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THE ETHICS OF EMAIL AND SOCIAL MEDIA: A TOP TEN LIST

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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(10) Marketing
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 ripe 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.").

- Noah Buhayar, Aviva Mistakenly Fires 1,300 Employees At Investment Unit, Bloomberg News, Apr. 20, 2012, http://www.bloomberg.com/news/2012-04-20/aviva-mistakenly-fires-1-300-employees-at-investment-unit.html ("Aviva Plc (AV), the United Kingdom's second-biggest insurer by market value, said the company's investment unit mistakenly sent an e-mail dismissing its entire staff before retracting the message.").

- 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&slreturn=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.'").

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.").

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

Introduction

Electronic communications can affect the creation of an attorney-client relationship. Because most of a lawyer's ethical and fiduciary duties arise from the existence of an attorney-client relationship, these new forms of communication obviously can play a dramatic role.

As this hypothetical indicates, the two key issues involve lawyers' duties of confidentiality and loyalty. Lawyers owe both of those duties to clients. So the question is whether and when those duties begin. There are three possibilities.

First, such a person might be treated for ethics and fiduciary duty purposes as a client. Of course, they will be treated as a former client should the initial communication never ripen into an actual attorney-client relationship. To the extent that such a person is considered a former client: (1) the lawyer may not disclose confidences gained from that person, or use to that person's detriment any confidential information unless it
becomes generally known; and (2) the lawyer may not represent other clients adverse to that person on any matter "substantially related" to the matter about which the person and the lawyer communicated, or any other matter even unrelated to the matter they discussed, if the lawyer acquired confidential information that the lawyer could use to the person's detriment. ABA Model Rule 1.9. Thus, the duty of confidentiality seals the lawyer's lips, and the duty of loyalty prevents the lawyer from taking matters adverse to the would-be client, despite the absence of any consummated attorney-client relationship. Because the person will be considered a "former" rather than current client, the lawyer would be presumably free to take matters adverse to the person that are unrelated to the matter they discussed. However, the more common scenario is for the lawyer to belatedly discover that he or she already represents the potential adversary. In that fact pattern, the lawyer cannot represent that adversary in the matter that the lawyer and person discussed, without the person's consent. That consent is nearly impossible to obtain, because the person has now retained another lawyer to represent him or her in the matter, and therefore has nothing to gain and much to lose by granting such a consent.

Second, such a person might be considered a former client for confidentiality purposes, but not for loyalty purposes. In that case, the lawyer will have to keep secret what the lawyer learned during any communications with the person, but may freely represent the person's adversary even in the matter about which they communicated. This sort of "threading of the needle" could be very difficult, if the same lawyer who communicated with the person wants to participate on behalf of the adversary. However, that person might be screened from others in the law firm, thus both
preserving the person's confidences and allowing the law firm to represent the adversary.

Third, the lawyer might owe no duties at all to such a person, other than the normal tort duties that we all owe to each other. In that scenario, the lawyer could disclose to anyone confidences that the lawyer obtained from the person. Given a lawyer's duty to diligently represent clients (ABA Model Rule 1.3) and keep clients "reasonably informed about the status of the matter" (ABA Model Rule 1.4(a)(3)), it is easy to envision that such a lawyer has a duty to advise the current client what the lawyer has just learned from a potential adversary. Similarly, the lawyer could represent the adversary even in the matter about which the lawyer received information from the person, because the lawyer would have no duty of loyalty to the person.

The principles applicable in all three of these scenarios depend on the person's reasonable expectation. In turn, this essentially puts the burden on the lawyer to control such expectation.

It is easy to see how the increasing use of electronic communications affects the analysis. Would-be clients traditionally made appointments to see a lawyer, the purpose of which was to discuss the possibility of hiring the lawyer. This time lapse allowed the lawyer to: (1) decide whether to disclaim any duty of confidentiality; and (2) check for conflicts. Because diligent and competent lawyers always took the second step, they never normally had to deal with the first possible step. In other words, the lawyer would cancel the appointment if there was a conflict, so the would-be client never had the opportunity to impart any confidential information to the lawyer. In essence, the lawyer could control the information flow by checking for conflicts first.
When would-be clients began to use the telephone to contact a lawyer, the lawyer could use the same basic approach -- although the lawyer had to be a bit quicker in doing so. Such a lawyer had to interrupt the would-be client's narrative, so the lawyer could run a conflicts check before acquiring any information from the would-be client. Thus, the lawyer could still control the information flow, although it was more difficult.

Lawyers knowingly participating in a "beauty contest" could follow the same steps. Here, however, it was far more likely that a lawyer would disclaim any duty of confidentiality. This is because the lawyer knew the would-be client was looking to retain a lawyer, thus giving a lawyer who might lose the "beauty contest" an incentive to preserve the lawyer's ability to represent the other side. A "beauty contest" participant might also arrange for a prospective consent from the would-be client, which would allow the lawyer to represent the other side if the would-be client retained another participant. Of course, all of this was possible because the lawyer had time to control the information flow.

Some of these principles apply in exactly the same way to lawyers' participation in certain electronic communications. 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.

(a)-(b) This issue becomes more complicated if there has been a unilateral
communication from a potential client to a lawyer.

It is much more difficult to control the receipt of information in the electronic age.
The first ethics opinions to have dealt with this issue described the situation in which "a
prospective client simply transmits information to a law firm providing no real opportunity
to the law firm to avoid its receipt." New York City LEO 2001-1 (3/2001). A 2010 New
Hampshire legal ethics opinion provided a more complete description of the scenario.

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.


So the question is whether the difficulty (or near impossibility) of preventing the
receipt of unsolicited confidential information affects the duties of confidentiality and
loyalty that arise when a lawyer knowingly receives information from a would-be client.

Most of the opinions have dealt with unsolicited emails sent by a would-be client
using a law firm's website link. However, the same basic question arises if a would-be
client simply looks up a lawyer's email address and sends an email without using a
website link, looks up the lawyer's telephone number and leaves an unsolicited detailed voicemail message on the lawyer's voicemail, etc.

A few bars have imagined scenarios involving the second alternative discussed above (requiring the lawyer to keep the information confidential, but allowing the lawyer to represent the adversary). But most bars have settled on the third scenario -- in which the lawyer does not have either a confidentiality or loyalty duty.

**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). The New York City Bar took a very lawyer-friendly approach.

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1 New York City LEO 2001-1 (3/2001) (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 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."); "The law firm in this case did not request or solicit the transmission to it of any confidential information by the prospective client. The 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. Indeed, Martindale Hubbell has put its directory on-line, with links to law firm web sites and e-mail addresses, facilitating unilateral communications from prospective clients."); "We believe . . . that there is a vast difference between the unilateral, unsolicited communication at issue here by a prospective client to a law firm and a communication made by a potential client to a lawyer at a meeting in which the lawyer has elected voluntarily to participate and is able to warn a potential client not to provide any information to the lawyer that the client considers confidential."); "[W]here, as here, a prospective client simply transmits information to a law firm providing no real opportunity to the law firm to avoid its
In dealing with the confidentiality issue, the New York City Bar acknowledged that a lawyer would have to maintain the confidentiality of information acquired even from an unsolicited would-be client, absent some disclaimer of confidentiality. However, the Bar then provided a crystal clear roadmap for lawyers wishing to disclaim such a duty. 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. If such a disclaimer is employed, and a prospective client insists on sending confidential information to the firm through the website, then no protection would apply to that information and the lawyer would be free to use it as she sees fit.

New York City LEO 2001-1 (3/1/01) (footnote omitted).

In dealing with the duty of loyalty, the New York City Bar essentially concluded that a lawyer who receives unsolicited confidential information may represent the adversary even if the lawyer must keep the information confidential (because the lawyer has not taken the steps to disclaim the confidentiality duty).

Information imparted in good faith by a prospective client to a lawyer or law firm in an e-mail generated in response to an

receipt, the Committee concludes that the law firm is not precluded from representing a client adverse to the prospective client in the matter."; quoting Professor Hazard, who explained that a prospective client "who tells a lawyer that he wants to sue XYZ . . . can properly be charged with knowledge that lawyers represent many different clients, and hence that there is a possibility that the immediate lawyer or her law firm already represents XYZ . . . "; explaining that a law firm web site disclaimer that "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" (footnote omitted); further explaining that a lawyer receiving confidential information in such an email from a prospective client should not disclose its contents to the existing client if the law firm did not have an adequate disclaimer, or if there is some other reason to think that the prospective client sent the confidential information in good faith).
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.

Id.

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. 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.

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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 email one of the firm's lawyers and provide information about its claim; noting that the lawyer who received the email declined to represent the company after determining that the law firm represented the proposed target on unrelated matters; explaining that "[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 email "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 "[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 "[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 "when 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
When 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.

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.

email might "materially limit" the law firm's ability to represent the target -- depending on the substance of the email 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 "[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").
• 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); providing several examples of appropriate disclaimer language at the end of the opinion).

