the participants have interests that are not completely adverse;\(^{65}\)

• When there is "the possibility of future discord between the parties," which is "analytically irrelevant to the current alignment of their interests";\(^{66}\)

• When the participants anticipate litigating against each other eventually.\(^{67}\)

These decisions display a remarkable range of possibilities. Some courts demand that there be no adversity whatever, while others honor a common interest arrangement if there is any similarity at all in the participants’ interests. This uncertainty dramatically reduces the usefulness of common interest arrangements. Clients and their lawyers must very carefully analyze the risks and rewards of attempting to assert a


\(^{63}\) Am. Eagle Outfitters, Inc. v. Payless Shoesource, Inc., No. CV 07-1675 (ERK)(VVP), 2009 U.S. Dist. LEXIS 105608, at *6-7 (E.D.N.Y. Nov. 12, 2009) ("Although some courts in this circuit have articulated a requirement that the common interest be 'identical' and not merely 'similar,' . . . that requirement has been called into question . . . . Thus, the fact that the parties asserting the rule have some diverging interests does not eradicate, but rather only limits, the scope of the protection it affords."); United States v. Bay State Ambulance & Hosp. Rental Serv., Inc., 874 F.2d 20, 28 (1st Cir. 1989).

\(^{64}\) Value Prop. Trust v. Zim Co. (In re Mortgage & Realty Trust), 212 B.R. 649, 653 (Bankr. C.D. Cal. 1997) ("The common interest privilege does not require a complete unity of interests among the participants. . . . The privilege applies where the interests of the parties are not identical, and it applies even where the parties' interests are adverse in substantial respects. The privilege applies even where a lawsuit is foreseeable in the future between the codefendants.").


\(^{66}\) Pampered Chef v. Alexanian, 737 F. Supp. 2d 958, 967 (N.D. Ill. 2010).

\(^{67}\) Niagara Mohawk Power Corp. v. Megan-Racine Assocs., Inc. (In re Megan-Racine Assocs., Inc.), 189 B.R. 562, 572 (Bankr. N.D.N.Y. 1995) ("In recognizing the exigencies of the joint-defense privilege, courts have not required a total identity of interest among the participants. The privilege applies when a limited common purpose necessitates disclosure to certain parties. Thus, even where a later lawsuit is foreseeable between the co-defendants that does not prevent them from sharing confidential information for the purpose of a common interest.").
common interest doctrine protection. They might also want to consider a joint representation.

**Need for a Lawyer's Participation in Protected Communications.** Courts disagree about the need for a lawyer's participation in a communication deserving protection under the common interest doctrine.

Courts take one of three approaches in analyzing the necessity for a lawyer's involvement.

**First**, some courts appear to hold that the common interest doctrine can broadly protect communications among common interest agreement participants without any lawyer's involvement. For instance, a 2010 Eastern District of New York case indicated that unrepresented individuals can benefit from common interest agreements. An earlier case seemed to indicate that common interest participants can communicate among themselves without a lawyer's involvement. However, these comments should be taken with a grain of salt. That broad a view of the common interest doctrine would dramatically expand privilege protection.

**Second**, some courts protect communications directly among common interest agreement participants under certain limited conditions. Although the Restatement indicates that an unrepresented party cannot participate in a common interest agreement, it explains that the privilege can protect communications directly between

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68 United States v. Hatfield, No. 06-CR-0550 (JS), 2010 U.S. Dist. LEXIS 4026, at *18 (E.D.N.Y. Jan. 8, 2010) (“[A]s joint defense agreements exist between the parties, not the attorneys, unrepresented individuals can enter into and benefit from these kinds of agreements.”).

69 United States v. Under Seal (In re Grand Jury Subpoenas 89-3 & 89-4, John Doe 89-129), 902 F.2d 244, 249 (4th Cir. 1990) (“[P]ersons who share a common interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims.”).

\[39772178.2\]
the clients if the communications were "made for the purpose of communicating with a privileged person." 70 For communications meeting that standard, the Restatement explains "any member of a client set — a client, the client's agent for communication, the client's lawyer, and the lawyer's agent . . . — can exchange communications with members of a similar client set." 71 In 2008, well-respected Southern District of New York Magistrate Judge James Francis indicated that such direct participant communications deserve protection if one of the participants relays a lawyer's advice to another participant. 72 Similarly, a circuit court explained that "[e]ven if we assume that the joint-defense privilege shields some communications between co-defendants made outside of counsel's presence, it would apply only if the communications were made pursuant to specific instructions by the lawyer." 73 Other courts have taken a similar approach. 74

Third, some courts apply what appears to be a per se rule requiring a lawyer's participation in the communications in order for them to deserve common interest

71 Id.
74 John B. v. Goetz, No. 3:98-0168, 2010 U.S. Dist. LEXIS 8821, at *296 (M.D. Tenn. Jan. 28, 2010) ("The joint-defense privilege shields some communications between co-defendants made outside of their counsel's presence, but only if the communications were pursuant to specific instructions of their counsel."); Zitzka v. Westmont, No. 07 C 0949, 2009 U.S. Dist. LEXIS 41081, at *6 (N.D. Ill. May 13, 2009) ("Importantly for our purposes here, the common interest doctrine may apply in certain circumstances to communications between two non lawyers who are both covered by the common interest."); Rembrandt Techs. L.P. v. Harris Corp., C.A. No. 07C-09-059-JRS, 2009 Del. Super. LEXIS 46, at *30 (Del. Super. Ct. Feb. 12, 2009) ("The Court finds that separately represented clients sharing a common legal interest may, at least in certain situations and under the close supervision of counsel, communicate directly with one another regarding that shared interest.").
Some courts adopting such a restrictive approach have applied it in circumstances that other courts would find eligible for protection. For instance, one court refused to protect communications by one participant's executive directly to another participant's executive even though the executive had first discussed a matter with his own attorney before calling his counterpart at the other participating company. Another court held that what it called the "joint defense" privilege did not protect direct communications between clients. As that court explained:

[S]ince communications directly between National Union and Zurich were never privileged, they cannot become privileged by virtue of the joint defense privilege. Such communications would be privileged only if they were made to their respective counsel and then shared by counsel with the other attorneys or their clients. In short, direct communications between or among various clients do not become privileged by the joint defense privilege; rather, privileged communications with counsel that are transmitted

75 Cooey v. Strickland, 269 F.R.D. 643, 653 (S.D. Ohio 2010); In re Outsidewall Tire Litig., Case No. 1:09cv1217, 2010 U.S. Dist. LEXIS 67578 (E.D. Va. July 6, 2010); Cooper Health Sys. v. Virtua Health, Inc., 259 F.R.D. 208, 214 (D.N.J. 2009) ("Further, the privilege does not extend to communications between non-attorneys who simply have a joint interest. The community of interest privilege is applicable to communications amongst attorneys, 'to be eligible for continued protection, the communication must be shared with the attorney of the member of the community of interest.'" (citation omitted)); Post v. Killington, Ltd., Case No. 2:07-cv-252, 2009 U.S. Dist. LEXIS 6399, at *18 (D. Vt. Jan. 14, 2009) ("There is no basis under Vermont law, given a clear rule and the admonition to construe the rule narrowly, to conflate the two provisions of the rule and extend the attorney-client privilege to communications among representatives of different corporate clients in the absence of their attorneys or representatives.").


by counsel to joint defense counsel or their clients simply remain privileged through the joint defense privilege.\textsuperscript{78}

The Third Circuit explained the basis for this seemingly harsh rule.

The requirement that the clients' separate attorneys share information (and not the clients themselves) derives from the community-of-interest privilege's roots in the old joint-defense privilege, which (to repeat) was developed to allow attorneys to coordinate their clients' criminal defense strategies. . . . Because the common-interest privilege is an exception to the disclosure rule, which exists to prevent abuse, the privilege should not be used as a post hoc justification for a client's impermissible disclosures. The attorney-sharing requirement helps prevent abuse by ensuring that the common-interest privilege only supplants the disclosure rule when attorneys, not clients, decide to share information in order to coordinate legal strategies.\textsuperscript{79}

Courts' differing approaches to the necessity of a lawyer's involvement adds to the uncertainty surrounding common interest agreements. Because common interest participants will not know when an adversary might challenge the agreement's effectiveness, the safest approach is to communicate only through the lawyers.

**Courts Rejecting Common Interest Agreements' Effectiveness.** Courts have rejected the applicability of the common interest doctrine in many other situations. In some cases the courts have found that one or more of the participants did not have an adequate anticipation of litigation to trigger the doctrine's protection. In other cases, courts have found the common interest doctrine inapplicable because the participants did not share a sufficiently common interest. In some situations, the courts found the doctrine applicable at certain times but inapplicable at other times.


\textsuperscript{79} Teleglobe Commc'ns Corp. v. BCE, Inc. (In re Teleglobe Commc'ns Corp.), 493 F.3d 345, 364-65 (3d Cir. 2007).
Courts have rejected the applicability of the common interest doctrine as asserted by the following participants:

- Debtor and creditor engaging in pre-petition strategizing,\(^80\)
- Company and its litigation finance company assisting in the litigation,\(^81\)
- Government and a qui tam plaintiff,\(^82\)
- Insurance company and insured,\(^83\)
- Corporate audit committee and executive being investigated for wrongdoing,\(^84\)
- City and a property owner,\(^85\)
- Company and its advertising agencies,\(^86\)
- Company and its land purchase agent,\(^87\)

\(^81\) Leader Techs., Inc. v. Facebook, Inc., 719 F. Supp. 2d 373 (D. Del. 2010).
\(^82\) In re Aftermarket Filters Antitrust Litig., Case No. 08 C 4883, MDL Dkt. No. 1957, 2010 U.S. Dist. LEXIS 122111, at *18-20, *22-23 (N.D. Ill. Nov. 18, 2010).
\(^83\) Evansville Greenway & Remediation Trust v. S. Ind. Gas & Elec. Co., Inc., No. 3:07-cv-0066-SEB-WGH, 2010 U.S. Dist. LEXIS 41899 (S.D. Ind. Apr. 28, 2010) (“Even so, the cases cited by SIGECO in support of its contention that insureds and insurers do not possess common interests are inapposite, because they relate to the common interest privilege in the context of the insured/insurer(s) relationship under circumstances where their interests had become adverse. . . . Those cases simply do not apply to a third party’s attempt to obtain documents that were prepared in connection with the insured’s and insurer’s pursuit of their mutual interests.”).
\(^84\) United States v. Hatfield, No. 06-CR-0550 (JS), 2010 U.S. Dist. LEXIS 4026, at *23 (E.D.N.Y. Jan. 8, 2010) (“Mr. Brooks has pointed to no authority suggesting that audit committees can enter into joint defense agreements with the very corporate executives they are supposedly investigating, and the Court’s own research could find none.”).
\(^85\) In re Condemnation of 16,262 Acre Area, 981 A.2d 391, 398 (Pa. Commw. Ct. 2009) (“Far from being co-defendants, the City and the RDA were adverse parties in the present condemnation proceedings. The mere assertion that the parties ‘supported’ each other’s prior, separate, legal pursuits (the City’s request for permission to acquire Parcel C and RDA’s declaratory judgment action), even if proved, sheds no light on the underlying common legal interest allegedly motivating such support.”).
\(^86\) LG Elecs. U.S.A., Inc. v. Whirlpool Corp., 661 F. Supp. 2d 958, 966-67 (N.D. Ill. 2009) (“Examining the communications withheld by Whirlpool, the communications suggest Whirlpool’s firm control over the relationship rather than joint strategy. The documents withheld by Whirlpool paint a picture of Whirlpool’s one-sided control of the advertising strategy pursued by its outside agencies. . . . Extending the exception to Whirlpool’s relationship, based on the information currently before the Court, would permit two companies to argue a common legal interest simply because they routinely deal with one another and neither desires to be sued.”).
Hypotheticals and Analyses

- Company's audit committee and a third party witness;\(^{88}\)
- Company and consultant with a financial state in the success of company transactions;\(^{89}\)
- Litigant and payee of fees;\(^{90}\)
- Government regulator and regulated company;\(^{91}\)
- Bankruptcy trustee and creditor;\(^{92}\)
- Company and board members being investigated for wrongdoing;\(^{93}\)


\(^{88}\) N.Y. City Emps.' Ret. Sys. v. Berry (In re Juniper Networks, Inc. Sec. Litig.), Case Nos. C 06-4327 & 08-00245 JW (PVT), 2009 U.S. District LEXIS 118859, at *9 (N.D. Cal. Dec. 9, 2009) ("In the present case, the Audit Committee has not carried its burden of establishing that the communications that occurred during the Audit Committee’s interview of Fisher were privileged. The communications occurred in the presence of Fisher's attorney (a third party who was not the agent of either Juniper or its attorneys), and the Audit Committee has not shown that the 'joint defense' or 'common interest' doctrine applies.").

\(^{89}\) Ayers Oil Co. v. Am. Bus. Brokers, Inc., No. 2:09 CV 02 DDN, 2009 U.S. Dist. LEXIS 111928, at *5-6 (E.D. Mo. Dec. 2, 2009) ("The record of this action indicates that Fecht has a commercial arrangement with Monroe [president of defendant company] on a transaction-by-transaction basis by which commissions for commercial transactions are shared between them. . . . Fecht and Monroe agreed to divide the labor necessary to complete the brokerage of a sale, with Fecht supplying industry expertise and Monroe completing contractual and financial provisions. . . . Fecht would receive 40% of any brokerage commission earned by ABB. . . . Fecht has no official position with ABB and has never owned any interest in ABB. . . . However, Fecht is not asserting any common claim with ABB, is not a party to this litigation to which the email relates, and shares no common adversary. Therefore, Fecht shares no legal interest in the matter, and stands only to benefit commercially, through a resulting business commission.").

\(^{90}\) Cozzens v. City of Lincoln Park, Case No. 08-11778, 2009 U.S. Dist. LEXIS 64112, at *12 (E.D. Mich. July 24, 2009) ("It was conceded that Mr. Seagraves had no interest in the lawsuit except as it represented a potential source of funds from which a loan made by Mr. Seagraves to Mr. Bednarski could be paid.").

\(^{91}\) Hope for Families & Cmty. Serv., Inc. v. Warren, Case No. 3:06-CV-1113-WKW [WO], 2009 U.S. Dist. LEXIS 5253, at *87 (M.D. Ala. Jan. 26, 2009) ("[O]ne party is the regulator, the other is the regulated; their interests could not be more legally adverse. The fact that they might share, or say they do, the same public policy interests ‘of the best interests of the citizens of Macon County’ does not -- could not -- merge their legal interests as the regulator and the regulated into a common interest.").


\(^{93}\) SEC v. Roberts, 254 F.R.D. 371, 378 n.4 (N.D. Cal. 2008) ("The court notes that not only is the Board not Howrey’s client such that the attorney-client privilege does not attach, the Board also does not have a common interest with the Special Committee since it was the Special Committee's mandate to ascertain whether members of the Board . . . may have engaged in wrongdoing.").
• Company and the government cooperating in an investigation into a third party’s alleged wrongdoing;\(^\text{94}\)
• Inventor of patent and purchaser;\(^\text{95}\)
• Two clients with similar problems;\(^\text{96}\)
• Company and a shareholder;\(^\text{97}\)
• Parties entering into a tolling agreement;\(^\text{98}\)
• Employee plaintiff who settled her case and then shared information with the defendant’s law firm;\(^\text{99}\)
• Litigants coordinating only logistical and scheduling issues;\(^\text{100}\)

\(^\text{94}\) In re Initial Pub. Offering Sec. Litig., 249 F.R.D. 457, 465 (S.D.N.Y. 2008); Reed v. Advocate Health Care, No. 06 C 3337, 2007 U.S. Dist. LEXIS 56245, at *7-8 (N.D. Ill. Aug. 1, 2007) ("[P]laintiffs have failed to show that they have a 'common interest' with the government. The cases cited by plaintiffs in which courts had found no waiver of the work-product privilege are distinguishable because there, the government had a common interest with the sharer of information because it was actively pursuing litigation or at least an investigation against the common adversary. Here, there is no evidence of even a governmental investigation of defendants concerning the nurse wages, let alone any litigation.").


\(^\text{97}\) Infinite Energy, Inc. v. Econnergy Energy Co., Case No. 1:06CV1214-SPM/AK, 2008 U.S. Dist. LEXIS 63493, at *8 (N.D. Fla. July 23, 2008) ("When asked what the common interests of Credit Suisse and Econnergy were in connection with the merger agreement Sprott [deponent] said, 'getting the deal done and selling the company.' . . . And when asked if there were any other interests, he responded 'not that comes to mind.'" (citation omitted)); Net2Phone, Inc. v. eBay, Inc., Civ. A No. 06-2469 (KSH), 2008 U.S. Dist. LEXIS 50451, at *24-25, *29, *29-30 (D.N.J. June 25, 2008) (not for publication) ("Simply because in-house counsel enforced the corporation’s patents, which would benefit its shareholders, does not mean that they shared a legal interest. Put differently, a legal interest cannot arise simply because a company acts in a way that advances the economic interests of its majority shareholder. A logical extension of plaintiff’s argument would expand the application of the common interest doctrine to cover all business transactions where a company acted in the interest of its majority shareholder. While shareholders and the corporation may share an interest in commercial success, this shared economic interest is not a legal interest.").

\(^\text{98}\) AMEC Civil, LLC v. DMJM Harris, Inc., Civ. A. No. 06-064 (FLW), 2008 U.S. Dist. LEXIS 54466, at *8-9 (D.N.J. July 10, 2008) ("Regardless of whether parties have a joint defense strategy, their discussion of possible future litigation between themselves is not a common interest in anticipation of future litigation brought by a third party. . . . The tolling agreement portions of the Agreement refer to adverse, not common[,] interests between DMJM, H&H, and NJDOT, so the common interest privilege is inapplicable, and the tolling portions of the document are indiscoverable.").

• Banks negotiating but not yet agreed upon merger;\(^{101}\)
• Corporation and bidder for the majority of its assets;\(^{102}\)
• Companies working together on a patent;\(^{103}\)
• Company and an executive cooperating in an internal investigation;\(^{104}\)
• Company and the government cooperating in pursuing corporate executive wrongdoers;\(^{105}\)
• Patent assignor and an assignee;\(^{106}\)
• Bank and its investment advisors;\(^{107}\)

\(^{100}\) Avocent Redmond Corp. v. Rose Elecs., Inc., 516 F. Supp. 2d 1199, 1204 (W.D. Wash. 2007) ("But they do not identify any communication between themselves and either their client or Cybex's counsel regarding a joint defense effort or strategy. The fact that they coordinated some of their efforts, like planning the Apex deposition, discussing discovery matters, and attending to other nonsubstantive scheduling matters, appears to be a necessary result of Judge Zilly's decision to combine the cases for pre-trial discovery, rather than a reflection of any joint defense strategy.").

\(^{101}\) Blau v. Harrison (In re JP Morgan Chase & Co. Sec. Litig.), MDL No. 1783, Master Dkt. No. 06 C 4674, 2007 U.S. Dist. LEXIS 60095, at *13-14 (N.D. Ill. Aug. 13, 2007) ("Fundamentally, the Court does not understand how Bank One and JP Morgan can be said to share a common legal interest prior to their signing the merger. Prior to the merger, these organizations stood on opposite sides of a business transaction. From a business standpoint and from a legal standpoint, the merger parties' interests stood opposed to each other. They had no common interest, and indeed, their interests were in conflict – each company wanted to get the best deal from the other company, and to the extent that one succeeded in its goal, the other suffered.").

\(^{102}\) Nidec Corp. v. Victor Co. of Japan, No. C-05-0686 SBA (EMC), 2007 U.S. Dist. LEXIS 48841, at *14-15 (N.D. Cal. July 3, 2007) ("In the instant case, there appears little to indicate that Defendants and the TPG fund might ever engage in joint litigation. The TPG fund was simply considering buying a majority share of JVC. It will not likely become a joint defendant with JVC.").

\(^{103}\) Avago Techs. Gen. IP PTE LTD. v. Elan Microelectronics Corp., Case No. C04-05385 RMW (HRL), 2007 U.S. Dist. LEXIS 24419, at *9-10 (N.D. Cal. Mar. 20, 2007) (not for publication) ("Simply working together with another company on a patent does not guarantee that the common interest exception to waiver will apply.").


• Affiliated corporations trying to assure that one of the corporations received payment;\textsuperscript{108}

• Alleged victim of a fraud and the FBI, which was investigating the fraud;\textsuperscript{109}

• Company and its outside auditor;\textsuperscript{110}

• Licensor and licensee;\textsuperscript{111}

• World Trade Center loan servicer and its insurance advisor;\textsuperscript{112}

• World Trade Center lessee and its insurance broker;\textsuperscript{113}

• Companies jointly lobbying government regulators;\textsuperscript{114}

• Company being investigated by the FTC and its advertising agency;\textsuperscript{115}

• Two companies entering into a license agreement;\textsuperscript{116}

• Company and an investment banker that had not been threatened with litigation;\textsuperscript{117}

• Presidential advisor and the federal government;\textsuperscript{118}


\textsuperscript{113} SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props. LLC, No. 01 Civ. 9291 (JSM), 2002 U.S. Dist. LEXIS 10919, at *14-15 (S.D.N.Y. June 19, 2002) (the insurance broker "is not a party to this litigation, and its legal position will be unaffected by the outcome of this case").


• First Lady and the federal government;\(^{119}\)
• Parties interested in preserving someone's reputation;\(^{120}\)
• Company and its financial advisor;\(^{121}\)
• Party and its "management consultant";\(^{122}\)
• Companies negotiating a merger (before execution of the merger agreement);\(^{123}\)
• Two corporations involved in an arms-length asset purchase;\(^{124}\)
• Company and a prospective buyer of the company.\(^{125}\)

The length and variety of this list highlight the enormous stakes in any dispute over a purported common interest arrangement. The participants cannot seek a declaratory judgment in advance that the privilege will protect communications that they share with each other or communications between them. In each of these situations, the participants presumably thought that they had properly created a common interest arrangement that allowed them to share privileged communications without destroying the privilege. Yet their adversaries successfully argued that the participants were not entitled to that protection. This allowed the adversaries to gain access to all of the

\(^{118}\) In re Lindsey, 158 F.3d 1263, 1279 (D.C. Cir.), cert. denied, 525 U.S. 996 (1998).
\(^{119}\) In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 922 (8th Cir.), cert. denied, 521 U.S. 1105 (1997).
\(^{120}\) United States v. Aramony, 88 F.3d 1369, 1392 (4th Cir. 1996).
shared communications that were intrinsically privileged before disclosure to the other
common interest participants.

Participants who fail to properly create a common interest arrangement because
they did not anticipate litigation presumably can rely on the von Bulow doctrine to
prevent a subject matter waiver caused by disclosure of privileged communications
outside the intimate attorney-client relationship. Clients who fail to properly create a
common interest arrangement because they lacked a sufficiently common interest
(rather than sufficient anticipation of litigation) might not be able to rely on the von
Bulow doctrine. Disclosure to gain some advantage in a judicial setting will often trigger
a subject matter waiver. Although no court seems to have held this, presumably that
rule might apply when co-defendants disclose privileged communications even though
they have interests that are too adverse to support a common interest agreement. To
be sure, one would think that the subject matter waiver doctrine would apply more to
disclosures seeking an advantage in the dispute with the plaintiff rather than one of the
other defendants. Still, there seems to be a theoretical possibility that the court might
not apply the protective von Bulow doctrine. In such a situation, common interest
participants might face the draconian consequence of a subject matter waiver for having
unsuccessfully attempted to create a common interest arrangement. Courts seem not
to have addressed these nuances.

In this hypothetical, the two members negotiating a joint venture arrangement are
clearly adversaries (albeit transactional adversaries). It is difficult to conceive of any
court finding that a common interest agreement could cover their adversarial
negotiations.
• See, e.g., In re Sulfuric Acid Antitrust Litig., 235 F.R.D. 407, 429 (N.D. Ill. 2006) (assessing privilege issues in an antitrust case; finding that the joint defense or common interest doctrine could not apply to a joint venture partner during the negotiation of the joint venture arrangement; "They are still competitors, perhaps more so than partners, and do not share an interest sufficiently common to extend the attorney-client privilege to their discussions."); contrasting that situation with the disclosure of documents after the joint venture arrangement was consummated; "Unlike the September 13, 1999 email from John Hammond (Appendix to Plaintiff's Motion, Ex. 17), this email clearly concerns the Noranda-DuPont joint venture, and concerns a legal matter in which the two companies share a common interest. It reflects legal advice from a DuPont attorney, Jim Higgins, regarding the legal consequences of a proposed course of conduct. The material is appropriately redacted.").

As explained above, the Seventh Circuit recognizes the effectiveness of common interest agreements in the absence of any litigation. Most courts would not follow this approach, and therefore presumably would find that a common interest agreement would not prevent a waiver even after the joint venture began operations.

**Best Answer**

The best answer to this hypothetical is **PROBABLY NO**.
Lawyers' Joint Representation of Their Company and the Joint Venture

Hypothetical 4

Your company and another company created an LLC joint venture, and you would like to jointly represent your client and the LLC. However, that arrangement has prompted you to ask some questions.

(a) May you jointly represent your company and the joint venture?

   YES

(b) If you are not fully licensed in the state where the joint venture will operate, may you jointly represent your company and the joint venture?

   YES (PROBABLY)

(c) Will the attorney-client privilege protect your communications with your company’s employees who have been assigned to the LLC?

   YES

(d) Will the privilege protect your communications with the other member’s employees assigned to the joint venture?

   MAYBE

(e) If your company asks you for a confidential analysis of how it might unwind the joint venture, must you advise the joint venture’s management about that request?

   MAYBE

(f) How do you advise one of your company’s designated LLC board members if the board member asks about the following scenario: the joint venture was hoping to develop a product that would generate profits for both members, but one of the
joint venture's scientists has just developed a product that could be hugely profitable for the joint venture, but would compete directly with one of your company’s main products. Should your company’s designated LLC board member vote to continue developing that product?

**MAYBE**

If you discover that one of your company’s employees assigned to the joint venture has engaged in serious misconduct that might substantially harm the joint venture, must you report that to the joint venture?

**YES (PROBABLY)**

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

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

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

Surprisingly, very few authorities or cases deal with this issue. The ABA Model Rules do not devote much attention to the creation of an attorney-client relationship. The relatively new rule governing "prospective" clients explains the creation of that relationship (ABA Model Rule 1.18(a)) and the absence of that relationship. *Id.* cmt. [2]. The many ABA Model Rule comments dealing with what the rules call a "common
representation" focus on the effects and risks of such a common representation, not on its creation. ABA Model Rule 1.7 cmts. [29]-[33].

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

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

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


Restatement § 14 includes the predictable analysis of such a relationship formation.¹ That section of the Restatement does not even mention joint representations. Thus, the Restatement apparently assumes that a joint representation begins in the same way as a sole representation.

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

¹ Restatement (Third) of Law Governing Lawyers § 14 (2000) ("A relationship of client and lawyer arises when: (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either (a) the lawyer manifests to the person consent to do so; or (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or (2) a tribunal with power to do so appoints the lawyer to provide the services.")
The keys to deciding the scope of a joint representation are the parties’ intent and expectations, and so a district court should consider carefully (in addition to the content of the communication themselves) any testimony from the parties and their attorneys on those areas.

...

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

...

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


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

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


An earlier district court decision listed ten factors.

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


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

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

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

Analyzing these factors often requires a fact-intensive examination of the situation. For instance, as discussed more fully below, the Delaware Bankruptcy Court conducted a hearing focusing on such issues in the Teleglobe case. The court took testimony from the clients and the lawyers involved. The court ultimately determined that there was no joint representation between now-bankrupt corporations and their former parent. Teleglobe USA Inc. v. BCE Inc. (In re Teleglobe Commc's Corp.), 392 B.R. 561, 589, 590 (Bankr. D. Del. 2008).

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

3 Neighborhood Dev. Collaborative v. Murphy, 233 F.R.D. 436, 441-42 (D. Md. 2005) ("What the Court takes exception to is NDC's effort to merge these two principles - to argue, in effect, that a joint representation of Party A and Party B may somehow arise through the expectations of Party B alone, despite Party A's views to the contrary. This position is untenable, because it would, as Defendant Murphy points out, 'allow the mistaken (albeit reasonable) belief by one party that it was represented by an attorney, to serve to infiltrate the protections and privileges afforded to another client.' . . . In other words, NDC suggests that Party A's (Murphy's) attorney-client privilege may be eviscerated by Party B's (NDC's) erroneous belief that it, too, was represented by Party A's counsel (AGG). Unsurprisingly, NDC cites no authority in support of this remarkable proposition. Moreover, NDC's argument runs contrary to the general policy that joint representations of clients with potentially adverse interests should be undertaken only when subject to very narrow limits." (footnote omitted)).
Clients’ Arguments that a Joint Representation Did Not Exist. In some situations, one client has an incentive to claim that a lawyer did not jointly represent it and another client.

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

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

Some large well-known law firms have found themselves dealing with this very troubling situation. For instance, a court ordered Troutman Sanders to produce to

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

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

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

Before remanding to the district court for an assessment of whether a joint representation existed, the Third Circuit provided some very useful guidance. Among

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5 Teleglobe Commc’ns Corp. v. BCE Inc. (In re Teleglobe Commc’ns Corp.), 493 F.3d 345 (3d Cir. 2007).
other things, the Third Circuit explained how the district court should assess the existence of a joint representation (discussed above).

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

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

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the production of a post-transaction document -- Blank Rome’s invoice which referred to
the firm’s pre-transaction work.

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

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

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

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

_Teleglobe Commc’ns Corp_, 493 F.3d at 372-73. Thus, the Third Circuit recognized that

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

_Id_, at 379.

Thus, analyzing the existence of a joint representation involving in-house lawyers can be even
more challenging, because in-house lawyers can enjoy some benefits of a joint representation (the ability
to engage in privileged communications beyond their client/employer’s employees) without actually
establishing a joint representation with those other entities. In _Teleglobe_, the Third Circuit warned that
In contrast, a lawyer representing individuals in the trust and estate setting might be more likely to explain whether the lawyer has an attorney-client relationship with one or more family members.

**Third Parties' Arguments that a Joint Representation Did Not Exist.** While only a handful of courts have dealt with disputes among arguable joint clients about the existence of a joint representation, even fewer courts have addressed a third party's argument that a joint representation did not exist.

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

About the only arguable grounds for a third party's attack on the existence of a joint representation is that the joint clients' interests were so divergent that the same

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

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

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

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

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

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

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

The Restatement's conflicts rules provide that when a joint attorney sees the co-clients' interests diverging to an unacceptable degree, the proper
However, some courts and bars have approved joint representations even of opposite sides in transactions.


- North Carolina LEO 2006-3 (1/23/09) (holding that a lawyer can represent both the buyer and seller in a real estate transaction).

- **But see** New York LEO 807 (1/29/07) ("The buyer and seller of residential real estate may not engage separate attorneys in the same firm to advance each side's interests against the other, even if the clients give informed consent to the conflict of interest.").

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

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

Thus, joint clients can even keep from one another privileged communications if a lawyer has been improperly representing them (presumably in violation of the conflicts of interest rules). **A fortiori,** one would expect that a third party would be unable to pierce the privilege despite such adversity between the jointly represented clients.
lawyer reasonably believes that he or she can adequately represent all the clients, and as long as the clients consent after full disclosure.

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

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

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

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

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

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

One 2010 case highlights what a difficult task third parties might have in doing so. In Oppliger v. United States, No. 8:06CV750 & 8:08CV530, 2010 U.S. Dist. LEXIS 15251 (D. Neb. Feb. 8, 2010), the court rejected the United States Government's argument that the attorney-client privilege did not protect communications between a company's buyer and seller -- who claimed that they had hired the same lawyer to represent them both in resolving a dispute over the sale. In fact, the court explained that the issue on which the same lawyer represented the buyer and the seller "constitutes a claim for breach of the Purchase Agreement." Id. at *14. That comes close to the totally prohibited "concurrent" representation under ABA Model Rule 1.7 (explained above) -- although that prohibition applies only to the actual assertion of a claim "in the same litigation or other proceeding before a tribunal." ABA Model Rule 1.7(b). Here, apparently, the parties had not asserted claims in litigation or other proceedings. However, it is remarkable that they would hire the same lawyer to represent them both in connection with such a possible claim.

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

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

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

Id. at *13-14.
If courts recognize an effective joint representation of companies on the opposite side of such a possible claim, it is difficult to see any situation in which a court would agree with a third party's challenge to a joint representation.

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

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

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

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

**Requirements of a Joint Representation.** The ABA Model Rules identify two issues that lawyers must address when jointly representing clients on the same matter.

**First,** lawyers must deal with the issue of **loyalty.** The loyalty issue itself involves two types of conflicts of interest -- one of which looks at whether the lawyer's representation is directly adverse to another client, and the other of which requires a far more subtle analysis -- because it examines one representation's effect on the lawyer's judgment.
Every lawyer is familiar with the first type of conflict of interest -- which exists if "the representation of one client will be directly adverse to another client." ABA Model Rule 1.7(a)(1). At the extreme, this type of direct conflict involves a representation that the ABA Model Rules flatly prohibit. Lawyers can never undertake a representation that involves "the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal." ABA Model Rule 1.7(b)(3). Even if representation does not violate this flat prohibition, adversity might nevertheless create a conflict of interest if a lawyer represents one client "directly adverse" to another client. For instance, a lawyer jointly representing two co-defendants in a lawsuit obviously cannot "point the finger" against one of the clients (without consent), even if such an argument does not amount to "the assertion of a claim."

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

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

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

ABA Model Rule 1.7(a)(2) (emphasis added).
This has been called a "rheostat" conflict. Unlike making a "yes" or "no" determination as required in analyzing the first type of conflict, a lawyer dealing with a "rheostat" conflict has a more difficult task. The lawyer must determine if some other duty, loyalty or interest has a "significant risk" of "materially" limiting the lawyer's representation of a client. This often involves a matter of degree rather than kind. For example, a lawyer with mixed feelings about abortion might feel awkward representing an abortion clinic, but would be able to adequately represent such a client. However, a vehemently pro-life lawyer might well find her representation of such a client "materially limited" by her personal beliefs. Thus, this second type of conflict requires a far more subtle analysis than a "light switch" type of conflict arising from direct adversity to another client.

As with the first of type of conflict, a lawyer dealing with a "rheostat" conflict may represent a client only if the lawyer "reasonably believes" that she can "provide competent and diligent representation," the representation does not violate the law, and each client provide "informed consent." ABA Model Rule 1.7(b). 12

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

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

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12 The ABA Model Rules require such consent to be "confirmed in writing," but many states do not. ABA Model Rule 1.7(b)(4).
In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients’ interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

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

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

First, they can say nothing to their clients -- and deal with any adversity if it develops. Because there is no conflict until such adversity develops, there is no need for disclosure and consent. The advantage of this approach is that the lawyer is more likely to obtain the business. The disadvantage is that all of the clients will be disappointed if adversity develops -- and might feel that the lawyer has been deceitful by not advising them of that possibility.
Second, the lawyer can salute the possibility of adversity, and advise the clients that they (and the lawyer) will have to deal with adversity if it ever develops. This has the advantage of warning the clients that they might have to address adversity, but of course leaves the outcome of any adversity uncertain.

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

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

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

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

A comment provides some additional guidance.

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

Id. cmt. c.

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

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

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

Id. illus. 1 (emphasis added).
The second Restatement illustration explains the lawyer’s duty if one of the spouses appears to be overbearing, and the lawyer senses a disagreement about the spouses’ estate objectives.

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

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

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

The same facts as in Illustration 1, except that Lawyer has not previously met the spouses. But in this instance, unlike in Illustration 2, in discussions with the spouses, Lawyer asks questions and suggests options that reveal both Spouse A and Spouse B to be knowledgeable about their respective rights and interests, competent to make independent decisions if called for, and in accord on their common and individual objectives. Lawyer has adequately verified the absence of a conflict of interest and thus may represent both clients in the matter without obtaining consent (see § 122).
Restatement (Third) of Law Governing Lawyers § 130 cmt. c, illus. 3 (2000) (emphasis added). In that situation, the lawyer can proceed to jointly represent the husband and wife, with disclosure and consent.

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

In assessing the issue of loyalty, a lawyer probably would conclude that he or she can jointly represent members of a joint venture. The lawyer must also address the information flow issue -- which is discussed below.

(b) Courts and bars generally permit in-house lawyers to represent their client/employer's affiliates. This issue involves both unauthorized practice of law issues (analyzing whether an in-house lawyer can ever represent a company other than his or her employer) and multijurisdictional practice issues (whether an in-house lawyer may represent a corporate affiliate in the state where the lawyer is not fully licensed).

Unauthorized Practice of Law. The initial issue is whether an in-house lawyer may represent her employer's corporate affiliates. The answer is usually yes. That basic approach clearly applies to wholly-owned subsidiaries. As the percentage of ownership dwindles, presumably the permissibility of the behavior disappears -- although partially owned subsidiaries might fall under the definition of corporate "affiliates" or "related" entities.\(^\text{13}\)

\(^{13}\) In-house lawyers practicing continuously in a state where they are not licensed also face limitations on their ability to represent their client/employer's corporate affiliates -- such a practice implicates a subset of the unauthorized practice of law rules called "multijurisdictional practice."
General Rules. Somewhat surprisingly, the ABA Model Rules do not explicitly address the permissibility of in-house lawyers representing a client/employer’s corporate affiliates (other than in the multijurisdictional practice rule).\(^\text{14}\)


In what was among the first analyses of the propriety of an in-house lawyer representing those other than the immediate client/employer, the ABA addressed the following question:

May an attorney employed by a corporation render legal services to a subsidiary thereof or to other corporations interrelated therewith through interlocking directorates without direct lawyer client relationship with said subsidiaries or interrelated corporations, and without additional consideration from said sources?

ABA Informal Op. 973 (8/26/67). The ABA concluded that "there is no real problem" with such representation as long as "there is substantial identity of underlying ownership of both the employer corporation and the other corporation for which the staff attorney of the employer is requested to perform legal services." The ABA explained that "substantial identity of underlying ownership" exists

in such situations as where the other corporation is a wholly owned subsidiary of the employer, or the employer is a wholly owned subsidiary of the other corporation, or the stock of both the employer and the other corporation is owned by substantially the same shareholders in substantially the same proportions.

Id.

\(^{14}\text{ABA Model Rule 5.5(d)(1).}\)
The ABA indicated that under those circumstances "we would as a matter of reality and practicality ignore, for purposes of ethical considerations, the separate legal identities of the employer and the other corporation," so that there "would in substance be only one 'client' involved." Id. (emphasis added).

The ABA warned such lawyers not to allow what the ABA calls their "basic client" to direct their judgment while representing the related entities. The ABA's reference to a "basic client" seems to recognize that there are several "clients" involved -- which is inconsistent with its earlier conclusion that "in substance" there is only one "client." The ABA nevertheless concluded that the in-house lawyer could provide legal advice to the other entities.

In discussing the lawyer's salary, the ABA explained that the payment of anything more than the "precise cost" of the lawyer's services by those related corporations would be impermissible.

The ABA suggested an alternative if the corporation did not require the lawyer's full time services -- adding the lawyer to the payroll of the other corporation on a part time basis.

The Restatement takes a similarly broad view.

Under traditional concepts of unauthorized practice, a lawyer employed by an organization may provide legal services only to the organization as an entity with respect to its own interests and not, for example, to customers of the entity with respect to their own legal matters. Included within the powers of a lawyer retained by an organization . . . should be the capacity to perform legal services for all entities within the same organizational family.

Most states' legal ethics opinions have tended to follow the ABA's and the Restatement's lead in taking a very liberal approach to such representations.

- Virginia LEO 1838 (5/10/07) (indicating that in-house lawyers can provide legal services to their employer's sister corporation, as long as the lawyers provide "independent professional judgment" on behalf of the sister company "free of any interference or direction" from the lawyer's employer, and as long as the lawyers do not share the sister company's confidences with their employer; the Bar explaining (1) that "discharging this duty of confidentiality to [the sister corporation] may require [the lawyers] to work off-site, at a physically separate office, rather than on the premises of [their employer]"; (2) that the lawyers must be conscious of possible conflicts between their clients, and should address conflicts "with a letter of representation that outlines who the lawyer would continue to represent, if either, in the event of a conflict"; (3) that the lawyers' employer can charge and collect legal fees from the sister corporation for the lawyers' work, as long as the amount is a simple reimbursement, and the employer does not earn any "direct or indirect profit for legal services provided").

- Texas LEO 512 (6/1995) (an in-house lawyer for a corporation may perform legal services for joint ventures "in corporate and partnership form, with other corporations," even if the in-house lawyer's employer is only a minority owner of the joint venture).

- Philadelphia LEO 93-1 (4/1993) (an in-house lawyer for a "medical management services company" may perform legal services for separately incorporated clinics, which all have "common shareholders, with the major shareholder of the Corporation being a shareholder in most of the clinics," as long as the in-house lawyer avoids conflicts).

- Virginia UPL Op. 69 (12/3/84) (holding that an in-house lawyer may represent a client/employer "and its affiliates" in court).

- Tennessee LEO 84-F-80 (10/17/84) (in-house lawyers may represent the client/employer's subsidiaries and related partnerships).

- Tennessee LEO 83-F-52 (8/12/83) (an in-house lawyer employed by a limited partnership may represent related partnerships and corporations, even those not under the "structural umbrella" of the corporation which is a general partner and majority interest holder of the in-house lawyer's direct employer, but "which are owned, at least in part, by the principals or some of the principals in the firms" related to the partnerships and corporations, as long as: the cost of the services are appropriately shared; the in-house lawyer's "direct employer" does not direct the in-house lawyer's judgment while representing other entities; and the lawyer avoids conflicts).
- Massachusetts LEO 83-9 (6/21/83) (in-house lawyers may represent a direct employer’s subsidiary and "affiliates"; as long as the lawyers avoid conflicts, they may even represent affiliates if there is "a departure from . . . commonality of ownership interest" with the direct employer; lawyers must avoid having their judgment directed by the direct employer, and should advise both the "primary employer" and the other represented entities that the lawyer may not keep secret from one what is learned from others; also explaining that "[a] pro rata share of the cost of an attorney's services may be allocated to the affiliated corporation, but an attorney's fees separately charged may not be paid to the corporation").

- Dallas LEO 1982-3 (7/16/82) (in-house lawyers may perform services for a "related group" of corporations, because "affiliated or related corporations, in effect, may be regarded as a single entity" for conflicts purposes).

- Texas LEO 343 (9/1968) (corporations wholly owned and 50% owned by an in-house lawyer’s direct employer are "for all practical purposes only one client," so that "it makes no difference which corporation is the general employer of the lawyer"; lawyers must be aware of possible conflicts if they represent "related corporations, which do not technically involve a parent, subsidiary or controlled corporation," but even in those situations "the possibility of the lawyer aiding his general corporate employer in the unauthorized practice of law . . . is more imaginary than real," because the in-house lawyer's employer "is merely providing a convenient means whereby the lawyer's services can be made available to the related corporations as they have need for such services").

Interestingly, one state has adopted a statute explicitly permitting such a practice by in-house lawyers.

Nothing in this section shall prohibit an attorney retained by a corporation, whether or not the attorney is also a salaried employee of the corporation, from representing the corporation or an affiliate, or from representing an officer, director, or employee of the corporation or an affiliate in any matter arising in connection with the course and scope of the employment of the officer, director, or employee.

N.C. Gen. Stat. § 84-5(b) (emphasis added).

Only one legal ethics opinion seemed to be critical of such a practice, and even that opinion did not prohibit the practice.
• Wisconsin LEO E-89-8 (1989) (explaining that "[a]lthough dual representation of a house counsel's employer and entities affiliated with the employer may be possible under some circumstances, it would seem generally ill advised unless the ownership interest in the respective entities were identical" (emphasis added)).

Ethics Issues Implicated by In-House Lawyers' Representation of Affiliates.

Not surprisingly, in-house lawyers' representation of their client/employer's affiliates involves a number of ethics issues.

Such a practice can result in conflicts of interest issues if adversity develops between the in-house lawyers' clients.

• Virginia LEO 1838 (5/10/07) (indicating that in-house lawyers can provide legal services to their employer's sister corporation, as long as the lawyers provide "independent professional judgment" on behalf of the sister company "free of any interference or direction" from the lawyer's employer, and as long as the lawyers do not share the sister company's confidences with their employer; the Bar explaining (1) that "discharging this duty of confidentiality to [the sister corporation] may require [the lawyers] to work off site, at a physically separate office, rather than on the premises of [their employer]"; (2) that the lawyers must be conscious of possible conflicts between their clients, and should address conflicts "with a letter of representation that outlines who the lawyer would continue to represent, if either, in the event of a conflict"; (3) that the lawyers' employer can charge and collect legal fees from the sister corporation for the lawyers' work, as long as the amount is a simple reimbursement, and the employer does not earn any "direct or indirect profit for legal services provided").

• Texas LEO 512 (6/1995) (holding that in-house lawyers may represent joint ventures in which their corporate employer is only a minority owner, as long as the lawyers avoid conflicts; explaining that the "potential conflict does not arise by virtue of the extent of control or ownership that the corporation has in the joint venture, or because the corporation charges or does not charge an amount for providing the in-house lawyer. It is the simultaneous representation of the joint venture and the corporation that presents the potential for conflict . . . ."; "It is only when a potential or actual conflict develops into an impermissible conflict that the lawyer should withdraw.").

• ABA LEO 392 (4/24/95) (finding that corporations may not profit from "renting" their in-house lawyers to others, but that in-house lawyers may receive compensation above the corporation's costs without violating the
ethics rules, as long as the lawyers "are in a position to give conflict-free representation to their other clients" and do not allow the corporate employer to interfere with their judgment).

- Massachusetts LEO 83-9 (6/21/83) (allowing in-house lawyers to represent companies "affiliated" with their client/employer, but recognizing that conflicts rules must be obeyed; also noting "the clients' consent to the representation after such disclosure is a prerequisite to multiple representation by the attorney").

These states' warning that lawyers representing multiple members of a corporate family must avoid conflicts seems somewhat inconsistent with the basic principle upon which the liberal approach rests -- that the lawyer is really representing just one "client."

A number of state bars have dealt with the ethics implications of an in-house lawyer's client/employer charging for the lawyer's services provided to others. The analysis takes one of several approaches.

First, some opinions have adopted a per se rule finding improper any arrangement under which the client/employer corporation receives any fee for the lawyer's services -- because the arrangement violates either the UPL or the fee-sharing rules.

