ATTORNEY ETHICS TRAPS IN USING EMAIL IN LAW PRACTICE
First Run Broadcast: December 6, 2012
1:00 p.m. E.T./12:00 p.m. C.T./11:00 a.m. M.T./10:00 a.m. P.T. (60 minutes)

This program will highlight many ways in which the use of email from the beginning to the end of an attorney-client relationship raises new (and sometimes worrisome) ethical issues. Most law firms have web sites with attorney biographies and email addresses. What are the ethical issues if you get an email from someone with an interest that conflicts with a client? What are your duties to inform your existing client? Many attorneys send law updates or regular newsletters to both existing and former or non-active clients. Does this raise conflict issues if former clients think they still have an attorney-client relationship with you? In the pressures of the day, email is sometimes misdirected, sent to adversaries when it was meant to be sent to clients. What duties do recipients and senders have in this context? These and many other fascinating ethical issues arise when you consider the way email has permeated law practice. This program will provide you with a practical guide to ethical issues in using email in your law practice.

- Unsolicited email over the web and its impact on the formation of an attorney-client relationship – and the duty to inform existing clients of email from potential adversaries
- Emailing law firm newsletters and law updates to non-active or former clients, its impact on an attorney-client relationship and conflicts issues
- Inadvertent email communications – when you must refrain from reading, when you must inform adversaries, and when you can read the whole communication
- Ex parte communications via email and the “reply all” function
- Ethical issues in meta-data in email
- Transmission of email and the attorney-client privilege – using public computer systems, the systems of adversaries or servers maintained by third parties and its impact on the privilege and confidentiality

Speaker:

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THE ETHICS OF EMAIL AND SOCIAL MEDIA

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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Introduction

Starting in the 1990s and accelerating rapidly since then, all of us have increasingly used electronic forms of communication, such as email, texting, etc. More recently, folks have communicated more widely through social media such as Facebook, blogs and tweets. These new forms of communication dramatically change the legal and ethical landscape in which lawyers practice.

Substance

The substance of electronic communications differs from our previous ways of communicating with each other. Electronic communications present an unprecedented combination of our two traditional means of communication. From even before the dawn of civilization, humans communicated orally. This type of communication involves words, but also includes body language, voice inflection and emotion. We traditionally have expected this type of communication to be fleeting, and therefore have tended to be less careful with its substance. Our instinct would often prevent us from writing down and therefore permanently memorializing the sort of things we might say to each other in a private conversation. This traditional approach manifests itself in some continuing rules that upon reflection make little sense. For instance, many states continue to prohibit one participant in a telephone call from recording the conversation, even though there could be no expectation of confidentiality.

The other tradition of human communication began later. We began to write each other, first with clay tablets and eventually with all the other forms of impersonal
written communications. We expect these to last, so in most (although not all) situations we tend to be more careful when we write.

Electronic communications combine these two traditions, in a way that significantly affects lawyers and their clients. Emails and other forms of electronic communications combine the informality of the oral tradition with the permanence of the written tradition. We began to use "smiley faces" to indicate a joke -- which would have been clear if we had smiled while saying something face to face, or used a voice inflection to indicate a joke if talking on the telephone. We react defensively if someone sends an all-caps email, because it seems like the sender is yelling at us.

For lawyers and their clients, electronic communications are enormously significant. They capture in permanent form (and therefore make vulnerable to discovery) the type of unguarded communications that would previously have been unavailable. For some unknown psychological reason, people communicate electronically in a way that they would never communicate orally. There is one story (perhaps apocryphal) that one email included an assurance that "I would never put this in writing." Some electronic communications that might have seemed funny at the time can appear sinister in retrospect. To make matters worse, the way we communicate electronically gives us little time to reflect, meaning that these communications often lack the sort of self-control that we would use when communicating in some other written form. Yet electronic communications last forever. In fact, they theoretically can last longer than other forms of written communication -- because they cannot easily be deleted once sent, and therefore cannot be destroyed like a single letter, a diary, or a box of historical documents.
For these reasons, nearly every important trial or political event has involved the exposure of embarrassing or damaging electronic communications. Those are the first objects of an adversary's discovery requests, because they tend to be more frank, self-critical or easily misinterpreted.

**Ease of Transmission**

Second, the ease of transmission is dramatically different for electronic communications. It often is nearly as easy to send an email or other electronic communication to numerous recipients as it is to send the email to one recipient.

In some situations, this widespread transmission is intentional. This has changed the way we practice law. Lawyers compulsively check emails. The ease of transmission has also affected the role of lawyers in their clients' affairs. For instance, one court explained that the difficulty of determining whether an in-house lawyer has acted in a primarily legal (rather than primarily business) role has been exacerbated by the advent of e-mail that has made it so convenient to copy legal counsel on every communication that might be seen as having some legal significance at some time regardless of whether it is right for legal analysis.


Because of the attorney-client privilege's fragility, the ease of transmission also makes it more likely that clients will waive their privilege protection through widespread circulation of privileged electronic communications.

The ease of transmission can also result in the accidental transmission of electronic communications. To be sure, it has always been possible to accidentally communicate to the wrong person. One newspaper reminded readers that General
Robert E. Lee's battle plans were accidentally disclosed to Union General George McClellan just before the Battle of Antietam.

However, electronic communications have dramatically exacerbated both the frequency and the scope of these accidents. Such transmissions can disclose the substance of communications to unintended recipients, and also affect the attorney-client privilege.

A few examples serve as frightening reminders.

- Krista Gjestland, Officials say system error caused dismissal emails to be sent to entire student body. Ypsilanti Courier, May 5, 2012, http://heritage.com/articles/2012/05/09/ypsilanti_courier/news/doc4fa582ffe5b60239294556.prt ("The dismissal emails sent to students read: 'As a result of your Winter 2012 academic performance, you have been dismissed from Eastern Michigan University,' and then goes on to explain the dismissal appeals process.").


- Karen Sloan, Baylor Overshares About Incoming Law Class. Nat'l L.J., Apr. 4, 2012, http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202547961362&Baylor_overshares_about_incoming_law_class&sreturn=20120729142516 ("File this one under 'Whoops!' Incoming students at Baylor University School of Law will perhaps know more than they ought to about their future classmates, because administrators accidentally sent them a spreadsheet detailing each of their scores on the Law School Admission Test, undergraduate grade-point averages and the amounts of any scholarship awards. The data also included prospective student's names, addresses, telephone numbers, undergraduate institutions and ethnicities. The spreadsheet was attached to an e-mail the admissions office sent out on April 3 to inform the class about an extension of the deadline for sending tuition deposits, said Frank Raczkiewicz, vice president of media communications for Baylor University. The deadline to pay the deposit was April 1, but a computer glitch prompted the law school to extend it until April 6, he said. About seven hours after the e-mail was sent, the school sent a second
message apologizing for the mistake, Raczkiewicz said, asking that recipients act professionally and delete the information from their computers. "Last night we sent out an e-mail to a small group and apologized to them for the unfortunate mistake," he said on April 4. "Fortunately, there were no Social Security numbers or anything else like that in the e-mail." The e-mail was sent to 400 applicants accepted by the law school, Raczkiewicz said.

- Ian Thoms, Skadden’s Flubs Shows Potential Pitfalls Of Securities and Exchange Commission E-Filing, Law360, Mar. 13, 2012, http://www.law360.com/securities/articles/318435/skadden-s-flub-shows-potential-pitfalls-of-sec-e-filing ("When Skadden Arps Slate Meagher & Flom LLP jumped the gun earlier this month and announced a highly anticipated land deal for its client Wynn Resorts Limited before the deal was actually finalized, other firms probably breathed a sigh of relief -- but as experts warn, it could just as easily have been them. Skadden was preparing in early March to announce the deal for Wynn, prepping press material and readying regulatory filings, when someone -- a clerk, the firm says -- prematurely posted a disclosure online, prompting Wall Street to rejoice and begin buying up shares of the casino company. Skadden quickly admitted its mistake and vowed never to do it again, but the blunder highlights how easy it is to make an error like this, especially at the dawn of the e-filing era, experts say. ‘A lot of times, no one is looking at these things before they go out,’ said Tim Loughran, professor of finance at the University of Notre Dame’s Mendoza College of Business. ‘It’s kind of sad. There’s a lot of little mistakes going on. This is a big one.’ On March 2, Skadden filed a Form 8-K with the United States Securities and Exchange Commission (SEC), announcing that Wynn had sealed the deal with the government of Macau to use 51 acres of land for a planned 2,000-room casino and resort. The filing satisfied the requirement that Wynn, like all public companies, notify shareholders whenever a material event occurs. The only problem was Macau’s government hadn’t, and still hasn’t, actually approved the deal. Wynn admitted the 8-K was a mistake about two hours after it was filed, and Skadden promptly followed with a brief statement accepting blame for the error. ‘We learned earlier today that a clerk in our filing department inadvertently made an unauthorized filing with respect to Wynn Resorts Limited,’ the firm said. ‘We apologize that this mistake occurred. We have taken steps to rectify the situation as quickly as possible and are reviewing what occurred to ensure that it cannot happen in the future.’ The mistake was compounded by the fact that it was immediately made public by the SEC’s online filing procedures -- the Electronic Data Gathering, Analysis and Retrieval, or EDGAR, system. The SEC accepts only online filings now, shunning snail mail in most instances, and it posts nearly all documents as soon as it receives them. With no safety net built in at the SEC’s end, companies and their law firms must be especially careful before submitting documents. They also need to avoid the temptation to pawn SEC filings off on associates or staff members without giving them a
proper review, law professors said. 'These types of things reflect worse on the law firm,' Loughran said. 'It’s sloppy.'

- Tom Wagner, Babette’s errant email cripples German parliament, Reuters, Jan. 26, 2012, available at http://www.reuters.com/article/2012/01/26/us-germany-emails-idUSTRE80P14A20120126 ("The German parliament’s email system was hampered for several hours for more than 4,000 staffers and deputies when hundreds of workers responded to an errant email sent by one staffer named ‘Babette’ to all 4,032 co-workers. The flood of emails began when 'Babette’ accidentally replied to ‘all’ on the Bundestag email list with a short answer to a colleague: ‘Please bring me a copy of the new directory.’ Their exchange quickly multiplied when hundreds of colleagues responded with comments ranging from please ‘remove my name from your list’ to 'I'd like to take this opportunity to say hello to my mother.”

- Christopher S. Stewart, New York Times Newspaper Trips Twice With Mistaken Blast Email, Wall St. J., Dec. 29, 2011, at B5 ("The New York Times conceded on Wednesday that it mistakenly sent an email blast to millions of readers with a surprising message about canceled print subscriptions -- but not before erroneously blaming computer spammers. The email, which was originally intended for 300 subscribers, ended up going out to 8.6 million people, according to the Times. In it, readers were asked to ‘reconsider’ their decision to cancel their subscriptions and offered an ‘exclusive rate of 50 percent off for 16 weeks.’ The paper's phone lines were suddenly overloaded. The message led to an immediate uproar online, with some speculating that the Times's database had been hacked. In an emailed statement with the subject line 'Spam message,' a spokeswoman for the Times wrote, ‘If you received an email today about canceling your New York Times subscription, ignore it. It's not from us.’ A couple hours later, however, the Times reversed itself, saying the email was accidentally sent by the paper and not by a spammer. The Times, the flagship newspaper of New York Times Co., wouldn’t comment on why it took so long for it to figure out that it was its own error.”).

- Jenna Johnson, 200 students have the shortest GWU career ever; Erroneous e-mail 'welcomes' rejected early-decision applicants, Wash. Post, Feb. 18, 2010, at B05 ("About 200 students who had sought early-decision admission to George Washington University received an e-mail last week that proclaimed ‘Congratulations’ and welcomed them to the Class of 2014 -- for several hours. Then came every college applicant’s nightmare. ‘This afternoon, you received an e-mail from me titled "Important GW Information,”’ wrote Kathryn Napper, executive dean of undergraduate admissions. ‘Unfortunately, this e-mail was sent to you in error. We are truly sorry for this confusion regarding your application to GW.’").
Of course, courts deal with such accidental transmissions when they impact someone’s legal rights. Some courts have noted this development with humorous comments.

- Order at 1, Crockett Capital Corp. v. Inland American Winston Hotels, Inc., Civ. A. No. 08-CVS-000691 (N.C. Super. Ct. June 25, 2009) ("Technology multiplies the opportunities for man to do dumb things and increases the speed at which he can do them.").


**Volume**

Third, the volume of electronic communications has become a staggering torrent. People send millions (if not billions) of electronic communications to each other every day.

This has resulted in dramatically increased discovery costs, among other things. It would be easy to attribute several federal rules changes (including Federal Rule of Evidence 502) to this increased volume of potentially discoverable communications.
Beginning of an Attorney-Client Relationship

Hypothetical 1

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

(a) May you tell your corporate client about the email?

YES (PROBABLY)

(b) Will you be able to represent your corporate client if the would-be plaintiff files a lawsuit?

YES (PROBABLY)

Analysis

Electronic communications can affect the creation of an attorney-client relationship. Lawyers who communicate with someone online can create an attorney-client relationship if the lawyer receives confidences and provides advice. Even this sort of informal communication can trigger all of the lawyer's traditional duties to clients, as well as render the lawyer vulnerable to malpractice for any improper advice.

Most articles about Facebook, blogs and other forms of social media warn lawyers not to accidentally establish an attorney-client relationship by communicating with a potential client using such media. Any sort of a dialogue between a lawyer and a potential client might trigger a relationship that a court or bar could find sufficient to trigger all of the lawyer's responsibilities that come with representing a client.
This issue becomes more complicated if there has been a unilateral communication from a potential client to a lawyer.

All lawyers know that they must preserve their clients' confidences. ABA Model Rule 1.6(a). The question here is whether lawyers must preserve the confidences they learn from prospective clients, even if a full attorney-client relationship never develops.

This scenario also implicates the conflicts rules, which supply a fairly easy but seemingly harsh answer. Nationwide, bars have repeatedly held that a lawyer who learns confidential information while interviewing a prospective client cannot (absent consent) later be adverse to the prospective client, even if no attorney-client relationship ever arises.

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

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

This issue becomes more complicated if the information obtained from the prospective client is of interest to an existing client. In that situation, the possible duty to keep the prospective client’s information secret runs directly contrary to what otherwise would be a clear fiduciary duty to reveal the material information to the existing client. If a lawyer received information "on the street" that a plaintiff was about to file a lawsuit against the lawyer’s client, fiduciary duties probably would require the lawyer to immediately advise the client. Do these fiduciary duties apply with equal force to an unsolicited email from a prospective client? Most bars answer in the negative.

**State Bar Opinions**

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

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

\(^1\) N.Y. City LEO 2001-1 (3/1/01) (essentially adopting the approach of ABA Model Rule 1.18; "Information imparted in good faith by a prospective client to a lawyer or law firm in an e-mail generated in
Information imparted in good faith by a prospective client to a lawyer or law firm in an e-mail generated in response to an internet web site maintained by the lawyer or law firm where such information is adverse to the interests of the prospective client generally would not disqualify the law firm from representing another present or future client in the same matter. Where the web site does not adequately warn that information transmitted to the lawyer or firm will not be treated as confidential, the information should be held in confidence by the attorney receiving the communication and not disclosed to or used for the benefit of the other client even though the attorney declines to represent the potential client.
N.Y. City LEO 2001-1 (3/1/01). In discussing law firms’ websites, the New York City Bar indicated that

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

Id. The New York City Bar assured lawyers that a law firm website disclaimer which prominently and specifically warns prospective clients not to send any confidential information in response to the web site because nothing will necessarily be treated as confidential until the prospective client has spoken to an attorney who has completed a conflicts check -- would vitiate any attorney-client privilege claim with respect to information transmitted in the face of such a warning.

Id. (footnote omitted).

Following the New York City Bar’s lead, bars in several states adopted the same basic approach -- finding that a lawyer receiving an uninvited email from a potential client had no duty of confidentiality.

- San Diego County LEO 2006-1 (2006) (addressing the ethical duties of a lawyer who receives an unsolicited email from a potential client, which includes harmful facts about the potential client; noting initially that the hypothetical lawyer did not have a website and did not advertise, although the state bar published her email address; concluding that: (1) “Vicky Victim’s [prospective client] unsolicited e-mail is not confidential. Private information received from a non-client via an unsolicited e-mail is not required to be held as confidential by a lawyer, if the lawyer has not had an opportunity to warn or stop the flow of non-client information at or before the communication is
delivered."  (2) "Lana [lawyer who received the unsolicited e-mail] is not precluded from representing Henry [other client whom the lawyer had already begun to represent when she received the unsolicited e-mail, and who has a claim against the potential client] and may use non-confidential information received from Vicky in that representation."  (3) "If Lana cannot represent Henry, she cannot accept representation of Vicki [sic] Victim since Lana had already received confidential information from Henry material to the representation."; explaining that "Vicky's admission that she had had 'a few drinks' prior to the accident which injured Henry is relevant and material to Henry's case and therefore constitute[s] a 'significant' development which must be communicated to Henry"; explaining that it would be a "closer question" if the lawyer "had placed an e-mail address at the bottom of a print advertisement for legal services or in a yellow page telephone listing under an 'attorney' category, without any disclaimers"; noting that in such a circumstance there would be an "inference" that "private information divulged to the attorney would be confidential"; a dissenting opinion argues that "I would err on the side of the consumer and find that there is a reasonable expectation of confidentiality on behalf of the consumer sending an e-mail to an attorney with the information necessary to seek legal advice").

- Nevada LEO 32 (3/25/05) (holding that a prospective client generally cannot create an attorney-client relationship through a "unilateral act" such as "sending an unsolicited letter containing confidential information to the attorney"; warning that such a relationship might arise if a lawyer solicits such information; explaining that "[a]n attorney who advertises or maintains a web-site may be deemed to have solicited the information from the prospective client, thereby creating a reasonable expectation on the part of the prospective client that the attorney desires to create an attorney-client relationship"; "Most attorneys have addressed this issue by posting disclaimers to the effect that nothing contained on the web-site or communicated through it by the prospective client will create an attorney-client relationship. This should be effective, since no one responding to the web-site could -- in the face of such an express disclaimer -- reasonably believe that an attorney-client relationship had been created."; explaining that "[i]t is presently unclear, however, whether the duty of confidentiality also attaches to communications which are unsolicited where no attorney-client relationship (either express or implied) exists. A recent opinion of the State Bar of Arizona ethics committee states that unsolicited communications to an attorney (not in response to an advertisement or web-site) are not confidential, since the sender could not have a reasonable expectation of privacy in the communication. Arizona State Bar Committee on the Rules of Professional Conduct, Op. No. 02-04. The opinion contains a well-reasoned dissent which argues otherwise, however."; noting that Nevada was considering a new rule based on ABA Model Rule 1.18, which deals with such a situation).
- California LEO 2005-168 (2005) (addressing the ramifications of a law firm’s receipt of an unsolicited email from a woman seeking a divorce lawyer; noting that the law firm’s web site included the statement: "I agree that I am not forming an attorney-client relationship by submitting this question. I also understand that I am not forming a confidential relationship."); explaining that the law firm already represented the husband in domestic relations matters; holding that the law firm’s web site’s warnings "were not adequate to defeat her reasonable belief that she was consulting Law Firm for the purpose of retaining Law Firm"; "Wife's agreement that she would not be forming a 'confidential relationship' does not, in our view, mean that Wife could not still have a reasonable belief that Law Firm would keep her information confidential. We believe that this statement is potentially confusing to a lay person such as Wife, who might reasonably view it as a variant of her agreement that she has not yet entered into an attorney-client relationship with Law Firm. . . . Without ruling out other possibilities, we note that had Wife agreed to the following, she would have had, in our opinion, no reasonable expectation of confidentiality with Law Firm: 'I understand and agree that Law Firm will have no duty to keep confidential the information I am now transmitting to Law Firm.' Another way in which Law Firm could have proceeded that would have avoided the confidentiality issue entirely would have been to request from web site visitors only that information that would allow the firm to perform a conflicts check." (footnote omitted); "A lawyer who provides to web site visitors who are seeking legal services and advice a means for communicating with him, whether by e-mail or some other form of electronic communication on his web site, may effectively disclaim owing a duty of confidentiality to web-site visitors only if the disclaimer is in sufficiently plain terms to defeat the visitors' reasonable belief that the lawyer is consulting confidentially with the visitor. Simply having a visitor agree that an 'attorney-client relationship' or 'confidential relationship' is not formed would not defeat a visitor's reasonable understanding that the information submitted to the lawyer on the lawyer's web site is subject to confidentiality. In this context, if the lawyer has received confidential information from the visitor that is relevant to a matter in which the lawyer represents a person with interests adverse to the visitor, acquisition of confidential information may result in the lawyer being disqualified from representing either.").

- Arizona LEO 02-04 (9/2002) ("An attorney does not owe a duty of confidentiality to individuals who unilaterally e-mail inquiries to the attorney when the e-mail is unsolicited. The sender does not have a reasonable expectation of confidentiality in such situations. Law firm websites, with attorney e-mail addresses, however, should include disclaimers regarding whether or not e-mail communications from prospective clients will be treated as confidential.").
In 2007, the Massachusetts Bar took a dramatically different approach.\(^2\) In direct contrast to the New York City analysis, the Massachusetts Bar indicated that a lawyer could control the flow of information -- by using a click-through disclaimer.

\begin{quote}
[\textit{W}hen an e-mail is sent using a link on a law firm's web site, the firm has an opportunity to set conditions on the flow of information. Using readily available technology, the firm may require a prospective client to review and "click" his assent to terms of use before using an e-mail link. Such terms of use might include a provision that any information communicated before the firm agrees to represent the prospective client will not be treated as confidential. Or the terms of use could provide that receipt of information from a
\end{quote}

\(^2\) Massachusetts LEO 07-01 (5/23/07) (addressing a situation in which a company seeking to retain a lawyer to sue another company used a law firm's web site biography link to e-mail one of the firm's lawyers and provide information about its claim; noting that the lawyer who received the e-mail declined to represent the company after determining that the law firm represented the proposed target on unrelated matters; explaining that "\textit{W}hen a visitor to Law Firm's web site uses the link to send an e-mail, there is no warning or disclaimer regarding the confidentiality of the information conveyed"; concluding that the company's e-mail "did not result in the formation of an attorney-client relationship," but nevertheless created a duty of confidentiality -- which arises "when the lawyer agrees to consider whether a client-lawyer relationship shall be established" (quoting Massachusetts Rule 1.6); explaining that "\textit{I}f ABC Corporation had obtained the lawyer's e-mail address from the internet equivalent of a telephone directory, we would have no hesitation in concluding that the lawyer had not 'agreed to consider' whether to form an attorney-client relationship"; ultimately concluding that "\textit{A} prospective client, visiting Law Firm's website, might reasonably conclude that the Firm and its individual lawyers have implicitly 'agreed to consider' whether to form an attorney-client relationship"; explaining that "\textit{W}hen an e-mail is sent using a link on a law firm's web site, the firm has an opportunity to set conditions on the flow of information. Using readily available technology, the firm may require a prospective client to review and 'click' his assent to terms of use before using an e-mail link. Such terms of use might include a provision that any information communicated before the firm agrees to represent the prospective client will not be treated as confidential. Or the terms of use could provide that receipt of information from a prospective client will not prevent the firm from representing someone else in the matter."; also concluding that the law firm might be prohibited from representing the target in the action being considered by the company seeking a lawyer, because the law firm's obligations to preserve the confidences of the company which sent the e-mail might "materially limit" the law firm's ability to represent the target -- depending on the substance of the e-mail sent to the Law Firm; "the information that ABC disclosed in the e-mail may have little long-term significance, especially once ABC has made its claim known to XYZ"; explaining that "\textit{O}n the other hand, ABC's e-mail may contain information, such as comments about ABC's motives, tactics, or potential weaknesses in its claim, that has continuing relevance to the prosecution and defense of ABC's claim. In that case, the obligation of the lawyer who received ABC's email to maintain the confidentiality of its contents would materially limit his ability to represent XYZ, with the result that both the lawyer and the Law Firm would be disqualified."; explaining that "the Committee believes that a law firm can avoid disqualification by requiring prospective clients to affirmatively indicate their consent to appropriate terms of use before using an e-mail link provided on the firm's web-site").
prospective client will not prevent the firm from representing someone else in the matter.

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

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

Id.

The 2007 Massachusetts legal ethics opinion did not start a trend. Since then, other states have followed the original New York City Bar approach in finding that a lawyer had no duty of confidentiality upon receiving an unsolicited email from a prospective client.

- Wisconsin LEO EF-11-03 (7/29/11) ("A person who sends a unilateral and unsolicited communication has no reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship. Consequently, the duties a lawyer owes prospective clients are not triggered by an unsolicited e-mail communication that 'the lawyer receives out of the blue from a stranger in search of counsel, as long as the lawyer did not do or publish anything that would lead reasonable people to believe that they could share private information with the lawyer without first meeting [the lawyer] and establishing a lawyer-client relationship.' To avoid creating ethical duties to a person in search of counsel, a lawyer who places advertisements or solicits email communications must take care that these advertisements or solicitations are not interpreted as the lawyer's agreement that the lawyer-client relationship is created solely by virtue of the person's response and that the person's response is confidential. The most common approach is the use of disclaimers. These disclaimers must have two separate and clear warnings: that there is no lawyer-client relationship and that the e-mail communications are not confidential. Moreover, these warnings should be
short and easily understood by a layperson. Use of nonlawyer staff to screen or communicate with prospective client will not relieve a lawyer of responsibilities arising under SCR 20:1.18.” (citation omitted); provide several examples of appropriate disclaimer language at the end of the opinion).

- New Hampshire LEO 2009-2010/1 (6/2010) (analyzing a lawyer's duty to prospective clients, under New Hampshire Rule 1.18, which is different from the ABA Model Rule 1.18; "Before the advent of the information superhighway, law firms had an easier time controlling the flow of potentially disqualifying information. Initial interviews with prospective clients were conducted in person or over the phone. Lawyers could more easily set the ground rules. They could control the prospective clients' expectations that the lawyer would or could maintain the confidentiality of any information disclosed during the initial consultation, and discourage the unilateral disclosure of compromising confidences by limiting disclosure to information needed to complete a conflicts check and confirm the lawyer's subject matter competence."); "Sending an unsolicited email is a unilateral act. The information that a person puts into an unsolicited email should not trigger confidentiality obligations if a lawyer, with no expectation that the sender is seeking legal representation or disclosing confidences, opens the email. When the law firm's website invites a member of the public to contact one of the firm's lawyers in an email, however, any disclosure made in the email looks less unilateral. Current technology restricts the attorney's ability to manage expectations and the flow of information."); "The ABA's Model Rule 1.18 applies only to persons who have made disclosures in 'discussions' and 'consultation' with a lawyer, and does not explicitly address the status of persons who send emails to a law firm via its website. New Hampshire's Rule 1.18 does not specifically address emails either, but it is broader than the ABA's model rule and covers any disclosure made in a good faith pursuit of legal representation."); "Though the opportunity to screen an otherwise disqualified attorney helps protect clients' freedom to choose their own counsel, law firms cannot casually rely on after-the-fact screening procedures to limit their obligations to good faith prospective clients. Screening is available to avoid imputed disqualification only if the lawyer took reasonable measures to limit his review of information from the prospective client to that which is reasonably necessary to determine whether to offer representation. The firm, therefore, should maintain and reinforce clear procedures to be followed during initial interactions with potential clients so that its lawyers gather only that information needed to rule out any conflict with existing clients and determine whether the matter is one that the firm is willing to undertake. The firm's lawyers should obviously know to stop reviewing materials as soon as they discern that the information contained in them exceed these limits."); "The firm will have to prove that prior consent -- which the prospective client indicated by 'clicking' acceptance of the terms of a website disclaimer purporting to waive confidentiality and potential conflicts of
interest -- was sufficiently 'informed' to be effective. After one of the firm's lawyers has received and reviewed the prospective client's confidential information, informed consent to representation of an adverse party will not be easily obtained. The firm's ability to continue to represent even a longstanding client, if it has interests adverse to the prospective client, will likely depend on the reasonableness of the measures taken to avoid disqualifying disclosures, and the effectiveness and timeliness of any screening procedures.

- Florida LEO 07-3 (1/16/09) ("A person seeking legal services who sends information unilaterally to a lawyer has no reasonable expectation of confidentiality regarding that information. A lawyer who receives information unilaterally from a person seeking legal services who is not a prospective client within Rule 4-1.18, has no conflict of interest if already representing or is later asked to represent an adversary, and may use or disclose the information. If the lawyer agrees to consider representing the person or discussed the possibility of representation with the person, the person is a prospective client under Rule 4.1.18, and the lawyer does owe a duty of confidentiality which may create a conflict of interest for the lawyer. Lawyers should post a statement on their websites that the lawyer does not intend to treat as confidential information sent to the lawyer via the website, and that such information could be used against the person by the lawyer in the future.").

- Virginia LEO 1842 (9/30/08) (because the duty of confidentiality attaches (according to the Virginia Rules Preamble) "when the lawyer agrees to consider whether a client-lawyer relationship shall be established"; lawyers may use to their client's advantage (and represent the adversary of a prospective client who sent) a prospective client's: (1) unsolicited voicemail message containing confidential information, sent to a lawyer who advertises in the local Yellow Pages and includes his office address and telephone number; (2) unsolicited e-mail containing confidential information, sent to a law firm which "maintains a passive website which does not specifically invite consumers to submit confidential information for evaluation or to contact members of the firm by e-mail"; someone submitting such confidential information does not have a reasonable basis for believing that the lawyer will maintain the confidentiality of the information, simply because the lawyer uses "a public listing in a directory" or a passive website; the lawyer in that situation had "no opportunity to control or prevent the receipt of that information" and "it would be unjust for an individual to foist upon an unsuspecting lawyer a duty of confidentiality, or worse yet, a duty to withdraw from the representation of an existing client"; lawyers might create a reasonable expectation of confidentiality if they include in advertisements or in their website language that implies "that the lawyer is agreeing to accept confidential information" in contrast to lawyers who merely advertise in the Yellow Pages or maintain a
passive website; a lawyer would have to keep confidential (and would be prohibited from representing a client adverse to a prospective client which supplies) information provided by a prospective client who completes an on-line form on a law firm website which "offers to provide prospective clients a free evaluation of their claims"; law firms "may wish to consider" including appropriate disclaimers on their website or external voicemail greeting, or including a "click-through" disclaimer "clearly worded so as to overcome a reasonable belief on the part of the prospective client that the information will be maintained as confidential").

- Iowa LEO 07-02 (8/8/07) (assessing the effect of lawyers receiving unsolicited emails from prospective clients; noting that "[g]one are the days when professional relationships begin with an in person consultation"; warning lawyers to consider whether any communication on their website or otherwise would lead a reasonable person to believe that the lawyer will maintain the confidentiality of any information that the prospective clients sends the lawyer; advising lawyers considering their "public marketing strategy" to "consider some form of notice from which would could [sic] be used to set the confidentiality expectation level of potential clients"; "For example, an Internet web page which markets the lawyer's services and gives contact details does not in and of itself support a claim that the lawyer somehow requested or consented to the sharing of confidential information. However, an Internet web page that is designed to allow a potential client to submit specific questions of law or fact to the lawyer for consideration would constitute bilateral communication with an expectation of confidentiality. A telephone voice mail message that simply ask [sic] the caller for their contact details would not in and of itself [sic] rise to the level of a bilateral communication but a message that encouraged the caller to leave a detailed message about their case could in some situations be considered bilateral.").

**ABA Model Rule 1.18**

In trying to deal with all of these issues, the ABA added Model Rule 1.18. That rule (called "Duties to Prospective Client") now starts with the bedrock principle that a person will be considered a "prospective client" if he or she "consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter."

ABA Model Rule 1.18(a).

The rule formerly used the word "discusses" rather than "consults." On August 6, 2012, the House of Delegates adopted the ABA 20/20 Commission's recommendation
to change the word to "consults." ABA, House of Delegates Resolution 105B

(amending Model Rules 1.18 and 7.3, and 7.1, 7.2 and 5.5). A revised comment provides more guidance.

A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer’s advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer’s obligations, and a person provides information in response. See also Comment [4]. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer’s education, experience, areas of practice, and contact information, or provides legal information of general interest. Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a "prospective client."

Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client."

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

The lawyer must treat such a person as a former client for conflicts purposes.

ABA Model Rule 1.18(b).

A lawyer in such a situation may not represent the adversary in the same or substantially related matter -- if "the lawyer received information from the prospective client that could be significantly harmful to that person in the matter." ABA Model Rule 1.18(c).
This would allow more flexibility to the lawyer than the standard rule, which would have prevented the lawyer's representation of the adversary if the lawyer had received any confidential information from the prospective client -- not just information that "could be significantly harmful" to the prospective client.