• 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 it self [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

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; noting that the New Hampshire approach would impute an individually disqualified lawyer to the entire firm unless the firm took steps to restrict the receipt of information beyond that required to run a conflicts check; "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
Best Answer

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

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."
Attempt to Disclaim an Attorney-Client Relationship

Hypothetical 2

You have been trying to determine how you can "cash in" on consumers' increasing use of the Internet to obtain advice, while avoiding some of the implications of an attorney-client relationship. One idea comes to mind, and you want to make sure that it would work.

May you set up a website in which you and other lawyers answer consumers' questions in return for a fee, while explicitly disclaiming an attorney-client relationship?

NO

Analysis

Whenever lawyers communicate with non-clients about a legal matter, the communication might create an attorney-client relationship. Of course, in some situations the lawyer and the would-be client intend to create such a relationship. In other situations, the law essentially imposes the relationship -- based on the nonlawyers' reasonable understanding and expectation. This possibility has always existed. A lawyer who answers a neighbor's legal question at a cocktail party or a fellow church member's question as they sit together in a pew might find that the lawyer has assumed the burdens of an attorney-client relationship. These might include the risk of liability, the inability to represent a "real" client whose interests are adverse to the person with whom the lawyer briefly interacted, etc.

Social media create many opportunities for this type of "accidental" (from the lawyer's standpoint) creation of an attorney-client relationship. Given the ease with which lawyers can engage in back-and-forth communications, many lawyers have found
it wise to disclaim an attorney-client relationship -- to reduce the odds that the law will impose the burdens of an attorney-client relationship on the lawyer.

This hypothetical involves a different scenario -- lawyers hoping to provide legal advice in return for a fee, but without assuming the duties of an attorney-client relationship. Not surprisingly, such an effort normally would fail.

- South Carolina LEO 12-03 (2012) (explaining that a lawyer could not participate in a website in which the lawyer answered questions in return for earning a fee from the website, while disclaiming providing any legal advice; "The website's use of testimonials, endorsements, the word 'expert,' and other misleading statements prohibit Lawyer's participation. The site invites specific questions about specific legal matters and offers specific legal advice but uses buried small-type statements to attempt to disclaim the creation of attorney-client relationships and to warn against reliance on the advice. The Committee believes Lawyer's participation under these circumstances would be improper."); "As to legal information websites in general, if a website complies with all communications and advertising rules, Lawyer could participate in such a program but with specific caution against inadvertently forming an attorney-client relationship by offering more than basic information of general applicability. Where legal advice is provided, it is improper for Lawyer to accept compensation from the website provider without complying with Rule 1.8(f)."; "Attempting to disclaim (through buried language) an attorney-client relationship in advance of providing specific legal advice in a specific matter, and using similarly buried language to advise against reliance on the advice given is patently unfair and misleading to laypersons."); "Finally, the language of the disclaimer, including the 'as is' clause, may be construed as an attempt to prospectively limit the lawyer's liability for the advice given, which would violate Rule 1.8(h) and therefore be deceptive in violation of Rule 7.1."); "The Committee specifically cautions lawyers to treat online communications with potential clients just as they would a live meeting, specifically regarding conflict checking and 'prospective clients.' However, because this particular website specifically disclaims the creation of attorney/client relationships, a lawyer's use of the website to create them would be tantamount to false, 'bait and switch' advertising by the lawyer."); "Where information provided through a website is limited to general information and not specific advice, and no attorney-client relationship is created, Rule 1.8(f) is not implicated. However, where providing legal advice regarding a specific matter does not result in the formation of an attorney-client relationship, a lawyer may not accept compensation from the service provider unless she complies with Rule 1.8(f).".)
Best Answer

The best answer to this hypothetical is NO.
Ethical Propriety of Electronic Communications

Hypothetical 3

You have one partner who seems to be a "nervous Nelly." He worries about nearly everything, and he frequently bothers you with what sometimes seem 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

(d) May a lawyer ethically store confidential client communications in the "cloud"?

YES

Analysis

Not surprisingly, both the ethics rules and case law have had to evolve as new forms of communication and data storage have appeared.

(a)-(c) 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.").
Some bars required lawyers to obtain their clients’ consent to communicate their
confidences using unencrypted email or cell phone technology. 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. In 1999, the ABA settled on
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 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.").

5 ABA LEO 413 (3/10/99) (lawyers may ethically communicate client confidences using unencrypted email 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").

6 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
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 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, a lawyer does not violate DR 4-101 by communicating with a client by e-mail, including the [I]nternet, 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.").
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.

- 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)).

(d) A new wave of ethics opinions also deal with various forms of data 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').

- 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."

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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; the best answer to (d) is YES.
Effect on the Attorney-Client Privilege of a Third Party's Assistance with Electronic Communications

Hypothetical 4

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."  \textit{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."  \textit{Id.} at *14.

**Best Answer**

The best answer to this hypothetical is \textbf{PROBABLY NO}.  

N 8/12
Substance of Communications Between Corporate Clients and Lawyers

Hypothetical 5

You have tried to teach your corporate clients’ executives to understand the attorney-client privilege and maximize the corporation’s privilege protection. The executives now realize that they cannot assure privilege protection by writing "privileged" in their emails’ "Re" line. However, you are now moving to more subtle issues.

Is the attorney-client privilege likely to protect a corporate executive’s email describing some incident or issue about which the executive seeks legal advice from you?

MAYBE

Analysis

This hypothetical deals with the content of communications between corporate employees and the corporation’s lawyers. The increasing use of email for such communications has increased the difficulty of corporations establishing privilege protection for intracorporate communications. Among other things, the substance of emails tends to be more cryptic than other forms of communication -- making it more difficult to establish the privileged nature of emails.

Perhaps another factor is the increasing volume of intracorporate communications, which might result in courts' tendency to look only at the four corners of withheld documents rather than the context of their transmission. The increasing volume of intracorporate emails also makes it less likely that lawyers will answer every one, which some courts consider as a factor in analyzing privilege protection.
Under the generally accepted Upjohn standard,¹ the attorney-client privilege can protect communications between a corporation's lawyer and any level of company employee possessing facts that the lawyer needs in order to give legal advice to the corporation. A handful of states (notably, Illinois) follow a much narrower approach, called the "control group" standard. Under that approach, the privilege only protects communications between a corporation's lawyer and those within the corporation who control the corporation's decisions based on the lawyer's advice.

Not surprisingly, lawyers and their clients cannot assure privilege protection by writing "privileged" on a document or email communication. In fact, such headers or stamps can actually hurt the company -- by dissipating the beneficial effect of stamps or headers used where appropriate, and by making it more difficult to argue that any inadvertent production of such stamped documents during litigation should not trigger a waiver.

One unfortunate trend seems to be courts' focus on four corners of documents when analyzing possible privilege protection. Perhaps it is understandable that courts should take such an easily applied approach to the issue, but companies and their lawyers should recognize the trend and train themselves to support any privilege protection by articulating the basis of the privilege in the communication itself.

For instance, in 2012 the Western District of New York stated bluntly that

[n]or is there any request within the text of the communication for legal advice or services and, as such, the communication is not protected by the attorney-client privilege.


A 2011 Eastern District of Pennsylvania case took a similarly narrow approach.

[N]othing about the memorandum or its contents suggests -- either explicitly or implicitly -- that the document was prepared in connection with a request for, or the provision of, legal advice. It is not marked "confidential" or "attorney-client privileged." It contains no requests for Isaacson's opinion about any legal matter. It does not refer to any request by Isaacson for factual information from the committee related to a legal issue Isaacson was considering on behalf of UEP. Rather, the memorandum describes certain decisions made by a "scientific committee," primarily regarding cage density. As UEP correctly observed, it describes the "economic impact" of the Program, not any of the Program's legal ramifications . . . . Thus, the memorandum is not facially "for the purpose of obtaining or providing legal assistance."


Other courts also seem to limit their review to the communication itself. In some situations, courts order such communications produced after redaction of the explicit questions posed to the lawyer recipient. Such an approach seems too narrow, because it ignores the possibility that the client was seeking the recipient lawyer's advice about the overall document.

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2 Oracle Am., Inc. v. Google, Inc., No. C-10-03561-WHA (DMR), 2011 U.S. Dist. LEXIS 96121, at *15 (N.D. Cal. Aug. 26, 2011) ("The Email text also never mentions legal advice, lawyers, litigation, Oracle, or patent infringement."); Henderson Apt. Venture, LLC v. Miller, Case No. 2:09-cv-01849, 2011 U.S. Dist. LEXIS 40829, at *25 (D. Nev. Mar. 31, 2011) ("In-house counsel is the last person listed on the courtesy copy line of the e-mail. Nothing in the e-mail suggests that legal advice is being solicited from counsel. No question is posed to counsel in the e-mail.").

In some situations, courts examining the four corners of a document find that the client's explicit request for legal advice is not extensive or elaborate enough to justify privilege protection. In 2012, the Middle District of Pennsylvania took this narrow approach.

The second email was sent to fifteen members of the Rite Aid team working on the store-structure assessment, including two in-house counsel, seeking review and feedback with respect to proposed store structure changes. Other than a general request for feedback on the attached proposal, the correspondence does not expressly seek legal counsel and does not indicate that it is covered by any privilege.


In 2011, the Northern District of California took the same approach.