These harsh opinions do not directly discuss in-house lawyers' representation of a client/employer's corporate affiliates, but would seem to apply if interpreted literally.

- See, e.g., Wisconsin LEO E-89-8 (1989) ("Wisconsin for-profit business entities may not engage in the practice of law . . . [so] full-time house counsel may not participate in any arrangement under which his or her employer charges for his or her legal services.").

Second, a number of opinions found that a client/employer corporation's profiting from the in-house lawyer's services would violate the UPL or fee-sharing rules. Unlike the per se approach discussed above, these opinions allow the corporation to receive
fees that equal the corporation's cost (presumably covering the in-house lawyer's salary, overhead, etc.).

- Virginia LEO 1838 (5/10/07) (indicating that in-house lawyers can provide legal services to their employer's sister corporation, as long as the lawyers provide "independent professional judgment" on behalf of the sister company "free of any interference or direction" from the lawyer's employer, and as long as the lawyers do not share the sister company's confidences with their employer; the Bar explaining (1) that "discharging this duty of confidentiality to [the sister corporation] may require [the lawyers] to work off site, at a physically separate office, rather than on the premises of [their employer]"; (2) that the lawyers must be conscious of possible conflicts between their clients, and should address conflicts "with a letter of representation that outlines who the lawyer would continue to represent, if either, in the event of a conflict"; (3) that the lawyers' employer can charge and collect legal fees from the sister corporation for the lawyers' work, as long as the amount is a simple reimbursement, and the employer does not earn any "direct or indirect profit for legal services provided" (emphasis added)).

- Texas LEO 531 (12/1999) ("the corporation may not charge wholly-owned subsidiaries 'market-based fees' for the legal services rendered by the corporation's in-house counsel. To permit the corporation to recover anything other than its 'costs' (even if those costs were later reimbursed to the subsidiary by means of a rebate) would permit the corporation to profit financially from the legal services provided by its in-house counsel and thereby engage in the unauthorized practice of law").

- Texas LEO 512 (6/1995) (concluding that a lawyer employed by a corporation may provide legal services to such related entities as a joint venture in which the corporate employer is a minority owner, as long as "any reimbursement by the joint venture or the other venturers for the compensation paid by the corporation to the lawyer is calculated in good faith to pay no more than the full costs to the corporation of the portion of the lawyer's time that is devoted to services for the joint venture" (emphasis added)).

- ABA LEO 392 (4/24/95) (analyzing a corporation's "rent" of its in-house lawyer to perform legal work for "other clients"; concluding that "while a corporation should be free to require its lawyers to reimburse its costs of employing in-house counsel when the lawyers do work for others, or to be made whole for the costs it actually incurred in a case when its lawyers are awarded fees by a court, a corporation may not reap profits from the work of its in-house attorneys" (emphasis added); explaining that "[i]t is permissible for the in-house lawyers, rather than the corporation, to receive a reasonable
fee beyond the amount the lawyers cost the corporation" as long as the lawyers do not let the corporation guide their professional judgment).

- Virginia UPL Op. 69 (12/3/84) (a Virginia licensed in-house lawyer may represent a bank, its affiliates and "second-tier" affiliates in judicial proceedings; the in-house lawyer and staff may prepare loan documents on behalf of the bank and affiliates, and collect a fee from the customers for the preparation -- as long as the fee "bears a reasonable relationship to the legal expense associated with the transaction").

- ABA Informal Op. 973 (8/26/67) (warning that any compensation to the client/employer risks having a nonlawyer direct the lawyer's services; "[t]echnically, we believe that reimbursement by the other corporation to the employer of the precise cost to it of supplying the lawyers' services would not constitute exploitation of his professional services in this limited monetary sense. However, payment of anything more would, and precise calculation of exact cost to the employer may not be practical."; concluding that the corporation charging for an in-house lawyer's services performed "for other corporations not owned by substantially the same interests as his own employer . . . very probably result[s] in violations" of the UPL prohibition and the rule prohibiting lawyers from having their professional guidance directed by nonlawyers).

Third, one legal ethics opinion seems to have permitted an internal corporate allocation of costs, but not a direct charge by the corporate client/employer (this opinion does not make much sense, and seems to emphasize form over substance).

- Massachusetts LEO 83-9 (6/21/83) (permitting in-house lawyers to represent corporations affiliated with their client/employer; explaining that "[a] pro rata share of the cost of an attorney's services may be allocated to the affiliated corporation, but an attorney's fees separately charged may not be paid to the corporation").

Thus, legal ethics opinions differ about whether corporations may charge for (or profit) from services that their in-house lawyers provide to others. The plurality of opinion seems to permit charges, but not profits.

However the formulation, this issue probably will not present a great impediment to most corporations, most of which would probably be willing to forego any profits (or even reimbursement) in order to shield their in-house lawyers from possible UPL
charges (and save the corporation from the leverage that those charges might give an adversary).

A small number of legal ethics opinions have dealt with the possible ethics violation involving a nonlawyer (the corporate employer) directing a lawyer's judgment. These opinions have warned lawyers to avoid the problem, rather than finding an inevitable violation.

- ABA LEO 392 (4/24/95) (noting that a corporation's profiting from "renting" its in-house lawyers to others would "encourage greater interference with the professional judgment of a lawyer than would occur if the corporation simply were to receive reimbursement of costs"; explaining that lawyers may receive compensation beyond the corporation's costs without violating the ethics rules, "[s]o long as the lawyers do not permit any interference by the corporate employer with their professional judgment").

- Massachusetts LEO 83-9 (6/21/83) (finding that in-house lawyers may represent corporate "affiliates" of their employers, but warning that the lawyers may not permit "the entity which employs or pays the attorney to render legal services for another to direct or regulate the attorney's professional judgment in rendering such legal services").

A number of legal ethics opinions have dealt with the confidentiality implications of in-house lawyers providing legal services to those other than their direct client/employers.

- Virginia LEO 1838 (5/10/07) (indicating that in-house lawyers can provide legal services to their employer's sister corporation, as long as the lawyers provide "independent professional judgment" on behalf of the sister company "free of any interference or direction" from the lawyer's employer, and as long as the lawyers do not share the sister company's confidences with their employer; the Bar explaining (1) that "discharging this duty of confidentiality to [the sister corporation] may require [the lawyers] to work off site, at a physically separate office, rather than on the premises of [their employer]"; (2) that the lawyers must be conscious of possible conflicts between their clients, and should address conflicts "with a letter of representation that outlines who the lawyer would continue to represent, if either, in the event of a conflict"; (3) that the lawyers’ employer can charge and collect legal fees from the sister corporation for the lawyers’ work, as long as the amount is a
simple reimbursement, and the employer does not earn any "direct or indirect profit for legal services provided" (emphasis added)).

- Massachusetts LEO 83-9 (6/21/83) ("[W]hen representing a company other than his or her primary employer, the attorney and his or her employer should understand that the confidences and secrets of the affiliate may not, without the affiliate's consent after full disclosure, be revealed by the attorney to, or used for the benefit of, the employer. When representing an affiliate and the employer, both clients should be advised that their respective confidences and secrets gained by the attorney in the course of the representation may not be withheld from the other, unless the clients make some other arrangement." (emphasis added)).

As with the conflicts analysis, these opinions recognize that the in-house lawyers are representing multiple clients.

While most analyses of in-house lawyers providing legal services to those other than their client/employer analyze hypothetical situations, a few legal ethics opinions offer advice about how to structure a representation so that it avoids any ethics violations.

The very first ABA analysis of this issue suggested one solution, and a later state legal ethics opinion echoed the ABA's thoughts.

- ABA Informal Op. 973 (8/26/67) (allowing in-house lawyers to provide legal services to affiliated corporations if there "is substantial identity of underlying ownership" of the affiliated corporation and the client/employer; finding various ethics prohibitions on in-house lawyers providing legal services to affiliated corporations "not owned by substantially the same interests as his own employer," but noting that "such of the other corporations as desire to have his services available on a regular basis could place him on their own payrolls on a part-time basis, with perhaps a corresponding reduction in his salary from his basic regular employer, or he could be retained and compensated directly and separately by any corporation other than his employer for each service he performs for such other corporation and his employer could make a pro rata reduction in his salary for the period involved, based upon the amount of his time devoted to the affairs of the other corporation rather than to his employer's business" (emphases added)).
• Washington Advisory Op. 1594 (1995) (finding that nothing in the Washington State ethics rules "prohibit a lawyer from being part-time, in-house corporate counsel for more than one client").

Other states would presumably recognize this solution too, because most (if not all) states permit lawyers to work for more than one employer -- although the lawyer must obviously avoid conflicts problems, etc. However, lawyers choosing this solution must be licensed by the state in which they hope to set up a separate practice -- to avoid violating multijurisdictional prohibitions.

**Multijurisdictional Practice.** The other issue involves multijurisdictional practice. Not surprisingly, the unauthorized practice of law analysis for in-house lawyers differs dramatically from lawyers who draw their clients from the public.

The ABA Model Rules contain a provision essentially permitting in-house lawyers to establish a "systematic and continuous presence” in a jurisdiction where they are not licensed.

A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that . . . are provided to the lawyer's employer or its organizational affiliates and are not services or which the form requires pro hac vice admission.

ABA Model Rule 5.5(d)(1) (emphasis added). A comment provides additional guidance Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the
employer and does not create an unreasonable risk to the client and others because the employer is well situated to access the lawyer's qualifications and the quality of the lawyer's work.

ABA Model Rule 5.5(d)(1) cmt. [16] (emphasis added).

The Restatement deals with in-house lawyers in a comment rather than in a black letter rule.

... [s]tates have permitted practice within the jurisdiction by inside legal counsel for a corporation or similar organization, even if the lawyer is not locally admitted and even if the lawyer's work consists entirely of in-state activities, when all of the lawyer's work is for the employer-client . . . and does not involve appearance in court. Leniency is appropriate because the only concern is with the client-employer, who is presumably in a good position to assess the quality and fitness of the lawyer's work. In the course of such work, the lawyer must deal with outsiders, such as by negotiating with others in settling litigation or directing the activities of lawyers who do enter an appearance for the organization in litigation.


Thus, the good news for in-house lawyers is that they generally may move to another state (at least a state which has adopted the ABA Model Rules approach) and establish a "systematic and continuous presence" in that state without obtaining a license from that state.

The bad news is that the state probably will require some sort of registration and (not surprisingly) payment of a fee.

The ABA Model Rules recognize that

[i]f an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including
assessments for client protection funds and mandatory continuing legal education.

ABA Model Rule 5.5(d)(1) cmt. [17] (emphasis added).

In 2008, the ABA adopted a model process for in-house lawyers to register in a state where they are not licensed, but in which they are continuously practicing. ABA Model Rule for Registration of In-House Counsel. In essence, this rule requires in-house counsel to register with the bar of the state in which they are practicing within 180 days of beginning to work in that state. Such in-house lawyers can represent the client/employer and its organizational affiliates, and also provide legal services to corporate directors, officers and employees — “but only on matters directly related to their work for the entity and only to the extent consistent with” the conflicts rules. Such lawyers cannot appear before a court or a tribunal, but are permitted to engage in pro bono work. Not surprisingly, such lawyers would be subject to discipline by the bar of the state with which they are registered.

Somewhat surprisingly, in 2009 the New York Bar explained that the applicable rule in New York was not clear.

- New York LEO 835 (12/24/09) (explaining that the new New York ethics rules do not provide any guidance for out-of-state lawyers from acting as in-house lawyers in New York; “The question whether an out-of-state lawyer may serve as in-house counsel for a New York corporation and maintain an office in New York for that purpose is a question of law, and is not answered by the New York Rules of Professional Conduct. The question is therefore beyond our jurisdiction and we offer no opinion on the question. Because the question is a recurring one, however, this Committee urges the Appellate Divisions and/or the New York State Legislature to provide further guidance regarding whether and to what extent out-of-state lawyers - especially in-house lawyers who provide services solely to a corporate employer - are authorized to practice law in New York.”).
Every state seems to be moving in the direction of requiring in-house lawyers to establish some official relationship with their state’s bar. In 2009, the ABA/BNA Lawyers’ Manual on Professional Conduct reported that just fourteen states had such a process in 2003, but by February 2009 the number of states had grown to thirty-two. ABA/BNA Lawyers’ Manual on Professional Conduct (2/18/09) at 93.

Although ABA Model Rule 5.5(b)(1) allows in-house lawyers to establish a “systematic and continuous presence” in a jurisdiction in which they are not licensed, the rule limits the clients to whom such in-house lawyers can provide services.

This rule allows out-of-state in-house lawyers to continuously practice in a state where they are not licensed, as long as their legal services are provided to the lawyer’s employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission.

ABA Model Rule 5.5(d)(1) (emphasis added).

Thus, such in-house lawyers must limit their representation to their client/employer and its "organizational affiliates." Comment [16] to that rule explains that the term "organizational affiliates" means entities that control, are controlled by, or are under common control with the employer.

ABA Model Rule 5.5 cmt. [16].

Similarly, the Restatement indicates that such in-house lawyers may provide legal services to "all entities within the same organizational family." Restatement (Third) of Law Governing Lawyers § 4 cmt. e (2000) (emphasis added).

Most states have adopted this basic limitation.
D.C. Ct. App. R. 49 ("Unauthorized Practice of Law") (allowing "[i]nternal" counsel to practice law in D.C., but "only to one's regular employer"; the Commentary to Rule 49(c)(6) explains that the exception is based on "the confinement of the lawyer's professional services to activities internal to the employer").

Florida Bar R. 17-1.2(b) (defining a "business organization" which an "authorized house counsel" can represent without a full license as "a corporation, partnership, association or other legal entity (taken together with its respective parents, subsidiaries, and affiliates) authorized to transact business in this state that is not itself engaged in the practice of law or the rendering of legal services outside such organization, whether for a fee or otherwise, and does not charge or collect a fee for the representation or advice other than to entities comprising such organization by the activities of the authorized house counsel" (emphasis added)).

Kentucky Sup. Ct. R. 2.111 (allowing in-house lawyers to represent their employers and "affiliated entities").

Missouri Sup. Ct. R. 8.105 (permitting Missouri in-house counsel a "[l]imited admission" to the Missouri Bar, allowing them to represent corporate employers -- including their "subsidiaries or affiliates" (emphasis added)).

South Carolina App. Ct. R. 405(a)(9) (providing for a limited certificate for in-house lawyers who represent corporations, as long as the in-house lawyers' work is provided "solely for the business employer or the parent or subsidiary of such employer" (emphasis added)).

Washington Admis. to Prac. R. 8(f) (recognizing a "limited license" for in-house lawyers, which limits their practice to representing their corporate employer -- "including its subsidiaries and affiliates" (emphasis added)).

(c)-(d) Under well-recognized law, an outside or in-house lawyer representing an entity such as a joint venture LLC can have privileged communications with employees of that entity if the communications otherwise meet the Upjohn standard (or the control group standard in those few states following that more limited approach).

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

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

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

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

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

ABA Model Rule 1.7 cmt. [31] (emphases added).
The ACTEC Commentaries repeatedly advise lawyers to address the information flow at the beginning of a joint representation.

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


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

The ACTEC Commentaries even provide an illustration emphasizing this point.

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

Id. at 92 (emphasis added).

Not surprisingly, bars have provided the same guidance.

- District of Columbia LEO 327 (2/2005) (addressing a situation in which a law firm which jointly represented several clients withdrew from representing some of the clients and continued to represent other clients; explaining that the law firm which began to represent the clients dropped by the first firm asked that firm to disclose all of the information it learned during the joint representation, which the firm refused to provide; ultimately concluding that the firm had to disclose to its successor all of the information it had acquired from any of the clients during the joint representation; "Under the terms of the retainer agreement, the prior firm's duty to communicate any relevant information to the other clients included any relevant information learned from other clients in the same matter, and this duty attached at the moment the prior firm learned the information. This underscores how important it is for a lawyer carefully to explain to all clients in a joint representation that, when they agree that any relevant or material information may be shared with one another, they cannot expect that any relevant or material confidential information they may subsequently reveal to the lawyer will be kept from the other co-clients." (emphasis added)).

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

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

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


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

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

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

- **Unnamed Attorney v. Ky. Bar Ass'n**, 186 S.W.3d 741, 742, 743 (Ky. 2006) (privately reprimanding a lawyer who had jointly represented a husband and wife in connection with a criminal investigation for failing to explain to the jointly represented clients that he would share the investigation results with both of them; explaining that "Movant advised the Does that a conflict of interest could arise in the course of his work on their behalf. He also advised them that if a conflict of interest did arise he might be required to withdraw from the joint employment. However, he did not advise them that any and all information obtained during the joint representation or obtained in any communication to him by them would be available to each client and exchanged freely between the clients in the absence of a conflict of interest. Movant asserts that he did not anticipate the possibility that the interests of the Does would become so materially divergent that there would be a conflict of interest in providing the results of the investigation to each of them. He acknowledges that he did not explain the potential ramifications of joint representation in that regard." (emphasis added); noting that "[t]he investigation produced information that indicated that one of the Does was directly involved in the shooting, contrary to what Movant had been told. Upon discovery of this information, and following communications with the KBA Ethics Hotline, Movant determined that he should withdraw from the joint employment. Furthermore, Movant concluded that he should not disclose certain results of his investigation to either Mr. or Mrs. Doe without the consent of each of them, which they declined to give. Movant encouraged each of them to obtain new counsel, and they followed this advice."; "In this case there was a lack of required communication by Movant. Specifically, Movant failed to explain that there would be no confidentiality as between the clients and the lawyer, that all information discovered would be furnished to both, and that each client was owed the same duty. When the investigation uncovered information that was favorable to one client but harmful to the other, Movant refused to release the information he had gathered without the acquiescence of both clients, which was not given. This resulted from his failure to initially explain the implications of common representation to both clients. When the investigation revealed that one of the clients was involved in the homicide, Movant had a duty with respect to that client to keep that fact confidential. On the other hand, he had a duty to the other client to provide exculpatory information which necessarily included information he was obligated to keep confidential." (emphasis added)).
Although the Kentucky case did not involve a trust and estate context, it highlights the wisdom of lawyers addressing the information flow at the beginning of any representation.

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

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

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

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

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

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

However, the comment then explains how this basic principle should guide a lawyer's conduct when beginning a joint representation -- in a sentence that ultimately does not make much sense.
The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. 

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

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

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

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

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

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

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

In ABA LEO 450, the ABA articulated the dilemma that a lawyer faces if one
client provides confidential information -- in the absence of some agreement on
information flow. Such a lawyer faces a dilemma if he learns confidential information
from one client that will cause that client damage if disclosed to the other client.
Absent an express agreement among the lawyer and the clients that satisfies the “informed consent” standard of Rule 1.6(a), the Committee believes that whenever information related to the representation of a client may be harmful to the client in the hands of another client or a third person, . . . the lawyer is prohibited by Rule 1.6 from revealing that information to any person, including the other client and the third person, unless disclosure is permitted under an exception to Rule 1.6.

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

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

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

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

However, the ABA legal ethics opinion instead inexplicably indicated that such a prior consent might not work. The ABA explained that it was “highly doubtful” that consents provided by the jointly represented clients "before the lawyer understands the facts giving rise to the conflict" will satisfy the "informed consent" standards. ABA LEO 450 (4/9/08).¹⁵ This conclusion seems directly contrary to Comment [31] to ABA Model

¹⁵ ABA LEO 450 (4/9/08) (“When a lawyer represents multiple clients in the same or related matters, the obligation of confidentiality to each sometimes may conflict with the obligation of disclosure

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

All in all, the ABA approach to this elemental issue is confusing at best. The pertinent ABA Model Rule and comment apparently apply only in a setting that seems implausible in the real world. And the pertinent ABA legal ethics opinion compounds the confusion by apparently precluding exactly the type of "no secrets" joint representation arrangement that Comment [31] encourages lawyers to arrange.
Most courts and bars take the ABA Model Rules approach -- finding that a joint representation is not sufficient by itself to allow a lawyer jointly representing multiple clients to share all confidences among the clients.

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

- **Unnamed Attorney v. Kentucky Bar Ass'n**, 186 S.W.3d 741, 742, 743 (Ky. 2006) (privately reprimanding a lawyer who had jointly represented a husband and wife in connection with a criminal investigation for failing to explain to the jointly represented clients that he would share the investigation results with both of them; explaining that "Movant advised the Does that a conflict of interest could arise in the course of his work on their behalf. He also advised them that if a conflict of interest did arise he might be required to withdraw from the joint employment. However, he did not advise them that any and all information obtained during the joint representation or obtained in any communication to him by them would be available to each client and exchanged freely between the clients in the absence of a conflict of interest. Movant asserts that he did not anticipate the possibility that the interests of the Does would become so materially divergent that there would be a conflict of interest in providing the results of the investigation to each of them. He acknowledges that he did not explain the potential ramifications of joint representation in that regard." (emphasis added); noting that "[t]he investigation produced information that indicated that one of the Does was directly involved in the shooting, contrary to what Movant had been told. Upon discovery of this information, and following communications with the KBA Ethics Hotline, Movant determined that he should withdraw from the joint employment. Furthermore, Movant concluded that he should not disclose certain results of his investigation to either Mr. or Mrs. Doe without the consent of each of them, which they declined to give. Movant encouraged each of them to obtain new counsel, and they followed this advice." (emphasis added); "In this case there was a lack of required communication by Movant. Specifically, Movant failed to explain that there would be no confidentiality as between the clients and the lawyer, that all information discovered would be furnished to both, and that each client was owed the same duty. When the investigation uncovered information that was favorable to one client but harmful to the other, Movant refused to release the information he had gathered without the acquiescence of both clients, which was not given. This resulted from his failure to initially explain the implications of common representation to both clients. When the
Ethics Issues Facing In-House Lawyers Who Represent Companies in Joint Ventures

Hypotheticals and Analyses

McGuireWoods LLP
T. Spahn (6/11/12)

Investigation revealed that one of the clients was involved in the homicide, Movant had a duty with respect to that client to keep that fact confidential. On the other hand, he had a duty to the other client to provide exculpatory information which necessarily included information he was obligated to keep confidential.” (emphasis added)).

- District of Columbia LEO 327 (2/2005) (addressing a situation in which a law firm which jointly represented several clients withdrew from representing some of the clients and continued to represent other clients; explaining that the law firm which began to represent the clients dropped by the first firm asked that firm to disclose all of the information it learned during the joint representation, which the firm refused to provide; ultimately concluding that the firm had to disclose to its successor all of the information it had acquired from any of the clients during the joint representation; “[I]t was ‘understood that (a) we will not be able to advise you about potential claims you may have against any of the Other Individuals whom we represent and (b) information you provide to use in connection with our representation of you may be shared by us with the Other Individuals whom we represent.’” After apparently learning certain confidential information from one of the jointly represented clients, the prior firm withdrew from representing the other clients and continued to represent only the client from whom the confidential information had been learned. Upon assuming the representation of the other clients, the inquiring law firm requested that the prior firm disclose all information relevant to its prior representation of those clients, including the confidential information that had led to its withdrawal. The prior firm refused. The inquirer seeks an opinion whether, under these circumstances, the prior firm is required to share with the other clients all relevant information learned during its representation, including any relevant confidences and secrets.”; “The retainer agreement here expressly provided that information disclosed in connection with the representation "may be shared" with the other clients in the same matter."; "The retainer agreement presumably reflects a collective determination by all co-clients that the interests in keeping one another informed outweighs their separate interests in confidentiality. Where the disclosing client has expressly or impliedly authorized the disclosure of relevant, confidential information to the lawyer's other clients in the same matter, the duty to keep the non-disclosing clients informed of anything bearing on the representation that might affect their interests requires the lawyer to disclose the confidential information. . . . Where the disclosing client has unambiguously consented to further disclosure, a lawyer's duty of loyalty to and the duty to communicate with the non-disclosing client tips the balance in favor of disclosure. Indeed, in light of the disclosing client's consent, there is nothing left on the other side of the balance. (footnote omitted); "It is, of course, possible that a client who has otherwise consented to the disclosure of confidential information may withdraw such consent for a specific disclosure. Where a client informs the lawyer before disclosing
certain confidential information that he or she intends to reveal something that may not be shared with the lawyer's other clients (notwithstanding a prior agreement to do so), the lawyer has an obligation at that point to inform the client that no such confidences may be kept. . . . Under the terms of the retainer agreement, the prior firm's duty to communicate any relevant information to the other clients included any relevant information learned from other clients in the same matter, and this duty attached at the moment the prior firm learned the information. This underscores how important it is for a lawyer carefully to explain to all clients in a joint representation that, when they agree that any relevant or material information may be shared with one another, they cannot expect that any relevant or material confidential information they may subsequently reveal to the lawyer will be kept from the other co-clients.”; “If the clients had not all agreed that the prior firm was authorized to share relevant or material information, the 'default' rule in our jurisdiction is that the prior firm would have been prohibited from sharing one client's confidences with the others. . . . But by contracting around this 'default' rule, the clients (and the prior firm) agreed that relevant or material information would be shared. Under these specific circumstances -- where the disclosing client has effectively consented to the disclosure -- an attorney's subsequent refusal to share such information with the other clients violates the D.C. Rules of Professional Conduct.” (emphasis added); “[A] lawyer violates the D.C. Rules of Professional Conduct when her [sic] or she withholds from one client relevant or material confidential information obtained from a co-client who has consented to the disclosure.”; “Where one client has given consent to the disclosure of confidential information by the lawyer to another client, we have already concluded that the lawyer may reveal the confidence or secret. Here we conclude that the lawyer must do so if the information is relevant or material to the lawyer's representation of the other client. Because the disclosing client previously has waived confidentiality, there is nothing to weigh against either the lawyer's duty of loyalty to the non-disclosing client or the lawyer's obligation to keep that client reasonably informed of anything bearing on the representation that might affect that client's interests.”).

- District of Columbia LEO 296 (2/15/00) (“The inquirer, a private law firm ('Firm'), has asked whether it is allowed or obligated to advise an employer, who paid the law firm to obtain a work trainee visa from the Immigration and Naturalization Service ('INS') for its alien employee, of its subsequent discovery that the employee had fabricated the credentials that qualified her for the visa.”; “The Firm desires to advise fully at the least the petitioning Employer of the alien employee's falsification. However, it does not wish to violate any duty under Rule 1.6 to protect client confidences or secrets that may exist between the alien and the Firm.”; "In a joint representation, a lawyer owes ethical duties of loyalty and confidentiality, as well as the duty to inform, to each client. A joint representation in and of itself does not alter the
lawyer's ethical duties to each client, including the duty to protect each client's confidences." (emphasis added); "The best practice is clearly to advise clients at the outset of a representation of the potential for ethical conflicts ahead. Written disclosure of potential effects of joint representation and written consent can substantially mitigate, if not eliminate, the ethical tensions inherent in common representation."; "Where duties to the two clients conflict, and no advance consent has been obtained, the law firm should make an effort to fulfill its duties to the employer by seeking the employee's informed consent to divulge the information. In the alternative, the Firm should encourage the employee client to divulge the facts to the Employer client. The Firm's fiduciary duty to the Employer requires an affirmative effort to achieve disclosure within the bounds of Rule 1.6 before withdrawing from the representation."; "Without clear authorization, a lawyer may not divulge the secrets of one client to another, even where the discussion involves the subject matter of the joint representation. This is particularly true where disclosure would likely be detrimental to the disclosing client. None of the other exceptions set forth in Rule 1.6 applies. Thus, absent client consent, the Firm may not divulge the secret. This result may seem unpalatable to the extent that the Employer who is also a client is left employing a dishonest worker whose visa has been fraudulently obtained pursuant to a petition signed by the Employer under penalty of perjury. Striking the balance in favor of protecting client confidences and secrets is nonetheless required by our Rules. The guarantee of confidentiality of communication between client and attorney is a cornerstone of legal ethics." (emphases added); ultimately concluding that a "lawyer who undertakes representation of two clients in the same matter should address in advance and, where possible in writing, the impact of joint representation on the lawyer's duty to maintain client confidences and to keep each client reasonably informed, and obtain each client's informed consent to the arrangement. The mere fact of joint representation, without more, does not provide a basis for implied authorization to disclose one client's confidences to another."; "Where express consent to share client confidences has not been obtained and one client shares in confidence relevant information that the lawyer should report to the non-disclosing client in order to keep that client reasonably informed, to satisfy his duty to the non-disclosing client the lawyer should seek consent of the disclosing client to share the information directly to the other client. If the lawyer cannot achieve disclosure, a conflict of interest is created that requires withdrawal."). [Although Washington, D.C. revised its ethics rules in 2007, new comments [14] - [18] to D.C. Rule 1.7 follow the ABA approach, and thus presumably do not affect the continuing force of this earlier legal ethics opinion.]

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

- New York LEO 555 (1/17/84) (addressing the following situation: "A and B formed a partnership and employed Lawyer L to represent them in connection
with the partnership affairs. Subsequently, B, in a conversation with Lawyer L, advised Lawyer L that he was actively breaching the partnership agreement. B preceded this statement to Lawyer L with the statement that he proposed to tell Lawyer L something 'in confidence.' Lawyer L did not respond to that statement and did not understand that B intended to make a statement that would be of importance to A but was to be kept confidential from A. Lawyer L had not, prior thereto, advised A or B that he could not receive from one communications regarding the subject of the joint representation that would be confidential from the other. B has subsequently declined to tell A what he has told Lawyer L. Lawyer L now asks what course he may or must take with respect to disclosure to A of what B has told him and with respect to continued representation of the partners; ultimately concluding that "It is the opinion of the Committee that (i) Lawyer L may not disclose to A what B has told him, and (ii) Lawyer L must withdraw from further representation of the partners with respect to the partnership affairs."; "The Committee believes that the question ultimately is whether each of the clients, by virtue of jointly employing the lawyer, impliedly agrees or consents to the lawyer's disclosing to the other all communications of each on the subject of the representation. It is the opinion of the Committee that, at least in dealing with communications to the lawyer directly from one of the joint clients, the mere joint employment is not sufficient, without more, to justify implying such consent where disclosure of the communication to the other joint client would obviously be detrimental to the communicating client. This is not to say that such consent is never to be found. The lawyer may, at the outset of the joint representation or even perhaps at some later stage if otherwise appropriate, condition his acceptance or continuation of the joint representation upon the clients' agreement that all communications from one on the subject of the joint representation shall or may be disclosed to the other. Where one joint client is a long-time client and the other is introduced to the lawyer to be represented solely in the one joint matter, it may be appropriate for the lawyer to obtain clear consent from the new client to disclosure to the long-time client. . . . Whatever is done, the critical point is that the circumstances must clearly demonstrate that it is fair to conclude that the clients have knowingly consented to the limited non-confidentiality." (emphasis added); "Both EC 5-16 and Rule 2.2 of the Model Rules emphasize that, before undertaking a joint representation, the lawyer should explain fully to each the implications of the joint representation. Absent circumstances that indicate consent in fact, consent should not be implied."; "Of course, the instant fact situation is a fortiori. Here, the client specifically in advance designated his communication as confidential, and the lawyer did not demur. Under the circumstances, the confidence must be kept."
**Authorities Recognizing a "No Secrets" Default Rule.** In stark contrast to the ABA Model Rules’ and various state bars’ requirement that lawyers keep secrets in the absence of an agreement to the contrary, some authorities take the opposite approach.

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

The *Restatement* takes this contrary approach.

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

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

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

Elsewhere the Restatement again admits that

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


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

The mandatory disclosure language appears in several Restatement provisions.

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

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

Id. (emphases added).

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

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


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

Id. (emphasis added).

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

Client X and Client Y jointly consult Lawyer about establishing a business, without coming to any agreement about the confidentiality of their communications to Lawyer. X sends a confidential memorandum to Lawyer in which X outlines the proposed business arrangement as X understands it. The joint representation then terminates, and Y knows that X sent the memorandum but not its contents. Subsequently, Y files suit against X to recover damages arising out of the business venture. Although X's memorandum would be privileged against a third person, in the litigation between X and Y the memorandum is not privileged. That result follows although Y never knew the contents of the letter during the joint representation.
Although appearing in the privilege section, this language seems clear on its face -- requiring disclosure to the other jointly represented clients rather than just allowing it.

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

The discretionary disclosure language appears elsewhere.

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

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


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

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

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

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

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

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

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

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

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

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

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

Id. illus. 4 (emphases added).

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

However, the Restatement seems to conclude in some sections that in the absence of some agreement the lawyer must disclose such confidences, while in other sections seems to conclude that the lawyer has discretion whether or not to disclose confidences.

The ACTEC Commentaries take the same approach as the Restatement -- rejecting a "no secrets" approach in the absence of an agreement on information flow among jointly represented clients.16

In the absence of any agreement to the contrary (usually in writing), a lawyer is presumed to represent multiple clients with regard to related legal matters jointly with resulting full

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16 In fact, as explained above, the Restatement points to the ACTEC Commentaries as one of the sources of its guidance. Restatement (Third) of Law Governing Lawyers § 60 reporter’s notes cmt. I (2000).
sharing of information between the clients. The better practice in all cases is to memorialize the clients’ instructions in writing and give a copy of the writing to the client. Nothing in the foregoing should be construed as approving the representation by a lawyer of both parties in the creation of inherently adversarial contract (e.g., marital property agreement) which is not subject to rescission by one of the parties without the consent and joinder of the other. See ACTEC Commentary on MRPC 1.7 (Conflicts of Interest: Current Clients). The lawyer may wish to consider holding a separate interview with each prospective client, which may allow the clients to be more candid and, perhaps, reveal conflicts of interest that would not otherwise be disclosed.


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

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

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

Id. at 76 (emphases added).

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

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

Id. at 76-77 (emphases added).

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

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

Id. at 77 (emphases added).

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

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

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

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

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

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

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

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

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

Id. at 929.

The New Jersey Supreme Court recognized that the ACTEC Commentaries "agreed with this approach, while other state bars have taken the opposite position."

Among other things, the New Jersey Supreme Court noted that the lawyer had learned the information from a third party, rather than one of the jointly represented clients. The court ultimately found it unnecessary to "reach the decision whether the lawyer's obligation to disclose is discretionary or mandatory" -- but clearly rejected the "keep secrets" approach.17
At least one bar also rejected the "keep secrets" approach in the absence of a previous agreement about information flow -- although in an opinion dealing with a lawyer's duty to disclose all pertinent information to former jointly represented clients. Although this scenario deals with privilege rather than ethics, it highlights the issue.

- Maryland LEO 2006-15 (2006) (holding that a lawyer fired by one of two jointly represented clients [who have now become adversaries] must withdraw from representing both clients, even if both clients consent to the lawyer's continuing to represent just one of the clients; "The lawyer is likely unable to provide competent and diligent representation to clients with interests that are diametrically opposed to one another. Further, (b)(3) [Maryland Ethics Rule 1.7(b)(3)] forbids the continued representation, even with a waiver, where one client asserts a claim against the other. That appears to be the case here, and, therefore, the conflict is not waivable."); also holding that the lawyer must provide both of the formerly jointly represented clients the lawyer's files; "With regard to the remaining two issues, former-Client B should have unfettered access to Attorney 1's files under what has been 'Waiver of Conflict of Interest.' These letters acknowledge that information provided by one client could become available to the other. The letters, however, stop short of explicitly authorizing the firm to disclose one spouse's confidential information to the other. Even in the absence of any such explicit authorization, the spirit of the letters supports the firm's decision to disclose to the wife the existence of the husband's illegitimate child."); "As the preceding authorities suggest, an attorney, on commencing joint representation of co-clients, should agree explicitly with the clients on the sharing of confidential information. In such a 'disclosure agreement,' the co-clients can agree that any confidential information concerning one co-client, whether obtained from a co-client himself or herself or from another source, will be shared with the other co-client. Similarly, the co-clients can agree that unilateral confidences or other confidential information will be kept confidential by the attorney. Such a prior agreement will clarify the expectations of the clients and the lawyer and diminish the need for future litigation. In the absence of an agreement to share confidential information with co-clients, the Restatement reposes the resolution of the lawyer's competing duties within the lawyer's discretion."); "In authorizing non-disclosure, the Restatement explains that an attorney should refrain from disclosing the existence of the illegitimate child to the wife because the trust 'would not materially affect Wife's own estate plan or her expected receipt of property under Husband's will.'"); noting that the American College of Trust and Estate Counsel agree with this discretionary standard; also acknowledging that "[t]he Professional Ethics Committees of New York and Florida, however, have concluded that disclosure to a co-client is prohibited. New York State Bar Ass'n Comm. on Professional Ethics, Op. 555 (1984); Florida State Bar Ass'n Comm. on Professional Ethics, Op. 95-4 (1997)."; emphasizing that the lawyer learned the information from a third party, not from either of the jointly represented clients; "Because Hill Wallack [lawyer] wishes to make the disclosure, we need not reach the issue whether the lawyer's obligation to disclose is discretionary or mandatory. In conclusion, Hill Wallack may inform the wife of the existence of the husband's illegitimate child."); "The law firm learned of the husband's paternity of the child through the mother's disclosure before the institution of the paternity suit. It does not seek to disclose the identity of the mother or the child. Given the wife's need for the information and law firm's right to disclose it, the disclosure of the child's existence to the wife constitutes an exceptional case with 'compelling reason clearly and convincingly shown.'" (citation omitted)).
recognized by some courts as the 'Joint Representation Doctrine,' which provides that: 'Generally, where the same lawyer jointly represents two clients with respect to the same matter, the clients have no expectation that their confidences concerning the joint matter will remain secret from each other, and those confidential communications are not within the privilege in subsequent adverse proceedings between the co-clients.' (emphasis added)).

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

In the absence of some agreement among jointly represented clients about information flow, it is unclear whether a lawyer will be bound by the ABA Model Rules approach or some case law in the pertinent jurisdiction that follows the Restatement approach.

(f) This scenario highlights the great difficulty facing a joint venture entity's boards of directors.

A board member honoring his or her fiduciary duties to the joint venture would vote in favor of development, while that same board member honoring his or her fiduciary duties to the joint venture member would vote against development of such a product. The law is not very clear about this issue. This is another reason why lawyers involved in joint ventures should carefully document their responsibilities and arrange for similarly specific descriptions of responsibilities of each member's representative on the board and of employee assigned to the joint venture.

(g) A lawyer who jointly represents a member and a joint venture must, absent some explicit agreement to the contrary, comply with the ethics rules that govern the lawyer representing an entity.
The ABA Model Rules continue the general principle that "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." ABA Model Rule 1.13(a).

The ABA Model Rules also contain elaborate provisions governing lawyers who learn that a constituent is "engaged in action, intends to act or refuses to act" in a matter "related to the representation" that is either a "violation of a legal obligation to the organization" or "a violation of law which reasonably might be imputed to the organization" and "is likely to result in substantial injury to the organization." ABA Model Rule 1.13(b).

Under the new version of the ABA Model Rules, "[u]nless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances[,] to the highest authority that could act on behalf of the organization as determined by applicable law." ABA Model Rule 1.13(b).

Sarbanes-Oxley regulations parallel these requirements.

**Best Answer**

The best answer to (a) is YES; the best answer to (b) is PROBABLY YES; the best answer to (c) is YES; the best answer to (d) is MAYBE; the best answer to (e) is MAYBE; the best answer to (f) is MAYBE; the best answer to (g) is PROBABLY YES.
Effect of Adversity between Joint Venture Members

Hypothetical 5

It looks like adversity is beginning to develop between your company and the other member of an LLC joint venture. You are jointly representing your company and the joint venture itself. You are wondering to what extent such adversity affects your ability to represent your company in any upcoming dispute.

(a) May you represent your company in a dispute with the joint venture?

   NO

(b) May you represent your company in a dispute with the other member?

   NO

(c) Are there any steps you could have taken to assure your availability to represent your company in the event of such adversity?

   YES

Analysis

(a) Absent consent, a lawyer may not represent one client in a matter that is “directly adverse to another client.” ABA Model Rule 1.7(a)(1). Therefore, a lawyer jointly representing two clients cannot represent one of the jointly represented clients adverse to one of the other jointly represented clients absent the consent of both.

   Because you represent the joint venture, you cannot be adverse to it without its consent.
Although you do not represent the other member of the joint venture, the issue here is whether your representation of the joint venture makes the other member a "client" for conflicts purposes.

As explained above, several courts have concluded that a lawyer representing a joint venture may not later be adverse to one of the joint venture's members on matters relating to the joint venture. These courts point to the relatively intimate relationship between the joint venture and its members, and the likelihood that the lawyer has gained confidential information from the members.

Arranging for a limited representation and (especially) a prospective consent might allow a lawyer jointly representing clients to later represent one client against the other, even in a substantially related matter.

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

**ABA Model Rules.** A comment to ABA Model Rule 1.7 explains that

[[the effectiveness of such [prospective] waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal
services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

ABA Model Rule 1.7 cmt. [22].

The ABA added this comment in 2002, as part of the Ethics 2000 revisions. The new comment greatly expands the ABA's endorsement of prospective consents. In fact, the Ethics 2000 changes were so dramatic that the ABA took the fairly unusual step of withdrawing an earlier opinion that dealt with prospective consents. ABA LEO 436 (5/11/05) (withdrawing earlier ABA LEO 372 (4/16/93), because recent changes to Model Rule 1.7 and especially Comment [22] allow "effective informed consent to a wider range of future conflicts" than permitted under the older version of the Model Rule; explaining that open-ended prospective consents are likely to be valid if (for instance) the client "has had the opportunity to be represented by independent counsel in relation to such consent and the consent is limited to matters not substantially related to the subject of the prior representation"; continuing to recognize that such prospective consents do not authorize the lawyer to "reveal or use confidential client information" absent an additional explicit consent).

Restatement. The Restatement takes the same basic approach. Restatement (Third) of Law Governing Lawyers, § 122 cmt. d (2000) warns that prospective consents are "subject to special scrutiny," but acknowledges that they are often appropriate.
A client's open-ended agreement to consent to all conflicts normally should be ineffective unless the client possesses sophistication in the matter in question and has had the opportunity to receive independent legal advice about the consent. . . . On the other hand, particularly in a continuing client-lawyer relationship in which the lawyer is expected to act on behalf of the client without a new engagement for each matter, the gains to both lawyer and client from a system of advance consent to defined future conflicts might be substantial. A client might, for example, give informed consent in advance to types of conflicts that are familiar to the client. Such an agreement could effectively protect the client's interest while assuring that the lawyer did not undertake a potentially disqualifying representation.


The issue of withdrawal of consent typically arises when consent was given in general terms or long in advance, and a direct conflict thereafter arises between the parties. Courts generally hold that such changed circumstances permit the objecting client to withdraw consent.

Restatement (Third) of Law Governing Lawyers § 122 reporter's note cmt. f.

State Legal Ethics Opinions. Every bar that has addressed the issue of prospective consents has refused to adopt a per se prohibition of such consents.
TAKING ADVANTAGE OF AN ADVERSARY'S MISTAKE

Hypotheticals and Analyses*

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

Hypothetical 1

A lawyer on the other side of one of your largest cases has always relied on his assistant to send out his emails. He must just have hired a new assistant, because several "incidents" in the past few months have raised some ethics issues.

(a) A few weeks ago, you received a frantic call from the other lawyer saying that his assistant had accidently just sent you an email with an attachment that was intended for his client and not for you. He tells you that the attachment contains his litigation strategy, and warned you not to open and read it. You quickly find the email in your "in box," and wonder about your obligations.

May you open and read the attachment?

MAYBE

(b) Last week you opened an email from the other lawyer. It seems to be some kind of status report. About halfway through reading it, you realize that it is the other lawyer’s status report to her client.

Must you refrain from reading the rest of the status report?

MAYBE

(c) You just opened an email from the other lawyer. After you read several paragraphs, you realize that the email was intended for a governmental agency. The email seems very helpful to your case, but would not have been responsive to any discovery requests because your adversary created it after the agreed-upon cut-off date for producing documents.

Must you refrain from reading the remainder of the email?

NO (PROBABLY)

(d) Must you advise your client of these inadvertently transmitted communications from the other lawyer, and allow the client to decide how you should act?

YES (PROBABILITY)

(e) Must the other lawyer advise his client of the mistakes he has made?

YES (PROBABILITY)
Analysis

This issue has vexed the ABA, state bars and state courts for many years.

ABA Approach

(a)-(b) In the early 1990s, the ABA started a trend in favor of requiring the return of such documents, but then shifted course in 2002. In 1992, the ABA issued a surprisingly strong opinion directing lawyers to return obviously privileged or confidential documents inadvertently sent to them outside the document production context.

In ABA LEO 368, the ABA indicated that

as a matter of ethical conduct contemplated by the precepts underlying the Model Rules, [the lawyer] (a) should not examine the materials [*that appear on their face to be subject to the attorney-client privilege or otherwise confidential*] once the inadvertence is discovered, (b) should notify the sending lawyer of their receipt and (c) should abide by the sending lawyer’s instructions as to their disposition.

ABA LEO 368 (11/10/92).

As explained below, many bars and courts took the ABA’s lead in imposing some duty on lawyers receiving obviously privileged or confidential documents to return them forthwith.

However, ten years later the ABA retreated from this position. As a result of the Ethics 2000 Task Force Recommendations (adopted in 2002), ABA Model Rule 4.4(b) now indicates that

[a] lawyer who receives a document relating to the representation of the lawyer’s client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

ABA Model Rule 4.4(b) (emphasis added).
Comment [2] to this rule reveals that in its current form the ABA’s approach is both broader and narrower than the ABA had earlier announced in its Legal Ethics Opinions.

ABA Model Rule 4.4(b) is broader because it applies to documents "that were mistakenly sent or produced by opposing parties or their lawyers," thus clearly covering document productions. ABA Model Rule 4.4 cmt. [2] (emphasis added).

The rule is narrower than the earlier legal ethics opinion because it explains that:

If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person.


A comment to ABA Model Rule 4.4 contains a remarkable statement that would seem to allow lawyers to read inadvertently transmitted documents that they know were not meant for them.

Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address.

ABA Model Rule 4.4 cmt. [3] (emphasis added).1

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1 ABA Model Rule 4.4 cmt. [3] (“Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it that it was inadvertently sent. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.”).
Thus, the ABA backed off its strict return requirement and now defers to legal principles stated by other bars or courts.

As a result of these changes in the ABA Model Rules, the ABA took the very unusual step of withdrawing the earlier ABA LEO that created the "return unread" doctrine.²

**Restatement**

The Restatement would allow use of inadvertently transmitted privileged information under certain circumstances.