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

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

3 New Hampshire LEO 2009-2010/1 (6/2010) (analyzing a lawyer's duty to prospective clients, under New Hampshire Rule 1.18, which is different from the ABA Model Rule 1.18; "Before the advent of the information superhighway, law firms had an easier time controlling the flow of potentially disqualifying information. Initial interviews with prospective clients were conducted in person or over the phone. Lawyers could more easily set the ground rules. They could control the prospective clients' expectations that the lawyer would or could maintain the confidentiality of any information disclosed during the initial consultation, and discourage the unilateral disclosure of compromising confidences by limiting disclosure to information needed to complete a conflicts check and confirm the lawyer's subject matter competence."; "Sending an unsolicited email is a unilateral act. The information that a person puts into an unsolicited email should not trigger confidentiality obligations if a lawyer, with no expectation that the sender is seeking legal representation or disclosing confidences, opens the email. When the law firm's website invites a member of the public to contact one of the firm's lawyers in an email, however, any disclosure made in the email looks less unilateral. Current technology restricts the attorney's ability to manage expectations and the flow of information."; "The ABA's Model Rule 1.18 applies only to persons who have made disclosures in 'discussions' and 'consultation' with a lawyer, and does not explicitly address the status of persons who send emails to a law firm via its website. New Hampshire's Rule 1.18 does not specifically address emails either, but it is broader than the ABA's model rule and covers any disclosure made in a good faith pursuit of legal representation."; "Though the opportunity to screen an otherwise disqualified attorney helps protect clients' freedom to choose their own counsel, law firms cannot casually rely on after-the-fact screening procedures to limit their obligations to good faith prospective clients. Screening is available to avoid imputed disqualification only if the lawyer took reasonable measures to limit his review of information from the prospective client to that which is reasonably necessary to determine whether to offer representation. The firm, therefore, should maintain and reinforce clear procedures to be followed during initial interactions with potential clients so that its
Best Answer

The best answer to (a) is **PROBABLY YES**; the best answer to (b) is **PROBABLY YES**.
End of the Attorney-Client Relationship

Hypothetical 2

Folks in charge of your law firm's marketing effort have urged you to send email "alerts," "law updates," etc. to one-time clients who have not sent your firm any work for the last year or so. They reason that maintaining some link with these arguably former clients might prompt them to hire you again. You worry about the conflicts of interest ramifications, because a former client might point to the communication as indicia of a continuing attorney-client relationship -- and try to disqualify you from representing another client adverse to it.

Is it risky to send a continuing stream of electronic communications to arguably former clients?

YES

Analysis

As in so many other aspects of practice, electronic communication can affect liability and conflicts of interest analyses.

Lawyers' duties to current clients differ dramatically from duties to former clients. Although maintaining an arguably current attorney-client relationship with a client might bring marketing benefits, it carries other risks.

Liability Risks

This scenario raises both ethics issues and (more ominously) malpractice issues.

The ABA Model Rules generally recognize that a client should be characterized either as a current client or former client. Lawyers obviously owe many duties to current clients, but very few duties to former clients (most of which involve protection of the client at the end of the representation, and confidentiality thereafter).
The Restatement takes the same basic position, although it acknowledges that in certain circumstances a lawyer might have some obligation to relay pertinent communications to former clients.

After termination a lawyer might receive a notice, letter, or other communication intended for a former client. The lawyer must use reasonable efforts to forward the communication. The lawyer ordinarily must also inform the source of the communication that the lawyer no longer represents the former client . . . . The lawyer must likewise notify a former client if a third person seeks to obtain material relating to the representation that is still in the lawyer's custody.

A lawyer has no general continuing obligation to pass on to a former client information relating to the former representation. The lawyer might, however, have such an obligation if the lawyer continues to represent the client in other matters or under a continuing relationship. Whether such an obligation exists regarding particular information depends on such factors as the client's reasonable expectations; the scope, magnitude, and duration of the client-lawyer relationship; the evident significance of the information to the client; the burden on the lawyer in making disclosure; and the likelihood that the client will receive the information from another source.


This comment seems to focus on "information" other than new legal developments, some changes in the law, etc.

Neither the ABA Model Rules nor the Restatement discusses lawyers' possible duty to keep former clients updated on any legal developments.

The ACTEC Commentaries recognize a strange "dormant" representation -- in which clients apparently can continue to receive the benefit of the lawyer's duties
normally owed only to current clients (even though the lawyer is not then handling any matters for such "dormant" clients).

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

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.4, at 57 (4th ed. 2006),

http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf

(emphasis added).

The ACTEC Commentaries provide an illustration of this point.

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


The ACTEC Commentaries repeat this approach in a later section.

[S]ending a client periodic letters encouraging the client to review the sufficiency of the client's estate plan or calling the client's attention to subsequent legal developments does not increase the lawyer’s obligations to the client. See ACTEC Commentary on MRPC 1.4 (Communication) for a discussion of the concept of dormant representation.


The ACTEC Commentaries clearly hope to avoid burdening trust and estate lawyers with liability for not updating the estate plans of arguably former clients. Thus, the answer probably is not as clear as the ACTEC Commentaries would like it to be.

There seem to be few if any malpractice cases against lawyers for failing to advise former clients of changes in the law. This lack of case law seems somewhat surprising, given both lawyers' increasing use of emails and other forms of electronic
communications to send "alerts" and "updates" to former clients, as well as the incentives for former clients to sue the "deep pockets" that lawyers frequently represent.

**Conflicts of Interest Risks**

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

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

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

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

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

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

ABA Model Rule 1.3 cmt. [4].

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

[T]he Committee notes that if there is a continuing relationship between lawyer and client, even if the lawyer is not on a retainer, and even if no active matters are being handled, the strict provisions governing conflicts in simultaneous representations, in Rule 1.7, rather than the more permissible former-client provisions, in Rule 1.9, are likely to apply.

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

The ACTEC Commentaries provide an analysis, but also without any definitive guidance.

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

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.4, at 57 (4th ed. 2006),
http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf

(emphasis added).

The case law is equally ambiguous, although some cases require some dramatic event or affirmative action by the lawyer before finding the representation to have ended.

- **Johnson v. Riebesell (In re Riebesell)**, 586 F.3d 782, 789 (10th Cir. 2009) (holding that a lawyer had an attorney-client relationship with a client until the client terminated the relationship; "[W]e agree with the bankruptcy court, which held otherwise - an attorney-client relationship did exist because (1) the relationship did not formally terminate until March or April 2003, when Johnson terminated it.").

- **Comstock Lake Pelham, L.C. v. Clore Family, LLC**, 74 Va. Cir. 35, 37-38 (Va. Cir. Ct. 2007) (opinion by Judge Thacher holding that a law firm which had last performed work for a client in August 2005 should be considered to still represent the client, because the law firm "never communicated to [the client] that [the law firm's] representation had been terminated. Regardless of who initiated the termination or representation, the Rules place the burden of communication squarely upon the lawyer. . . . Because the burden is upon the lawyer to communicate with the client upon the termination of representation, the lack of communication of same from [law firm] could lead one to reasonably conclude that the representation was ongoing. It was [law firm's] burden to clarify the relationship, and they failed to satisfy that burden.").

- **GATX/Airlog Co. v. Evergreen Int'l Airlines, Inc.**, 8 F. Supp. 2d 1182, 1186, 1187 (N.D. Cal. 1998) (disqualifying the law firm of Mayer, Brown & Platt upon the motion of the Bank of New York; explaining that the law firm's "use of the word 'currently' to describe the MBP/BNY relationship evidences its longstanding and continuous nature. Some affirmative action would be needed to sever that type of relationship, and MBP assumed the relationship had not been severed." (emphasis added); also concluding that the Bank was a current client because "MBP [the firm] assisted BNY [the Bank] on a repeated basis whenever matters arose over a three-year period. Although MBP may or may not still have been working on matters for BNY when the January 30 complaint was filed, it is undisputed that MBP billed BNY through January 12.")., vacated as moot, 192 F.3d 1304 (9th Cir. 1999).

- **Mindscape, Inc. v. Media Depot, Inc.**, 973 F. Supp. 1130, 1132-33 (N.D. Cal. 1997) (finding that a law firm's attorney-client relationship with a client
was continuing as long as the lawyer had a "power of attorney" in connection with a patent, was listed with the Patent & Trademark Office as the addressee for correspondence with the client, and had not yet corrected a mistake in a patent that had earlier been discovered).

- **Research Corp. Techs., Inc. v. Hewlett-Packard Co.,** 936 F. Supp. 697, 700 (D. Ariz. 1996) ("The relationship is ongoing and gives rise to a continuing duty to the client unless and until the client clearly understands, or reasonably should understand that the relationship is no longer depended on." (emphasis added; citation omitted); denying Hewlett-Packard's motion to disqualify plaintiff's counsel).

- **Shearing v. Allergan, Inc.,** No. CV-S-93-866-DWH (LRL), 1994 U.S. Dist. LEXIS 21680 (D. Nev. Apr. 4, 1994) (noting that the law firm had not performed any work for the client for over one year, but pointing to a letter that the law firm sent to the client indicating that they were a valuable client and that the firm remained ready to respond to the client's needs; granting motion to disqualify plaintiff's counsel).

- **Alexander Proudfoot PLC v. Federal Ins. Co.,** Case No. 93 C 6287, 1994 U.S. Dist. LEXIS 3937, at *10 (N.D. Ill. Mar. 30, 1994) (holding that the insurance company could "assume" that the firm would continue to act as its lawyer if and when the need arose based on the law firm's prior service to the party and stating that "any perceived disloyalty to even a 'sporadic' client besmirches the reputation of [the] legal profession"), dismissed on other grounds, 860 F. Supp. 541 (N.D. Ill. July 27, 1994).

- **Lemelson v. Apple Computer, Inc.,** Case No. CV-N-92-665-HDM (PHA), 1993 U.S. Dist. LEXIS 20132, at *12 (D. Nev. June 2, 1993) (quoting an earlier decision holding that "the attorney-client relationship is terminated only by the occurrence of one of a small set of circumstances" and listing those circumstances as one of three occurrences -- first, an express statement that the relationship is over, second, acts inconsistent with the continuation of the relationship, or third, inactivity over a long period of time (citation omitted); concluding that "[n]one of these events occurred in the instant action").

- **SWS Fin. Fund A v. Salomon Bros., Inc.,** 790 F. Supp. 1392, 1398, 1403 (N.D. Ill. 1992) (finding that an attorney-client relationship existed between Salomon Brothers and a law firm which had periodically answered commodity law questions, and had finished its last billable project about two months before attempting to take a representation adverse to Salomon; finding that the law firm had the "responsibility for clearing up any doubt as to whether the client-lawyer relationship persisted" (emphasis added); ultimately concluding disqualification was inappropriate).
At least one court has taken a more forgiving approach.

- Banning Ranch Conservancy v. Superior Court, 123 Cal. Rptr. 3d 348, 352 (Cal Ct. App. 2011) (holding that a lawyer's open-ended retainer agreement with the city entered into six years earlier did not render the city a current client when the lawyer had not provided services to the city under the agreement; "The 2005 agreements provide that the Shute firm would provide legal services to the City, on an 'as requested' basis, in connection with 'public trust matters of concern to [the City].' The agreements, however, conditioned such representation on the Shute firm's confirmation of its 'ability to take on the matter.' If such representation was requested and accepted, the agreed-upon rates were to be $250 per hour for partners and $215 per hour for associates. The City's supporting declarations showed the 2005 agreements never had been terminated."; "The Shute firm continued doing some minor legal work on another matter, but that matter concluded in early 2006. Other than the initial matter concerning mooring permit regulations, the City never requested that the Shute firm undertake any other legal work pursuant to the 2005 letter agreements."); overturning the trial court's disqualification order).

Thus, the safest (and in some courts, the only) way to terminate an attorney-client relationship is to send a "termination letter" explicitly ending the relationship. Some lawyers (especially those who practice in the domestic relations area) routinely send out such letters.

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

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

The best answer to this hypothetical is YES.
Ex Parte Contacts with Adversaries

Hypothetical 3

You have been representing a company for about six months in a contentious patent dispute (not yet in litigation) with a wealthy individual inventor. This morning you received a short email from the inventor. He thinks his lawyer is standing in the way of resolving the dispute, and wants to deal directly with you.

(a) May you communicate directly with the inventor in an effort to resolve the case?

NO

(b) If the inventor's lawyer sends you an email showing a copy to the inventor, may you respond to the email using the "Reply to All" function?

MAYBE

Analysis

Introduction

The ABA Model Rules contain a fairly simple prohibition that generates a nearly endless series of 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.

This prohibition rests on several basic principles.

This Rule contributes to the proper functioning of the legal system by protecting 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 client-lawyer relationship and the uncounseled disclosure of information relating to the representation.
ABA Model Rule 4.2 cmt. [1].

As one analyzes application of the basic prohibition, it becomes apparent that the more important principle underlying the rule is the need to avoid interference between a client's and lawyer's relationship. For instance, the prohibition extends to many types of communications that could not possibly involve a lawyer's "overreaching."

The Restatement follows essentially the same approach, although with a few more variations.

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.

Restatement (Third) of Law Governing Lawyers § 99(1) (2000). The Restatement recognizes the two same basic principles underlying the prohibition.

The rules stated in §§ 99-103, protect against overreaching and deception of nonclients. The rule of this Section also protects the relationship between the represented nonclient and that person's lawyer and assures the confidentiality of the nonclient's communications with the lawyer . . . .

The language of ABA Model Rule 4.2 and the Restatement involves several important issues.

First, courts and bars might have to determine whether there is a "matter" sufficient to trigger the Rule 4.2 prohibition.

For instance, in Alaska LEO 2006-1, the Alaska Bar dealt with situations 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, the Alaska Bar discussed 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.

Alaska LEO 2006-1 (1/27/06).

Second, courts and bars might have to determine whether a lawyer engaging in such an ex parte contact is doing so "[i]n representing a client." ABA Model Rule 4.2 (emphasis added).

In some situations involving ex parte contacts, lawyers are not acting as client representatives. For instance, Maryland LEO 2006-7 held 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. The Maryland Bar contrasted 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 that tribunal in carrying out its sacred responsibility. Thus, a ward may not select, instruct, terminate, or otherwise control his guardian."

In contrast, an attorney-client relationship is "an agent-principal relationship." . . . "A client's right to select and direct his or her attorney is a fundamental aspect of attorney-client relations. Thus, the principal-agent relationship between a client and an attorney is always a consensual one."

From this explication, it does not appear that the member appointed by the court as Guardian "represents" the Resident. From your recitation of the facts, no attorney-client relationship exists, only a guardian-ward relationship. Accordingly, MRPC 4.2 is not applicable to communications between the Guardian and the Nursing Facility.
Maryland LEO 2006-7 (2006) (citations omitted); 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."); 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.").

The restriction on ex parte communications to situations in which a lawyer is "representing a client" also allows clients to seek "second opinions" from other lawyers -- because those other lawyers are not "representing a client" in that matter.

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.
Restatement (Third) of Law Governing Lawyers § 99 cmt. c (2000); 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.").

Third, as in other situations involving conflicts of interests, courts and bars might have to determine whether the other person is "represented by another lawyer." ABA Model Rule 4.2 (emphasis added).

In class action situations, this issue normally involves a debate about whether the attorney-client relationship has begun. The Restatement explains the majority position on this issue.

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.

Restatement (Third) of Law Governing Lawyers § 99 cmt. l (2000); 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)); Philadelphia
LEO 2006-6 (9/2006) (holding that a defense lawyer may engage in ex parte communications with purported class members before a class certification; "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 the putative class is permitted."); citing the Restatement; noting that the ex parte contact would be with sophisticated corporations rather than unsophisticated individuals; warning that the lawyer must make the recipients of the communications aware of the pending class action); 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").

The ABA has also taken this approach. 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 lawyer whom the potential class member may have no interest in retaining.; of course, "the court may assume control over communications by counsel with class members").

In other situations, the debate focuses on whether the attorney-client relationship has ended. See, e.g., 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.").

Fourth, courts and bars might have to determine if the lawyer making ex parte contacts "knows" that the other person is represented by another lawyer in the matter.

ABA Model Rule 1.0 defines "knows" as denoting
actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

ABA Model Rule 1.0(f). A comment to ABA Model Rule 4.2 explains that

[...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] (emphasis 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).

Fifth, courts and bars might have to determine if an ex parte contact constitutes a "communication" for purposes of Rule 4.2.

For instance, in Hill v. Shell Oil Co., 209 F. Supp. 2d 876 (N.D. Ill. 2002), plaintiffs filed a class action suit against Shell gas stations, claiming that they discriminated against blacks. The previous six years, plaintiffs had arranged for assistants posing as consumers to interact with Shell gas station managers, videotaping what they alleged to be racial discrimination. Plaintiffs arranged for the interactions to be videotaped. When Shell discovered this type of investigation, it moved for a protective order to prohibit any
further such contacts. The court denied the protective order, 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.

Id. at 880.

Courts take Rule 4.2 very seriously.

For instance, in In re Conduct of Knappenberger, 108 P.3d 1161 (Or. 2005), four law firm employees filed an employment-related lawsuit against a lawyer. After the lawyer they sued received service of the Summons and Complaint late on a Friday afternoon, he confronted one of the employees and "ask[ed], in an angry tone, what it was and whose idea it had been." Id. at 1163. It was apparently undisputed that "[t]he entire conversation lasted between 30 seconds and one minute." Id. (emphasis added). The lawyer spoke the next day to another plaintiff who had sued him -- in a conversation that lasted between 5 and 20 minutes. Both of these plaintiffs reported these contacts to their lawyers, who amended the Complaint to add a retaliation claim.
The Oregon Supreme Court found that the lawyer had violated the ex parte contact prohibition, and suspended him for 120 days. The court noted in passing (but apparently found irrelevant) the fact that the lawyer ultimately won the lawsuit brought by his employees.

The general rule applies even to lawyers sending copies of pleadings to represented adversaries.

Under the anti-contact rule of this Section, a lawyer ordinarily is not authorized to communicate with a represented nonclient even by letter with a copy to the opposite lawyer or even if the opposite lawyer wrongfully fails to convey important information to that lawyer’s client . . . such as a settlement offer.


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. ABA Model Rule 4.2 cmt. [3] (“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.”).

The Restatement takes the same approach. Restatement (Third) of Law Governing Lawyers § 99 cmt. b (2000) (“[t]he general exception to the rule . . . requires consent of the opposing lawyer; consent of the client alone does not suffice”);

Restatement (Third) of Law Governing Lawyers § 99 cmt. f (2000) (“[t]he anti-contact rule applies to any communication relating to the lawyer’s representation in the matter,
whoever initiates the contact and regardless of the content of the ensuing communication").

For instance, in N.Y. City LEO 2005-04 (4/2005), the New York City Bar applied the ex parte prohibition even to communications initiated by a "sophisticated non-lawyer insurance adjuster."

Ignoring this rule can cause real damage. In Inorganic Coatings, Inc. v. Falberg, 926 F. Supp. 517 (E.D. Pa. 1995), for instance, a lawyer for Inorganic Coatings sent a letter to an International Zinc official (Falberg) threatening to sue his company for certain conduct. Inorganic's lawyer later spoke with International Zinc's lawyer about a possible settlement, but the conversation was unsuccessful. Later the same day, the lawyer received a telephone call from Falberg. Inorganic's lawyer advised Falberg that "it would be best" if the communication took place between the lawyers, but did not terminate the conversation. Id. at 520. The lawyer spoke with Falberg for about ninety minutes and took twenty-four pages of notes. Among other things, he used the information to revise his draft complaint.

The court found that Inorganic's lawyer had violated the ethics code's prohibition on such ex parte contacts, and disqualified the lawyer and his firm from representing Inorganic even though they had been engaged for over one year in investigating and preparing the lawsuit.

It may seem counter-intuitive, 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. N.Y. City LEO 2005-04 (4/2005) ("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.”).

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).

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.


(b) Analyzing the use of the "Reply to All" function highlights the unique nature of email communications.

Every bar prohibits sending hardcopy correspondence to a client shown as a copy recipient of her lawyer's communication. In other words, a lawyer's display of a copy to her client does not amount to the type of consent permitting the adversary's lawyer to communicate directly with the client.
In contrast, a lawyer attending a conference with his client, the adversary's lawyer and the adversary presumably may communicate directly with the adversary -- the presence of all of the participants in the meeting amounts to consent by the adversary's lawyer for such direct communications (although it would be best even in that setting to explicitly obtain the other lawyer's consent to direct communications).

Email communications fall somewhere between these two examples. A New York City ethics opinion\(^1\) recently explained that a lawyer's inclusion of her client as a

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\(^1\) New York City LEO 2009-1 (2009) (explaining that lawyers might be permitted ethically to use the "reply to all" function on an e-mail 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."); explaining a few considerations that affect the analysis; "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 consent 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 addressees to
copy recipient on an email might amount to a consent to such direct communications.

As the New York City Bar explained,

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.

New York City LEO 2009-1 (2009). The New York City Bar explained that one key element is how the communication was 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.

Id. The other key element is the adversarial nature of the communication.

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.

Id. The New York City Bar warned that the "safest course is to obtain that consent orally or in writing from counsel." Id.

avoid sending emails to represented persons whose counsel have not consented to the direct communication.

\[6312230.16\]
The New York City Bar’s analysis highlights the complexity of email communications. As indicated above, no bar has ever conducted a similar analysis in the case of hardcopy communications.

**Best Answer**

The best answer to (a) is **NO**; the best answer to (b) is **MAYBE**.
Inadvertent Transmission of Communications

Hypothetical 4

A lawyer on the other side of one of your largest cases must just have hired a new assistant, because the other lawyer has made several mistakes in the past month.

(a) A few weeks ago, you received a frantic call from the other lawyer saying that her assistant had Fed Ex’d a package to you that was intended for her client. She said the package would arrive tomorrow morning, and asked that you send it back at her expense.

Must you return the Fed Ex package without opening it and reading the contents?

YES

(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)

Analysis

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

In the early 1990s, the ABA started a trend in favor of requiring the return of such documents, but then shifted course in 2002.
ABA Approach

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 [privileged] materials 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.

ABA Model Rule 4.4 cmt. [2].

In its new form, the ABA approach defers to case law on the issue of whether a lawyer must return such documents, but provides a professional "safe harbor" for those who do.

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

ABA Model Rule 4.4 cmt. [3].

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 recently took the very unusual step of withdrawing the earlier ABA LEO that created the "return unread" doctrine.¹

**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 lawyer or other agent of the opposing person, the receiving lawyer must not accept the information. An offending lawyer

¹ 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.").
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).²

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).³

² 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).

³ 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 passed the ABA "simply notify the sender" approach to a much more harsh approach -- which requires the receiving lawyer to notify the sender of the receipt only if the receiving lawyer actually "knows" of the inadvertent nature of the communication.
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.\(^4\)

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.").\(^5\)

\(^4\) 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.").

\(^5\) 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.

- 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.

**Best Answer**

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


Metadata

Hypothetical 5

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

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).
lawyer or the lawyer's assistant "reviews or makes use of the metadata [received from another person] without first ascertaining whether the sender intended to include such metadata"; pointing to the absence in the Maryland Rules of any provision requiring the recipient of inadvertently transmitted privileged material to notify the sender; a receiving lawyer "can, and probably should, communicate with his or her client concerning the pros and cons of whether to notify the sending attorney and/or to take such other action which they believe is appropriate"; noting that the 2006 Amendments to the Federal Rules will supersede the Maryland ethics provisions at least in federal litigation, and that violating that new provision would likely constitute a violation of Rule 8.4(b) as being "prejudicial to the administration of justice").

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

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

Alabama LEO 2007-02 (3/14/07).
The Ethics of Email and Social Media
Hypotheticals and Analyses
ABA Master

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

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

The D.C. Bar held that

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

Id. (emphases added).

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

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

Second, in discussing the "actual knowledge" requirement, the D.C. Bar noted the obvious example of the sending lawyer advising the receiving lawyer of the inadvertence "before the receiving lawyer reviews the document." District of Columbia LEO 341. However, the D.C. Bar then gave another example that appears much closer to a negligence standard.

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

Id.

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

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

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

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,

[1]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
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.

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).

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

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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

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

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.

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
Maine. The next state to vote on metadata was Maine. In Maine LEO 196, the Maine Bar reviewed most of the other opinions on metadata, and ultimately concluded that

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

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

Not surprisingly, the Maine Bar also held that

the sending attorney has an ethical duty to use reasonable care when transmitting an electronic document to prevent the disclosure of metadata containing confidential information. Undertaking this duty requires the attorney to reasonably apply a basic understanding of the existence of

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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").
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

\(^6\) _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.".)
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.

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


**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

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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").
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

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

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

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

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
North Carolina. In early January 2010, the North Carolina Bar joined other bars in warning lawyers to take "reasonable precautions" to avoid disclosure of confidential metadata in documents they send.

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

The North Carolina Bar analogized the situation to a lawyer who receives "a faxed pleading that inadvertently includes a page of notes from opposing counsel." The North Carolina Bar concluded that a lawyer searching for metadata in an electronic 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).

¹⁰ North Carolina LEO 2009-1 (1/15/10) (in an opinion issued sua sponte, concluding that a lawyer "who sends an electronic communication must take reasonable precautions to prevent the disclosure of confidential information, including information in metadata, to unintended recipients."; also concluding that "a lawyer may not search for confidential information embedded in metadata of an electronic communication from another party or a lawyer for another party. By actively searching for such information, a lawyer interferes with the client-lawyer relationship of another lawyer and undermines the confidentiality that is the bedrock of the relationship. Rule 1.6. Additionally, if a lawyer unintentionally views confidential information within metadata, the lawyer must notify the sender and may not subsequently use the information revealed without the consent of the other lawyer or party."; analogizing the presence of embedded confidential metadata in a document received by the lawyer to "a faxed pleading that inadvertently includes a page of notes from opposing counsel": noting that under North Carolina Rule 4.4(b), the receiving lawyer in that situation must "promptly notify the sender," and not explaining why the receiving lawyer must do anything more than comply with this rule when receiving an electronic document and discovering any metadata that the sender appears to have inadvertently included; later reiterating that "a lawyer who intentionally or unintentionally discovers confidential information embedded within the metadata of an electronic communication may not use the information revealed without the consent of the other lawyer or party."; explaining that a lawyer searching for metadata would violate Rule 8.4(d)'s prohibition on conduct that is "prejudicial to the administration of justice"; concluding that "a lawyer may not search for and use confidential information embedded in the metadata of an electronic communication sent to him or her by another lawyer or party unless the lawyer is authorized to do so by law, rule, court order or procedure, or the consent of the other lawyer or party. If a lawyer unintentionally views metadata, the lawyer must notify the sender and may not subsequently use the information revealed without the consent of the other lawyer or party.".)
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 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).\(^{11}\)

\[^{11}\] 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
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 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.

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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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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 a 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.

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

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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."

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

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).
"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.

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
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processing feature is "standard" or "special." And of course that type of technological characterization changes every day.

**Washington.** The Washington State Bar Association dealt with metadata in a 2012 opinion. Washington LEO 2216 (2012). In essence, Washington followed Oregon's lead in distinguishing between a receiving lawyer's permissible use of "standard" software to search for metadata and the unethical use of "special forensic software" designed to thwart the sending lawyer's scrubbing efforts.

The Washington LEO opinion posed three scenarios. In the first, a sending lawyer did not scrub metadata, so the receiving lawyer was able to use "standard word processing features" to find metadata in a proposed settlement document. Id. Washington state began its analysis of this scenario by noting that the sending lawyer has an ethical duty to "act competently" to protect from disclosure the confidential information that may be reflected

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

Id. The Bar pointed to the Washington version of Rule 4.4(b) in explaining that the receiving lawyer could read the metadata. The Bar indicated that the receiving lawyer in that scenario simply had a duty to notify the sending lawyer “that the disclosed document contains readily accessible metadata.” Id.

In the second scenario,

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

Id. Somewhat surprisingly, the Washington Bar indicated that in that scenario the receiving lawyer

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

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

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

The ethical rules do not expressly prohibit [the receiving lawyer] from utilizing special forensic software to recover metadata that is not readily accessible or has otherwise been 'scrubbed' from the document. Such efforts would, however, in the opinion of this committee, contravene the prohibition in RPC 4.4(a) against 'us[ing] methods of obtaining evidence that violate the legal rights of [third persons]' and would constitute 'conduct that is prejudicial to the administration of justice' in contravention of RPC 8.4(d). To the extent that efforts to mine metadata yield information that intrudes on the attorney-client relationship, such efforts would also violate the public policy of preserving confidentiality as the foundation of the attorney-client relationship. . . . As such, it is the opinion of this committee that the use of special software to recover, from electronic documents, metadata that is not readily accessible does violate the ethical rules.

Id.

Current "Scorecard"

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

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

2001

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

2004

New York LEO 782 (12/18/04) -- NO
2006
Florida LEO 06-2 (9/5/06) -- NO
ABA LEO 442 (8/5/06) -- YES

2007
Maryland LEO 2007-9 (2007) -- YES
Alabama LEO 2007-02 (3/14/07) -- NO
District of Columbia LEO 341 (9/2007) -- NO
Arizona LEO 07-3 (11/2007) -- NO

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

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

2010
North Carolina LEO 2009-1 (1/15/10) -- NO
Minnesota LEO 22 (3/26/10) -- MAYBE
The Ethics of Email and Social Media
Hypotheticals and Analyses
ABA Master

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

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).

15 Florida LEO 06-2 (9/16/06).
• 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**.
Ethical Propriety of Electronic Communications

Hypothetical 6

You have one partner who seems to be a "nervous Nelly." He worries about nearly everything, and he frequently bothers you with what sometimes seems to be frivolous questions. He must have just read some marketing piece from an electronic security firm, because he has called you in a panic with several questions.

(a) May a lawyer ethically communicate with a client using a cordless phone?

YES

(b) May a lawyer ethically communicate with a client using a cell phone?

YES

(c) May a lawyer ethically communicate with a client using unencrypted email?

YES

Analysis

(a)-(c) Not surprisingly, both the ethics rules and case law have had to evolve as new forms of communication have appeared.

As in so many other areas, the ethics rules and bar committees interpreting and enforcing the ethics rules have scrambled to keep up with technology. One of the first bars to deal with unencrypted email held that lawyers could not communicate "sensitive" material using unencrypted email, \(^1\) but quickly backed away from a per se prohibition. \(^2\)

\(^1\) Iowa LEO 95-30 (5/16/96) ("[S]ensitive material must be encrypted to avoid violation of DR 4-101 and pertinent Ethical Considerations of the Iowa Code of Professional Responsibility for Lawyers and related Formal Opinions of the Board.").

\(^2\) Iowa LEO 96-01 (8/29/96) ("[W]ith sensitive material to be transmitted on E-mail counsel must have written acknowledgment by client of the risk of violation of DR 4-101 which acknowledgment includes consent for communication thereof on the Internet or non-secure Intranet or other forms of proprietary networks, or it must be encrypted or protected by password/firewall or other generally accepted equivalent security system."), amended by Iowa LEO 97-01 ("[W]ith sensitive material to be transmitted on e-mail counsel must have written acknowledgment by client of the risk of violation of...").
Some bars required lawyers to obtain their clients' consent to communicate their confidences using unencrypted email or cell phone technology.\textsuperscript{3} Other bars did not go quite as far, but indicated that lawyers should warn their clients of the dangers of communicating confidences using such new technologies.\textsuperscript{4} In 1999, the ABA settled on DR 4-101 which acknowledgment includes consent for communication thereof on the Internet or non-secure Intranet or other forms of proprietary networks to be protected as agreed between counsel and client.\textsuperscript{4}

\textsuperscript{3} Missouri Informal Op. 970161 (1997) ("[U]nless e-mail communications, in both directions, are secured through a quality encryption program, Attorney would need to advise clients and potential clients that communication by e-mail is not necessarily secure and confidential."); Iowa LEO 96-1 (8/29/96), as amended by Iowa LEO 97-1 (9/18/97) ("With sensitive material to be transmitted on E-mail counsel must have written acknowledgment by client of the risk of violation of DR 4-101 which acknowledgment includes consent for communication thereof on the Internet or non-secure Intranet or other forms of proprietary networks, as agreed between counsel and client."); North Carolina LEO RPC 215 (7/21/95) ("A lawyer has a professional obligation, pursuant to Rule 4 of the Rules of Professional Conduct, to protect and preserve the confidences of a client. This professional obligation extends to the use of communications technology. However, this obligation does not require that a lawyer use only infallibly secure methods of communication. Lawyers are not required to use paper shredders to dispose of waste paper so long as the responsible lawyer ascertains that procedures are in place which 'effectively minimize the risks that confidential information might be disclosed.' RPC 133. Similarly, a lawyer must take steps to minimize the risks that confidential information may be disclosed in a communication via a cellular or cordless telephone. First, the lawyer must use reasonable care to select a mode of communication that, in light of the exigencies of the existing circumstances, will best maintain any confidential information that might be conveyed in the communication. Second, if the lawyer knows or has reason to believe that the communication is over a telecommunication device that is susceptible to interception, the lawyer must advise the other parties to the communication of the risks of interception and the potential for confidentiality to be lost."). Accord New Hampshire LEO 1991-92/6 (4/19/92) ("In using cellular telephones or other forms of mobile communications, a lawyer may not discuss client confidences or other information relating to the lawyer's representation of the client unless the client has consented after full disclosure and consultation. (Rule 1.4; Rule 1.6; Rule 1.6(a)). An exception to the above exits [sic], where a scrambler-descrambler or similar technological development is used. (Rule 1.6)."