Merely forwarding a communication to a lawyer with the subject line "legal review needed" is not sufficient to confer the privilege to the initial communication if it does not on its own qualify as a privileged communication. If the law were otherwise, all communications could be protected as privileged simply by forwarding them to an attorney.


Lawyers training their clients to maximize the attorney-client privilege protection should remind their clients to articulate this request for legal advice in their communications to the lawyer. These lawyers know that judges ultimately make privilege calls based on documents that the judges or their associates review in camera. Judges are not likely to read any further if the first sentence in a client-to-lawyer
communication explicitly mentions that the client seeks the lawyer's advice. The request obviously must accurately reflect the client's intent, but failing to explicitly articulate a request for legal advice can create confusion where none should exist and sometimes cost the client the privilege protection that the client deserves.

As difficult as it is to determine if a client's direct communication to a lawyer amounts to an implicit request for legal advice, it can be even more difficult to determine whether a client copying the lawyer on a communication being sent to someone else has implicitly sought the lawyer's advice about the subject of the communication.

Not surprisingly, the client's communication to the lawyer as a copy recipient rather than a direct recipient is not dispositive. Courts examine both the communication's content and context. For instance, in 2010 the District of Minnesota found that the privilege protected communications to a company's lawyer about the company's response to a television story. The court noted that

> [t]he first two emails copied ADT's General Counsel, and the other two emails were sent directly to him. The context of these emails demonstrates that these communications contain an implicit request for legal advice regarding the content of the Dateline response, and therefore they are protected by the attorney-client privilege.


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4 Henderson Apt. Venture, LLC v. Miller, Case No. 2:09-cv-01849, 2011 U.S. Dist. LEXIS 40829, at *25 (D. Nev. Mar. 31, 2011) ("In-house counsel is the last person listed on the courtesy copy line of the e-mail. Nothing in the e-mail suggests that legal advice is being solicited from counsel. No question is posed to counsel in the e-mail.").

5 Wierciszewski v. Granite City Ill. Hosp. Co. LLC, Case No. 11 cv-120-GPM-SCW, 2011 U.S. Dist. LEXIS 128772, at *4 (S.D. Ill. Nov. 7, 2011) ("[I]t appears from the context of the emails that Ron Payton and others were merely making attorney Garrett aware of the situation and were not emailing him for the purpose of seeking legal advice from counsel.").
Another court explained how such communications’ content can affect the privilege analysis.

Simply copying the email to the lawyer does not gain a privilege. It’s one thing to allow a corporate agent to seek legal advice from a lawyer and business advice from another corporate official in the same email. It’s another for a corporate official to specifically ask for business advice in an email and route it to the lawyer.


These principles apply to communications in which a client relays historical facts to the lawyer, and to the client’s communication of contemporaneous documents (such as drafts) to the lawyer.

A communication that prompts a lawyer’s response is obviously more likely to deserve privilege protection, because the lawyer construed it as a request for legal advice. A number of courts have pointed to this factor. In 2012, a New Jersey court denied privilege protection after noting that

[from our sampling of the file, it appears that MBUSA's in-house attorneys rarely responded to these e-mails, if at all.


Earlier, the Eastern District of Virginia acknowledged that a lawyer responded to the client’s email, but not with legal advice.

While general counsel is a recipient of the email chain, the communications do not explicitly ask for legal advice, opinions, or oversight. Furthermore, the attorney’s response is limited to clarifying a business issue and scheduling a meeting.

While the lawyer’s response can also be an artificial attempt to assure privilege protection, most lawyers and clients probably are not that clever or plan that far ahead. However, the absence of a lawyer’s response does not necessarily mean that the client’s implicit request for legal advice does not deserve privilege protection. Otherwise, clients with tardy or sloppy lawyers would lose privilege protection if they never receive a response from an overworked or negligent lawyer.

A detailed legal analysis probably assures protection both for the client’s communications and for the lawyer’s response. However, some courts inexplicably fail to protect shorter lawyer responses such as "OK." There is no reason to deny privilege protection just because the lawyer communicates succinctly. Lawyers keeping in mind some courts’ narrow approach can bolster their client’s privilege claim by responding to their client’s communications that explicitly or implicitly seek their legal advice. Such responses might convince a court to protect both the client’s and the lawyer’s communication.

Best Answer

The best answer to this hypothetical is MAYBE.
Pattern of Intracorporate Communications: Legal Versus Business Advice

Hypothetical 6

You have served as your company's general counsel for several decades, and have seen plenty of executives come and go. One recently-promoted vice president has an annoying habit of copying numerous other employees on any emails he sends you. You have occasionally asked why he does this, because you don't think that some of the employees receiving copies need to know what you and the vice president are communicating about. The vice president explains that he would rather err on the side of giving a "heads up" to any of his colleagues who might be interested in your email communications.

Does widespread disclosure of privileged communications within a company pose a risk to the privilege protection?

YES

Analysis

This hypothetical focuses on the pattern of communications' distribution within a corporation. Courts' analysis of that pattern can affect the courts' characterization of the communications' content, and thus their privilege protection. The issue arose in part because of the ease of transmission involving emails.

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 ripe for legal analysis.


The bottom line is that widespread intracorporate transmission of arguably privileged communications can destroy the privilege. Some courts use a waiver
analysis in describing this effect. This hypothetical addresses the approach of other courts -- which focuses on the availability of the privilege ab initio. These courts conclude that a widespread transmission of an intracorporate communication demonstrates that the communication was primarily business-related and not primarily legal. This aborts the privilege, rather than waiving it -- but the effect has the same disastrous impact.

In analyzing the scope of intracorporate transmission that can result in the privilege's loss, courts examine who within the corporation has a "need to know" the communication.

"Need to Know" Standard: Introduction

Along with the Upjohn standard and the control group standard, courts analyzing privilege protection in the corporate context sometimes deal with what normally is called the "need to know" standard. That standard focuses on the role of employees who participate in communications, are present during otherwise privileged communications, or receive pre-existing privileged communications. Those employees with a "need to know" generally will be considered inside the privilege protection in those settings, while employees without a "need to know" usually will not.

Unlike the Upjohn standard, the "need to know" standard focuses on lawyer-to-client communications in the corporate context, rather than on the employee's possession of facts the lawyer needs to advise the corporate client. The "need to know" refers to an employee's need to know a lawyer's advice. In focusing on communications going in that direction, the "need to know" standard matches the

"control group" standard. However, employees with a "need to know" do not necessarily make important corporate decisions, like those employees within the protected "control group." In fact, lower-level employees might well have a "need to know."

Courts disagree about the exact scope of the "need to know" standard. They also disagree about the specificity of evidence corporations must present on that issue.

**Where the "Need to Know" Standard is Relevant**

Determining the impact of a corporate employee's status as inside or outside privilege protection in some respects matches the analysis for client agents. However, the unique privilege issues arising in the corporate context add other factors as well.

Communications to and from an employee without a "need to know" could be an indicia that the communication primarily related to business rather than legal matters. The presence of such an employee in an otherwise privileged corporate communication might abort the privilege. Disclosing a pre-existing privileged communication to such an employee could waive the privilege. An employee outside the "need to know" group might not have the power to waive a corporation's privilege.

**Relationship of the "Need to Know" Standard, and the Upjohn Standard**

The "need to know" standard differs from both the majority Upjohn standard and the minority "control group" standard.

The Upjohn standard focuses on the employee's possession of facts that the lawyer needs before the lawyer can give advice to the corporate client. It therefore protects core privileged communications, which are client-to-lawyer communications of facts to the lawyer. Even a first-day lower-level employee might fit the Upjohn standard,
if that employee has facts the lawyer needs. The first-day employee might or might not need the lawyer's advice to perform her job. That requires a different analysis than analyzing that employee's possession of facts that the lawyer needs.

Although employees meeting the Upjohn standard usually have obtained those facts during the course of their duties, that is not necessarily required. For instance, an assembly-line worker might witness an incident in the lunchroom. If the company's lawyer needs the assembly-line worker's recollection of what he or she saw, that communication will deserve privilege protection under Upjohn. In fact, even former corporate employees can be within the Upjohn standard.

In contrast, the "need to know" standard focuses on the employee's need to receive the lawyer's advice in order to perform his or her job. Thus, the "need" refers to the lawyer's advice, not to the lawyer's recipient of the employee's facts.

Unlike Upjohn, the "need to know" standard focuses on the lawyer-to-client communication. In many situations, corporate employees will be within the Upjohn standard but not meet the "need to know" standard. For instance, an assembly-line worker who witnessed a lunchroom incident can engage in a privileged communication with the company's lawyer about what he or she saw, but probably has no "need to know" the lawyer's impressions or advice about the incident.

On the other hand, an employee might meet the "need to know" standard, but not have any facts that the lawyer needs. For instance, a new salesperson might need legal advice about avoiding antitrust issues during discussions with competitors, but does not have any factual information the lawyer needs. In that situation, the lawyer-to-
client communications will deserve protection to the extent that they reflect confidences that the lawyer acquired from somewhere else within the corporation.