If the disclosure operates to end legal protection for the information, the lawyer may use it for the benefit of the lawyer's own client and may be required to do so if that would advance the client's lawful objectives . . . . That would follow, for example, when an opposing lawyer failed to object to privileged or immune testimony . . . . The same legal result may follow when divulgence occurs inadvertently outside of court . . . . The receiving lawyer may be required to consult with that lawyer's client . . . about whether to take advantage of the lapse. If the person whose information was disclosed is entitled to have it suppressed or excluded . . . , the receiving lawyer must either return the information or hold it for disposition after appropriate notification to the opposing person or that person's counsel. A court may suppress material after an inadvertent disclosure that did not amount to a waiver of the attorney-client privilege . . . . Where deceitful or illegal means were used to obtain the information, the receiving lawyer and that lawyer's client may be liable, among other remedies, for damages for harm caused or for injunctive relief against use or disclosure. The receiving lawyer must take steps to return such confidential client information and to keep it confidential from the lawyer's own client in the interim. Similarly, if the receiving lawyer is aware that disclosure is being made in breach of trust by a

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² ABA LEO 437 (10/1/05) (citing February 2002 ABA Model Rules changes; withdrawing ABA LEO 368; holding that ABA Model Rule 4.4(b) governs the conduct of lawyers who receive inadvertently transmitted privileged communications from a third party; noting that Model Rule 4.4(b) "only obligates the receiving lawyer to notify the sender of the inadvertent transmission promptly. The rule does not require the receiving lawyer either to refrain from examining the materials or to abide by the instructions of the sending lawyer.").
lawyer or other agent of the opposing person, the receiving lawyer must not accept the information. An offending lawyer may be disqualified from further representation in a matter to which the information is relevant if the lawyer’s own client would otherwise gain a substantial advantage. . . . A tribunal may also order suppression or exclusion of such information.

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

**State Bar Opinions**

States began to adopt, adopt variations of, or reject the ABA Model Rule version of Rule 4.4(b).

States are moving at varying speeds, and (not surprisingly) taking varying approaches.

First, some states have simply adopted the ABA version. See, e.g., Florida Rule 4-4.4(b).³

Second, some states have adopted a variation of the ABA Model Rule that decreases lawyers' responsibility upon receipt of an inadvertently transmitted communication or document. For instance, as of January 1, 2010, Illinois adopted a version of Rule 4.4(b) that only requires the receiving lawyer to notify the sending lawyer if the lawyer "knows" of the inadvertence -- explicitly deleting the "or reasonably should know" standard found in the ABA Model Rule 4.4(b).⁴

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³ Interestingly, despite adopting the ABA “simply notify the sender” approach, Florida has also prohibited a receiving lawyer from searching for metadata in an electronic document received from a third party (which at best could be characterized as having been "inadvertently" included with the visible parts of such a document). Florida LEO 06-2 (9/15/06).

⁴ Illinois Rule 4.4(b) (“A lawyer who receives a document relating to the representation of the lawyer’s client and knows that the document was inadvertently sent shall promptly notify the sender.”).

Interestingly, Illinois formerly prohibited lawyers from reading and using inadvertently transmitted communication once the lawyer realized the inadvertence. Illinois LEO 98-04 (1/1999). Thus, Illinois moved from a variation of the "return unread" approach beyond the ABA "simply notify the sender"
Third, some states have adopted the ABA Model Rule approach, but warn lawyers that case law might create a higher duty. For instance, the New York state courts adopted the ABA version of Rule 4.4(b), but the New York State Bar adopted comments with such an explicit warning.\(^5\)

Fourth, some jurisdictions have explicitly retained a higher duty for the receiving lawyer. For instance, Washington, D.C. Rule 4.4(b) uses only a "knows" and not a "knows or reasonably should know" standard -- but require receiving lawyers who know of the inadvertence to stop reading the document. D.C. Rule 4.4(b) ("A lawyer who receives a writing relating to the representation of a client and knows, before examining the writing, that it has been inadvertently sent, shall not examine the writing, but shall notify the sending party and abide by the instructions of the sending party regarding the return or destruction of the writing.").\(^6\)

\(^{5}\) New York Rule 4.4 cmt. [2] (2009) "Although this Rule does not require that the lawyer refrain from reading or continuing to read the document, a lawyer who reads or continues to read a document that contains privileged or confidential information may be subject to court-imposed sanctions, including disqualification and evidence-preclusion."); New York Rule 4.4 cmt. [3] (2009) ("[T]his Rule does not subject a lawyer to professional discipline for reading and using that information. Nevertheless, substantive law or procedural rules may require a lawyer to refrain from reading an inadvertently sent document, or to return the document to the reader, or both.").

\(^{6}\) A comment to that rule provides more explanation. D.C. Rule 4.4 cmt. [2] ("Consistent with Opinion 256, paragraph (b) requires the receiving lawyer to comply with the sending party's instruction about disposition of the writing in this circumstances [sic], and also prohibits the receiving lawyer from reading or using the material. ABA Model Rule 4.4 requires the receiving lawyer only to notify the sender in order to permit the sender to take protective measures, but Paragraph (b) of the D.C. Rule 4.4 requires the receiving lawyer to do more.").
Fifth, some states have not adopted any variation of ABA Model Rule 4.4(b), and continue to address the issues through legal ethics opinions. See, e.g., Virginia LEO 1702 (11/24/97) (adopting the reasoning of ABA LEO 368; explaining that once the lawyer recognizes a document as confidential, the lawyer "has an ethical duty to notify opposing counsel, to honor opposing counsel's instructions about disposition of the document, and not to use the document in contravention of opposing counsel's instructions"); Virginia LEO 1786 n.7 (12/10/04) (acknowledging that the ABA has changed its Model Rules to replace a "return unread" policy with a notice requirement, but reiterating Virginia's approach articulated in Virginia LEO 1702).

**Courts' Approach**

Court decisions have also reached differing conclusions. Some courts have allowed lawyers to take advantage of their adversary's mistake in transmitting privileged or confidential documents. These courts normally do not even mention the ethics issues, but instead focus on attorney-client privilege or work product waiver issues.

Other decisions indicate that lawyers who fail to notify the adversary or return inadvertently transmitted privileged documents risk disqualification or sanctions.

- Greg Mitchell, E-Mail "Oops" Ends With General Counsel Being Booted From Case, The Recorder, Jan. 4, 2011 ("Hagey represents a handful of engineers in Oakland who in September left engineering and design firm Arcadis to start their own shop. Apparently worried their former employer would try to interfere, they hired Braun Hagey and later conferred by e-mail -- with autocomplete inserting an old Arcadis address for one of the former employees. So four message threads, including one attaching a draft declaration, were delivered to Arcadis, where an e-mail monitoring system routed them to legal."); "In a declaration, Hagey said the plaintiffs didn't realize their e-mails had been intercepted until lawyers at Gordon & Rees filed a counterclaim that references the day the former employees held a meeting -- a date, he said, Gordon & Rees could only have learned from the e-mails. Reached Wednesday, Hagey declined to comment publicly."); "In a declaration, Elizabeth Spangler, an in-house lawyer at Arcadis, acknowledged
receiving the threads and reviewing the draft complaint -- at which point she said she realized the material was probably privileged. She said, however, that there were no great revelations in the material, and she didn't share it with anyone. She did say, though, that she must have inadvertently given Gordon & Rees the date on which the exiting employees met. She also said she later learned her boss, Arcadis' general counsel Steven Niparko, had also briefly reviewed the e-mail.

"On December 17, United States District Judge Jeffrey White ordered that Arcadis replace Gordon & Rees with new, untainted counsel. He also ordered Spangler off the case, and said the General Counsel must be 'removed from all aspects of the day-to-day management.' And he ordered Arcadis to pay fees and costs of $40,000.

- **Rico v. Mitsubishi Motors Corp.,** 171 P.3d 1092, 1096, 1097, 1099, 1099-1100, 1100-01 (Cal. 2007) (upholding the disqualification of a plaintiff's lawyer who somehow came into possession of and then used notes created by defendant's lawyer to impeach defendant's expert; noting that defendant's lawyer claimed that plaintiff's lawyer took the notes from his briefcase while alone in a conference room, while the plaintiff's lawyer claimed that he received them from the court reporter -- although she had no recollection of that and generally would not have provided the notes to one of the lawyers; agreeing with the trial court that the notes were "absolutely privileged by the work product rule" because they amounted to "an attorney's written notes about a witness's statements"; "When a witness's statement and the attorney's impressions are inextricably intertwined, the work product doctrine provides that absolute protection is afforded to all of the attorney's notes."; explaining that "[t]he document is not a transcript of the August 28, 2002 strategy session, nor is it a verbatim record of the experts' own statements. It contains Rowley's summaries of points from the strategy session, made at Yukevich's direction. Yukevich also edited the document in order to add his own thoughts and comments, further inextricably intertwining his personal impressions with the summary."; not dealing with the attorney-client privilege protection; rejecting the argument that the notes amounted to an expert's report. Although the notes were written in dialogue format and contain information attributed to Mitsubishi's experts, the document does not qualify as an expert's report, writing, declaration, or testimony. The notes reflect the paralegal's summary along with counsel's thoughts and impressions about the case. The document was absolutely protected work product because it contained the ideas of Yukevich and his legal team about the case."; adopting a rule prohibiting a lawyer from examining materials "where it is reasonably apparent that the materials were provided or made available through inadvertence"; acknowledging that the defense lawyer's notes were not "clearly flagged as confidential," but concluding that the absence of such a label was not dispositive; noting that the plaintiff's lawyer "admitted that after a minute or two of review he realized the notes related to the case and that Yukevich did not intend to reveal them"; ultimately adopting an objective rather than a subjective standard on this issue; also rejecting plaintiff's
lawyer’s argument that he could use the work product protected notes because they showed that the defense expert had lied; agreeing with the lower court and holding that "once the court determines that the writing is absolutely privileged, the inquiry ends. Courts do not make exceptions based on the content of the writing." Thus, 'regardless of its potential impeachment value, Yukevich's personal notes should never have been subject to opposing counsel's scrutiny and use.'"; also rejecting plaintiff's argument that the crime fraud exception applied, because the statutory crime fraud exception applies only in a law enforcement action and otherwise does not trump the work product doctrine).

- **Conley, Lott, Nichols Mach. Co. v. Brooks**, 948 S.W.2d 345, 349 (Tex. App. 1997) (although a lawyer's failure to return a purloined privileged document would not automatically result in disqualification, "what he did after he obtained the documents must also be considered"; disqualifying the lawyer in this case because his retention and use of the knowingly privileged documents amounted to "conduct [that] fell short of the standard that an attorney who receives unsolicited confidential information must follow").

- **American Express v. Accu-Weather, Inc.**, Nos. 91 Civ. 6485 (RWS), 92 Civ. 705 (RWS), 1996 WL 346388 (S.D.N.Y. June 25, 1996) (imposing sanctions on a lawyer for what the court considered the unethical act of opening a Federal Express package and reviewing a privileged document after receiving a telephone call and letter advising that the sender had inadvertently included a privileged document in the package and asking that the package not be opened).

**Conclusion**

Thus, lawyers seeking guidance on the issue of inadvertently transmitted communications must check the applicable ethics rules, any legal ethics opinions analyzing those rules (remembering that some of the old legal ethics opinions might now be inoperative), and any case law applying the ethics rules, other state statutes, or any governing common law principles that supplement or even trump the ethics rules. Lawyers should remember that many judges have their own view of ethics and professionalism -- and might well consider lawyers seeking to diligently represent their clients in reviewing inadvertently transmitted communications as stepping over the line and thus acting improperly.
(c) The 1992 ABA ethics opinion articulating a "do not read" rule applied that principle only to materials "that appear on their face to be subject to the attorney-client privilege or otherwise confidential" privileged communications. In contrast, ABA Model Rule 4.4(b) on its face applies to any document meeting the Rule 4.4(b) standard. In other words, it is not limited to documents containing the other client's confidences, or to privileged communications between the other client and her lawyer.

(d) Only one state has articulated a principle that probably most lawyers would not welcome -- that they have a duty to communicate with their client about how the lawyer should treat an inadvertently transmitted communication he or she receives.

- Pennsylvania LEO 2011-010 (3/2/11) (addressing the following situation: "You advised that during the course of settlement negotiations, opposing clients and opposing counsel have on several occasions copied you on e-mails between them which related to the litigation matter. You properly advised opposing counsel of these emails, and you erased them and asked him to advise his clients to stop copying you on emails."); noting that the lawyer properly complied with Rule 4.4(b) by advising the opposing lawyer of the inadvertence, but also finding that the lawyer was obligated to consult with his client about what steps to take; "You are required by PA rule of Professional Conduct ("RPC") 1.1 to represent your client effectively and competently. In order to do so, you must evaluate the nature of the information received in the emails, the available steps to protect your client's interests in light of this information, and the advantages and disadvantages of disclosing this information to the client and utilizing the information."; "These rules require that you make the decision whether and how to use the information in the emails from opposing counsel in consultation with your client. It is necessary to advise the client of the nature of the information, if not the specific content, in order to have that discussion." (emphasis added)).

No other state has taken this position, although it certainly seems consistent with lawyers' general duty of disclosure to their clients.

Under ABA Model Rule 1.4,

a lawyer shall . . . keep the client reasonably informed about the status of the matter.
ABA Model Rule 1.4(a)(3). On the other hand, the version of ABA Model Rule 4.4 adopted in 2002 seems to give lawyer’s discretion about how to proceed.

Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer.

ABA Model Rule 4.4 cmt. [3] (emphasis added).\(^7\)

If the client insists on his or her lawyer reading the inadvertently transmitted communication, the lawyer might try to talk the client out of such a hardline position. Of course, clients probably would not be impressed with such a lawyer’s argument that he or she might make the same mistake in the future and should build up sufficient “good will” with the adversary’s lawyer in case the client’s lawyer needs a similar favor in the future. Many clients would dismiss such an argument, justifiably pointing out that in that circumstance the client can simply sue his or her lawyer for malpractice -- so the client does not need any “good will” from the adversary.

If the lawyer cannot dissuade the client from insisting that the lawyer read the inadvertently transmitted communication, the lawyer might withdraw from the representation. Under ABA Model Rule 1.16(b)(4) the lawyer may withdraw even if the withdrawal will have a “material adverse effect on the interests of the client” if (among other things)

the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

\(^7\) ABA Model Rule 4.4 cmt. [3] (“Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it that it was inadvertently sent. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.”).
ABA Model Rule 1.16(b)(4). It is difficult to imagine a complete rupture of the relationship based on such a disagreement, but one is certainly theoretically possible.

(e) Lawyers who accidentally transmit a communication to an adversary might have a duty to advise their client of the mistake. Under ABA Model Rule 1.4, [a] lawyer shall . . . keep the client reasonably informed about the status of the matter.

ABA Model Rule 1.4(a)(3).

Authorities generally agree that lawyers’ duty of communication requires them to advise their clients of their possible malpractice to clients.

- In re Kieler, 227 P.3d 961, 962, 965 (Kan. 2010) (suspending for one year a lawyer who had not advised the client of the lawyer’s malpractice in missing the statute of limitations; "The Respondent told Ms. Irby that the only way she could receive any compensation for her injuries sustained in that accident was to sue him for malpractice. He told her that it was "not a big deal," that he has insurance, and that is why he had insurance. The Respondent was insured by The Bar Plan." (internal citation omitted); "In this case, the Respondent violated KRPC 1.7 when he continued to represent Ms. Irby after her malpractice claim ripened, because the Respondent’s representation of Ms. Irby was in conflict with his own interests. Though the Respondent admitted that Ms. Irby’s malpractice claim against him created a conflict, he failed to cure the conflict by complying with KRPC 1.7(b). Accordingly, the Hearing Panel concludes that the Respondent violated KRPC 1.7.").

- Texas LEO 593 (2/2010) (holding that a lawyer who has committed malpractice must advise the client, and must withdraw from the representation, but can settle the malpractice claim if the client has had the opportunity to seek independent counsel but has not done so; "Although Rule 1.06(c) provides that, if the client consents, a lawyer may represent a client in certain circumstances where representation would otherwise be prohibited, the Committee is of the opinion that, in the case of malpractice for which the consequences cannot be significantly mitigated through continued legal representation, under Rule 1.06 the lawyer-client relationship must end as to the matter in which the malpractice arose."); "[A]s promptly as reasonably possible the lawyer must terminate the lawyer-client relationship and inform the client that the malpractice has occurred and that the lawyer-client relationship has been terminated."); "Once the lawyer has candidly disclosed both the malpractice and the termination of the lawyer-client relationship to the client, Rule 1.08(g) requires that, if the lawyer wants to attempt to settle
the client’s malpractice claim, the lawyer must first advise in writing the now
former client that independent representation of the client is appropriate with
respect to settlement of the malpractice claim: “A lawyer shall not . . . settle a
claim for . . . liability [for malpractice] with an unrepresented client or former
client without first advising that person in writing that independent
representation is appropriate in connection therewith.”).

- California 12009-178 (2009) (“An attorney must promptly disclose to the client
the facts giving rise to any legal malpractice claim against the attorney. When
an attorney contemplates entering into a settlement agreement with a current
client that would limit the attorney’s liability to the client for the lawyer’s
professional malpractice, the attorney must consider whether it is necessary
or appropriate to withdraw from the representation. If the attorney does not
withdraw, the attorney must: (1) [c]omply with rule 3-400(B) by advising the
client of the right to seek independent counsel regarding the settlement and
giving the client an opportunity to do so; (2) [a]dvice the client that the lawyer
is not representing or advising the client as to the settlement of the fee
dispute or the legal malpractice claim; and (3) [f]ully disclose to the client the
terms of the settlement agreement, in writing, including the possible effect of
the provisions limiting the lawyer’s liability to the client, unless the client is
represented by independent counsel.”; later confirming that “[a] member
should not accept or continue representation of a client without providing
written disclosure to the client where the member has or had financial or
professional interests in the potential or actual malpractice claim involving the
representation.”; "Where the attorney's interest in securing an enforceable
waiver of a client’s legal malpractice claim against the attorney conflicts with
the client's interests, the attorney must assure that his or her own financial
interests do not interfere with the best interests of the client. . . . Accordingly,
the lawyer negotiating such a settlement with a client must advise the client
that the lawyer cannot represent the client in connection with that matter,
whether or not the fee dispute also involves a potential or actual legal
malpractice claim.”; "A lawyer has an ethical obligation to keep a client
informed of significant developments relating to the representation of the
client. . . . Where the lawyer believes that, he or she has committed legal
malpractice, the lawyer must promptly communicate the factual information
pertaining to the client's potential malpractice claim against the lawyer to the
client, because it is a 'significant development.'"; "While no published
California authorities have specifically addressed whether an attorney's cash
settlement of a fee dispute that includes a general release and a section 1542
waiver of actual or potential malpractice claims for past legal services falls
within the prescriptions of this rule, it is the Committee's opinion that rule 3-
300 should not apply.”).}

- Minnesota LEO 21 (10/2/09) (a lawyer "who knows that the lawyer’s conduct
could reasonably be the basis for a non-frivolous malpractice claim by a
current client" must disclose the lawyer's conduct that may amount to
malpractice; citing several other states’ cases and opinions; “See, e.g., Tallon v. Comm. on Prof'l Standards, 447 N.Y.S. 2d 50, 51 (App. Div. 1982) (‘An attorney has a professional duty to promptly notify his client of his failure to act and of the possible claim his client may thus have against him.’); Colo. B. Ass'n Ethics Comm., Formal Op. 113 (2005) (‘When, by act or omission, a lawyer has made an error, and that error is likely to result in prejudice to a client's right or claim, the lawyer must promptly disclose the error to the client.’); Wis. St. B. Prof'l Ethics Comm., Formal Op. E-82-12 (‘[A]n attorney is obligated to inform his or her client that an omission has occurred which may constitute malpractice and that the client may have a claim against him or her for such an omission.’); N.Y. St. B. Ass'n Comm. on Prof'l Ethics, Op. 734 (2000); 2000 WL 33347720 (Generally, an attorney 'has an obligation to report to the client that [he or she] has made a significant error or omission that may give rise to a possible malpractice claim.'); N.J. Sup. Ct. Advisory Comm. on Prof'l Ethics, Op. 684 (‘The Rules of Professional Conduct still require an attorney to notify the client that he or she may have a legal malpractice claim even if notification is against the attorney's own interest.’).”;
also explaining the factors the lawyer must consider in determining whether the lawyer may still represent the client; “Under Rule 1.7 the lawyer must withdraw from continued representation unless circumstances giving rise to an exception are present. . . . Assuming continued representation is not otherwise prohibited, to continue the representation the lawyer must reasonably believe he or she may continue to provide competent and diligent representation. . . . If so, the lawyer must obtain the client's 'informed consent,' confirmed in writing, to the continued representation. . . . Whenever the rules require a client to provide 'informed consent,' the lawyer is under a duty to promptly disclose to the client the circumstances giving rise to the need for informed consent. . . . In this circumstance, 'informed consent' requires that the lawyer communicate adequate information and explanation about the material risks of and reasonably available alternatives to the continued representation.”).

- New York LEO 734 (11/1/00) (holding that the Legal Aid Society "has an obligation to report to the client that it has made a significant error or omission [missing a filing deadline] that may give rise to a possible malpractice claim"; quoting from an earlier LEO in which the New York State Bar "held that a lawyer had a professional duty to notify the client promptly that the lawyer had committed a serious and irremediable error, and of the possible claim the client may have against the lawyer for damages" (emphasis added)).

Given the hundreds (if not thousands) of judgment calls that lawyers make during an average representation, it might be very difficult to determine what sort of mistake rises to the level of such mandatory disclosure. For instance, it is difficult to imagine
that a lawyer might tell the client that the lawyer could have done a better job of framing one question during a discovery deposition. However, it seems equally clear that a lawyer would have to advise his client if the lawyer accidentally transmitted to the adversary a document containing some critical litigation or settlement strategy.

**Best Answer**

The best answer to (a) is **MAYBE**; the best answer to (b) is **MAYBE**; the best answer to (c) is **PROBABLY NO**; the best answer to (d) is **PROBABLY YES**; the best answer to (e) is **PROBABLY YES**.
Inadvertent Production of Privileged Documents in Litigation: Ethics Issues

Hypothetical 2

Last week you received and reviewed ten boxes of documents produced by a litigation adversary. This morning you received a letter from the adversary, demanding that you return three documents it claims to have "inadvertently" included in the production.

Must you return the following documents your adversary claims to have "inadvertently" included in the production?

(a) A memorandum from your adversary's trial lawyer to its president, marked "privileged and confidential" and analyzing the litigation risks in this case?

MAYBE

(b) A memorandum to the adversary's president which does not list an author, but which discusses this litigation (your adversary's lawyer claims that she just learned that the memorandum was written by a former in-house lawyer).

MAYBE

(c) A chart of customer complaints that could be very useful in the litigation, but which falls outside the scope of your discovery request.

NO

Analysis

The original ABA Legal Ethics Opinion dealing with this issue did not apply to privileged or confidential documents produced during a litigation document production, although the newest version of ABA Model Rule 4.4(b) also provides guidance for documents accidentally produced in a litigation document production. Under current ABA Model Rule 4.4(b), a lawyer receiving a document that the lawyer "knows or reasonably should know" was inadvertently provided to the lawyer "shall promptly notify the sender."
Most courts dealing with the inadvertent production of privileged documents during a litigation document production do not address the ethics issue, but instead limit their analysis to assessing the possible waiver of the attorney-client privilege or work product doctrine protection.

Of course, a litigant claiming that it "inadvertently" produced a document in discovery must be prepared to establish that its mistake was physical rather than conceptual. One court discussed this distinction.

In contrast, the facts here demonstrate that defendant's counsel specifically reviewed the Criteria Document and knowingly and intentionally produced that document after determining that paragraphs 9 and 10 should be redacted and that the remainder of the document should be produced to plaintiffs. According to defendant, its disclosure is nonetheless "inadvertent" because the disclosure was based on a mistake of counsel, who reviewed the document outside the context of Ms. Ferrell's cover memorandum and, without the benefit of that memorandum, did not realize that the document was authored by defendant's in-house counsel and could not otherwise ascertain from the face of the document that it was entitled to protection from disclosure. . . . There is a distinction, however, between an "inadvertent" disclosure and a disclosure that is "advertent and intended where the person making discovery was merely unaware of the legal consequences or nature of the document produced."


Some courts explicitly hold that the "return unread" and similar approaches to inadvertently transmitted documents outside the litigation context simply do not apply to document productions.

We emphasize that these factors apply only when a lawyer receives an opponent's privileged materials outside the normal course of discovery. If a lawyer receives privileged
materials because the opponent inadvertently produced them in discovery, the lawyer ordinarily has no duty to notify the opponent or voluntarily return the materials. Rather, the producing party bears the burden of recovering the documents by establishing that the production was involuntary.

In re Meador, 968 S.W.2d 346, 352 (Tex. 1998).

Ironically, the Northern District of Illinois pointed to a change in the Illinois ethics rules from the "return unread" to the "simply notify the sender" concept in prohibiting the receiving lawyer in a document production from using arguably inadvertently produced protected documents.

- Coburn Group, LLC v. Whitecap Advisors LLC, 640 F. Supp. 2d 1032, 1043 (N.D. Ill. 2009) (providing an extensive analysis of Rule 502, and ultimately concluding that defendant had not waived privilege protection for two documents totaling sixteen pages that were inadvertently produced in a 40,000 page document production; finding that some documents at issue did not deserve work product protection; pointing to newly revised Illinois ethics rules (effective January 1, 2010); "The recently revised Illinois Rules of Professional Conduct added a new subsection requiring a lawyer who receives a document that the lawyer knows was inadvertently sent to notify the sender promptly. Ill. Rule of Prof. Conduct 4.4(b) (effective Jan. 1, 2010). The commentary states that the purpose of the notification is to allow the sender to take protective measures, although whether the privileged status of the document has been waived is beyond the scope of the rule. (Id. comment P 2) Requiring the receiving lawyer to notify the sending lawyer is clearly at odds with any purported duty on the part of the receiving lawyer to use the information for the benefit of his or her client."; "Under Rule 502, Whitecap may assert work-product protection for the e-mail notwithstanding the inadvertent disclosure. Coburn's counsel is not under a duty to use the e-mail and, indeed, is not permitted to use the e-mail.").

A number of courts have addressed the ethics issue. One court indicated that lawyers receiving inadvertently produced documents may use them,\(^1\) while other courts require lawyers to return such documents.\(^2\)

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\(^2\)
Several courts have sanctioned lawyers for taking advantage of an adversary's accidental production of a protected document in litigation.

- **Bak v. MCL Fin. Group, Inc.**, 88 Cal. Rptr. 3d 800 (Cal. Ct. App. 2009) (upholding an arbitration panel's $7,500 sanction imposed on defendants' lawyer for copying privileged documents plaintiffs inadvertently delivered to him, and then sending a copy to the arbitration panel).

- **Atlas Air, Inc. v. Greenberg Traurig, P.A.**, 997 So. 2d 1117, 1119 (Fla. Dist. Ct. App. 2008) (disqualifying a defense law firm because several of its lawyers read and relied upon privileged documents belonging to the adversary which had been accidentally delivered to the defense lawyer by a third party contractor "retained by the parties to copy and produce documents following the ABA approach; declining to apply the approach to documents mistakenly produced in document productions "since there is a presumption those documents are not inadvertently produced").

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2. **Brandt v. FDIC** (In re Southeast Banking Corp. Sec. & Loan Loss Reserve Litig.), 212 B.R. 386, 396 (Bankr. S.D. Fla. 1996) (in a magistrate judge's opinion, applying the ABA approach to documents inadvertently produced during a document production; "It should have been blatantly obvious to [counsel] that he had accidentally come into possession of privileged materials.... [H]e knew or should have known that the [adversary] would not voluntarily turn over the very documents they were attempting to keep away from him in the proceeding, which was pending at that time.... [W]hen he noticed the boxes of [privileged] documents, and was skeptical as to whether he was being permitted to copy them, he had an obligation to notify the [adversary's] attorney and follow her instructions.; enforcing the parties' protective order non waiver provision and ordering the documents returned; later affirmed by the U.S. District Judge except for the rescission of lawyer's pro hac vice status); **Transportation Equip. Sales Corp. v. BMY Wheeled Vehicles**, 930 F. Supp. 1187, 1188 (N.D. Ohio 1996) (applying the ABA approach in the context of privileged documents inadvertently produced during a document production; requiring the offending lawyer to return the documents and "any additional documents containing direct or indirect reference to the document," provide a list of all people who learned of the documents and describe steps that will be taken to avoid information in the documents from being used; warning that "noncompliance with this Order by any person affiliated with the plaintiff may lead to dismissal with prejudice of the plaintiff's complaint and an award of attorney's fees and costs to the defendant"); **State Compensation Ins. Fund v. WPS, Inc.**, 82 Cal. Rptr. 2d 799, 807-08 (Cal. Ct. App. 1999) (finding that a party who accidentally sent 273 pages of clearly marked privileged and confidential material as part of three boxes of documents produced in litigation had not waived the privilege; noting that the lawyer who received the documents should have alerted the adversary of its mistake, but would not be sanctioned or disqualified; distinguishing Aerojet-General Corp., and adopting ABA Formal Op. 92-368 as a "standard for future application to instances similar to that presented here "; "Accordingly, we hold that the obligation of an attorney receiving privileged documents due to the inadvertence of another is as follows: When a lawyer who receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged. The parties may then proceed to resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders and other judicial intervention may be justified. We do, however, hold that whenever a lawyer ascertains that he or she may have privileged attorney-client material that was inadvertently provided by another, that lawyer must notify the party entitled to the privilege of the fact.").
examined by the parties lawyers”; noting that the lower court had only disqualified the individual lawyers, and instead disqualifying the entire firm).

- Lazar v. Mauney, 192 F.R.D. 324, 328, 330, 331 (N. D. Ga. 2000) (addressing a situation in which plaintiff’s lawyer mistakenly produced a privileged letter; "The letter in question is a communication made by plaintiff to his attorneys in this case regarding the instant litigation. It is clear to the court that the primary purpose of the letter was to communicate plaintiff’s thoughts about and responses to defendants’ counterclaims. In the letter, plaintiff also requested his counsel to inform him of the potency of his case against defendants. He did so with colorful and distasteful expressions. Nevertheless, the letter clearly was a communication confidentially made to counsel for the purpose of securing legal advice and assistance and therefore is protected by the attorney-client privilege under Georgia law." (footnote omitted); noting that defendant returned the document, but used a copy of the document in a later motion; explaining that under Georgia law only the client can waive the privilege; "The inadvertent disclosure of plaintiff's counsel does not waive the plaintiff's attorney-client privilege because the privilege can be waived only by the intentional relinquishment of the privilege by the client."; also noting that mistakes are likely in a large document production; concluding that defendant's lawyers had "implicitly if not explicitly, behaved dishonestly" by exploiting plaintiff's lawyer's mistake and by "deceive[ing] her into believing that the situation had been rectified and resolved"; noting that "Mr. Allen's [defendant's lawyer] excuse that Ms. Anderson [plaintiff's lawyer] did not ask if he retained a copy and that he never said he did not keep a copy is entirely inadequate"; "Let the court be perfectly clear: it will not tolerate unethical, dishonest, or unprofessional conduct by the attorneys before it, lest the honor of this profession be blemished and placed in disrepute. When attorneys behave as Mr. Gary and Mr. Allen did, it is no wonder that 'the public, and perhaps the profession itself, seem increasingly convinced that lawyers are simply a plague on society['] instead of professionals who behave with honesty and integrity. Geoffrey Hazard, Jr., The Future of Legal Ethics, 100 YALE L.J. 1239, 1240 (1991)."; prohibiting defendants from any "further use or distribution of the letter or its contents"; "The court is of the opinion that defense counsel's conduct and the publication of the letter has irreparably violated the attorney-client privilege with regards to the letter and that ordering the letter's return is akin to trying to retrieve feathers scattered to the wind from a burst pillow. Nonetheless, it is proper, and this court so ORDERS defendants to return to plaintiff's counsel all copies of the inadvertently produced privileged letter along with a list of every distribution made thereof. Defendants are to do so within twenty-four (24) hours of the receipt of this order.").
Changes in the pertinent ethics rules might affect this analysis -- so it is unclear whether these courts facing the same situation today (or in the future) would reach the same conclusion.

As the courts begin to apply Federal Rule of Evidence 502, they probably will find document production incidents governed as much by that rule (and its underlying principle) as by earlier state precedents.

(c) No bar or court seems to have applied the "return unread" doctrine to non-privileged but non-responsive documents.

**Best Answer**

The best answer to (a) is MAYBE; the best answer to (b) is MAYBE; the best answer to (c) is NO.
Evidence of an Adversary's Wrongdoing Transmitted Inadvertently or by an Unauthorized Person

Hypothetical 3

From the beginning of this important case, your client warned you that your adversary and its lawyers were "sleaze balls." Two recent incidents confirmed your client's characterization, and created dilemmas for you.

(a) This morning you opened up a large brown envelope addressed to you in unfamiliar handwriting. The first page is a short note in the same handwriting saying simply "You need to see these. Don't tell anyone how you got them." The envelope contains three documents. From your very quick review, you can see that they are copies of e-mails from the adversary's lawyer to her CFO. In the first e-mail you quickly scan, the lawyer chastised the CFO for having destroyed several responsive documents after the litigation began, and advised her of the severe penalties for spoliation.

Must you refrain from reading the other e-mails and using them in the litigation?

**NO (PROBABLY)**

(b) About an hour after you open the plain brown envelope, you received an e-mail from the adversary's lawyer. When you opened the e-mail, you saw that the lawyer intended it for her CFO. It is marked "privileged and confidential," and the first line reads: "I just learned that you destroyed more documents even though I told you never to do that again."

Must you refrain from reading the remainder of the e-mail and using it in the litigation?

**MAYBE**

**Analysis**

This hypothetical involves two related but distinct scenarios.

(a) In ABA LEO 382 (7/5/94), the ABA indicated that lawyers who received unsolicited privileged or confidential materials from a third party should refrain from reviewing the documents, notify the adversary that the lawyer received them and either return them or ask a court to rule on their disposition. The ABA justified this approach
(which differed from the "return unread" approach applied to inadvertently transmitted privileged documents) because the documents described in this LEO were not inadvertently sent to the lawyer -- but rather were intentionally sent by a third party who might or might not have been authorized to deal with the documents. The ABA indicated that a court might have to examine this issue, because the intentional transmission of the documents could have been motivated by such varying intentions as a disloyal employee’s attempt to hurt a corporation by purloining documents, or a well-intentioned whistleblower’s attempt to stop corporate misconduct. Given this uncertainty, the ABA called for the court's involvement.

Unlike its "return unread" policy governing inadvertently transmitted privileged communications, the ABA has not explicitly rejected its approach to a third party's intentional transmission of privileged communications. If anything, the "keep the documents but notify the court" approach follows the new ABA attitude toward inadvertently transmitted privileged communications. ABA Model Rule 4.4(b).

Still, the ABA recently took the unusual step of withdrawing ABA LEO 382. In the years between the ABA's promulgation and withdrawal of ABA LEO 382, several state bars endorsed the ABA approach.

- New York LEO 700 (5/7/98) ("A lawyer who receives an unsolicited and unauthorized communication from a former employee of an adversary's law firm may not seek information from that person if the communication would exploit the adversary's confidences or secrets. Where the information communicated involves alleged criminal or fraudulent conduct in which opposing counsel may be assisting, the receiving lawyer should communicate

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1 ABA LEO 440 (5/13/06) (withdrawing ABA LEO 382; reciting the standards under revised ABA Model Rule 4.4(b); noting that "if the providing of the materials is not the result of the sender's inadvertence," Model Rule 4.4(b) does not apply, and determining "[w]hether a lawyer may be required to take any action in such an event is a matter of law beyond the scope" of the ABA Model Rules).
with a tribunal or other appropriate authority to get further direction as to the
use of the information.

(b) This scenario involves an inadvertent transmission of privileged
communications, but one which confirms clearly improper (if not illegal) conduct.

It is unclear how most bars would react to this situation. As explained elsewhere,
the ABA would now permit the receiving lawyer to use this inadvertently transmitted
e-mail, although the lawyer would have to notify the other side of the inadvertent
transmission.

States continuing to follow the old ABA "return unread" policy would have the
most difficult time dealing with this scenario. Literal language of some states' legal
ethics opinions would preclude the receiving lawyer's reading, retention or use of this
e-mail -- but common sense and concern for the institutional integrity of the court
system would weigh in favor of allowing use of this e-mail.

Best Answer

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

Hypothetical 4

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,"\(^1\) 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}.

\textbf{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,

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

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

Arizona. In Arizona LEO 07-03, 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.


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 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."\(^4\)

\(^4\) 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,\(^5\) 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.")
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 and use the metadata for the client's benefit without violating the Rules of Professional Conduct.


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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."\(.)"
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 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

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.").
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 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

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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").
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.

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

**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.

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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 discovery (which may contain metadata) must be handled in the same way as other documents being produced).
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 "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

\(^{10}\) 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."; and 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.").
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.

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

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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.”).
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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 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."

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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)."
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,” 13 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.”

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.

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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).
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.


\[\text{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}
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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. \textit{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 . . . .

\textit{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." \textit{Id.}

In the second scenario,

\begin{quote}
shortly after opening the document and discovering the readily accessible metadata, [the receiving lawyer] receives 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.").
\end{quote}
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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**

ABA LEO 442 (8/5/06) -- **YES**

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

**2007**

Maryland LEO 2007-9 (2007) -- **YES**

Alabama LEO 2007-02 (3/14/07) -- **NO**

District of Columbia LEO 341 (9/2007) -- **NO**

Arizona LEO 07-3 (11/2007) -- **NO**


**2008**

N.Y. County Law. Ass’n LEO 738 (3/24/08 )-- **NO**
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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 (11/11) -- 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. 15

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15 Florida LEO 06-2 (9/16/06).
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).

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**.
Duty to Disclose an Adversary’s Document Error

Hypothetical 5

You represent an estranged son who has been feuding with his wealthy parents. The parents have agreed to include certain provisions in their estate plan in an effort to resolve the latest dispute, and you and the parents’ lawyer have been exchanging drafts of the parents' estate plan documents. You finished your negotiations last night, and early this morning received an agreement that the parents' lawyer says memorializes your final agreement. However, you notice that the parents’ lawyer failed to include a provision that you had reluctantly agreed to last night -- which would be favorable to the parents rather than to your client.

(a) Without your client's consent, must you advise the parents' lawyer of her mistake?

YES (PROBABLY)

(b) Must you advise your client of the parents' lawyer's mistake?

NO (PROBABLY)

Analysis

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

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

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

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

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

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

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

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

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

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

Best Answer

The best answer to (a) is PROBABLY YES; the best answer to (b) is PROBABLY NO.
EX PARTE COMMUNICATIONS

Hypotheticals and Analyses*

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

Hypothetical 1

You are representing one of your clients in a lawsuit against a large retailer. The retailer's litigator has been very difficult, and you think that he is "short stopping" some of your settlement offers without passing them along to the retailer's vice president who is supervising the litigation for the defendant retailer. You think that you might be able to resolve the case if you can "work around" the retailer's "scorched earth" litigator.

Without the retailer’s lawyer’s consent, may you contact the retailer’s vice president who is supervising the litigation, and try to settle the case?

NO

Analysis

The ABA Model Rules prohibit such communication.

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

ABA Model Rule 4.2.

Best Answer

The best answer to this hypothetical is NO.
Application Only to Lawyers "Representing" a Client:
Lawyers Acting in Other Capacities

Hypothetical 2

You have read your state’s Rule 4.2, and see that it begins with the phrase "[i]n representing a client . . . ." You and your partners have a varied civil practice, and you wonder how that rule applies to some of what you and your partners do on a daily basis.

(a) One of your partners sometimes acts as a guardian ad litem for minor children. In playing that role, can she communicate ex parte with one of the child’s parents -- without the parent’s lawyer’s consent?

YES (PROBABLY)

(b) One of your partners sometimes serves as a bankruptcy trustee. In playing that role, will he be able to communicate ex parte with a represented debtor -- without the debtor’s lawyer’s consent?

MAYBE

Analysis

The ABA Model Rules contain a one-sentence prohibition that generates numerous issues.

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

ABA Model Rule 4.2.¹

¹ The Restatement contains essentially the same standard. Restatement (Third) of Law Governing Lawyers § 99(1) (2000) ("A lawyer representing a client in a matter may not communicate about the subject of the representation with a nonclient whom the lawyer knows to be represented in the matter by another lawyer or with a representative of an organizational nonclient who is represented as defined in § 100, unless: (a) the communication is with a public officer or agency to the extent stated in § 101; (b) the lawyer is a party and represents no other client in the matter; (c) the communication is authorized by law; (d) the communication reasonably responds to an emergency; or (e) the other lawyer consents.")
This hypothetical addresses the "[i]n representing a client" phrase.

On its face, the prohibition on ex parte communications (absent the other lawyer's consent) only applies if a lawyer engaging in such ex parte communications does so "in representing a client."

(a) In some situations involving ex parte contacts, lawyers are not acting as client representatives. Many of these situations involve lawyers acting as guardians or guardians ad litem.

- North Carolina LEO 2006-19 (1/19/07) (holding that the ex parte communication rule "does not apply to a lawyer acting solely as a guardian ad litem").

- Maryland LEO 2006-7 (2006) (holding that a lawyer appointed by the court as guardian of the property of a disabled nursing home resident may communicate directly with the nursing facility, even though the facility is represented by a lawyer; contrasting the role of a guardian with that of a lawyer; "A guardian is not an agent of a ward, because guardians are not subject to the ward's control; rather, the guardians serve a unique role as agents of the court. In reality the court is the guardian; an individual who is given that title is merely an agent or arm of the tribunal in carrying out its sacred responsibility. Thus, a ward may not select, instruct, terminate, or otherwise control his guardian." (citations omitted); "In contrast, an attorney-client relationship is 'an agent-principal relationship.' . . . 'A client's right to select and direct his or her attorney is a fundamental aspect of attorney-client relations. Thus, the principal-agent relationship between a client and an attorney is always a consensual one.'"; "From this explication, it does not appear that the member appointed by the court as Guardian 'represents' the Resident. From your recitation of the facts, no attorney-client relationship exists, only a guardian-ward relationship. Accordingly, MRPC 4.2 is not applicable to communications between the Guardian and the Nursing Facility.'").

- North Carolina LEO 2002-8 (1/24/03) ("[A] lawyer who is appointed the guardian ad litem for a minor plaintiff in a tort action and is represented in this capacity by legal counsel, must be treated by opposing counsel as a represented party and, therefore, direct contact with the guardian ad litem, without consent of counsel, is prohibited.'").
The ex parte communications rule does apply to lawyers acting in a dual capacity, including in a representational role.

- Ohio LEO 2006-5 (6/9/06) ("The DR 7-104(A)(1) restraint on communication with represented persons and parties applies to an attorney who is appointed to serve in a dual role as guardian ad litem and attorney for a minor child. Thus, it is improper for an attorney, appointed to serve in a dual role as a child's attorney and guardian ad litem, to communicate on the subject of the representation with a represented person or party unless there is consent by counsel or authorization by law, such as through a court rule or court order. Communication that is administrative in nature, such as scheduling appointments or meetings, is not communication on the subject of the representation.").

Although the majority rule seems to permit ex parte communications by a lawyer acting solely as a guardian ad litem, one state has indicated that another lawyer involved in the case must obtain the guardian ad litem's consent to speak with the child or other participant on whose behalf the guardian ad litem serves.

- Utah LEO 07-02 (6/10/07) ("When a guardian ad litem is appointed by the court to represent a person in a judicial proceeding, another attorney may not communicate with the represented person about the subject of the representation unless the attorney first obtains the consent of the GAL or an appropriate order from a court of competent jurisdiction. Except, however, if a mature minor independently and voluntarily attempts to obtain a second opinion or independent representation from an uninvolved attorney, that attorney does not violate Rule 4.2 by speaking with the minor, even if the communication is without the GAL's prior permission or consent.").

This approach seems to recognize that a guardian ad litem acts as a "representative" of the party, which might likewise trigger the prohibition on the guardian ad litem's communications with any other participant who has a lawyer.

The majority rule that the ex parte contact rule does not apply to lawyers acting in these other capacities highlights one popular misconception about the ex parte contact prohibition. If the rule's sole purpose was to prevent lawyers from using their
persuasive skills to prejudice an adversary, the prohibition would apply in these circumstances. However, the rule’s language generally renders the rule inapplicable here.

(b) States take varying approaches to Rule 4.2’s application to lawyers acting as bankruptcy trustees.

Some states apply Rule 4.2 to lawyers acting in that role.

- Virginia LEO 1861 (2/21/12) (because a lawyer/trustee in a Chapter 7 bankruptcy proceeding acts as a fiduciary, he or she may not communicate ex parte with a represented debtor without the debtor’s lawyer’s consent -- unless such communications are “authorized” or mandated by law; noting that examples of such authorized communicates include “notices that, by statute or court rule, must be sent to the debtor personally, or a scheduled and noticed proceeding such as a meeting of creditors pursuant to 11 U.S.C. §341.”; also noting that another statute (18 U.S.C. § 1302(b)(4)) authorizes a “wide variety of communications” between Chapter 13 trustees and debtors.).

Other states permit ex parte contacts by lawyers acting solely as trustees.

- North Dakota LEO 09-04 (7/16/09) (“[l]f the RA [lawyer requesting the opinion] has or will have a dual capacity (1) as representative of the estate, and (2) as legal counsel for the representative of the estate, communication with a represented Debtor is prohibited under Rule 4.2. However, if the RA is not representing the bankruptcy estate as legal counsel, and is acting solely as trustee for the bankruptcy estate, Rule 4.2 does not prohibit direct contact with the represented Debtor as long as RA makes it clear to all persons involved in the action that RA is not representing the bankruptcy estate or the trustee as legal counsel and that there is no attorney-client relationship.”).

- Arizona LEO 03-02 (4/2003) (addressing ex parte contact with debtors by lawyers who are acting as bankruptcy trustees; “The lawyer-trustee may communicate directly with persons who are represented by counsel concerning the subject matter of the bankruptcy case. This direct communication is limited to situations where an attorney is appointed to act exclusively as a bankruptcy trustee. If the attorney has dual appointment to act also as attorney for the trustee, then ER 4.2 applies and prohibits ex parte contacts and communications, unless otherwise authorized by law.”).
Best Answer

The best answer to (a) is YES; the best answer to (b) is MAYBE.
Application to Lawyers Representing Themselves Pro Se or Acting as Clients

Hypothetical 3

All your work as an associate and a young partner paid off last year, when you and your husband finally built your "dream home." However, since then you have discovered several major structural problems with your home. You sued the general contractor, who hired a local "scorched earth" litigator. You are hoping there is a way that you can communicate directly with the general contractor himself (with whom you had a fairly cordial relationship during the building process).