\textsuperscript{4} Philadelphia LEO 98-6 (3/1998) ("A thoughtful practitioner can communicate with persons on the Internet as the inquirer intends and steer clear of ethical violations as long as he or she is mindful of the rules."); Alaska LEO 98-2 (1/16/98) ("In the Committee's view, a lawyer may ethically communicate with a client on all topics using electronic mail. However, an attorney should use good judgment and discretion with respect to the sensitivity and confidentiality of electronic messages to the client and, in turn, the client should be advised, and cautioned, that the confidentiality of unencrypted e-mail is not assured. Given the increasing availability of reasonably priced encryption software, attorneys are encouraged to use such safeguards when communicating particularly sensitive or confidential matters by e-mail, i.e., a communication that the attorney would hesitate to communicate by phone or by fax. . . . While e-mail has many advantages, increased security from interception is not one of them. However, by the same token, e-mail in its various forms is no less secure than the telephone or a fax transmission. Virtually any of these communications can be intercepted, if that is the intent. The Electronic Communications Privacy Act (as amended) makes it a crime to intercept communications made over phone lines, wireless communications, or the Internet, including e-mail, while in transit, when stored, or after receipt. See 18
this position. Finally, some bars simply approved lawyers' use of such electronic communications.

U.S.C. § 2510 et seq. The Act also provides that '[n]o otherwise privileged wire, oral or electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.' 18 U.S.C. § 2517(4). Accordingly, interception will not in most cases result in a waiver of the attorney-client privilege." (footnotes omitted); Pennsylvania Informal Op. 97-130 (9/26/97) ("1. A lawyer may use e-mail to communicate with or about a client without encryption; 2. A lawyer should advise a client concerning the risks associated with the use of e-mail and obtain the client's consent either orally or in writing; 3. A lawyer should not use unencrypted e-mail to communicate information concerning the representation, the interception of which would be damaging to the client, absent the client's consent after consultation; 4. A lawyer may, but is not required to, place a notice on client e-mail warning that it is a privileged and confidential communication; and 5. If the e-mail is about the lawyer or the lawyer's services and is intended to solicit new clients, it is lawyer advertising similar to targeted, direct mail and is subject to the same restrictions under the Rules of Professional Conduct."); South Carolina LEO 97-08 (6/1997) ("A lawyer should discuss with a client such options as encryption in order to safeguard against even inadvertent disclosure of sensitive or privileged information when using e-mail."); Arizona LEO 97-04 (1997) ("Lawyers may want to have the e-mail encrypted with a password known only to the lawyer and the client so that there is no inadvertent disclosure of confidential information. Alternatively, there is encryption software available to secure transmissions. E-mail should not be considered a 'sealed' mode of transmission. See American Civil Liberties Union v. Reno, 929 F. Supp. 824, 834 (E.D. Pa. 1996). At a minimum, e-mail transmissions to clients should include a cautionary statement either in the 're' line or beginning of the communication, indicating that the transmission is 'confidential' 'Attorney/Client Privileged', similar to the cautionary language currently used on facsimile transmittals. Lawyers also may want to caution clients about transmitting highly sensitive information via e-mail if the e-mail is not encrypted or otherwise secure from unwanted interception."); N.Y. City LEO 1994-11 (10/21/94) ("Lawyers should consider taking measures sufficient to ensure, with a reasonable degree of certainty, that communications are no more susceptible to interception than standard land-line telephone calls. At a minimum, given the potential risks involved, lawyers should be circumspect and discreet when using cellular or cordless telephones, or other similar means of communication, to discuss client matters, and should avoid, to the maximum reasonable extent, any revelation of client confidences or secrets. . . . A lawyer should exercise caution when engaging in conversations containing or concerning client confidences or secrets by cellular or cordless telephones or other communication devices readily capable of interception, and should consider taking steps sufficient to ensure the security of such conversations."); see also Cal. Evid. Code § 952 ("A communication between a client and his or her lawyer is not deemed lacking in confidentiality solely because the communication is transmitted by facsimile, cellular telephone, or other electronic means between the client and his or her lawyer.").

ABA LEO 413 (3/10/99) (lawyers may ethically communicate client confidences using unencrypted e-mail sent over the Internet, but should discuss with their clients different ways of communicating client confidences that are "so highly sensitive that extraordinary measures to protect the transmission are warranted").

Maine LEO 195 (6/30/08) ("The Commission concludes that, as a general matter and subject to appropriate safeguards, an attorney may utilize unencrypted e-mail without violating the attorney's ethical obligation to maintain client confidentiality."); District of Columbia LEO 281 (9/18/98) ("In most circumstances, transmission of confidential information by unencrypted electronic mail does not per se violate the confidentiality rules of the legal profession. However, individual circumstances may require greater means of security."); Vermont LEO 97-5 (1997) ("[T]he Committee decides that since (a) e-mail privacy is no less to be expected than in ordinary phone calls, and (b) unauthorized interception is illegal,
As technology improved, the risks of being overheard or intercepted diminished. More importantly, the law caught up with the technology, and now renders illegal most interception of such electronic communications. These changes have created a legal expectation of confidentiality, which renders ethically permissible use of such communications. After all, every state and bar has long held that lawyers normally can use the United States Postal Service to communicate client confidences -- yet anyone could steal an envelope from a mailbox and rip it open.

Not surprisingly, bars have warned about the danger of using various wireless technologies that might easily be intercepted.

- ABA LEO 459 (8/4/11) (explaining that a lawyer representing an employee who might communicate with the lawyer using the employer's email system should warn the employee that the employer's policy might allow it to access such communications; noting that lawyers ordinarily should take the same a lawyer does not violate DR 4-101 by communicating with a client by e-mail, including the Internet, without encryption. In various instances of a very sensitive nature, encryption might be prudent, in which case ordinary phone calls would obviously be deemed inadequate.); North Dakota LEO 97-09 (9/4/97) ("More recent and, in the view of this Committee, more reasoned opinions, have concluded that a lawyer may communicate routine matters with clients, and/or other lawyers jointly representing clients, via unencrypted electronic mail (e-mail) transmitted over commercial services (such as America Online or MCI Mail) or the Internet without violating the aforesaid rule unless unusual circumstances require enhanced security measures."); Illinois LEO 96-10 (5/16/97) ("In summary, the Committee concludes that because (1) the expectation of privacy for electronic mail is no less reasonable than the expectation of privacy for ordinary telephone calls, and (2) the unauthorized interception of an electronic message subject to the ECPA is illegal, a lawyer does not violate Rule 1.6 by communicating with a client using electronic mail services, including the Internet, without encryption. Nor is it necessary, as some commentators have suggested, to seek specific client consent to the use of unencrypted e-mail. The Committee recognizes that there may be unusual circumstances involving an extraordinarily sensitive matter that might require enhanced security measures like encryption. These situations would, however, be of the nature that ordinary telephones and other normal means of communication would also be deemed inadequate."); South Carolina LEO 97-08 (6/1997) ("There exists a reasonable expectation of privacy when sending confidential information through electronic mail (whether direct link, commercial service, or Internet). Use of electronic mail will not affect the confidentiality of client communications under South Carolina Rule of Professional Conduct 1.6. . . . The Committee concludes, therefore, that communication via e-mail is subject to a reasonable expectation of privacy. Because the expectation is no less reasonable that [sic] the expectation of privacy associated with regular mail, facsimile transmissions, or land-based telephone calls and because the interception of e-mail is now illegal under the Electronic Communications Privacy Act, 18 U.S.C. §§2701(a) and 2702(a), use of e-mail is proper under Rule 1.6.").
step if they represent clients using library or hotel computers, or using a home computer that can be accessed by adverse family members; acknowledging that this disclosure duty arises "once the lawyer has reason to believe that there is a significant risk" that the client might communicate through means that third parties can access.

- California LEO 2010-179 (2010) ("With regard to the use of a public wireless connection, the Committee believes that, due to the lack of security features provided in most public wireless access locations, Attorney risks violating his duties of confidentiality and competence in using the wireless connection at the coffee shop to work on Client's matter unless he takes appropriate precautions, such as using a combination of file encryption, encryption of wireless transmissions and a personal firewall. Depending on the sensitivity of the matter, Attorney may need to avoid using the public wireless connection entirely or notify Client of possible risks attendant to his use of the public wireless connection, including potential disclosure of confidential information and possible waiver of attorney-client privilege or work product protections, and seek her informed consent to do so." (footnote omitted)).

A new wave of ethics opinions also deal with various forms of storage, such as the "cloud." Bars dealing with such storage do not adopt per se prohibitions. Instead, they simply warn the user to be careful.

- Washington LEO 2215 (2012) ("A lawyer may use online data storage systems to store and back up client confidential information as long as the lawyer takes reasonable care to ensure that the information will remain confidential and that the information is secure against risk of loss.").

- Vermont LEO 2010-6 (2011) ("The Vermont Bar Association Professional Responsibility Section agrees with the consensus view that has emerged with respect to use of SaaS [Software as a Service]. Vermont lawyers' obligations in this area include providing competent representation, maintaining confidentiality of client information, and protecting client property in their possession. As new technologies emerge, the meaning of 'competent representation' may change, and lawyers may be called upon to employ new tools to represent their clients. Given the potential for technology to grow and change rapidly, this Opinion concurs with the views expressed in other States, that establishment of specific conditions precedent to using SaaS would not be prudent. Rather, Vermont lawyers must exercise due diligence when using new technologies, including Cloud Computing. While it is not appropriate to establish a checklist of factors a lawyer must examine, the examples given above are illustrative of factors that may be important in a given situation. Complying with the required level of due diligence will often
involve a reasonable understanding of: (a) the vendor's security system; (b) what practical and foreseeable limits, if any, may exist to the lawyer's ability to ensure access to, protection of, and retrieval of the data; (c) the material terms of the user agreement; (d) the vendor's commitment to protecting confidentiality of the data; (e) the nature and sensitivity of the stored information; (f) notice provisions if a third party seeks or gains (whether inadvertently or otherwise) access to the data; and (g) other regulatory, compliance, and document retention obligations that may apply based upon the nature of the stored data and the lawyer's practice. In addition, the lawyer should consider: (a) giving notice to the client about the proposed method for storing client data; (b) having the vendor's security and access systems reviewed by competent technical personnel; (c) establishing a system for periodic review of the vendor's system to be sure the system remains current with evolving technology and legal requirements; and (d) taking reasonable measures to stay apprised of current developments regarding SaaS systems and the benefits and risks they present.

- Pennsylvania LEO 2011-200 (2011) (describing the steps that a lawyer should take when dealing with "cloud" computing, including detailed lists of required steps and descriptions of what other states have held on this issue; "If an attorney uses a Smartphone or an iPhone, or uses web-based electronic mail (e-mail) such as Gmail, Yahoo!, Hotmail or AOL Mail, or uses products such as Google Docs, Microsoft Office 365 or Dropbox, the attorney is using 'cloud computing.' While there are many technical ways to describe cloud computing, perhaps the best description is that cloud computing is merely 'a fancy way of saying stuff's not on your computer.'"; "The use of 'cloud computing,' and electronic devices such as cell phones that take advantage of cloud services, is a growing trend in many industries, including law. Firms may be eager to capitalize on cloud services in an effort to promote mobility, flexibility, organization and efficiency, reduce costs, and enable lawyers to focus more on legal rather than technical and administrative issues. However, lawyers must be conscientious about maintaining traditional confidentiality, competence, and supervisory standards."; "This Committee concludes that the Pennsylvania Rules of Professional Conduct require attorneys to make reasonable efforts to meet their obligations to ensure client confidentiality, and confirm that any third-party service provider is likewise obligated."; "Accordingly, as outlined above, this Committee concludes that, under the Pennsylvania Rules of Professional Conduct an attorney may store confidential material in 'the cloud.' Because the need to maintain confidentiality is crucial to the attorney-client relationship, attorneys using 'cloud' software or services must take appropriate measures to protect confidential electronic communications and information. In addition, attorneys may use email but must, under appropriate circumstances, take additional precautions to assure client confidentiality.".)
• Oregon LEO 2011-188 (11/2011) ("Lawyer may store client materials on a third-party server so long as Lawyer complies with the duties of competence and confidentiality to reasonably keep the client's information secure within a given situation. To do so, the lawyer must take reasonable steps to ensure that the storage company will reliably secure client data and keep information confidential. Under certain circumstances, this may be satisfied though a third-party vendor's compliance with industry standards relating to confidentiality and security, provided that those industry standards meet the minimum requirements imposed on the Lawyer by the Oregon RPC's. This may include, among other things, ensuring the service agreement requires the vendor to preserve the confidentiality and security of the materials. It may also require that vendor notify Lawyer of any nonauthorized third-party access to the materials. Lawyer should also investigate how the vendor backs up and stores its data and metadata to ensure compliance with the Lawyer's duties." (footnote omitted); "Although the third-party vendor may have reasonable protective measures in place to safeguard the client materials, the reasonableness of the steps taken will be measured against the technology 'available at the time to secure data against unintentional disclosure.' As technology advances, the third-party vendor's protective measures may become less secure or obsolete over time. Accordingly, Lawyer may be required to reevaluate the protective measures used by the third-party vendor to safeguard the client materials." (footnotes omitted)).

• Alabama LEO 2010-02 (2010) (analyzing various issues relating to client files; allowing lawyers to retain the client files in the "cloud" as long as they take reasonable steps to maintain the confidentiality of the data; "The Disciplinary Commission . . . has determined that a lawyer may use 'cloud computing' or third-party providers to store client data provided that the attorney exercises reasonable care in doing so.").

• California LEO 2010-179 (2010) ("Whether an attorney violates his or her duties of confidentiality and competence when using technology to transmit or store confidential client information will depend on the particular technology being used and the circumstances surrounding such use. Before using a particular technology in the course of representing a client, an attorney must take appropriate steps to evaluate: 1) the level of security attendant to the use of that technology, including whether reasonable precautions may be taken when using the technology to increase the level of security; 2) the legal ramifications to a third party who intercepts, accesses or exceeds authorized use of the electronic information; 3) the degree of sensitivity of the information; 4) the possible impact on the client of an inadvertent disclosure of privileged or confidential information or work product; 5) the urgency of the situation; and 6) the client's instructions and circumstances, such as access by others to the client's devices and communications."; "Attorney takes his laptop computer to the local coffee shop and accesses a public wireless..."
[I]nternet connection to conduct legal research on the matter and email Client. He also takes the laptop computer home to conduct the research and email Client from his personal wireless system."; "[A]n attorney should consider the following before using a specific technology: . . . Whether reasonable precautions may be taken when using the technology to increase the level of security. As with the above-referenced views expressed on email, the fact that opinions differ on whether a particular technology is secure suggests that attorneys should take reasonable steps as a precautionary measure to protect against disclosure. For example, depositing confidential client mail in a secure postal box or handing it directly to the postal carrier or courier is a reasonable step for an attorney to take to protect the confidentiality of such mail, as opposed to leaving the mail unattended in an open basket outside of the office door for pick up by the postal service. Similarly, encrypting email may be a reasonable step for an attorney to take in an effort to ensure the confidentiality of such communications remain so when the circumstance calls for it, particularly if the information at issue is highly sensitive and the use of encryption is not onerous. To place the risks in perspective, it should not be overlooked that the very nature of digital technologies makes it easier for a third party to intercept a much greater amount of confidential information in a much shorter period of time than would be required to transfer the same amount of data in hard copy format. In this regard, if an attorney can readily employ encryption when using public wireless connections and has enabled his or her personal firewall, the risks of unauthorized access may be significantly reduced. Both of these tools are readily available and relatively inexpensive, and may already be built into the operating system. Likewise, activating password protection features on mobile devices, such as laptops and PDAs, presently helps protect against access to confidential client information by a third party if the device is lost, stolen or left unattended." (footnotes omitted); "The greater the sensitivity of the information, the less risk an attorney should take with technology. If the information is of a highly sensitive nature and there is a risk of disclosure when using a particular technology, the attorney should consider alternatives unless the client provides informed consent. As noted above, if another person may have access to the communications transmitted between the attorney and the client (or others necessary to the representation), and may have an interest in the information being disclosed that is in conflict with the client's interest, the attorney should take precautions to ensure that the person will not be able to access the information or should avoid using the technology. These types of situations increase the likelihood for intrusion." (footnote omitted); "If use of the technology is necessary to address an imminent situation or exigent circumstances and other alternatives are not reasonably available, it may be reasonable in limited cases for the attorney to do so without taking additional precautions."; "With regard to the use of a public wireless connection, the Committee believes that, due to the lack of security features provided in most public wireless access locations, Attorney risks violating his duties of
confidentiality and competence in using the wireless connection at the coffee shop to work on Client’s matter unless he takes appropriate precautions, such as using a combination of file encryption, encryption of wireless transmissions and a personal firewall. Depending on the sensitivity of the matter, Attorney may need to avoid using the public wireless connection entirely or notify Client of possible risks attendant to his use of the public wireless connection, including potential disclosure of confidential information and possible waiver of attorney-client privilege or work product protections, and seek her informed consent to do so.” (footnote omitted); “Finally, if Attorney’s personal wireless system has been configured with appropriate security features, the Committee does not believe that Attorney would violate his duties of confidentiality and competence by working on Client’s matter at home. Otherwise, Attorney may need to notify Client of the risks and seek her informed consent, as with the public wireless connection.” (footnote omitted)).

- District of Columbia LEO 357 (12/2010) ("As a general matter, there is no ethical prohibition against maintaining client records solely in electronic form, although there are some restrictions as to particular types of documents. Lawyers and clients may enter into reasonable agreements addressing how the client's files will be maintained, how copies will be provided to the client if requested, and who will bear what costs associated with providing the files in a particular form; entering into such agreements is prudent and can help avoid misunderstandings. Assuming no such agreement was entered into prior to the termination of the relationship, however, a lawyer must comply with a reasonable request to convert electronic records to paper form. In most circumstances, a former client should bear the cost of converting to paper form any records that were properly maintained in electronic form. However, the lawyer may be required to bear the cost if (1) neither the former client nor substitute counsel (if any) can access the electronic records without undue cost or burden; and (2) the former client's need for the records in paper form outweighs the burden on the lawyer of furnishing paper copies. Whether (1) a request for electronic files to be converted to paper form is reasonable and (2) the former client's need for the files in paper form outweighs the lawyer's burden of providing them (such that the lawyer should bear the cost) should be considered both from the standpoint of a reasonable client and a reasonable lawyer and should take into account the technological sophistication and resources of the former client.”; "Even if the lawyer must bear the cost of converting the electronic records to paper form, however, the lawyer may charge the former client for the reasonable time and labor expense associated with locating and reviewing the electronic records where such time and expense results from special instructions or requests from the former client. See D.C. Legal Ethics Op. 283 (1998) (‘review of the files is being undertaken for the benefit of the client and, like other forms of client services, may be compensated by a reasonable fee’).")

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Florida LEO 10-2 (9/24/10) ("The Professional Ethics Committee has been asked by the Florida Bar Board of Governors to write an opinion addressing the ethical obligations of lawyers regarding information stored on hard drives. An increasing number of devices such as computers, printers, copiers, scanners, cellular phones, personal digital assistants (PDAs), flash drives, memory sticks, facsimile machines and other electronic or digital devices (collectively, 'Devices') now contain hard drives or other data storage media. Because many lawyers use these Devices to assist in the practice of law and in doing so intentionally and unintentionally store their clients' information on these Devices, it is important for lawyers to recognize that the ability of the Devices to store information may present potential ethical problems for lawyers."); "For example, when a lawyer copies a document using a photocopier that contains a hard drive, the document is converted into a file that is stored on the copier's hard drive. This document usually remains on the hard drive until it is overwritten or deleted. The lawyer may choose to later sell the photocopier or return it to a leasing company. Disposal of the device without first removing the information can result in the inadvertent disclosure of confidential information."); "If a lawyer chooses to use these Devices that contain Storage Media, the lawyer has a duty to keep abreast of changes in technology to the extent that the lawyer can identify potential threats to maintaining confidentiality. The lawyer must learn such details as whether the Device has the ability to store confidential information, whether the information can be accessed by unauthorized parties, and who can potentially have access to the information. The lawyer must also be aware of different environments in which confidential information is exposed such as public copy centers, hotel business centers, and home offices. The lawyer should obtain enough information to know when to seek protection and what Devices must be sanitized, or cleared of all confidential information, before disposal or other disposition. Therefore, the duty of competence extends from the receipt, i.e., when the lawyer obtains control of the Device, through the Device's life cycle, and until disposition of the Device, including after it leaves the control of the lawyer."); "A lawyer has a duty to obtain adequate assurances that the Device has been stripped of all confidential information before disposition of the Device. If a vendor or other service provider is involved in the sanitization of the Device, such as at the termination of a lease agreement or upon sale of the Device, it is not sufficient to merely obtain an agreement that the vendor will sanitize the Device upon sale or turn back of the Device. The lawyer has an affirmative obligation to ascertain that the sanitization has been accomplished, whether by some type of meaningful confirmation, by having the sanitization occur at the lawyer's office, or by other similar means."); "Further, a lawyer should use care when using Devices in public places such as copy centers, hotel business centers, and outside offices where the lawyer and those under the lawyer's supervision have little
or no control. In such situations, the lawyer should inquire and determine whether use of such Devices would preserve confidentiality under these rules; concluding that when a lawyer "chooses to use Devices that contain Storage Media such as printers, copiers, scanners, and facsimile machines must take reasonable steps to ensure that client confidentiality is maintained and that the Device is sanitized before disposition, including: (1) identification of the potential threat to confidentiality along with the development and implementation of policies to address the potential threat to confidentiality; (2) inventory of the Devices that contain Hard Drives or other Storage Media; (3) supervision of nonlawyers to obtain adequate assurances that confidentiality will be maintained; and (4) responsibility of sanitization of the Device by requiring meaningful assurances from the vendor at the intake of the Device and confirmation or certification of the sanitization at the disposition of the Device.

- New York LEO 842 (9/10/10) ("A lawyer may use an online data storage system to store and back up client confidential information provided that the lawyer takes reasonable care to ensure that confidentiality will be maintained in a manner consistent with the lawyer's obligations under Rule 1.6. In addition, the lawyer should stay abreast of technological advances to ensure that the storage system remains sufficiently advanced to protect the client's information, and should monitor the changing law of privilege to ensure that storing the information online will not cause loss or waiver of any privilege.

- Arizona LEO 09-04 (12/2009) ("Lawyers providing an online file storage and retrieval system for client access of documents must take reasonable precautions to protect the security and confidentiality of client documents and information. Lawyers should be aware of limitations in their competence regarding online security measures and take appropriate actions to ensure that a competent review of the proposed security measures is conducted. As technology advances over time, a periodic review of the reasonability of security precautions may be necessary.

- Missouri LEO 127 (5/19/09) ("Rule 4-1.15(j) requires attorneys to maintain the file for a period of ten years, or for such other period as agreed upon with the client. However, no rule or previous opinion addresses the issue of whether the file may be maintained in electronic form.

- North Carolina LEO 2008-5 (7/18/08) (explaining that lawyers may store confidential client files in a website that can be accessed by the internet, but must be careful to protect confidentiality).

- Maine LEO 195 (6/30/08) ("The Commission concludes that, as a general matter and subject to appropriate safeguards, an attorney may utilize
unencrypted e-mail without violating the attorney's ethical obligation to maintain client confidentiality.

- New Jersey LEO 701 (4/24/06) (allowing law firms to keep their files in an electronic format as long as the law firm exercises reasonable care to preserve the confidences of its clients; "What the term 'reasonable care' means in a particular context is not capable of sweeping characterizations or broad pronouncements. But it certainly may be informed by the technology reasonably available at the time to secure data against unintentional disclosure"; "when client confidential information is entrusted in unprotected form, even temporarily, to someone outside the firm, it must be under a circumstance in which the outside party is aware of the lawyer's obligation of confidentiality, and is itself obligated, whether by contract, professional standards, or otherwise, to assist in preserving it. Lawyers typically use messengers, delivery services, document warehouses, or other outside vendors, in which physical custody of client sensitive documents is entrusted to them even though they are not employed by the firm. The touchstone in using 'reasonable care' against unauthorized disclosure is that: (1) the lawyer has entrusted such documents to an outside provider under circumstances in which there is an enforceable obligation to preserve confidentiality and security, and (2) use is made of available technology to guard against reasonably foreseeable attempts to infiltrate the data. If the lawyer has come to the prudent professional judgment he has satisfied both these criteria, then 'reasonable care' will have been exercised. In the specific context presented by the inquirer, where a document is transmitted to him by email over the Internet, the lawyer should password a confidential document (as is now possible in all common electronic formats, including PDF), since it is not possible to secure the Internet itself against third party access.

**Best Answer**

The best answer to (a) is **YES**; the best answer to (b) is **YES**; the best answer to (c) is **YES**.
Effect on the Attorney-Client Privilege of an Agent's Assistance with Electronic Communications

Hypothetical 7

You represent a company sued by two elderly individual plaintiffs. During discovery, you learn that the two plaintiffs routinely asked their son to help them print off emails to and from their lawyer (before anyone anticipated litigation). You wonder whether you can argue that such a practice waived the plaintiffs' attorney-client privilege.

Does a client waive the attorney-client privilege by relying on a third party to print off privileged emails?

NO (PROBABLY)

Analysis

Most courts find that the only client agents or consultants within the attorney-client privilege are those necessary for the transmission of information between the client and the lawyer. However, courts sometimes disagree about whether a client agent’s involvement meets the "necessary" standard.

In 2010, well-respected Southern District of New York Magistrate Judge James Francis held that two individual plaintiffs waived their privilege by disclosing protected communications to their financial adviser, their accountant, and their own son. See Green v. Beer, No. 06 Civ. 4156 (KMW) (JCF), 2010 U.S. Dist. LEXIS 65974 (S.D.N.Y. July 2, 2010). Nearly two months later, in Green v. Beer, No. 06 Civ. 4156 (KMW) (JCF), 2010 U.S. Dist. LEXIS 87484 (S.D.N.Y. Aug. 24, 2010), Judge Kimba Wood agreed with Judge Francis’s conclusion about the first two client agents -- but disagreed about the son. Judge Wood pointed to the son’s explanation that he was assisting his
parents in sending and receiving emails -- ultimately concluding that "the technical assistance provided by their son, in his capacity as their agent, should not constitute a waiver of the attorney-client privilege." *Id.* at *13-14. Judge Wood also noted the public policy involved, explaining that clients without technical expertise "should not be prevented from enjoying the advantages of email correspondence for fear that the necessary assistance of a third party -- here, the Green Plaintiffs' son -- in sending or receiving such correspondence will lead to the forfeiture of the attorney-client privilege." *Id.* at *14.

**Best Answer**

The best answer to this hypothetical is **PROBABLY NO.**
Communicating with a Client on Computer Equipment Owned by a Potential Adversary

Hypothetical 8

You normally represent companies in employment cases, but you recently began to represent a senior level executive who has begun tentative plans to leave her company. She has asked for your guidance in how to minimize liability risks in doing so. After a few phone calls with your new client, you received an email from her with several questions about how she can terminate her employment without violating a specific employment contract provision. You see that she has used her "gmail" account, but in the body of the lengthy email she refers to having to be careful that her secretary does not see her typing -- because she is using her company laptop.

(a) Do you have an ethical duty to warn your client of the risks inherent in her use of company equipment to communicate with you?

YES

(b) If the company discovers your client's emails on its server, would the company be able to read and use the emails?

YES (PROBABLY)

(c) If the company discovers your client's emails on its server, will the company's lawyer have a duty to advise your client?

NO (PROBABLY)

Analysis

(a) In 2011, the ABA issued a legal ethics opinion advising lawyers that they have a duty in these circumstances to warn their clients.

- ABA LEO 459 (8/4/11) (explaining that a lawyer representing an employee who might communicate with the lawyer using the employer's email system should warn the employee that the employer's policy might allow it to access such communications; noting that lawyers ordinarily should take the same step if they represent clients using library or hotel computers, or using a home computer that can be accessed by adverse family members; acknowledging that this disclosure duty arises "once the lawyer has reason to believe that there is a significant risk" that the client might communicate through means that third parties can access.).
Among the many aspects of our daily lives that electronic communications have changed, employees now frequently engage in personal communications using their employer's resources. Of course, that has always occurred. However, in old days company employees might have purloined company stationery, envelopes and stamps to mail personal letters or used company telephones during office hours to make personal phone calls. Because the letters were not retained in the company and because the telephone calls generally were not recorded, that type of personal use generally did not implicate privilege issues.

However, the relative permanence of electronic communications has changed the analysis. Employees using the employer's servers, laptops, cell phones or other devices to engage in personal communications might now find that those communications are available to the employer. If no one actually learns of such communications, they obviously do not implicate any privilege issues. In some situations, the employer might search for those communications, while on other occasions the company might stumble into them during a document production or similar exercise. In either situation, courts must deal with the individual employee's "expectation of confidentiality" when engaging in such communications.

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1. Employee use of company computers for personal communications also implicates issues such as property rights, employee privacy laws, employer policies and even labor union contracts. All of these are outside the scope of this book.

2. That issue generally arises in one of three ways. First, and perhaps most importantly, employees sometimes retain personal lawyers in matters in which their interests are adverse to the company's interests. This can occur when the employee is considering complaining about some employment issue, planning to leave the company and move to a competitor or establish a competitive company, etc. These are the situations in which the employer might actively search for an employee's e-mails with a personal lawyer. Second, employees might engage in inappropriate use of the company's computer system, although not necessarily in a matter adverse to the company's interests. For instance, the employee might view pornography, engage in sexually harassing e-mails, etc. In investigating such improper
Several courts have analyzed the privilege implications of such personal use of company equipment. These courts usually examine whether the individual employees had a reasonable "expectation of confidentiality," which sometimes requires an examination of the employer's personnel manuals and similar policies.³

In 2009, the Eastern District of New York articulated how courts generally approach this issue.

Lacking such definitive guidance, courts instead have considered whether documents maintained on a company computer system remain privileged on a case-by-case basis, under general privilege principles. Specifically, courts have sought to determine whether the employee, as a practical matter, had a reasonable expectation that the attorney-client communications would remain confidential despite being stored on a company's computer system. In this regard, some courts have considered the following four factors: (1) does the corporation maintain a policy banning personal or other objectionable use; (2) does the company monitor the use of the employee's computer or e-mail; (3) do third parties have a right of access to the computer or e-mails; and (4) did the corporation notify the employee, or was the employee aware, of the use and monitoring policies? . . .

After applying these four factors, or privilege principles generally, most -- but not all -- courts have held that conduct, the company might actively examine the employee's e-mails and find communications between the employee and a personal lawyer. Third, companies collecting and reviewing documents in a litigation setting might find e-mails between an employee and a personal lawyer that are totally unrelated to the company's business or concerns. For instance, the employee might have used the company's computer to communicate with a lawyer about a divorce, a house closing, an adoption, etc. In those situations, the company does not really care about the personal privileged communications, but might face a logistical dilemma in deciding whether to claim privilege, log the documents, etc.

³ Some courts have found that the mere presence of an employee's electronic communications on the employer's equipment did not destroy the privilege, even in the absence of an employee manual warning of this effect. Klingeman v. DeChristofaro, Case No. 4:09CV528, 2010 U.S. Dist. LEXIS 98025, *5 (N.D. Ohio Sept. 8, 2010) ("The mere physical presence of the communications on Davis & Young's servers or in its office space does not eviscerate the attorney-client privilege between Defendant and Cantalamessa with respect to such communications, especially where the e-mails were in a static account and the documents were in a file protected from disclosure to others."); Forward v. Foschi, No. 9002/08, 2010 N.Y. Misc. LEXIS 1066, at *38 (N.Y. Sup. Ct. May 18, 2010) ("Accessing someone's personal e-mail accounts without express authorization is an invasion of privacy.").
employees do not waive privilege simply by maintaining documents on a company computer system.

United States v. Hatfield, No. 06-CR-0550 (JS), 2009 U.S. Dist. LEXIS 106269, at *27-28 (E.D.N.Y. Nov. 13, 2009). The court ultimately found that the privilege protected the communications, and also warned companies of the unintended consequences of arguing otherwise.

Although not relevant to this case, the Court notes that a general rule holding that individuals waive privilege by storing personal documents on a company computer could have significant unintended but very damaging consequences. As much as companies expect their employees to devote the full working day to business matters, it is indisputable that employees with pressing personal legal affairs (i.e., a divorce, a lawsuit) sometimes feel the need to communicate with their counsel while at work. This, in turn, may lead to files or file fragments being stored on a company computer or e-mail server (even if the employee attempts to delete the file or e-mail). Creating a broad waiver rule would not only impose a severe legal prejudice for nothing more than a (possible) violation of a company’s internal policy, it could also subject companies to third party subpoenas seeking ‘waived’ privileged documents.

Id. at *34 n.15.