To make matters more complicated, properly analyzing the "need to know" standard might require determining whether an employee simply needs instructions, or needs to know the legal basis for those instructions. For instance, an assembly-line worker does not need to know the reason why she must add a safety guard when making a chain saw, while the plant manager almost surely has a need to know that the company is adding this expensive process to decrease product liability litigation. In contrast, a lower-level salesman probably needs to know why he or she should never discuss prices with a competitor's lower-level salesman he or she might meet in the lobby of a customer.

**Relationship of the "Need to Know" Standard and the "Control Group" Standard**

The "need to know" standard also differs from the "control group" standard. Although courts seem not to have really discussed the distinction, it seems fair to say that the corporation's "control group" consists of those within the company who make decisions for the company. These are the employees who act on the lawyer's advice, and can bind the company by taking actions based on that advice.

The "need to know" standard appears to be broader than that, at least as defined in the Restatement and in those few courts who have tried to articulate a general definition of the term.

First, the "need to know" standard focuses more on the employee's need for legal advice to do his or her job, rather than to make decisions for the corporation. For instance, a human resources employee has a "need to know" a lawyer's latest analysis
of the labor laws. The employee needs this advice so he or she can perform his or her
daily functions, not to set policy or make some grand decisions for the corporation. In
2007, a New York state court recognized this justifiable principle.

[T]he privilege protects from disclosure communications
among corporate employees that reflect advice rendered by
counsel to the corporation. . . . This follows from the
recognition that since the decision making power of the
corporate client may be diffused among several employees,
the dissemination of confidential information to such persons
does not defeat the privilege.


One would think that courts would protect and even nurture such an inclusive
and collaborative corporate culture. It is therefore not surprising that those courts
examining the "need to know" standard normally find that it encompasses a larger group
of employees than the "control group" standard.

Second, the "need to know" standard seems to be matter-specific rather than
general. For instance, a salesman might "need to know" the corporation's antitrust
lawyer's advice before attending a meeting, even though he or she would not fall within
the "control group." In contrast, an employee at the same level of the corporate
hierarchy as the salesman but involved in manufacturing almost surely would not have a
"need to know" antitrust advice.

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2 For instance, a Southern District of New York magistrate judge found that a company's executive
vice president was not sufficiently involved in a legal issue to be within the privilege protection on that
issue, so that his presence during a meeting addressing that issue aborted the privilege. Not surprisingly,
the district court judge reversed that holding, essentially finding that a company's executive vice president
needed to know about everything going on in the company. **Ashkinazi v. Sapir**, No. 02 CV 0002 (RCC),
Defining the "Need to Know" Standard

The Restatement provides useful guidance about the "need to know" standard, and takes a characteristically broad view.

The need-to-know limitation . . . permits disclosing privileged communications to other agents of the organization who reasonably need to know of the privileged communication in order to act for the organization in the matter. Those agents include persons who are responsible for accepting or rejecting a lawyer's advice on behalf of the organization or for acting on legal assistance, such as general legal advice, provided by the lawyer. Access of such persons to privileged communications is not limited to direct exchange with the lawyer. A lawyer may be required to take steps assuring that attorney-client communications will be disseminated only among privileged persons who have a need to know. . . . The need-to-know concept properly extends to all agents of the organization who would be personally held financially or criminally liable for conduct in the matter in question or who would personally benefit from it, such as general partners of a partnership with respect to a claim for or against the partnership. It extends to persons, such as members of a board of directors and senior officers of an organization, whose general management and supervisory responsibilities include wide areas of organizational activities and to lower-echelon agents of the organization whose area of activity is relevant to the legal advice or service rendered.


Thus, the Restatement adopts what amounts to a "relevance" standard.

In a 2001 case, the Southern District of New York provided another helpful and broad definition of the "need to know" standard.

The "need to know" must be analyzed from two perspectives: (1) the role in the corporation of the employee or agent who receives the communication; and (2) the nature of the communication, that is, whether it necessarily incorporates legal advice. To the extent that the recipient of the information is a policymaker generally or is responsible for the specific subject matter at issue in a way that depends
upon legal advice, then the communication is more likely privileged. For example, if an automobile manufacturer is attempting to remedy a design defect that has created legal liability, then the vice president for design is surely among those to whom confidential legal communications can be made. So, too, is the engineer who will actually redesign the defective part: he or she will necessarily have a dialogue with counsel so that the lawyers can understand the practical constraints and the engineer can comprehend the legal ones. By contrast, the autoworker on the assembly line has no need to be advised of the legal basis for a charge [sic] in production even though it affects the worker's routine and thus is within his or her general area of responsibility. The worker, of course, must be told what new production procedure to implement, but has no need to know the legal background.


In 2002, the District of Columbia circuit court articulated an expansive approach to the "need to know" standard. Defendant GSK logged withheld documents, and also submitted a GSK Vice President's affidavit explaining that the withheld documents had only been circulated to employees involved in the pertinent issues. The FTC argued that GSK should have explained why each of the recipients listed on the privilege log needed the privileged documents. The district court agreed with the FTC, but the circuit court reversed. The circuit court found that the vice president's declaration was sufficient. The circuit court specifically rejected the district court's requirement that GSK explain why each of the recipients needed the documents.

The district court faulted GSK for not having explained 'why any, let alone all, of the employees received copies of certain documents,' . . . and the Commission likewise claims

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3 FTC v. GlaxoSmithKline, 294 F.3d 141, 145 (D.C. Cir. 2002).
4 Id. at 147.
on brief that GSK should have shown why each individual in possession of a confidential document 'needed the information [therein] to carry out his/her work.' These demands are overreaching. The Company's burden is to show that it limited its dissemination of the documents in keeping with their asserted confidentiality, not to justify each determination that a particular employee should have access to the information therein. Not only would that task be Herculean -- especially when the sender and the recipient are no longer with the Company -- but it is wholly unnecessary. After all, when a corporation provides a confidential document to certain specified employees or contractors with the admonition not to disseminate further its contents and the contents of the documents are related generally to the employees' corporate duties, absent evidence to the contrary we may reasonably infer that the information was deemed necessary for the employees' or contractors' work. . . . We do not presume, therefore, that any business would include in a restricted circulation list a person with no reason to have access to the confidential document -- that is, one who has no 'need to know.'

**FTC v. GlaxoSmithKline, 294 F.3d 141, 147-48 (D.C. Cir. 2002).**

In fact, the circuit court essentially applied a standard analogous to the very liberal "business judgment" rule used in corporate board liability cases.

Moreover, we can imagine no useful purpose in having a court review the business judgment of each corporate official who deemed it necessary or desirable for a particular employee or contractor to have access to a corporate secret. It suffices instead that the corporation limited dissemination to specific individuals whose corporate duties relate generally to the contents of the documents.

**Id.** at 148.

In 2008, the District of South Carolina also adopted a broader view of the "need to know" standard.

Some of these people seem fairly far down in the corporate chain (at least given the information presented to the Special Master). But the 'need to know' test from **Glaxo** [FTC v. **GlaxoSmithKline, 294 F.3d 141 (D.C. Cir. 2002)], **supra**, is
not rigorous -- it simply requires that 'the contents of the documents are related generally to the employees' corporate duties.' That test is met here. I note that the email was not distributed widely throughout the corporation.


A 2009 Northern District of Illinois decision also adopted an expansive approach to the dissemination of documents within a corporation. That decision found that the attorney-client privilege protected a draft securities filing prepared by a corporate executive for an in-house lawyer's review and circulated to other nonlawyers.

In a corporate structure, there may be many individuals who must consult with one another so that all relevant information is known before making a legal decision. In the case at hand, all of the non-lawyer individuals who were privy to the Bolger e-mail were employees of Aon. Each individual, including the CFO, CEO, Head of Investor Relations, Controller, and member of the Controller's division, was directly concerned with the matter of the Form 10-K disclosures. To disallow corporations the space to collectively discuss sensitive information with legal counsel would be to ignore the realities of large-scale corporate operation. For this reason, there is no doubt that the inclusion of these individuals in the e-mail correspondence did not destroy the attorney-client privilege.


Other courts have also taken a broad view.


Courts taking a more narrow view of the "need to know" standard usually do not articulate the contours of the standard. Instead, those courts find that corporations either could not enjoy privilege protection, or had lost it because certain employees participated in or later received privileged communications. Courts reaching such a troubling conclusion usually do not explain why the employees were outside the standard, they simply find that the corporation failed to carry the burden of proof on the issue or conclude that the privilege was lost.

**Evidentiary Support for the "Need to Know" Standard**

Not surprisingly, courts taking a broad view of the "need to know" standard likewise tend to take a fairly easy view of a corporation’s burden of proof.

A 2002 District of Columbia circuit court decision essentially applied the "business judgment" rule in finding that any employee receiving a privileged communication almost by definition had a "need to know."