(a) If you are representing yourself pro se in litigation, may you contact the general contractor without his lawyer's consent?

NO (PROBABLY)

(b) If you hired a lawyer to represent you in the litigation, may you contact the general contractor without his lawyer's consent?

YES (PROBABLY)

Analysis

The ABA Model Rules contain a one-sentence prohibition that generates numerous issues.

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

ABA Model Rule 4.2.¹

¹ The Restatement contains essentially the same standard. Restatement (Third) of Law Governing Lawyers § 99(1) (2000) ("A lawyer representing a client in a matter may not communicate about the subject of the representation with a nonclient whom the lawyer knows to be represented in the matter by another lawyer or with a representative of an organizational nonclient so represented as defined in § 100, unless: (a) the communication is with a public officer or agency to the extent stated in § 101; (b) the
This hypothetical addresses the "in representing a client" phrase. Specifically, this hypothetical deals with lawyers either representing themselves pro se or acting as litigants while being represented by another lawyer. If the ex parte communication rule rested solely on the law's worry that sneaky and persuasive lawyers would take advantage of an unrepresented person during ex parte communications, the prohibition would apply in either situation -- because the lawyer has the same persuasive skills whether representing himself or acting solely in the role as a litigant (and thus represented by another lawyer). However, the majority rule prohibits the lawyer from conducting ex parte communications in the former setting but not the latter setting. Such an approach demonstrates that the ex parte prohibition rests on other considerations beside the worry that an unrepresented person will be somehow prejudiced when communicating with a skillful lawyer.\(^2\)

In a 2009 article, Professors Hazard and Irwin articulated courts’ and bars’ explanation of the basis for Rule 4.2’s restrictions.

\(^2\) In a 2009 article, Professors Hazard and Irwin explained the history of Rule 4.2.

Model Rule 4.2's version of the no-contact rule, set forth above, is currently in force in substantially similar form in all U.S. jurisdictions. Its roots can be found in Canon 9 of the 1908 ABA Canons of Professional Ethics, which advised that "[a] lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel." Canon 9 was effectively a rule of evidence, however, and its no-contact concept was much more limited than that of today’s provision. Case law addressing the canon generally focused on whether concessions or admissions obtained directly from a represented person should be denied legal effect.

Courts and commentators have elaborated on the ways in which Rule 4.2 serves its three functions of protecting the client, the lawyer, and the client-lawyer relationship. They have explained that the Rule guards a party against rhetorical attack by opposing counsel, which could undermine the party's confidence in her lawyer's competence and assessment of a case. The Rule prevents opposing counsel from causing a party to ignore her lawyer's advice and from "driving a wedge" between a party and her lawyer. And it protects the attorney-client privilege -- critical to a strong client-lawyer relationship -- by precluding inadvertent of legally imprudent disclosures of privileged information.

Geoffrey C. Hazard, Jr. & Dana Remus Irwin, Toward a Revised 4.2 No-Contact Rule, 60 Hastings L.J. 797, 802 (Mar. 2009) (footnotes omitted).

(a) Courts and bars have disagreed about whether lawyers representing themselves should be treated (for the prohibition on ex parte contacts with represented parties) as: (1) lawyers (in which case they may contact a represented person only with that person's lawyer's consent); or (2) clients (in which case they have the absolute right to contact the other person without that person’s lawyer's consent).

Interestingly, the Restatement takes a distinct minority view in this area. The Restatement could not be any clearer.

A lawyer representing his or her own interests pro se may communicate with an opposing represented nonclient on the same basis as other principals.


However, most authorities disagree.

- Disciplinary Bd. v. Lucas, 789 N.W.2d 73, 76 (N.D. 2010) (issuing a public reprimand against a lawyer for engaging in ex parte communication with a represented counsel in an action in which the lawyer represented himself pro se; "Lucas argues he did not violate Rule 4.2 because the rule does not apply when an attorney is representing himself. His view is too narrow. The rule
protects 'a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the lawyer-client relationship, and the uncounseled disclosure of information relating to the representation.' N.D.R. Prof. Conduct 4.2 cmt. 1. Most courts have held Rule 4.2 applies to attorneys representing themselves because it is consistent with the purpose of the rule. Lucas relies on a Connecticut Supreme Court decision to argue Rule 4.2 does not apply when he is representing himself because he is not representing a client. . . . We join the majority of courts in rejecting the rationale of the court in Pinsky [Pinsky v. Statewide Grievance Committee, 578 A.2d 1075, 1079 (Conn. 1990)].

- Maryland LEO 2006-3 (2006) (assessing the propriety of a lawyer representing himself or herself pro se engaging in ex parte communications with the other party; "[T]here is authority to suggest that a lawyer, acting pro se, is not subject to the restrictions of what is sometimes known as the 'anti-contact rule' contained in Rule 4.2. In that regard, the Restatement of Law (3d) makes a specific exception to the anti-contact rule when a lawyer is a party to a matter and represents no other client in the matter. Section 99(1) of the Restatement of Law (3d) . . . ."); noting that other authorities and states have reached the opposite conclusion; "We believe the opinions that prohibit a lawyer from having contact with a represented party opponent to be the most persuasive.").

- In re Disciplinary Proceeding Against Haley, 126 P.3d 1262, 1271-72 (Wash. 2006) (noting the vigorous debate among courts, bars and other authorities about the ethical propriety of lawyers representing themselves pro se contacting represented adversaries; ultimately concluding that Washington's Rule 4.2 "prohibits a lawyer who is representing his own interests in a matter from contacting another party whom he knows to be represented by counsel," but reducing to a reprimand the sanctions awarded against a lawyer for violating the rule, because the matter was "impermissibly vague" in Washington until this decision).

- Alaska LEO 2006-1 (1/27/06) ("[W]hen representing herself, for purposes of Rule 4.2, the lawyer may not act as if she is a 'party' who is not bound by the ethical rules that govern lawyers' contact with represented individuals. Rather, even when representing herself, a lawyer is subject to the dictates of Rule 4.2.").

- Hawaii LEO 44 (4/24/03) ("a lawyer who is a party in a matter and who is proceeding pro se cannot communicate directly about the subject of the representation with another person who is known to be represented by counsel in the matter without first obtaining consent from the other person's lawyer or is authorized to do so by law or a court order").
• District of Columbia LEO 258 (9/20/95) ("[a] lawyer who is a party in a matter and is proceeding pro se cannot communicate directly with another party who is known to be represented by counsel in the matter without first obtaining consent from the other party’s lawyer").

• Virginia LEO 1527 (5/11/93) (a lawyer/shareholder who has filed a suit in his or her own name against a corporation may not contact its officers, directors, or “control group” employees without the consent of the corporation’s lawyer).

• Virginia LEO 521 (8/1/83) ("even lawyers representing themselves may not contact an opponent who is represented by another lawyer").

Thus, lawyers must examine the law of the pertinent jurisdiction before proceeding.

(b) This scenario presents even a more difficult question, because here the lawyer is definitely a "client" -- having hired a lawyer to represent him or her.

The Restatement considers a represented lawyer to be a client -- thus presumably placing the lawyer off-limits to ex parte contacts by an adversary’s lawyer, but freeing the lawyer/client to initiate ex parte contacts on his or her own. The Restatement explains that

[a] lawyer represented by other counsel is a represented person and hence covered by this Section.

Restatement (Third) of Law Governing Lawyers § 99 cmt. c (2000)).

Most states take this approach.

• Virginia LEO 1819 (9/19/05) (describing the ex parte contact prohibition as a rule which applies only when a lawyer is "representing a client").

• Virginia LEO 771 (3/11/86) (a lawyer who is a litigant (but not proceeding pro se) may directly contact the adversary).

However, this rule certainly runs counter to the spirit of ABA Model Rule 4.2 -- which focuses at least in part on a lawyer’s ability to take advantage of an
unrepresented person. For instance, the District of Columbia Bar described these lawyerly powers (although addressing the prohibition of the lawyer's ex parte communications) when representing himself or herself pro se, the language could apply equally to lawyers acting as clients in these circumstances.

[U]nlike the lay party, the pro se lawyer brings her professional skills and legal knowledge with her whenever she deals with her lay adversary. The lawyer-party, no matter whether she is acting in her "lawyer" or her "party" capacity, still retains a presumptively unfair advantage over an opposing party. We therefore conclude that a lawyer must comply with the requirements of Rule 4.2(a) when she represents a client, be that client the lawyer herself or another party.

District of Columbia LEO 258 (9/20/95).

In a 2009 article, Professors Hazard and Irwin explained that Rule 4.2 does not currently provide guidance on the permissibility of ex parte contacts by a lawyer who is a party to the matter.

There is little consensus about the proper approach to these situations. Model Rule 4.2 is silent on the issue, while the Restatement (Third) includes an exception for a "lawyer [who] is a party [to the matter] and [who] represents no other client in the matter." State courts and ethics committees have split on the issue, some holding that the Rule does not apply in such situations, some holding that it does, and some adopting an intermediate approach. Minnesota, for example, provides that "a party who is a lawyer may communicate directly with another party unless expressly instructed to avoid communication by the other lawyer['], or unless the other party manifests a desire to communicate only through counsel." One court has explained that when proceeding pro se, "[t]he lawyer still has an advantage over the average layperson, and the integrity of the relationship between the represented person and counsel is not entitled to less protection merely because the lawyer is appearing pro se." We agree. A lawyer poses the same threat to the adverse party whether representing a client, proceeding pro se, or
being represented by another lawyer. In all cases, the lawyer can use her training in the law to influence or even intimidate the adverse party and to interfere with the adversary's client-lawyer relationship.

Geoffrey C. Hazard, Jr. & Dana Remus Irwin, Toward a Revised 4.2 No-Contact Rule, 60 Hastings L.J. 797, 830-31 (Mar. 2009) (footnotes omitted). Professors Hazard and Irwin proposed a change in Rule 4.2 to address this issue.

We therefore propose changing the text of the Rule from "In representing a client, a lawyer shall not . . ." to "A lawyer participating in a matter shall not . . ." We also propose a comment that states: "This Rule applies to a lawyer who is a party to a proceeding in the same matter as it does to a lawyer representing a client."

Id. at 831 (citation and footnote omitted).

Lawyers considering such ex parte communications should check the applicable ethics rules. They should also confirm that the pertinent court would not be offended by such communications, even if they would pass muster under the literal language of the applicable rule.

**Best Answer**

The best answer to (a) is PROBABLY NO; the best answer to (b) is PROBABLY YES.
Application to Lawyers Giving "Second Opinions"

Hypothetical 4

Because you have had a few run-ins with your state bar, you have tried to be very cautious in all of your litigation-related conduct. You just received a call from a local businesswoman who says that she has become dissatisfied with her current lawyer handling a commercial case for her, and would like to talk with you. It sounds like she wants a "second opinion" from you about her current lawyer's competence, and might want to hire you -- depending on the outcome of your analysis.

May you discuss the businesswoman's case (including the conduct of her current lawyer) without that other lawyer's consent?

YES

Analysis

The ABA Model Rules contain a one-sentence prohibition that generates numerous issues.

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

ABA Model Rule 4.2.¹

This hypothetical addresses the "in representing a client" phrase.

The restriction on ex parte communications to situations in which a lawyer is "representing a client" allows lawyers to communicate with represented clients seeking

¹ The Restatement contains essentially the same standard. Restatement (Third) of Law Governing Lawyers § 99(1) (2000) ("A lawyer representing a client in a matter may not communicate about the subject of the representation with a nonclient whom the lawyer knows to be represented in the matter by another lawyer or with a representative of an organizational nonclient so represented as defined in § 100, unless: (a) the communication is with a public officer or agency to the extent stated in § 101; (b) the lawyer is a party and represents no other client in the matter; (c) the communication is authorized by law; (d) the communication reasonably responds to an emergency; or (e) the other lawyer consents.")
a "second opinion" -- because those lawyers are not yet "representing a client" in that matter. ABA Model Rule 4.2 cmt. [4] ([n]or does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter").

The Restatement also takes this approach.

A lawyer who does not represent a person in the matter and who is approached by an already-represented person seeking a second professional opinion or wishing to discuss changing lawyers or retaining additional counsel, may, without consent from or notice to the original lawyer, respond to the request, including giving an opinion concerning the propriety of the first lawyer's representation.


Not surprisingly, state bars take the same approach.

- Louisiana LEO 07-RPCC-014 (10/12/07) ("Rule 4.2 of the Louisiana Rules of Professional Conduct generally serves to prohibit a lawyer, while representing a client in a matter, from communicating about the subject of the representation with another person the lawyer knows to be already represented by counsel in the same matter. However, the Committee believes that when a person already represented by counsel in a matter initiates contact and communication with a lawyer who does not represent anyone in connection with that matter, the Rule does not prohibit that lawyer from responding to or communicating further with that person, such as when providing an initial consultation and/or a second opinion sought by that person, nor does it prohibit a lawyer from communicating with such persons concerning matters outside the scope of the representation." (emphasis added); noting that many Louisiana lawyers believe that Rule 4.2 prohibits them from providing second opinions to other lawyers' clients; "The Committee simply takes this opportunity to point out that Rule 4.2 does not serve to prevent the already-represented client from seeking such a second opinion nor does it serve to prevent the would-be second lawyer from communicating with the already-represented client who initiates contact with the lawyer when that lawyer does not already represent a client in connection with the same matter. In short, despite the beliefs and/or hopes of some lawyers -- especially those made uncomfortable by a mistaken belief that their clients are engaging in some imagined form of 'professional adultery' -- Rule
4.2 is not an 'anti-poaching' rule and cannot be used to shield clients from their own decisions to consult another lawyer.

- Utah LEO 07-02 (6/10/07) ("When a guardian ad litem is appointed by the court to represent a person in a judicial proceeding, another attorney may not communicate with the represented person about the subject of the representation unless the attorney first obtains the consent of the GAL or an appropriate order from a court of competent jurisdiction. Except, however, if a mature minor independently and voluntarily attempts to obtain a second opinion or independent representation from an uninvolved attorney, that attorney does not violate Rule 4.2 by speaking with the minor, even if the communication is without the GAL's prior permission or consent.")

**Best Answer**

The best answer to this hypothetical is **YES**.
Definition of "Matter"

**Hypothetical 5**

You were just hired last week to represent a passenger seriously injured in a traffic accident. The civil litigation has not yet begun, but you have learned that one of the drivers involved in the accident has hired a criminal lawyer (who does not handle any civil cases) to represent him in dealing with a federal investigation into contraband goods found in that driver's truck after the accident. You would like to speak with that other driver, but you wonder whether you need his criminal lawyer's consent to do so.

Without the truck driver's lawyer's consent, may you communicate with the truck driver about the accident?

**MAYBE**

**Analysis**

The ABA Model Rules contain a one-sentence prohibition that generates numerous issues.

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

ABA Model Rule 4.2.¹

This hypothetical deals with the term "matter" in the rule.

¹ The Restatement contains essentially the same standard. Restatement (Third) of Law Governing Lawyers § 99(1) (2000) ("A lawyer representing a client in a matter may not communicate about the subject of the representation with a nonclient whom the lawyer knows to be represented in the matter by another lawyer or with a representative of an organizational nonclient so represented as defined in § 100, unless: (a) the communication is with a public officer or agency to the extent stated in § 101; (b) the lawyer is a party and represents no other client in the matter; (c) the communication is authorized by law; (d) the communication reasonably responds to an emergency; or (e) the other lawyer consents.")
Courts and bars sometimes must determine whether a communication relates to the same "matter" in which the person is represented. This issue sometimes arises when there are factually-related civil cases or civil and criminal cases.

The Oregon Supreme Court dealt with this issue -- although the pertinent Oregon rule's prohibition used the term "subject" rather than "matter."

- In re Newell, 234 P.3d 967, 971, 972, 972-73, 973-74, 976 (Or. 2010) (publicly reprimanding a Oregon lawyer who deposed a witness in a civil case about the subject of incidents that were also involved in a criminal case against the witness; noting that the lawyer realized that the witness was represented by a criminal lawyer in a related criminal matter, but did not notify the criminal lawyer of the deposition; rejecting the lawyer's argument that he did not have ex parte communications on the same "subject" as that in which the witness had a criminal defense lawyer; noting that the disciplinary panel concluded that Oregon's Rule 4.2 "covers 'instances such as the present case in which the [a]ccused knew the witness to be represented in a pending criminal proceeding but nevertheless proceeded to interrogate the witness about that subject''; agreeing with the panel; "In this case, there is no dispute that the accused communicated with Fahey in the course of representing Jewett-Cameron, that Fahey was represented in the criminal action, and that the accused knew that he was communicating with Fahey on the subject on which Fahey was represented. The only question is whether the communication concerned the subject on which the accused represented Jewett-Cameron and on which Coit represented Fahey. As a factual matter, the answer to that question is 'yes.' The subject on which the accused represented Jewett-Cameron was Greenwood's alleged overstatement of its inventory. The accused sought to recover part of the purchase price from Greenwood on the theory that Greenwood's assets were less than its books showed. Coit represented Fahey on that same subject. The criminal action was based on Fahey's embezzlement from Greenwood, which resulted in Greenwood's overstated inventory. Factually, each lawyer's representation involved a common subject -- whether Greenwood's books were overstated." (emphases added); "[T]he accused argues that his communication with Fahey would violate RPC 4.2 only if Coit represented Fahey in Jewett-Cameron's action against Greenwood and if the accused knew that fact."; "Subject, the word that the rule uses, is broader than the word 'matter,' as the accused defines it." (emphasis added); "[I]t is sufficient for the purposes of this case to hold, as we do, that the accused communicated with Fahey on the subject on which Coit represented Fahey and on which the accused represented Jewett-Cameron. The accused's communication accordingly was a 'communication on the subject of the representation' within the meaning of..."
RPC 4.2."; also rejecting the lawyer's argument that his deposition of the witness was "authorized by law").

Just a few months earlier, the Illinois Supreme Court held that prosecutors had not acted unethically in communicating with a mother suspected of child abuse, without the consent of the lawyer appointed to represent the mother in the child custody matter.

- **People v. Santiago, 925 N.E.2d 1122, 1128-29, 1129 (Ill. 2010)** (finding that prosecutors had not violated the ex parte communication rule by communicating with a mother who is a suspect in a criminal child abuse case without the consent of a lawyer appointed to represent the mother in a child protection case involving the same underlying facts; "The disagreement in this case turns on the phrases 'the subject of the representation' and 'that matter.' Defendant argues that 'the subject of representation' and 'that matter' in this case were the injury to S.H. and defendant's culpability regarding the circumstances of that injury. Defendant claims that 'the subject of the representation' is not the theory under which she may be culpable, but rather the facts supporting her culpability. Defendant maintains that there was such an integral relationship between the criminal and child protection cases that, pursuant to Rule 4.2, defendant's child protection attorney should have been contacted and allowed to be present when defendant was questioned by prosecutors concerning the criminal case."; "The State counters that the use of the phrase 'that matter,' when read together with the introductory clause 'during the course of representing a client' and the phrase 'subject of the representation,' indicates that the drafters intended the application of the rule to be case specific: specific to the matter in which the party is represented. Thus, because attorney MacGregor did not represent defendant in the criminal investigation, she had no right to be present or to object to the questioning of defendant in that investigation."; "Because defendant was not represented by counsel in the criminal matter, Rule 4.2 did not prohibit the prosecutors from communicating with defendant in that case." (emphasis added)).

In some fairly rare situations, the definition of "matter" becomes an important issue in a purely civil context. In 2011, the Northern District of West Virginia allowed lawyers representing CSX to call former clients of a plaintiffs' law firm that CSX had
sued for improper conduct in asbestos cases. The plaintiffs' law firm argued that the "matter" about which CSX's lawyers wanted to contact the law firm's former clients obviously related to the law firm's previous representation of those clients. The court disagreed that this relationship prohibited the ex parte contacts.

These fraud, conspiracy, and RICO claims are separate and distinct matters from the Peirce Firm's representation of a client in a third-party asbestos claim, and they are separate and distinct from a client's Federal Employees Liability Act ('FELA') claim against CSX. While this Court acknowledges that the clients' claims against CSX and/or third-party manufacturers and this action brought by CSX against the Peirce Firm defendants are similar in the sense that they may involve the subject of a client's asbestos-related injury claim, they are different matters within the meaning of Rule 4.2. Although Rule 4.2 is broad enough to encompass a variety of transactions, it is not so broad as to prevent communication regarding all subjects that may happen to share the same underlying facts as the 'matter.'

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2 CSX Transp., Inc. v. Gilkison, Peirce, Raimond & Coulter, P.C., Civ. A. No. 5:05CV202, 2011 U.S. Dist. LEXIS 130118, at *16-17, *19, *20 (N.D. W. Va. Nov. 9, 2011) (allowing plaintiff CSX to call former clients of a law firm CSX had sued for improper conduct in asbestos cases; "Rule 4.2 only applies when the person with whom the lawyer seeks to communicate is represented in the same matter as the matter in which the communicating lawyer is representing his client. In this case the subject of the representation is CSX's allegations of fraud against the Peirce Firm defendants. The third amended complaint sets forth a claim that the Peirce Firm orchestrated a scheme to inundate CSX and other entities with thousands of asbestos cases without regard to their merit, in violation of the federal Racketeer Influenced and Corrupt Organizations Act ('RICO'), 18 U.S.C. § 1961, et seq. Third Am. Compl. ¶ 1-3. In the third amended complaint, the plaintiff also argues that the Peirce Firm defendants' conduct supports claims for common law fraud and conspiracy. Id. at ¶ 3. These fraud, conspiracy, and RICO claims are separate and distinct matters from the Peirce Firm's representation of a client in a third-party asbestos claim, and they are separate and distinct from a client's Federal Employees Liability Act ('FELA') claim against CSX. While this Court acknowledges that the clients' claims against CSX and/or third-party manufacturers and this action brought by CSX against the Peirce Firm defendants are similar in the sense that they may involve the subject of a client's asbestos-related injury claim, they are different matters within the meaning of Rule 4.2."); "Although Rule 4.2 is broad enough to encompass a variety of transactions, it is not so broad as to prevent communication regarding all subjects that may happen to share the same underlying facts as the 'matter.'"); "Rule 4.2, which references a party known to be represented by a lawyer, cannot be construed to bar communications with a person who is no longer represented by counsel because his claims have been resolved. . . . If representation has been terminated, however, Rule 4.2 is inapplicable.";

Of course, the safest course for any lawyer involved in a situation like this is to obtain the consent of whatever lawyer is representing the person in an arguably related matter. However, the questioning lawyer obviously must live with whatever answer he or she receives, so taking that safe course might essentially preclude ex parte communications with an important witness.

This issue might also arise if a lawyer wishes to communicate with a former client about unpaid fees. In 2011, the New York City Bar explained that a lawyer normally may communicate with a former client about unpaid fees, unless the lawyer knows that his or her replacement counsel is representing the former client in connection with the unpaid fees.

- New York City LEO 2011-1 (2011) ("We address the question of whether a lawyer may contact, on her own behalf, a former client to discuss matters relating to the prior representation without the prior consent of successor counsel. This issue arises in a number of contexts including, for example, where a lawyer seeks to collect a fee or permission to return or destroy client files after she has been discharged by the client and replaced by new counsel. We conclude that a lawyer may not contact her former client regarding matters as to which the lawyer knows the client is represented by successor counsel."); "Rule 4.2, of course, does not flatly prohibit all contact with former clients and there appears to be no reason to adopt any such blanket prohibition. Indeed, we believe that such a per se rule would unduly restrict an attorney's ability to communicate with a former client regarding matters as to which the client is not represented by counsel. In our view, therefore, an inquiry from an attorney to a former client, including, but not limited to, a request for unpaid fees and expenses, would not run afoul of Rule 4.2 in the absence of any reason to believe that successor counsel is representing the client with respect to payment of those fees."); "In contrast, when a lawyer knows that the former client has secured new counsel, Rule 4.2 prohibits direct contact regarding any matter within the scope of the representation -- even where the lawyer is acting pro se -- unless the lawyer obtains the prior consent of successor counsel."); "To be sure, this conclusion
may not be fully supported by the language of the first clause of Rule 4.2, which lawyers might justifiably interpret as permitting contact whenever the attorney initiating the communication is acting pro se and thus not 'representing a client.' Nevertheless, we believe that our construction, and that of most courts and ethics committees that have considered the question, comports with and furthers one of the salutary policy objectives of the rule, namely, to protect 'a represented nonlawyer party from "possible overreaching by other lawyers who are participating in the matter."' (citation omitted).

The definition of "matter" can also arise if the lawyer (or the lawyer's agents) engage in essentially nonsubstantive communications with a represented person. This issue might also implicate the "communicate" term as it is used in ABA Model Rule 4.2, but it probably makes more sense to analyze such situations under the "matter" prong of the rule.

Courts and bars sometimes indicate that such nonsubstantive communications do not run afoul of the ex parte communications rule.

- Ohio LEO 2006-5 (6/9/06) ("The DR 7-104(A)(1) restraint on communication with represented persons and parties applies to an attorney who is appointed to serve in a dual role as guardian ad litem and attorney for a minor child. Thus, it is improper for an attorney, appointed to serve in a dual role as a child's attorney and guardian ad litem, to communicate on the subject of the representation with a represented person or party unless there is consent by counsel or authorization by law, such as through a court rule or court order. Communication that is administrative in nature, such as scheduling appointments or meetings, is not communication on the subject of the representation." (emphasis added)).

- Alaska LEO 2006-1 (1/27/06) (dealing with a situation in which a lawyer has a consumer complaint about a local company, disagrees with a local newspaper's editorial policy, or has concerns as a homeowner with a municipal government's decision on a building permit; among other things, discussing whether any of the scenarios involved a "matter" in which the store, newspaper or government is represented; "In the three examples set forth above, the key question posed in each instance is whether there is a 'matter' that is 'the subject of the representation.' An initial contact to attempt to obtain information or to resolve a conflict informally rarely involves a matter that is known to be the subject of representation. Consequently, lawyers,
representing clients or themselves, ordinarily are free to contact institutions that regularly retain counsel in an attempt to obtain information or to resolve a problem informally. These sorts of contacts frequently resolve a potential dispute long before it becomes a 'matter' that is 'the subject of representation.' The above examples are all worded to suggest the inquiry occurs at the early stage of a consumer or citizen complaint. Inquiries directed to employees and managers would be proper in each instance. . . . The line between permitted contacts at the early stage of a potential matter and forbidden contacts after a dispute has sharpened and become a 'matter that is the subject of representation' depends on the question discussed in the preceding section: Until the lawyer knows that an opposing counsel has been asked by the party to deal with the particular new matter, the lawyer is not prohibited from dealing directly with representatives of the party." (emphasis added)).

- **Hill v. Shell Oil Co.**, 209 F. Supp. 2d 876, 880 (N.D. Ill. 2002) (denying defendant's motion for protective order that would prohibit class-action plaintiffs' agents from posing as consumers to interact with Shell gas station managers and videotaping what they allege to be racial discrimination; finding that the gas station managers were in the Rule 4.2 "off-limits" category, but that the contacts between the investigators and the gas station employees did not constitute "communications" sufficient to trigger the Rule 4.2 prohibition; "Here we have secret videotapes of station employees reacting (or not reacting) to plaintiffs and other persons posing as consumers. Most of the interactions that occurred in the videotapes do not involve any questioning of the employees other than asking if a gas pump is prepay or not, and as far as we can tell these conversations are not within the audio range of the video camera. These interactions do not rise to the level of communication protected by Rule 4.2. To the extent that employees and plaintiffs have substantive conversations outside of normal business transactions, we will consider whether to bar that evidence when and if it is offered at trial." (emphases added)).

Lawyers engaging in (or arranging for others to engage in) such nonsubstantive communications should be very wary, because not all courts and bars might be this forgiving.

**Best Answer**

The best answer to this hypothetical is **MAYBE**.
Required Level of Knowledge that the Third Person Has a Lawyer

Hypothetical 6

You are representing a landowner in an ugly dispute with his neighbor about a stream that crosses both of their lots. You would like to speak with the neighbor in an effort to resolve the dispute, but you do not know if the neighbor has a lawyer. Your client has told you that the neighborhood "gossip" is that the neighbor has hired a high-priced lawyer from a large downtown law firm, but you do not know the accuracy of that gossip.

May you communicate ex parte with the neighbor?

YES (PROBABLY)

Analysis

The ABA Model Rules contain a one-sentence prohibition that generates numerous issues.

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

ABA Model Rule 4.2. ¹

This hypothetical deals with the "knows to be represented by another lawyer" standard.

¹ The Restatement contains essentially the same standard. Restatement (Third) of Law Governing Lawyers § 99(1) (2000) ("A lawyer representing a client in a matter may not communicate about the subject of the representation with a nonclient whom the lawyer knows to be represented in the matter by another lawyer or with a representative of an organizational nonclient so represented as defined in § 100, unless: (a) the communication is with a public officer or agency to the extent stated in § 101; (b) the lawyer is a party and represents no other client in the matter; (c) the communication is authorized by law; (d) the communication reasonably responds to an emergency; or (e) the other lawyer consents.").
Courts and bars must sometimes determine if a lawyer making ex parte contacts "knows" that the contacted person is represented by another lawyer in the matter.

ABA Model Rule 1.0 defines "knows" as denoting

\[\text{actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.}\]

ABA Model Rule 1.0(f). However, the ABA Model Rules then seem to back off a pure "actual knowledge" standard. A comment to ABA Model Rule 4.2 explains that

\[\text{the prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.}\]

ABA Model Rule 4.2 cmt. [8] (emphases added). The ABA has also explained that

Rule 4.2 does not, like Rule 4.3 [governing a lawyer's communications with an unrepresented person], imply a duty to inquire. Nonetheless, it bears emphasis that, as stated in the definition of "knows" . . . actual knowledge may be inferred from the circumstances. It follows, therefore, that a lawyer may not avoid Rule 4.2's bar against communication with a represented person simply by closing her eyes to the obvious.

ABA LEO 396 (7/28/95) (emphasis added).

The safest course (and perhaps the required course) is for a lawyer in this situation to begin any ex parte communication by asking the person whether he or she has a lawyer in the matter. If so, the lawyer must of course immediately end the communication. In that circumstance, the lawyer would also be wise to alert the person's lawyer about the contact and the lawyer's termination of the communication.
immediately upon learning that the lawyer represented the person in the matter. Not advising the person's lawyer might render the questioning lawyer vulnerable to an ethics charge or some court sanction.

The ABA has explained that a lawyer's representation of a client on "all matters" does not actually create the type of attorney-client relationship on a specific "matter" that triggers the prohibition on an adversary's ex parte communication about that matter.

By prohibiting communication about the subject matter of the representation, the Rule contemplates that the matter is defined and specific, such that the communicating lawyer can be placed on notice of the subject of representation. Thus, if the representation is focused on a given matter, such as one involving past conduct, and the communicating lawyer is aware of this representation, she may not communicate with the represented person absent consent of the representing lawyer. However, where the representation is general -- such as where the client indicates that the lawyer will represent her in all matters -- the subject matter lacks sufficient specificity to trigger the operation of Rule 4.2.

Similarly, retaining counsel for "all" matters that might arise would not be sufficiently specific to bring the rule into play. In order for the prohibition to apply, the subject matter of the representation needs to have crystallized between the client and the lawyer. Therefore, a client or her lawyer cannot simply claim blanket, inchoate representation for all future conduct whatever it may prove to be, and expect the prohibition on communications to apply. Indeed, in those circumstances, the communicating lawyer could engage in communications with the represented person without violating the rule.

ABA LEO 396 (7/28/95) (emphases added).

Bars take the same approach.

- Wisconsin LEO E-07-01 (7/1/07) ("When an organization is represented in a matter, SCR 20:4.2 prohibits a lawyer representing a client adverse to the organization in the matter from contacting constituents who direct, supervise
or regularly consult with the organization's lawyer concerning the matter, who have the authority to obligate the organization with respect to the matter, or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. All other constituents may be contacted without consent of the organization's lawyer. Consent of the organization's lawyer is not required for contact with a former constituent of the organization, regardless of the constituent's former position. When contacting a current or former constituent of a represented organization, a lawyer must state their [sic] role in the matter, must avoid inquiry into privileged matters and must not give the unrepresented constituent legal advice. The mere fact, however, that a current or former constituent may possess privileged information does not in itself prohibit a lawyer adverse to the organization from contacting the constituent. A lawyer representing an organization may not assert blanket representation of all constituents and may request, but not require, that current constituents refrain from giving information to a lawyer representing a client adverse to the organization. The mere fact that an organization has in-house counsel does not render the organization automatically represented with respect to all matters." (emphasis added)).

Defense lawyers occasionally find themselves in an awkward position when dealing with this provision. Some people threatening to sue corporations (such as employees, former employees, users of allegedly defective products or others) claim to be represented by a lawyer -- but are bluffing. Once someone in that position claims to have a lawyer, the defense lawyer is essentially paralyzed -- and cannot communicate with the person unless she admits that she was lying about having a lawyer.

**Best Answer**

The best answer to this hypothetical is **PROBABLY YES**.
When Does a "Representation" Begin?

Hypothetical 7

Your largest client was just served with a class action complaint. The named plaintiff is claiming to have been injured by relying on your client's public misstatements when buying the client's stock. The plaintiff seeks to represent other similarly situated purchasers of the stock. You think you might be able to gain some insight into the case if you can interview some of the class members. You also hope that you might be able to settle some of their individual claims, which would reduce the number of folks seeking damages in the case if a court certifies the class.

Without class counsel's consent, can you communicate with members of the purported class before class certification?

YES (PROBABLY)

Analysis

The ABA Model Rules contain a one-sentence prohibition that generates numerous issues.

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

ABA Model Rule 4.2.¹

This hypothetical deals with the "represented by another lawyer in the matter" phrase in a class action context.

¹ The Restatement contains essentially the same standard. Restatement (Third) of Law Governing Lawyers § 99(1) (2000) ("A lawyer representing a client in a matter may not communicate about the subject of the representation with a nonclient whom the lawyer knows to be represented in the matter by another lawyer or with a representative of an organizational nonclient so represented as defined in § 100, unless: (a) the communication is with a public officer or agency to the extent stated in § 101; (b) the lawyer is a party and represents no other client in the matter; (c) the communication is authorized by law; (d) the communication reasonably responds to an emergency; or (e) the other lawyer consents.").
In class action situations, this issue normally involves a debate about whether the attorney-client relationship has begun.

A comment to the ABA Model Rules explains that "unnamed members of the class are ordinarily not considered to be clients of the lawyer" representing the class. However, this comment deals with characterizing those unnamed class members as "clients" for conflicts of interest purposes, not for ex parte communication purposes.

An ABA legal ethics opinion addressed this issue in the context of ex parte communications. That ethics opinion explained that

> [a] client-lawyer relationship with a potential member of the class does not begin until the class has been certified and the time for opting out by a potential member of the class has expired.

ABA LEO 445 (4/11/07). Thus, the Model Rules "do not generally prohibit counsel for either plaintiff or defendant from communicating with persons who may in the future become members of the class.” Id.

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2 ABA Model Rules, Rule 1.7 cmt. [25] ("When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

3 ABA LEO 445 (4/11/07) (in the class action context, "a client-lawyer relationship with a potential member of the class does not begin until the class has been certified and the time for opting out by a potential member of the class has expired"); thus, Model Rules 4.2 and 7.3 "do not generally prohibit counsel for either plaintiff or defendant from communicating with persons who may in the future become members of the class"; both lawyers must comply with Model Rule 4.3 if they communicate with potential class members; plaintiffs' lawyer must comply with Model Rule 7.3 if they are soliciting membership in the class, but those restrictions "do not apply to contacting potential class members as witnesses"; "both plaintiffs' counsel and defense counsel have legitimate need to reach out to potential class members regarding the facts that are the subject of the potential class action, including information that may be relevant to whether or not a class should be certified"; "restricting defense communication with potential plaintiffs could inhibit the defendant from taking remedial measures to alleviate a harmful or dangerous condition that has led to the lawsuit; a defendant in a class action lawsuit also would be prevented from attempting to reach conciliation agreements with members of the potential class without going through a
The **Restatement** also takes this approach.

A lawyer who represents a client opposing a class in a class action is subject to the anticontact rule of this Section. For the purposes of this Section, according to the majority of decisions, once the proceeding has been certified as a class action, the members of the class are considered clients of the lawyer for the class; prior to certification, only those class members with whom the lawyer maintains a personal client-lawyer relationship are clients. Prior to certification and unless the court orders otherwise, in the case of competing putative class actions a lawyer for one set of representatives may contact class members who are only putatively represented by a competing lawyer, but not class representatives or members known to be directly represented in the matter by the other lawyer.


Most courts and bars take the same approach.

- **Winans v. Starbucks Corp.,** No. 08 Civ. 3734 (LTS) (JCF), 2010 U.S. Dist. LEXIS 134136, at *7 (S.D.N.Y. Dec. 15, 2010) (in an opinion by Magistrate Judge Francis; "The complication here arises from the fact that the ASMs are members of the putative class. Because the class has not yet been certified, Starbucks is under no general prohibition against speaking with them.").

- **Hernandez v. Vitamin Shoppe Indus. Inc.,** 95 Cal. Rptr. 3d 734 (Cal. Ct. App. 2009) (holding that a lawyer representing an individual plaintiff could not communicate with class members after class certification, unless the class counsel consented).

- **Castaneda v. Burger King Corp.,** No. C 08-4262 WHA (JL), 2009 U.S. Dist. LEXIS 69592, at *21-22, *22-23, *23 (N.D. Cal. July 31, 2009) (finding that defense lawyers could engage in ex parte communications with class members before class certification; "Plaintiffs should provide Defendants with contact information for the putative class members, as required by Rule 26, as part of their initial disclosures, since the putative class members are potential witnesses. Both parties are permitted to take pre-certification discovery, including discovery from prospective class members. Plaintiffs’ counsel have also allegedly advised putative class members not to talk to Defendants’ counsel. If true, this would be a violation of pertinent codes of lawyer whom the potential class member may have no interest in retaining"; "the court may assume control over communications by counsel with class members.").
professional conduct."); "Plaintiffs' counsel have no right to be present at any contact between Defendants' counsel and putative class members. It is Plaintiff's burden to show abusive or deceptive conduct to justify the court's cutting off contact, and they fail to do so. This is not an employment case, where the Defendant may threaten or imply a threat to the job of a plaintiff who cooperates with Plaintiffs' counsel or refuses to cooperate with Defendants' counsel. This is an ADA access case, not an employment case; Defendants have no power over these prospective plaintiffs."); "Defendant counsel must identify themselves and advise contacts that they need not speak with them if they do not want to do so. Defendants are admonished not to inquire into the substance of communications between putative plaintiffs and class counsel.").

- Debra L. Bassett, Pre-Certification Communication Ethics in Class Actions, 36 Ga. L. Rev. 353, 355-56 (Winter 2002) ("The majority view, embraced by most courts, the Restatement, and the leading class action treatise, holds that before class certification, putative class members are not 'represented' by class counsel." (footnotes omitted)).

- Blanchard v. Edgemark Fin. Corp., No. 94 C 1890, 1998 U.S. Dist. LEXIS 15420, at *19 (N.D. Ill. Sept. 11, 1998) (recognizing that class members are represented "[o]nce a class has been certified" (citation omitted)).

The minority view recognizes an attorney-client relationship between a class lawyer and class members before certification.

- Philadelphia LEO 2009-1 (4/2009) ("The majority rule in most jurisdictions is that after a class action is filed but prior to certification of a class, contact between counsel for a defendant and members of a putative class is permitted, because prior to class certification only those class members with whom plaintiffs' counsel maintains a personal attorney-client relationship are considered clients."); "However, Pennsylvania courts have not followed this majority rule. Rather, Pennsylvania courts have interpreted Rule 4.2 as barring defense counsel in a state class action from contacting current or former employee class members regarding the subject matter of the lawsuit prior to a decision on certification (unless accomplished via deposition or other formal means of discovery with proper notice provided to the plaintiff's counsel)." (emphasis added)).

That Philadelphia legal ethics opinion dealt with the interesting dilemma facing lawyers working on related cases in differing jurisdictions taking opposite approaches to this issue. In that legal ethics opinion, the Philadelphia Bar dealt with both in-house and
outside lawyers working together in defending a company from class actions in Pennsylvania and New Jersey federal courts. Philadelphia prohibited ex parte communications with class members before certification, while New Jersey apparently allowed such communications. The Philadelphia Bar explained that the governing rule would depend on where the litigation was pending, not where the witness lived. The Philadelphia Bar suggested a difficult, if not unworkable, solution:

The Committee is of the strong opinion that the ideal way to proceed would be to retain independent counsel admitted in New Jersey to conduct the New Jersey interviews to obtain the information, and then avoid having this information transmitted in any fashion to those attorneys working on the Pennsylvania case until and if the Pennsylvania court is notified of and grants permission for its use. In this fashion, in the New Jersey matter the client is allowed full access to information available under New Jersey law, while the attorneys working on the Pennsylvania case are protected from disqualification, and thus the adverse consequences of being forced to change counsel during the course of the litigation.

Lawyers clearly put themselves in harm's way if they communicate ex parte with a class representative after a court certifies the class.

Jackson Lewis was disqualified from a potentially big class action against Barnes & Noble last month, demonstrating the hidden risks of trying to gut class actions by settling with named plaintiffs. Alameda County, Calif., Superior Court Judge Steven Brick acknowledged that ousting the firm was a "drastic" move, but indicated from the bench that it was necessary in this case. Disqualification was a strategy more in vogue with both sides of the bar before the rules of litigating wage-and-hour class actions firmed up in the past five years. But Brick's decision shows the threat is still alive. "It's a trap for the unwary," said Francis "Tripper" Ortman, a partner in Seyfarth Shaw's San Francisco office who wasn't involved in the case. "You've got to be very sensitive when you're dealing with the class representative." Sara Minor, a former community relations manager at a Barnes & Noble store, sued over unpaid mileage and wrongful termination in Merced County, Calif., Superior Court. Then, she became class representative in a suit that San Diego plaintiffs firm Clark & Markham filed in Alameda County, which alleges that Barnes & Noble illegally paid its California workers with checks from out-of-state banks. She said she only took the $13,500 Jackson Lewis offered her to settle her Merced suit because she and her husband were facing eviction. She didn't want to withdraw as class representative, she said, but it was part of the deal, and she needed the money. The trouble stemmed from Clark & Markham's claims that it had no idea Jackson Lewis was luring away its class representative. They were aware some negotiations had taken place, they say, but thought they'd ended. In his deposition or other formal means of discovery with proper notice provided to the plaintiff's counsel), explaining that the issue of ex parte communications will be governed by the ethics rules of the court in which the case is pending, not the location of where the witnesses reside; inexplicably suggesting that the law department set up an ethics screen between the two sets of lawyers working on the New Jersey and the Pennsylvania cases, although the cases raise "identical substantive claims"; "The Committee is of the strong opinion that the ideal way to proceed would be to retain independent counsel admitted in New Jersey to conduct the New Jersey interviews to obtain the information, and then avoid having this information transmitted in any fashion to those attorneys working on the Pennsylvania case until and if the Pennsylvania court is notified of and grants permission for its use. In this fashion, in the New Jersey matter the client is allowed full access to information available under New Jersey law, while the attorneys working on the Pennsylvania case are protected from disqualification, and thus the adverse consequences of being forced to change counsel during the course of the litigation.").
tentative ruling, Brick noted that Jackson Lewis had put Minor’s lawyer, Amy Carlson of San Jose firm Williams, Pinelli & Cullen, in an ethically compromising position and "intruded upon the attorney-client relationship between Minor and class counsel without the consent of class counsel, thereby threatening that relationship."

Kate Moser, Jackson Lewis Disqualified Over Deal With Class Representative, Law.Com, Oct. 14, 2010. Lawyers also risk sanctions if they communicate ex parte with absent class members after certification.

In a 2009 article, Professors Hazard and Irwin explained courts' and bars' mixed rules governing ex parte communications with absent class members before class certification, and after certification but before expiration of the opt-out period. To clarify the situation, they proposed the following comment:

Once a proceeding has been certified as a class action and any opt-out period has expired, members of the class are considered represented persons for purposes of this Rule. Prior to that time, only those members of the class with whom the class's lawyer maintains a personal client-lawyer relationship are considered represented persons.

Geoffrey C. Hazard, Jr. & Dana Remus Irwin, Toward a Revised 4.2 No-Contact Rule, 60 Hastings L.J. 797, 843 (Mar. 2009).

**Best Answer**

The best answer to this hypothetical is **PROBABLY YES**.
When Does a "Representation" End?

Hypothetical 8

Last year, you defended a car dealership in a lawsuit brought by a software vendor, which claimed that your client breached a software delivery contract. You won a jury trial, and the appeals period ended three months ago. You are now facing the possibility of a lawsuit from an auto parts vendor, and you think it would be worthwhile for you to interview the CEO of the software vendor about his dealings with your client.

Without the consent of the lawyer who represented the software vendor in the litigation against your client, may you communicate with the software vendor's CEO about the vendor's dealings with your client?

MAYBE

Analysis

The ABA Model Rules contain a one-sentence prohibition that generates numerous issues.

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

ABA Model Rule 4.2.¹

This hypothetical deals with the "represented by another lawyer in the matter" phrase -- as applied to post-litigation communications.

For obvious reasons, it can be difficult to know when a representation ends.

¹ The Restatement contains essentially the same standard. Restatement (Third) of Law Governing Lawyers § 99(1) (2000) ("A lawyer representing a client in a matter may not communicate about the subject of the representation with a nonclient whom the lawyer knows to be represented in the matter by another lawyer or with a representative of an organizational nonclient so represented as defined in § 100, unless: (a) the communication is with a public officer or agency to the extent stated in § 101; (b) the lawyer is a party and represents no other client in the matter; (c) the communication is authorized by law; (d) the communication reasonably responds to an emergency; or (e) the other lawyer consents.").
- CSX Transp., Inc. v. Gilkison, Peirce, Raimond & Coulter, P.C., Civ. A. No. 5:05CV202, 2011 U.S. Dist. LEXIS 130118, at *20 (N.D. W. Va. Nov. 9, 2011) (allowing plaintiff CSX to call former clients of a law firm CSX had sued for improper conduct in asbestos cases; "Rule 4.2, which references a party known to be represented by a lawyer, cannot be construed to bar communications with a person who is no longer represented by counsel because his claims have been resolved. . . . If representation has been terminated, . . . Rule 4.2 is inapplicable."; also finding that CSX's lawyer could communicate with the former clients about their claim against the law firm, which was not the same "matter" as the now-resolved asbestos cases in which the plaintiffs' law firm represented the clients against CSX).