Other courts have reached the same conclusion, based on their finding that the employer’s manual did not clearly enough warn the employees that their personal communications might be reviewable by the employer.4

4 Shanahan v. Superior Court, No. B220947 c/w 221164, 2010 Cal. App. Unpub. LEXIS 5756, at *17-18 (Cal. Ct. App. 2d July 21, 2010) (“the Bank's policy of access, as expressed in the employee handbook and code of conduct, does not negate that expectation of confidentiality as it does not contain any express reference to waiving the attorney-client privilege. In other words, the facts in the instant case trump the Bank's policy.”); Convertino v. United States Dept of Justice, 674 F. Supp. 2d 97, 110 (D.D.C. 2009) (“On the facts of this case, Mr. Tukel's expectation of privacy was reasonable. The DOJ maintains a policy that does not ban personal use of the company e-mail. Although the DOJ does have access to personal e-mails sent through this account, Mr. Tukel was unaware that they would be regularly
accessing and saving e-mails sent from his account. . . . Because his expectations were reasonable, Mr. Tukel's private e-mails will remain protected by the attorney-client privilege.\textsuperscript{16}); Orbit One Commc'ns, Inc. v. Numerex Corp, 255 F.R.D. 98, 108 n.11 (S.D.N.Y. 2008) ("Numerex's company handbook states that all data stored on company computers is company property and should not be considered private property of any particular employee. . . . However, all data stored on company computers is subject to disclosure except for 'communications [that] may be subject to the attorney-client privilege. . . or some other protection which is recognized by the law.' . . . Given this language, it is uncertain whether an employee's expectation of confidentiality would be unreasonable under any circumstances."); Sprenger v. Rector & Bd. of Visitors of Va. Tech, Civ. A. No. 7:07cv502, 2008 U.S. Dist. LEXIS 47115, at *13 (W.D. Va. June 17, 2008) ("While the Policy was tendered to the court, no affidavit or other evidence was offered as to knowledge, implementation, or enforcement of the Policy. There is no showing that Mr. or Mrs. Sprenger were notified of the Policy by a log-on banner, flash screen, or employee handbook and whether Mr. or Mrs. Sprenger were ever actually aware of the Policy. It is unclear whether third parties had a right of access to the e-mails. The record also does not show whether the Policy was regularly enforced and whether the state employees' computer use was actually monitored. Given the nature of the martial [sic] communications involved, the burden is on the defendants to demonstrate that the privilege has been waived."); TransOcean Capital, Inc. v. Fortin, Dkt. No. 2005-0955-BLS2, 2006 Mass. Super. LEXIS 504, at *11 (Mass. Super. Ct. Oct. 18, 2006) ("Since the evidence does not demonstrate that Fortin [subsidiary's managing director] reasonably should have recognized that his personal email communications with Batter [Hale & Dorr lawyer] were accessible to TransOcean [parent company] because he used its email address, this Court finds that they were made in confidence and that Fortin did not waive his attorney-client privilege by using the Company's email address and computer system."); Moecker v. Greenspoon, Marder, Hirschfeld, Rafkin, Ross, Berger & Abrams Anton, P.A. (In re Lentek Int'l, Inc.), Ch. 11 Case No. 6:03-bk-08035-KSJ, Adv. No. 6:05-ap-190, 2006 Bankr. LEXIS 2536, at *7-8 (Bankr. M.D. Fla. Sept. 12, 2006); Nat'l Econ. Research Assocs., Inc. v. Evans, Dkt. No. 04-2618 BLS2, 2006 Mass. Super. LEXIS 371, at *8-9 (Mass. Super. Ct. Aug. 3, 2006) ("Based on the warnings furnished in the Manual, Evans could not reasonably expect to communicate in confidence with his private attorney if Evans e-mailed his attorney using his NERA e-mail address through the NERA Intranet, because the Manual plainly warned Evans that e-mails on the network could be read by NERA network administrators. The Manual, however, did not expressly declare that it would monitor the content of Internet communications. Rather, it simply declared that NERA would monitor the Internet sites visited. Most importantly, the Manual did not expressly declare, or even implicitly suggest, that NERA would monitor the content of e-mail communications made from an employee's personal e-mail account via the Internet whenever those communications were viewed on a NERA-issued computer. Nor did NERA warn its employees that the content of such Internet e-mail communications is stored on the hard disk of a NERA-issued computer and therefore capable of being read by NERA."); Curto v. Med. World Commc'ns, Inc., No. 03CV6327 (DRH)(MLO), 2006 U.S. Dist. LEXIS 29387 (E.D.N.Y. May 16, 2006); In re Asia Global Crossing, Ltd., 322 B.R. 247, 259 (Bankr. S.D.N.Y. 2005) ("The evidence is equivocal regarding the existence or notice of corporate policies banning certain uses or monitoring employee e-mails. Charles Carroll, the debtor's former general counsel, emphatically stated that Asia Global did not enact or enforce a policy that e-mails on the company server belonged to the company, and he never told anyone that Asia Global had such a policy. . . . He understood that company policy permitted personal use of the e-mail system . . ., he never told employees that their e-mails would be monitored, and he did not monitor any employee's e-mail. . . . Each of the Insiders submitted nearly identical declarations containing similar statements."); In re Grand Jury Subpoenas, Case No. 04-X-73533, 2005 U.S. Dist. LEXIS 21081, at *19 (E.D. Mich. Sept. 27, 2005) ("[T]he Court recognizes that if Intervenor had a personal document addressed to him on a confidential basis at Corporation, and kept that private document in a locked place in his private office, the fact that he stored it in his Corporation office does not strip him of his right to claim the attorney-client privilege or work product protection as to specifically-labeled personal, confidential attorney client work product documents seeking legal advice regarding personal matters, not exposed to third parties.").
These decisions do not per se reject the possibility that the employer could eliminate an employee’s reasonable expectation of confidentiality, but instead find the policy language insufficient. In essence, they hold that “if only” the employer’s policy had said something else, the employee could not claim any personal privilege protection for communications using the employer’s equipment. These cases serve as reminders that companies should monitor the case law and update their personnel policies to comply with any states’ requirements.

Only one court seems to have flatly indicated that the employer’s personnel policy could never completely eliminate an employee’s expectation of confidentiality, regardless of the policy’s language. In 2010, the New Jersey Supreme Court held that a company’s Executive Director of Nursing could continue to claim privilege for communications with her personal lawyer made “through her personal, password-protected, web-based e-mail account” -- using her company-issued laptop.\(^5\) The court

\(^5\) Stengart v. Loving Care Agency, Inc., 990 A.2d 650, 655, 655-56, 657, 659, 660, 664, 665 (N.J. 2010) (holding that a corporate executive could assert attorney-client privilege protection for her e-mails to and from her personal lawyer using a personal, password-protected web-based e-mail account on her company laptop; “This case presents novel questions about the extent to which an employee can expect privacy and confidentiality in personal e-mails with her attorney, which she accessed on a computer belonging to her employer. Marina Stengart used her company-issued laptop to exchange e-mails with her lawyer through her personal, password-protected, web-based e-mail account. She later filed an employment discrimination lawsuit against her employer, Loving Care Agency, Inc. (Loving Care), and others.”; “The company provided her with a laptop computer to conduct company business. From that laptop, Stengart could send e-mails using her company e-mail address; she could also access the Internet and visit websites through Loving Care’s server. Unbeknownst to Stengart, certain browser software in place automatically made a copy of each web page she viewed, which was then saved on the computer’s hard drive in a ‘cache’ folder of temporary Internet files. Unless deleted and overwritten with new data, those temporary Internet files remained on the hard drive.”; noting that the e-mails sent by Stengart’s personal lawyer contained a warning that the e-mail was privileged and intended only for the recipient; quoting the defendant’s company’s policy, which permitted “[o]ccasional personal use”; and finding that the policy did not explicitly address personal password-protected web-based e-mail use; “It is not clear from that language whether the use of personal, password-protected, web-based e-mail accounts via company equipment is covered. The Policy uses general language to refer to its ‘media systems and services’ but does not define those terms. Elsewhere, the Policy prohibits certain uses of ‘the e-mail system,’ which appears to be a reference to company e-mail accounts. The Policy does not
found that the company’s personnel policy did not specifically address such use of the company computer, and also explained that

[b]ecause of the important public policy concerns underlying the attorney-client privilege, even a more clearly written company manual -- that is, a policy that banned all personal computer use and provided unambiguous notice that an employer could retrieve and read an employee’s attorney-client communications, if accessed on a personal, password-
protected e-mail account using the company's computer system -- would not be enforceable.


In contrast, many courts have found that employees could not assert privilege protection for such personal emails.6

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6 Holmes v. Petrovich Dev. Co., 119 Cal. Rptr. 3d 878 (Cal. Ct. App. 2011); Alamar Ranch, LLC v. Cnty. of Boise, Case No. CV-09-004-S-BLW, 2009 U.S. Dist. LEXIS 101866, at *11 (D. Idaho Nov. 2, 2009) ("This case presents a simple scenario where the IHFA put all employees -- including Kirkpatrick -- on notice that their e-mails would (1) become IHFA's [Idaho House & finance Ass'n] property, (2) be monitored, stored, accessed and disclosed by IHFA, and (3) should not be assumed to be confidential. While Kirkpatrick states that she was not aware of any company monitoring . . . , the Court's earlier discussion of the legal standards makes clear that her 'bare assertion that [she] did not subjectively intend to waive the privilege is insufficient to make out the necessary element of nonwaiver.' . . . It is unreasonable for any employee in this technological age -- and particularly an employee receiving the notice Kirkpatrick received -- to believe that her e-mails, sent directly from her company's e-mail address over its computers, would not be stored by the company and made available for retrieval."); Leor Exp. & Prod. LLC v. Aguiar, Case No. 09-60136-CIV-SEITZ/O'SULLIVAN, 2009 U.S. Dist. LEXIS 87323 (S.D. Fla. Sept. 23, 2009); SEC v. Finazzo, 543 F. Supp. 2d 224 (S.D.N.Y. 2008); United States v. Etkin, Case No. 07-CR-913 (KMK), 2008 U.S. Dist. LEXIS 12834, at *11, *16, *17, *18 (S.D.N.Y. Feb. 19, 2008) (assessing a situation in which a criminal defendant used a New York state police computer; noting that the computer had a "flash-screen notice" indicating that users of the computer "had 'no legitimate expectation of privacy during any use of th[e] system or in any data on th[e] system'; finding that this warning destroyed the criminal defendant's expectation of privacy, even if he was never verbally advised of the policy; "By virtue of the log-on notices, Defendant is properly charged with knowledge of the fact that any email he sent to his wife from his work computer could be read by a third party."); Scott v. Beth Israel Med. Ctr., Inc., 847 N.Y.S.2d 436, 439, 444 (N.Y. Sup. Ct. 2007) (noting that Beth Israel's policy indicated that the hospital's computer systems were the hospital's property and "should be used for business purposes only"); also noting that the policy stated "'[a]ll information and documents created, received, saved or sent on the Medical Center's computer or communications systems are the property of the Medical Center. Employees have no personal privacy right in any material created, received, saved or sent using Medical Center communication or computer systems. The Medical Center reserves the right to access and disclose such material at any time without prior notice.'"); Banks v. Mario Indus., Inc., 650 S.E.2d 687, 695-96 (Va. 2007) ("Pursuant to Mario's employee handbook, Mario permitted employees to use their work computers for personal business. However, Mario's employee handbook provided that there was no expectation of privacy regarding Mario's computers. Cook created the pre-resignation memorandum on a work computer located at Mario's office. Cook printed the document from this computer, and Cook sent it to his attorney for the purposes of seeking legal advice. Cook then deleted the document from the computer. Mario's forensics computer expert, however, retrieved the document from the computer's hard drive. We held in Giglett v. Commonwealth, 252 Va. 79, 92, 472 S.E.2d 263, 270 (1996), that 'the [attorney-client] privilege is waived where the communication takes place under circumstances such that persons outside the privilege can overhear what is said.' See Edwards [Commonwealth v. Edwards, 235 Va. 488 (1988)], 235 Va. at 509, 370 S.E.2d at 301 ("The privilege may be expressly waived by the client, or a waiver may be implied from the client's conduct."); Ober v. Miller, Civ. A. No. 1:04-CV-1669, 2007 U.S. Dist. LEXIS 93236, at *59 (M.D. Pa. Dec. 18, 2007) ("[A]ssuming that Ober was not on notice of the internal investigation until Periandi's official complaint was filed on March 23, 2004 . . . , his claim regarding the second search nevertheless would fail. The court finds that the prevalence of workplace monitoring of computers makes any expectation of privacy that a
This issue can also arise when corporations change hands, and employees leave their personal and privileged communications behind. Several courts have held that
employees did not lose their privilege protection by leaving privileged communications behind when they left their employment.\textsuperscript{7}

Similarly, another court held that the founder of a company that had sold substantially all of its assets to another company could withhold as privileged his email communications that were on the server at the time of the closing but that he had removed before the acquiring company took physical possession of the server.\textsuperscript{8} This result is consistent with the general rule that merely providing access to a third party does not waive the privilege if the third party never obtains the communication. However, the result does not make sense if the privilege never protected the communications in the first place because they were undertaken on company equipment.

\textsuperscript{7}\textit{Tse v. UBS Fin. Servs., Inc.}, No. 03 Civ. 6234 (GEL), 2005 U.S. Dist. LEXIS 12227, at *3-4 (S.D.N.Y. June 9, 2005) (assessing the privilege implications of the defendant's discovery of a diskette in a work area previously occupied by plaintiff while she worked for the defendant; applying the inadvertent production standard and finding that defendant should return the diskette to the former employee; “The Court has reviewed both the letter and the diskette on which it was stored. It is clear that the letter is an attorney-client communication in which the client expressly requests legal advice, and, had it not been inadvertently disclosed to defendant, there would be no question as to its entitlement to protection under the attorney-client privilege. Notwithstanding that disclosure, plaintiff has not been so careless as to waive her privilege. If, as plaintiff avers, she created the letter at home, it was perhaps imprudent for her to bring the disk on which it was stored to work. Nonetheless, the letter was stored out of sight, on a disk, inside a file folder in plaintiff's work area. It was not printed out, or stored in any other way that made it easily accessible, or even its existence known, to a third-party.”); \textit{Sparshott v. Feld Entm't, Inc.}, Civ. A. No. 99-0551 (JR), 2000 U.S. Dist. LEXIS 13800, at *2-3 (D.D.C. Sept. 21, 2000) (finding that a discharged employee had not waived the attorney-client privilege covering a Dictaphone tape recording of conversations with his lawyer by failing to take the tape from his office after he was fired; “A reasonable analysis of the record compels the conclusion that Smith simply forgot the tape on March 7 and, under pressure (and under scrutiny) to clean out his office a few days later, forgot it then as well. That set of facts does not amount to a waiver of Smith's attorney-client privilege. Smith's ejection from the building and lockout from his office was indeed involuntary, and his neglect or failure to recall that the tape was in the dictaphone was not an affirmative act such as, for example, throwing a confidential document into the garbage”).

In 2011, the ABA indicated that a lawyer representing a company which uncovers such employee emails does not have a duty to advise the employee or her lawyer, because the transmission was not "inadvertent."

- ABA LEO 460 (8/4/11) (despite acknowledging some case law to the contrary, explaining 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."; noting 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."; providing as examples 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; explaining that 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; so 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 an 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.).

Although the ABA's opinion could not be any clearer, lawyers should also remember courts' often critical attitude toward a lawyer who would take advantage of such confidential emails.

- 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, unainted 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.").

**Best Answer**

The best answer to (a) is **YES**; the best answer to (b) is **PROBABLY YES**; the best answer to (c) is **PROBABLY NO**.
Working with Service Providers

**Hypothetical 9**

Your firm just purchased several new servers, and they have given you nothing but trouble for the past two weeks. You have been unable to send or receive email at least several hours each day. The supplier from whom you purchased the servers seems incapable of fixing the problem, and you want to quickly retain another consultant to fix the problem.

Must you include a confidentiality provision in whatever agreement you enter into with the new consultant?

**YES (PROBABLY)**

**Analysis**

To comply with their broad duty of confidentiality, lawyers must take all reasonable steps to assure that anyone with whom they are working also protects client confidences.

For instance, in ABA LEO 398 (10/27/95), the ABA indicated that a lawyer who allows a computer maintenance company access to the law firm’s files must ensure that the company establishes reasonable procedures to protect the confidentiality of the information in the files. The ABA also indicated that the lawyer would be “well-advised” to secure the computer maintenance company’s written assurance of confidentiality.

In its recent decision generally approving outsourcing of legal services, the ABA reminded lawyers that they should consider conducting due diligence of the foreign legal providers -- such as “investigating the security of the provider’s premises,
computer network, and perhaps even its recycling and refuse disposal procedures.”

ABA LEO 451 (7/9/08).  

Lawyers must be very careful even when dealing with service providers such as copy services. Universal City Dev. Partners, Ltd. v. Ride & Show Eng’g, Inc., 230 F.R.D. 688, 698 (M.D. Fla. 2005) (assessing a litigant’s efforts to obtain the return of inadvertently produced privileged documents; noting that the litigant had sent the documents to an outside copy service after putting tabs on the privileged documents, and had directed the copy service to copy everything but the tabbed documents and send them directly to the adversary; noting that the litigant had not reviewed the copy service’s work or ordered a copy of what the service had sent the adversary; emphasizing what the court called the "most serious failure to protect the privilege" --

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1  ABA LEO 451 (7/9/08) (generally approving the use of outsourcing of legal services, after analogizing them to such "[o]utsourced tasks" as reliance on a local photocopy shop, use of a “document management company,” “use of a third-party vendor to provide and maintain a law firm's computer system” and “hiring of a legal research service”; lawyers arranging for such outsourcing must always "render legal services competently,” however the lawyers perform or delegate the legal tasks; lawyers must comply with their obligations in exercising “direct supervisory authority” over both lawyers and nonlawyers, “regardless of whether the other lawyer or the nonlawyer is directly affiliated with the supervising lawyer's firm”; the lawyer arranging for outsourcing “should consider” conducting background checks of the service providers, checking on their competence, investigating “the security of the provider’s premises, computer network, and perhaps even its recycling and refuse disposal procedures”; lawyers dealing with foreign service providers should analyze whether their education and disciplinary process is compatible with that in the U.S. -- which may affect the level of scrutiny with which the lawyer must review their work product; such lawyers should also explore the foreign jurisdiction's confidentiality protections (such as the possibility that client confidences might be seized during some proceedings, or lost during adjudication of a dispute with the service providers); because the typical outsourcing arrangement generally does not give the hiring lawyer effective “supervision and control” over the service providers (as with temporary lawyers working within the firm), arranging for foreign outsourced work generally will require the client's informed consent; lawyers must also assure the continued confidentiality of the client’s information (thus, “[w]ritten confidentiality agreements are . . . strongly advisable in outsourcing relationships”); to minimize the risk of disclosure of client confidences, the lawyer should verify that the service providers are not working for the adversary in the same or substantially related matter; lawyers generally may add a surcharge (without advising the client) to a contract lawyer’s expenses before billing the client; if the lawyer “decides” to bill those expenses as a disbursement, the lawyer may only bill the client for the actual cost of the services “plus a reasonable allocation of associated overhead, such as the amount the lawyers spent on any office space, support staff, equipment, and supplies”; the same rules apply to outsourcing, although there may be little or no overhead costs).
the litigant's "knowing and voluntary release of privileged documents to a third party -- the copying service -- with whom it had no confidentiality agreement. Having taken the time to review the documents and tab them for privilege, RSE's counsel should have simply pulled the documents out before turning them over to the copying service. RSE also failed to protect its privilege by promptly reviewing the work performed by the outside copying service.; refusing to order the adversary to return the inadvertently produced documents).

**Best Answer**

The best answer to this hypothetical is **PROBABLY YES**.
Outsourcing of Discovery Work

Hypothetical 10

In an effort to cut expenses in an upcoming document collection, privilege review and log creation project, you are considering a number of options. One of your newest lawyers recommends that you use a cost-saving measure that her previous firm frequently used -- relying on lawyers and paralegals in Bangalore, India, to handle those tasks.

(a) May you outsource these tasks to lawyers in India?

YES

(b) What ethics considerations will you have to address?

DISCLOSURE TO THE CLIENT; DEGREE OF NECESSARY SUPERVISION; ASSURANCES OF CONFIDENTIALITY; CONFLICTS OF INTEREST

Analysis

More and more law firms and corporate law departments are relying on foreign outsourcing for large projects like this.

Lawyers analyzing these issues must protect their clients from real risks, while avoiding the sort of "guild mentality" that will prevent the lawyer from exploring all of the options that might save the client money.

(a) No ethics rules prohibit such outsourcing. Just as lawyers may arrange for co-counsel from Indiana, so they can arrange for co-counsel or other assistance from India.

(b) The ABA and state bars are still wrestling with the ethics implications of foreign outsourcing.
The ABA has explicitly explained that lawyers may hire "contract" lawyers to assist in projects -- although the ABA focused on billing questions.

State bars have also dealt with ethics issues implicated by lawyers employing "temps" and "independent contractor" lawyers.

1 ABA LEO 420 (11/29/00) (a law firm hiring a contract lawyer may either bill his or her time as: (1) fees, in which case the client would have a "reasonable expectation" that the contract lawyer has been supervised, and the law firm can add a surcharge without disclosure to the client (although some state bars and courts require disclosure of both the hiring and the surcharge); or (2) costs, in which case the law firm can only bill the actual cost incurred "plus those costs that are associated directly with the provision of services" (as explained in ABA LEO 379); ABA LEO 356 (12/16/88) (temporary lawyers must comply with all ethics rules arising from a lawyer's representation of a client, but depending on the facts (such as whether the temporary lawyer "has access to information relating to the representation of firm clients other than the clients on whose matters the lawyer is working") may not be considered "associated" with law firms for purposes of the imputed disqualification rules (the firm should screen such temporary lawyers from other representations); lawyers hiring temporary lawyers to perform "independent work for a client without the close supervision of a lawyer associated with the law firm" must obtain the client's consent after full disclosure; lawyers need not obtain the client's consent to having temporary lawyers working on the client matters if the temporary lawyers are "working under the direct supervision of a lawyer associated with the firm"); lawyers need not advise clients of the compensation arrangement for temporary lawyers "assuming that a law firm simply pays the temporary lawyer reasonable compensation for the services performed for the firm and does not charge the payments thereafter to the client as a disbursement").

2 Virginia LEO 1712 (7/22/98) (this is a comprehensive opinion dealing with temporary lawyers ("Lawyer Temps"); a lawyer temp is treated like a lateral hire for conflicts purposes (although lawyer temps who are not given "broad access to client files and client communications" could more easily argue that they had not obtained confidences from firm clients for which they had not directly worked); as with lateral hires, screening lawyer temps does not cure conflicts; lawyer temps may reveal the identity of other clients for which they have worked unless the clients request otherwise or the disclosure would be embarrassing or detrimental to the former clients; paying a staffing agency (which in turn pays the lawyer temp) does not amount to fee-splitting because the agency has no attorney-client relationship with the client and is not practicing law (the New York City Bar took a different approach, suggesting that the client separately pay the lawyer temp and agency); if a firm lawyer closely supervises the lawyer temp, the hiring of lawyer temps need not be disclosed to the client; a lawyer must inform the client before assigning work to a lawyer other than one designated by the client; because "[a] law firm's mark-up of or surcharge on actual cost paid the staffing agency is a fee," the firm must disclose it to the client if the "payment made to the staffing agency is billed to the client as a disbursement, or a cost advanced on the client's behalf"; on the other hand, the firm "may simply bill the client for services rendered in an amount reflecting its charge for the Lawyer Temp's time and services" without disclosing the firm's cost, just as firms bill a client at a certain rate for associates without disclosing their salaries; in that case, the "spread" between the salary and the fees generated "is a function of the cost of doing business including fixed and variable overhead expenses, as well as a component for profit"; because the relationship between a lawyer temp and a client is a traditional attorney-client relationship, the agency "must not attempt to limit or in any way control the amount of time a lawyer may spend on a particular matter, nor attempt to control the types of legal matters which the Lawyer Temp may handle"; agencies may not assign lawyer temps to jobs for which they are not competent).
Law firms hiring such lawyers and those lawyers themselves must also follow the unauthorized practice of law rules of the jurisdiction in which they will be practicing.

See, e.g., District of Columbia UPL Op. 16-05 (6/17/05) (holding that contract lawyers who are performing the work of lawyers rather than paralegals or law clerks must join the D.C. Bar if they work in D.C. or "regularly" take "short-term assignments" in D.C.).

In recent years, the ABA and a number of state bars have explicitly approved foreign outsourcing of legal services as long as the lawyers take common-sense precautions.

- Virginia LEO 1850 (12/28/10) (in a compendium opinion, providing advice about lawyers outsourcing, defined as follows: "Outsourcing takes many forms: reproduction of materials, document retention database creation, conducting legal research, drafting legal memoranda or briefs, reviewing discovery materials, conducting patent searches, and drafting contracts, for example."); explaining that, among other things, a lawyer engaging in such outsourcing must: (1) "exercise due diligence in the selection of lawyers or nonlawyers"; (2) avoid the unauthorized practice of law (explaining that the Rules: "do not permit a nonlawyer to counsel clients about legal matters or to engage in the unauthorized practice of law, and they require that the delegated work shall merge into the lawyer's completed work product" and direct that "the initial and continuing relationship with the client is the responsibility of the employing lawyer," ultimately concluding that "in order to

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3 Virginia LEO 1735 (10/20/99) (a law firm may employ independent contractor lawyers under the following conditions: whether acting as independent contractors, contract attorneys or "of counsel," the lawyers must be treated as part of the law firm for confidentiality and conflicts of interest purposes; the firm must advise clients of any "mark-up" between the amount billed for the independent contractor lawyers' services and the amount paid to them if "the firm bills the amount paid to Attorney as an out-of-pocket expense or disbursement," but need not make such disclosure to the clients if the firm bills for the lawyers' work "in the same manner as it would for any other associate in the Firm" and the independent contractor lawyer works under another lawyer's "direct supervision" or the firm "adopts the work product as its own"; the independent contractor lawyers may be designated as "of counsel" to the firm if they have a "close, continuing relationship with the Firm and direct contact with the firm and its clients" and avoid holding themselves out as being partners or associates of the firm; the firm must disclose to clients that an independent contractor lawyer is working on the client's matter if the lawyers "will work independently, without close supervision by an attorney associated with the Firm," but need not make such disclosure if the "temporary or contract attorney works directly under the supervision of an attorney in the Firm"; the firm may pay a "forwarding" or "referral" fee to the independent contractor lawyers for bringing in a client under the new Rules).
avoid the unauthorized practice of law, the lawyer must accept complete responsibility for the nonlawyer's work. In short, the lawyer must, by applying professional skill and judgment, first set the appropriate scope for the nonlawyer's work and then vet the nonlawyer's work and ensure its quality.

(3) "obtain the client's informed consent to engage lawyers or nonlawyers who are not directly associated with or under the direct supervision of the lawyer or law firm that the client retained"; (4) assure client confidentiality; noting that "if payment is billed to the client as a disbursement," the lawyer must pass along any cost without mark-up unless the client consents (although the lawyer may also pass along any overhead costs -- which in the case of outsourced services "may be minimal or nonexistent"), and that "if the firm plans to bill the client on a basis other than the actual cost which can include a reasonable allocation of overhead charges associated with the work," the client must consent to such a billing arrangement "in cases where the nonlawyer is working independently and outside the direct supervision of a lawyer in the firm"; explaining that a lawyer contemplating outsourcing at the start of an engagement "should" obtain "client consent to the arrangement" and provide "a reasonable explanation of the fees and costs associated with the outsourced project." [The remainder of the opinion appears to allow a law firm hiring outsourced service providers working under the direct supervision of a lawyer associated with the firm to treat them as if they were lawyers in the firm -- both for client disclosure and consent purposes, as well as for billing purposes.]; acknowledging that a lawyer can treat as inside the firm for disclosure and billing purposes an outsourced service provider who handles "specific legal tasks" for the firm while working out of her home (although not meeting clients there), who has "complete access to firm files and matters as needed" and who "works directly with and under the direct supervision" of a firm lawyer, but that a law firm may not treat (for consent and billing purposes) outsourced service providers as if they are in the firm who are working in India and, who conduct patent searches and prepare applications for firm clients, but who "will not have access to any client confidences with the exception of confidential information that is necessary to perform the patent searches and prepare the patent applications"; explaining that the same is true of lawyers whom the law firm occasionally hire, but who also work "for several firms on an as needed contract basis"; noting that a lawyer does not need to inform the client when a lawyer outsources "truly tangential, clerical or administrative" legal supports services, or "basic legal research or writing" services (such as arranging for a "legal research 'think tank' to produce work product that is then incorporated into the work product" of the firm). [The Bar's hypotheticals do not include the possibility of an overseas lawyer or a lawyer working for several U.S. law firms on an "as needed contract basis" -- but who work under the "direct supervision" of a lawyer associated with the firm.]; concluding that lawyers "must advise the client of the outsourcing of legal services and must obtain client consent anytime there is disclosure of client confidential information to a nonlawyer who is working independently
The Ethics of Email and Social Media
Hypotheticals and Analyses
ABA Master

McGuireWoods LLP
T. Spahn (10/12/12)

and outside the direct supervision of a lawyer in the firm, thereby superseding any exception allowing the lawyer to avoid discussing the legal fees and specific costs associated with the outsourcing of legal services”).

- Ohio LEO 2009-6 (8/14/09) (offering guidance for lawyers outsourcing legal services; defining "legal services" as follows: "[L]egal services include but are not limited to document review, legal research and writing, and preparation of briefs, pleadings, legal documents. Support services include, but are not limited to ministerial services such as transcribing, compiling, collating, and copying."; ultimately concluding that a lawyer was not obligated to advise the client if a "temp" lawyer was working inside the firm under the direct supervision of a firm lawyer; also ultimately concluding that a lawyer can decide whether to bill for outsourced services as a fee, but that the lawyer must advise the client of how the lawyer will bill for those services; “[P]ursuant to Prof. Cond. Rules 1.4(a)(2), 1.2(a), and 1.6(a), a lawyer is required to disclose and consult with a client and obtain informed consent before outsourcing legal or support services to lawyer or nonlawyers. Disclosure, consultation, and informed consent is not necessary in the narrow circumstance where a lawyer or law firm temporarily engages the services of a nonlawyer to work inside the law firm on a legal matter under the close supervision and control of a lawyer in the firm, such as when a sudden illness of an employee requires a temporary replacement who functions as an employee of the law firm. Outside this narrow circumstance, disclosure, consultation, and consent are the required ethical practice.”; explaining how the lawyer may bill for the outsourced services; explaining how the duty of confidentiality applies; “[P]ursuant to Prof. Cond. Rules 1.5(a) and 1.5(b), a lawyer is required to establish fees and expenses that are reasonable, not excessive, and to communicate to the client the basis or rate of the fee and expenses; these requirements apply to legal and support services outsourced domestically or abroad. The decision as to whether to bill a client for outsourced services as part of the legal fee or as an expense is left to a lawyer’s exercise or professional judgment, but in either instance, if any amount beyond cost is added, it must be reasonable, such as a reasonable amount to cover a lawyer’s supervision of the outsourced services. The decision must be communicated to the client preferably in writing, before or within a reasonable time after commencing the representation, unless the lawyer will charge a client whom the lawyer has regularly represented on the same basis as previously charged.”).

- ABA LEO 451 (8/5/08) (generally approving the use of outsourcing of legal services, after analogizing them to such “[o]utsourced tasks” as reliance on a local photocopy shop, use of a “document management company,” “use of a third-party vendor to provide and maintain a law firm’s computer system” and “hiring of a legal research service,” or “foreign outsourcing”; lawyers arranging for such outsourcing must always “render legal services competently,”
however the lawyers perform or delegate the legal tasks; lawyers must comply with their obligations in exercising "direct supervisory authority" over both lawyers and nonlawyers, "regardless of whether the other lawyer or the nonlawyer is directly affiliated with the supervising lawyer's firm"; the lawyer arranging for outsourcing "should consider" conducting background checks of the service providers, checking on their competence, investigating "the security of the provider's premises, computer network, and perhaps even its recycling and refuse disposal procedures"; lawyers dealing with foreign service providers should analyze whether their education and disciplinary process is compatible with that in the U.S. -- which may affect the level of scrutiny with which the lawyer must review their work product; such lawyers should also explore the foreign jurisdiction's confidentiality protections (such as the possibility that client confidences might be seized during some proceedings, or lost during adjudication of a dispute with the service providers); because the typical outsourcing arrangement generally does not give the hiring lawyer effective "supervision and control" over the service providers (as with temporary lawyers working within the firm), arranging for foreign outsourced work generally will require the client's informed consent; lawyers must also assure the continued confidentiality of the client's information (thus, "[w]ritten confidentiality agreements are . . . strongly advisable in outsourcing relationships"); to minimize the risk of disclosure of client confidences, the lawyer should verify that the service providers are not working for the adversary in the same or substantially related matter; explaining that (among other things) lawyers can charge "reasonable" fees for the outsourced lawyer's work by deciding whether to treat the outsourced lawyer in one of two ways: (1) like a contract lawyer (noting that "a law firm that engaged a contract lawyer [and directly supervises the contract lawyer] could add a surcharge to the cost paid by the billing lawyer provided the total charge represented a reasonable fee for the services provided to the client," and that "the lawyer is not obligated to inform the client how much the firm is paying a contract lawyer" as long as the fee is reasonable); or (2) as an expense to be passed along to the client (noting that "][i]f the firm decides to pass those costs through to the client as a disbursement," the lawyer cannot absent client consent add any markup other than "associated overhead" -- which in the case of outsourced legal services "may be minimal or nonexistent" to the extent that the outsourced work is "performed off-site without the need for infrastructural support").