The Company's privilege log and the affidavit of Charles Kinzig [GSK's Vice President and Director of Corporate Intellectual Property] establish that GSK circulated the documents in question only to specifically named employees and contractors, most of whom were attorneys or managers and all of whom 'needed to provide input to the legal department and/or receive the legal advice and strategies formulated by counsel.' The affidavit also states that each

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15601, 2009 U.S. Dist. LEXIS 14160, at *25 (E.D. Mich. Feb. 24, 2009) (concluding that the forwarding of legal advice "to subordinate employees in a position to employ the advice contained in the performance of their assigned duties is, in my view, fully consistent with the purposes underlined in the attorney-client privilege."); Delta Fin. Corp. v. Morrison, No. 011118/2003, 2007 N.Y. Misc. LEXIS 6946, at *10-11 (N.Y. Sup. Ct. Oct. 11, 2007) ("[T]he privilege protects from disclosure communications among corporate employees that reflect advice rendered by counsel to the corporation. . . .  This follows from the recognition that since the decision making power of the corporate client may be diffused among several employees, the dissemination of confidential information to such persons does not defeat the privilege."); Ashkinazi v. Sapir, No. 02 CV 0002 (RCC), 2004 U.S. Dist. LEXIS 14523, at *6 (S.D.N.Y. July 27, 2004) (reversing a magistrate judge’s conclusion that a company's executive vice president did not satisfy the "need to know" standard, and essentially finding that a company's executive vice president needed to know about everything going on in the company).
intended recipient was bound by corporate policy or, in the case of the contractors, by a separate understanding, to keep confidential the contents of the documents. The Company's submission thus leads ineluctably to the conclusion that no document was 'disseminated beyond those persons who, because of the corporate structure, needed to know its contents.'

FTC v. GlaxoSmithKline, 294 F.3d 141, 147 (D.C. Cir. 2002) (citation omitted).

The circuit court indicated that "we can imagine no useful purpose" in having a court second-guess a corporate official's decision to involve employees in privileged communications. A 2008 District of South Carolina decision taking a broad view of the "need to know" standard also demanded little of the corporation. The court explained that the company did not have to go through the recipient list employee-by-employee and explain why each recipient needed the information -- but instead could "show that it limited its dissemination of the documents in keeping with their asserted confidentiality." The court applied this approach to the particular emails at issue. For instance, the court found that the privilege applied to one executive's email to a company lawyer and other executives. The court explained that "[t]he fact that Wilson [the company executive sending the email] was probably seeking business advice from the non-legal corporate personnel does not lose the privilege if the reason for communicating with the lawyer is to obtain the lawyer's legal viewpoint."

This approach makes great sense. Once the court determines that the communication was primarily motivated by legal rather than business concerns, it

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8 Id. at *4 (citation omitted).
9 Id. at *6.
seems logical to presume that corporate managers would not disclose it beyond those employees who need to know it. And if the corporation's manager misjudged an employee's "need to know" and circulated it too widely within the corporation, it does not make any sense for that decision to forfeit the corporation's privilege. Such wider than necessary circulation within a company does not harm the company, and does not put the privileged communications in a corporate adversary's hands. For this reason, it does not make sense to find that such an internal circulation should allow the corporation’s adversary later access to those communications.

Some courts undertake a qualitative analysis. One court took an interesting approach. In addition to analyzing the role of privileged communications' recipients, the court noted that "[t]he recipient lists were limited to between five and twenty-five individuals within a 50,000-person organization [a pharmaceutical company]."\(^{10}\) That court found that disclosure to this smaller number of individuals did not cause a waiver.

Predictably, courts taking a narrow view of the "need to know" standard require far more evidentiary support for each employee's inclusion in privileged communications or later sharing of privileged communications. Their restrictive approach parallels the district court analysis that the District of Columbia circuit court reversed in the FTC v. GlaxoSmithKline\(^{11}\) case.

For instance, in 2010 the District of New Jersey dealt with this issue.\(^{12}\) In that case, third party Novartis withheld some marketing documents as privileged --


\(^{11}\) 294 F.3d 141, 147 (D.C. Cir. 2002).

acknowledging that "there were 112 recipients of the confidential presentations at issue," but arguing that "all were members of Novartis management." Defendant (challenging Novartis' privilege claim) argued that Novartis had failed to "adequately identify the individuals who received copies of the presentations and to explain why these individuals needed the asserted privileged information to carry out their employment duties." The court agreed with defendant that Novartis' "broad classification" of the recipients as "management" did "not convince the Court that dissemination was limited to individuals who needed to know the information contained in the presentations." The court found the privilege inapplicable, and ordered Novartis to produce the documents.

In an earlier case, a North Carolina court analyzed the presence of a third party at a board of director's meeting. The court explained that

\[
\text{[t]he Credit Union bore the burden of demonstrating that the attorney-client communication recorded in Document 27 [minutes of the April 17, 2001, board of directors meeting] was not made in the presence of a third party. The minutes state that a member of a "Supervisory Committee" was present at the meeting as well as an individual "from management" identified only as "Valerie Marsh." The minutes themselves do not clarify who these individuals are or the nature of their duties or responsibilities with respect to the Credit Union.}
\]


The court rejected the corporate litigant's first attempt at explaining that the third person was within the "need to know" circle.

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13 \text{Id. at *26.}
14 \text{Id. at *27.}
15 \text{Id.}
Instead of identifying the people present at the board meeting, their corporate responsibilities, and their relationship to the dispute at issue, the Credit Union relied, before the trial court, solely on a sweeping, generic statement of confidentiality set forth in the Simpson affidavit: "Information communicated between Mr. Drake and the Credit Union regarding this matter has not been shared with anyone other than individuals that needed to know such information based upon the management structure of the Credit Union." This statement is not sufficient, standing alone, to meet the Credit Union's burden.

Id.

Interestingly, the court also rejected the litigant's effort to meet that burden in two paragraphs of its appellate brief, because "the record does not indicate that this information was ever presented to the trial court."17

In addition to looking for evidentiary support of a "need to know" claim by focusing on the participating employees, some courts examine the documents themselves to see whether the intracorporate circulation aborted the privilege. For instance, one California court noted that the California's evidence code could protect communications with those "'present to further the interest of the client'" or "'the accomplishment of the purpose for which the lawyer is consulted,'" and therefore noted that "[t]he disputed documents must be reviewed to determine whether the Zurich employees to whom legal advice was relayed come within this broad definition."18

**Vioxx Standard: Introduction**

Although attorney-client privilege protection mainly rests on the communication's content rather than on its context, content can affect privilege protection in at least two

17 Id.

18 *Zurich Am. Ins. Co. v. Superior Court*, 66 Cal. Rptr. 3d 833, 845 (Cal. Ct. App. 2007) (citation omitted) (remanding with direction that the court assess both the documents and the Zurich employees who received the documents).
situations. First, the presence of a third party outside the privilege protection during an otherwise privileged communication can essentially abort the privilege. Second, the disclosure of privileged communications to such a third party outside the privilege can waive the privilege.

Determining which employees can enjoy privileged communications involves application of either the Upjohn or the "control group" standard. Determining which employee can share in privileged communications back from the lawyer focuses on the "need to know" standard.

Some courts assess the content of the communication as an indicia of the communication's primary purpose. In essence, some courts have pointed to the involvement of certain corporate employees in the communication as evidence that the communication primarily related to business rather than legal advice. These corporate employees could theoretically be within the privilege under the Upjohn standard, but their involvement does not meet the Upjohn standard because they do not have facts that the lawyer needs before giving advice to the corporation. Although these courts might have found that these other employees' involvement either aborted the privilege or waived the privilege, these courts do not go in that direction. Instead, they rely on the employees' involvement as negating the existence of privilege protection ab initio, because the communication does not primarily involve legal advice.

A handful of courts took this approach before 2007. However, in that year a well-respected law professor acting as a special master in a highly publicized case involving the drug Vioxx wrote a lengthy report taking this approach. This analysis was adopted

Since the Vioxx decision, some courts have adopted the same position, while other courts have specifically rejected the Vioxx approach. The Vioxx view of intracorporate communications seems contrary to both a laudable corporate culture of transparency and the increasing use of email.

**Pre-Vioxx Decisions**

Before the 2007 Vioxx decision so explicitly articulated the privilege's inapplicability based on widespread intracorporate circulation, a handful of courts pointed to this factor in analyzing the primary purpose test.

For instance in 2004, a Southern District of New York decision explained that "[t]he number of email recipients who were outside the legal department further militated in favor of finding that the document was not privileged."\(^{19}\) A year later another Southern District of New York decision used almost identical language in reaching the same conclusion.\(^{20}\)

In 2006, the Middle District of Georgia found the privilege inapplicable to a company president's email to the company's lawyer because (among other things) the president sent copies to "persons who were not officers or directors" of the company.\(^{21}\)


For some reason, the court repeatedly mentioned that the president sent five of the emails to these other persons "by blind copy."\(^{22}\)

To be sure, some pre-Vioxx decisions examine intracorporate circulation of emails and came to a different conclusion about its effect on the privilege. In 2005, the Eastern District of Pennsylvania found that Plaintiffs SmithKline Beecham and GlaxoSmithKline had not forfeited the privilege through intracorporate circulation.

Interestingly, the court compared the small number of recipients of the documents to the large number of the corporate employees.

> Plaintiff has identified with specificity nearly every person who received each document. . . . Each document purportedly served the purpose of either securing or providing legal advice or legal services -- they were not routine business communications. . . . None of these documents was widely distributed. The recipient lists were limited to between five and twenty-five individuals within a 50,000-person organization.