- K-Mart Corp. v. Helton, 894 S.W.2d 630, 631 (Ky. 1995) ("The Court of Appeals correctly observed that the continued representation of an individual after the conclusion of a proceeding is not necessarily presumed and that the passage of time may be a reasonable ground to believe that a person is no longer represented by a particular lawyer. Rule 4.2 is not intended to prohibit all direct contact in such circumstances. Here counsel for plaintiffs had reasonable grounds to believe that the petitioners were not represented by counsel when he took the Pittman statement. In considering the fact that no contact was made by an attorney on behalf of K-Mart until more than one year after the incident which gave rise to this action and almost one year after plaintiffs' counsel took the statement, we believe that the communication with the K-Mart employee was not with a party the attorney knew was represented by another attorney in the matter.").

Bars have also wrestled with the issue. For instance, Virginia LEO 963 (9/4/87) indicated that a lawyer may not send an adversary a letter during the time an appeal may be filed if the adversary was represented during the trial, even though no appeal has been filed and the adversary’s lawyer has not indicated that an appeal will be filed. More recently, Virginia LEO 1709 (2/24/98) indicated that a lawyer may not contact an adversary ex parte after the adversary has non-suited a case, because "the entry of a non-suit does not terminate the representation of a party." The Virginia Bar explained that the presumption of representation continues after the non-suit, just as the presumption continues during the period when an appeal might be filed after a final judgment.
Best Answer

The best answer to this hypothetical is **MAYBE**.
Meaning of "Communication"

**Hypothetical 9**

You have been representing a client in litigation that has dragged on now for over three years. You suspect that the other side's lawyer has not been informing his client of important facts -- such as your client's position on the key issues, and the evidence supporting those positions. You and your client believe that if the other side knew of your client's positions and the evidence, the case might be resolved. You are trying to think of a way that you can arrange this, but you worry about the reaction of the other side's very aggressive trial lawyer.

Without the other side's lawyer's consent, can you send a copy of your client's interrogatory answers to the other side -- without any cover letter or other communication.

**NO**

**Analysis**

The ABA Model Rules contain a one-sentence prohibition that generates numerous issues.

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

ABA Model Rule 4.2.¹

This hypothetical deals with the meaning of "communicate about the subject of the representation."

¹ The Restatement contains essentially the same standard. Restatement (Third) of Law Governing Lawyers § 99(1) (2000) ("A lawyer representing a client in a matter may not communicate about the subject of the representation with a nonclient whom the lawyer knows to be represented in the matter by another lawyer or with a representative of an organizational nonclient so represented as defined in § 100, unless: (a) the communication is with a public officer or agency to the extent stated in § 101; (b) the lawyer is a party and represents no other client in the matter; (c) the communication is authorized by law; (d) the communication reasonably responds to an emergency; or (e) the other lawyer consents.").
Sending a represented person any type of "communication" presumably violates the prohibition -- whether the "communication" consists of a publicly-filed pleading or any other type of communication.

In a way, this seems counterintuitive. The lawyer representing the adversary almost surely has an ethical duty to pass along pleadings (or at least the substance of the pleadings) to his or her client. The sending lawyer might simply argue that he or she is "assisting" the adversary’s lawyer in fulfilling that ethical duty. Such an argument would almost surely fail.

No court or bar seems to have dealt with another interesting issue involving the term "communication." It is unclear whether a lawyer can attend a meeting between his or her client and a represented person -- without that person's lawyer's consent. If "communication" means oral communication, such a lawyer might seek to avoid the rule's prohibition by simply not saying anything or responding to the represented person -- but merely observing. To the extent that the lawyer and the represented person exchange social pleasantries about the weather, the local football team, etc., the lawyer could argue that those communications did not relate to the "matter" on which the represented person has retained a lawyer.

Such an action seems to fall outside the literal language of the rule's prohibition, but would also seem to give that lawyer an unfair advantage that the rule might prohibit -- being able to witness the represented person's unguarded communications, demeanor, body language, etc.
Best Answer

The best answer to this hypothetical is NO.
Application Outside Litigation and Adversarial Settings

Hypothetical 10

You are representing a dry cleaner in connection with a customer's complaint about a ruined dress. The customer is a paralegal at a local law firm, and has advised your client that one of the law firm's young lawyers is helping her determine what to do. So far the disagreement has been fairly amicable, with your client and the customer both indicating that they want to avoid litigation.

Your client just told you that another customer has volunteered to support his version of one heated conversation he had with the complaining customer in the store. Although the other customer is willing to help support your client's story, he has asked his lawyer brother-in-law to help him determine how to help your client without being dragged into the dispute by the complaining customer. You would like to work things out informally.

(a) Because litigation has not begun or even seems likely, may you call the complaining customer without her lawyer's consent?

NO

(b) Because the other customer/witness seems to be an ally rather than an adversary, may you call him without his lawyer's consent?

NO

Analysis

(a) The ABA Model Rules contain a one-sentence prohibition that generates numerous issues.

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.
ABA Model Rule 4.2.¹

This hypothetical deals with the reach of the rule, and its applicability in nonadversarial settings.

ABA Model Rule 4.2 formerly used the term "party" rather than "person." However, in 1995 the ABA switched to the term "person." The ABA itself explained that the change represented a clarification rather than a change in meaning.

States take the same approach. See, e.g., Indiana LEO 1 (2003) ("[t]he Committee here emphasizes that Rule 4.2 is not limited to circumstances in which a lawsuit has been filed").

(b) ABA Model Rule 4.2 and every state's counterpart apply to any ex parte contacts with a represented person -- whether that person is a friend or a foe.

The Restatement explains that the prohibition

is not limited to situations of opposing parties in litigation or in which persons otherwise have adverse interests. Thus, the rule covers a represented co-party and a nonparty fact witness who is represented by counsel with respect to the matter, as well as a nonclient so represented prior to any suit being filed and regardless of whether such suit is contemplated or eventuates.


Of course, contacting a friendly person ex parte might not draw any complaint by her lawyer or result in an ethics charge, but the prohibition applies nevertheless.

¹ The Restatement contains essentially the same standard. Restatement (Third) of Law Governing Lawyers § 99(1) (2000) ("A lawyer representing a client in a matter may not communicate about the subject of the representation with a nonclient whom the lawyer knows to be represented in the matter by another lawyer or with a representative of an organizational nonclient so represented as defined in § 100, unless: (a) the communication is with a public officer or agency to the extent stated in § 101; (b) the lawyer is a party and represents no other client in the matter; (c) the communication is authorized by law; (d) the communication reasonably responds to an emergency; or (e) the other lawyer consents.").
Best Answer

The best answer to (a) is NO; the best answer to (b) is NO.
Irrelevance of the Adversary's Consent

Hypothetical 11

For six months, you have represented your corporate client in a dispute with a sophisticated and very wealthy inventor. This evening, the inventor called you on your cell phone. The inventor tells you that he thinks his lawyer is actually an obstacle to resolving the dispute short of litigation. He proposes to negotiate a resolution directly with you.

(a) May you continue speaking with the inventor about the resolution?

NO

(b) May you continue speaking with the inventor if he tells you that his lawyer consents to the conversation?

NO (PROBABLY)

(c) May you continue speaking with the inventor if he tells you that he has fired his lawyer?

MAYBE

Analysis

Introduction

The ABA Model Rules contain a one-sentence prohibition that generates numerous issues.

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.
ABA Model Rule 4.2.¹

This hypothetical addresses the "consent of the other lawyer" phrase.

ABA Model Rule 4.2 and every state’s variation require the other person’s lawyer’s consent. The other person’s consent does not suffice.

The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

ABA Model Rule 4.2 cmt. [3].

The Restatement takes the same approach.

The general exception to the rule . . . requires consent of the opposing lawyer; consent of the client alone does not suffice . . .


The anti-contact rule applies to any communication relating the lawyer’s representation in the matter, whoever initiates the contact and regardless of the content of the ensuing communication


In a 2009 article, Professors Hazard and Irwin explained that the ex parte contact rule does not permit the client to waive the protection in circumstances where waiver would be inappropriate.

¹ The Restatement contains essentially the same standard. Restatement (Third) of Law Governing Lawyers § 99(1) (2000) (“A lawyer representing a client in a matter may not communicate about the subject of the representation with a nonclient whom the lawyer knows to be represented in the matter by another lawyer or with a representative of an organizational nonclient so represented as defined in § 100, unless: (a) the communication is with a public officer or agency to the extent stated in § 101; (b) the lawyer is a party and represents no other client in the matter; (c) the communication is authorized by law; (d) the communication reasonably responds to an emergency; or (e) the other lawyer consents.”).
A represented person's lawyer, but not a represented person himself, can waive the protections of Model Rule 4.2. If represented persons have the authority to waive the protections of other ethical rules, the question arises why the same is not true with respect to the no-contact rule. The answer lies in the logic of the no-contact rule, which is premised on the notion that a layperson is fatally vulnerable to an opposing lawyer's importunities.

Accordingly, the rule's protections cannot be waived by a client, even if the client is sophisticated, and even if the client has good reason for wanting to communicate with another lawyer involved in a matter. One can envision many such situations. A high-level whistleblower might want to contact a government lawyer to offer information about the corporate target of a government investigation. A spouse in a domestic relations matter might be dissatisfied with counsel and interested in other or joint representation. A criminal co-defendant, mistrustful of counsel, might want to initiate a conversation with the prosecutor regarding possible cooperation.

Geoffrey C. Hazard, Jr. & Dana Remus Irwin, Toward a Revised 4.2 No-Contact Rule, 60 Hastings L.J. 797, 825-26 (Mar. 2009) (footnotes omitted) (emphasis added).

Although acknowledging that the majority view does not permit the client to consent to such ex parte communications, professors Hazard and Irwin suggest that in certain limited circumstances such a consent should be recognized. Professors Hazard and Irwin proposed an amendment to Rule 4.2 to address this issue.

[W]e would add a general exception to Model Rule 4.2 for client waiver. But we would qualify it with the safeguard that the lawyer must memorialize in writing the client's initiation of the communication. Accordingly, we propose specifying in new paragraph (a) that the Rule's prohibition does not apply where "the represented person initiates the communication, a fact that is confirmed in writing."

Id. at 828.
There is little indication that any state bar has adopted this approach, although it makes sense in certain limited circumstances.

(a) Under the majority view requiring the represented person's lawyer's consent (and not just the person's consent), lawyers have faced severe sanctions for communicating with represented persons.

- *Inorganic Coatings, Inc. v. Falberg*, 926 F. Supp. 517, 518, 521 (E.D. Pa. 1995) (disqualifying a plaintiff's lawyer, who had communicated ex parte with someone who apparently was a senior executive at a company the plaintiff's lawyer had threatened to sue, and which the plaintiff's lawyer knew was represented by counsel; explaining the factual context; "Halberstadt [plaintiff's lawyer] received a telephone call from Gregg Falberg [senior executive at International Zinc, the company plaintiff had threatened to sue, and which the plaintiff's lawyer knew was represented by a lawyer]. Falberg called Halberstadt to again try to settle things without litigation. Halberstadt advised Falberg that it would be best if Halberstadt communicated with Falberg's counsel, but continued speaking with Falberg anyway. The telephone call lasted approximately 90 minutes and consisted of matters relevant to the litigation, including Falberg's relationship with ICI [plaintiff], Falberg's dealings with Defendant Polyset, Falberg's customers, Polyset's manufacturing processes, potential witnesses, and Falberg's opinions of the patents at issue. D-6; D-7. During their conversation, Halberstadt took 24 pages of notes. In the period between Halberstadt's conversation with Falberg and the filing of the Complaint, Halberstadt revised his draft of the Complaint."; holding that the plaintiff's lawyer had a duty to avoid the communication, even though the company's executive had initiated the conversation; also noting that the company was prejudiced, because the plaintiff's lawyer had revised the complaint as a result of the conversation; ordering the plaintiff's lawyer to produce all of his notes of the conversation, and also ordering replacement counsel to certify that he did not have access to any of the information obtained during the improper conversation; "Defendants’ Motion to Disqualify Plaintiff’s Counsel (Halberstadt and his law firm) from further participation in this action for violation of Rule 4.2 of the Pennsylvania Rules of Professional Conduct is granted. Plaintiff and its counsel will also be required to produce all notes and memoranda related to the ex parte contact with Defendant Gregg Falberg. In addition, this Court will allow ICI ten days to obtain new counsel, which counsel will certify that it does not have access to the information obtained pursuant to the unethical communication. Finally, this court will seal all of the records containing reference to the unethical communication.").
• Monceret v. Board of Prof'l Responsibility, 29 S.W.3d 455, 457, 461 (Tenn. 2000) (affirming a private admonition critical of a plaintiff's lawyer who deposed a witness who was represented in the matter, but without the witness's lawyer's consent; explaining that the plaintiff's lawyer had "discussed the absence of Mealer's attorney with Mealer [witness] before beginning the deposition, and Mealer elected to proceed in the absence of counsel"); noting that "[a]n apparent majority of courts have followed this interpretation and have held that the Rule is not waived simply because the represented person initiates contact or is otherwise willing to communicate"; "In light of this authority, we reject Monceret's contention that even thought he did not consult with Mealer's attorney, Mealer herself waived her right to the presence of counsel. Such a holding would be inconsistent with the plain language and spirit of DR 7-104(A)(1). We likewise reject Monceret's argument that the issuance of a subpoena satisfies the 'authorized by law' exception found in DR 7-104(A)(1). Such a conclusion would minimize the attorney's ethical obligation under the Rule and would create an exception that would threaten to swallow the Rule.").

In some situations, courts' application of this rule seems too harsh. For instance, the Northern District of Illinois disqualified the defense lawyer for negotiating a settlement with an individual class member through negotiations with the class member's lawyer -- but without class counsel's explicit consent. The court was not deterred by evidence that the class counsel knew of the settlement negotiations.

• Blanchard v. Edgemark Fin. Corp., No. 94 C 1890, 1998 U.S. Dist. LEXIS 15420, at *23-24 (N.D. Ill. Sept. 14, 1998) (disqualifying a defense lawyer for violating the ex parte communication rule; explaining that the defense lawyer had negotiated settlement with a plaintiff's lawyer, but without notice to class counsel representing a class that included the individual plaintiff; inexplicably finding that class counsel's knowledge of the individual negotiation did not relieve the defense lawyer of the obligation to seek explicit consent; "[W]e agree with the Magistrate Judge that Hedlund's [class counsel] apparent acquiescence to the negotiations is insufficient to remove this case from the ambit of Rule 4.2 While Hedlund may have been aware of the negotiations and did not object or attempt to intervene, there is no indication that Hedlund affirmatively consented to the communications. We have not discovered, nor have defendants cited, any authority that would excuse such an ethical violation merely because the party's counsel failed to take affirmative steps to prevent the communication. As the Magistrate Judge correctly noted, it is the responsibility of each lawyer to make sure that his or her conduct is in compliance with the pertinent ethical rules. Therefore, we reject defendants'
contention that Gravelyn [defense lawyer] should be excused from his unethical conduct because Hedlund did nothing to prevent it.

On the other hand, one court upheld a settlement agreement despite an alleged violation of this rule.

- **Myerchin v. Family Benefits, Inc.,** 76 Cal. Rptr. 3d 816 (Cal. Ct. App. 2008) (assessing a situation in which a plaintiff settled a breach of contract case by accepting $200,000, but refused to dismiss the case by alleging that the settlement agreement was unenforceable based on the defendant's lawyer's ex parte negotiation of a settlement agreement with the plaintiff rather than through the plaintiff's lawyer; noting that plaintiff refused to return the $200,000; ultimately concluding that the plaintiff could not renege on the settlement agreement despite the ex parte communications).

(b) It may seem counterintuitive, but a lawyer takes an enormous risk by accepting at face value even a highly sophisticated person's assurance that the person's lawyer has consented to an ex parte communication. See, e.g., New York City LEO 2005-04 (4/2005) (applying the ex parte prohibition even to communications initiated by what the bar called a "sophisticated non-lawyer insurance adjustor"; "[a] lawyer who proceeds on the basis of other evidence of consent, such as the opposing client's assurance that its counsel has consented, runs the risk of violating the rule if opposing counsel did not in fact consent").

As explained above, Professors Hazard and Irwin proposed such an exception in a 2009 article, but no bar seems to have taken the bait.

(c) Courts and bars have wrestled with the lawyer's obligations if the person indicates that she has fired her lawyer.

The ABA has explained that a lawyer may proceed with an ex parte communication with a person only if the lawyer has "reasonable assurance" that the representation has ended. ABA LEO 396 (7/28/95).
In 2012, a Washington court sanctioned a lawyer who responded ex parte to an adversary's email in which the adversary indicated (among other things) that the adversary "did not wish to be represented by her attorney."

- **Engstrom v. Goodman**, 271 P.3d 959, 961, 964 (Wash. Ct. App. 2012) (imposing a $3,000 sanction against a lawyer who responded ex parte to a represented litigant who is an adversary of the lawyer's client; explaining that a defendant sent an email to the plaintiff's lawyer "in which she said she did not agree to a new trial and she did not wish to be represented by her attorney"; explaining that the plaintiff's lawyer prepared a declaration that the defendant signed, which the plaintiff used to strike the defendant's pleading; "Engstrom [plaintiff] contends there was no violation of the rule because it was Hardesten [defendant] who initiated the communication with Williams [plaintiff's lawyer] by sending him the e-mail message."; "The fact that Hardesten first approached Williams is irrelevant."; "Engstrom further argues that Williams should be excused for soliciting Hardesten's declaration because her e-mail message gave him a reasonable basis to believe she was unrepresented. Engstrom is mistaken. The question is whether there is a reasonable basis for an attorney to believe a party may be represented. If so, the attorney's duty is to determine whether the party is in fact represented. . . . Williams did not fulfill this duty. As Hardesten's attorney had not withdrawn, Williams had a reasonable basis for believing Hardesten was still represented, despite her statement that she did not 'wish to be represented' by that attorney. By taking the matter into his own hands, Williams took advantage of Hardesten." (footnote omitted); "Williams could have simply forwarded the e-mail to Hardesten's attorney. Alternatively, he could have submitted it to the court under RCW 2.44.030."), review denied, 175 Wn. 2d 1004 (Wash. Sept. 5, 2012).

On the other hand, the Texas Supreme Court has held that

Rule 4.02 does not require an attorney to contact a person's former attorney to confirm the person's statement that representation has been terminated before communicating with the person. Confirmation may be necessary in some circumstances before an attorney can determine whether a person is no longer represented, but it is not required by Rule 4.02 in every situation, and for good reason. The attorney may not be able to provide confirmation if, as in this case, he and his client have not communicated. And while a client should certainly be expected to communicate with his attorney about discontinuing representation, the client in
some circumstances may have reasons for not doing so immediately.


Lawyers undertaking such communications undoubtedly put themselves in harm's way, but apparently do not violate the ethics rules in every jurisdiction.

**Best Answer**

The best answer to (a) is **NO**; the best answer to (b) is **PROBABLY NO**; the best answer to (c) is **MAYBE**.
Using "Reply to All" Function

Hypothetical 12

You have been representing a company for about 18 months in an effort to negotiate the purchase of a patent from a wealthy individual inventor. The negotiations have been very cordial at times, but occasionally turn fairly contentious. You and your company's vice president have met several times with the inventor and his lawyer, both at the inventor's home and in a conference room in your company's headquarters. After some of the fruitful meetings, you and the other lawyer have exchanged draft purchase agreements, with both of you normally copying the vice president and the inventor. Last week things turned less friendly again, and you heard that the inventor's lawyer might be standing in the way of finalizing a purchase agreement. This morning you received a fairly cool email from the other lawyer, rejecting your latest draft purchase agreement and essentially threatening to "start all over again" in the negotiations given what he alleges to be your client's unreasonable position. As in earlier emails, the other lawyer showed a copy of the email to his client, the inventor.

May you respond to the other lawyer's email using the "Reply to All" function, and defending your client's positions in the negotiations?

MAYBE

Analysis

As in other ethics contexts, the increasing use of electronic communications has complicated matters.

Also as in other ethics contexts, the New York City Bar seems to be the first (and so far only) bar to have dealt with the "Reply to All" function. In a 2009 legal ethics opinion, the New York City Bar indicated that in some circumstances lawyers may safely use the "Reply to All" function.

- New York City LEO 2009-1 (2009) (explaining that lawyers might be permitted ethically to use the "reply to all" function on an email that the lawyer receives from a lawyer representing an adversary, and on which the other lawyer has copied his or her client; "The no-contact rule (DR 7-104(A)(1)) prohibits a lawyer from sending a letter or email directly to a represented person and simultaneously to her counsel, without first obtaining 'prior consent' to the
direct communication or unless otherwise authorized by law. Prior consent to
the communication means actual consent, and preferably, though not
necessarily, express consent; while consent may be inferred from the conduct
or acquiescence of the represented person's lawyer, a lawyer communicating
with a represented person without securing the other lawyer's express
consent runs the risk of violating the no-contact rule if the other lawyer has
not manifested consent to the communication."

"We agree that in the context
of group email communications involving multiple lawyers and their respective
clients, consent to 'reply to all' communications may sometimes be inferred
from the facts and circumstances presented. While it is not possible to
provide an exhaustive list, two important considerations are (1) how the group
communication is initiated and (2) whether the communication occurs in an
adversarial setting."

"Initiation of communication: It is useful to consider how the group
communication is initiated. For example, is there a meeting where the
lawyers and their clients agree to await a communication to be circulated to
all participants? If so, and no one objects to the circulation of
correspondence to all in attendance, it is reasonable to infer that the lawyers
have consented by their silence to inclusion of their clients on the distribution
list. Similarly, a lawyer may invite a response to an email sent both to her
own client and to lawyers for other parties. In that case, it would be
reasonable to infer counsel's consent to a 'reply to all' response from any one
of the email's recipients."

"Adversarial context: The risk of prejudice and
overreaching posed by direct communications with represented persons is
greater in an adversarial setting, where any statement by a party may be
used against her as an admission. If a lawyer threatens opposing counsel
with litigation and copies her client on the threatening letter, the 'cc' cannot
reasonably be viewed as implicit consent to opposing counsel sending a
response addressed or copied to the represented party. By contrast, in a
collaborative non-litigation context, one could readily imagine a lawyer
circulating a draft of a press release simultaneously to her client and to other
parties and their counsel, and inviting discussion of its contents. In that
circumstance, it would be reasonable to view the email as inviting a group
dialogue and manifesting consent to 'reply to all' communications."

"Because
the rule requires the consent of opposing counsel, the safest course is to
obtain that consent orally or in writing from counsel. A lawyer who proceeds
on the basis of other evidence of consent, such as the opposing client's
assurance that its counsel has consented, runs the risk of violating the rule if
opposing counsel did not in fact consent."

"We are mindful that the ease and
convenience of email communications (particularly 'reply to all' emails)
sometimes facilitate inadvertent contacts with represented persons without
their lawyers' prior consent. Given the potential consequence of violating DR
7-104(A)(1), counsel are advised to exercise care and diligence in reviewing
the email addresses to avoid sending emails to represented persons whose
counsel have not consented to the direct communication.").
Given the novelty of this issue in the New York City Bar's explanation (especially the difference between a friendly negotiation context and an adversarial context), lawyers would be wise not to respond with a "Reply to All" email -- at least until other bars add their voice to this issue.

**Best Answer**

The best answer to this hypothetical is **MAYBE**.
"Authorized by Law" Exception

Hypothetical 13

You represent the owner of a small apartment building in a nearby college town. Your client has had a running feud for nearly six months with one of her tenants -- a law student, who has hired a local civil rights lawyer to represent him. The tenant has already filed two ethics charges against you. You think that the charges are groundless, but you obviously are a bit "skittish." Your client just asked you to send a notice to the tenant indicating that your client is terminating the apartment lease at the end of the school year. One of the lease provisions requires that such a notice be sent directly to the tenant. Now you wonder whether the tenant will file another ethics charge if you send the notice directly to the tenant.

May you send the termination notice directly to the tenant?

YES (PROBABLY)

Analysis

Introduction

The ABA Model Rules contain a one-sentence prohibition that generates numerous issues.

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

ABA Model Rule 4.2.¹

This hypothetical addresses the "authorized to do so by law" phrase.

¹ The Restatement contains essentially the same standard. Restatement (Third) of Law Governing Lawyers § 99(1) (2000) ("A lawyer representing a client in a matter may not communicate about the subject of the representation with a nonclient whom the lawyer knows to be represented in the matter by another lawyer or with a representative of an organizational nonclient so represented as defined in § 100, unless: (a) the communication is with a public officer or agency to the extent stated in § 101; (b) the lawyer is a party and represents no other client in the matter; (c) the communication is authorized by law; (d) the communication reasonably responds to an emergency; or (e) the other lawyer consents.")
The court "authorized by law" standard generally involves one or more of five issues.

First, courts have dealt with that standard's application to court processes and discovery of litigants or nonlitigants. Some communications of that sort clearly fall within the "authorized by law" exception -- but others clearly do not. The Oregon Supreme Court addressed this issue.

Without the "authorized by law" exception or the consent of the opposing party's lawyer, a lawyer could not cross-examine the opposing party at trial, depose that party, or subpoena a represented witness to testify before the grand jury.

The "authorized by law" exception permits a lawyer to communicate directly with another party in those situations without the consent of that party's lawyer. However, nothing in the terms of that exception or the cases interpreting it suggests that the exception goes as far as the accused would take it. The accused would interpret the exception to permit an end-run around the represented person's lawyer. As we understand the accused's argument, as long as a lawyer can subpoena a nonparty witness to testify at trial or in a deposition before the witness has an opportunity to contact his or her own lawyer, the "authorized by law" exception would permit the lawyer to ask that witness unlimited questions without the opportunity for the witness's lawyer to protect his or her client's interests. That interpretation of the exception, if accepted, would undermine the purpose of the rule.

\[\ldots\]

\[\ldots\] [T]he "authorized by law" exception does not extend so far that it permits one lawyer to unilaterally exclude a represented witness's lawyer from the deposition.
In re Newell, 234 P.3d 967, 974, 976 (Or. 2010). Significantly, in that case the Oregon Supreme Court publically reprimanded an Oregon lawyer who had deposed a witness in a civil case without the consent of the witness's criminal lawyer handling a related criminal case.

In re Newell, 234 P.3d 967, 971, 972, 972-73, 973-74, 974, 976 (Or. 2010) (publicly reprimanding a Oregon lawyer who deposed a witness in a civil case about the subject of incidents that were also involved in a criminal case against the witness; noting that the lawyer realized that the witness was represented by a criminal lawyer in a related criminal matter, but did not notify the criminal lawyer of the deposition; rejecting the lawyer's argument that he did not have ex parte communications on the same "subject" as that in which the witness had a criminal defense lawyer; noting that the disciplinary panel concluded that Oregon's Rule 4.2 "covers instances such as the present case in which the [a]ccused knew the witness to be represented in a pending criminal proceeding but nevertheless proceeded to interrogate the witness about that subject."; agreeing with the panel; "In this case, there is no dispute that the accused communicated with Fahey in the course of representing Jewett-Cameron, that Fahey was represented in the criminal action, and that the accused knew that he was communicating with Fahey on the subject on which Fahey was represented. The only question is whether the communication concerned the subject on which the accused represented Jewett-Cameron and on which Coit represented Fahey. As a factual matter, the answer to that question is 'yes.’ The subject on which the accused represented Jewett-Cameron was Greenwood's alleged overstatement of its inventory. The accused sought to recover part of the purchase price from Greenwood on the theory that Greenwood's assets were less than its books showed. Coit represented Fahey on that same subject. The criminal action was based on Fahey's embezzlement from Greenwood, which resulted in Greenwood's overstated inventory. Factually, each lawyer's representation involved a common subject -- whether Greenwood's books were overstated;"; "'[T]he accused argues that his communication with Fahey would violate RPC 4.2 only if Coit represented Fahey in Jewett-Cameron's action against Greenwood and if the accused knew that fact.\text{";}; "'Subject,' the word that the rule uses, is broader than the word 'matter,' as the accused defines it."; "[I]t is sufficient for the purposes of this case to hold, as we do, that the accused communicated with Fahey on the subject on which Coit represented Fahey and on which the accused represented Jewett-Cameron. The accused's communication accordingly was a 'communicat[ion] on the subject of the representation' within the meaning of RPC 4.2."; also rejecting the lawyer's argument that his deposition of the witness was "authorized by law"; "Without the 'authorized by law' exception or the consent of the opposing party's lawyer, a lawyer could not cross-examine the opposing party at trial, depose that party, or subpoena a represented witness to testify before the grand jury."; "The 'authorized by law' exception permits a lawyer to communicate directly with another party in those situations without the consent of that party's lawyer. However, nothing in the terms of that exception or the cases interpreting it suggests that the exception goes as far as the accused would take it. The accused would interpret the exception to permit an end-run around the represented person's lawyer. As we understand the accused's argument, as long as a lawyer can subpoena a nonparty witness to testify at trial or in a deposition before the witness has an opportunity to contact his or her own lawyer, the 'authorized by law' exception would permit the lawyer to ask that witness unlimited questions without the opportunity for the witness's lawyer to protect his or her client's interests. That interpretation of the exception, if accepted, would undermine the purpose of the rule."; "'[T]he ‘authorized by law’ exception does not extend so far that it permits one lawyer to unilaterally exclude a represented witness's lawyer from the deposition.’").
Other courts have likewise rejected the argument that depositions or other discovery fall within the "authorized by law" exception to the prohibition on ex parte communications.

- See, e.g., Monceret v. Board of Prof'l Responsibility, 29 S.W.3d 455, 457, 461 (Tenn. 2000) (affirming a private admonition critical of a plaintiff's lawyer who deposed a witness who was represented in the matter, but without the witness's lawyer's consent; explaining that the plaintiff's lawyer had "discussed the absence of Mealer's attorney with Mealer [witness] before beginning the deposition, and Mealer elected to proceed in the absence of counsel"); noting that "[a]n apparent majority of courts have followed this interpretation and have held that the Rule is not waived simply because the represented person initiates contact or is otherwise willing to communicate"; "In light of this authority, we reject Monceret's contention that even thought he did not consult with Mealer's attorney, Mealer herself waived her right to the presence of counsel. Such a holding would be inconsistent with the plain language and spirit of DR 7-104(A)(1). We likewise reject Monceret's argument that the issuance of a subpoena satisfies the 'authorized by law' exception found in DR 7-104(A)(1). Such a conclusion would minimize the attorney's ethical obligation under the Rule and would create an exception that would threaten to swallow the Rule." (emphasis added)).

Thus, the "authorized by law" exception to the prohibition on ex parte communications applies to some court processes, but not others.³

Second, a lawyer's ex parte communications with government officials sometimes implicate the "authorized by law" standard.

- See, e.g., Kansas LEO 00-6 (2000) ("Communications between a lawyer representing a zoning applicant and an elected or appointed government official regarding the zoning matter fall under the 'authorized by law' exception to Rule 4.2 and are therefore permissible.").

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³ To the extent a lawyer defending a witness argues that any deposition questions (absent his or her consent) violate the ex parte communication prohibition and do not fall within the "authorized by law" exception, the questioning lawyer might have to obtain a court order requiring responses to the discovery -- thus falling within the "court order" exception in ABA Model Rule 4.2 and similar state rules.
Most courts and bars analyzing such communications rely instead on the constitutional provisions permitting citizens to petition the government, but in some circumstances the "authorized by law" exception seems appropriate as well.

Third, courts have struggled with reconciling applicable ethics rules and certain statutes that seem to permit ex parte contacts.

For instance, Section 10 of the Federal Employers' Liability Act ("FELA") provides that

> [a]ny contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from voluntarily furnishing information to a person in interest as to facts incident to the injury or death of any employee, shall be void.

45 U.S.C. § 60 ("FELA § 10").

In one case, the District of Massachusetts noted the enormous variation among courts determining whether this provision trumps the ethics rules.

There is a sharp division among district courts on the question of whether FELA § 60 [sic] overrides ethical rules prohibiting a plaintiff's lawyer from contacting employees of a defendant, in a railroad or Jones Act action, without the awareness of defense counsel.


Other courts have reached the opposite conclusion. Mayfield v. Soo Line R.R., No. 95 C 2394, 1995 U.S. Dist. LEXIS 18051 (N.D. Ill. Nov. 29, 1995) (finding that provision of the FELA trumps any violation of Rule 4.2, so that the plaintiff may contact ex parte interviews of defendant railroad's employees).

Fourth, provisions in privately negotiated contracts or leases present a more difficult question, because they are not based on statutes or rules.

Still, the Restatement takes an expansive view.

Contractual notice provisions may explicitly provide for notice to be sent to a designated individual. A lawyer's dispatch of such notice directly to the designated nonclient, even if represented in the matter, is authorized to comply with legal requirements of the contract.

Restatement (Third) of Law Governing Lawyers § 99 cmt. g (2000).

State bars take the same basic approach.

- Virginia LEO 1375 (10/1/90) (contractually required notices between a landlord and a tenant are permissible even if the parties are represented by lawyers, although courtesy would demand that a copy of the notice be sent to the recipient's lawyer).

- Illinois LEO 85-05 (12/1985) (finding that a lawyer representing a purchaser under a real estate contract requiring notice to "the seller" may send the required notice directly to the seller even though the seller is represented by a lawyer, because "the terms of the contract would authorize the lawyer acting
for the purchaser to communicate such notice as is required by the contract directly to the seller").

As could be expected, the sending lawyer in these circumstances must limit the communication to the contractually required language.

- Indiana LEO 1 (2003) (recognizing the exception, but advising lawyers to limit any such notice to the position or intent of the sending person, so the notice does not amount to a "communication" within the meaning of Rule 4.2).

- Illinois LEO 85-05 (12/1985) (finding that a lawyer representing a purchaser under a real estate contract requiring notice to "the seller" may send the required notice directly to the seller even though the seller is represented by a lawyer, because "the terms of the contract would authorize the lawyer acting for the purchaser to communicate such notice as is required by the contract directly to the seller"; warning that "it would be improper for the lawyer in question to expand the communication with the seller beyond such notice as is specifically required by the contract (to include a counter-offer or to seek an extension of the time for obtaining a mortgage commitment for example)."

Although lawyers might be able to take advantage of the "authorized by law" exception in the context of a private contract, they should be wary of doing so. To the extent that the lawyer wants to communicate herself rather than work with the client to send such a contractual notice or similar communication, the lawyer's effort to intimidate or impress the represented person in essence establishes why the prohibition should apply.

**Fifth**, two academics have argued that the ex parte contact rule should contain an exception for emergency communications that might ultimately be authorized by a court order, but which the communicating lawyer does not have time to obtain.

In a 2009 article, Professors Hazard and Irwin explained that there are emergency situations in which an ex parte communication should be permissible.

One can envision several situations in which a lawyer might want to contact a represented person directly in order
to avert imminent harm. A lawyer might want to warn a represented person that the lawyer’s client is likely to engage in violent acts. Or a lawyer might want to communicate directly with a represented spouse or partner regarding a child’s whereabouts or health emergency. Recognizing such exigencies, the Restatement (Third) includes an exception "to protect life or personal safety and to deal with other emergency situations . . . to the extent reasonably necessary to deal with the emergency." Model Rule 4.2 has no such express qualification. Rather, it addresses the issue in Comment 6, which states that an emergency may justify a court order authorizing communication. Obtaining such an order may of course be appropriate in some situations, but it is insufficient for addressing an immediate risk of harm.

Geoffrey C. Hazard, Jr. & Dana Remus Irwin, Toward a Revised 4.2 No-Contact Rule, 60 Hastings L.J. 797, 829 (Mar. 2009) (footnotes omitted).

Professors Hazard and Irwin proposed an amendment to the Comment to Rule 4.2 as follows:

Communications necessary in light of what the lawyer reasonably believes to be an emergency include communications that the lawyer believes necessary to address an imminent and reasonably certain risk of death, substantial bodily harm or compromised personal safety. They may also include communications that the lawyer believes necessary to address an imminent risk of harm to the financial interests or property of another, in furtherance of which the lawyer’s client used the lawyer’s services. See Rule 1.6. Where the risk of harm is not imminent, a lawyer should seek a court order prior to engaging in the communication.

Id. at 829-30.

Best Answer

The best answer to this hypothetical is PROBABLY YES.
Clients' Direct Communication with Represented Persons

Hypothetical 14

As the only in-house lawyer for your relatively small client, you frequently appear as counsel of record in litigating cases as well as providing daily advice to your client's executives. You are currently working on a nasty piece of litigation in which your adversary has hired an aggressive and unreasonable lawyer. You think the case might settle if the other lawyer were not involved in the discussions.

Without your adversary's lawyer's consent, may your client's CEO call the adversary's CEO to discuss the case?

YES

Analysis

This area of ethics law is so confusing and difficult to apply in part because the strictly enforced prohibition on lawyers' ex parte contacts with represented persons stands alongside an equally powerful rule -- clients only speak with clients.

An ABA Model Rule comment makes this very clear.

Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make.

ABA Model Rule 4.2 cmt. [4].

Courts and bars take the same approach.

- Illinois LEO 04-02 (4/2005) (explaining that "a client's 'absolute right' to negotiate and resolve her legal affairs will not be interfered with absent fraud and an attempt to keep her from consulting with her lawyer. . . . The client has the absolute right to negotiate directly and sign agreements without her lawyer's presence or consent," (emphasis added)).

may directly contact a represented opposing party; no rule prohibits such communication”.

A much more perplexing situation involves the extent to which a lawyer can suggest or assist clients in exercising their undeniable right to communicate directly with another represented person.

**Best Answer**

The best answer to this hypothetical is **YES**.
Lawyers' Participation in Clients' Communications

Hypothetical 15

You are acting as counsel of record for your small company in litigation against an adversary represented by an aggressive and unreasonable lawyer. You think that direct communications between your client's CEO and the adversary's CEO might resolve the case. You are considering how to raise this issue with your client's CEO.

(a) If your client's CEO proposes to call the adversary's CEO directly, must you discourage your CEO from doing so?

NO (PROBABLY)

(b) May you "suggest" that your client's CEO call the other CEO directly (without the adversary's lawyer's consent)?

YES (PROBABLY)

(c) May you prepare your client's CEO for such a direct communication?

YES (PROBABLY)

Analysis

Introduction

Determining in what way a lawyer may participate in a client's direct ex parte communication with a represented adversary highlights the competing rules underlying the ex parte contact prohibition: lawyers are absolutely prohibited from such ex parte communications (except in a few specific situations), while clients are absolutely free to do so.

ABA

The old ABA Model Code version of Rule 4.2 contained the phrase "or cause another to communicate" -- thus explicitly prohibiting lawyers from "causing" their clients...
to initiate ex parte contacts. ABA Model Code of Prof'l Responsibility DR 7-104(A)(1).

In 1983, the ABA explicitly deleted that phrase when adopting Model Rule 4.2. Illinois dropped the "cause another" language when it revised its ethics rules in 2010. The New York ethics rules still contain that phrase. New York Rule 4.2(a).

In 1992, the ABA pointed to lawyers' duties of competence, diligence and communication in concluding that a lawyer may advise a client about the client's right to initiate ex parte communications on his or her own. ABA LEO 362 (7/6/92).

Specifically, the ABA indicated that a lawyer who does not believe that a settlement offer is making it to another party "has a duty [to his client] to discuss not only the limits on the lawyer's ability to communicate with the offeree-party, but also the freedom of the offeror-party to communicate with the opposing offeree-party." Id. (emphases added).

The ABA left "for another day" the application of the more general provision in ABA Model Rule 8.4(a), which provides that it is professional misconduct for a lawyer to "violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." Id. Thus, the ABA had a difficult time reconciling the overall prohibition on lawyers "doing indirectly what [they] may not do directly" and the conscious deletion of that principle in the reformulation of ABA Model Rule 4.2 in 1983.

In 2011, the ABA revisited this issue. ABA LEO 461 (8/4/11). The ABA acknowledged the tension between Rule 8.4's prohibition on a lawyer violating the ethics rules through the actions of another, and Rule 4.2 cmt. [4]'s permission for lawyers to advise their clients about communications "that the client is legally entitled to make." The ABA noted that some states prohibiting lawyers for even suggesting that
their client call a represented adversary had not adopted such a comment. The ABA also explained that restricting a lawyer's involvement in suggesting or assisting with such ex parte communications might disadvantage unsophisticated clients who did not recognize the benefits of such communications and who might require a lawyer's assistance in undertaking them.

The ABA eventually adopted a very permissive rule.

[A] lawyer may give substantial assistance to a client regarding a substantive communication with a represented adversary. That advice could include, for example, the subjects or topics to be addressed, issues to be raised and strategies to be used. Such advice may be given regardless of who -- the lawyer or the client -- conceives of the idea of having the communication.

. . . [T]he lawyer may review, redraft and approve a letter or a set of talking points that the client has drafted and wishes to use in her communications with her represented adversary. . . . The client also could request that the lawyer draft the basic terms of a proposed settlement that she wishes to have with her adverse spouse, or to draft a formal agreement ready for execution.

Id. However, the ABA concluded with a warning that lawyers may not engage in "overreaching."

Prime examples of overreaching include assisting the client in securing from the represented person an enforceable obligation, disclosure of confidential information, or admissions against interest without the opportunity to seek the advice of counsel. To prevent such overreaching, a lawyer must, at a minimum, advise her client to encourage the other party to consult with counsel before entering into obligations, making admissions or disclosing confidential information. If counsel has drafted a proposed agreement for the client to deliver to her represented adversary for execution, counsel should include in such agreement conspicuous language on the signature page that warns the
other party to consult with his lawyer before signing the agreement.

Id. This ABA LEO appears to go further than any state has gone in permitting lawyers' involvement in their clients' ex parte communication with represented persons.

**Restatement**

The Restatement is somewhat more explicit, indicating in Section 99 that the general prohibition on ex parte contacts does not prohibit the lawyer from assisting the client in otherwise proper communication by the lawyer's client with a represented nonclient.

Restatement (Third) of Law Governing Lawyers § 99(2) (2000). As the Restatement explains,

[p]rohibiting such advice would unduly restrict the client's autonomy, the client's interest in obtaining important legal advice, and the client's ability to communicate fully with the lawyer. The lawyer may suggest that the client make such a communication but must not assist the client inappropriately to seek confidential information, to invite the nonclient to take action without the advice of counsel, or otherwise to overreach the nonclient.


For purposes of the prohibition against inducing a nonlawyer to act in the lawyer's stead, whether a client is such a nonlawyer depends on the nature of the purported violation, and many situations involve close questions. Thus, a lawyer may not offer an unlawful inducement to a witness . . . and the lawyer may not assist or induce a client to do so. Similarly, a lawyer may not file a nonmeritorious motion . . . and a lawyer may not assist or induce a client to file such a motion pro se. On the other hand, because of the superior legal interest in recognizing the right of the client to speak directly to an opposing party and not only through that
party's lawyer, and because of the superior interest in providing clients a full range of legal services relevant to a matter, the client's lawyer may counsel the client about the content of a communication directly with an opposing party known to be represented by counsel under the limitations stated in § 99(2) and Comment k thereto.


The Restatement provides an example of a lawyer's permissible involvement in a client's communication.

Lawyer represents Owner, who has a worsening business relationship with Contractor. From earlier meetings, Lawyer knows that Contractor is represented by a lawyer in the matter. Owner drafts a letter to send to Contractor stating Owner's position in the dispute, showing a copy of the draft to Lawyer. Viewing the draft as inappropriate, Lawyer redrafts the letter, recommending that Client send out the letter as redrafted. Client does so, as Lawyer knew would occur. Lawyer has not violated the rule of this Section.

Restatement (Third) of Law Governing Lawyers § 99, illus. 6 (2000).

**Courts and Bars**

States take differing positions on this issue.

At least one state has dealt with this issue in a rule rather than an opinion. New York's Rule 4.2 indicates that in representing a client, a lawyer "shall not communicate or cause another to communicate" about the pertinent subject matter with another party known to be represented by a lawyer. New York Rule 4.2(a) (emphasis added). The rule also explicitly requires a lawyer who counsels his or her client to communicate with a represented person must give a "heads up" to that person's lawyer.

[A] lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives
reasonable advance notice to the represented person's counsel that such communications will be taking place.

New York Rule 4.2.

Some courts and bars take a fairly strict view, and generally prohibit lawyers from assisting their clients in ex parte communications with other represented persons.

- **Bd. of Prof'l Responsibility v. Melchior**, 269 P.3d 1088, 1091 (Wyo. 2011) (issuing a public censure of a lawyer who arranged for his divorce client to communicate ex parte with the client's husband and have him sign a settlement agreement; "Respondent has acknowledged that he violated this Rule when he created and gave to his client a divorce settlement agreement and a confidential financial statement at a time when Respondent knew or reasonably should have known that there was a substantial risk that she would deliver them to the husband, whom Respondent knew was being represented by counsel.").

- **In re Pyle**, 91 P.3d 1222, 1227, 1227-28 (Kan. 2004) (issuing a public censure of a lawyer who arranged for his client to prepare and present for signature an affidavit to a represented party; explaining that the lawyer represented a woman injured in her boyfriend's driveway; explaining that the girlfriend's lawyer prepared an affidavit for the boyfriend to sign that admitted negligence, but that the lawyer hired by the insurance company to represent the boyfriend denied liability; further explaining that the lawyer threatened the insurance defense lawyer with disciplinary charges for ignoring the insured's position on the accident and taking the insurance company's position; quoting the lawyer's cover letter to his client; "Enclosed please find a proposed affidavit to be signed by Mr. Gutzman [boyfriend, who is then being represented by the insurance defense lawyer]. As a party to the case, you have the right to communicate with Mr. Gutzman. Therefore, please talk with him and see if he will sign the enclosed affidavit." (emphasis added by the court); noting the lawyer's argument in response to an allegation that he impermissibly acted through his client in ex parte communications with a represented person; "Pyle [lawyer] argues that he did not communicate with Gutzman when he prepared the second affidavit. He maintains he told Molie [lawyer's client] that he could not communicate with Gutzman but that she could, and he asserts he prepared the second affidavit at her direction."; finding an ethics violation; "Pyle prepared an affidavit for Gutzman concerning the very nature of the case, albeit at his client's request, and encouraged Moline to deliver it to Gutzman, who was represented by counsel. Pyle knew Moline would obtain Gutzman's signature on the affidavit without opposing counsel's consent. Pyle, through his client, communicated with Gutzman about the subject of the case without Conderman's [Gutzman's lawyer]
approval. Pyle circumvented the constraints of KRPC 4.2 by encouraging his client to do that which he could not." (emphasis added)).