- Colorado LEO 121 (adopted 5/17/08) (approving outsourcing of legal services to lawyers licensed only in other states or only in other countries; ultimately concluding that paying a "temp" lawyer does not amount to a fee-split for ethics rules purposes; also concluding that the lawyer can add a markup when billing the client for the foreign lawyer's outsourced services, and does not have to disclose that markup to the client even if it is "substantial"; warning Colorado lawyers that they must undertake certain steps;
"Reasonable efforts include: (a) confirming that the Domestic or Foreign Lawyer is licensed and in good standing in his or her home jurisdiction; (b) confirming that the Domestic or Foreign Lawyer is competent to undertake the work to be assigned; and (c) supervising the work of any nonlawyer hired by the Colorado lawyer to assist in assigned tasks."; also warning that "in general, the Colorado lawyer must determine whether the activities of the Domestic or Foreign Lawyer constitute the practice of law in Colorado, and, if so, whether and to what extent those activities are authorized by virtue of the Colorado lawyer's supervision of and responsibility for the Domestic or Foreign Lawyer's work."; advising the Colorado lawyer to assure that the temporary lawyer does not have a conflict of interest; finding that the fee-splitting rules do not apply "if the firm is responsible for paying the Domestic or Foreign Lawyer regardless of whether the client pays the firm, and if the Domestic or Foreign Lawyer's compensation is not a percentage or otherwise directly tied to the amount paid by the client. If the payment to a Domestic or Foreign Lawyer under this analysis constitutes the division of a fee, then the hiring Colorado Lawyer must comply with Colo. RPC 1.5(d)."; "Whether the delegation of tasks to a Domestic or Foreign Lawyer constitutes a significant development that the Colorado Lawyer must disclose to the client depends on the circumstances. If the lawyer reasonably believes that a client expects its legal work to be performed exclusively by Colorado Lawyers, the Colorado Lawyer may be required to disclose the fact of delegation, as well as its nature and extent. The Committee continues to conclude that a Colorado lawyer is not required to affirmatively disclose the amount of fees paid to, and profits made from, the services of Domestic and Foreign Lawyers, even where the mark-up is substantial."; "[W]hether the Colorado Lawyer must inform a client of the use of Foreign or Domestic Lawyers will depend upon the facts of the matter, particularly the client's expectations. At least as of this writing, the Committee is of the opinion that most clients of Colorado Lawyers do not expect their legal work to be outsourced, particularly to a foreign county. Thus in the vast majority of cases, a Colorado Lawyer outsourcing work to a Foreign Lawyer who is not affiliated with the Colorado law firm would constitute a 'significant development' in the case and disclosure to the client would be required.".

- North Carolina LEO 2007-12 (4/25/08) (analogizing foreign outsourcing and lawyers' reliance on the services of "any nonlawyer assistant"; concluding that a lawyer in that circumstance must advise the client of any foreign outsourcing; indicating that lawyers may arrange for foreign outsourcing, as long as the lawyers: "determine that delegation is appropriate"; make "reasonable efforts' to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer"; "exercise due diligence in the selection of the foreign assistant" (including taking such steps as investigating the assistant's background, obtaining a resume and work product samples, etc.); "review the foreign assistant's work on an ongoing basis to ensure its
quality”; "review thoroughly" the foreign assistant’s work; make sure that "[f]oreign assistants may not exercise independent legal judgment in making decisions on behalf of the client”; "ensure that procedures are in place to minimize the risk that confidential information might be disclosed" (including the selection of a mode of communication); obtain the client’s "written informed consent to the outsourcing," because absent "a specific understanding between a lawyer and client to the contrary, the reasonable expectation of the client is that the lawyer retained by the client, using the resources within the lawyer's firm, will perform the requested legal services").

- Florida LEO 07-2 (1/18/08) (addressing foreign outsourcing; concluding that a lawyer might be obligated to advise the client of such foreign outsourcing; "A lawyer is not prohibited from engaging the services of an overseas provider to provide paralegal assistance as long as the lawyer adequately addresses ethical obligations relating to assisting the unlicensed practice of law, supervision of nonlawyers, conflicts of interest, confidentiality, and billing. The lawyer should be mindful of any obligations under law regarding disclosure of sensitive information of opposing parties and third parties.”; "The committee believes that the law firm should obtain prior client consent to disclose information that the firm reasonably believes is necessary to serve the client's interests. Rule 4-1.6 (c)(1), Rules Regulating The Florida Bar. In determining whether a client should be informed of the participation of the overseas provider an attorney should bear in mind factors such as whether a client would reasonably expect the lawyer or law firm to personally handle the matter and whether the non-lawyers will have more than a limited role in the provision of the services.”; "The law firm may charge a client the actual cost of the overseas provider, unless the charge would normally be covered as overhead.").

- San Diego County LEO 2007-1 (undated) (assessing a situation in which a lawyer in a two-lawyer firm was retained to defend a "complex intellectual property dispute" although he was not experienced in intellectual property litigation; noting that the lawyer hired an Indian firm "to do legal research, develop case strategy, prepare deposition outlines, and draft correspondence, pleadings, and motions in American intellectual property cases at a rate far lower than American lawyers could charge clients if they did the work themselves"; also noting that the lawyer had not advised his client that he had retained the Indian firm; explaining that the lawyer eventually was successful on summary judgment in the case; holding that: (1) the lawyers did not assist in the unauthorized practice of law; explaining that it is not necessary for a non-lawyer to be physically present in California to violate the UPL Rules, as long as the non-lawyer communicated into California; concluding that "[t]he California lawyer in this case retained full control over the representation of the client and exercised independent judgment in reviewing the draft work performed by those who were not
California attorneys. His fiduciary duties and potential liability to his corporate client for all of the legal work that was performed were undiluted by the assistance he obtained from Legalworks [the Indian firm]. In short, in the usual arrangement, and in the scenario described above in particular, the company to whom work was outsourced has assisted the California lawyer in practicing law in this state, not the other way around. And that is not prohibited."; (2) the lawyer had a duty to inform the client of the firm's retention of the Indian firm, because the work was within the "reasonable expectation under the circumstances" that the client would expect the lawyer to perform (citation omitted); (3) whether the lawyer violated his duty of competence depended on whether he was capable of adequately supervising the Indian firm; "The Committee concludes that outsourcing does not dilute the attorney's professional responsibilities to his client, but may result in unique applications in the way those responsibilities are discharged. Under the hypothetical as we have framed it, the California attorneys may satisfy their obligations to their client in the manner in which they used Legalworks, but only if they have sufficient knowledge to supervise the outsourced work properly and they make sure the outsourcing does not compromise their other duties to their clients. However, they would not satisfy their obligations to their clients unless they informed the client of Legalworks' anticipated involvement at the time they decided to use the firm to the extent stated in this hypothetical.".

- N.Y. City LEO 2006-3 (8/2006) (assessing the ethics ramifications of New York lawyers outsourcing legal support services overseas; distinguishing between the outsourcing of "substantive legal support services" (and "administrative legal support services" such as transcriptions, accounting services, clerical support, data entry, etc.; holding that New York lawyers may ethically outsource such substantive services if they: (1) avoid aiding non-lawyers in the unauthorized practice of law, which requires that the lawyer "must at every step shoulder complete responsibility for the non-lawyer's work. In short, the lawyer must, by applying professional skill and judgment, first set the appropriate scope for the non-lawyer's work and then vet the non-lawyer's work and ensure its quality."; (2) adequately supervise the overseas workers, which requires that the "New York lawyer must be both vigilant and creative in discharging the duty to supervise. Although each situation is different, among the salutary steps in discharging the duty to supervise that the New York lawyer should consider are to (a) obtain background information about any intermediary employing or engaging the non-lawyer, and obtain the professional résumé of the non-lawyer; (b) conduct reference checks; (c) interview the non-lawyer in advance, for example, by telephone or by voice-over-internet protocol or by web cast, to ascertain the particular non-lawyer's suitability for the particular assignment; and (d) communicate with the non-lawyer during the assignment to ensure that the non-lawyer understands the assignment and that the
non-lawyer is discharging the assignment according to the lawyer's expectations.; (3) preserve the client's confidences, suggesting "[m]easures that New York lawyers may take to help preserve client confidences and secrets when outsourcing overseas include restricting access to confidences and secrets, contractual provisions addressing confidentiality and remedies in the event of breach, and periodic reminders regarding confidentiality"; (4) avoid conflicts of interest, advising that "[a]s a threshold matter, the outsourcing New York lawyer should ask the intermediary, which employs or engages the overseas non-lawyer, about its conflict-checking procedures and about how it tracks work performed for other clients. The outsourcing New York lawyer should also ordinarily ask both the intermediary and the non-lawyer performing the legal support service whether either is performing, or has performed, services for any parties adverse to the lawyer's client. The outsourcing New York lawyer should pursue further inquiry as required, while also reminding both the intermediary and the non-lawyer, preferably in writing, of the need for them to safeguard the confidences and secrets of their other current and former clients.""); (5) bill appropriately, noting that "[b]y definition, the non-lawyer performing legal support services overseas is not performing legal services. It is thus inappropriate for the New York lawyer to include the cost of outsourcing in his or her legal fees. . . . Absent a specific agreement with the client to the contrary, the lawyer should charge the client no more than the direct cost associated with outsourcing, plus a reasonable allocation of overhead expenses directly associated with providing that service."; (6) obtain the client's consent when necessary, as "there is little purpose in requiring a lawyer to reflexively inform a client every time that the lawyer intends to outsource legal support services overseas to a non-lawyer. But the presence of one or more additional considerations may alter the analysis: for example, if (a) non-lawyers will play a significant role in the matter, e.g., several non-lawyers are being hired to do an important document review; (b) client confidences and secrets must be shared with the non-lawyer, in which case informed advance consent should be secured from the client; (c) the client expects that only personnel employed by the law firm will handle the matter; or (d) non-lawyers are to be billed to the client on a basis other than cost, in which case the client's informed advance consent is needed.").

Although there are some variations among these bars' analyses, all of them take the same basic approach.

First, lawyers must avoid aiding non-lawyers in the unauthorized practice of law.

This requires the lawyers to take responsibility for all of the outsourced work. The lawyers must ultimately adopt the outsourced work as their own.
Second, lawyers must provide some degree of supervision -- although the exact nature and degree of the supervision is far from clear. Lawyers should consider such steps as researching the entity that will conduct the outsourced work, conducting reference checks, interviewing the folks who will handle the outsourced work, specifically describing the work the lawyers require, and reviewing the work before adopting it as their own.

Third, lawyers must assure that the organization they hire adequately protects the client's confidences. This duty might involve confirming that the foreign lawyers' ethics are compatible with ours, and might also require some analysis of the confidentiality precautions and technologies that the foreign organization uses.

Fourth, the lawyers arranging for such outsourcing should avoid conflicts of interest. At the least the lawyers should assure that the organization handling the outsourced work is not working for the adversary. Some of the bars warn lawyers to take this step to avoid the inadvertent disclosure of confidential communications rather than to avoid conflicts.

Fifth, lawyers must bill appropriately. As explained above, if the lawyers are not "adding value" to the outsourced workers, they should pass along the outsourcing bill directly to their client as an expense. In that situation, the lawyer generally may add overhead expenses to the bill (although the ABA noted that there will be very few overhead expenses in a foreign outsourcing operation).

Sixth, lawyers usually must advise their clients that they are involving another organization in their work. As the various legal ethics opinions explain, such disclosure may not be required if the contract or temporary lawyers act under the direct supervision
of the law firm -- but disclosure is always best, and almost surely would be required in a situation involving a foreign law organization. For instance, the ABA indicated that the lawyer's lack of immediate supervision and control over foreign service providers means that they must obtain the client’s consent to send work overseas. The North Carolina Bar indicated that lawyers arranging for outsourcing must always obtain their clients' written informed consent.

**Best Answer**

The best answer to (a) is **YES**; the best answer to (b) is **DISCLOSURE TO THE CLIENT; DEGREE OF NECESSARY SUPERVISION; ASSURANCES OF CONFIDENTIALITY; CONFLICTS OF INTEREST**.
Donating Electronic Files to Institutions

Hypothetical 11

Your company's General Counsel just announced her early retirement after five wild years in which she advised your company, your state's senior senator and several important private clients that she continued to represent out of her home office. She wants to donate her files (including all of her emails) to a local university justifiably believing that they would be a treasure trove for future historians.

May your company's retiring General Counsel donate her files to the research library?

NO (UNLESS EACH CLIENT CONSENTS)

Analysis

The ethical duty of confidentiality and the attorney-client privilege last forever. ABA Model Rule 1.6 cmt. [18] ("The duty of confidentiality continues after the client-lawyer relationship has terminated."); Swidler & Berlin v. United States, 524 U.S. 399 (1998) (holding that the attorney-client privilege survived the client's suicide).

A number of state legal ethics opinions have explained that lawyers may not -- without consent following full disclosure of every client -- donate their files to research libraries or other third parties. Virginia LEO 1664 (2/9/96) (because a lawyer's duty to maintain confidences and secrets survives the client's death, a lawyer may not provide a former client's historically significant files to a university without either obtaining the client's consent or determining that the files contain no confidences or secrets; a lawyer may give limited information to an outside agency if it is necessary for the lawyer to perform the lawyer's job, but the lawyer must be careful in selecting the agency and instruct the agency that the information must be kept confidential; information is no longer confidential once it becomes a matter of public record unless it is a "secret").
implied (though not formal) attorney-client relationship can arise whenever a lawyer receives confidences or secrets from a person who had an expectation of confidentiality even if no representation resulted”); Virginia LEO 928 (6/11/87) (the ethical duty of confidentiality continues after a client's death, and the lawyer may not turn over the client's files to an institution).

Unfortunately, there is no exception for papers even of historical significance.

**Best Answer**

The best answer to this hypothetical is **NO (UNLESS EACH CLIENT CONSENTS)**.
Discarding Electronic Files

Hypothetical 12

One of your colleagues has served for several years on the board of an inner-city organization that helps disadvantaged high school students learn about the business world. When your law department decided to switch from regular PCs to laptops for all lawyers, your colleague asked the General Counsel whether she could donate the old PCs to the organization on whose board she serves.

May your law department donate the old PCs to the inner-city organization?

YES (AFTER TAKING PRECAUTIONS)

Analysis

This hypothetical raises both ethics and privilege issues. The sloppy handling of client confidences can violate a lawyer's duty of confidentiality, and also result in waiver of the attorney-client privilege. Not surprisingly, lawyers must diligently maintain their clients' confidences, both during the relationship and after the relationship.

In its decision generally approving outsourcing of legal services, the ABA reminded lawyers that they should consider conducting due diligence of the foreign legal providers -- such as "investigating the security of the provider's premises, computer network, and perhaps even its recycling and refuse disposal procedures."

ABA LEO 451 (8/5/08).¹

¹ ABA LEO 451 (8/5/08) (generally approving the use of outsourcing of legal services, after analogizing them to such "[o]utsourced tasks" as reliance on a local photocopy shop, use of a "document management company," "use of a third-party vendor to provide and maintain a law firm's computer system and "hiring of a legal research service"; lawyers arranging for such outsourcing must always "render legal services competently," however the lawyers perform or delegate the legal tasks; lawyers must comply with their obligations in exercising "direct supervisory authority" over both lawyers and nonlawyers, "regardless of whether the other lawyer or the nonlawyer is directly affiliated with the supervising lawyer's firm"; the lawyer arranging for outsourcing "should consider" conducting background checks of the service providers, checking on their competence, investigating "the security of the provider's..."
One newspaper article highlighted the ethical risk of sloppy client file destruction.

- **Disciplinary Counsel v. Shaver**, 904 N.E.2d 883, 884 (Ohio 2009) (issuing a public reprimand against a lawyer (and Mayor of Pickerington, Ohio) for discarding client files in a dumpster, and leaving approximately 20 boxes of other client files next to the dumpster; noting that the tenant who had moved into the office that was vacated by the lawyer "had misgivings about the propriety of respondent's disposal method," "examined the contents of several of the boxes left by the dumpster," and moved the boxes back into a garage that the lawyer continued to lease; also explaining that "[n]either of the property owners nor the new tenant contacted respondent again about his failure to remove all the contents of the garage. An anonymous tipster, however, contacted a television station about the incident, and the tip led to television news and newspaper stories."); publicly remanding the lawyer for violations of Rules 1.6(a) and 1.9(c)(2) -- which prohibit lawyers from revealing client confidences).

The most frightening form of inadvertent express waiver is exemplified by **Suburban Sew 'N Sweep, Inc. v. Swiss-Bernina, Inc.**, 91 F.R.D. 254 (N.D. Ill. 1981). In *Suburban*, the plaintiff sifted through the defendant's trash dumpster for two years. This unpleasant task yielded hundreds of discarded privileged documents. The court held that the defendants had not taken reasonable steps to ensure complete obliteration of the documents (such as shredding) and, therefore, had expressly waived the privilege.

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premises, computer network, and perhaps even its recycling and refuse disposal procedures"; lawyers dealing with foreign service providers should analyze whether their education and disciplinary process is compatible with that in the U.S. -- which may affect the level of scrutiny with which the lawyer must review their work product; such lawyers should also explore the foreign jurisdiction's confidentiality protections (such as the possibility that client confidences might be seized during some proceedings, or lost during adjudication of a dispute with the service providers); because the typical outsourcing arrangement generally does not give the hiring lawyer effective "supervision and control" over the service providers (as with temporary lawyers working within the firm), arranging for foreign outsourced work generally will require the client's informed consent; lawyers must also assure the continued confidentiality of the client's information (thus, "[w]ritten confidentiality agreements are . . . strongly advisable in outsourcing relationships"); to minimize the risk of disclosure of client confidences, the lawyer should verify that the service providers are not working for the adversary in the same or substantially related matter; lawyers generally may add a surcharge (without advising the client) to a contract lawyer's expenses before billing the client; if the lawyer "decides" to bill those expenses as a disbursement, the lawyer may only bill the client for the actual cost of the services "plus a reasonable allocation of associated overhead, such as the amount the lawyers spent on any office space, support staff, equipment, and supplies"; the same rules apply to outsourcing, although there may be little or no overhead costs).
Under this approach, the negligent destruction of documents, not just the negligent handling of documents or the negligent production of documents to an opponent, can amount to a waiver.\(^2\)

Other courts take a more forgiving approach and find that clients do not waive the attorney-client privilege if they take reasonable steps when discarding their privileged documents.\(^3\)

Giving away computer hard drives without "scrubbing" them could be analogized to throwing away paper records without even bothering to shred them. Under some of

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\(^2\) Although it did not deal with the attorney-client privilege issue, another court reached a similar conclusion in United States v. Scott, 975 F.2d 927, 929-30 (1st Cir. 1992) (A criminal defendant argued that the government violated his Fourth Amendment rights by conducting a warrantless seizure and reconstruction of shredded documents from trash bags he had left outside his home. The court found that the defendant could have no expectation of privacy after placing the shredded documents "in a public area accessible to unknown third parties." The court concluded, "[i]n our view, shredding garbage and placing it in a public domain subjects it to the same risks regarding privacy, as engaging in a private conversation in pubic where it is subject to the possibility that it may be overheard by other persons.").

\(^3\) Sparshott v. Feld Entm't, Inc., Civ. A. No. 99-0551 (JR), 2000 U.S. Dist. LEXIS 13800, at *2-3 (D.D.C. Sept. 21, 2000) (finding that a discharged employee had not waived the attorney-client privilege covering a dictaphone tape recording of conversations with his lawyer by failing to take the tape from his office after he was fired; "[a] reasonable analysis of the record compels the conclusion that Smith simply forgot the tape on March 7 and, under pressure (and under scrutiny) to clear out his office a few days later, forgot it then as well. That set of facts does not amount to a waiver of Smith's attorney-client privilege. Smith's ejection from the building and lockout from his office was indeed involuntary, and his neglect or failure to recall that the tape was in the dictaphone was not an affirmative act such as, for example, throwing a confidential document into the garbage"); McCafferty's, Inc. v. Bank of Glen Burnie, 179 F.R.D. 163, 169-70 (D. Md. 1998) (finding that client had not waived the attorney-client privilege by discarding a privileged document by tearing it into sixteen pieces and throwing it in the trash; "To be sure, there were additional precautions which Joyner could have taken. . . . BGB could have used a paper shredder. Joyner could have burned the pieces of the memo before throwing the ashes away. She could have torn it into smaller pieces, or distributed the pieces into several trash cans in different locations. However, the issue is not whether every conceivable precaution which could have been taken was taken, but whether reasonable precautions were taken. Under the facts of this case, Joyner would have had to anticipate that someone would trespass onto BGB's private property, look through an entire dumpster of trash, remove sealed bags of garbage, sift through them looking for torn up documents, and then piece them together. Even in an age where commercial espionage is increasingly common, the likelihood that someone will go to the unseemly lengths which Mariner did to obtain the Serotte memo is not sufficiently great that I can conclude that the precautions Joyner took were not reasonable. Although the precautions taken in this case were not perfect, they were sufficient to preserve the attorney-client privilege against the clandestine assault by Mariner's "dumpster diver." (citation omitted)).
the precedent, this could cause a real problem on both the ethics front and the privilege front.

If the hard drives have been properly "scrubbed," there would be nothing wrong with giving away the computers.

**Best Answer**

The best answer to this hypothetical is **YES (AFTER TAKING PRECAUTIONS).**
Use of New Technologies

Hypothetical 13

The outcome of a large commercial case might hinge on a neutral witness’s credibility. You are considering ways to confidentially test his credibility.

May you:

(a) Bring to your deposition of the neutral witness a young associate in your law firm who has a psychology PhD and an uncanny ability to determine if a witness is telling the truth or lying?

YES

(b) Install new software on your laptop computer which can analyze speech patterns and determine the likelihood that someone is lying -- and then bring your laptop to the deposition and view the results on the screen while you are deposing the neutral witness?

NO (PROBABLY)

(c) Use the new speech pattern software to analyze the neutral witness’s statements on the subject matter during a press conference that was broadcast on the local news station?

YES (PROBABLY)

Analysis

This hypothetical comes from Philadelphia LEO 2000-1 (2/2000).

The inquirer has asked this Committee to analyze the ethical implications for an attorney utilizing a recently-developed software program which purports to instantaneously analyze speech patterns to determine the veracity of the speaker. The technology firm that developed the software has asked the inquirer to use it in the inquirer’s law practice “to determine its validity in real life situations.”

(a) No one could object to using such methods unless there was some active deception involved.
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(b) The Philadelphia Bar held that using the software during a deposition violated several rules.

A person testifying at a deposition expects that testimony offered on the record will be transcribed and may be used thereafter at trial or in some other context. However, neither the deponent nor an attorney attending the deposition has reason to anticipate that the deponent's speech patterns will be calibrated and analyzed on a basis such as propounded for the described software. Using the software surreptitiously at the deposition, without the consent of the deponent and counsel present at the deposition, therefore may be deemed to violate Rule 4.1 (Truthfulness in Statements to Others), Rule 4.4 (Respect for Rights of Third Persons) and Rule 8.4 (prohibiting conduct involving dishonesty, fraud, deceit or misrepresentation).

(c) The Philadelphia Bar took a different approach to audiotapes obtained through lawful means and analyzed using the software.

In contrast, we see no ethical violation in using the software to analyze a lawfully-obtained, lawfully-created tape recording or videotape originally prepared for some other purpose, as long as: (1) it does not violate any restriction placed on the recording or videotape by law or otherwise, (2) the creation of the recording or videotape involved no deception. In other words, if the inquirer comes into possession of a lawfully-created tape recording without restrictions as to its use, the software may be used to analyze the speech patterns on the tape. We distinguish that scenario, however, from a situation in which the inquirer knows before making a tape that the inquirer intends to use the software to analyze it, yet fails to disclose that intention to the speaker.

Many lawyers would probably think that this activity would pass muster under the ethics rules, but the Philadelphia bar's hostile reaction should prompt lawyers to check the applicable rules and how the bars have interpreted them. This is especially important in any pre-litigation informal discovery -- because under the ABA Model
Rule 8.5 approach, the applicable ethics rules might be supplied by the state where the
court occurred rather than by the state where the litigation ultimately will ensue.

**Best Answer**

The best answer to (a) is **YES**; the best answer to (b) is **PROBABLY NO**; the
best answer to (c) is **PROBABLY YES**.
Discovery of a Party's or Witness's Social Media

Hypothetical 14

You represent an automobile manufacturer which has just been sued in a product liability case. The plaintiff claims to have suffered serious back injuries in an accident. One of the newest lawyers at your firm suggests that you check the plaintiff's Facebook page to see what the plaintiff has to say about the accident and her injuries.

May you check the plaintiff's Facebook page (and perhaps other social media sites on which the plaintiff is active) without the plaintiff's lawyer's consent?

YES

Analysis

As long as there is no "communication" with the party or witness whose social media sites are being checked, such research does not violate the prohibition on ex parte communications with a represented party. ABA Model Rule 4.2. Some bars would prohibit arguably deceptive conduct designed to gain access to such social media sites.

Simply researching a party's or witness's social media sites seems permissible in every state.

- Womack v. Yeoman, 83 Va. Cir. 401, 405 (Va. Cir. Ct. 2011) (finding nothing inappropriate with a defendant's lawyer gathering information about the plaintiff; "At no time did Defendant's counsel ever 'hack' into any private accounts, breach any law, or engage in unethical conduct. The Defendant's counsel was able to gather information by conducting a Google search of numerous family members. Further, Defendant's counsel did nothing wrong when accessing public Facebook accounts. Information posted on Facebook is a forward [sic] the results to the Plaintiff's counsel. Plaintiff's counsel objected to the information, during an emotional conversation at the courthouse, and stated Defendant's attorney had engaged in unethical and illegal conduct by 'hacking' into the various social networking online accounts. Plaintiff's counsel advised him the information was from public sites, like Google.").
New York LEO 843 (9/10/10) ("A lawyer representing a client in pending litigation may access the public pages of another party's social networking website (such as Facebook or MySpace) for the purpose of obtaining possible impeachment material for use in the litigation."); "Here . . . the Facebook and MySpace sites the lawyer wishes to view are accessible to all members of the network. New York's Rules 8.4 would not be implicated because the lawyer is not engaging in deception by accessing a public website that is available to anyone in the network, provided that the lawyer does not employ deception in any other way (including, for example, employing deception to become a member of the network). Obtaining information about a party available in the Facebook or MySpace profile is similar to obtaining information that is available in publicly accessible online or print media, or through a subscription research service such as Nexis or Factiva, and that is plainly permitted. Accordingly, we conclude that the lawyer may ethically view and access the Facebook and MySpace profiles of a party other than the lawyer's client in litigation as long as the party's profile is available to all members in the network and the lawyer neither 'friends' the other party nor directs someone else to do so." (footnote omitted)).

A party's or witness's postings on social media sites can be a rich source of useful evidence. One 2010 article emphasized this point.

Lev Kalman, Web Searches Serve as a Litigation Tool, Legal Intelligencer, Mar. 1, 2010 ("In the defense context, a critical component of litigating personal injury lawsuits is determining the extent to which a plaintiff has been injured, if at all. While use of a private investigator is often employed to make this determination, photographs posted on Facebook, which may show vacations, activities and interactions with friends, may also provide insight. In this day and age, a picture really can speak a thousand words -- and it may tell a story that the user may never have intended. Current digital camera technology provides a tremendous amount of information on the context of a digital photograph. For example, Samsung unveiled a global positioning system camera in the summer of 2009 that automatically geo-tags digital images, recording the latitude and longitude of where in the world each photo is taken. The location data is then automatically embedded into each image's digital file. A party may become excited about the technology lauded by the camera manufacturer without realizing how that technology may be used against him or her. Photographs posted on Facebook have very real consequences in litigation. In January 2010, a welder's claim against manufacturers of welding consumables in multidistrict litigation pending in Cleveland, Ohio, was dismissed after photographs of him were discovered on Facebook in which he was racing high-speed powerboats. Although the plaintiff had been claiming a severe disability, the Facebook photos clearly
showed otherwise and were instrumental in achieving dismissal of his claims.

Given the potentially devastating effect of social media site information about their clients, some lawyers cannot resist the temptation to hide such evidence. One example in Virginia serves as a good lesson for all lawyers.

- Peter Vieth, Top Personal Injury Lawyer Quits Allen Firm, Virginia Lawyers Weekly, July 20, 2011 ("Charlottesville lawyer Matthew B. Murray, the immediate past president of the Virginia Trial Lawyers Association (VTLA), has resigned from his law firm and reportedly is leaving the practice of law."); "Murray's resignation from Allen, Allen Allen & Allen, the largest personal injury firm in Virginia, came one day after the filing of legal papers accusing him of lying to the court in a Charlottesville wrongful death case last December."); "Among the allegations: In the face of a discovery order, Murray removed a potentially damaging email from the stack provided to the judge. The message allegedly directed his client to cleanup his Facebook page."); "Postings on Facebook became an issue after a defense lawyer discovered a surprising photograph of Lester on his personal page. In that photo, taken about a year after his wife’s death, Lester was holding a can of beer wearing a garter belt around his head and a t-shirt reading 'I [heart] hot moms.'"); "Murray allegedly attempted damage control by asking Lester to take down other potentially embarrassing photos. These included photographs showing Lester partying with unidentified women. This alleged request, relayed through a staffer, was dubbed the 'stink-bomb email' in the pleadings."); "Murray allegedly told the staffer it would be fine with him if she 'forgot to print' the stink-bomb message.").

- Peter Vieth, Verdict Slashed, Lawyer Referred for Discipline, Virginia Lawyers Weekly, Sept. 12, 2011 ("A Charlottesville judge slashed a record wrongful death verdict by two-thirds and ordered sanctions against the plaintiff and his lawyer in the aftermath of a hotly contested trial."); "Circuit Court Judge Edward L. Hogshire also referred Charlottesville lawyer Matthew B. Murray to the Virginia State Bar on three separate findings of wrongdoing, and referred Murray's client to the local prosecutor for consideration of a perjury charge."); "As the case moved toward trial in 2009, a skirmish erupted over Isaiah Lester's Facebook pages. For unknown reasons, Lester sent a Facebook message to defense lawyer David M. Tafuri. Tafuri checked out Lester's Facebook page and took note of a photo that showed Lester clutching a beer can, wearing a T-shirt proclaiming 'I [heart] hot moms.'"); "Tafuri asked for copies of all aspects of Lester's Facebook site, including all related photographs."); "Hogshire said, 'Instead of providing what was sought, Murray created a scheme to take down or deactivate Lester's Facebook page and to
respond by stating that Lester had no Facebook page as of the date the
response was signed.”; “As disputes continued over the Facebook evidence,
Hogshire demanded copies of all communications between Lester and his
lawyer’s office, including some the plaintiff claimed were privileged.”; “Despite
that order, Murray deliberately failed to disclose an email that directed Lester
to delete various pictures from the Facebook site. Murray once referred to
the message as the ‘stink bomb.’ Murray hid that email, Hogshire found, ‘out
of fear that the Court would grant another continuance of the trial.’”; “
Ultimately, all of the Facebook photos emerged and were used to
cross-examine Lester at trial.”; “After the trial, Murray produced the ‘now
notorious email’ to the judge, but he falsely represented that the earlier
omission was caused by the mistake of a paralegal.”).

- Peter Vieth, Court Orders Record Sanction Against Charlottesville Lawyer,
Virginia Lawyers Weekly, Nov. 9, 2011 (“In what appears to be the final trial
court chapter of a tangled Charlottesville legal saga, a judge has imposed
$542,000 in sanctions against attorney Matthew B. Murray for hiding evidence
and trying to deflect blame for lapses in his disclosures to the court.”; “The
monetary penalty is a record for sanctions against a lawyer in Virginia state
courts, according to Virginia State Bar Ethics Counsel James M. McCauley.”;
“In addition to the sanctions against Murray, Judge Edward L. Hogshire
ordered Murray’s client, Isaiah Lester, to pay $180,000. The judge directed
the two to pay the sum of $722,000 to the defendants who incurred additional
legal expenses probing improprieties stemming from a series of embarrassing
Facebook photographs.”; “Hogshire reduced Lester’s award [$6.2 million] to
$2.1 million in a September 1 decision later criticized by one of the jurors.
The juror disputed Hogshire’s conclusion that the panel must have been
unduly influenced by Murray’s histrionics at trial, which included singing,
praying and overly dramatic objections.”).

**Best Answer**

The best answer to this hypothetical is **YES**.
Using Arguably Deceptive Means to Gain Access to a Witness's Social Media

Hypothetical 15

You have read about the useful data a lawyer can obtain about an adverse party or witness by searching social media sites. One of your partners just suggested that you have one of your firm's paralegals send a "friend request" to an adverse (and unrepresented) witness. The paralegal would use his personal email. He would not make any affirmative misstatements about why he is sending the "friend request," but he likewise would not explain the reason for wanting access to the witness's social media.

May you have a paralegal send a "friend request" to an adverse witness, as long as the paralegal does not make any affirmative misrepresentations?

MAYBE

Analysis

This hypothetical involves the level of arguable deception that a lawyer or lawyer's representative may engage in while conducting discovery.

The Philadelphia Bar was apparently the first to address this issue, and found such a practice unacceptable.