This pre-Vioxx decision made a good point, noting how narrowly the documents were circulated within a large corporate entity.

**Vioxx**

In **In re Vioxx Products Liability Litigation**, 501 F. Supp. 2d 789 (E.D. La. 2007), the judge handling the Vioxx product liability cases against Merck sought the assistance of a special master after having been criticized by the Fifth Circuit for the way he conducted his own privilege review. The judge hired well-known American University law professor Paul Rice. Professor Rice and his assistant spent approximately $400,000 reviewing 2,500 representative Merck documents over three months -- $160

\(^{22}\) *Id.*
per document. Professor Rice provided both an abstract discussion of the attorney-client privilege (essentially a law review article) and also listed a series of guidelines to use when reviewing Merck's privileged documents.

Professor Rice eventually outlined, and the court ultimately adopted, a remarkably narrow view of the attorney-client privilege in the corporate setting. Professor Rice first noted that Merck's in-house lawyers provided everything from legal advice to grammatical guidance. He insisted that Merck's in-house lawyers demonstrate that the "primary purpose" of each communication involved legal advice rather than some other type of advice. He specifically rejected Merck's argument that pharmaceutical companies operate in such a heavily regulated context that essentially every internal communication involves legal advice. He also rejected Merck's argument that narrowly interpreting the privilege would allow Merck's adversaries to "reverse engineer" documents and uncover protected legal advice.

Perhaps the most narrow approach involves Professor Rice's (and then the court's) explanation that the "distribution pattern" of Merck's internal documents often demonstrated unprotected non-legal purposes.23

The court provided several basic principles that affected its analysis of the "distribution pattern's" impact on the primary purpose test. First, the attorney-client privilege clearly protected "classic" communications such as one-on-one communications between a Merck employee seeking legal advice and Merck's in-house lawyer providing that advice.24 Second, under the so-called "derivative" rule,

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23 In re Vioxx Prods. Liability Litig., 501 F. Supp. 2d 789, 803 (E.D. La. 2007)
24 Id. at 805-06.
communications from lawyers to clients generally deserved privilege protection only if they disclosed or otherwise reflected the client's confidential communications to the lawyer.\textsuperscript{25} Third, Merck had the burden of overcoming what the Opinion called "the logical inference created by the pattern of the distribution."\textsuperscript{26}

The court then described several presumptions and guidelines for initial communications from a Merck employee to others (including Merck in-house lawyers as a direct recipients or as copy recipients). First, emails simultaneously sent to an in-house lawyer and a nonlawyer "usually" did not deserve privilege protection.\textsuperscript{27} Second, the privilege was more likely to protect communications if the lawyer received a blind copy of the communication rather than a visible copy.\textsuperscript{28} Third, documents that employees received as copy recipients might deserve privilege protection because the sender wanted to advise the employees of legal advice that the sender sought from a lawyer.\textsuperscript{29} Fourth, an email string sent only to the lawyer for purposes of receiving legal advice might entirely deserve privilege protection, because the email string will be produced elsewhere without the email forwarding it to the lawyer for purposes of receiving legal advice.\textsuperscript{30}

The court also provided guidance for determining if the privilege protected Merck's in-house lawyers' responses to the emails they received from Merck employees. The court pointed to the "derivative rule" in noting that any communications

\textsuperscript{25} Id. at 795-96.
\textsuperscript{26} Id. at 809.
\textsuperscript{27} Id. at 805.
\textsuperscript{28} Id.
\textsuperscript{29} Id. at 812.
\textsuperscript{30} Id. at 811.
from Merck's in-house lawyers back to Merck employees in response to widely circulated emails seeking legal advice might not deserve any privilege protection at all -- but overlooked this technical rule and allowed Merck to redact a lawyer's advice and line edits in such documents.31

Finally, the court provided some guidance for analyzing the privilege implications of Merck's later circulation of these initial communications to the lawyer and from the lawyer. The privilege did not protect such later circulation unless the email (1) conveyed the lawyer's legal advice, or (2) involved the lawyer seeking additional facts.32 Significantly, the privilege applied only if one of these purposes was the sole reason for the later circulation of the communications.33

All in all, Professor Rice's academic approach (which the court adopted) would generally protect only communications between the particular Merck employee who needed the legal advice and Merck's in-house lawyer, without including anyone else in the email message traffic.

**Post-Vioxx Decisions Taking the Vioxx Approach**

The year after Vioxx, another court handling another large case against another drug company explicitly adopted Professor Rice's approach. In In re Seroquel Products Liability Litigation,34 the court repeatedly quoted from the Vioxx decision in stripping away the privilege from many documents withheld by AstraZeneca. As in Vioxx, the court held that "[r]outine inclusion of attorneys in the corporate effort of creating

31  Id. at 811 & 796 n.9.
32  Id. at 811-12.
33  Id. at 809.
marketing and scientific documents does not support the inference that the underlying communications were created and transmitted primarily to obtain legal advice as was required to justify a privilege."\textsuperscript{35} The court noted that "[t]he great bulk of AstraZeneca's privilege claims suffer from this approach of simply relying on an attorney's tangential involvement in the process of creating a document to shield the entire process of gathering information and drafting and revising the document."\textsuperscript{36} 

A 2009 case taking this approach also involved a special master's report in a case involving pharmaceuticals.\textsuperscript{37} In this Eastern District of Pennsylvania case, Special Master Jerome Shestack examined privilege protection for many GlaxoSmithKline employees, essentially adopting the Vioxx approach. For instance, in analyzing one email, the court noted that an email "was sent to thirteen GSK [GlaxoSmithKline] employees for review, only one of whom was an attorney," meaning that "the primary purpose of the e-mail was not the obtaining or giving of legal advice."\textsuperscript{38} For another email, he noted that a lawyer "was only one of fifteen people who received the prior e-mail and only one of seven from whom approval was sought."\textsuperscript{39} In another email, the lawyer "was only one of seventeen people who received the prior e-mail and one of five for whom approval was sought."\textsuperscript{40} With yet another email, he noted that an email "was sent to four GSK employees (directly to three and copied to one) only one of whom was

\begin{footnotes}
\textsuperscript{35} Id. at *104-05.
\textsuperscript{36} Id. at *105.
\textsuperscript{38} Id. at *10-11.
\textsuperscript{39} Id. at *17.
\textsuperscript{40} Id.
\end{footnotes}
an attorney" -- and that the text of the prior email "was specifically addressed to the three non-attorneys and to [the] attorney." This meant that "[u]nder these circumstances, the primary purpose of the prior e-mail was not the obtaining or giving of legal advice, and it is not protected by the attorney-client privilege." Other courts have taken this approach since then.

**Post-Vioxx Decisions Rejecting the Vioxx Approach**

One of the first cases to deal with the Vioxx "pattern of distribution" analysis declined to apply that approach, but based its refusal on the distinguishable factual scenario in Vioxx. The Eastern District of Pennsylvania explained in that case that it was "hesitant to rely on the Vioxx case as persuasive authority" because that decision focused on Merck's "pervasive regulation" theory and "reverse engineering" theory that was not involved in the case before the court.

**Conclusion**

The decision rejecting the Vioxx approach seems much more consistent with all of the social interests justifying privilege protection.

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41 Id. at *28.
42 Id.
43 Acosta v. Target Corp., No. 05 C 7068, 2012 U.S. Dist. LEXIS 31655, at *19-20 (N.D. Ill. Mar. 9, 2012) ("[T]he privilege does not apply to an e-mail 'blast' to a group of employees that may include an attorney, but where no request for legal advice is made and the input from the attorney is business-related and not primarily legal in nature."); In re Chase Bank USA, N.A. "Check Loan" Contract Litig., MDL No. 2032, Case No. 3:09-md-2032 MMC (JSC), 2011 U.S. Dist. LEXIS 82706, at *17-18 (N.D. Cal July 28, 2011) ("Forwarding 'draft customer service training materials' to a lawyer does not create a privilege when the exact same materials are being forwarded to a significant number of non-legal personnel. While the attorney's comments on the draft training materials would certainly be privileged, the materials themselves and the email at Log No. 1048 are not privileged given the large number of non-legal personnel who were sent the email and asked to review the materials."); WildEarth Guardians v. United States Forest Serv., 713 F. Supp. 2d 1243, 1266 (D. Colo. 2010) ("The e-mail was 'shot-gunned' to eleven recipients, only two of whom were attorneys, and indiscriminately sought input from any of the eleven recipients. Given the context of the redacted communications, I am highly skeptical that they are subject to the protections of the attorney-client privilege.").
First, providing privilege protection to emails sent within a broad "need to know" range provides certainty, which is one of the keystones of the attorney-client privilege.

Second, it is important to recognize that all of the employees addressed in these cases (as well as in Vioxx and the other cases taking the Vioxx approach) were within the corporate hierarchy. All of them were capable of engaging in privileged communications under the Upjohn standard, and none were outsiders.

Third, it is consistent with the privilege's applicability generally to permit a fairly widespread intracorporate circulation of privileged communications to encourage lawful conduct by corporate employees. Even if the employees participating in the email communication did not strictly need to know the particular advice provided by the company's lawyer on the specific topic, they might need the advice in the future, and it helps the corporate culture of compliance for their involvement in any communications with corporate lawyers providing advice to the corporation. In other words, the corporation benefits if its employees become comfortable with both the process of involving lawyers in their decision-making, and with their substantive knowledge about legal advice generally.