- In re Anonymous, 819 N.E.2d 376, 377-78, 378-79, 379 & n.1 (Ind. 2004) (issuing a private reprimand against a lawyer who arranged for his client to have a represented person sign an affidavit; "After the client took the respondent [lawyer] to the client's home, the respondent took out a copy of the proposed affidavit that had been faxed to employee's counsel, handed it to his client, and explained that he and his co-counsel were trying to sever the client's trial from the employee's. He further explained that the proposed affidavit had been faxed to employee's counsel in order to sever the trials, but that employee's counsel had not given the respondent any indication whether the employee would to sign it. The client then returned to the store to see if the employee sign the affidavit. About ten minutes later, the client returned to his house with the employee who had the affidavit in his hand. The employee attempted to speak with the respondent about it, but the respondent told him that he would not speak with him without the employee's counsel present. The employee and the client then talked, and the employee signed the affidavit. The employee never talked to his counsel about the affidavit. The respondent did not specifically know that the employee had not discussed the affidavit with his counsel, but he also had no reason to believe that the two had discussed it."); "[T]he Commission and the respondent stipulate that even though his client may not have been acting as the respondent's agent in obtaining the signature on the affidavit, the respondent ratified his client's direct contact with the employee by failing to take steps to intervene when the client presented the affidavit for signature, by failing to take steps to contact employee's counsel while he was waiting for him to sign the affidavit, by thereafter taking control of the affidavit once it was signed, and by filing the document with the federal court. The parties agree that respondent attempted to take procedural advantage of the signed document before abandoning that attempt when employee's counsel objected to its use."); "If an attorney simply received the affidavit obtained by a client without suggesting, directly or indirectly, any contact between the two, no violation would have occurred. . . . Although ratification of a client's independently initiated communication is not sufficient to constitute violation, we believe the respondent's active participation in the events leading to the employee signing the affidavit amounts to more than mere ratification of his client's actions. Instead, the events of August 24 reflect the respondent's instigation of a series of contacts calculated to obtain the employee's signature on the affidavit despite the respondent's unsuccessful attempts to obtain the employee's signature through opposing counsel. The respondent visited his client's store, a place where he knew the employee worked, bringing with him the unsigned affidavit. He presented the affidavit to his client and explained that counsel had given no indication whether or not the employee would sign it. He made no effort to dissuade his client from speaking directly with the
employee about signing the affidavit." (emphasis added); "Although the respondent minutes later directly told the employee that he could not speak with him about the case without counsel present, the respondent did not intervene or attempt to contact counsel when the employee signed the document in his presence after again discussing the matter with the client. Under these facts, we find that the respondent violated Prof. Cond. R. 4.2." (emphasis added); "The comment to Prof. Cond. R. 4.2 provides, inter alia, that 'parties to a matter may communicate directly with each other...' However, that statement is not intended to insulate from scrutiny situations where a party communicates with another at the insistence of or in the presence of the party's counsel and while the adverse party's counsel is absent and unaware of the contact." (emphasis added)).

- **Holdren v. General Motors Corp.**, 13 F. Supp. 2d 1192, 1193, 1194, 1195, 1195-96, 1196 (D. Kan. 1998) (entering a protective order stopping a plaintiff from communicating with defendant's employees; explaining the situation; "At some point thereafter, perhaps as a result of these concerns, plaintiff asked his counsel whether he should attempt to obtain signed sworn statements from certain GM employees. According to plaintiff's deposition testimony, his counsel responded, 'That would be a good idea. Yeah.' In this same conversation, plaintiff's counsel advised his client on the 'effect of out of court statements' and the 'value' of written statements. Plaintiff's counsel also discussed with his client the costs associated with alternative methods of discovery. Finally, at plaintiff's request, plaintiff's counsel advised his client how to draft an affidavit. . . . Plaintiff testified that he obtained written statements from at least four GM employees and has sought statements from several others.; holding that "since plaintiff's counsel is barred under Rule 4.2 from communicating with certain GM employees, he may not circumvent Rule 4.2 by directing his client to contact these employees.; "A review of the few decisions addressing whether an attorney has 'caused' his or her client to act suggests that there is a broad spectrum of conduct that constitutes a violation of this disciplinary rule. At one end of the spectrum are those cases which an attorney actually requests or engineers a contact or action by the client that would otherwise be prohibited by the disciplinary rules. See, e.g., In re Marietta, 223 Kan. 11, 569 P.2d 921 (1977) (publicly censuring lawyer who 'caused his client' to communicate with opposing party in violation of DR 7-104(a)(1) where lawyer prepared release of liability for client to deliver to opposing party). At least one case, however, has suggested that an attorney's mere knowledge of a client's contact or action is sufficient to constitute an ethical violation. See Massa v. Eaton Corp, 109 F.R.D. 312, 313 (W.D. Mich. 1985) (plaintiff's counsel violated DR 7-104(A)(1) by 'allowing' his client to conduct informal interviews of managerial level employees of corporate defendant);" (emphasis added); explaining that "[t]he conduct of plaintiff's counsel in this case falls somewhere on the spectrum between two extremes. Here, plaintiff began discussing the facts of his case
with GM employees before his lawsuit was filed and before either 'party' was represented by counsel. Thus, plaintiff clearly made the decision to discuss his case with GM employees without any influence or suggestion by his counsel. Although plaintiff's contacts continued after both parties had retained counsel, and plaintiff's counsel knew of his client's contacts, 'there is nothing in the disciplinary rules which restrict a client's right to act independently in initiating communications with the other side, or which requires that lawyers prevent or attempt to discourage such conduct.'"; "The circumstances described by the parties, however, indicate that plaintiff's counsel had more than mere knowledge of his client's contacts. Significantly, plaintiff's counsel encouraged plaintiff to obtain affidavits from GM employees by advising him of the difference between 'out of court statements' and signed affidavits for trial purposes. Counsel also discussed with his client the costs associated with formal methods of discovery (presumably, depositions). Moreover, albeit at his client's request, counsel facilitated his client's actions by advising him how to draft an affidavit. While it is true that plaintiff's counsel encouraged his client's actions only after plaintiff specifically asked about obtaining written statements, the court finds that such conduct crosses the line and violates Rule 4.2 "through the acts of another." (emphases added); "The court notes, however, that there is no evidence or allegation that plaintiff's counsel knowingly or deliberately violated the disciplinary rules. Rather, it seems that plaintiff's counsel, while attempting to walk the appropriate line ever so delicately, has simply stepped over that line. Nonetheless, he violated the rule and defendants are entitled to relief. Accordingly, defendants' motion for a protective order is granted." (emphasis added)).

- Massa v. Eaton Corp., 109 F.R.D. 312, 313 (W.D. Mich. 1985) (entering a protective order preventing plaintiff from communicating with defendant's managerial employees; "It is unclear exactly how many Eaton employees, other than the three identified above, have been contacted by the Plaintiffs since the institution of this suit. It is equally unclear whether any of these contacts have been made with the prior knowledge of, or at the behest of, Plaintiffs' attorney. It is, however, conceded by Plaintiffs' counsel that he has been the beneficiary of these investigative efforts and that he does not intend to direct his client to cease their ex parte contacts unless ordered to do so by the Court.").

In a 1993 legal ethics opinion, the California Bar even condemned what many lawyers would think permissible (and might even routinely engage in) -- drafting communications for their clients to send to a represented person.
California LEO 1993-131 (1993) (warning that a lawyer representing a husband in a divorce action must be very careful in providing any guidance to the husband related to the husband's direct contact with the wife; also warning that "[c]ounselling clients regarding such communication" can violate the California ethics rules; explaining that "by discouraging direct communication between the parties themselves, an attorney may be failing to act competently by foreclosing opportunities to efficiently settle or resolve the dispute"; "When the content of the communication to be had with the opposing party originates with or is directed by the attorney, it is prohibited by rule 2-100. Thus, an attorney is prohibited from drafting documents, correspondence, or other written materials, to be delivered to an opposing party represented by counsel even if they are prepared at the request of the client, are conveyed by the client and appear to be from the client rather than the attorney. An attorney is also prohibited from sending the opposing party materials and simultaneously sending copies to the party's counsel. Providing copies to opposing counsel does not diminish the prohibited nature of the communications with the opposing party." (emphases added); "An attorney is also prohibited from scripting the questions to be asked or statements to be made in the communications or otherwise using the client as a conduit for conveying to the represented opposing party words or thoughts originating with the attorney."; "When the content of the communication to be had with the opposing party originates with and is directed by the client, it is permitted by rule 2-100. Thus, an attorney may confer with the client as to the strategy to be pursued in, the goals to be achieved by, and the general nature of the communication the client intends to initiate with the opposing party as long as the communication itself originates with and is directed by the client and not the attorney." (emphasis added)).

Other courts seem more forgiving.

Jones v. Scientific Colors, Inc., 201 F. Supp. 2d 820 (N.D. Ill. 2001) (denying plaintiffs' motion for sanctions and to disqualify defendant's lawyer for arranging for undercover investigators to speak with represented employees to determine if they were engaging in wrongdoing; explaining that the lawyer had not specifically directed the undercover investigators to speak with the represented employees).

Needless to say, many situations fall between the extreme of a lawyer merely advising a client of the client's right to communicate ex parte with a represented person, and the lawyer "causing" the client to engage in such communications (or, to put it another way, undertaking actions indirectly that the lawyer could not undertake directly).
Some states try to draw the line between "direction" and "suggestion."

- Virginia LEO 1820 (1/27/06) (explaining that in-house lawyers may not "direct" those working for them to initiate prohibited ex parte contacts, but would require more facts to determine whether the contacts "occurred with sufficient involvement" of the in-house counsel to trigger Rules 4.2 and 8.4(a)).

- Virginia LEO 1755 (5/7/01) ("while a party is free on his own initiative to contact the opposing party, a lawyer may not avoid the dictate of Rule 4.2 by directing his client to make contact with the opposing party").

- Virginia LEO 233 (1/3/74) (explaining that a lawyer may not instruct a client to communicate with an adverse party without obtaining the consent of the adverse party's lawyer).

To be sure, some of the situations addressed in these decisions involve manifest abuse. For instance in Vickery v. Commission for Lawyer Discipline, 5 S.W.3d 241 (Tex. App. 1999), a Texas court dealt with a multimillionaire lawyer who was sued for malpractice. The Texas court set the scene for what came next.

Vickery told his wife, in 1990, that their personal assets were in danger. At that time, Vickery proposed a divorce. He explained to Helen that a divorce would allow them to shield half their assets from any judgment arising out of the malpractice claim.

Helen did not favor the idea of a divorce for at least two reasons: (1) Helen believed she and Glenn had a happy marriage, and (2) they had a daughter, Jessica. Vickery told Helen the arrangement was necessary purely to protect their assets. Moreover, by filing the divorce in Harris County, instead of Liberty County where they were living at the time, Vickery promised to keep the proceeding quiet. He also promised to reunite as soon as the malpractice suit was concluded. Vickery even recited some of their friends as examples of couples who had allegedly employed this very technique to protect their own assets. Because Helen had always allowed Vickery to take the lead in managing their financial and legal affairs, she reluctantly agreed to the divorce.
Id. at 249. Vickery's planning did not end there.

Vickery instructed Helen that, for the sake of appearance, they would have to live apart from each other until the malpractice action had been resolved. He suggested that his wife and daughter should remain on their Moss Hill Ranch in Liberty County while he moved into one of their other residences in Harris County.

Id.

Vickery's wife soon realized what was happening.

First, Helen discovered that Vickery had married one of her close friends, Lucille. Second, Vickery immediately instituted an action to evict his former wife and daughter from the Moss Hill Ranch where they had lived during the marriage. Third, Helen discovered that significant assets had not been included in the property division.

Id. at 249-50.

After his wife hired a lawyer, Vickery "induced" one of his friends to set up a meeting with his ex-wife and try to resolve the matter. The Texas court found the contact improper, and suspended Vickery for two years.

(a) No state seems to require lawyers to actively discourage their clients from exercising their absolute right to contact a represented party on their own, although setting up the communication and then standing silent while it occurs might cause problems in the most strict states.

(b) The ABA and the Restatement would not prohibit this, but some states might continue to bar such a "suggestion."

(c) Depending on the state, "assisting" the client might be appropriate. However, lawyers practicing in states taking a strict approach should be very wary of providing any substantive assistance.
Best Answer

The best answer to (a) is PROBABLY NO; the best answer to (b) is PROBABLY YES; the best answer to (c) is PROBABLY YES.
Lawyers' Participation in Other Lawyers' Communications

Hypothetical 16

You represent a plaintiff in a medical malpractice case against a doctor, based on the doctor's use of a relatively novel medical treatment/procedure. You just learned that another local plaintiff's lawyer is about to depose the doctor in a case that involves the same medical treatment/procedure, but a different plaintiff. You wonder to what extent you can coordinate with that other lawyer.

Without the consent of the defense lawyer in your case, may you provide suggested deposition questions to the other lawyer who will be deposing the doctor who is also a defendant in the malpractice case you are handling?

MAYBE

Analysis

This hypothetical deals with whether a lawyer impermissibly engages in ex parte communications indirectly through another lawyer.¹

This hypothetical comes from a 2004 North Carolina legal ethics opinion.²

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¹ In addition to this general prohibition, some states also have retained the old ABA Model Code's prohibition on lawyers "causing another" to engage in impermissible ex parte communications. Although most situations implicating this principle involve lawyers acting through their clients, they might act through other lawyers as well.

² North Carolina LEO 2004-4 (7/16/04) (holding that a lawyer representing a plaintiff against a doctor in a medical malpractice case can prepare general deposition questions that another lawyer representing another plaintiff in an unrelated case can ask the defendant doctor, who is acting as an expert in the other case; explaining the factual context: (1) "Attorney A represents Roe, a plaintiff in a medical malpractice lawsuit against Dr. Jones (Lawsuit #1). Dr. Jones is represented by Attorney X. Attorney B represents Doe, a plaintiff in an entirely different medical malpractice lawsuit against Dr. Smith (Lawsuit #2). Dr. Smith is represented by Attorney Y. The two cases are unrelated and involve different plaintiffs, hospitals, defendants, and venues. Attorney A and Attorney B are also in different law firms. The medical treatment/procedure that is the basis for the malpractice claims is the same in both lawsuits."); "At the request of Attorney Y, Dr. Jones agrees to act as an expert witness for the defense in Lawsuit #2. Attorney B schedules Dr. Jones' deposition. Prior to the deposition, Attorney A hears that the defendant in his lawsuit will be testifying as an expert witness in Lawsuit #2. Attorney A asks Attorney B to include a series of questions in the deposition of Dr. Jones. The questions do not relate to the specific facts in either case but rather ask the doctor to explain or opine about the medical treatment/procedure that is at issue. The answers to the questions will be relevant to both lawsuits. Attorney A does however hope that the questions will solicit answers from Dr. Jones that will be helpful to the plaintiff's case against Dr. Jones. Attorney A does not notify Attorney X that he has submitted..."
The North Carolina Bar held that the first lawyer could suggest questions that the second lawyer could pose to the doctor, as long as the questions "do not relate to the specific facts in either case, but rather ask the doctor to explain or opine about the medical treatment/procedure that is at issue."\(^3\) In contrast, the first lawyer would need the doctor's malpractice defense lawyer's consent if the suggested questions "would probe the facts and circumstances at issue" in the first lawyer's malpractice case.\(^4\)

The North Carolina Bar's explanation for this line-drawing effort is not any more satisfactory than the line drawing itself.

A lawyer may not circumvent the prohibition in the rule by asking another person to engage in the prohibited communications for him. Nevertheless, lawyers are encouraged to consult with other lawyers who practice in the same field or who handle similar cases in order that they might learn from each other and thereby improve the representation of their clients.

North Carolina LEO 2004-4 (7/16/04).

\(^3\) Id.

\(^4\) Id.
Best Answer

The best answer to this hypothetical is MAYBE.
Ex Parte Communications with Government Employees

Hypothetical 17

Because your child has had developmental problems since birth, you have become somewhat of a crusader for the type of school programs that help such children. Last month you began to represent another parent with a child needing such programs, and filed a lawsuit against the school board -- alleging failure to meet federal guidelines. Having tussled with the school board's lawyer several times, you know that the litigation will not be easy.

(a) Without the school board's lawyer's consent, may you call the chairman of the school board and discuss the pertinent school programs?

YES (PROBABLY)

(b) Without the school board's lawyer's consent, may you call a teacher and discuss the pertinent school programs?

MAYBE

Analysis

Introduction

Ex parte contacts with a government entity follow some of the traditional analysis, but with a constitutional twist.

The ABA Model Rules contain a one-sentence prohibition that generates numerous issues.

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.
ABA Model Rule 4.2.¹

This hypothetical addresses both the "in representing a client" phrase and the ABA rule comment addressing permissible ex parte communications with constituents of a represented organization.

In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization’s lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

ABA Model Rule 4.2 cmt. [7].

ABA Model Rule 4.2 contains the standard exception, which permits ex parte communications that are "authorized" by law. Comment [5] explains how this exception applies to ex parte contacts with government officials.

Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government.

ABA Model Rule 4.2 cmt. [5].

The ABA explained this issue in ABA LEO 408 (8/2/97) (although generally a lawyer may not have ex parte contacts with a represented government entity, the constitutional right to petition allows a lawyer to establish such ex parte contacts if the

¹ The Restatement contains essentially the same standard. Restatement (Third) of Law Governing Lawyers § 99(1) (2000) ("A lawyer representing a client in a matter may not communicate about the subject of the representation with a nonclient whom the lawyer knows to be represented in the matter by another lawyer or with a representative of an organizational nonclient so represented as defined in § 100, unless: (a) the communication is with a public officer or agency to the extent stated in § 101; (b) the lawyer is a party and represents no other client in the matter; (c) the communication is authorized by law; (d) the communication reasonably responds to an emergency; or (e) the other lawyer consents.").
official has authority to "take or recommend action in the controversy, and the sole purpose of the communication . . . is to address a policy issue, including settling the controversy"; the lawyer must give advance notice of such contact to the government lawyer and provide copies of any written materials to be presented to the government official).

The Restatement devotes an entire rule to this issue. According to the Restatement, the general prohibition

against contact with a represented nonclient does not apply to communications with employees of a represented governmental agency or with a governmental officer being represented in the officer's official capacity.

. . . In negotiation or litigation by a lawyer of a specific claim of a client against a governmental agency or against a governmental officer in the officer's official capacity, the prohibition stated in § 99 applies, except that the lawyer may contact any officer of the government if permitted by the agency or with respect to an issue of general policy.


Restatement § 101 cmt. b provides a lengthy justification for this approach, emphasizing the First Amendment right to petition the government, and the "dubious" need of "the government for the broad protection of the anti-contact rule. " Comment b explains that the limit on ex parte contacts "should be limited to those instances in which the government stands in a position closely analogous to that of a private litigant and with respect to contact where potential for abuse is clear." Restatement (Third) of Law Governing Lawyers § 101 cmt. b.
Academics have also analyzed this issue. In a 2009 article, Professors Hazard and Irwin explained the ABA’s and the Restatement's approach to citizens contacting government officials.

An ABA formal opinion in 1997 concluded that a lawyer representing a private party in a suit against the government can communicate directly with a public official who has authority "to take or recommend action in the matter of communication" if two conditions are met: (i) the communication is for the purpose of addressing a policy issue, and (ii) government counsel is given reasonable advance notice of the intent to communicate. The ABA opinion concluded that notwithstanding this exception, Rule 4.2 applies in full force in contexts "where the right to petition has no apparent applicability, either because of the position and authority of the official sought to be contacted or because of the purpose of the proposed communication."

The Restatement (Third) articulates an exception, independent from the "authorized by law" exception, which permits direct communications "with employees of a represented governmental agency or with a governmental officer being represented in the officer's official capacity." But the Restatement (Third) then articulates an exception to this exception: the no-contact rule continues to apply "[i]n negotiation or litigation by a lawyer or a specific claim of a client against a governmental agency or against a governmental officer in the officer's official capacity." The coherence of this formulation depends on definitions of "specific claim" and "official capacity." The Restatement (Third)'s comment offers little additional guidance regarding the intended meanings of these phrases, but observes that "[w]hen the government is represented in a dispute involving a specific claim, the status of the government as client may be closely analogous to that of any other organizational party."

Geoffrey C. Hazard, Jr. & Dana Remus Irwin, Toward a Revised 4.2 No-Contact Rule, 60 Hastings L.J. 797, 820 (Mar. 2009) (footnotes omitted).

Bars take differing approaches to this issue.
For instance, the D.C. Bar has a specific black-letter rule on this issue.

This rule does not prohibit communication by a lawyer with government officials who have the authority to redress the grievances of the lawyer's client, whether or not those grievances or the lawyer's communications relate to matters that are the subject of the representation, provided that in the event of such communications the disclosures specified in (b) are made to the government official to whom the communication is made.

D.C. Rule 4.2(d). The D.C. Rule also has a unique comment.

Paragraph (d) does not permit a lawyer to bypass counsel representing the government on every issue that may arise in the course of disputes with the government. It is intended to provide lawyers access to decision makers in government with respect to genuine grievances, such as to present the view that the government's basic policy position with respect to a dispute is faulty, or that government personnel are conducting themselves improperly with respect to aspects of the dispute. It is not intended to provide direct access on routine disputes such as ordinary discovery disputes, extensions of time or other scheduling matters, or similar routine aspects of the resolution of disputes.

D.C. Rule 4.2 cmt.[11].

- Accord District of Columbia LEO 340 (6/2007) ("Under D.C. Rule 4.2(d) [which differs from the ABA Model Rules, and permits ex parte contact with "government officials who have the authority to redress grievances of the lawyer's client"], a lawyer representing a client in a dispute being litigated against a government agency may contact a government official within that agency without the prior consent of the government's counsel to discuss substantive legal issues [not just public policy issues], so long as the lawyer identifies himself and indicates that he is representing a party adverse to the government. In addition, the lawyer may also contact officials at other government agencies who have the authority to affect the government's position in the litigation concerning matters, provided that the lawyer makes the same disclosures as stated above. The lawyer cannot, however, contact government officials either within the agency involved in the litigation or elsewhere concerning routine discovery matters, scheduling issues or the like, absent the consent of government counsel."); "[The government official] is not obligated to engage in the communication and may ask the lawyer to communicate with government counsel rather than directly with the official.").
• District of Columbia LEO 280 (3/18/98) (explaining the D.C. approach, and indicating that any concern about a lawyer being able to "overwhelm the lay person" is "not fully applicable in the governmental context because government officials generally are presumed to be sufficiently capable of resisting legal or policy arguments that are not proper and genuinely persuasive," and because "government officials, by virtue of their experience and expertise, should be competent to decide whether to engage in such discussions with opposing counsel without seeking legal advice or having a lawyer present").

A 2006 North Carolina legal ethics opinion explained that in that state the prohibition:

• Applies only to "negotiation or litigation of a specific claim";\(^2\)
• Applies only to upper level governmental officials;\(^3\)
• Requires notice to the government's lawyer;\(^4\)
• Applies only in the course of an official proceeding;\(^5\)

\(^2\) North Carolina LEO 2005-5 (7/21/06) ("[T]here is some authority that the Rule 4.2(a) prohibition should only apply to communications with a government agency or employee if the communication relates to negotiation or litigation of a specific claim of a client. We agree.; "Routine communications on general policy issues or administrative matters would not require prior approval from government counsel. The rationale for this partial exception is that the limitations on communications under Rule 4.2(a) should be confined to those instances where the government stands in a position analogous to a private litigant or any other private organizational party. Under these circumstances, the government agency or official should be protected because the opportunity for abuse is clear.").

\(^3\) North Carolina LEO 2005-5 (7/21/06) ("The protections under Rule 4.2(a) only extend to County Manager and department heads if, with respect to this employment matter, 1) they supervise, direct, or consult with County Attorney, 2) they can bind or obligate County as to its position in litigation or settlement; 3) their acts or omissions are at issue in the litigation; or 4) they have participated substantially in the legal representation of County. Because it is likely that the human resources director and the county manager fall within one or more of these categories in an employment dispute, and because Attorney A should have known that County Attorney represented County on this matter, Attorney A must obtain consent from County Attorney before communicating a threat of litigation directly to County Manager and Human Resources Director.").

\(^4\) North Carolina LEO 2005-5 (7/21/06) ("Under Rule 4.2(b), in representing a client who has a dispute with a represented government agency or body, a lawyer may communicate orally about the subject of the representation with elected officials who have authority over such government agency or body so long as the lawyer gives 'adequate notice to opposing counsel.' Adequate notice should be meaningful notice: that is, sufficient information for opposing counsel to act on it to protect the client's interests. The time and place of the intended oral communication with the elected official must be included as well as the identity of the elected official or officials to whom the communication will be directed. Notice must also be reasonable and give opposing counsel enough time to act on it and be present if he so chooses.").
A 2011 North Carolina legal ethics opinion explained that lawyers could rely on the "authorized by law" exception in filling freedom of information act requests.

- North Carolina LEO 2011-15 (10/21/11) (explaining that a lawyer may communicate ex parte with a government official to identify and request access to public records; "Adopted in 1995, RPC 219 rules that a lawyer may communicate with a custodian of public records, pursuant to the North Carolina Public Records Act, N.C. Gen. Stat. Chap. 132, for the purpose of making a request to examine public records related to a representation although the custodian and the government entity employing the custodian are adverse parties and the lawyer for the custodian and the government entity does not consent to the communication."); "ABA Formal Ethics Opinion 95-396 (1995) observes that Model Rule 4.2's exception permitting a communication 'authorized by law' is satisfied by a 'constitutional provision, statute, or court rule, having the force and effect of law, that expressly allows a particular communication to occur in the absence of counsel.'"; "N.C. Gen. Stat. §132-6(a) requires that: '[e]very custodian of public records shall permit any record in the custodian's custody to be inspected and examined at reasonable times and under reasonable supervision by any person, and shall, as promptly as possible, furnish copies thereof upon payment of any fees as may be prescribed by law.'"; "The statute authorizes direct communication with a custodian of public records for the purpose of inspecting and furnishing copies of public records and remains an exception to the communications prohibited in current Rule 4.2(a)."; "A lawyer may communicate with a custodian of public records for the purposes set forth in N.C. Gen. Stat. §132-6(a), to inspect, examine, or obtain copies of public records. To the extent that the lawyer must communicate with the custodian to identify the records to be inspected, examined, or copied, the communication is in furtherance of the purpose of the Public Records Act to facilitate access to public records and is allowed without obtaining the consent of opposing counsel. Such communications should be limited to the identification of records and should not be used by the lawyer as an opportunity to engage in communications about the substance of the disputed matter." (footnote omitted)).
Virginia takes an interesting approach that is directly contrary to the ABA approach. In Virginia, a lawyer apparently may engage in ex parte contacts with lower government officials but not those with decision-making power.

- Virginia LEO 1537 (6/22/93) (a lawyer representing a child and parents adverse to a school board may directly contact school board employees who are not in a position to bind the school board; the rule prohibiting an attorney's communication with adverse parties should be narrowly construed in the context of litigation with the government in order to permit reasonable access to witnesses for the purpose of uncovering evidence, particularly where no formal discovery processes exist).

- Virginia LEO 777 (4/22/86) (a lawyer suing a county board may not contact a board member, but may contact county employees if they are "not charged with the responsibility of executing board policy").

Some courts and bars seem to generally allow such ex parte communications -- relying on the constitutional standard, the "authorized by law" exception or simply their own analysis.

- Kansas LEO 00-6 (2000) ("Communications between a lawyer representing a zoning applicant and an elected or appointed government official regarding the zoning matter fall under the 'authorized by law' exception to Rule 4.2 and are therefore permissible.").

- Alabama LEO 2003-03 (9/18/03) (holding that a lawyer for one state agency may "communicate directly with members of the County Board of Education to discuss settlement of the pending lawsuit without obtaining the consent or approval of the attorney representing the County Board of Education").

- Kansas LEO 00-6 (8/28/02) ("communications between a lawyer representing a zoning applicant and an elected or appointed government official regarding the zoning matter falls under the 'authorized by law' exception to Rule 4.2 and are therefore permissible. The Comment to KRPC 4.2 specifically states that 'communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.' The mere fact that a city has a legal department does not create a barrier between elected and appointed officials and counsel representing private clients. We also counsel lawyers to consider KRPC 3.9 in these situations, which we believe excludes the application of KRPC 3.5(c) in the context of a zoning board process. If this request was set in the context"
of litigation, it would require a different type of analysis. However, this situation comports with constitutional guarantees of freedom of access to government. Counsel may want to heed the advice given by one commentator who believes that such contact is permissible even over the objection of the government's counsel, but who advises that counsel should notify the government's counsel of the fact of the contact as a reasonable accommodation.

- American Canoe Ass'n v. City of St. Albans, 18 F. Supp. 2d 620, 621 (S.D.W. Va. 1998) (holding that ex parte contact with government agencies is "authorized by law" and therefore "permissible").

Other courts and bars are more restrictive.

- United States v. Sierra Pac. Indus., 759 F. Supp. 2d 1198, 1201, 1213 (E.D. Cal. 2010) (finding that defendant's lawyer improperly engaged in ex parte communications with lower level government employees; explaining that defendant's lawyer took a field trip (open to the public) with United States Forest Service tour guides, and asked them various questions during the tour; finding that "Schaps' actions were not an exercise of a First Amendment right to seek redress of a particular grievance, but were rather an attempt to obtain evidence from these employees."); "There is little to support the characterization of Schaps' communications with the employees as an exercise of the right to petition a policy level government official for a change in policy or to redress a grievance. Rather, the facts show and the court finds that he was attempting to obtain information for use in the litigation that should have been pursued through counsel and through the Federal Rules of Civil Procedure governing discovery. SPI surely has the right to conduct discovery. But interviewing Forest Service employees, without notice to government's counsel, on matters SPI considers part of its litigation with the government -- even if not successful in obtaining relevant evidence -- strikes at and, indeed questions they very policy purpose for the no contact rule.

(a)-(b) Ironically, under the ABA approach, it would be more likely that the ethics rules permit contact with the chairman of the school board rather than with a lower level employee -- while at least one state (Virginia) takes exactly the opposite approach.

**Best Answer**

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

Hypothetical 18

After a few unsuccessful years in private practice, you became a prosecutor. You were surprised the first time that one of your colleagues said you could conduct a non-custodial interview of a suspected criminal you know to have hired a lawyer. That seemed inconsistent with the rule with which you were familiar while in private practice.

Without a criminal suspect's lawyer's consent, may you conduct a non-custodial interview of the suspect?

YES (PROBABLY)

Analysis

This issue has caused considerable (and heated) debate between prosecutors and bar officials -- on all levels of government from the federal to the local.

In a 2009 article, Professors Hazard and Irwin explained the history of federal prosecutors' interpretation of the "authorized by law" exception.

The Rule’s application in the context of investigatory activities has a long and contentious history, which gained prominence after the Second Circuit’s decision in United States v. Hammad [846 F.2d 854 (2d Cir.), modified, 858 F.2d 834 (2d Cir. 1988)]. There, the Second Circuit held that Rule 4.2 prohibited communications with suspects of a criminal investigation prior to the initiation of formal proceedings. The original opinion was withdrawn and replaced by an opinion conceding that "legitimate investigation techniques" can sometimes be "authorized by law," but the Department of Justice (DOJ) nevertheless reacted with alarm. The DOJ worried that the decision would deprive government lawyers of important tools of investigation and would chill their investigative efforts. Accordingly, in June 1989, Attorney General Richard Thornburgh issued a department memorandum stating that the law enforcement activities of DOJ lawyers were "authorized" by federal law and therefore exempt from application of states' no-contact rules. The defense bar and
the ABA countered that the memorandum’s approach was impermissible in so far as it attempted to exempt DOJ lawyers from the ethical obligations generally applicable to lawyers.

Geoffrey C. Hazard, Jr. & Dana Remus Irwin, Toward a Revised 4.2 No-Contact Rule, 60 Hastings L.J. 797, 807 (Mar. 2009) (footnotes omitted).

Professors Hazard and Irvin explained that the DOJ issued a new no-contact rule in 1994, which was rejected by a 1998 congressional action called the "McDade Amendment" -- which provided that all government lawyers were subject to state ethics rules. However, the congressional action did not end the debate.

In any event, the McDade Amendment does not address the key issue of what communications are "authorized by law" and therefore permissible. Relying on this ambiguity, the DOJ continues to assert the validity of its policy that certain lawful investigatory techniques are authorized by law and permissible under the Rule. Courts, meanwhile, continue to disagree on whether Rule 4.2 applies to federal prosecutors engaged in investigations that are otherwise entirely lawful.

Attempting to reconcile the positions of the DOJ, Congress, and the defense bar, the ABA's Ethics Committee and the Ethics 2000 Commission recommended substantial amendments to Model Rule 4.2 in 2002. Among other changes, the amendments would have authorized (i) communications with represented persons by federal agents acting under direction of government lawyers prior to the initiation of formal law enforcement proceedings, and (ii) communications with a represented organization's agent or employee who initiated a communication relating to a law enforcement investigation. The ABA declined to adopt the proposed amendments.

Id. at 810 (footnotes omitted).

Professors Hazard and Irwin explained that most authority permits government lawyers to engage in ex parte communications with a represented person before "the
initiation of formal law enforcement proceedings" (id. at 810), but also hold that a
defendant "cannot waive the no-contact rule’s protections under any circumstances."
Id. at 813.

The ABA Model Rules devote part of a comment to this issue.

Communications authorized by law may also include
investigative activities of lawyers representing governmental
entities, directly or through investigative agents, prior to the
commencement of criminal or civil enforcement proceedings.
When communicating with the accused in a criminal matter,
a governmental lawyer must comply with this Rule in
addition to honoring the constitutional rights of the accused.
The fact that a communication does not violate a state or
federal constitutional right is insufficient to establish that the
communication is permissible under this Rule.

ABA Model Rule 4.2 cmt. [5].

In ABA LEO 396 (7/28/95), the ABA explained that a number of court decisions
held the ex parte prohibition "wholly inapplicable to all pre-indictment non-custodial
contacts, . . . or holding it inapplicable to some such contacts by informants or
undercover agents." Although the ABA clearly did not endorse that line of cases, it
indicated that "so long as this body of precedent remains good law, it is appropriate to
treat contacts that are recognized as proper by such decisional authority as being
'authorized by law' within the meaning of that exception stated in the Rule. " Id.

The Restatement devotes a lengthy comment to this issue, after noting that
[c]ontroversy has surrounded the question whether
prosecutors are fully subject to the rule of this Section with
respect to contact, prior to indictment, with represented
nonclients accused or suspected of crime.

After articulating the arguments against and in favor of applying the ex parte contact rule in this setting, the Restatement also notes that

[i]t has been extensively debated whether, beyond such constitutional protections, the anti-contact rule independently imposes all constraints of this Section on prosecutors, or, to the contrary, whether the authorized-by-law exception . . . entirely removes such limitations.

Id.

The Restatement concludes that "[p]rosecutor contact in compliance with law is within the authorized-by-law exception." Id.

D.C. also has its own comment on this issue, although it provides little guidance.

This Rule is not intended to enlarge or restrict the law enforcement activities of the United States or the District of Columbia which are authorized and permissible under the Constitution and law of the United States or the District of Columbia. The "authorized by law" proviso to Rule 4.2(a) is intended to permit government conduct that is valid under this law. The proviso is not intended to freeze any particular substantive law, but is meant to accommodate substantive law as it may develop over time.

D.C. Rule 4.2 cmt. [12].

As expected, the case law and legal ethics opinions tend to give the government leeway. These courts and bars generally either point to the "authorized by law" exception, conclude that the prosecutor's communications do not relate to the same "matter" on which the witness has a lawyer (if the lawyer is handling a civil matter), or rely on some other argument in refusing to condemn such ex parte contacts.

- South Carolina LEO 11-04 (5/20/11) (holding that Rule 4.2 did not prohibit a federal investigator from contacting a represented person ex parte, because the investigator was not representing a client; "As a federal investigator, Inquirer is not 'representing a client,' and therefore the prohibition does not apply. However, Inquirer should take care to avoid overreaching.").
- **People v. Santiago**, 925 N.E.2d 1122, 1129 (Ill. 2010) (refusing to suppress statements made by a criminal defendant interviewed by a prosecutor about possible child abuse, even though the prosecutor knew that the defendant was represented by a lawyer in a child protection case based on the same underlying facts; “The State counters that the use of the phrase ‘that matter,’ when read together with the introductory clause ‘during the course of representing a client’ and the phrase ‘subject of the representation,’ indicates that the drafters intended the application of the rule to be case specific: specific to the matter in which the party is represented. Thus, because attorney MacGregor did not represent defendant in the criminal investigation, she had no right to be present or to object to the questioning of defendant in that investigation.”; “We agree with the State that a plain reading of Rule 4.2 demonstrates the rule was not violated in this case. Defendant focuses on the phrases ‘the subject of the representation’ and ‘that matter’ in arguing that the ‘matter’ and ‘the subject of the representation’ was the injury to S.H. However, defendant fails to reconcile her interpretation of Rule 4.2 with the language of the rule as a whole.”).

- **United States v. Carona**, 630 F.3d 917, 921, 921-22, 922 (9th Cir. 2010) (holding that government lawyers did not violate the prohibition on ex parte communications by providing a friendly witness fake court documents in an effort to trigger communication by the target of an investigation; “To determine whether ‘pre-indictment, non-custodial communications by federal prosecutors and investigators with represented parties’ violated Rule 2-100, we have adopted a ‘case-by-case adjudication’ approach rather than a bright line rule. . . . We have recognized the possibility that such conversations could violate the rule and ‘declined to announce a categorical rule excusing all such communications from ethical inquiry.’ . . . Nonetheless, our cases have more often than not held that specific instances of contact between undercover agents or cooperating witnesses and represented suspects did not violate Rule 2-100.”; “We have not previously needed to consider the question of whether providing fake court papers to an informant to use during a conversation with a represented party is conduct that violates Rule 2-100. Under the facts presented here, we conclude that it does not.”; “The use of a false subpoena attachment did not cause the cooperating witness, Haidl, to be any more an alter ego of the prosecutor than he already was by agreeing to work with the prosecutor. Haidl was acting at the direction of the prosecutor in his interactions with Carona, yet no precedent from our court or from any other circuit, with the exception of Hammad [United States v. Hammad, 858 F.2d 834 (2d Cir. 1988)], has held such indirect contacts to violate Rule 2-100 or similar rules.”; “The false documents were props used by government to bolster the ability of the cooperating witness to elicit incriminating statements from a suspect.”; “It would be antithetical to the administration of justice to allow a wrongdoer to immunize himself against such undercover operations simply by letting it be known that he has retained
counsel."; "There were no direct communications here between the
prosecutors and Carona. The indirect communications did not resemble an
interrogation. Nor did the use of fake subpoena attachments make the
informant the alter ego of the prosecutor. On the facts presented in this case,
we conclude that there was no violation of Rule 2-100.

- Nebraska LEO 09-03 (2009) ("If the victim in a criminal case has retained
counsel to represent him in a civil case arising from the same set of facts and
involving common issues and evidentiary questions, and that attorney has
requested that contact with the victim regarding those aspects of the
prosecution be made only through him, Rule 4.2 prohibits the prosecutor from
having direct contact with the victim regarding those aspects of the case.";
analyzing whether the criminal and the civil cases involved the same "matter"
for purposes of Rule 4.2, citing various cases and bar opinion explaining that
they did involve the same "matter"; "In light of the foregoing authorities, the
Committee believes that Rule 4.2 would prohibit a prosecutor from directly
contacting a victim/witness for the purpose of obtaining from him a release for
his medical records. Although the criminal prosecution and the civil case in
which the victim is represented by counsel are different cases, they clearly
arise from the same set of facts and involve at least some common issues. In
addition, the evidence the prosecutor seeks for the criminal prosecution will
likewise no doubt be relevant in the associated civil litigation. Thus, the
decision as to what medical information the victim should voluntarily release
for the prosecution is one that his attorney may properly insist be made only
with the attorney's counsel. Obviously, that conclusion may render the
prosecutor's job more difficult and time consuming. However, it does not
prevent him from effectively carrying out his prosecutorial duties."; "[I]f the
attorney for the victim/witness insists that all communications regarding the
medical records go through him, he is obligated to respond to the prosecutor's
requests in a reasonable and timely manner. If efforts to work through the
attorney are unsuccessful, there are still avenues available to the prosecutor
to obtain the information needed for prosecution, such as a subpoena, or if
necessary, a search warrant.

- State v. Clark, 738 N.W.2d 316, 339 (Minn. 2007) (affirming the murder
conviction despite police officers' ex parte communications with the defendant
after his arraignment; holding that the ex parte communications violated
Minnesota Rule 4.2, although they provided the defendant's lawyer notice of
the interview and an opportunity to be present; "[W]e conclude that when a
government attorney is involved in a matter such that Minn. R. Prof. Conduct
4.2 applies, the state may not have any communication with a represented
criminal defendant about the subject of the representation unless (1) the state
first obtains the lawyer's consent; (2) the communication is 'authorized by law'
as discussed below; or (3) the state obtains a court order authorizing the
communication. We reach our conclusion on the plain and unambiguous

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language of the rule as currently written. Accordingly, to the extent that any of our past cases suggest that the state can meet the requirements of Rule 4.2 by providing the defendant's lawyer notice and an opportunity to be present, those cases are no longer good law.

- North Carolina LEO 99-10 (7/21/00) ("[A] government lawyer working on a fraud investigation may instruct an investigator to interview employees of the target organization provided the investigator does not interview an employee who participates in the legal representation of the organization or an officer or manager of the organization who has the authority to speak for and bind the organization."); inexplicably holding that the government fraud investigator could conduct ex parte interviews of corporate employees whose acts apparently might be imputed to the corporation; explaining the factual context of the question: "[t]he fraud investigator wants to interview the current house managers and aides, without notice and outside the presence of Attorney C, to ask them whether they falsified records, whether they saw others falsify records, and whether they or others were ordered by supervisors to falsify records. The investigator will take the following steps before each such interview: (1) identify himself, (2) state that he is investigating possible criminal violations, (3) not interview any employee who participated substantially in the legal representation of Corporation, and (4) not elicit privileged communications between Corporation and Attorney C."); answering the following question affirmatively: "May Attorney A direct the investigator to proceed with informal interviews of the house managers and aides without the consent of Attorney C?").

- United States v. Balter, 91 F.3d 427 (3d Cir.) (in an opinion by Judge Alito, the Third Circuit found that New Jersey's Rule 4.2 did not apply to prosecutors' contacts with criminal suspects in the course of an investigation, because the contacts were "authorized by law"), cert. denied, 519 U.S. 1011 (1996).

In 2010, a Texas legal ethics opinion seemed to place some limits on what government lawyers can do.

- Texas LEO 600 (8/2010) ("Under the Texas Disciplinary Rules of Professional Conduct, a lawyer for a Texas governmental agency is not required to limit communications by the agency's enforcement officers who are not subject to the lawyer's direct supervisory authority with regulated persons who are represented by lawyers. However, a lawyer for a governmental agency is not permitted to communicate directly with a regulated person that is represented in the matter of a lawyer who has not consented to the communications and is not permitted to cause or encourage such communications by other agency employees, and the agency lawyer is obligated to prevent such
communications by employees over whom the lawyer has direct supervisory authority.

In a related context, courts and bars seem to ignore the ex parte communication prohibition when lawyers or those acting under the lawyer's direction engage in some socially-worthwhile project such as housing discrimination tests. In most situations, of course, such tests are essentially "sting" operations -- taking place before the discriminating landlord has hired a lawyer on the discrimination charge. Thus, those situations sometimes do not implicate the rule at all. However, one would think that cases would have dealt with repeated efforts of those seeking to stop housing discrimination to find violations at various locations of a large corporate landlord, apartment owner, etc. The apparent absence of any case law or bar opinions on this issue probably means that the courts and bars simply recognize an exception without articulating it.

In a 2009 article, Professors Hazard and Irwin proposed an amendment to Rule 4.2 which recognizes the benefits of ex parte communications by testers engaged in housing discrimination tests, etc.

A communication is authorized by law when it is in connection with: . . . . (2) transmittal of legally required or permitted notice, such as service of process; [or] (3) an investigative procedure permitted by public policy, notwithstanding that it involves an element of deception, such as by discrimination testers.

Geoffrey C. Hazard, Jr. & Dana Remus Irwin, Toward a Revised 4.2 No-Contact Rule, 60 Hastings L.J. 797, 824-25 (Mar. 2009).

Despite the ABA's obvious frustration with this sort of communication, it is unlikely that courts or bars will prohibit them.
Best Answer

The best answer to this hypothetical is PROBABLY YES.
Limitations on the Substance of Permitted Ex Parte Communications

Hypothetical 19

You represent a plaintiff who was hit by a school bus. You are carefully following your state's ethics rules, and calling only those school employees who are "fair game" for such ex parte contacts.

(a) May you ask a school bus driver (not involved in the accident) what guidance she received from the school board's lawyers about talking to you or other plaintiff's lawyers?

NO

(b) May you continue interviewing a former school bus driver after she tells you that she signed a confidentiality agreement that prohibits her from talking to anyone about her job, except upon a court's order?

NO (PROBABLY)

Analysis

Entirely apart from the permitted ex parte contacts, the ethics rules govern the substance of those contacts that the ethics rules allow.

(a) A comment to ABA Model Rule 4.2 indicates that

[in communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization.

ABA Model Rule 4.2 cmt. [7]. That comment refers to ABA Model Rule 4.4, which discusses the rights of third persons, including "legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship." ABA Model Rule 4.4 cmt. [1]. Accord ABA LEO 359 (3/22/91) (indicating that seeking to induce a former employee to
violate the privilege would itself violate Rule 4.4’s requirement that lawyers respect third persons’ rights).

The Restatement takes a different approach that limits more types of communications, and even puts some people “off-limits.”

A lawyer communicating with a nonclient in a situation permitted under § 99 may not seek to obtain information that the lawyer reasonably should know the nonclient may not reveal without violating a duty of confidentiality to another imposed by law.