- Philadelphia LEO 2009-02 (3/2009) (analyzing a lawyer interested in conducting an investigation of a non-party witness (not represented by any lawyer); explaining the lawyer's proposed action: "The inquirer proposes to ask a third person, someone whose name the witness will not recognize, to go to the Facebook and Myspace websites, contact the witness and seek to 'friend' her, to obtain access to the information on the pages. The third person would only state truthful information, for example, his or her true name, but would not reveal that he or she is affiliated with the lawyer or the true purpose for which he or she is seeking access, namely, to provide the information posted on the pages to a lawyer for possible use antagonistic to the witness. If the witness allows access, the third person would then provide the information posted on the pages to the inquirer who would evaluate it for possible use in the litigation."); finding the conduct improper; "Turning to the ethical substance of the inquiry, the Committee believes that the proposed
course of conduct contemplated by the inquirer would violate Rule 8.4(c) because the planned communication by the third party with the witness is deceptive. It omits a highly material fact, namely, that the third party who asks to be allowed access to the witness’s pages is doing so only because he or she is intent on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness. The omission would purposefully conceal that fact from the witness for the purpose of inducing the witness to allow access, when she may not do so if she knew the third person was associated with the inquirer and the true purpose of the access was to obtain information for the purpose of impeaching her testimony.

The inquirer has suggested that his proposed conduct is similar to the common -- and ethical -- practice of videotaping the public conduct of a plaintiff in a personal injury case to show that he or she is capable of performing physical acts he claims his injury prevents. The Committee disagrees. In the video situation, the videographer simply follows the subject and films him as he presents himself to the public. The videographer does not have to ask to enter a private area to make the video. If he did, then similar issues would be confronted, as for example, if the videographer took a hidden camera and gained access to the inside of a house to make a video by presenting himself as a utility worker.

The Committee is aware that there is a controversy regarding the ethical propriety of a lawyer engaging in certain kinds of investigative conduct that might be thought to be deceitful. For example, the New York Lawyers’ Association Committee on Professional Ethics, in its Formal Opinion No. 737 (May 2007), approved the use of deception, but limited such use to investigation of civil right or intellectual property right violations where the lawyer believes a violation is taking place or is imminent, other means are not available to obtain evidence and rights of third parties are not violated."

Since then, several bars have taken the same approach.

- San Diego LEO 2011-2 (5/24/11) (holding that a lawyer may not make a "friend request" to either an upper level executive of a corporate adversary (because even the request is a "communication" about the subject matter of the representation), or even to an unrepresented person; "A friend request nominally generated by Facebook and not the attorney is at least an indirect ex parte communication with a represented party for purposes of Rule 2-100(A). The harder question is whether the statement Facebook uses to alert the represented party to the attorney’s friend request is a communication 'about the subject of the representation.' We believe the context in which that statement is made and the attorney’s motive in making it matter. Given what results when a friend request is accepted, the statement from Facebook to the would-be friend could just as accurately read: '[Name] wants to have access to the information you are sharing on your Facebook page.’ If the communication to the represented party is motivated by the quest for
information about the subject of the representation, the communication with
the represented party is about the subject matter of that representation."; "[W]e conclude that the lawyer may ethically view and access the Facebook
and MySpace profiles of a party other than the lawyer's client in litigation as
long as the party's profile is available to all members of the network and the
lawyer neither 'friends' the other party nor directs someone to do so."; "We
believe that the attorney in this scenario also violates his ethical duty not to
deceive by making a friend request to a represented party's Facebook page
without disclosing why the request is being made. This part of the analysis
applies whether the person sought to be friended is represented or not and
whether the person is a party to the matter or not.; "We agree with the scope
of the duty set forth in the Philadelphia Bar Association opinion [Philadelphia
LEO 2009-02], notwithstanding the value in informal discovery on which the
City of New York Bar Association [New York City LEO 2010-02] focused.
Even where an attorney may overcome other ethical objections to sending a
friend request, the attorney should not send such a request to someone
involved in the matter for which he has been retained without disclosing his
affiliation and the purpose for the request.; "Nothing would preclude the
attorney's client himself from making a friend request to an opposing party or
a potential witness in the case. Such a request, though, presumably would
be rejected by the recipient who knows the sender by name. The only way to
gain access, then, is for the attorney to exploit a party's unfamiliarity with the
attorney's identity and therefore his adversarial relationship with the recipient.
That is exactly the kind of attorney deception of which courts disapprove.;";
"We have concluded that those [ethics] rules bar an attorney from making an
ex parte friend request of a represented party. An attorney's ex parte
communication to a represented party intended to elicit information about the
subject matter of the representation is impermissible no matter what words
are used in the communication and no matter how that communication is
transmitted to the represented party. We have further concluded that the
attorney's duty not to deceive prohibits him from making a friend request even
of unrepresented witnesses without disclosing the purpose of the request.
Represented parties shouldn't have 'friends' like that and no one --
represented or not, party or non-party -- should be misled into accepting such
a friendship.");

- New York LEO 843 (9/10/10) ("A lawyer representing a client in pending
litigation may access the public pages of another party's social networking
website (such as Facebook or MySpace) for the purpose of obtaining possible
impeachment material for use in the litigation.;" "Here . . . the Facebook and
MySpace sites the lawyer wishes to view are accessible to all members of the
network. New York's Rules 8.4 would not be implicated because the lawyer is
not engaging in deception by accessing a public website that is available to
anyone in the network, provided that the lawyer does not employ deception in
any other way (including, for example, employing deception to become a
member of the network). Obtaining information about a party available in the Facebook or MySpace profile is similar to obtaining information that is available in publicly accessible online or print media, or through a subscription research service such as Nexis or Factiva, and that is plainly permitted. Accordingly, we conclude that the lawyer may ethically view and access the Facebook and MySpace profiles of a party other than the lawyer's client in litigation as long as the party's profile is available to all members in the network and the lawyer neither 'friends' the other party nor directs someone else to do so.

- Philadelphia LEO 2009-02 (3/2009) (analyzing a lawyer interested in conducting an investigation of a non-party witness (not represented by any lawyer); explaining the lawyer's proposed action: "The inquirer proposes to ask a third person, someone whose name the witness will not recognize, to go to the Facebook and Myspace websites, contact the witness and seek to 'friend' her, to obtain access to the information on the pages. The third person would only state truthful information, for example, his or her true name, but would not reveal that he or she is affiliated with the lawyer or the true purpose for which he or she is seeking access, namely, to provide the information posted on the pages to a lawyer for possible use antagonistic to the witness. If the witness allows access, the third person would then provide the information posted on the pages to the inquirer who would evaluate it for possible use in the litigation."); finding the conduct improper; "Turning to the ethical substance of the inquiry, the Committee believes that the proposed course of conduct contemplated by the inquirer would violate Rule 8.4(c) because the planned communication by the third party with the witness is deceptive. It omits a highly material fact, namely, that the third party who asks to be allowed access to the witness's pages is doing so only because he or she is intent on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness. The omission would purposefully conceal that fact from the witness for the purpose of inducing the witness to allow access, when she may not do so if she knew the third person was associated with the inquirer and the true purpose of the access was to obtain information for the purpose of impeaching her testimony."); "The inquirer has suggested that his proposed conduct is similar to the common -- and ethical -- practice of videotaping the public conduct of a plaintiff in a personal injury case to show that he or she is capable of performing physical acts he claims his injury prevents. The Committee disagrees. In the video situation, the videographer simply follows the subject and films him as he presents himself to the public. The videographer does not have to ask to enter a private area to make the video. If he did, then similar issues would be confronted, as for example, if the videographer took a hidden camera and gained access to the inside of a house to make a video by presenting himself as a utility worker."); "The Committee is aware that there is a controversy regarding the ethical propriety of a lawyer engaging in certain kinds of
investigative conduct that might be thought to be deceitful. For example, the New York Lawyers' Association Committee on Professional Ethics, in its Formal Opinion No. 737 (May 2007), approved the use of deception, but limited such use to investigation of civil right or intellectual property right violations where the lawyer believes a violation is taking place or is imminent, other means are not available to obtain evidence and rights of third parties are not violated.

Ironically, in the very same month that the New York State Bar indicated that a lawyer could not send a "friend request" to the subject of searching, the New York City Bar held the opposite.

- New York City LEO 2010-2 (9/2010) ("A lawyer may not attempt to gain access to a social networking website under false pretenses, either directly or through an agent."); 
  "[W]e address the narrow question of whether a lawyer, acting either alone or through an agent such as a private investigator, may resort to trickery via the internet to gain access to an otherwise secure social networking page and the potentially helpful information it holds. In particular, we focus on an attorney's direct or indirect use of affirmatively 'deceptive' behavior to 'friend' potential witnesses. . . . [W]e conclude that an attorney or her agent may use her real name and profile to send a 'friend request' to obtain information from an unrepresented person's social networking website without also disclosing the reasons for making the request. While there are ethical boundaries to such 'friending,' in our view they are not crossed when an attorney or investigator uses only truthful information to obtain access to a website, subject to compliance with all other ethical requirements." (footnote omitted) (emphasis added); 
  "Despite the common sense admonition not to 'open the door' to strangers, social networking users often do just that with a click of the mouse."; 
  "[A]bsent some exception to the Rules, a lawyer’s investigator or other agent also may not use deception to obtain information from the user of a social networking website."; "We are aware of ethics opinions that find that deception may be permissible in rare instances when it appears that no other option is available to obtain key evidence. See N.Y. County 737 (2007) (requiring, for use of dissemblance, that 'the evidence sought is not reasonably and readily obtainable through other lawful means'); see also ABCNY Formal Op. 2003-2 (justifying limited use of undisclosed taping of telephone conversations to achieve a greater societal good where evidence would not otherwise be available if lawyer disclosed taping). Whatever the utility and ethical grounding of these limited exceptions -- a question we do not address here -- they are, at least in most situations, inapplicable to social networking websites. Because non-deceptive means of communication ordinarily are available to obtain information on a social networking page -- through ordinary discovery of the targeted individual or of
the social networking sites themselves -- trickery cannot be justified as a necessary last resort. For this reason we conclude that lawyers may not use or cause others to use deception in this context." (footnote omitted); "While we recognize the importance of informal discovery, we believe a lawyer or her agent crosses an ethical line when she falsely identifies herself in a 'friend request.'"; "Rather than engage in 'trickery,' lawyers can -- and should -- seek information maintained on social networking sites, such as Facebook, by availing themselves of informal discovery, such as the truthful 'friending' of unrepresented parties, or by using formal discovery devices such as subpoenas directed to non-parties in possession of information maintained on an individual's social networking page. Given the availability of these legitimate discovery methods, there is and can be no justification for permitting the use of deception to obtain the information from a witness on-line."; "Accordingly, a lawyer may not use deception to access information from a social networking webpage. Rather, a lawyer should rely on the informal and formal discovery procedures sanctioned by the ethical rules and case law to obtain relevant evidence.").

The trend seems to be against permitting such "friending" in the absence of a disclosure of the request's purpose.

**Best Answer**

The best answer to this hypothetical is **MAYBE**.
Researching Jurors' Social Media Sites

Hypothetical 16

You have read about lawyers and their representatives researching adverse parties' and witnesses' social media sites. One of your partners about to begin a jury trial just asked if he could conduct the same research of potential jurors.

May a lawyer research potential jurors' social media sites?

YES

Analysis

The only bars which have apparently dealt with this issue found such action ethical, as long as there was no communication with the jurors, and the jurors could not determine that his or her social media site had been checked by a lawyer.

- New York City Bar 2012-2 (2012) ("Attorneys may use social media websites for juror research as long as no communication occurs between the lawyer and the juror as a result of the research. Attorneys may not research jurors if the result of the research is that the juror will receive a communication. If an attorney unknowingly or inadvertently causes a communication with a juror, such conduct may run afoul of the Rules of Professional Conduct. The attorney must not use deception to gain access to a juror's website or to obtain information, and third parties working for the benefit of or on behalf of an attorney must comport with all the same restrictions as the attorney. Should a lawyer learn of juror misconduct through otherwise permissible research of a juror's social media activities, the lawyer must reveal the improper conduct to the court.").

- New York County Law. Ass'n LEO 743 (5/18/11) (explaining that a lawyer can investigate jurors by using their publicly-available social network information, although such a search might an improper "communication" if the juror knows that the lawyer has searched; "It is proper and ethical under RPC 3.5 for a lawyer to undertake a pretrial search of a prospective juror's social networking site, provided that there is no contact or communication with the prospective juror and the lawyer does not seek to 'friend' jurors, subscribe to their Twitter accounts, send tweets to jurors or otherwise contact them. During the evidentiary or deliberation phases of a trial, a lawyer may visit the publicly available Twitter, Facebook or other social networking site of a juror, but not...")
'friend,' email, send tweets to jurors or otherwise communicate in any way with the juror, or act in any way by which the juror becomes aware of the monitoring. Moreover, the lawyer may not make any misrepresentation or engage in deceit, directly or indirectly, in reviewing juror social networking sites."; "[U]nder some circumstances a juror may become aware of a lawyer's visit to the juror's website. If a juror becomes aware of an attorney's efforts to see the juror's profiles on websites, the contact may well consist of an impermissible communication, as it might tend to influence the juror's conduct with respect to the trial." (footnote omitted)).

Best Answer

The best answer to this hypothetical is YES.
Jurors' Improper Communications

Hypothetical 17

You recently finished a rare court-appointed criminal case, and were disappointed that your client was convicted of armed robbery. You just discovered that one of the jurors had been posting comments on her Facebook page during the trial. You wonder whether this will give you grounds for an appeal.

May you base an appeal on a juror's postings on a social media site?

YES

Analysis

In recent years, numerous articles have noted the dramatic increase in improper juror communications, as well as the legal impact of such misconduct.

- Deborah Elkins, It's Just Google!, Virginia Lawyers Weekly, May 18, 2012 ("At the outer limits of juror misconduct, a juror in England actually posted information on a trial on her Facebook page, and asked people to vote for a verdict.").

- Michael Tarm, Courtroom Clash Over Tweets, Associated Press, Apr. 17, 2012 ("Getting news from a big trial once took days, moving at the speed of a carrier pigeon or an express pony. The telegraph and telephone cut that time dramatically, as did live TV."); "Now comes Twitter with more changes, breaking up courtroom journalism into bite-size reports that take shape as fast as a reporter can tap 140 characters into a smartphone. But the micro-blogging site is putting reporters on a collision course with judges who fear it could threaten a defendant's right to a fair trial."); "The tension was highlighted recently by a Chicago court's decision to ban anyone from tweeting or using other social media at the trial of a man accused of killing Oscar winner Jennifer Hudson's family. Reporters and their advocates insist the practice is essential to providing a play-by-play for the public as justice unfolds."); "The judge in the Illinois case fears that feverish tweeting on smartphones could distract jurors and witnesses."); "Tweeting takes away from the dignity of a courtroom," said Irv Miller, media liaison for Cook County Judge Charles Burns. 'The judge doesn't want the trial to turn into a circus.'"); "Burns is allowing reporters to bring cellphones and to send e-mails periodically, a notable concession in a state that has only recently announced it will begin experimenting with cameras in court and where cellphones are..."
often barred from courtrooms."); "There's also an overflow courtroom where reporters can tweet freely. But there will be no audio or video of proceedings in the room, just live transcripts scrolling across a screen."); "In their request for a new trial, attorneys for Texas financier R. Allen Stanford, who was convicted of fraud last month, argued that tweeting by reporters distracted jurors and created other risks. The federal judge denied he request."); "And a Kansas judge recently declared a mistrial after a Topeka Capital-Journal reporter tweeted a photo that included the grainy profile of a juror hearing a murder case. The judge had permitted camera phones in court but said no photos were to be taken of jurors."); "Reporter Ann Marie Bush hadn't realized one juror was in view, Publisher Gregg Ireland said, adding that the company 'regrets the error and loss of the court's time.'"); "Journalists understand judges' concerns, Dalglish [director, Reporters Comm. for Freedom of the Press] said. But the better solution is for courts to do what they have done for decades -- tell jurors not to follow news on their case, including by switching off their Twitter feeds."); "One obstacle to reaching a consensus is that no one agrees on what Twitter is or does. Some judges say it's broadcasting, like television, which is banned from courtrooms in some states. [Radio journalist] Fuller says tweets are more like notes that get shared.").


("Judges typically instruct jurors not to do any independent research or communicate with anyone about the case they are hearing, either through social media or in person. Courts are concerned about what users might say online, because it could be construed as having a bias about the case or reveal information about a trial or deliberations before they becomes public. Even postings that seem benign could lead to questions about the juror's ability to follow directions or whether he has communicated about the case elsewhere. 'It is a whole new world,' said Dennis Sweeney, a retired judge in Maryland, who in late 2009 presided over the corruption trial of former Baltimore Mayor Sheila Dixon. Some called it the 'Facebook Five' case, when members of the jury communicated with one another about the case on the site, prompting the mayor to seek a new trial. The parties reached a plea before that, and the jurors in the case weren't punished. A challenge for courts is that use of social media is difficult to detect. Late last year, 79% of judges who responded to a survey question by the Federal Judicial Center said they had no way of knowing whether jurors had violated a social-media ban. Legal experts say someone would need to have access to a juror's postings and flag it to the court. In the Baltimore case, a newspaper reporter detected the Facebook posts. In the Arkansas case, someone working with the defense detected the juror's tweets. Judges are taking stiffer measures when they do find out. Last month, Florida juror Jacob Jock was held in contempt of court and sentenced to three days in jail after he used Facebook to 'friend' a defendant in a personal-injury case. (Mr. Jock said the friend request was accidental.). Last summer, a Texas man was sentenced to two
days of community service for ‘friend ing’ a plaintiff in a car-wreck case. Later this month, a state appeals court in Sacramento, California, will hear arguments in a case that will examine whether a juror empaneled for a gang-beating case should have to divulge Facebook records to defense attorneys seeking to overturn their clients’ 2010 convictions in light of the juror’s posting during the trial.”).

- Brian Grow, As Jurors Go Online, United States Trials Go Off Track, Reuters Legal, Dec. 8, 2010 (“A Reuters Legal analysis found that jurors’ forays on the Internet have resulted in dozens of mistrials, appeals and overturned verdicts in the last two years. For decades, courts have instructed jurors not to seek information about cases outside of evidence introduced at trial, and jurors are routinely warned not to communicate about a case with anyone before a verdict is reached. But jurors these days can, with a few clicks, look up definitions of legal terms on Wikipedia, view crime scenes via Google Earth, or update their blogs and Facebook pages with snide remarks about the proceedings. The consequences can be significant. A Florida appellate court in September overturned the manslaughter conviction of a man charged with killing his neighbor, citing the jury foreman’s use of an iPhone to look up the definition of “prudent” in an online dictionary. In June, the West Virginia Supreme Court of Appeals granted a new trial to a sheriff’s deputy convicted of corruption, after finding that a juror had contacted the defendant through MySpace. Also in September, the Nevada Supreme Court granted a new trial to a defendant convicted of sexually assaulting a minor, because the jury foreman had searched online for information about the types of physical injuries suffered by young sexual assault victims.”); “Over a three-week period in November and December, Reuters Legal monitored Twitter, reading tweets that were returned when “jury duty” was typed into the site’s search engine. Tweets from people describing themselves as prospective or sitting jurors popped up at the astounding rate of one nearly every three minutes. Many appeared to be simple complaints about being called for jury duty in the first place, or about the boredom of sitting through a trial. But a significant number included blunt statements about defendants’ guilt or innocence. ‘Looking forward to a not guilty verdict regardless of evidence,’ one recent message stated. Read another: ‘Jury duty is a blow. I’ve already made up my mind. He’s guilty. LOL.’ Last month, a person using the Twitter name @JohnnyCho wrote that he was in a pool of potential jurors in Los Angeles Superior Court, and tweeted, ‘Guilty! He’s guilty! I can tell!’ In later tweets, @JohnnyCho said he was picked for the jury and that the defendant was convicted.”); “In another recent case, Susan Dennis, a Seattle blogger, posted in late October that she was a prospective juror in the Superior Court of King County, Washington. The prosecutor during jury selection, she wrote, was ‘Mr. Cheap Suit’ and ‘annoying,’ while the defense attorney ‘just exudes friendly. I want to go to lunch with him. And he’s cute.’ She also wrote that the judge had instructed jurors not to tweet about the robbery case but had ‘made no
mention’ of blogging. Reached by email, Dennis responded that she had no comment. Reuters Legal described the circumstances to a jury consultant, who independently notified the court about the blog. That day, the judge dismissed Dennis from the jury pool for ignoring his instruction not to communicate online about the case, according to Amy Montgomery, one of the prosecutors. ‘We believe, probably stupidly, that jurors follow judges’ instructions,’ said public defender Jonathan Newcomb. ‘They don’t.’ Complications caused by Internet-surfing jurors have arisen in major corporate disputes. In September, Exxon Mobil Corp challenged a verdict awarding $104 million to New York City in a ground-water contamination case, in part because two jurors allegedly looked up information online. U.S. District Court Judge Shira Scheindlin denied a new trial, but she acknowledged in her ruling that ‘search engines have indeed created significant new dangers for the judicial system.’” (emphases added)).

Courts have taken aggressive steps to warn jurors against such improper communications while they serve.

- Adolfo Pesquera, Florida Jurors Banned From Blogging About Criminal Cases, Daily Business Review, May 21, 2012 (“Trial judges must tell jurors they ‘must not use electronic devices or computers to talk about this case, including tweeting, texting, blogging, emailing, posting information on a website or chat room, or any other means at all.’”; “A 2010 Reuters Legal survey found at least 90 verdicts subject to challenge from 1999 to 2010 because of internet-related juror misconduct. More than half the cases cited occurred from 2008 to 2010. Despite instructions, jurors continue to misuse Google and their Facebook and Twitter accounts.”; “Earlier this month, Miami-Dade Circuit Judge Jose Fernandez heard a challenge to an armed robbery conviction based on the jury foreman’s social media use. Miami filmmaker Billy Corben, the accused tweeter, was singled out by the defense attorney for flouting the ‘repeated and clear command of this court.’”; “The March 23 drunken-driving manslaughter conviction of Wellington polo mogul John Goodman also is in doubt in part because a juror wrote an e-book based on his involvement in the trial.”).

- Most Federal Judges Warn Jurors About Social Media, The Third Branch Newsletter, Mar. 2012 (“Most federal judges have taken steps to ensure that jurors do not use social media to discuss the trial in which they are involved, a survey of trial judges in all of the nation’s 94 judicial districts indicates. The Federal Judicial Center was asked by the Judicial Conference Committee on Court Administration and Case Management (CACM) to survey federal judges on the issue. Its report said that 94 percent of the 508 judges who responded said they formally have warned jurors about any case-connected use of social media. ‘The most common strategy is incorporating social
media use into jury instructions — either the model jury instructions provided by CACM or judges’ own personal jury instructions,’ the report said. ‘Also common are the practices of reminding jurors on a regular basis not to use social media to communicate during trial or deliberations, explaining the reasons behind the ban on social media, and confiscating electronic devices in the courtroom,’ the report added. As a result of the survey, CACM has asked a subcommittee to consider whether the model jury instructions the committee issued in December 2009 should contain additional language. The subcommittee also was asked to explore additional options mentioned by some judges, such as having jurors sign a pledge promising to avoid social media. The survey, conducted in October 2011, found that the detected use of social media by jurors during trials and deliberations is not a common occurrence. Of the 508 responding judges, only 30 reported any detected instances. Twenty-eight of those 30 judges said they discovered social media use in only one or two trials. Of the 17 judges who described the type of social media used by jurors, three judges reported that a juror 'friended' or attempted to 'friend' one or more participants in the case, and three reported that a juror communicated or attempted to communicate directly with participants in the case. One judge reported that a juror revealed identifying information about other jurors. Two judges described situations in which a juror contacted a party with case-specific information. In one, the juror contacted the plaintiff’s former employee to reveal a likely verdict. In the other, an alternate juror contacted an attorney during jury deliberations to provide feedback and the likely verdict. Action taken by judges who learned of jurors’ social media use varied. Nine judges reported that they removed a juror from the jury; eight said they cautioned the wayward juror but allowed them to remain on the jury. Four judges declared mistrials because of such juror conduct; one judge held a juror in contempt of court; and one judge reported fining a juror.”

- Erin L. Burke, Erik K. Swanholt and Jessica M. Sawyer, Twelve Angry Tweets, Law 360, Mar. 6, 2012 ("In late 2011, California’s Judicial Council revised California’s Criminal Jury Instruction 100, a pretrial jury instruction in which the judge explains to a jury the prohibition on allowing anything outside the courtroom to influence their decisions, to read: 'Do not share information about the case in writing, by email, by telephone, on the Internet, or by any other means of communication. . . . Do not use the Internet . . . in any way in connection with this case, either on your own or as a group.' The Judicial Council was even more direct with its changes to Civil Jury Instruction 100 (CAC) (amended effective January 1, 2012). That instruction was amended to include a generic list of prohibited electronic media, warning jurors not to use ‘any electronic device or media, such as a cell phone or smart phone, PDA, computer, the Internet, any Internet service, any text or instant-messaging, any Internet chat room, blog, or Website, including social networking websites or online diaries, to send or receive any information to or
from anyone about this case or your experience as a juror until after you have been discharged from your jury duty.” (footnotes omitted)).

In addition to warning jurors against such misconduct, states have adopted statutory provisions under which jurors can be punished for such misconduct.

- **New California Law Bans Jurors' Texting, Tweeting**, Associated Press, Aug. 6, 2011 (“A new state law clarifies that jurors are prohibited from texting, tweeting and using smart phones to discuss or research cases. The bill by Democratic Assemblyman Felipe Fuentes of Sylmar also clarifies that jurors cannot use electronic or wireless communications to contact court officials. Governor Jerry Brown signed AB 141 on Friday. The bill adds to existing jury instructions. It specifies that jurors consider only facts presented to them in court without doing their own research or communicating outside the jury room. The system’s Judicial Council says jurors’ use of electronic devices has become ‘an increasingly significant threat to the integrity of the justice system.’ The law, which takes effect in January, makes it a misdemeanor for jurors to use electronic or wireless devices to research or communicate with others.”).

Courts have not been reluctant to use these new statutes or other provisions to deter such juror misconduct.

- **Juror Number One v. Superior Court**, 142 Cal. Rptr. 3d 151, 161-62 (Cal. Ct. App. 2012) (finding that a juror being investigated for Facebook posting during a trial could not resist the court’s discovery of the posting; “[I]n the present matter, Juror Number One does not claim respondent court exceeded its inherent authority to inquire into juror misconduct. Just as the court may examine jurors under oath . . . it may also examine other evidence of misconduct. In this instance, the court seeks to review in camera the very items -- the Facebook posts -- that constitute the misconduct. Juror Number One contends such disclosure violates the SCA, but it does not. Even assuming the Facebook posts are protected by the SCA, the SCA protects against disclosure by third parties, not the posting party. Juror Number One also contends the order is not authorized, because the court has completed its investigation of misconduct. But such investigation obviously has not been completed. Juror Number One also contends the compelled disclosure violates his Fourth and Fifth Amendment rights. However, beyond asserting this to be so, he provides no argument or citation to authority. Thus, those arguments are forfeited. Finally, Juror Number One argues forced disclosure of his Facebook posts violates his privacy rights. However, Juror Number One has not shown he has any expectation of privacy in the posts and, in any event, those privacy rights do not trump real parties in interest's rights to a fair
trial free from juror misconduct. The trial court has the power and the duty to inquire into whether the confirmed misconduct was prejudicial.

- Cheryl Miller, *Facebooking Juror Sets Fair Trial Rights Against Privacy Concerns*, The Recorder, Mar. 27, 2012 (“A three-justice panel on Friday appeared split over whether a former jury foreman should be forced to hand over months of Facebook postings he made during a 2010 felony trial in Sacramento. In a case with the potential to set the boundaries between social media privacy and fair-trial rights, five defendants convicted in a gang-related beating want to see what the foreman, known only as Juror Number 1, told his Facebook friends about the trial.”).

- Ben Zimmer, *Juror Could Face Jail Time for ‘Friending’ Defendant*, USA Today, Feb. 7, 2012 (“A man accused of ‘friending’ a defendant in a case while serving on her jury could face jail time next week. Jacob Jock was selected for the jury in a car-wreck case in December and told the usual prohibitions. But when the judge learned Jock looked up the female defendant on Facebook and sent her a friend request, Jock was kicked off the jury and admonished.”).

Not surprisingly, such juror misconduct occasionally results in dramatic legal consequences.

- Dimas-Martinez v. State of Arkansas, No. CR-11-5, 2011 Ark. LEXIS 593, at *7, *21, *25-26 (Ark. Dec. 8, 2011) (overturning a death row inmate’s conviction for murder because jurors slept during the trial and one juror tweeted about the trial contrary to the judge’s instruction; “Appellant points to the facts that one juror fell asleep during the guilt phase of the trial, a fact that was brought to the circuit court’s attention, and a second juror was posting on his Twitter account during the case, and continued to do so even after being questioned by the circuit court, as evidence of juror misconduct that calls into question the fairness of his trial.” (footnote omitted); “In his motion for new trial, Appellant stated that Juror 2 tweeted two different times on April 1, 2010, during the time the jury was deliberating in the sentencing phase. Specifically, at 1:27 p.m., Juror 2 tweeted: ‘If its wisdom we seek . . . We should run to the strong tower.’ Then, again at 3:45 p.m., he tweeted, ‘Its over.’ But, the jury did not announce that it had reached a sentence until 4:35 p.m. The circuit court denied Appellant's motion for a new trial, finding that Appellant suffered no prejudice.”; “Finally, we take this opportunity to recognize the wide array of possible juror misconduct that might result when jurors have unrestricted access to their mobile phones during a trial. Most mobile phones now allow instant access to a myriad of information. Not only can jurors access Facebook, Twitter, or other social media sites, but they can also access news sites that might have information about a case. There is
also the possibility that a juror could conduct research about many aspects of a case. Thus, we refer to the Supreme Court Committee on Criminal Practice and the Supreme Court Committee on Civil Practice for consideration of the question of whether jurors' access to mobile phones should be limited during a trial.

**Best Answer**

The best answer to this hypothetical is **YES**.
Juror's Improper Independent Research

Hypothetical 18

You just won a large intellectual property case. Your celebration was cut short when you learned that one of the jurors had used her smartphone to research the meaning of some terms in the jury instructions.

Does a juror's personal investigation provide grounds for reversing a judgment?

YES

Analysis

Not surprisingly, jurors are supposed to consider only that evidence which has been tested by the crucible of the trial. In some situations, judges specifically instruct jurors to ignore evidence that has been improperly admitted.

Despite being explicitly warned not to do so, some jurors cannot resist the temptation to conduct their own research while serving on a jury.

Some courts have criticized jurors but not taken any harsh measures.

- In re Toppin, [No Number in Original], 2011 N.J. Super. Unpub. LEXIS 2573, at *5-6, *15-17, *25, *26, *30 (N.J. Super. Ct. Crim. Div. Oct. 11, 2011) (criticizing but declining to punish a juror who had researched various legal terms on the internet despite being advised not to do so; "With the assistance of a Sheriff's Officer, the materials were retrieved. The materials, printed from the internet, included a definition of 'preponderance' and 'preponderance of the evidence.' Also included were Wikipedia articles regarding 'legal burden of proof,' 'reasonable doubt,' 'beyond the shadow of a doubt,' 'jurisprudence,' and 'critical thinking,' as well as an article by Jim Hopper, Ph.D., entitled 'Recovered Memories of Sexual Abuse.'"; citing other examples of similar jury misconduct; "Anecdotal evidence, unsurprisingly, seems to support Bell's research, as there appear to be countless examples of jurors conducting internet research. Among them is a South Dakota juror who, in a seat belt product liability case, 'googled' the defendant and informed five other jurors the defendant had not been sued previously. . . . Additionally, a juror in a federal corruption trial in Pennsylvania posted his progress during deliberations on the internet, resulting in a motion for mistrial. . . . Jurors were
running searches in Google for lawyers and parties involved in a case, finding news articles about the case, researching definitions and information in Wikipedia, and looking for evidence excluded from the case presented. . . . As disconcerting as it is, while those transgressions happened to be discovered, they probably represent just the tip of the iceberg of juror (mis)behavior.; noting courts' efforts to avoid problems; "A San Diego Superior Court Judge has recently adopted a novel policy requiring jurors to sign declarations stating they will not use the internet or other media to conduct research. . . . Should a juror violate his or her signed declaration, the juror is subject to punishment by a fine, probation, or incarceration."; "Instructions and warnings have, at times, failed to prevent jurors from discussing cases on the internet, and, as a result, some courts have adopted various forms of punishment for disobedience. . . . Some judges use relatively minor penalties as a reprimand for misconduct, as was the case when a Michigan judge fined a juror $250 for sharing her belief the defendant was guilty on her Facebook page. . . . The judge also required the juror to write a short essay on the Sixth Amendment. . . . Others have called for a harsher financial penalty, thereby holding jurors who have engaged in misconduct on the internet financially accountable for the costs of retrial."; "A Florida judge chose to 'remove [the] distraction and temptation' of cell phones, iPods, and other such devices by requiring jurors to leave the devices on the table by the witness stand when court is in session and during jury deliberations."; "An assembly bill in California, signed by the Governor on August 5, 2011, added an admonishment to ward off independent electronic research by jurors.").

As with courts' reaction to improper jury communications, inappropriate juror research can have a wide-ranging impact.