Fourth, as noted in the Eastern District of Pennsylvania's 2005 case, the number of employees involved in the email communication usually represents a tiny percentage of the number of corporate employees. It is not as if the privileged communications were placed in the company newsletter circulated to tens of thousands of employees, and potentially made available to their family members, friends, etc.

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Fifth, it makes little sense to hand over all of these sensitive emails to the corporation's enemy, on the theory that the corporation might have let a few extra people within the corporation participate in the email discussion.

**Best Answer**

The best answer to this hypothetical is **YES**.
Corporate Clients' and Their Lawyers' Creation of Documents

Hypothetical 7

You have been practicing for about 30 years, and have seen an enormous change in the way that you and your clients work on draft documents. In the "old days," you would either send a memorandum describing your suggested changes to a client's draft, or send the client back a fax of the client's draft document with your handwritten marginal notes reflecting your suggested changes. Now you tend to collaboratively work on the same electronic document -- each making changes in the same document as you transmit it back and forth to each other.

(a) Will the attorney-client privilege protect drafts that your client creates for your review?

YES (PROBABLY)

(b) Will the attorney-client privilege protect drafts that you create for your client's review?

YES (PROBABLY)

(c) If the privilege protection is available, what will it protect?

PORTIONS OF THE DRAFTS NOT ULTIMATELY DISCLOSED TO THIRD PARTIES (PROBABLY).

Analysis

This hypothetical focuses on draft documents created by corporate clients and their lawyers. Increasing use of electronic communications has altered the way these clients and lawyers create documents. Historically, clients and their lawyer often exchanged separate drafts, each of which reflected the client's or lawyer's changes. More recently, clients and lawyers have tended to work on the same document by making changes electronically. The process thus results in a single document, although changes in that document can be traced by examining metadata.
Privilege protection for client-created or lawyer-created drafts also involves another issue. Any protection for a draft document "evaporates" once the client determines to disclose the final draft outside the intimate attorney-client relationship. Courts have had to determine what metadata deserves continuing privilege protection once the client is satisfied with the final draft to be disclosed.

(a) **Client-Created Drafts: Introduction**

Courts sometimes wrestle with contemporaneous documents that clients send their lawyers but that do not primarily contain factual recitations. These documents sometimes include draft documents, about which the client might be seeking legal advice.

Much like contemporaneous documents that recite historical facts, these communications require some careful analysis. The key is whether the client seeks legal advice about the drafts. Simply sending a lawyer a draft document cannot assure privilege protection. On the other hand, the privilege clearly protects communications between a client and a lawyer about a draft, as long as the communication involves the lawyer's legal advice about that draft.

It can be useful to consider the various types of communications as possibly deserving privilege protection. Clients sometimes prepare drafts that they have not yet sent their lawyer. Clients sometimes send drafts to lawyers as direct recipients, either by themselves or as one of many recipients. Clients sometimes send copies to their lawyer.

If privilege protection is available, courts must then assess the scope of that protection. Some courts protect the entire draft sent to the lawyer, while others only
protect portions of the draft that are not ultimately disclosed outside the attorney-client relationship.

**Drafts Not Yet Sent to a Lawyer**

The privilege can protect drafts the client has not yet sent the lawyer, as long as the client creates the draft with the intent to seek legal advice about the draft.\(^1\) The analysis follows the legal principles applicable to other privileged documents that the client has not yet sent to the lawyer, or which are in the process of being transmitted to the lawyer.

Not surprisingly, one would expect courts to be very suspicious of privilege protection for such draft documents, unless the client can clearly demonstrate an intent to send the draft to the lawyer for purposes of seeking legal advice.\(^2\)

**Difference Between a Work-in-Process Draft and a Final Draft**

Conceptually, there is a potentially dispositive difference between a client sending the lawyer (1) a "work-in-process" draft about which the client seeks legal advice, and (2) a final version of a draft that the client intends to disclose outside the attorney-client relationship.

Thus, before determining the privilege effect of clients sending lawyers and others contemporaneous documents, courts must first determine the documents' status. The client might be sending a preliminary draft to the lawyer that might amount to an implicit request for legal advice about that draft. On the other hand, the client might be sending the lawyer the final version of a document essentially as an "FYI" copy. It


seems possible that the lawyer receiving such a final version might still try to intervene with advice about the document. In that situation, the lawyer's advice normally would deserve privilege protection, but the client's transmission communication and the document itself probably would not. This is because the client was not trying to obtain legal advice about the document by sending what was intended to be the final version.

In some situations, it can be difficult to tell if a document represents a preliminary draft about which the client seeks legal advice or the final draft. One court confronted such a situation:

As to document CE580-585, the government contends that it is a draft… Although the government’s Vaughn index notes that this is a draft, there is no other indication that this characterization is correct. The document itself indicates that it is a 'Memorandum For Record' and is signed by a military official. There are no markings on the document indicating that it is predecisional or a draft. Indeed, the document does not contain any marks or corrections of any kind. Additionally, there is no cover sheet explaining that it is a draft or requesting that it be reviewed or corrected. The government, therefore, fails to meet its burden and, accordingly, it must disclose this document. . . . If the government still asserts that this is a draft document, they may provide additional supporting information to the court for review. Otherwise, the government must disclose this document.


One would expect that the court would find it nearly impossible to distinguish between these different types of drafts by looking at the document itself. Instead, it would seem that a court should look at extrinsic evidence, such as the client's or the lawyer's affidavits about the documents they exchanged.
Client-Created Drafts About Which Clients Seek Legal Advice

Clients clearly cannot assure privilege protection simply by sending a contemporaneous document to a lawyer. This general rule applies even if the lawyer is the only direct recipient of that document.

However, most courts protect as privileged contemporaneous documents about which clients seek a lawyer's advice. In 2011, the Western District of New York articulated this general rule.

Draft documents prepared by a client and submitted to counsel to facilitate rendering legal advice on proposed transactions may remain privileged although the final version was intended for distribution to third-parties provided the draft documents demonstrated an intent to seek confidential legal advice on their content.


Thus, courts have protected as privileged draft documents about which the client has sought legal advice. Courts have protected:

- Draft response to a government inquiry;
- Draft grievance disposition;
- Draft client policies;

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4 Id.
• Draft email to a third party;\(^9\)
• The client's draft patent application;\(^10\)
• The client's draft agreement, accompanied by a request for legal review and advice;\(^11\)
• The client's draft interrogatory answers;\(^12\)
• The client's draft letter to a third party;\(^13\)
• The client's invention report, which was not accompanied by an explicit request for legal advice.\(^14\)


\(^10\) Ergo Licensing, LLC v. Carefusion 303, Inc., 263 F.R.D. 40, 44-45 (D. Me. 2009) ("Case law differs on the question of whether drafts of documents intended to be filed with a government agency, and thus intended to the public, are covered by the attorney-client privilege. . . . I find persuasive the discussion and conclusion of the court in In re Rivastigmine Patent Litig., 237 F.R.D. 69, 85-86 (S.D.N.Y. 2006), which, after reviewing the emerging trends in application of the attorney-client privilege to draft patent applications, held that the privilege 'generally applies to draft patent applications.'"); TNI Packaging, Inc. v. Perdue Farms, Inc., No. 05 C 2900, 2006 U.S. Dist. LEXIS 7774, at *6-7 (N.D. Ill. Feb. 28, 2006).


\(^12\) Sperling v. City of Kennesaw Police Dep't, 202 F.R.D. 325, 327 (N.D. Ga. 2001) ("The Original Narrative, however, is a communication which was made by Plaintiff to her attorney for the purpose of securing legal services or assistance in a legal proceeding. The Court concludes, therefore, that the Original Narrative is a privileged attorney-client communication.").

\(^13\) Smithkline Beecham Corp. v. Pentech Pharms., Inc., No. 00 C 2855, 2001 U.S. Dist. LEXIS 18281, at *13 (N.D. Ill. Nov. 5, 2001) ("The document is a draft letter from client to attorney and was not sent to third parties. The letter also expressly demonstrates an intention to keep the communication confidential. Therefore, it may be withheld as privileged."); Va. Elec. & Power Co. v. Westmoreland-LG&E Partners, 526 S.E.2d 750, 755 (Va. 2000) (rejecting an adversary's effort to obtain a draft letter business people had prepared for a lawyer's review; although acknowledging that the adversary was "only seeking factual material, the context of the letter, not the advice counsel gave" about the letter, correctly recognizing that "substance of the letter in this case constitutes the very matter for which legal advice was sought. There is no 'factual material' apart from the substance of the letter itself."); "The privilege attaches to a document even if the document does not contain, or is not accompanied by, a written request for legal advice, if the proponent of the privilege sustains its burden of proof to show that the document was prepared with the intention of securing legal advice on its contents. . . . As we have said, the record in this case contains the testimony of Brown that when he drafted the letter he intended to get legal advice on its content and on whether he should deliver it to Mable.").