Several decisions have held that a lawyer representing a client in a matter may not communicate concerning the representation with a nonclient agent who the lawyer knows is likely to possess extensive and relevant confidential and privileged information, or similar legally protected information of another nonclient interested in the matter that is confidential with respect to the lawyer’s client. Those decisions typically involve a person -- for example, an expert witness or paralegal assisting opposing counsel -- whose employment has entailed exposure to extensive confidential information about the principal, who likely possesses little information that is not privileged, and whose role as confidential agent should have been apparent to the inquiring lawyer. They also involve situations in which confidentiality occurs by operation of law and not solely, for example, through a contractual undertaking of the agent.


In a 2009 article, Professors Hazard and Irwin proposed an amendment to ABA Model Rule 4.2 to emphasize limits on the substance of any permitted ex parte communications.

A lawyer engaged in communication permitted by this Rule shall not seek or obtain information protected by the
attorney-client privilege or work-product immunity, and shall comply with the standard and conduct set forth in Rule 4.3.

Geoffrey C. Hazard, Jr. & Dana Remus Irwin, Toward a Revised 4.2 No-Contact Rule, 60 Hastings L.J. 797, 844 (Mar. 2009).

Courts routinely instruct lawyers engaging in permissible ex parte contacts to avoid asking questions that would intrude into the attorney-client privilege.

- Castaneda v. Burger King Corp., No. C 08-4262 WHA (JL), 2009 U.S. Dist. LEXIS 69592, at *21-22, *22-23, *23 (N.D. Cal. July 31, 2009) (finding that defense lawyers could engage in ex parte communications with class members before class certification; "Plaintiffs should provide Defendants with contact information for the putative class members, as required by Rule 26, as part of their initial disclosures, since the putative class members are potential witnesses. Both parties are permitted to take pre-certification discovery, including discovery from prospective class members. Plaintiffs' counsel have also allegedly advised putative class members not to talk to Defendants' counsel. If true, this would be a violation of pertinent codes of professional conduct." (emphasis added); "Plaintiffs' counsel have no right to be present at any contact between Defendants' counsel and putative class members. It is Plaintiff's burden to show abusive or deceptive conduct to justify the court's cutting off contact, and they fail to do so. This is not an employment case, where the Defendant may threaten or imply a threat to the job of a plaintiff who cooperates with Plaintiffs' counsel or refuses to cooperate with Defendants' counsel. This is an ADA access case, not an employment case; Defendants have no power over these prospective plaintiffs."; "Defendant counsel must identify themselves and advise contacts that they need not speak with them if they do not want to do so. Defendants are admonished not to inquire into the substance of communications between putative plaintiffs and class counsel.").

- Victory Lane Quick Oil Change, Inc. v. Hoss, Case No. 07-14463, 2009 U.S. Dist. LEXIS 22579, at *5-6, *6-7(E.D. Mich. Mar. 20, 2009) (holding that Michigan Rule 4.2 permits ex parte communications with a corporate adversary's former high-level executive [former high ranking Director of Operations who has been a central defense operative in this litigation and privy to substantial privileged attorney-client communications concerning this case]; explaining the substance of the ex parte communications; "[I]t was determined that the Roberts Supplemental Affidavit did not involve any party admissions of Plaintiff because the document was prepared when Mr. Roberts was no longer an agent or employee of Plaintiff and thus was not making the statements in the scope of his agency or employment authority. It
was also determined that the Roberts Supplemental Affidavit did not contain disclosure of any confidential attorney-client communications. There were certain portions that arguably might relate to factual admissions of Mr. Roberts while still employed by Plaintiff that might be imputed to the Plaintiff. Yet, the overwhelming majority of the contents of the Roberts Supplemental Affidavit does not topics [sic] of concern to the ethics committees applying M.R.P.C. 4.2 to former employees."; explaining that "[w]hile Defense counsel displayed some caution when Mr. Roberts first approached them in December 2008, and urged Mr. Roberts to consult with his personal attorney prior to their having his statements reduced to an affidavit, given his former role with Plaintiff, his extensive involvement in this case, and his being privy to confidential discussions with Plaintiffs’ counsel, Defense counsel would have been prudent to contact Plaintiff's counsel prior to furthering the discussions with Mr. Roberts or sought direction from this Court. As noted at the hearing, it could be argued that defense counsel violated M.R.P.C. 4.2 in their contact with Mr. Roberts."; ultimately prohibiting defendants from using the affidavit they obtained from plaintiff’s former high-level executive, but allowing a limited additional discovery).

- **Siebert & Co. v. Intuit Inc.**, 820 N.Y.S.2d 54, 55, 56 (N.Y. App. Div. 2006) (reversing a lower court's disqualification of a defense lawyer who spoke for three hours ex parte with plaintiff company's former chief operating officer; noting that "[a]t the commencement of the interview, defense counsel's colleague warned the executive to be careful not to disclose any privileged information, including any legal strategies or communications with plaintiff's counsel"; finding that a document entitled "Timeline" that the former executive shared with defense counsel did not deserve attorney-client privilege because the document was "essentially a list of events" and therefore did not meet the standard for the attorney-client privilege, which requires that the "communication itself must be primarily of a legal, not factual, character").

- District of Columbia LEO 287 (10/20/98) (finding that a lawyer may conduct ex parte contacts with unrepresented former employees of a corporate adversary, but may not seek privileged information during the contacts).

- **Brown v. State Dep't of Corrections**, 173 F.R.D. 265, 269 (D. Or. 1997) (holding that a lawyer making ex parte contacts with current or former employees of a corporate adversary "may neither ask nor permit a current or former employee to disclose privileged communications").

- **Action Air Freight, Inc. v. Pilot Air Freight Corp.**, 769 F. Supp. 899, 904 (E.D. Pa. 1991) ("We find that Rule 4.2 permits defense counsel to make ex parte contacts with the former employees currently working for Pilot Air. Opposing counsel may inquire into the underlying facts giving rise to the dispute but
must refrain from soliciting information protected by the attorney-client relationship.

- **Hanntz v. Shiley, Inc.**, 766 F. Supp. 258, 271 (D.N.J. 1991) ("It is appropriate for counsel to communicate, ex parte, with former employees so long as no attorney-client confidences of the corporation are part of the inquiry. No absolute bar to ex parte communications is required to protect such attorney-client confidences. It is sufficient that ethical considerations prevent an attorney from breaching the attorney-client privilege of the corporation." (citation omitted)).

Most lawyers would probably realize that they cannot intrude into some other client's privileged or confidential communications. They would also probably recognize that a nonlawyer could not be expected to sort out these questions, and decide what information the witness may or may not disclose.

(b) At least one court has also applied the same approach to information protected by a confidentiality agreement.

- **Philip Morris Co. v. American Broadcasting Co.**, 36 Va. Cir. 1, 24 (Va. Cir. Ct. 1995) ("Any confidentiality agreement protects covered material from disclosure except on formal discovery. It would not prevent the employee from disclosing the fact that he held confidential information, but he could not disclose the information without violating the agreement absent formal discovery.")

**Best Answer**

The best answer to (a) is **NO**; the best answer to (b) is **PROBABLY NO**.
Application Only to Lawyers "Representing" a Client: Lawyers Playing Nonlegal Roles in Corporations

Hypothetical 20

After about 20 years in private practice, you became general counsel of your firm’s largest client. After 10 years in that role, you moved just yesterday to another position -- Senior Vice President for Operations. You no longer have a legal title, and no role in the law department. The company’s CEO just called you up to her office to meet with the president of the company’s largest customer, in an effort to resolve a dispute about the timeliness of some deliveries. You know that the customer has a lawyer representing it in connection with this dispute, because you have spoken to that lawyer several times while in your previous General Counsel position.

Without the customer’s lawyer’s consent, may you participate in the meeting between your company’s CEO and the customer’s CEO in an effort to resolve the dispute?

YES (PROBABLY)

Analysis

The ABA Model Rules contain a one-sentence prohibition that generates numerous issues.

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

ABA Model Rule 4.2.¹

This hypothetical addresses the "[i]n representing a client" phrase.

¹ The Restatement contains essentially the same standard. Restatement (Third) of Law Governing Lawyers § 99(1) (2000) ("A lawyer representing a client in a matter may not communicate about the subject of the representation with a nonclient whom the lawyer knows to be represented in the matter by another lawyer or with a representative of an organizational nonclient so represented as defined in § 100, unless: (a) the communication is with a public officer or agency to the extent stated in § 101; (b) the lawyer is a party and represents no other client in the matter; (c) the communication is authorized by law; (d) the communication reasonably responds to an emergency; or (e) the other lawyer consents.").
Lawyers acting in a nonlegal capacity while employed by corporations frequently face this dilemma. If the ex parte communication rule rested solely on the worry that lawyers would gain some advantage when communicating with a nonlawyer, such lawyers would still be governed by the ex parte communication rule even after moving into a non-representational role.²

On the face of the ethics rules, a lawyer in this situation presumably could participate in the meeting and communicate ex parte with represented persons.

However, there are several reasons why a lawyer in this setting (especially so soon after a shift to the business side) would want to at least notify (if not obtain the consent from) the represented person’s lawyer. First, such a sign of good faith would avoid poisoning the business relationship. Second, a court might use its inherent power or some other rule or common law principle to sanction the lawyer, despite the literal language of the applicable ethics rule.

**Best Answer**

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

² No court or bar seems to have addressed the issue of whether this "representing a client" phrase means "representing" a client in a legal capacity or "representing" a client in the way that a salesperson "represents" a company. It is probably safe to assume that the phrase means the former rather than the latter.
Ex Parte Communications with a Corporate Adversary's Employees

Hypothetical 21

You represent a plaintiff injured when she was hit by a truck. The trucking company lawyer has been "running you ragged" in an effort to force a favorable settlement. You are trying to think of ways that you can gather evidence without the cost of depositions.

Without the trucking company lawyer's consent, may you interview:

(a) The trucking company's chairman?

   NO

(b) The trucking company's vice chairman, who has had nothing to do with this case and who would not be involved in any settlement?

   MAYBE

(c) The supervisor of the truck driver who hit your client (and whose statements would be admissible as "statements against interest")?

   YES (PROBABLY)

(d) A truck driver who has worked for the trucking company for the same number of years as the driver who hit your client (to explore the type of training she received)?

   YES (PROBABLY)

(e) The trucking company's mechanic, who checked out the truck the day before the accident?

   MAYBE
(f) The truck driver who hit your client?

   NO

Analysis

Introduction

Of all the ex parte contact issues, the permissible scope of ex parte contacts with employees of a corporate adversary has the most practical consequences, and (unfortunately) the most subtle differences from state to state.

The ABA Model Rules address this issue in a comment.

In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

ABA Model Rule 4.2 cmt. [7].

Significantly, the Ethics 2000 changes deleted an additional category of corporate employees that had formerly been off-limits:

or whose statement may constitute an admission on the part of the organization.

Thus, the ABA Ethics 2000 changes liberalized the Rule, expanding the number of corporate employees who are fair game for ex parte contacts.

The Restatement defines a "represented nonclient" who is off-limits to ex parte contacts as follows:

[A] current employee or other agent of an organization represented by a lawyer:
(a) if the employee or other agent supervises, directs, or regularly consults with the lawyer concerning the matter or if the agent has power to compromise or settle the matter;

(b) if the acts or omissions of the employee or other agent may be imputed to the organization for purposes of civil or criminal liability in the matter; or

(c) if a statement of the employee or other agent, under applicable rules of evidence, would have the effect of binding the organization with respect to proof of the matter.

Restatement (Third) of Law Governing Lawyers § 100(2) (2000). The first two categories match ABA Model Rule 4.2 cmt. [7], but the third category is quite different.

Elsewhere, the Restatement explains that

modern evidence rules make certain statements of an employee or agent admissible notwithstanding the hearsay rule, but allow the organization to impeach or contradict such statements. Employees or agents are not included within Subsection (2)(c) solely on the basis that their statements are admissible evidence. A contrary rule would essentially mean that most employees and agents with relevant information would be within the anti-contact rule, contrary to the policies described in Comment b.

Restatement (Third) of Law Governing Lawyers § 100 cmt. e (2000). Thus, the Restatement takes the same position as the ABA Ethics 2000 change.

In a 2009 article, Professors Hazard and Irwin explained the confusion about permissible ex parte communications with employees of a corporate adversary. After a lengthy discussion, they proposed to add a Comment to Rule 4.2 to explain the standard.

In the context of organizational representation, the prohibition on communications applies where the lawyer knows or reasonably should know that a constituent is in a position within the organization to be classified as a represented person. This means that the lawyer has actual
knowledge of the constituent’s position or that a lawyer of reasonable prudence and competence would have actual knowledge in the same circumstances. See Rule 1.0(j).

Geoffrey C. Hazard, Jr. & Dana Remus Irwin, Toward a Revised 4.2 No-Contact Rule, 60 Hastings L.J. 797, 840 (Mar. 2009).

In 2002, the Nevada Supreme Court issued an opinion which provided an excellent summary of the principles involved in this issue, the competing approaches and the advantages and disadvantages of those approaches. Palmer v. Pioneer Inn Assocs., Ltd., 59 P.3d 1237 (Nev. 2002).

The Nevada Supreme Court listed various interests furthered by restricting contacts between the corporation’s adversary and corporate employees.

- "[P]rotecting the attorney-client relationship from interference." Id. at 1242.
- "[P]rotecting represented parties from overreaching by opposing lawyers." Id.
- "[P]rotecting against the inadvertent disclosure of privileged information." Id.
- "[B]alancing on one hand an organization’s need to act through agents and employees, and protecting those employees from overreaching and the organization from the inadvertent disclosure of privileged information.” Id.

The Nevada Supreme Court also listed the interests that would justify some ex parte contacts between a plaintiff’s lawyer and corporate employees.

- "[T]he lack of any such protection afforded an individual, whose friends, relatives, acquaintances and co-workers may generally all be contacted freely." Id.
- "[P]ermitting more equitable and affordable access to information pertinent to a legal dispute.” Id.
- "[P]romoting the court system’s efficiency by allowing investigation before litigation and informal information-gathering during litigation.” Id.
• "[P]ermitting a plaintiff's attorney sufficient opportunity to adequately investigate a claim before filing a complaint in accordance with Rule 11." Id.

• "[E]nhancing the court's truth-finding role by permitting contact with potential witnesses in a manner that allows them to speak freely." Id.

The Nevada Supreme Court described the pros and cons of six possible tests. First, the "blanket test" prohibits all ex parte contacts with employees of a corporate adversary.

The blanket test has the advantages of clarity, and offering the most protection to the organization. However, the blanket test limits or eliminates counsel's opportunity to "properly investigate a potential claim before a complaint is filed," and also forces all discovery to be taken through expensive depositions. Id. at 1243.

Second, the "party-opponent admission test" prohibits ex parte contacts with any employee whose statement might be admissible as a party-opponent admission under FRE 801(d)(2)(D) and its state counterparts. Id.

Under this approach, an employee's statement "is not hearsay, and thus is freely admissible against the employer, if it concerns a matter within the scope of the employee's employment, and is made during the employee's period of employment." Id. The party-opponent admission test has the advantage of protecting the organization "from potentially harmful admissions made by its employees to opposing counsel, without the organization's counsel's presence." Id. The organization's interest in avoiding such a situation is "particularly strong because such admissions are generally recognized as a very persuasive form of evidence." Id.
The party-opponent admission test has a disadvantage of "essentially cover[ing] all or almost all employees, since any employee could make statements concerning a matter within the scope of his or her employment, and thus could potentially be included within the Rule." \textit{Id.} This means that the test can "effectively serve as a blanket test." \textit{Id.}

Third, the "managing-speaking agent test" prohibits ex parte contacts with those employees who have "speaking" authority for the organization, that is, those with legal authority to bind the organization. \textit{Id.} at 1245 (footnote omitted).

Identifying such off-limits employees must be "determined on a case-by-case basis according to the particular employee's position and duties and the jurisdiction's agency and evidence law." \textit{Id.} The managing-speaking agent test has the advantage of balancing the competing policies of "protecting the organizational client from overreaching . . . and the adverse attorney's need for information in the organization's exclusive possession that may be too expensive or impractical to obtain through formal discovery." \textit{Id.} The managing-speaking agent test has the disadvantage of "lack of predictability." \textit{Id.}

Fourth, the "control group test" prohibits ex parte contacts with only those top management level employees who have responsibility for making final decisions, and those employees whose advisory roles to top management indicate that a decision would not normally be made without those employees' advice or opinion. \textit{Id.}
The control group test has the advantage of reducing discovery costs by increasing the number of fair-game employees. The control group test has the disadvantage of being narrower than the attorney-client privilege rule expressed in Upjohn. It also lacks predictability, because it is not easy to tell who is within the "control group." Id.

Fifth, the "case-by-case balancing test" looks at each case and determines which ex parte contacts would be appropriate. According to the Nevada Supreme Court, "this test has been applied only when a lawyer seeks prospective guidance from a court." Id. at 1246.

Sixth, the "New York test" prohibits ex parte communications with corporate employees whose acts or omissions in the matter under inquiry are binding on a corporation (in effect, the corporation's "alter egos") or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel. Id. This is the approach adopted by the Restatement, and is also called the "alter ego test." This approach "would clearly permit direct access to employees who were merely witnesses to an event for which the corporate employer is sued." Id. The advantages of the New York test are its balancing of protection of the organization and the need for informal investigation. Its disadvantages are its unpredictability, and the possibility that it provides too much protection for the organization.

The Nevada Supreme Court ultimately selected the "Managing-Speaking Agent Test." The court explained that this approach does not prohibit ex parte contacts with "employees whose conduct could be imputed to the organization based simply on the doctrine of respondeat superior." Id. at 1248. The off-limits employees under this test
are only those whose statements can "bind" the corporation in a "legal evidentiary sense." Id. An employee is not deemed off-limits "simply because his or her statement may be admissible as a party-opponent admission." Id.

States take varying approaches to this common situation. For instance, some jurisdictions include their approach in the black-letter rule.

For purposes of this Rule, the term "party" or "person" includes any person or organization, including an employee of an organization, who has the authority to bind a party organization as to the representation to which the communication relates.

D.C. Rule 4.2(c). In a comment, D.C. Rule 4.2(c) explains that "the Rule does not prohibit a lawyer from communicating with employees of an organization who have the authority to bind the organization with respect to the matters underlying the representation if they do not also have authority to make binding decisions regarding the representation itself." D.C. Rule 4.2 cmt. [4].

Some states include their approach in a comment to their ethics rules.

In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons in the organization's "control group" as defined in Upjohn v. United States, 449 U.S. 383 (1981) or persons who may be regarded as the "alter ego" of the organization. The "control group" test prohibits ex parte communications with any employee of an organization who, because of their status or position, have the authority to bind the corporation. Such employees may only be contacted with the consent of the organization's counsel, through formal discovery or as authorized by law. An officer or director of an organization is likely a member of that organization's "control group." The prohibition does not apply to former employees or agents of the organization, and an attorney may communicate ex parte with such former employee or agent even if he or she was a member of the organization's "control group." If an agent or employee of
the organization is represented in the matter by separate counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule.

Virginia Rule 4.2 cmt. [7].

Most states follow the basic ABA Model Rule and Restatement approach -- considering "off-limits" corporate employees with managerial responsibility or involvement in the pertinent incident.

- North Carolina LEO 2005-5 (7/21/06) ("Even when a lawyer knows an organization is represented in a particular matter, Rule 4.2(a) does not restrict access to all employees of the represented organization. See[,] e.g., 97 FEO 2 and 99 FEO 10 (delineating which employees of a represented organization are protected under Rule 4.2). Counsel for an organization, be it a corporation or government agency, may not unilaterally claim to represent all of the organization’s employees on current or future matters as a strategic maneuver. See 'Communications with Person Represented by Counsel,' Practice Guide, Lawyers' Manual on Professional Conduct 71:301 (2004) (list of cases and authorities rejecting counsel's right to assert blanket representation of organization's constituents). The rule’s protections extend only to those employees who should be considered the lawyer's clients either because of the authority they have within the organization or their degree of involvement or participation in the legal representation of the matter.").

- North Carolina LEO 99-10 (7/21/00) ("[A] government lawyer working on a fraud investigation may instruct an investigator to interview employees of the target organization provided the investigator does not interview an employee who participates in the legal representation of the organization or an officer or manager of the organization who has the authority to speak for and bind the organization."; inexplicably holding that the government fraud investigator could conduct ex parte interviews of corporate employees whose acts apparently might be imputed to the corporation; explaining the factual context of the question: "[t]he fraud investigator wants to interview the current house managers and aides, without notice and outside the presence of Attorney C, to ask them whether they falsified records, whether they saw others falsify records, and whether they or others were ordered by supervisors to falsify records. The investigator will take the following steps before each such interview: (1) identify himself, (2) state that he is investigating possible criminal violations, (3) not interview any employee who participated substantially in the legal representation of Corporation, and (4) not elicit privileged communications between Corporation and Attorney C."; answering the following question affirmatively: "May Attorney A direct the investigator to
...proceed with informal interviews of the house managers and aides without the consent of Attorney C?

- North Carolina LEO 97-2 (1/16/98) (finding that a lawyer for an employee may not communicate ex parte with an adjuster for an insurance workers' compensation insurance carrier; "Although an adjuster for an insurance company may not be considered a 'manager' or 'management personnel' for the company, the adjuster does have managerial responsibility for the claims that she investigates. The adjuster is also privy to privileged communications with the legal counsel for the company and is generally involved in substantive conversations with the organization's lawyer regarding the representation of the organization. To safeguard the client-lawyer relationship from interference by adverse counsel and to reduce the likelihood that privileged information will be disclosed, Rule 4.2(a) protects from direct communications by opposing counsel not only employees who are clearly high-level management officials but also any employee who, like the adjuster in this inquiry, has participated substantially in the legal representation of the organization in a particular matter. Such participation includes substantive and/or privileged communications with the organization's lawyer as to the strategy and objectives of the representation, the management of the case, and other matters pertinent to the representation.").

However, the ABA Model Rules' dramatic changes in its approach (essentially rendering "fair game" for ex parte communications large numbers of corporate employees) and variations among states' ethics rules have generated considerable confusion in many states.

Examining federal and state courts' decisions in just two states -- Illinois and Virginia -- shows how confusing all of this can be. In some ways, this confusion plays to the advantage of corporations' lawyers, because it certainly might deter ex parte communications by lawyers representing the corporation's adversaries.

Illinois

Illinois seems to have a mismatch between its federal courts and its state courts. (As explained below, the Illinois Bar issued an opinion that provides at least some consistency.)
In Weibrecht v. Southern Illinois Transfer, Inc., 241 F.3d 875 (7th Cir. 2001), the
Seventh Circuit upheld the Southern District of Illinois’s adoption of the ABA approach. The Seventh Circuit acknowledged that an earlier Illinois court decision applied Illinois Rule 4.2

only to those members of a corporate defendant’s "control group" who have "the responsibility of making final decisions and those employees whose advisory roles to top management are such that a decision would not normally be made without those persons’ advice."


The Seventh Circuit half-heartedly explained that federal courts were free to take a different approach than Illinois courts in applying the same Illinois rule.

Nonetheless, the district court considered the Fair Automotive test in its order denying Shane’s Rule 60(b) motion and concluded that, because Fair Automotive was decided under a prior version of the Illinois Rules, it is not clear that the Illinois courts would still apply the control group test. In any event, the district court was construing its own local rule, and even though in this case the district court has incorporated Illinois’s rules by reference, nothing compelled the district court to adopt the same interpretation of those rules that has been adopted by an intermediate Illinois court. (We see no indication in the materials accompanying the professional conduct rules of the Southern District of Illinois that the district court intended to bind itself to follow the Illinois Supreme Court's interpretations of the Illinois rules, much less to follow decisions from other Illinois courts.) The district court was within its discretion in choosing to follow the ABA test rather than the control group test, and we will not disturb that decision.

Id. at 882.
Illinois federal court decisions issued since Weibrecht follow the same approach -- ignoring the Illinois state court interpretation of Rule 4.2 in favor of the ABA version. Hill v. Shell Oil Co., 209 F. Supp. 2d 876, 878-79 (N.D. Ill. 2002) (finding that managers at a gas station were within the "off-limits" category of Rule 4.2; "In determining whether Rule 4.2 covers non-managerial employees, courts have recognized the tension between a party's need to conduct low-cost informal discovery, and an opposing party's need to protect employees from making ill-considered statements or admissions . . . . The conduct of station attendants is at the heart of this litigation, and it is being offered as an example of the alleged discrimination of the defendants. As a result, the employees fall under the second category of Rule 4.2: employees whose acts or omissions in the matter at issue can be imputed to the organization."); Mundt v. U.S. Postal Serv., No. 00 C 6177, 2001 U.S. Dist. LEXIS 17622, at *12 (N.D. Ill. Oct. 25, 2001) ("In Weibrecht, the Seventh Circuit upheld the District Court's adoption of a three-part test, set out in the American Bar Association's official commentary to the Model Rules of Professional Conduct, to determine whether an employee is to be considered represented. See ABA Model Rules of Professional Conduct Rule 4.2 cmt. 4 (1995). Under that test, a defendant's employee is regarded as being represented by the defendant's lawyer if any of three conditions are met: (1) the employee has 'managerial responsibility' in the defendant's organization, (2) the employee's acts or omissions can be imputed to the organization for purposes of liability, or (3) the employee's statements constitute an admission.").
To make matters even more complicated, the ABA has changed its Model Rule 4.2 since the Seventh Circuit issued this opinion. One is left to wonder whether an Illinois federal court would follow the old ABA approach or the new ABA approach.

In at least one respect, the Illinois Bar provided some clarification. In Illinois LEO 09-01, the Illinois Bar rejected its earlier "control group" analysis and adopted the ABA Model Rule approach. Illinois LEO 09-01 (1/2009) (rejecting earlier Illinois law which placed off-limits ex parte communications by a corporation's adversary only those within the corporate "control group"; instead adopting the ABA Model Rule 4.2 standard; "A lawyer may communicate with a current constituent of a represented organization about the subject-matter of the representation without the consent of the organization's counsel only when the constituent does not (i) supervise, direct or regularly consult with the organization's lawyer concerning the matter; (ii) have authority to obligate the organization with respect to the matter; or (iii) have acts or omissions in connection with the matter that may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with former constituents about the matter of the representation. If the constituent has his or her own counsel, however, that counsel must consent to the communication."; also explaining that "a lawyer who is allowed to communicate with a constituent may not invade the privileges of the Represented Organization"; holding that former employee could be contacted ex parte).

However, this still leaves a mismatch between the federal and the state courts. As explained above, the Illinois federal courts' adoption of the ABA Model Rule
approach included the prohibition on ex parte contacts with a corporate employee
whose statements would be admissible against the corporation.

The Illinois Bar's current approach does not include that prohibition, but instead
adopts the post-2000 ABA Model Rule approach -- which renders those employees fair
game for ex parte contacts.

**Virginia**

Virginia has had trouble reconciling its Bar's approach with its federal courts'
approach.

The Virginia ethics rules contain a unique comment describing folks who are off-
limits to ex parte communications with representatives of a corporate adversary.

In the case of organization, this Rule prohibits communications by a lawyer for one party concerning the
matter in representation with persons in the organization's
"control group" as defined in *Upjohn v. United States*, 449
U.S. 383 (1981) or persons who may be regarded as the
"alter ego" of the organization. The "control group" test
prohibits ex parte communications with any employee of an
organization who, because of their status or position, have
the authority to bind the corporation. Such employees may
only be contacted with the consent of the organization's
counsel, through formal discovery or as authorized by law.
An officer or director of an organization is likely a member of
that organization's "control group." The prohibition does not
apply to former employees or agents of the organization, and
an attorney may communicate ex parte with such former
employee or agent even if he or she was a member of the
organization's "control group." If an agent or employee of
the organization is represented in the matter by separate
counsel, the consent by that counsel to a communication will
be sufficient for purposes of this Rule.

Virginia Rule 4.2 cmt. [7].
The "control group" reference seems fairly clear -- because it piggybacks on the Upjohn United States Supreme Court case. However, the comment does not describe who "may be regarded as the 'alter ego' of the organization." That term usually comes up in cases involving plaintiffs' efforts to pierce the corporate veil and hold others responsible for a corporation's liabilities.

Neither the "control group" nor "alter ego" phrase would seem to include some corporate employees or other representatives who should clearly be off-limits -- defined in ABA Model Rule 4.2 cmt. [7] as those "whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability." In essence, that exclusion includes the bus company employee who ran over a plaintiff's client. The bus driver clearly is not in the bus company "control group." In traditional corporate terms, the bus driver clearly is not the "alter ego" of the bus company. Thus, the Virginia Bar and Virginia courts have had to deal with this obvious hole in the Virginia rules' definition of those immune from ex parte communications by the corporation's adversary.

On a number of occasions, the Virginia Bar held that a lawyer may contact the employee of a corporate adversary unless the employee could "commit the corporation to specific courses of action" or could be characterized as the corporation's "alter ego." See, e.g., Virginia LEO 801 (5/27/86); Virginia LEO 795 (5/27/86); Virginia LEO 530 (11/23/83); Virginia LEO 507 (3/30/83); Virginia LEO 459 (7/21/82); Virginia LEO 347 (12/4/79). The Virginia Bar has even referred to the pre-Upjohn "control group" test. See, e.g., Virginia LEO 801 (5/27/86); Virginia LEO 795 (5/27/86).
Although the Virginia Bar has not explained exactly where the line should be drawn, it has provided some hints. For instance, in Virginia LEO 507 (3/30/83), the Virginia Bar held that a lawyer could not contact his corporate opponent's "regional manager." Accord Virginia LEO 459 (7/21/82) (store managers deemed off-limits).

On the other hand, in one Legal Ethics Opinion the Virginia Bar indicated that lawyers initiating such ex parte contacts must disclose their adversarial role, and then try "to ascertain whether that employee feels that his employment or his situation requires that he first communicate with counsel for the corporate entity." Virginia LEO 905 (3/17/89). A lawyer concluding that the employee "feels" this way must presumably end the communication.

Virginia court decisions are hopelessly confused. Four cases decided in a little over ten months in the mid-1990s would leave any practitioner perplexed.

In Queensberry v. Norfolk & Western Railway, 157 F.R.D. 21 (E.D. Va. 1993), the Eastern District of Virginia dealt with a railroad's motion to prohibit plaintiff (an injured railroad worker proceeding under the Federal Employers' Liability Act ("FELA")) from conducting ex parte communications with the railroad's employees. The court acknowledged that its local rule adopted as the applicable ethics standards the then-current Virginia Code of Professional Responsibility. The court quoted Virginia Code of Prof'l Responsibility DR 7-103(A), and then noted that its language was "identical" to what was then the ABA Model Code of Prof'l Responsibility DR 7-104(A)(1). For some reason, the court did not rely on the Virginia Code comment describing who is fair game and off-limits within an organization, but instead relied on ABA LEO 359 (3/22/91). The ABA approach has always been different from Virginia's approach.
Focusing on what was then the ABA prohibition on ex parte contacts with those "whose statement may constitute an admission on the part of the organization" -- a prohibition that has never appeared in the Virginia Code or the Virginia Rules -- the court then turned to Federal Rule of Evidence 801(d)(2) in concluding that "virtually any employee may conceivably make admissions binding on his or her employer."

Queensberry, 157 F.R.D. at 23. Thus, the court granted the railroad's motion, and prohibited the plaintiff from conducting ex parte interviews of railroad workers.

Just a few months later, the Roanoke (Virginia) Circuit Court dealt with an identical request by the same railroad to prohibit a plaintiff from conducting ex parte interviews of railroad employees. Schmidt v. Norfolk & W. Ry., 32 Va. Cir. 326 (Va. Cir. Ct. 1994). The state court explained that "while I have the greatest respect for the district judge who decided Queensberry, I conclude that he was incorrect in his interpretation of the application of Virginia's Disciplinary Rules in this situation and therefore do not follow his guidance on the point." Id. at 328.

Though there is no Virginia appellate decision on point, the standing committee on Legal Ethics of the Virginia State Bar "has consistently opined that it is not impermissible for an attorney to directly contact and communicate with employees of an adverse party provided that the employees are not members of the corporation's control[] group and are not able to commit the organization or corporation to specific courses of action that would lead one to believe the employee is the corporation's alter ego. See, e.g., Legal Ethics Opinion Nos. 347, 530, 795; Upjohn Co. v. U.S., 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)." Legal Ethics Opinion No. 1504, December 14, 1992.

While the Virginia State Bar's "control group" test may not be the one followed in the majority of jurisdictions, the overwhelming weight of authority rejects the Railway Company's argument that the Disciplinary Rules prohibit

The railway company relies for support of its interpretation of DR 7-103(A)(1) on a memorandum opinion of another trial judge. Queensberry v. Norfolk and Western Railway Company, 157 F.R.D. 21 (E.D. Va. 1993). The plaintiff argues, and I agree, that in deciding that case, the federal district judge was justifiably concerned with the effect, under the Federal Rules of Evidence, of any admission that even the lowest-level employee might make. As the plaintiff notes, such a concern does not exist in Virginia’s state courts, where the Federal Rules do not apply. Thus, the plaintiff suggests, Queensberry should be distinguished from the case at bar.

Id. at 327-28. The court therefore denied the railroad’s motion.

A few months after that, another Eastern District of Virginia judge addressed an identical request by the same railroad. Tucker v. Norfolk & W. Ry., 849 F. Supp. 1096 (E.D. Va. 1994). The court followed what it called the "thoughtful" opinion in Queensberry in granting the railroad’s request. Id. at 1099. Interestingly, the court indicated that "both parties in this action agree" that the ex parte prohibition applies only "after a lawsuit is filed." Id. at 1098. This is an incorrect statement of the law in every state. The court therefore allowed the plaintiff to re-interview employees his lawyer had spoken with before litigation began, although they would not be able to obtain any "new information" from them. Id. at 1101.

Several months later, the Winchester, Virginia Circuit Court addressed this issue in connection with a hospital’s motion to prevent plaintiff from engaging in ex parte communications with the hospital’s nurses about a malpractice case. Dupont v. Winchester Med. Ctr., Inc., 34 Va. Cir. 105 (Va. Cir. Ct. 1994). The state court judge
cited the Virginia Rule, but quoted from the ABA comment -- as well as noting the Queensberry and Tucker cases. The court found that the hospital’s nurses were not the "alter ego" of the hospital, but that they would be off-limits under either the Virginia precedent or the ABA approach.

However, the nurses’ negligent acts may make the Medical Center vicariously liable in that the nurses may "act on behalf of the corporation or make decisions on behalf of the corporation in the particular area which is the subject matter of the litigation." LEO 905, which will control the destiny of the Medical Center vis a vis its potential liability to the Plaintiff. This LEO 905 language, which LEO 1504 characterizes as "dispositive," is substantially similar to that of the official comment to ABA Model Rule 4.2, and is in fact a functional analysis based upon either the employee’s relationship to the corporation ("make decisions on behalf"), which is the traditional control group analysis, or the employee’s participation in the events giving rise to the cause of action ("act on behalf of the corporation"), which is closely akin to the substance of the official comment to ABA Rule 4.2.

Id. at 108. As the court explained,

[w]here the employees are actual players in the alleged negligent act or where they have the authority to make decisions to bind the corporation, then they are acting as the corporation with regard to those acts and are in essence its alter ego. A corporation may have many heads and even more hands, and any one or more of the heads and hands may bind the corporation. There is no reason why a corporation or other organization, which must act through surrogates, should be afforded less protection under the rules of discovery than a natural person. Therefore, the better rule to be applied in the context of permissible discovery and ex parte contacts would be that of the official comment to ABA Model Rule 4.2 and LEO 905. Accordingly, the plaintiff may not contact The Medical Center’s nurses who were, or may be, directly involved in the sponge issue in this case outside the discovery process. However, to the extent that employees of the Medical Center are not persons "whose act or omission in connection with that matter [i}
litigation] may be imputed to the organization for purposes of civil . . . liability or whose statement may constitute an admission on the part of the organization," those corporate employees may be contacted ex parte by the Plaintiff.

Id. at 108-09. The court entered an order prohibiting the plaintiff from ex parte contacts with

the nurses who attended to the physician and who may have negligently placed the sponges. However, to the extent that there are other nurses or employees who are not involved in the sponge placement process of this particular plaintiff, then the plaintiff is free to talk to such nurses outside the discovery process so long as traditional rules of patient confidentiality and the principles discussed in this order are not transgressed.

Id. at 109-10.

A federal court decision in Virginia on this topic also followed the ABA approach rather than the Virginia approach. In Lewis v. CSX Transportation, Inc., 202 F.R.D. 464 (W.D. Va. 2001), the court addressed CSX's motion to enjoin a plaintiff's lawyer from conducting ex parte interviews of CSX employees. The court relied on the Tucker and Queensberry approach. The court acknowledged that the Western District of Virginia Local Rules adopt the Virginia ethics rules, but noted that the court can "look to federal law in order to interpret and apply those rules." Id. at 466 (quoting McCallum v. CSX Transp., Inc., 149 F.R.D. 104, 108 (M.D.N.C. 1993)). The court also cited Federal Rule of Evidence 801 -- noting that an employee's statement can amount to an admission.

Of course, all of these cases were decided under the old ABA approach, which placed off-limits corporate employees whose statements were admissible as admissions against their corporate employer's interest. In fact, that was the explicit provision on which all three federal district court decisions rested. Now that the ABA has changed its
approach, and rendered those corporate employees fair game for ex parte contacts, there is simply no telling what the federal courts would do in Virginia.

In 2005, a Virginia state court decision dealing with this topic followed the Virginia rules. Pruett v. Virginia Health Servs., Inc., 69 Va. Cir. 80, 85 (Va. Cir. Ct. 2005) (permitting plaintiff's lawyer to initiate ex parte communications with a defendant nursing home's current employees, except for current "control group" employees and current non "control group" employees who provide resident care; permitting ex parte contacts even with those nursing home employees, as long as the communications "do not relate to the acts or omissions alleged to have caused injury, damage or death to plaintiff's decedent"; also permitting ex parte contacts with former nursing home "control group" and non "control group" employees).

The most recent Virginia state court to deal with this topic extensively analyzed both the "control group" and "alter ego" definition in Virginia Rule 4.2 cmt. [7]. In Yukon Pocahontas Coal Co. v. Consolidation Coal Co., 72 Va. Cir. 75 (Va. Cir. Ct. 2006), defendant's lawyer communicated briefly with several limited partners of plaintiffs' limited liability partnerships. The court concluded that the limited partners were not members of the plaintiffs' "control group," because "[b]y definition, a limited partner cannot bind or act on behalf of" plaintiffs. Id. at 91.

However, the court held that the limited partners were somehow "alter egos" of the plaintiffs, because the plaintiffs' partnership agreements allowed them to "make decisions on behalf of [plaintiffs] in the particular area which is a subject matter in the underlying litigation" -- voting on the general partner's proposed partnership agreement amendments dealing with his power to act on plaintiffs' behalf (which the court
described as the issue being litigated). Id. at 92. The court pointed to several old Virginia legal ethics opinions, which defined as "alter egos" of a corporation those agents who can commit the organization because of their authority or some other law providing that power. The court also pointed to the Pruett case, in which another circuit court found off-limits to ex parte communications floor nurses who obviously were not in the nursing home's "control group," but who allowed the nursing home to carry on its business through their "'hands on' interaction." Id. (quoting Pruett v. Virginia Health Servs., Inc. at 84-85).

This strange definition of "alter ego" does not come from any standard corporate law jurisprudence. Instead, it appears to be a judicial effort to plug the hole left in Virginia Model Rule 4.2 cmt. [7], which does not include the obvious prohibition on ex parte contacts with those (as characterized in ABA Model Rule 4.2 cmt. [7]) "whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability." However, this definition of "alter ego" does not exactly match with the ABA Model Rule definition of those off-limits lower level employees. It makes sense to prevent ex parte contacts with non-control group corporate employees whose "act or omission" might put the corporation at risk, but these Virginia courts' definition of "alter ego" employees goes beyond that group and apparently includes witnesses whose acts or omissions would not have that effect.

The most recent Virginia federal court opinion takes the same inexplicable approach as an earlier federal court decision.

discrimination plaintiff from ex parte contacts with company employees; declining to apply the holding in Lewis v. CSX Transp., Inc., 202 F.R.D. 464 (W.D. Va. 2001) because that case involved ex parte contact with "the very employees who used and maintained the piece of equipment at issue," which meant that their statements would "be an admission of liability imputable to the employer"; inexplicably analyzing the issue as the Lewis court had done, in light of the standard found in an earlier version of ABA Rule 4.2 (which prohibited ex parte communications with persons "whose statement[s] may constitute an admission on the part of the corporate party"); ultimately declining to enjoin ex parte contacts by the plaintiff's lawyer with employees "whose statements could not be used to impute liability upon the employee," but prohibiting "ex parte contact in this context with any supervisory or managerial employee").

All in all, Virginia case law presents a confusing and contradictory amalgam of current and obsolete Virginia and ABA principles.

**Best Answer**

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

n 12/11
Applying the "Regularly Consults" Standard

Hypothetical 22

You are trying to determine if you can communicate ex parte with a corporate adversary's executive. Based on your deposition of that executive, you know that the executive had a few conversations with the company's lawyer about your litigation against the company. Other than that, the executive has had nothing to do with the case.

Is this executive off-limits to ex parte communications?

**NO (PROBABLY)**

**Analysis**

ABA Model Rule 4.2 cmt. [7] places off-limits a constituent of an organization who (among other things) "regularly consults with the organization's lawyer concerning the matter."

In 2007, the Wisconsin Bar dealt with this issue. The Bar explained that the ex parte communication prohibition is specific to the 'matter' in question. In large organizations, some management constituents may direct or control counsel for some matters, but not others. The vice president of human resources may direct the corporation's lawyer on an employment discrimination matter and thus be covered by SCR 20:4.2. However, if the chief financial officer was a witness to the alleged act of discrimination, but has no involvement in the direction or control of the organization's lawyer handling the defense of the discrimination claim, the officer would not be protected by SCR 20:4.2. The mere fact that a constituent holds a management position does not trigger the protections of the Rule.
Wisconsin LEO E-07-01 (7/1/07). The Bar clearly indicated that

a constituent who is simply interviewed or questioned by an
organization's lawyer about a matter does not 'regularly
consult' with the organization's lawyer.

Id.

Although this approach complies with the literal language of most states' version
of Rule 4.2, lawyers approaching upper level corporate managers based on this
standard face the risk of an ethics violation or court sanctions if the employee with
whom they communicate ex parte is later found to have been "off-limits" under this
standard.

**Best Answer**

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

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1 Wisconsin LEO E-07-01 (7/1/07) (explaining that Wisconsin's Rule 4.2 allows even senior
executives to be contacted ex parte by a corporation's adversary, depending on the subject matter: "[T]he
category is specific to the 'matter' in question. In large organizations, some management constituents
may direct or control counsel for some matters, but not others. The vice president of human resources
may direct the corporation's lawyer on an employment discrimination matter and thus be covered by SCR
20:4.2. However, if the chief financial officer was a witness to the alleged act of discrimination, but has no
involvement in the direction or control of the organization's lawyer handling the defense of the
discrimination claim, the officer would not be protected by SCR 20:4.2. The mere fact that a constituent
holds a management position does not trigger the protections of the Rule."; "a constituent who is simply
interviewed or questioned by an organization's lawyer about a matter does not 'regularly consult' with the
organization's lawyer").
Ex Parte Communications with a Corporate Adversary's Former Employees

Hypothetical 23

You represent an accounting firm in defending a malpractice case brought by a bank whose vice president embezzled several hundreds of thousands of dollars undetected. You have heard from various sources that the bank's president was having an affair with the vice president's wife, and "turned a blind eye" to obvious warning signs that something was wrong. You think that several former bank employees might be able to corroborate these rumors.

(a) Without the bank's lawyer's consent, may you interview the bank's former senior vice president?

YES (PROBABLY)

(b) Without the bank's lawyer's consent, may you interview a former bank teller (who allegedly saw evidence of the president's affair)?

YES (PROBABLY)

Analysis

Introduction

Unlike other areas involving ex parte communications, the ethics authorities seem to be unanimous in this area -- although the courts are not.

A comment to ABA Model Rule 4.2 clearly indicates that the [c]onsent of the organization's lawyer is not required for communication with a former constituent.

ABA Model Rule 4.2 cmt. [7]. See also ABA LEO 396 (7/28/95); ABA LEO 359 (3/22/91).

The Restatement is just as clear, and even provides an explanation.
Contact with a former employee or agent ordinarily is permitted, even if the person had formerly been within a category of those with whom contact is prohibited. Denial of access to such a person would impede an adversary’s search for relevant facts without facilitating the employer’s relationship with its counsel.

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

Thus, under both the ABA Model Rules and the Restatement, former corporate employees are fair game for ex parte communications initiated by the corporation’s adversary’s lawyer -- even if they would have clearly been off-limits while still with the company.

In a 2009 article, Professors Hazard and Irwin explained the mixed approach the courts take towards ex parte communications with a corporate adversary’s former employees. They proposed a revision to the comments to Rule 4.2 as follows:

In the case of a represented organization, consent of the organization’s lawyer is not required for communication with a former constituent unless the former constituent is represented by the organization’s lawyer through an independent engagement or unless a lawyer knows or reasonably should know the former constituent’s conduct materially contributed to the matter underlying the representation. In communicating with a former constituent, a lawyer shall not seek to elicit privileged or confidential information.

Geoffrey C. Hazard, Jr. & Dana Remus Irwin, Toward a Revised 4.2 No-Contact Rule, 60 Hastings L.J. 797, 842 (Mar. 2009).