- **United States v. Lawson**, 677 F.3d 629, 639-40, 650 & n.28, 651 (4th Cir. 2012) (granting the defendant a new trial after he was convicted by a jury of violating animal fighting prohibition laws; "Juror 177 used a computer printer at his home to reproduce the Wikipedia entry for the term 'sponsor,' and later brought the printout to the jury room when the deliberations resumed. Juror 177 shared the printout with the jury foreperson, Juror 185, and also attempted to show the material to other jurors, but was stopped when some of them told him it would be inappropriate to view the material. These actions violated the explicit instructions of the district court, which had admonished the jurors not to conduct any outside research about the case, including research on the internet."; "We observe that we are not the first federal court to be troubled by Wikipedia's lack of reliability. See Bing Shun Li v. Holder, 400 F. App'x 854, 857-58 (5th Cir. 2010) (expressing 'disapproval of the [immigration judge's] reliance on Wikipedia and [warning] against any improper reliance on it or similarly reliable internet sources in the future'
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(footnote omitted); Badasa v. Mukasey, 540 F.3d 909, 910-11 (8th Cir. 2008) (criticizing immigration judge's use of Wikipedia and observing that an entry 'could be in the middle of a large edit or it could have been recently vandalized'); Crispin v. Christian Audigier, Inc., 717 F. Supp. 2d 965, 977 (C.D. Cal. 2010) (criticizing parties' reliance on Wikipedia); Kole v. Astrue, No. CV 08-0411, 2010 U.S. Dist. LEXIS 31245, 2010 WL 1338092, at *7 n.3 (D. Idaho Mar. 31, 2010) (admonishing counsel from using Wikipedia as an authority, observing that "Wikipedia is not a reliable source at this level of discourse").; "We note, however, that this Court has cited Wikipedia as a resource in three cases."; "In this case, we are unable to say that Juror 177's use of Wikipedia did not violate the fundamental protections afforded by the Sixth Amendment. Accordingly, we vacate the appellants' convictions under the animal fighting statute, and we award them a new trial with respect to those charges.").

- Brian Grow, As Jurors Go Online, United States Trials Go Off Track, Reuters Legal, Dec. 8, 2010 ("A Reuters Legal analysis found that jurors' forays on the Internet have resulted in dozens of mistrials, appeals and overturned verdicts in the last two years. For decades, courts have instructed jurors not to seek information about cases outside of evidence introduced at trial, and jurors are routinely warned not to communicate about a case with anyone before a verdict is reached. But jurors these days can, with a few clicks, look up definitions of legal terms on Wikipedia, view crime scenes via Google Earth, or update their blogs and Facebook pages with snide remarks about the proceedings. The consequences can be significant. A Florida appellate court in September overturned the manslaughter conviction of a man charged with killing his neighbor, citing the jury foreman's use of an iPhone to look up the definition of "prudent" in an online dictionary. In June, the West Virginia Supreme Court of Appeals granted a new trial to a sheriff's deputy convicted of corruption, after finding that a juror had contacted the defendant through MySpace. Also in September, the Nevada Supreme Court granted a new trial to a defendant convicted of sexually assaulting a minor, because the jury foreman had searched online for information about the types of physical injuries suffered by young sexual assault victims." (emphasis added); "Over a three-week period in November and December, Reuters Legal monitored Twitter, reading tweets that were returned when "jury duty" was typed into the site's search engine. Tweets from people describing themselves as prospective or sitting jurors popped up at the astounding rate of one nearly every three minutes. Many appeared to be simple complaints about being called for jury duty in the first place, or about the boredom of sitting through a trial. But a significant number included blunt statements about defendants' guilt or innocence. "Looking forward to a not guilty verdict regardless of evidence," one recent message stated. Read another: "Jury duty is a blow. I've already made up my mind. He's guilty. LOL." Last month, a person using the Twitter name @JohnnyCho wrote that he was in a pool of potential jurors.
in Los Angeles Superior Court, and tweeted, "Guilty! He's guilty! I can tell!"
In later tweets, @JohnnyCho said he was picked for the jury and that the
defendant was convicted."; "In another recent case, Susan Dennis, a Seattle
blogger, posted in late October that she was a prospective juror in the
Superior Court of King County, Washington. The prosecutor during jury
selection, she wrote, was 'Mr. Cheap Suit' and 'annoying,' while the defense
attorney 'just exudes friendly. I want to go to lunch with him. And he's cute.'
She also wrote that the judge had instructed jurors not to tweet about the
robbery case but had 'made no mention' of blogging. Reached by email,
Dennis responded that she had no comment. Reuters Legal described the
circumstances to a jury consultant, who independently notified the court about
the blog. That day, the judge dismissed Dennis from the jury pool for ignoring
his instruction not to communicate online about the case, according to Amy
Montgomery, one of the prosecutors. 'We believe, probably stupidly, that
jurors follow judges' instructions,' said public defender Jonathan Newcomb.
'They don't.' Complications caused by Internet-surfing jurors have arisen in
major corporate disputes. In September, Exxon Mobil Corp challenged a
verdict awarding $104 million to New York City in a ground-water
contamination case, in part because two jurors allegedly looked up
information online. U.S. District Court Judge Shira Scheindlin denied a new
trial, but she acknowledged in her ruling that 'search engines have indeed
created significant new dangers for the judicial system.'" (emphasis added)).

**Best Answer**

The best answer to this hypothetical is **YES**.
Judges' "Friending" of Lawyers Who Appear Before Them

Hypothetical 19

You have been going through a long series of discovery fights in a case pending in one of your state's most rural areas. You suspect some "home cooking," because the judge has ruled against you on essentially every matter that has come before him. You just discovered that the judge is a Facebook "friend" with the adversary's lawyer, and you wonder whether this is proper.

Is it permissible for a judge to be a Facebook "friend" with a lawyer who appears before the judge?

YES (PROBABLY)

Analysis

Because in nearly every situation judges are drawn from the legal community in which they have practiced, they frequently handle matters in which current or former professional colleagues and friends represent litigants.


Depending on the length and intensity of the friendship (and the nature of the case), a judge's personal friendship with a lawyer might require the judge's recusal. In most situations, such a personal friendship would not require the judge's recusal.¹

¹ See, e.g., People v. Chavous, No. 240340, 2004 Mich. App. LEXIS 1149, at *2-3 (Mich. Ct. App. May 6, 2004) (unpublished opinion) (refusing to overturn a verdict against a criminal defendant, who had been unsuccessful in seeking to disqualify the judge -- a childhood friend of the prosecutor; "In the present case, the trial judge disclosed that he knew the prosecutor as a child because they lived in the same neighborhood. However, the last communication between the two had occurred in 1996. Prior to 1996, they had not seen each other since college. The trial judge stated that he was comfortable
Another option is for the judge to disclose the friendship, and essentially give any litigant a "veto power" over the judge's participation. The ABA Model Judicial Code provision describing this process does not find it effective if the judge's "bias or prejudice" rises to the level actually requiring recusal. ABA Model Code of Judicial Conduct, Rule 2.11(C) (2007). Accord Code of Conduct for United States Judges, Canon 3D (2009).

Most of the states which have analyzed this issue have found nothing improper with a judge's "friending" of one of the lawyers who appears before the judge.

- Ohio LEO 2010-7 (12/3/10) (holding that a judge may "friend," on a social networking site, a lawyer who appears before the judge but must be careful not to violate other judicial rules; "A judge may be a 'friend' on a social networking site with a lawyer who appears as counsel in a case before the judge. As with any other action a judge takes, a judge's participation on a social networking site must be done carefully in order to comply with the ethical rules in the Ohio Code of Judicial Conduct. A judge who uses a social networking site should following these guidelines. To comply with Jud. Cond. Rule 1.2, a judge must maintain dignity in every comment, photograph, and other information shared on the social networking site. To comply with Jud. Cond. Rule 2.4(C), a judge must not foster social networking interactions with individuals or organizations if such communications erode confidence in the independence of judicial decision making. To comply with Jud. Cond. Rule 2.9(A), a judge should not make comments on a social networking site about any matters pending before a judge -- not to a party, not to a counsel for a party, not to anyone. To comply with Jud. Cond. Rule 2.9(C), a judge should not view a party's or witnesses' pages on a social networking site and should not use social networking sites to obtain information regarding the matter before the judge. To comply with Jud. Cond. Rule 2.10, a judge should avoid making any comments on a social networking site about a pending or handling the case, and there was no need to recuse. Although the prosecutor apprised defense counsel of the prior relationship months earlier, defendant sought disqualification just before the commencement of trial. At the request of his client, defense counsel moved to disqualify the trial judge. Both the trial court and the chief judge denied the motion. Following de novo review of the record, we cannot conclude that the trial court's decision was an abuse of discretion. Wells, supra. [People v. Wells, 605 N.W.2d 374, 379 (Mich. Ct. App. 1999)] Defendant failed to meet her burden of establishing bias or prejudice with blanket assertions unsupported by citations to the record. Id. Defendant's only argument is that the rulings against her objections may show bias, but this Court has specifically stated that repeated rulings against a litigant do not require disqualification of a judge.")
impending matter in any court. To comply with Jud. Cond. Rule 2.11(A)(1), a judge should disqualify himself or herself from a proceeding when the judge’s social networking relationship with a lawyer creates bias or prejudice concerning the lawyer for a party. There is no bright-line rule: not all social relationships, online or otherwise, require a judge’s disqualification. To comply with Jud. Cond. Rule 3.10, a judge may not give legal advice to others on a social networking site. To ensure compliance with all of these rules, a judge should be aware of the contents of his or her social networking page, be familiar with the social networking site policies and privacy controls, and be prudent in all interactions on a social networking site.

- Kentucky Judicial Ethics Op. JE-119 (1/20/10) ("The consensus of this Committee is that participation and listing alone do not violate the Kentucky Code of Judicial Conduct, and specifically do not 'convey or permit others to convey the impression that they are in a special position to influence the judge.' . . . However, and like the New York committee, this Committee believes that judges should be mindful of 'whether on-line connections alone or in combination with other facts rise to the level of a close social relationship' which should be disclosed and/or require recusal."); "In addition to the foregoing, the Committee is compelled to note that, as with any public media, social networking sites are fraught with peril for judges, and that this opinion should not be construed as an explicit or implicit statement that judges may participate in such sites in the same manner as members of the general public. Personal information, commentary and pictures are frequently part of such sites. Judges are required to establish, maintain and enforce high standards of conduct, and to personally observe those standards."); "Judges are generally prohibited from engaging in any ex parte communications with attorneys and their clients. Canon 3B(7). The Commentary to this section explicitly states that '[a] judge must not independently investigate facts in a case and must consider only the evidence presented.' In addition, a judge is disqualified from hearing a case in which the judge has 'personal knowledge of disputed evidentiary facts[,]' Canon 3E(1)(a). A North Carolina judge was publically reprimanded for conducting independent research on a party appearing before him and for engaging in ex parte communications, through Facebook, with the other party's attorney."); "While a proceeding is pending or impending in any court, judges are prohibited from making 'any public comment that might reasonably be expected to affect its outcome or impair its fairness. . . .' Canon 3B(9). Furthermore, full-time judges are prohibited from practicing law or giving legal advice. Canon 4G. Judges, therefore, must be careful that any comments they may make on a social networking site do not violate these prohibitions. While social networking sites may have an aura of private, one-on-one conversation, they are much more public than off-line conversations, and statements once made in that medium may never go away."); [T]he Committee believes that a Kentucky judge or justice's participation in social
networking sites is permissible, but that the judge or justice should be extremely cautious that such participation does not otherwise result in violations of the Code of Judicial Conduct.

- South Carolina Judicial Ethics Advisory Op. 17-2009 (2009) ("A judge may be a member of Facebook and be friends with law enforcement officers and employees of the Magistrate as long as they do not discuss anything related to the judge's position as magistrate.").

- New York Judicial Ethics Advisory Comm. Op. 08-176 (1/29/09) (allowing judges to participate in social network websites, as long as they otherwise comply with the judicial ethics rules; "Provided that the judge otherwise complies with the Rules Governing Judicial Conduct, he/she may join and make use of an Internet-based social network. A judge choosing to do so should exercise an appropriate degree of discretion in how he/she uses the social network and should stay abreast of the features of any such service he/she uses as new developments may impact his/her duties under the Rules."); "There are multiple reasons why a judge might wish to be a part of a social network; reconnecting with law school, college, or even high school classmates; increased interaction with distant family members; staying in touch with former colleagues; or even monitoring the usage of that same social network by minor children in the judge's immediate family."); "The Committee cannot discern anything inherently inappropriate about a judge joining and making use of a social network. A judge generally may socialize in person with attorneys who appear in the judge's court, subject to the Rules Governing Judicial Conduct."); warning judges that they must be careful to avoid such steps as linking to an advocacy group; crossing the line in any relationship sufficiently to create a "close social relationship" requiring disclosure or disqualification; or engaging in improper ex parte communications).

On the other hand, several states have gone the other way.

- Florida Judicial Ethics Advisory Comm. Op. 2009-20 (11/17/09) ("[A] judge may [not] add lawyers who may appear before the judge as 'friends' on a social networking site, and permit such lawyers to add the judge as their 'friend.'"; "The Committee believes that listing lawyers who may appear before the judge as 'friends' on a judge's social networking page reasonably conveys to others the impression that these lawyer 'friends' are in a special position to influence the judge. This is not to say, of course, that simply because a lawyer is listed as a 'friend' on a social networking site or because a lawyer is a friend of the judge, as the term friend is used in its traditional sense, means that this lawyer is, in fact, in a special position to influence the judge. The issue, however, is not whether the lawyer actually is in a position to influence the judge, but instead whether the proposed conduct, the identification of the
lawyer as a 'friend' on the social networking site, conveys the impression that
the lawyer is in a position to influence the judge. The Committee concludes
that such identification in a public forum of a lawyer who may appear before
the judge does convey this impression and therefore is not permitted.”; “The
Committee notes, in coming to this conclusion, that social networking sites
are broadly available for viewing on the internet. Thus, it is clear that many
persons viewing the site will not be judges and will not be familiar with the
Code, its recusal provisions, and other requirements which seek to assure the
judge’s impartiality. However, the test for Canon 2B is not whether the judge
intends to convey the impression that another person is in a position to
influence the judge, but rather whether the message conveyed to others, as
viewed by the recipient, conveys the impression that someone is in a special
position to influence the judge. Viewed in this way, the Committee concludes
that identifying lawyers who may appear before a judge as 'friends' on a
social networking site, if that relationship is disclosed to anyone other than the
judge by virtue of the information being available for viewing on the internet,
violates Canon 2(B).”; “The inquiring judge has asked about the possibility of
identifying lawyers who may appear before the judge as 'friends' on the social
networking site and has not asked about the identification of others who do
not fall into that category as 'friends'. This opinion should not be interpreted
to mean that the inquiring judge is prohibited from identifying any person as a
'friend' on a social networking site. Instead, it is limited to the facts presented
by the inquiring judge, related to lawyers who may appear before the judge.
Therefore, this opinion does not apply to the practice of listing as 'friends'
persons other than lawyers, or to listing as 'friends' lawyers who do not
appear before the judge, either because they do not practice in the judge's
area or court or because the judge has listed them on the judge's recusal list
so that their case are not assigned to the judge.”).

- North Carolina Judicial Standards Comm. Inquiry No. 08-234 (4/1/09)
(publicly reprimanding a judge who engaged in ex parte communication with a
party's lawyer on a judge's Facebook page, and also conducted an
independent investigation of the other party using Google; "On or about the
evening of September 10, 2008, Judge Terry checked Schieck's 'Facebook'
account and saw where Schieck had posted 'how do I prove a negative.'
Judge Terry posted on his 'Facebook' account, he had 'two good parents to
choose from' and 'Terry feels that he will be back in court' referring to the
case not being settled. Schieck then posted on his 'Facebook' account, 'I
have a wise Judge.'"; "Sometime on or about September 9, 2008, Judge
Terry used the internet site 'Google' to find information about Mrs. Whitley's
photography business. Judge Terry stated he wanted to seek examples of
Mrs. Whitley's photography work. Upon visiting Mrs. Whitley's web site,
Judge Terry stated he viewed samples of photographs taken by Mrs. Whitley
and also found numerous poems that he enjoyed."; explaining that Judge
Terry later recited one of the mother's poems in court, "to which he had made
minor changes”; finding Judge Terry's conduct improper; "Judge Terry had ex parte communications with counsel for a party in a matter being tried before him. Judge Terry was also influenced by information he independently gathered by viewing a party's web site while the party's hearing was ongoing, even though the contents of the web site were never offered as nor entered into evidence during the hearing.").

The North Carolina opinion also discusses several other types of judicial misconduct, so it is unclear whether North Carolina would flatly prohibit a judge's "friending" of one of the lawyers appearing before the judge.

**Best Answer**

The best answer to this hypothetical is **PROBABLY YES**.
Judges' Improper Independent Research

Hypothetical 20

You are handling a criminal case in which one key issue is whether a witness properly identified your client. Your client allegedly was wearing a yellow hat, so an important issue was the availability of yellow hats in New York City. To your surprise, the judge announced in court this morning that he had conducted some Internet research last evening, and discovered that there were many types of yellow hats on sale in New York City. You wonder whether the judge's investigation amounted to improper conduct that gives you ground for a mistrial.

Is it permissible for judges to conduct their own research using the Internet?

MAYBE

Analysis

Introduction

The ABA Model Judicial Code severely restricts judges’ personal factual investigations.

A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.

ABA Model Code of Judicial Conduct, Rule 2.9(C) (2007). Not surprisingly, this prohibition explicitly extends to electronic sources (such as the Internet). ABA Model Code of Judicial Conduct, Rule 2.9 cmt. [6] (2007) ("The prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic.").

The ABA Model Judicial Code even finds it necessary to include a limited permission for judges to consult with court staff and officials. ABA Model Code of Judicial Conduct, Rule 2.9(A)(3) (2007) ("A judge may consult with court staff and court
officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.”).

**Background**

In appellate courts, the line between factual investigation and background reading seems to blur. Although there is no reason to think that the ABA Model Code of Judicial Conduct applies any differently to appellate judges than it does to trial judges, appellate courts routinely examine such extraneous material that has not been tested through cross-examination.

To be sure, there is an important difference between a judge conducting her own research and the judge relying on material presented by one of the parties to an appeal (or an amicus). Still, it is interesting to consider the role of material presented on appeal that has not survived the crucible of cross-examination at trial.

Many academic writers urge courts to accept such extrajudicial sources of information, as a way to advance basic social justice. For instance, in her article *Beyond Brandeis: Exploring the Uses of Non-Legal Materials in Appellate Briefs*, 34 U.S.F. L. Rev. 197 (2000), Temple University School of Law Professor Ellie Margolis defended use of such materials.

As long as appellate courts decide cases and write opinions that rely upon non-legal materials, lawyers should learn to use these materials effectively. . . . Lawyers are missing a golden opportunity for advocacy by allowing judges alone to research non-legal materials and draw their own connections, often unsupported, between the legal arguments presented and the factual information thought to
be supportive of the judge’s conclusion. It is particularly important for lawyers to do this when making policy arguments, for which non-legal information may often provide the best support. For all of these reasons, lawyers not only can, but should use non-legal information in support of arguments in appellate briefs.

. . . .

. . . In cases which require the formulation of a new legal rule, policy-based reasoning is extremely important, and the appellate lawyer should present policy arguments as effectively as possible to the court. Non-legal materials can often be the best, and sometimes the only support for these policy arguments. Indeed, non-legal materials serve a unique function in supporting policy arguments that is different from other uses of legislative facts. Because of this, the appellate court is the appropriate forum to use them.

Id. at 202-03 & 210-11 (emphases added; footnotes omitted).

Most commentators point to the case of Muller v. Oregon, 208 U.S. 412 (1908) as initiating this process of judicial reliance on extrajudicial sources. In that case, the Supreme Court upheld the constitutionality of an Oregon law limiting to ten hours the amount of time that women may work in certain establishments.

The state of Oregon was represented in that case by Louis Brandeis, who filed what became known as a “Brandeis Brief” in support of the Oregon statute. Brandeis’s brief consisted of a two-sentence introduction, a few transition sentences, a one-sentence conclusion, and 113 pages of statutory citations and (primarily) social science study reports and academic treatises about how women cannot tolerate long work hours. For example, the Brandeis Brief contained the following passages:

Long hours of labor are dangerous for women primarily because of their special physical organization. In structure and function women are differentiated from men. Besides these anatomical and physiological differences,
physicians are agreed that women are fundamentally weaker than men in all that makes for endurance: in muscular strength, in nervous energy, in the powers of persistent attention and application.


The various social science study reports quoted in the Brandeis Brief have some remarkable conclusions and language.

"You see men have undoubtedly a greater degree of physical capacity than women have. Men are capable of greater effort in various ways than women."\(^1\)

\[\ldots\]

"Woman is badly constructed for the purposes of standing eight or ten hours upon her feet."\(^2\)

\[\ldots\]

"It has been declared a matter of public concern that no group of its women workers should be allowed to unfit themselves by excessive hours of work, by standing, or other physical strain, for the burden of motherhood, which each of them should be able to assume."\(^3\)

\[\ldots\]

"The children of such mothers -- according to the unanimous testimony of nurses, physicians, and others who were


interrogated on this important subject -- are mostly pale and weakly; when these in turn, as usually happens, must enter upon factory work immediately upon leaving school, to contribute to the support of the family, it is impossible for a sound, sturdy, enduring race to develop.\textsuperscript{4}

Based on all of this social science, the Brandeis Brief ends with the following conclusion:

We submit that in view of the facts above set forth and of legislative action extending over a period of more than sixty years in the leading countries of Europe, and in twenty of our States, it cannot be said that the Legislature of Oregon had no reasonable ground for believing that the public health, safety, or welfare did not require a legal limitation on women's work in manufacturing and mechanical establishments and laundries to ten hours in one day.


Incidentally, an article published approximately 100 years after Brandeis filed his brief pointed out that Brandeis's dramatic conclusion stated exactly the opposite of what he intended to argue. Clyde Spillenger, Revenge of the Triple Negative: A Note on the Brandeis Brief in Muller v. Oregon, 22 Const. Comment. 5 (Spring 2005).

In its decision upholding Oregon's statute, the United States Supreme Court explicitly relied on Brandeis's Brief -- emphasizing women's physical weakness and their importance in bearing and raising children. Emphasizing "the difference between the

"The reasons for the reduction of the working day to ten
hours -- (a) the physical organization of women, (b) her
maternal functions, (c) the rearing and education of the
children, (d) the maintenance of the home -- are all so
important and so far reaching that the need for such
reduction need hardly be discussed."

Muller v. Oregon, 208 U.S. at 419 n.1. The court took "judicial cognizance of all matters
of general knowledge" -- including the following:

That woman's physical structure and the performance
of maternal functions place her at a disadvantage in the
struggle for subsistence is obvious. This is especially true
when the burdens of motherhood are upon her. Even when
they are not, by abundant testimony of the medical fraternity
continuance for a long time on her feet at work, repeating
this from day to day, tends to injurious effects upon the body,
and as healthy mothers are essential to vigorous offspring,
the physical well-being of woman becomes an object of
public interest and care in order to preserve the strength and
vigor of the race.

Still again, history discloses the fact that woman has
always been dependent upon man.

... 

[S]he is not an equal competitor with her brother.

... 

It is impossible to close one's eyes to the fact that she still
looks to her brother and depends upon him.

... 

[S]he is so constituted that she will rest upon and look to him
for protection; that her physical structure and a proper
discharge of her maternal functions -- having in view not
merely her own health, but the well-being of the race --
justify legislation to protect her from the greed as well as the passion of man.

The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation and upholds that which is designed to compensate for some of the burdens which rest upon her.

Id. at 421, 422, 422-23 (emphases added).

The United States Supreme Court continues to debate reliance on such extrajudicial sources.

In Roper v. Simmons, 543 U.S. 551 (2005), for instance, the Supreme Court found unconstitutional states’ execution of anyone under 18 years old, however horrible their crime. Justice Kennedy’s majority relied heavily on social science sources (presented for the first time to the court, and therefore not subjected to cross-examination) indicating that people under 18 are not fully capable of making rational decisions, and therefore should never be subject to execution.

Justice Scalia’s dissent severely criticized the majority’s reliance on such studies.

Today’s opinion provides a perfect example of why judges are ill equipped to make the type of legislative judgments the Court insists on making here. To support its opinion that States should be prohibited from imposing the death penalty on anyone who committed murder before age 18, the Court looks to scientific and sociological studies, picking and choosing those that support its position. It never explains why those particular studies are methodologically sound; none was ever entered into evidence or tested in an adversarial proceeding.
Id. at 616-17 (emphasis added) (Scalia, J., dissenting). Justice Scalia said that by selecting favorable extrajudicial and untested social science articles means that "all the Court has done today, to borrow from another context, is to look over the heads of the crowd and pick out its friends." Id. (emphasis added).

Justice Scalia provided a concrete example.

We need not look far to find studies contradicting the Court's conclusions. As petitioner points out, the American Psychological Association (APA), which claims in this case that scientific evidence shows persons under 18 lack the ability to take moral responsibility for their decisions, has previously taken precisely the opposite position before this very Court. In its brief in [another case], the APA found a "rich body of research" showing that juveniles are mature enough to decide whether to obtain an abortion without parental involvement. . . . The APA brief, citing psychology treatises and studies too numerous to list here, asserted: "[B]y middle adolescence (age 14-15) young people develop abilities similar to adults in reasoning about moral dilemmas, understanding social rules and laws, [and] reasoning about interpersonal relationships and interpersonal problems."

Id. at 617-18 (emphases added; citation omitted) (Scalia, J., dissenting).

The Supreme Court (and other appellate courts) nevertheless continues to rely on extrajudicial sources that have never been subjected to cross-examination.

**Modern Examples of Judges’ Independent Investigations**

A North Carolina legal ethics opinion that condemned a judge's “friending” as ex parte communications with one side’s lawyer also found that the judge had engaged in an improper investigation.

- North Carolina Judicial Standards Comm. Inquiry No. 08-234 (4/1/09) (publicly reprimanding a judge who engaged in ex parte communication with a party's lawyer on a judge's Facebook page, and also conducted an independent investigation of the other party using Google; "On or about the evening of September 10, 2008, Judge Terry checked Schieck’s ‘Facebook’
account and saw where Schieck had posted 'how do I prove a negative.' Judge Terry posted on his 'Facebook' account, he had 'two good parents to choose from' and 'Terry feels that he will be back in court' referring to the case not being settled. Schieck then posted on his 'Facebook' account, 'I have a wise Judge.\"'; "Sometime on or about September 9, 2008, Judge Terry used the internet site 'Google' to find information about Mrs. Whitley's photography business. Judge Terry stated he wanted to seek examples of Mrs. Whitley's photography work. Upon visiting Mrs. Whitley's web site, Judge Terry stated he viewed samples of photographs taken by Mrs. Whitley and also found numerous poems that he enjoyed.\"; explaining that Judge Terry later recited one of the mother's poems in court, "to which he had made minor changes\"; finding Judge Terry's conduct improper; "Judge Terry had ex parte communications with counsel for a party in a matter being tried before him. Judge Terry was also influenced by information he independently gathered by viewing a party's web site while the party's hearing was ongoing, even though the contents of the web site were never offered as nor entered into evidence during the hearing.\").

Somewhat surprisingly, in 2010 the Second Circuit found nothing improper in then-District Judge Denny Chin's internet investigation of the availability of yellow hats for sale.

- United States v. Bari, 599 F.3d 176, 179, 180, 181 (2d Cir. 2010) (holding that then District Judge Denny Chin had not acted improperly in performing a Google search to confirm his understanding that there are many types of yellow hats for sale, so that a criminal defendant's possession of a particular kind of yellow hat was an important piece of evidence pointing to the criminal defendant's guilt; "[W]e now consider whether the District Court committed reversible error when it conducted an independent Internet search to confirm its intuition that there are many types of yellow rain hats for sale.\"; "Common sense leads one to suppose that there is not only one type of yellow rain hat for sale. Instead, one would imagine that there are many types of yellow rain hats, with one sufficient to suit nearly any taste in brim-width or shade. The District Court's independent Internet search served only to confirm this common sense supposition.\" (emphasis added); "Bari argues in his reply brief that 'Judge Chin undertook his internet search precisely because the fact at issue . . . was an open question whose answer was not obvious.' . . . We do not find this argument persuasive. As broadband speeds increase and Internet search engines improve, the cost of confirming one's intuitions decreases. Twenty years ago, to confirm an intuition about the variety of rain hats, a trial judge may have needed to travel to a local department store to survey the rain hats on offer. Rather than expend that time, he likely would have relied on his common sense to take judicial notice of the fact that not all
rain hats are alike. Today, however, a judge need only take a few moments to confirm his intuition by conducting a basic Internet search.” (emphases added); “As the cost of confirming one’s intuition decreases, we would expect to see more judges doing just that. More generally, with so much information at our fingertips (almost literally), we all likely confirm hunches with a brief visit to our favorite search engine that in the not-so-distant past would have gone unconfirmed. We will not consider it reversible error when a judge, during the course of a revocation hearing where only a relaxed form of Rule 201 applies, states that he confirmed his intuition on a ’matter[] of common knowledge.’”).

Interestingly, Judge Chin was then in the process of joining the Second Circuit.

**Best Answer**

The best answer to this hypothetical is **MAYBE**.
"Blog" Descriptions of Past Successes

Hypothetical 21

For the last several months, you have prepared a "blog" describing recent criminal cases in the southern city where you practice criminal defense law. Most of the cases you describe are your own cases. The bar has insisted that you include a prominent disclaimer preceding those blogs in which you describe cases that you won. You take the position that you have a First Amendment right to publish stories about significant new cases, so your state's restrictive marketing rules should not apply to your blog.

If you "blog" about cases that you have won, must you include a prominent disclaimer required by your state's ethics rules whenever a lawyer mentions past successes in marketing materials.

MAYBE

Analysis

The first bar discipline case involving a lawyer's blogs about his own cases apparently arose in Richmond, Virginia.

In 2011, a Bar disciplinary panel found that a lawyer had improperly failed to add the required disclaimer when describing his past successes in a "blog."

- In the Matter of Horace F. Hunter, Virginia State Bar Doc. No. 11-032-084907 (11/8/11) ("[T]he panel found by clear and convincing evidence that Mr. Hunter violated Rules 7.1(a)4 and 7.2(a)3 by disseminating case results in advertising without the required disclaimer. The panel appreciated Mr. Hunter's enthusiasm for writing about his cases (with appropriate consent) and criminal law issues as a whole. However, the panel found no difference between advertising and marketing as defined in Rule 7.2. Mr. Hunter admitted that his postings were for marketing purposes." (footnotes omitted).

On June 29, 2012, a three-judge panel upheld that portion of the disciplinary panel's conclusion.

The Court finds that a Public Admonition is an appropriate sanction, and the Court imposes as Terms that, on or before
July 5, 2012, Respondent post the following disclaimer on his website: 'Case results depend upon a variety of factors unique to each case. Case results do not guarantee or predict a similar result in any future case.' The alternative sanction to be imposed upon Respondent if Respondent does not comply with the Terms is a Public Reprimand.


Of course, this outcome presumably would be different in states which totally prohibit lawyers from publicizing their successes, or states allowing such communications as long as they are not false and misleading.

**Best Answer**

The best answer to this hypothetical is **MAYBE**.
"Blogging" and Hosting a Forum Addressing a Particular Lawyer's Allegedly Improper Conduct

Hypothetical 22

You and some of your fellow lawyers in a small town have been disgusted by one particularly aggressive defense lawyer’s conduct in various cases that you have handled against him. You wonder whether you may host or participate in a "blog" in which you and other local lawyers criticize the defense lawyer's conduct.

May a lawyer host or participate in a "blog" dedicated to criticizing another lawyer’s allegedly wrongful conduct?

YES

Analysis

This hypothetical comes from a 2012 New York State legal ethics opinion. The bar found the conduct permissible.

- New York LEO 912 (3/15/12) ("The Rules of Professional Conduct do not prohibit a lawyer from hosting or participating in a blog dedicated to publishing factually accurate criticism of another lawyer’s professional conduct."); noting that the ethics rules prohibit certain lawyer criticism of judges, but that "there is no comparable provision that specifically addresses public criticism of a lawyer by a lawyer. Therefore, any ethical restraint on such expression would, under the Rules, necessarily derive from the more general provisions of Rule 8.4(c), prohibiting a lawyer from engaging in conduct 'involving dishonesty, fraud, deceit or misrepresentations', or Rule 8.4(d), prohibiting a lawyer from engaging in conduct that is 'prejudicial to the administration of justice.' . . . Assuming that the blog criticism is sufficiently accurate and in context not to run afoul of Rule 8.4(c), the question is whether there are any limitations arising from Rule 8.4(d) on a lawyer's factually sustainable public criticism of another lawyer. We believe there are none."); pointing to "aspirational" standards of civility, and to the ethics rules’ requirement that a lawyer report sufficiently egregious conduct by another lawyer to the bar).
Best Answer

The best answer to this hypothetical is **YES**.
Characterizing the Intrusiveness of Electronic Marketing

Hypothetical 23

After attending an excellent seminar entitled "The Ethics of Email and Social Media," you think you understand the basic ethics rules governing your law firm’s marketing. However, you have been considering how the basic rules apply to new forms of "electronic" marketing.