Courts take differing approaches. Most courts find such ex parte communications permissible.

of a corporate adversary; noting that "[a] minority of courts . . . have applied Rule 4.2 to former employees in certain situations, such as where the former employee was a member of an organization's management or control group, or where the former employee had privileged or confidential information, or where the conduct of the former employee could have been imputed to the employer." [citing Serrano v. Cintas Corp., Civ. A. No. 04-40132, 2009 U.S. Dist. LEXIS 120068 (E.D. Mich. Dec. 23, 2009)]; "Without deciding the motion to disqualify at this time, and considering the nuanced approach counseled in Serrano at the deposition stage, the Motion for Protective Order [Doc. #56] is GRANTED, to the extent that counsel may not inquire at the deposition about communications Mr. Kemp had with Madsen, Presley & Parenteau, LLC, concerning his involvement in the termination of these plaintiffs. There is no claim that Mr. Kemp possesses either privileged or confidential information concerning plaintiffs' claims. The Hartford may inquire whether its former employee Gary Kemp has communicated to plaintiffs' counsel knowledge that may support a claim of discriminatory pattern and practice beyond his involvement in the termination of plaintiffs. A fair subject of inquiry includes Mr. Kemp's past involvement in reduction in force initiatives and/or termination of others' employment, conversations with The Hartford's lawyers, his access to confidential and/or privileged materials, and specific litigation strategies in other cases. The Hartford's counsel may inquire by naming employees and/or the lawsuit or describe the litigation so that Mr. Kemp will be able to recall his involvement and counsel can determine whether Kemp has specific privileged and/or confidential information that could prejudice The Hartford in this lawsuit. At this time, defendant has only speculated that Mr. Kemp was exposed to privileged/confidential information during his employment that could prejudice The Hartford in this lawsuit.").

- Arista Records LLC v. v. Lime Group LLC, 715 F. Supp. 2d 481, 500 (S.D.N.Y. 2010) (declining to issue a protective order preventing plaintiffs from ex parte communications with a defendant's former chief technology officer; "The Court will not issue a protective order prohibiting Plaintiffs from speaking with Bildson [a defendant's former chief technology officer]. Plaintiffs have made a good faith effort to avoid learning privileged information from Bildson. Forrest and Page, Bildson's attorney, have submitted affidavits stating that Forrest met with Bildson only once, and that she never sought privileged information from him. Forrest and Page both state that they repeatedly warned Bildson not to provide him with such information. Defendants have presented no evidence that Bildson disclosed privileged communications to Plaintiffs, other than the two declarations discussed.").

former officer or employee of a corporation on an *ex parte* basis even though the attorney knows that the corporation is represented by counsel.

- Victory Lane Quick Oil Change, Inc. v. Hoss, Case No. 07-14463, 2009 U.S. Dist. LEXIS 22579, at *5-6, *6-7 (E.D. Mich. Mar. 20, 2009) (holding that Michigan Rule 4.2 permits ex parte communications with a corporate adversary's former high-level executive [former high ranking Director of Operations who has been a central defense operative in this litigation and privy to substantial privileged attorney-client communications concerning this case]; explaining the substance of the ex parte communications; "[I]t was determined that the Roberts Supplemental Affidavit did not involve any party admissions of Plaintiff because the document was prepared when Mr. Roberts was no longer an agent or employee of Plaintiff and thus was not making the statements in the scope of his agency or employment authority. It was also determined that the Roberts Supplemental Affidavit did not contain disclosure of any confidential attorney-client communications. There were certain portions that arguably might relate to factual admissions of Mr. Roberts while still employed by Plaintiff that might be imputed to the Plaintiff. Yet, the overwhelming majority of the contents of the Roberts Supplemental Affidavit does not topics [sic] of concern to the ethics committees applying M.R.P.C. 4.2 to former employees."); explaining that "[w]hile Defense counsel displayed some caution when Mr. Roberts first approached them in December 2008, and urged Mr. Roberts to consult with his personal attorney prior to their having his statements reduced to an affidavit, given his former role with Plaintiff, his extensive involvement in this case, and his being privy to confidential discussions with Plaintiffs' counsel, Defense counsel would have been prudent to contact Plaintiff's counsel prior to furthering the discussions with Mr. Roberts or sought direction from this Court. As noted at the hearing, it could be argued that defense counsel violated M.R.P.C. 4.2 in their contact with Mr. Roberts."); ultimately prohibiting defendants from using the affidavit they obtained from plaintiff's former high-level executive, but allowing a limited additional discovery).

- Muriel Siebert & Co. v. Intuit Inc., 820 N.Y.S.2d 54, 55 (N.Y. App. Div. 2006) (assessing a defense lawyer's ex parte interview of one of plaintiff's former employees; noting that the lower court had disqualified the lawyer because of an "appearance of impropriety," despite the inapplicability of the ex parte contact prohibition on ex parte communications with former employees of a corporate adversary); also noting that "[h]ere, after the litigation had commenced, plaintiff terminated its chief operating officer. After plaintiff's counsel informed defense counsel that the executive was no longer within its control, both attorneys agreed that it would be appropriate for defense counsel to subpoena the witness for deposition. Before that deposition was held, defense counsel conducted a pre-deposition interview of the witness for approximately three hours. At the commencement of the interview, defense

- Snowling v. Massanutten Military Acad., 57 Va. Cir. 284, 284 (Va. Cir. Ct. 2002) ("I will allow the Plaintiff to contact ex parte the former employees of the Defendant who were named at our hearing on January 3, 2002. Such contact is ethically permitted under Legal Ethics Opinion No. 1670. These persons are no longer employees of the Defendant, and I do not believe that they were part of the 'control group' when they were employed by MMA.").


- Olson v. Snap Prods., Inc., 183 F.R.D. 539, 544 (D. Minn. 1998) ("likewise, a majority of Courts which have considered the issue agree that, in general, Rule 4.2 does not bar ex parte attorney contacts with an adversary's former employees who are not themselves represented in the matter. A minority of Courts, which are concerned over the unfairness of litigants being able to obtain the sensitive information of an opponent from the opponent's past employees, extend the 'no contact' rule to former employees.” (citations omitted)).

- Davidson Supply Co. v. P.P.E., Inc., 986 F. Supp. 956, 959 (D. Md. 1997) (holding that the Maryland ethics code does not prohibit ex parte contacts with former employees, and refusing to disqualify a law firm for conducting an ex parte interview of a former employee who was "not an attorney or an investigator, but was simply a marketer").

Other courts and bars treat former employees the same way they treat current employees.

- North Carolina LEO 97-2 (1/16/98) (addressing an adversary's ability to communicate ex parte with former employees of a corporate adversary; distinguishing between permissible ex parte contacts with a former employee who was not heavily involved in the legal representation of the corporation in the pertinent matter and impermissible ex parte communications with a former employee who played such a role while at the company; holding that a lawyer representing a sexual harassment plaintiff could communicate ex parte with a former employee who might have engaged in alleged sexual harassment; addressing the following situation: "Employee X is no longer employed by Corporation. While an employee of Corporation, however, Employee X may have engaged in activities that would constitute the sexual harassment of
other employees of Corporation. An action alleging sexual harassment based on Employee X's conduct was brought against Corporation. Although he is not a named defendant in the action, Employee X's acts, while an employee, may be imputed to the organization. When he was employed, Employee X did not discuss the corporation's representation in this matter with Corporation's lawyer. Employee X is unrepresented. May the lawyer for the plaintiffs in the sexual harassment action interview Employee X without the consent of the lawyer for Corporation?"; finding the communications permissible; "Unlike the adjuster in the two prior inquiries, Employee X was not an active participant in the legal representation of his former employer in the sexual harassment action. It does not appear that he was involved in any decision making relative to the representation of Corporation nor was he privy to privileged client-lawyer communications relative to the representation. Rather, Employee X is a fact witness and a potential defendant in his own right. Permitting ex parte contact with Employee X by the plaintiff's counsel will not interfere with Corporation's relationship with its lawyer nor will it result in the disclosure of privileged client-lawyer communications regarding the representation. Comment [5] to Rule 4.2, which indicates that the rule prohibits communications with any employee '. . . whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization,' should be applicable only to current employees. The purpose of Rule 4.2 is not enhanced by extending the prohibition to former employees who, during the time of their employment, did not participate substantively in the representation of the organization."; contrasting this scenario with an adversary's ex parte communication with a former corporate employee who had played an intimate role in the legal issues while employed by the company; "The protection afforded by Rule 4.2(a) to 'safeguard the client-lawyer relationship from interference by adverse counsel' can be assured to a represented organization only if there is an exception to the general rule that permits ex parte contact with former employees of an organization without the consent of the organization's lawyer. See RPC 81 (permitting a lawyer to interview an unrepresented former employee of an adverse corporate party without the permission of the corporation's lawyer). The exception must be made for contacts with a former employee who, while with the organization, participated substantially in the legal representation of the organization, including participation in and knowledge of privileged communications with legal counsel. Permitting direct communications with such a person, although no longer employed by the organization, would interfere with the effective representation of the organization and the organization's relationship with its legal counsel. Such communications are permitted only with the consent of the organization's lawyer or in formal discovery proceedings. The general rule, set forth in RPC 81, permitting a lawyer to interview an unrepresented former employee of an
adverse organizational party without the consent of the organization's lawyer, remains in effect with the limited exception explained above.


One court concocted an interesting process.

- Equal Employment Opportunity Comm'n v. First Wireless Group Inc., No. CV-03-4990 (JS)(ARL), 2006 U.S. Dist. LEXIS 67694, at *3-5 (E.D.N.Y. Sept. 20, 2006) ("With respect to the non-managerial former employees, the court agrees with the EEOC that there is no basis for prohibiting the EEOC's contact with former employees. . . . The only justification for restricting contact with a former employee would be to protect privileged information that the employee may possess. . . . This circumstance typically arises only with former managerial or supervisory employees. Accordingly, by September 27, 2006, First Wireless is to identify, from the list provided, any former managerial or supervisory employees with access to privileged information. As to each of these employees, First Wireless is to provide the EEOC with a declaration identifying the position held by each such employee, as well as a description of their duties and responsibilities. Upon receipt of the list form [sic] First Wireless, the EEOC is to provide First Wireless with the subject matter of its intended communication with such employees by September 29, 2006. If, after reviewing the subject matter of the intended communication, First Wireless believes that those employees may be asked about information protected by a privilege belonging to First Wireless, it shall communicate its concern to the EEOC. If the issue cannot be resolved by the parties, First Wireless may then renew its application for a protective order with respect to the 'manager-level' employees.")

In some states, the answer might depend on the court and even the geographic area where the lawyer acts.
Virginia provides a good example of how confusing this can be. The Virginia ethics rules could not be any clearer: "[t]he prohibition [on ex parte contacts] does not apply to former employees or agents." Virginia Rule 4.2 cmt. [7]. Several Virginia state court cases reaffirmed this approach.


- **Snowling v. Massanutten Military Acad.**, 57 Va. Cir. 284, 284 (Va. Cir. Ct. 2002) ("I will allow the Plaintiff to contact ex parte the former employees of the Defendant who were named at our hearing on January 3, 2002. Such contact is ethically permitted under Legal Ethics Opinion No. 1670. These persons are no longer employees of the Defendant, and I do not believe that they were part of the "control group" when they were employed by MMA. I have reviewed the opinion of the Honorable John E. Wetsel Jr., Judge of the Twenty-sixth Judicial Circuit, in **Dupont v. Winchester Medical Center**, 34 Va. Cir. 105 (Circuit Court of the City of Winchester, 1994). While I do not disagree with Judge Wetsel's reasoning, there is, in my view, an important difference between the situation presented there and the one at hand. That distinction lies in the employment status of the persons with whom the Plaintiff seeks contact. In our case, these persons are no longer employed by the Defendant. I realize this ruling puts me at odds with Magistrate Judge Sargent in **Armsey v. Medshares Management Services**, 184 F.R.D. 569 (W. D. Va. 1998); however, I find myself in agreement with the opinions handed down in those several cases cited in Armsey where ex parte contact with former non-managerial employees was allowed.").

In 1998, a Western District of Virginia federal court case relied on the court's inherent power to preclude ex parte communications with a corporate defendant's former employees whose "statements, actions or omissions" could be imputed to the corporate defendant.

- **Armsey v. Medshares Mgmt. Servs., Inc.**, 184 F.R.D. 569, 574 (W.D. Va. 1998) ("I agree with the committee that former employees may no longer bind their corporate employer by their current statements, acts or omissions. Yet, this does not prevent liability being imposed upon their former employer based on the statements, acts or omissions of these individuals which occurred during the course of their employment. In fact, Plaintiffs' counsel in
this case has informed the court that it seeks to speak to each of these former employees because Plaintiffs believe that they can impute liability upon Medshares through the statements, actions or omissions of these former employees. Under these facts, I do not believe ex parte communications with these former employees is proper." (citations omitted)).

However, ten years later another Western District of Virginia decision concluded that Virginia Rule 4.2 "strikes the correct balance between efficient and appropriate discovery, protection from overreaching by counsel in dealing with unrepresented persons, and a protection of a corporate party's privileged and confidential information."

Bryant v. Yorktowne Cabinetry, Inc., 538 F. Supp. 2d 948, 953 (W.D. Va. 2008). The Bryant court distinguished the Armsey case because the plaintiff was not seeking to impute the former employees' "statements, conduct or actions" to the corporate defendant. Id.\(^1\) However, Bryant clearly represents a fundamental disagreement with

\(^1\) Bryant v. Yorktowne Cabinetry, Inc., 538 F. Supp. 2d 948, 950, 953, 953-954 (W.D. Va. 2008) (assessing the permissibility of plaintiff's ex parte communications with former employees of a corporate adversary; explaining that the Virginia State Bar has issued legal ethics opinions permitting such ex parte communications, while another Western District of Virginia case (Armsey v. Medshares Mgmt. Servs., Inc., 184 F.R.D. 569 (W.D. Va. 1998) prohibited such ex parte communications; noting "the vast divergence of opinion in state and federal courts in other jurisdictions on the issue of ex parte communications between counsel and former management employees of an adverse corporate party."); explaining several policy reasons in favor of the bar approach; "First, as this issue is an ethical one, it is critical to provide clear guidance to practicing lawyers. Lawyers need to know where the electrified third rail lies. The bright line rule set forth in the text and comments to Virginia Rule 4.2 serves this purpose. Indeed, any lack of clarity in this area can only serve to foster more discovery disputes requiring the parties and the courts to expend resources to resolve. Second, requiring discovery of former employees only through formal means will needlessly raise the cost of litigating with corporate parties. Third, the court in Frank v. L.L. Bean, Inc., 377 F. Supp. 2d 233, 238 (D. Me. 2005), appropriately inquired as to 'why the onus should not be on counsel for the witness' former employer to offer him or her counsel,' and suggested that '[s]uch efforts could be undertaken by defense counsel as a matter of course when a plaintiff seeks to hold a corporate defendant vicariously liable for the wrongful acts of a former employee.'"); finding the situation distinguishable from that in Armsey because the plaintiff did not seek to impute the former corporate employee's "statements, conduct or actions" to the corporate defendant; ultimately allowing such ex parte communications; "In sum, the court believes that the approach taken by the Virginia State Bar Committee on Legal Ethics and the Rules of Professional Conduct strikes the correct balance between efficient and appropriate discovery, protection from overreaching by counsel in dealing with unrepresented persons, and the protection of a corporate party's privileged and confidential information. . . . Thus, although the Rules allow communication with former corporate employees, including those with managerial responsibilities, opposing counsel must tread very carefully to avoid discussing information which 'may reasonably be foreseen as stemming from attorney/client
the Armsey case, so it is unclear where the Western District of Virginia now stands on that issue. The Eastern District of Virginia has not spoken, so it would be difficult to guess its approach.

Thus, Virginia practitioners apparently may conduct ex parte communications with former employees if they are litigating in state court, may not engage in such ex parte communications if they are litigating in western Virginia federal courts, and will have to guess what they can do if they are litigating in eastern Virginia federal courts.

A far more difficult dilemma arises if the lawyer wants to communicate ex parte with a former employee who is clearly fair game under the ethics rules, but who has been so infused with privileged or confidential information that the lawyer almost inevitably risks obtaining such information. For instance, a lower level employee of a corporate adversary might have had extensive discussions with the corporation’s lawyer about an incident. Lawyers undertaking ex parte communications with such persons risk disqualification, even if they try to avoid explicitly asking questions calling for such information, or stumbling into such information.

communications;’ Virginia LEO 1749, or to 'use methods of obtaining evidence that violate the legal rights of such a person.' Va. R. Prof'l Conduct 4.4.”; imposing several procedural requirements on such communications; "1. Upon contacting any former employee, plaintiff's counsel shall immediately identify himself as the attorney representing plaintiff in the instant suit and specify the purpose of the contact. 2. Plaintiff's counsel shall ascertain whether the former employee is associated with defendant or is represented by counsel. If so, the contact must terminate immediately. 3. Plaintiff's counsel shall advise the former employee that (a) participation in the interview is not mandatory and that (b) he or she may choose not to participate or to participate only in the presence of personal counsel or counsel for the defendant. Counsel must immediately terminate the interview of the former employee if he or she does not wish to participate. 4. Plaintiff's counsel shall advise the former employee to avoid disclosure of privileged or confidential corporate materials. In the course of the interview, plaintiff's counsel shall not attempt to solicit privileged or confidential corporate information and shall terminate the conversation should it appear that the interviewee may reveal privileged or confidential matters. 5. Plaintiff shall create and preserve a list of all former employees contacted and the date(s) of contact(s) and shall maintain and preserve any and all statements or notes resulting from such contacts, whether by phone or in person, as they may be subject to in camera review to ensure compliance with this Order.”

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Some courts take a surprisingly liberal (and trusting) view.

- **Gianzero v. Wal-Mart Stores, Inc.**, Civ. A. No. 09-cv-00656-REB-BEB, 2011 U.S. Dist. LEXIS 50630 (D. Colo. May 5, 2011) (allowing a company's adversary to communicate ex parte with a former company employee, even though the former employee had been exposed to privilege communications while working at the company).

- **Arista Records LLC v. Lime Group LLC**, 784 F. Supp. 2d 398, 417 (S.D.N.Y. 2011) (allowing a corporation's adversary to communicate ex parte with a former company employee; "The Court will not issue a protective order prohibiting Plaintiffs from speaking with Bildson. Plaintiffs have made a good faith effort to avoid learning privileged information from Bildson. Forrest and Page, Bildson's attorney, have submitted affidavits stating that Forrest met with Bildson only once, and that she never sought privileged information from him. Forrest and Page both state that they repeatedly warned Bildson not to provide them with such information. Defendants have presented no evidence that Bildson disclosed privileged communications to Plaintiffs, other than the two declarations discussed above."); "Because Bildson had access to privileged information while at LW[plaintiff], however, the Court believes that it is sensible and fair to order additional precautions to ensure that Bildson does not reveal privileged information to Plaintiffs in the future. Accordingly, the Court orders Plaintiffs: (1) not to request privileged information from Bildson; (2) to stop Bildson from revealing privileged information, if Plaintiffs become aware that he is doing so; and (3) to promptly provide Bildson and his attorney with a copy of this order, and to ensure that Bildon's attorney discusses with Bildson his obligation not to disclose privileged information.").

- **Siebert & Co. v. Intuit Inc.**, 820 N.Y.S.2d 54, 55, 56 (N.Y. App. Div. 2006) (reversing a lower court's disqualification of a defense lawyer who spoke for three hours ex parte with plaintiff company's former chief operating officer; noting that "[a]t the commencement of the interview, defense counsel's colleague warned the executive to be careful not to disclose any privileged information, including any legal strategies or communications with plaintiff's counsel"; finding that a document entitled "Timeline" that the former executive shared with defense counsel did not deserve attorney-client privilege because the document was "essentially a list of events" and therefore did not meet the standard for the attorney-client privilege, which requires that the "communication itself must be primarily of a legal, not factual, character").

One court did not criticize a lawyer for ex parte communications with such a former high-level official of a corporate adversary, but prohibited the defendants from using the fruits of the communications.
• Victory Lane Quick Oil Change, Inc. v. Hoss, Case No. 07-14463, 2009 U.S. Dist. LEXIS 22579, at *5-6, *6-7 (E.D. Mich. Mar. 20, 2009) (holding that Michigan Rule 4.2 permits ex parte communications with a corporate adversary’s former high-level executive [former high ranking Director of Operations who has been a central defense operative in this litigation and privy to substantial privileged attorney-client communications concerning this case]; explaining the substance of the ex parte communications; “[I]t was determined that the Roberts Supplemental Affidavit did not involve any party admissions of Plaintiff because the document was prepared when Mr. Roberts was no longer an agent or employee of Plaintiff and thus was not making the statements in the scope of his agency or employment authority. It was also determined that the Roberts Supplemental Affidavit did not contain disclosure of any confidential attorney-client communications. There were certain portions that arguably might relate to factual admissions of Mr. Roberts while still employed by Plaintiff that might be imputed to the Plaintiff. Yet, the overwhelming majority of the contents of the Roberts Supplemental Affidavit does not topics [sic] of concern to the ethics committees applying M.R.P.C. 4.2 to former employees.”; explaining that ”[w]hile Defense counsel displayed some caution when Mr. Roberts first approached them in December 2008, and urged Mr. Roberts to consult with his personal attorney prior to their having his statements reduced to an affidavit, given his former role with Plaintiff, his extensive involvement in this case, and his being privy to confidential discussions with Plaintiffs’ counsel, Defense counsel would have been prudent to contact Plaintiff's counsel prior to furthering the discussions with Mr. Roberts or sought direction from this Court. As noted at the hearing, it could be argued that defense counsel violated M.R.P.C. 4.2 in their contact with Mr. Roberts.”; ultimately prohibiting defendants from using the affidavit they obtained from plaintiff’s former high-level executive, but allowing a limited additional discovery).

Other courts are more restrictive.

• Weber v. Fujifilm Medical Systems, U.S.A., No. 3:10 CV 401 (JBA), 2010 U.S. Dist. LEXIS 72416 (D. Conn. July 19, 2010) (holding that several former employees of a corporate defendant were off limits for ex parte communications because they had been exposed to privileged communications while at the company).

(a)-(b) Either of these ex parte contacts would be acceptable under the ABA Model Rules, the Restatement, and most (if not all) state ethics rules.

However, court decisions might prohibit or restrict such ex parte contacts.
Best Answer

The best answer to (a) is PROBABLY YES; the best answer to (b) is PROBABLY YES.
Ex Parte Communications with a Corporate Adversary's In-House Lawyer

Hypothetical 24

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

The ABA Model Rules contain a one-sentence prohibition that generates numerous issues.

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

ABA Model Rule 4.2.¹

¹ The Restatement contains essentially the same standard. Restatement (Third) of Law Governing Lawyers § 99(1) (2000) ("A lawyer representing a client in a matter may not communicate about the subject of the representation with a nonclient whom the lawyer knows to be represented in the matter by another lawyer or with a representative of an organizational nonclient so represented as defined in § 100, unless: (a) the communication is with a public officer or agency to the extent stated in § 101; (b) the lawyer is a party and represents no other client in the matter; (c) the communication is authorized by law; (d) the communication reasonably responds to an emergency; or (e) the other lawyer consents.").
This hypothetical addresses the "[i]n representing a client" phrase.

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 issued a legal ethics opinion generally permitting ex parte contacts with the corporate adversary's in-house lawyers.

- ABA LEO 443 (8/5/06) (explaining that 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"); concludes that 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"; noting that 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 Comment [7] of Rule 4.2 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"; acknowledging that "in a rare case adverse counsel is asked not to communicate about a matter with inside counsel"; not analyzing 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 similarly explains that

[i]nside 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).
Both the ABA legal ethics opinions and the Restatement deal with ex parte communication to an in-house lawyer.

Most states follow the same approach as the ABA and the Restatement take.

- Wisconsin LEO E-07-01 (7/1/07) ("A lawyer does not violate SCR 20:4.2 by contacting in-house counsel for an organization that is represented by outside counsel in a matter. The retention of outside counsel does not normally transform counsel for an organization into a represented constituent and contact with a lawyer does not raise the same policy concerns as contact with a lay person.").

- 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").

- District of Columbia LEO 331 (10/2005) (concluding that "[i]n 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"; explaining 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").

Other states disagree.

- Rhode Island LEO 94-81 (2/9/95) (indicating that a lawyer may not communicate a settlement offer to in-house counsel with a copy to outside counsel, unless outside counsel consents).

- North Carolina LEO 128 (4/16/93) (explaining 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").

The ABA legal ethics opinions and the Restatement do not address communications by an in-house lawyer who is not otherwise clearly designated as a lawyer representing the corporation in litigation or some transactional matter. Because clients can always speak to clients, characterizing an in-house lawyer as a "client" rather than a lawyer presumably frees such in-house lawyers to communicate directly.
with a represented adversary of the corporation -- without the adversary's lawyer's consent. This seems inappropriate at best (although presumably corporate employees with a law degree may engage in such ex parte communications as long as they are not "representing" their corporation in a legal capacity).

In any event, at least one bar has forbidden such communications by in-house lawyers.

- Illinois LEO 04-02 (4/2005) (holding that a company's general counsel may not initiate ex parte contacts permitted by Rule 4.2).

Of course, lawyers and their clients must consider other issues as well. For instance, in-house lawyers hoping to avoid the ex parte prohibition rules by characterizing themselves as clients rather than as 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.

Although the pertinent ABA legal ethics opinion and the Restatement would permit such ex parte communications, lawyers would be wise to check the applicable state's approach.
Best Answer

The best answer to (a) is PROBABLY YES; the best answer to (b) is MAYBE.
Claiming or Establishing an Attorney-Client Relationship

Hypothetical 25

You have been working with in-house counsel at one of your largest clients, defending several employment discrimination cases being handled by a very aggressive plaintiff's lawyer. The lawyer has filed discovery asking for the home addresses and telephone numbers of several hundred current and former employees. From the nature of the discovery, it is obvious that the plaintiff's lawyer intends to informally (and ex parte) approach those current and former employees. Your in-house lawyer contact has asked you what you can do to prevent such communications (she worries that some of the employees might be so "disgruntled" with the company that they would assist the plaintiff).

(a) May you advise the plaintiff's lawyer that he cannot communicate ex parte with the current employees, because you represent them?

   NO

(b) May you advise the plaintiff's lawyer that he cannot communicate ex parte with the former employees, because you represent them?

   NO

(c) Should you recommend to the in-house lawyer that you (or she) formally represent the most important employees?

   NO (PROBABLY)

Analysis

The ABA Model Rules contain a one-sentence prohibition that generates numerous issues.

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.
ABA Model Rule 4.2.¹

This hypothetical addresses the "represented by another lawyer in the matter."

As tempting as it is for outside or in-house lawyers to essentially render "off-limits" company employees by asserting an attorney-client relationship with them, state bars routinely find such a statement essentially irrelevant.

- Wisconsin LEO E-07-01 (7/1/07) ("When an organization is represented in a matter, SCR 20:4.2 prohibits a lawyer representing a client adverse to the organization in the matter from contacting constituents who direct, supervise or regularly consult with the organization's lawyer concerning the matter, who have the authority to oblige the organization with respect to the matter, or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. All other constituents may be contacted without consent of the organization's lawyer. Consent of the organization's lawyer is not required for contact with a former constituent of the organization, regardless of the constituent's former position. When contacting a current or former constituent of a represented organization, a lawyer must state their [sic] role in the matter, must avoid inquiry into privileged matters and must not give the unrepresented constituent legal advice. The mere fact, however, that a current or former constituent may possess privileged information does not in itself prohibit a lawyer adverse to the organization from contacting the constituent. A lawyer representing an organization may not assert blanket representation of all constituents and may request, but not require, that current constituents refrain from giving information to a lawyer representing a client adverse to the organization. The mere fact than an organization has in-house counsel does not render the organization automatically represented with respect to all matters." (emphasis added)).

- North Carolina LEO 2005-5 (7/21/06) ("Even when a lawyer knows an organization is represented in a particular matter, Rule 4.2(a) does not restrict access to all employees of the represented organization. See[,] e.g., 97 FEO 2 and 99 FEO 10 (delineating which employees of a represented organization

¹ The Restatement contains essentially the same standard. Restatement (Third) of Law Governing Lawyers § 99(1) (2000) ("A lawyer representing a client in a matter may not communicate about the subject of the representation with a nonclient whom the lawyer knows to be represented in the matter by another lawyer or with a representative of an organizational nonclient so represented as defined in § 100, unless: (a) the communication is with a public officer or agency to the extent stated in § 101; (b) the lawyer is a party and represents no other client in the matter; (c) the communication is authorized by law; (d) the communication reasonably responds to an emergency; or (e) the other lawyer consents.")
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are protected under Rule 4.2). Counsel for an organization, be it a corporation or government agency, may not unilaterally claim to represent all of the organization’s employees on current or future matters as a strategic maneuver. See ‘Communications with Person Represented by Counsel,’ Practice Guide, Lawyers’ Manual on Professional Conduct 71:301 (2004) (list of cases and authorities rejecting counsel's right to assert blanket representation of organization's constituents). The rule's protections extend only to those employees who should be considered the lawyer's clients either because of the authority they have within the organization or their degree of involvement or participation in the legal representation of the matter."

Virginia LEO 1589 (4/11/94) (explaining that a corporation's lawyer may not simply advise a former employee that the lawyer is representing the former employee individually and direct the former employee not to speak with opposing counsel; noting former employees have the right to choose their own counsel, and until they have done so the corporation's lawyer must treat them as unrepresented parties with potentially adverse interests (and thus may only advise them to secure counsel)).

In 2008, the Colorado Bar not only found such an assertion irrelevant. It also found that a factually inaccurate claim of an attorney-client relationship violates two other ethics rules -- the prohibition on false statements, and the prohibition on "unlawfully obstruct[ing] another party's actions as to evidence."

Colorado LEO 120 (5/17/08) (finding it improper for a lawyer representing a company to essentially impose an attorney-client relationship on the company employees, in order to prevent the corporation's adversary from ex parte communications; "In general, it is improper for a lawyer who represents an organization to assert that he or she represents some or all of the constituents of the organization unless the lawyer reasonably believes he or she has in fact been engaged by the constituent or constituents. Knowingly making such assertion without having a reasonable belief that he or she has in fact been engaged by the constituent or constituents would violate Rule 4.1 on truthfulness in statements to others. Further, such an assertion may violate Rule 3.4(a), which prohibits unlawfully obstructing another party's access to evidence." (emphasis added); "Courts have rejected the assertion that a lawyer representing an organization automatically represents its employees, because an attorney-client relationship cannot be formed unilaterally, at the direction of the lawyer or the organization." (emphasis added); finding that a lawyer taking such a position would be making an untruthful statement; "A lawyer who knowingly asserts that he or she
represents current or former constituents of an organization automatically or unilaterally, without having a reasonable belief that he or she has in fact been engaged by the constituents, may violate at least two separate Rules. First, a lawyer knowingly making such an assertion without having such a belief would violate Rule 4.1 on truthfulness in statements to others. Second, a lawyer who unilaterally asserts that he or she represents current or former constituents of an organization may violate Rule 3.4. Among other things, Rule 3.4(a) prohibits a lawyer from 'unlawfully obstruct[ing] another party’s actions as to evidence, . . .’ If a lawyer asserts that an attorney-client relationship exists with current for former constituents of an organization client without actually hav[ing] an attorney-client relationship with the constituents, the effect is to prevent the adverse party’s lawyer from communicating ex parte with those constituents without the consent of the lawyer, pursuant to Rule 4.2.” (emphasis added)).

One court also warned lawyers that they could not create what essentially is an "opt out" attorney-client relationship.

- Harry A. v. Duncan, 330 F. Supp. 2d 1133, 1141-42 (D. Mont. 2004) (rejecting an argument by defendants' lawyer that he represents all employees; concluding that “an attorney-client relationship cannot be created unilaterally by the attorney or by the person's employer. . . . Pursuant to the basic contract law, as applied in this context by the Restatement § 14, the District's blanket letter to employees is insufficient by itself to create attorney-client relationships with all those employees. To form an attorney-client relationship, a prospective client must manifest to the lawyer the intent to be represented. Restatement § 14(1). The memorandum placed upon employees an obligation to 'opt-out' if they did not wish GLR to represent them. As a matter of law, however, the decision not to respond for the purpose of opting out does not constitute a manifestation to enter into a fiduciary or contractual relationship. Consent to enter into a contract must be 'free, mutual, and communicated by each party to the other.'” (citations omitted) (emphases added); permitting plaintiff's lawyer to conduct ex parte contacts that meet the Montana standard).

One bar seems to have taken a more forgiving approach -- essentially allowing such an assertion if the employees are otherwise off-limits under the applicable ethics rule.

- Utah LEO 04-06 (12/2/04) ("If corporate counsel has actually formed an attorney-client relationship with these employee-witnesses, and has fully complied with Utah Rules of Professional Conduct 1.7 (including obtaining
informed consent from all multiple clients to joint representation and informing them of the possible need for withdrawal from representing any of them should an actual conflict arise), this is permissible and opposing counsel may not interview them. However, in the absence of such a fully formed and proper attorney-client relationship, it is improper for corporate counsel to block opposing counsel's access to other current corporate constituents, by asserting an attorney-client relationship unless these individuals were control group members, their acts could be imputed to the organization or their statement would bind the corporation with respect to the matter under Utah Rules of Professional Conduct 4.2. Similarly, it is improper to block opposing counsel's access to any former employee in the absence of a current fully formed and proper attorney-client relationship." (emphasis added)).

(a)-(b) Thus, lawyers clearly cannot assert that they represent current or former employees unless there is a "meeting of the minds" agreement that such a relationship exists.

(c) Outside and (especially) in-house lawyers should only reluctantly and warily represent employees or former employees.

This issue obviously focuses on whether the person intended to be contacted is "represented" for purposes of placing them off-limits. Even if a lawyer actually represents a client, the representation must be fairly specific (rather than "general" or involving "all matters") before triggering the ex parte communication prohibition. The ABA has explained this issue.

By prohibiting communication about the subject matter of the representation, the Rule contemplates that the matter is defined and specific, such that the communicating lawyer can be placed on notice of the subject of representation. Thus, if the representation is focused on a given matter, such as one involving past conduct, and the communicating lawyer is aware of this representation, she may not communicate with the represented person absent consent of the representing lawyer. However, where the representation is general -- such as where the client indicates that the lawyer will represent her in all matters --
the subject matter lacks sufficient specificity to trigger the operation of Rule 4.2.

Similarly, retaining counsel for "all" matters that might arise would not be sufficiently specific to bring the rule into play. In order for the prohibition to apply, the subject matter of the representation needs to have crystallized between the client and the lawyer. Therefore, a client or her lawyer cannot simply claim blanket, inchoate representation for all future conduct whatever it may prove to be, and expect the prohibition on communications to apply. Indeed, in those circumstances, the communicating lawyer could engage in communications with the represented person without violating the rule.

ABA LEO 396 (7/28/95) (emphases added). Thus, only a fairly specific representation will prevent an adversary from ex parte communications.

Creating such a relationship carries with it all of the duties that an attorney-client relationship brings -- including duties of loyalty, confidentiality (especially if the representation is considered a joint representation with the company) and other duties.

Under ethics and privilege rules, a lawyer jointly representing multiple clients in the same matter often cannot keep secrets from any of his/her jointly represented clients (absent an agreement to the contrary, entered into after full disclosure). In addition, a lawyer establishing an attorney-client relationship with a company employee cannot be adverse to that employee on any matter, absent a valid prospective consent or consent at the time. If a lawyer jointly represents multiple clients who eventually become adverse to one another, the lawyer frequently must abandon representation of all of the jointly represented clients.
Thus, the disadvantages of these rules might well outweigh the advantage of claiming a relationship with employees to place them off-limits to ex parte contacts from an adversary.

One New York state court took an extreme position in this context -- finding that Morgan Lewis lawyers had violated New York's ban on in-person solicitation by offering to represent current and former employees of their corporate client.

- **Rivera v. Lutheran Med. Ctr., 866 N.Y.S.2d 520, 525, 526 (N.Y. Sup. Ct. 2008)** (in an opinion by the Supreme Court of New York, Kings County, Judge Michael A. Ambrosio, analyzing defendant hospital's law firm Morgan Lewis's conduct in soliciting as separate clients of the firm: two executives of the defendant hospital; one current lower level employee who was involved in the alleged sexual harassment; two other current lower level hospital employees, apparently not involved in the incident; two former hospital supervisory employees; recognizing that the first three individuals would be considered "parties" under New York's ex parte communications rule, and therefore not "subject to informal interviews by plaintiff's counsel"; explaining that the last four witnesses would have been fair game for ex parte communications from the plaintiff's lawyer; "These [four] witnesses are not parties to the litigation in any sense and there is no chance that they will be subject to any liability. They were clearly solicited by Morgan Lewis on behalf of LMC to gain a tactical advantage in this litigation by insulating them from any informal contact with plaintiff's counsel. This is particularly egregious since Morgan Lewis, by violating the Code in soliciting these witnesses as clients, effectively did an end run around the laudable policy consideration of Niesig in promoting the importance of informal discovery practices in litigation, in particular, private interviews of fact witnesses. This impropriety clearly affects the public view of the judicial system and the integrity of the court."; ultimately disqualifying Morgan Lewis from representing the four witnesses, because of the firm's improper solicitation of the witnesses, and reporting Morgan Lewis to the bar's Disciplinary Committee).

Thus, lawyers hoping to preclude ex parte communications by creating an actual attorney-client relationship with employees or former employees should definitely keep the "big picture" in mind.
Best Answer

The best answer to (a) is NO; the best answer to (b) is NO; the best answer to (c) is PROBABLY NO.
Request to Avoid Ex Parte Communications

Hypothetical 26

You are the only in-house lawyer at a consulting firm with several hundred employees. A former employee just sued your company for racial discrimination, and you suspect that her lawyer will begin calling some of your company's current and former employees to gather evidence. You would like to take whatever steps you can to protect your company from these interviews.

(a) May you send a memorandum to all current employees "directing" them not to talk with the plaintiff's lawyer if she calls them?

NO (PROBABLY)

(b) May you send a memorandum to all current employees "requesting" them not to talk with the plaintiff's lawyer if she calls them?

YES

(c) May you send a memorandum to all former employees "requesting" them not to talk with the plaintiff's lawyer if she calls them?

MAYBE

(d) May you advise employees that they are not required to talk to the plaintiff's lawyer if the lawyer calls them?

YES (PROBABLY)

Analysis

Introduction

The ABA permits some defensive measures as an exception to the general prohibition on lawyers providing any advice to unrepresented persons.

A lawyer shall not . . . request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

ABA Model Rule 3.4(f) (emphases added).

The Rule seems self-evident, although the ABA added a small comment.

Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.

ABA Model Rule 3.4 cmt. [4] (emphasis added). The ABA has not reconciled its use of the term "request" in the black-letter rule and its use of the term "advise" in the comment. The former seems weaker than the latter, and the distinction might make a real difference in the effect that the lawyer's communication has on the client employee/agent. An employee receiving an ex parte contact from an adversary might think that she can ignore her employer's lawyer's "request" to refrain from talking to the adversary's lawyer, but might feel bound if the employer's lawyer has "advised" her not to give information to the adversary's lawyer.

The Restatement addresses this issue as part of its ex parte contact provision. The Restatement uses the "request" standard, and even specifically warns that lawyers may run afoul of other rules if they "direct" their client employees/agents not to speak with an adversary's lawyer. The Restatement also answers a question that the ABA Model Rules leave open -- whether lawyers' requests that their client employees/agents not give information to the adversary limit in any way the adversary's lawyers from trying to obtain such information. The Restatement indicates that it does not.
A principal or the principal's lawyer may inform employees or agents of their right not to speak with opposing counsel and may request them not to do so (see § 116(4) & Comment e thereto). In certain circumstances, a direction to do so could constitute an obstruction of justice or a violation of other law. However, even when lawful, such an instruction is a matter of intra-organizational policy and not a limitation against a lawyer for another party who is seeking evidence. Thus, even if an employer, by general policy or specific directive, lawfully instructs all employees not to cooperate with another party's lawyer, that does not enlarge the scope of the anti-contact rule applicable to that lawyer.


Most states take this approach.

- See, e.g., New York City LEO 2009-5 (2009) ("In civil litigation, a lawyer may ask unrepresented witnesses to refrain from voluntarily providing information to other parties to the dispute. A lawyer may not, however, advise an unrepresented witness to evade a subpoena or cause the witness to become unavailable. A lawyer also may not tamper with the witness (e.g., bribe or intimidate a witness to obtain favorable testimony for the lawyer's client). And while lawyers generally are prohibited from rendering legal advice to unrepresented parties, they may inform unrepresented witnesses that they have no obligation to voluntarily communicate with others regarding a matter in dispute and may suggest retention of counsel." (emphasis added)); "The Committee concludes that a lawyer may ask an unrepresented witness to refrain from providing information voluntarily to other parties. We are persuaded in part by the absence of any explicit rule to the contrary in the Code, and the absence of any specific prohibition in the new Rules, even though the New York State Bar Association recommended Proposed Rule 3.4(f), which specifically would have prohibited such conduct. We do not know why the Appellate Divisions declined to adopt Proposed Rule 3.4(f), but we view the omission as a factor reinforcing our conclusion that it would be inappropriate to imply a restriction nowhere found on the face of the Rule, as approved.""); "Nor do we believe that the administration of justice would be prejudiced by a lawyer's request that a non-party witness refrain from communicating voluntarily with the lawyer's adversary. Even when a witness complies with such a request, the adverse party still may subpoena the witness to compel testimony or production of documents. And, a lawyer, of course, is prohibited from assisting a witness in evading a subpoena. Thus, an adverse party may compel the unrepresented witness to provide information through available discovery procedures even if that witness refuses to voluntarily speak with that party's lawyer."; "[T]his rule does not
prohibit a lawyer from advising an unrepresented witness that she has no obligation to speak voluntarily with the lawyer’s adversary.”; "The Rules also do not prohibit a lawyer from asking an unrepresented witness to notify her in the event the witness is contacted by the lawyer’s adversary. So long as the lawyer does not suggest that the witness must comply with this request, we believe it does not unduly pressure the witness, especially when accompanied by the suggestion that the witness consider retaining her own counsel.”).

Lawyers going beyond this fairly narrow range of permitted activity risk court sanctions or bar discipline.

- **Castaneda v. Burger King Corp.,** No. C 08-4262 WHA (JL), 2009 U.S. Dist. LEXIS 69592, at *21-22, *22-23, *23 (N.D. Cal. July 31, 2009) (finding that defense lawyers could engage in ex parte communications with class members before class certification; "Plaintiffs should provide Defendants with contact information for the putative class members, as required by Rule 26, as part of their initial disclosures, since the putative class members are potential witnesses. Both parties are permitted to take pre-certification discovery, including discovery from prospective class members. Plaintiffs’ counsel have also allegedly advised putative class members not to talk to Defendants’ counsel. If true, this would be a violation of pertinent codes of professional conduct.”; "Plaintiffs’ counsel have no right to be present at any contact between Defendants’ counsel and putative class members. It is Plaintiff's burden to show abusive or deceptive conduct to justify the court’s cutting off contact, and they fail to do so. This is not an employment case, where the Defendant may threaten or imply a threat to the job of a plaintiff who cooperates with Plaintiffs' counsel or refuses to cooperate with Defendants’ counsel. This is an ADA access case, not an employment case; Defendants have no power over these prospective plaintiffs.”; "Defendant counsel must identify themselves and advise contacts that they need not speak with them if they do not want to do so. Defendants are admonished not to inquire into the substance of communications between putative plaintiffs and class counsel.”).

- **Cleary Gottlieb Steen & Hamilton LLP v. Kensington Int'l Ltd.,** 284 F. App’x 826 (2d Cir. 2008) (unpublished opinion) (affirming a district court’s order reprimanding the law firm of Cleary Gottlieb and ordering Cleary Gottlieb to pay $165,000 as a sanction for one of Cleary Gottlieb's lawyer’s (a member of the law firm’s executive committee based in Paris) efforts to persuade a potentially damaging witness from providing testimony against Cleary’s client in the Congo; [in the district court opinion, **Kensington Int'l Ltd. v. Republic of Congo,** No. 03 Civ. 4578 (LAP), 2007 U.S. Dist. LEXIS 63115, at *8 (S.D.N.Y. Aug. 23, 2007), the court noted that the Cleary Gottlieb lawyer advised the
witness that he would be taking a great risk by appearing at a deposition without a lawyer, but that Cleary Gottlieb could not represent him at the deposition, and that the Cleary Gottlieb lawyer had told the witness that he should not testify "out of patriotism" (citation omitted); the district court noted that the witness testified that the Cleary Gottlieb lawyer "told me as such not to go" to the deposition, 2007 U.S. Dist. LEXIS 63115, at *8 (citation omitted); the district court also ordered that the formal reprimand "should be circulated to all attorneys at Cleary," 2007 U.S. Dist. LEXIS 63115, at *34).

- In re Jensen, 191 P.3d 1118, 1128 (Kan. 2008) (analyzing a situation in which a father's lawyer contacted the client's former wife's new husband's employer to ask about the new husband's income; ultimately concluding that the lawyer violated Kansas's Rule 3.4(a) and 8.4(a) by advising the new husband's employer that he did not have to appear in court, although the employer was under a subpoena to appear in court; also finding that the lawyer's statement that the employer did not have to appear in court violated Rule 4.1(a); rejecting a Bar panel's conclusion that the lawyer also violated Rule 4.3 by not explaining to the new husband's employer what role is was playing; explaining that the Bar had not established that "it was highly probable that Jensen [husband's lawyer] should have known of" the witness's confusion; ultimately issuing a public censure of the lawyer).

(a) The ABA and state ethics rules only allow a lawyer to "request" that current client employees not provide information to the corporation's adversaries. The Restatement explains that "[i]n certain circumstances, a direction to do so could constitute an obstruction of justice or a violation of other law." Restatement (Third) of Law Governing Lawyers § 100 cmt. f (2000) (emphasis added).

(b) The ABA, the Restatement and state ethics rules allow company lawyers to take this step. Another option is for the company's lawyers to advise company employees that they are free to meet with lawyers for the company's adversary, but that the company lawyers would like to attend such meetings.

(c) The ABA and Restatement provisions allow such "requests" only to current company employees and agents. To the extent that a former employee does not count as a company agent, presumably a lawyer could not request former
employees to refrain from providing information to the company's adversary. Some states explicitly allow company lawyers to make similar requests to "former" employees or agents. Virginia Rule 3.4(h)(2).

(d) Lawyers may find themselves facing another ethics rule if they do more than "request" that an employee or former employee not voluntarily provide facts to an adversary. For instance, lawyers advising an employee or former employee that they do not have to speak with the adversary's lawyer almost surely are giving legal advice to an unrepresented person.

The ABA Model Rules provide that

The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

ABA Model Rule 4.3. A comment provides further guidance.

The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur.

ABA Model Rule 4.3 cmt. [2].

Lawyers should be very careful to document the type of direction they give to any current or former employee who might misunderstand the "request," or turn on the company and its lawyer. To the extent that the witness incorrectly remembers that he
or she was "told" by the company's lawyer not to provide information, the lawyer might face court or bar scrutiny.

**Best Answer**

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