(a) Do the rules governing in-person solicitation apply to your emails to potential clients?

NO (PROBABLY)

(b) Do the rules governing in-person solicitation apply to your communications with potential clients during real-time electronic "conversations"?

YES (PROBABLY)

(c) May you arrange for a vendor to analyze (without human intervention) emails that you receive, and automatically send targeted advertising for third parties based on words in the email (for instance, the provider might send an advertisement for travel services to a client who sent an email mentioning a certain hotel's name)?

MAYBE

(d) May you arrange for an autodial message to be sent to potential clients, ending with a statement indicating that the potential client can speak to a lawyer or lawyer’s representative by pressing a number on the telephone?

MAYBE

Analysis

Not surprisingly, states have had to analyze lawyers’ marketing through electronic communications.

States initially struggled with determining whether a law firm's website had such interactive characteristics that it fell under the solicitation rules rather than the general
rules governing print, telephone, or radio advertisements. States eventually found that websites did not fall under the solicitation rules.

- California LEO 2001-155 (6/19/01) ("We conclude that Attorney A's web site is not a 'solicitation' under rule 1-400(B). . . . We further conclude that neither the nature of the website communication nor the nature of the technology it employs to reach readers requires a different result. Although e-mail communication as part of website technology permits faster responses and more interaction than is possible with other forms written communication, it does not create the risk that the attorney might be able to use her persuasive ability and experience to influence unduly the potential client's thoughtful decision to hire her. Similarly, although e-mail can be transmitted through telephone lines, its resemblance to a telephone discussion ends with the mechanism of transmission. The static nature of an e-mail message allows a potential client to reflect, re-read, and analyze; the written form allows the potential client to share and discuss the communication with others and maintain a permanent record of its contents; and the mechanical steps involved in sending and receiving messages impose a measured pace on the interchange.").

- Vermont LEO 97-5 (1997) ("[T]he Committee concludes that the Code of Professional Responsibility's Disciplinary Rules governing advertising and solicitation provides sufficient guidance. An internet 'home page' is similar to the phone book's 'yellow pages' and law firm brochures and is not 'directed to a specific recipient'. See DR 2-103 and DR 2-104.").

- Illinois LEO 96-10 (5/16/97) ("The creation and use by a lawyer of an Internet 'web site' containing information about the lawyer and the lawyer's services that may be accessed by Internet users, including prospective clients, is not 'communication directed to a specific recipient' within the meaning of the rules, and therefore only the general rules governing communications concerning a lawyer's services and advertising should apply to a lawyer 'web site' on the Internet.").

- Pennsylvania LEO 96-17 (5/3/96) ("It is my opinion that advertising on the Internet via a web site does not constitute in-person solicitation as prohibited under Rule 7.3(a).").

However, courts and bars have continued to debate the exact nature of websites.
On February 27, 2009, the Florida Supreme Court addressed the Florida Bar's proposed ethics rules governing electronic marketing. The Florida Supreme Court described the context of its analysis.

Before submitting previous proposed amendments to the Court for consideration, see In re Amendments to the Rules Regulating the Florida Bar - Advertising, 971 So. 2d 763 (Fla. 2007), the Task Force originally concluded that websites are distinguished from general advertising because the typical viewer would not access a lawyer's website by accident, but would be searching for that lawyer, a lawyer with similar characteristics, or information regarding a specific legal topic. In contrast, the Board of Governors' Citizens Forum disagreed with the Task Force and concluded that attorney websites should be subject to the same general regulations as other forms of lawyer advertising. The Citizen's Forum reasoned that for website advertising, the public should be provided with the same protections (from false and misleading attorney advertising) that are required for more traditional methods of advertising. Thereafter, the Board voted to continue regulating websites pursuant to the general advertising regulations, except for a few specified exceptions.

Afterwards, through its study, the Special Committee determined that each substantive attorney advertising regulation should apply to attorney websites, and that websites should be subject to the same regulation as other forms of media, except websites should be exempt from the requirement that advertisements must be filed with the Bar for review. However, in December 2006, the Board voted against adopting the Special Committee's recommendation that all substantive lawyer advertising rules apply to lawyer websites.

In re Amendments to Rules Regulating the Fla. Bar -- Rule 4-7.6, Computer Accessed Commc'ns, No. SC08-1181, 2009 Fla. LEXIS 271, at *3 n.1 (Fla. Feb. 27, 2009). The Florida Supreme Court quoted the bar's petition as framing the basic issue.

"A website cannot be easily categorized as either information at the request of the prospective client, which is subject to no
regulation under this subchapter but is subject to the general prohibition against dishonesty, or as advertising in a medium that is totally unsolicited and broadly disseminated to the public, such as television, radio, or print media. Although some steps must be initiated by the viewer to access a website, the viewer might not necessarily be attempting to access that law firm's website, or a law firm website at all. It is therefore inappropriate to treat a website as information upon request, because it is not the same as direct contact with a known law firm requesting information. On the other hand, the viewer is unlikely to access a lawyer or law firm website completely by accident."

Id. at *3 (emphases added; internal citation omitted).

The Florida Bar petitioned the Florida Supreme Court to approve rules that would have required a lawyer's home page to comply "with all the substantive lawyer advertising regulations" -- but which would declined to apply all marketing rules to a lawyer's website "after the homepage." Id. at *4.

The Florida Supreme Court rejected the Florida Bar's approach.

In contrast to the Bar's arguments, we find that the proposed amendments are not sufficient to make material behind the homepage fall under the concept of information "upon request" (which is exempted from regulation by subchapter 4-7, pursuant to rule 4-7(f)). We recognize, however, that sufficient changes could be made to the rules regulating websites to make pages behind the homepage constitute materials "upon request." For example, a website could require users to complete two steps on webpages before they could access result or testimonial information. First, a user could be required to complete a "Request" page with their name, address, and phone number (all required fields). Second a disclaimer page could appear with the bottom of the page requiring a click on a button to indicate that the user had read the disclaimer (and an option for the user to discontinue the request for information). Only after the user navigated through these two pages would the user be able to obtain the additional information. This process would make obtaining information from a website similar to obtaining information "upon request" from a lawyer, when a
potential client picks up a phone and calls a lawyer to ask for information, and then is mailed a DVD or brochure by the lawyer with the requested information.

Id. at *6-7 (emphases added).

Several months after issuing this opinion, the Florida Supreme Court withdrew the opinion -- because the Florida Bar had essentially complied with the Supreme Court's implicit direction to take a different approach about such website pages.

The Florida Supreme Court’s difficulty in applying marketing rules to lawyers’ websites reflects the unique nature of that type of marketing. States will undoubtedly continue to debate this issue.

(a) A lawyer’s email to a prospective client seems to fall somewhere between the less intrusive direct mail communication and the more intrusive telephone call or in-person visit.

Although states have struggled with deciding which rules to apply in such circumstances, most states hold that an email must comply with the direct mail requirements -- not the far more restrictive solicitation rules.

- Florida Rule 4-7.6(c) ("A lawyer shall not send, or knowingly permit to be sent, on the lawyer's behalf or on behalf of the lawyer's firm or partner, an associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, an unsolicited electronic mail communication directly or indirectly to a prospective client for the purpose of obtaining professional employment unless [the e-mail complies with specified requirements].").

- Ohio LEO 2004-1 (2/13/04) (holding that email advertisement sent to prospective clients must be treated as direct mail solicitation under the Ohio ethics rules, including limitations on recipients and requirement of disclaimers such as "ADVERTISEMENT ONLY" in the email).

- California LEO 2001-155 (2001) ("We conclude that Attorney A's web site is not a 'solicitation' under rule 1-400(B). . . . We further conclude that neither the nature of the website communication nor the nature of the technology it
employs to reach readers requires a different result. Although e-mail communication as part of website technology permits faster responses and more interaction than is possible with other forms of written communication, it does not create the risk that the attorney might be able to use her persuasive ability and experience to influence unduly the potential client's thoughtful decision to hire her. Similarly, although e-mail can be transmitted through telephone lines, its resemblance to a telephone discussion ends with the mechanism of transmission. The static nature of an e-mail message allows a potential client to reflect, re-read, and analyze; the written form allows the potential client to share and discuss the communication with others and maintain a permanent record of its contents; and the mechanical steps involved in sending and receiving messages impose a measured pace on the interchange.

- West Virginia LEO 98-03 (10/16/98) ("The Lawyer Disciplinary Board also finds that e-mail and messages left in news groups can be a form of written solicitation governed by Rule 7.3(b) and (c). . . . This would require an attorney who is soliciting professional employment from a prospective client to include the words 'ADVERTISING MATERIAL' in the heading for an e-mail or news group communication. That way, when the e-mail message or news group posting comes up, the receiver has the option of opening it or putting [it] in the electronic trash without reading it, just like the recipient of mail has. In the past, the Lawyer Disciplinary Board has interpreted the Rules of Professional Conduct to permit an attorney to omit the words 'ADVERTISING MATERIAL' on the outside of an envelope if the attorney is mailing to a market not necessarily known to be in need of legal services, such as a geographic area or a legally obtained list of customers. Because of the ease and low cost of sending e-mail, the Board has concerns about recipients being inundated with solicitations and being forced to review them all to make sure that a lawyer is not trying to communicate personally with the user on a current matter. The Board therefore strongly recommends that all e-mail messages and news group postings have the 'ADVERTISING MATERIAL' designation as part of the heading.").

- Utah LEO 97-10 (10/24/97) ("The applicability of the Rules of Professional Conduct to e-mail is more difficult to analyze. Because (a) e-mail is in writing (similar to a facsimile transmission), (b) it does not represent a 'live' communication (unlike the chat-room discussions), and (c) the recipient can ignore the message or respond at leisure and after due reflection, we find that e-mail is not an "in person" communication under Rule 7.3(a). However, because e-mail is different from a written advertisement that is delivered through the U.S. Postal Service or other similar services, it may have a different impact due to the speed and mode of transmission and the difficulty of regulation. In addition to the rules discussed above, the lawyer should be aware that the instantaneous nature of e-mail could raise issues regarding
Rules 7.3(b)(1) and (b)(3), which prohibit direct solicitation to those who are in such a state that they cannot exercise reasonable judgment in employing a lawyer and solicitations which involve coercion, duress, or harassment."

(footnote omitted; emphasis added)).

- Pennsylvania LEO 97-130 (9/26/97) ("If the e-mail is about the lawyer or the lawyer’s services and is intended to solicit new clients, it is lawyer advertising similar to targeted, direct mail and is subject to the same restrictions under the Rules of Professional Conduct.").

- Arizona LEO 97-04 (4/1997) ("Communication with a potential client via cyberspace should not be considered either a prohibited telephone or in-person contact because there is not the same element of confrontation/immediacy as with the prohibited mediums. A potential client reading his or her e-mail, or even participating in a ‘chat room’ has the option of not responding to unwanted solicitations.").

- Michigan LEO RI-276 (7/11/96) ("A lawyer may solicit legal business through an electronic mail communication directed to a specific addressee or group of addressees by following the same ethics rules applicable to general and direct mail solicitation.").

In contrast, Illinois and Tennessee seem to have applied in-person solicitation rules to emails.

- Illinois LEO (5/16/97) ("If a lawyer uses the Internet or other electronic mail service to direct messages to specific recipients, then the rules regarding solicitation would apply.").

- Tennessee LEO 95-A-570 (5/17/95) (not for publication) ("While unsolicited mailing and promotions have been permitted by the Supreme Court, unsolicited phone contacts have not been. The reasoning is that a letter can be thrown away while a phone call or direct personal solicitation is an intrusion into the privacy of the recipient and cannot be so easily ignored. This form of solicitation on the Internet would be an improper solicitation in violation of DR 2-103.").

These opinions are admittedly older now, and these bars might take a different approach if asked again.

(b) The ABA Model Rules now indicate that "real-time electronic contact" be treated as in-person solicitation under ABA Model Rule 7.3(a).
Nearly every state which has dealt with real time "chat rooms" or similar electronic communications has applied the solicitation rather than the direct mail marketing rules.

- Florida LEO A-00-1 (8/15/00) (relying on legal ethics opinions from Michigan, West Virginia, Utah, and Virginia in bolstering its conclusion that lawyer participation in a real time "chat room" would amount to prohibited solicitation under Florida Rule 4-7.4(a)).

- New York City LEO 1998-2 (1998) (law firms should maintain a copy of their website for one year; lawyers communicating electronically with clients must avoid impermissible solicitation; law firms may not pay an internet service provider a percentage of fees earned through internet contacts).

- West Virginia LEO 98-03 (10/16/98) ("The Board is of the opinion that solicitations via real time communications on the computer, such as a chat room, should be treated similar to telephone and in-person solicitations. Although this type of communication provides less opportunity for an attorney to pressure or coerce a potential client than do telephone or in-person solicitations, real-time communication is potentially more immediate, more intrusive and more persuasive than e-mail or other forms of writing. Therefore, the Board considers Rule 7.3(a) to prohibit a lawyer from soliciting potential clients through real-time communications initiated by the lawyer.").

- Virginia Adver. Op. A-0110 (4/14/98) ("Lawyers who communicate on the Internet in 'real time' chat rooms must abide by the restrictions on solicitation set forth in DR 2-103 [now appearing in Rule 7.3(a)]. 'In-person' communication in personal injury and wrongful death cases is prohibited, subject to certain exceptions, by DR 2-103(F) [now appearing in Rule 7.3(f)]. 'In-person' communications include not only face to face communication but also ‘telephonic communication.’ The Committee believes that a lawyer who solicits employment in a 'real time' chat room may not solicit employment in personal injury or wrongful death cases by communicating with the victim or their immediate family.").

- Philadelphia LEO 98-6 (3/1998) ("The inquirer should be careful that he does not engage in any activity which constitutes improper solicitation. In the opinion of the Committee, conversation interactions with persons on the Internet do not constitute improper solicitation, but in any one particular case the interaction may evolve in such a way that it could be characterized as such.").
Utah LEO 97-10 (10/24/97) ("Chat rooms' have become a popular medium of communication on Internet sites. The typical format involves simultaneous participation of several users in a real-time exchange of written messages at a common site that are displayed at each participant's computer terminal. Although these communications can often be reduced to written form, a chat-group communication is more analogous to an in-person conversation due to its direct, confrontational nature and the difficulty of monitoring and regulating it. We, therefore, find that an attorney's advertising and solicitation through a chat group are 'in person' communications under Rule 7.3(a) and are accordingly restricted by the provisions of that rule.").

Illinois LEO 96-10 (5/16/97) ("On the other hand, lawyer participation in an electronic bulletin board, chat group, or similar service, may implicate Rule 7.3, which governs solicitation, the direct contact with prospective clients. The Committee does not believe that merely posting general comments on a bulletin board or chat group should be considered solicitation. However, of [sic] a lawyer seeks to initiate an unrequested contact with a specific person or group as a result of participation in a bulletin board or chat group, then the lawyer would be subject to the requirements of Rule 7.3. For example, if the lawyer sends unrequested electronic messages (including messages in response to inquiries posted in chat groups) to a targeted person or group, the messages should be plainly identified as advertising material.").

Michigan LEO RI-276 (7/11/96) ("A lawyer may not solicit legal business during an interactive electronic communication unless ethics rules governing in-person solicitation are followed. . . . A different situation arises if a lawyer is participating in interactive communication on the Internet, carrying on an immediate electronic conversation. If the communication was initiated by the lawyer without invitation, such 'real time' communications about the lawyer's services would be analogous to direct solicitation, outside the activity permitted by MRPC 7.3.").

On the other hand, two states declined to apply the in-person solicitation rules to chat rooms.

California LEO 2004-166 (2004) (holding that the pertinent California rule defines "solicitation" as communication in person or over a telephone line, thus excluding on-line communications -- but noting that most states rely on a broader definition to find that real time on-line communications fall under the definition of "solicitation"; "While an attorney's communication with a prospective fee-paying client in the mass disaster victims Internet chat room described herein is not a prohibited 'solicitation' within the meaning of subdivision (B) of rule 1-400, it violates subdivision (D)(5) of rule 1-400, which bans transmittal of communications that intrude or cause duress. Attorney's
communication would also be a presumed violation of Standard (3) to rule 1-400, which presumes improper any communication delivered to a prospective client whom the attorney knows may not have the requisite emotional or mental state to make a reasonable judgment about retaining counsel."; noting "that ethics committees in other states, including Florida, Michigan, Oregon, Utah, Virginia, and West Virginia, have concluded that messages delivered via real time Internet communication channels are prohibited solicitations. Some of these states, for example, Florida, have a rule more broadly-worded than rule 1-400, which more readily permits its application to chat room situations. However, other states, including Utah and Michigan, have interpreted their rules regulating in person and telephonic communications to encompass 'real time' chat room conversations." (footnotes omitted); concluding that "the 'by telephone' language in rule 1-400(B)(2)(a) does not apply to chat room communications because that would contradict the rule's plain language and undermine fair notice of prohibited conduct").

• Arizona LEO 97-04 (4/7/97) ("ER 7.3 prohibits telephone and in-person solicitation. Communication with a potential client via cyberspace should not be considered either a prohibited telephone or in-person contact because there is not the same element of confrontation/immediacy as with the prohibited mediums. A potential client reading his or her e-mail, or even participating in a 'chat room' has the option of not responding to unwanted solicitations. . . . In order for this portion of ER 7.3 to apply to a computerized solicitation, the following elements would be necessary: 1) the lawyer must initiate the contact (thus, lawyer responses to questions posed by potential clients in 'chat rooms' or inquiries sent directly to a particular lawyer would not need to comply with this rule); and 2) the potential client would have to have a known legal need for a particular matter. Thus, for instance, solicitations sent to all members of an environmental listserve would not be affected because those members might be interested in environmental issues but not necessarily have a need for representation in a particular environmental case. If those elements exist, then the lawyer must comply with the disclosure obligations set forth in ER 7.3(b)." (emphasis added)).

In 2010, the Philadelphia Bar dealt with this issue. The Bar concluded after a very lengthy and detailed analysis that real-time electronic communications should now be treated under the direct mail provision rather than the solicitation provision -- because "the social attitudes and developing rules of internet etiquette are changing," so that "it has become readily apparent to everyone that they need not respond instantaneously to electronic overtures." Philadelphia LEO 2010-6 (6/2010).
Philadelphia LEO 2010-6 (6/10) (analyzing the categorization of blogs and "chat rooms" for purposes of marketing regulation; noting that Pennsylvania Rule 7.3 defines "solicit" as including "contact in-person, by telephone or by real-time electronic communication," but that the term "solicit" does "not include written communications, which may include targeted, direct mail advertisements"; noting that "[u]ntil January 1, 2005, Rule 7.3 did not include the phrase, or any reference to, 'real-time electronic communication.' That phrase was added to the Pennsylvania Rule on January 1, 2005."; "The question of whether or not Rule 7.3 barred electronic communication arose before this body before. We opined in late 2004 -- applying the then current, now former Rule 7.3 -- that participation in chat rooms was not barred by 7.3(a), reasoning that the kind of risk inherent in direct communication via telephone or personal interaction was not present in the social medium of a chat room. See, Philadelphia Bar Association Formal Opinion 2004-5. It seemed clear at the time, however, that the opinion would not survive the amendment to the Rule."; after analyzing emails, blogging and chat rooms, concluding that "[i]n this respect, each of these kinds of electronic communication is different from in-person direct communication and telephone calls. In the latter kinds of in-person communications with an overbearing lawyer, the prospective client can walk away or hang up the phone, but it is socially awkward to do so in the face of a determined advocate. In the former, however, as the Supreme Court found even in the case of individually targeted direct mail solicitations, a recipient can readily and summarily decline to participate in the communication. Moreover, each of these kinds of social interactions enables the lawyer using it to make and retain a copy of the communication, as required by Rule 7.2."; ultimately concluding that "[t]he Committee believes that the rationale of the prohibition on direct solicitation, both as explained in the Rule itself and the accompanying comments, and by the Supreme Court's opinion in Shapero [Shapero v. Ky. Bar Ass'n, 486 U.S. 466 (1988)], lead to the conclusion that usage of these kinds of social media for solicitation purposes is acceptable under Rule 7.3. All of these kinds of social interactions are characterized by an ability on the part of the prospective client to 'turn off' the soliciting lawyer and respond or not as he or she sees fit, and an ability to keep a record of its contents."; rejecting the ABA's approach to "real-time electronic communication"; "We do recognize that Rule 7.3 does specifically refer to 'real-time electronic communication,' and that the ABA Reporter's Explanation states that those words were intended to refer to 'chat rooms.' But we do not feel bound to apply them as the Reporter's Explanation may have intended." (emphasis added); noting that the ABA (in Pennsylvania) did not "refer specifically to 'chat rooms' in the Rule itself"; also explaining that "even assuming that the technological abilities of chat rooms are the same today as they were in 2000, we think it also relevant that the social attitudes and developing rules of internet etiquette are changing. It seems to us that with
the increasing sophistication and ubiquity of social media, it has become readily apparent to everyone that they need not respond instantaneously to electronic overtures, and that everyone realizes that, like targeted mail, e-mails, blogs and chat room comments can be readily ignored, or not, as the recipient wishes." (emphasis added); "Thus, the Committee concludes that Rule 7.3 does not bar the use of social media for solicitation purposes where the prospective clients to whom the lawyer’s communication is directed have the ability, readily exercisable, to simply ignore the lawyer’s overture, just like they could a piece of directed, targeted mail. Where that is the case those risks which might be inherent in an individualized, overbearing communication are not sufficiently present to bar the use of such methods of social interaction for any solicitation purposes. Under this view of Rule 7.3, ‘real-time electronic communication’ is limited to electronic modes of communication used in a way in which it would be socially awkward or difficult for a recipient of a lawyer’s overtures to not respond in real time. The Committee also concludes that even on line chat rooms of the sort where discussion occurs by typed communications do not constitute real-time electronic media." (emphasis added); ultimately permitting solicitation during real-time electronic "chat rooms").

A year later, the North Carolina Bar took the same approach.

- North Carolina LEO 2011-8 (7/15/11) (holding that a law firm can "utilize a live chat support service on its website"; warning that the law firm would have to consider the possibility of establishing an "inadvertent" lawyer-client relationship, and would also have to avoid misleading any potential client who was chatting with a nonlawyer but might think he was chatting with a lawyer; noting that Rule 7.3(a)’s provision prohibiting "real-time electronic" solicitation did not apply, because the client was initiating the communication with the firm; also pointing to the discussion in Philadelphia LEO 2010-6 (2010); explaining that "[t]he use of a live chat support service does not subject the website visitor to undue influence or intimidation. The visitor has the ability to ignore the live chat button or to indicate with a click that he or she does not wish to participate in a live chat session.").

(c) Perhaps surprisingly, a 2008 New York state legal ethics opinion found this process acceptable, as long as no human reviewed the client’s emails.

- New York LEO 820 (2/8/08) (analyzing the ethics of a service which reviews lawyers’ emails and prepares advertisements; "In recent years, some e-mail providers have offered free or low-cost e-mail services in which, in exchange for providing the user with e-mail services -- sending and receiving e-mail and providing storage on the provider’s servers -- the provider’s computers scan e-mails and send or display targeted advertising to the user of the service.

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The e-mail provider identifies the presumed interests of the service's user by scanning for keywords in e-mails opened by the user. The provider's computers then send advertising that reflects the keywords in the e-mail. As an example, an e-mail that referred to travel to a particular locale might be accompanied by an advertisement for travel service providers in that locale."

(emphasis added); "A lawyer may use an e-mail service provider that conducts computer scans of e-mails to generate computer advertising, where the e-mails are not reviewed by or provided to human beings other than the sender and recipient." (emphasis added); "We would reach the opposite conclusion if the e-mails were reviewed by human beings or if the service provider reserved the right to disclose the e-mails or the substance of the communications to third parties without the sender's permission (or a lawful judicial order). Merely scanning the content of e-mails by computer to generate computer advertising, however, does not pose a threat to client confidentiality, because the practice does not increase the risk of others obtaining knowledge of the e-mails or access to the e-mails' content. A lawyer must exercise due care in selecting an e-mail service provider to ensure that its policies and stated practices protect client confidentiality." (emphasis added)).

(d) This question comes from a North Carolina legal ethics opinion, which found the process unethical.

In North Carolina LEO 2006-17 (1/19/07), the North Carolina Bar framed the question as follows:

Attorney would like to solicit professional employment by use of a recorded telephone message. He intends to obtain telephone numbers from the census bureau's database of persons who are not on the "do not call" list for commercial solicitations by telephone. Attorney's law firm (or a service hired by the firm) will autodial the people on the list. When a person answers the phone, he will hear the following recorded message:

This is an announcement of the Tax, Estate & Elder Planning Center, a North Carolina law firm. Have you or your loved ones experienced the overwhelming cost of nursing home, assisted living, or in home care? The Tax, Estate & Elder Planning Center would like for you to know more about government programs that may help cover these costs while
protecting your savings. If you would like to know more about these programs press one now.

If the recipient presses the number one on the key pad of his phone, he will hear a short pre-recorded informational message on programs such as Medicaid, Special Assistance, and veterans' benefits. Whether the recipient opts to listen to the message or not, he will hear the following recorded message at the end of the phone call:

If you are interested in knowing more about how to qualify for these programs, then press two to be connected with a representative of the Tax, Estate & Elder Planning Center Law Firm. Thanks you for taking time to listen to this announcement.

If the recipient of the phone call follows the prompts, he will be connected with a person at Attorney's law firm.

Id. The North Carolina Bar distinguished between a message that a listener could essentially ignore, and a message that invited the listener to establish a person-to-person or telephonic relationship.

Although it appears that recorded telephone advertising messages are permitted by the Rules of Professional Conduct, Rule 7.3(a) and the comment to the rule do not contemplate that a recorded message will lead to an interpersonal encounter with a lawyer (or the lawyer's agent) at the push of a button on the telephone key pad. To avoid the risks of undue influence, intimidation and, over-reaching, a potential client must be given an opportunity to contemplate the information about legal services received in a recorded telephone solicitation. This cannot occur if a brief, unexpected, and unsolicited telephone call leads to an in-person encounter with a lawyer, even if the recipient of the phone call must choose to push a number to be connected with the lawyer.

Therefore, Attorney may autodial potential clients and play a recorded message provided the message is truthful and not misleading. He may not, however, include a means for the recipient of the call to be immediately connected with a lawyer (or an agent of the lawyer). Instead, the message
may provide a telephone number or other contact information for the lawyer or the lawyer’s firm so that the potential client may subsequently call the lawyer or law firm after contemplating the information received from the recorded message.

Id. (emphases added).

**Best Answer**

The best answer to (a) is **PROBABLY NO**; the best answer to (b) is **PROBABLY YES**; the best answer to (c) is **MAYBE**; the best answer to (d) is **MAYBE**.
Daily Deals and Other New Forms of Marketing

Hypothetical 24

You just asked one of your newest lawyers to propose ways to expand your firm's marketing activities using social media. Now you have to decide whether to accept her recommendations.

(a) May your law firm offer the sort of "daily deals" that have become increasingly popular?

**YES**

(b) May your law firm offer a prize to folks who join your firm's social network?

**YES (PROBABLY)**

Analysis

As in other areas, bars have analyzed the ethical propriety of lawyers using new forms of marketing, including social media.

(a) At least two states have explicitly approved law firms' use of "daily deals" in their marketing efforts.

- South Carolina LEO 11-05 (2011) ("The use of 'daily deal' websites to sell vouchers to be redeemed for discounted legal services does not violate the Rule 5.4(a) prohibition on sharing of legal fees, but the attorney is cautioned that the use of such websites must be in compliance with Rules 7.1 and 7.2 and could lead to violations of several other rules if logistical issues are not appropriately addressed."); "The fact that the charge for this form of advertising service is deducted up front by the company rather than invoiced and then paid from the lawyer's operating account does not transform the transaction from the payment of advertising costs into an improper fees split.").

- North Carolina LEO 2011-10 (10/21/11) (finding that a lawyer could advertise a "deal of the day" or "group coupon," and pay a percentage of each "daily deal" or coupon sold; noting that the amount paid to the website company with which the lawyer advertised do not depend on the lawyer's fees received but rather on the coupons sold; "Lawyer would like to advertise on a 'deal of the day' or 'group coupon' website. To utilize such a website, a consumer
registers his email address and city of residence on the website. The website company sends local ‘daily deals’ or coupons for discounts on services to registered consumers. The daily deals are usually for services such as spa treatments, tourist attractions, restaurants, photography, house cleaning, etc. The daily deals can represent a significant reduction off the regular price of the offered service. Consumers who wish to participate in the 'deal of the day' purchase the deal online using a credit card that is billed."; "The website company negotiates the discounts with businesses on a case-by-case basis; however, the company’s fee is always a percentage of each “daily deal” or coupon sold. Therefore, the revenue received by the business offering the daily deal is reduced by the percentage of the revenue paid to the website company."; concluding that "[a]lthough the website company's fee is deducted from the amount paid by a purchaser for the anticipated legal service, it is paid regardless of whether the purchaser actually claims the discounted service and the lawyer earns the fee by providing the legal services to the purchaser. Therefore, the fee retained by the website company is the cost of advertising on the website and does not violate Rule 5.4(a) which prohibits, with a few exceptions, the sharing of legal fees with nonlawyers. The purpose for fee-splitting prohibition is not confounded by this arrangement.”; warning the lawyer to avoid misleading advertising; also advising (a) that "a lawyer must deposit entrusted funds in a trust account. Rule 1.15-2(b). The payments received by the lawyer from the website company are advance payments of legal fees that must be deposited in the lawyer's trust account and may not be paid by the lawyer or transferred to the law firm operating account until earned by the provision of legal services."; (b) that "a professional relationship with a purchaser of the discounted legal service is established once the payment is made and this relationship must be honored. The lawyer has offered his services on condition that there is no conflict of interest and the service is appropriate for the purchaser, and the purchaser has accepted the offer. At a minimum, the purchaser must be considered a prospective client entitled to the protections afforded to prospective clients under Rule 1.18."; (c) that the lawyer must refund any amount to a client who does not ultimately use the lawyer's services before the "expiration date" of the discount or coupon, and (d) that the lawyer may not condition the offer "upon the purchaser’s agreement that the money paid will be a flat fee or a minimum fee that is earned by the lawyer upon payment" -- "[i]n light of the many uncertainties of a legal representation arranged in the manner proposed”).

As indicated in those two states’ conditional approvals of such marketing efforts, law firms must very carefully handle the money they receive as part of the marketing
process and the compensation the firms pay to the website assisting the firm in that process.

More recently, another state indicated that law firms' use of "daily deal" marketing was "fraught with peril."

- Indiana LEO 1 (2012) (holding that a lawyer’s use of daily deal coupons was probably unethical and "fraught with peril"; "The obligation to establish the attorney-client relationship and the language of the guideline are such that engaging in the Company's [which administers the coupon program] style of sales arrangement is a problem for the lawyer who would thereby delegate the initial creation of the lawyer-client relationship to either the Company or the client. That duty rests with the lawyer. The proposed coupon arrangement may be an abrogation and/or violation of that duty."; "The Committee finds that when a lawyer has received funds from a prospective client who is not or cannot be represented by the lawyer for any reason, the lawyer has a duty to refund the entire amount of fee paid, including the Company's share, to the client. Because the Company might be disbursing the ‘funds’ to the lawyer incrementally, it is unclear how a lawyer can ethically refund the client's funds at that time."; "[T]he business models employed by many of the online coupon providers do not ask the attorney to pay 'reasonable costs.' Rather, some of the Companies ask for half of the fees collected. Notwithstanding the fixed, minimal costs associated with creating and administering the online coupon, the Company gets 50% of the fees charged. The Committee finds that such an arrangement violates Rule 7.2(b)(1), because the fees being kept by the Company are not tied to the 'reasonable costs' of the advertisements."; "The Committee's analysis of this inquiry is that a lawyer accepting a group coupon style arrangement may violate the Rules of Professional Conduct by: (1) delegating the creation of the lawyer-client relationship to a nonlawyer; (2) allowing someone other than the lawyer to hold the property of the potential client pending the lawyer's engagement or transfer of the property of the potential client, or completion of the legal work, which is not permitted by Rule 1.15; (3) allowing a potential client to create a conflict of interest with a current client which may force the lawyer to withdraw from the representation of a current client for an inappropriate reason under Rule 1.16; and (4) sharing fees for channeling clients in violation of Rules 5.4 and 7.2 as stated.").

As with the analysis undertaken by the states generally approving "daily deals," the Indiana ethics opinion focused on the money flow rather than the basic concept.
(b) The one state to have dealt with law firms’ offering a prize to join the firm’s social network has approved that type of marketing.

- New York State LEO 873 (6/9/11) (“The Rules of Professional Conduct do not prohibit an attorney from offering a prize to join the attorney’s social network as long as the prize offer is not illegal, but if the primary purpose of the prize offer is the retention of the attorney, then it will constitute an ‘advertisement’ and will be subject to the rules governing lawyer advertising. If the prize offer is an advertisement, and if it is targeted to specific recipients, and if a significant motive is pecuniary gain, it will also constitute a ‘solicitation’ and will be subject to additional requirements and restrictions.”).

Best Answer

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