\(^14\) In re Spalding Sports Worldwide, Inc., 203 F.3d 800, 806 (Fed. Cir. 2000).
Source of Proof

Courts have also addressed the type of proof that must support a privilege assertion in this setting, as well as the burden of proof.

First, courts obviously look at the face of the document for some evidence that the client was motivated by requests for legal advice. In 2012, the Western District of Oklahoma articulated this approach.

[T]he draft must have been prepared by the attorney or forwarded to the attorney with a request for legal advice concerning its content, or it must contain the attorney's notes and/or comments regarding its content. The fact that a copy of a document was distributed to the client's attorney, without a request for legal comment or advice and without responsive comments or notes made by the attorney, does not render it privileged.


Second, some courts point to the lawyer's response to this type of communication as an important factor. For instance, one court found that a draft document was privileged, noting that it contained a lawyer's "handwritten notes demonstrating that the document was actually received and reviewed by legal counsel as intended by the client." 15 Thus "[t]hose documents demonstrate an implied request for legal advice and that in fact that advice was given." 16 In contrast, another court denied privilege protection for drafts sent for comment to both lawyers and nonlawyers.

16 Id.
That court held that "[w]hile the documents may have been reviewed by Jones Walker attorneys, there are no modifications made."\textsuperscript{17} Other courts take the same approach.\textsuperscript{18}

In 2012, a New Jersey court refused to extend privilege protection to emails that the client had copied to a lawyer. The court noted that

> [f]rom our sampling of the file, it appears that [defendant's] in-house attorneys rarely responded to these e-mails, if at all.


While a lawyer's response to a client's request for legal advice about a draft certainly "closes the loop" in terms of proof, it does not seem logical for courts to take a per se approach if the client's intent when sending a document should govern, not the lawyer's response. Otherwise, the client might lose the privilege by sending a draft document to a lawyer who considers silence as an approval of the client's draft, or even to a busy or non-responsive lawyer.

As in so many other areas, electronic communications affect this analysis. Traditionally, a client might have mailed or faxed a draft document, which the lawyer reviewed and then sent a standalone memorandum back to the client with thoughts or suggestions. That standalone memo would certainly have deserved privilege protection if the lawyer's suggestions primarily involved legal rather than business or other advice.


\textsuperscript{18} \textit{Evan Law Grp. LLC v. Taylor}, No. 09 C 4896, 2011 U.S. Dist. LEXIS 5756, at *3 (N.D. Ill. Jan. 20, 2011) ("Mr. Taylor himself, though not a lawyer, drafted the resignation letter attached to JPT001199, emailed it to both attorneys, and simply asked if they had any comment on the letter. It does not appear as though either attorney did, as the exact letter was used by Mr. Taylor to resign from his position with Plaintiff.").
Similarly, to the extent that a lawyer writes marginal notes or handwritten changes in the
draft and returns it to the client, it is easy to isolate and redact those lawyer changes.
Again, they presumably deserve privilege protection if they primarily involve legal
advice.

With electronic documents however, lawyers increasingly make the changes
directly in the document, and then transmit the altered document back to the client.
Courts properly analyzing this situation correctly perceive that "[i]t has become
commonplace in the business world, and perhaps particularly so in the legal profession,
to use document drafts to facilitate discussion, thereby conserving time and money."19

Third, courts naturally look in some situations to either the client's or the lawyer's
affidavit that demonstrates the client's intent to seek legal advice about the draft.20
While some evidence may not be as helpful as proof of the client's and lawyer's intent
appearing on the face of the documents themselves, courts presumably can rely on
statements under oath demonstrating privilege protection.

Fourth, at least one court has held that "[w]here, as here, in-house counsel
appears as one of many recipients of an otherwise business-related memo, the federal
courts place a heavy burden on the proponent to make a clear showing that counsel is
acting in a professional capacity and that the document reflects legal, as opposed to
business, advice."21 Presumably the heavy burden also involves courts' attempt to
differentiate legal from business advice.

19  Kobluk v. Univ. of Minn., 574 N.W.2d 436, 442 (Minn. 1998).
Lawyers helping their clients maximize available privilege protection should
(1) train their clients to articulate (if accurate) the client's request for legal advice about
any draft document that the client sends to the lawyer as a direct or copy recipient; and
(2) respond to the client's request for legal advice about the draft document, either by
suggesting changes or by confirming that the lawyer has reviewed the draft and does
not suggest any changes in the draft, which is itself a form of legal advice.

Effect of Clients Including Others in Their Communication of Drafts to Lawyers:
Including Lawyers as Direct Recipients

In many situations, clients send a contemporaneous document such as a draft to
both lawyers and nonlawyers, seeking input from everyone.

Some courts examine such a "distribution pattern" in analyzing whether the
document primarily relates to legal advice rather than business advice.

Courts not short-stopping the analysis of the document's content sometimes
analyze a different test -- whether the client sent the document to a lawyer primarily for
purposes of seeking legal advice. The content-based analysis focuses on the nature of
the document and the intent of the original author. The other type of analysis
(discussed here) focuses on the reason the author circulates the document and the
nature of any responses the author receives.

Courts take one of two approaches to such a transmission.

First, some courts apply essentially a per se test, holding that a
contemporaneous non-factual document sent to a lawyer and to a non-lawyer for review
cannot deserve privilege protection, because the document was by definition not created "primarily" for purpose of receiving legal review.\textsuperscript{22}

As one court explained it,

"[w]here non-legal personnel are asked to provide a response to a matter raised in a document, it cannot be said that the 'primary' purpose of the document is to seek legal advice. This is because the response by non-legal personnel by definition cannot be 'legal' and thus the purpose of the request cannot be primarily legal in nature."

Urban Box Office Network, Inc. v. Interfase Managers, L.P., No. 01 Civ. 8854 (LTS)(THK), 2006 U.S. Dist. LEXIS 20648, at *18-19 (S.D.N.Y. Apr. 18, 2006) (citation omitted). Ten years earlier, the Northern District of California was even more blunt.

The attorney-client privilege does not attach, however, to documents which were prepared for simultaneous review by both legal and nonlegal personnel within the corporation.


Under this per se approach, sending a contemporaneous draft document to a nonlawyer essentially precludes any privilege claim for the draft document. Of course, this parallels the "pattern of distribution" rule that dooms any privilege claim for intracorporate communications that include any corporate employees who do not need the corporate lawyer's advice.

\textsuperscript{22} In re Avandia Mktg., MDL No. 1871, No. 07-md-01871-CMR, 2009 U.S. Dist. LEXIS 122246, at *24 (E.D. Pa. Oct. 2, 2009) (in an opinion by Special Master Jerome Shestack, essentially following the Vioxx approach to the attorney-client privilege in a corporate setting: "The primary purpose of the e-mail that is part of Document #16 was not to seek legal advice. The e-mail contains no request for legal advice; it simply transmits the current draft of a presentation to nine GSK employees, one of whom is an attorney. Thus, the e-mail is not privileged."); United States v. IBM Corp., 66 F.R.D. 206, 213 (S.D.N.Y. 1974).
Here, courts strip the privilege from the attachment, while in the other situation courts strip the privilege from the intracorporate communication itself.

Second, some courts take a more nuanced approach. They explain that the number of recipients is not dispositive of the issue, although it can obviously affect the analysis. 23 For instance, in 2008, the District of South Carolina held that the attorney-client privilege protected an email sent by a corporate executive to the company’s lawyer and other executives, "seeking a combination of business and legal advice." 24 The court explained that the fact that the executive "was probably seeking business advice from the other nonlegal corporate personnel does not lose the privilege if the reason for communicating with the lawyer is to obtain the lawyer’s legal viewpoint." 25

Several courts have held that a contemporaneous draft sent by a client to a lawyer along with other recipients deserved privilege protection. 26 As the Eastern District of Pennsylvania explained,

> [e]ach of the documents cited by Defendant was distributed to multiple recipients, including at least one [SmithKline] attorney or subordinate of an attorney, as well as other [SmithKline] employees. . . . Nowhere is it clear that a communication was primarily between non-attorney employees or that counsel was merely "copied in." . . . According to the affidavit of Plaintiff’s Counsel Brian Russell, each of these documents "were communications with

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23 In re Buspirone Antitrust Litig., 211 F.R.D. 249, 253 (S.D.N.Y. 2002) ("[T]he fact that a request to counsel was sent simultaneously to non-legal personnel should not by itself dictate the conclusion that the document was not prepared for the purpose of obtaining legal advice.").
25 Id.
26 United States v. KPMG LLP, Misc. No. 02-0295 (TFH), 2003 U.S. Dist. LEXIS 18476, at *14 (D.D.C. Oct. 8, 2003) ("The e-mail, which is directed to legal counsel as well as others, requests comments from each recipient. In effect the sender is requesting each addressee to comment from his expertise perspective. Thus, the lawyer addressee is requested to comment on the legal aspects of the draft attachments.").
[SmithKline's] counsel or their subordinates for the purpose of securing or providing legal services and/or legal advice or were in the furtherance of securing or providing the same."


Few if any courts have examined these issues with the type of detailed approach that would provide guidance to clients and their lawyers. The basic issue is whether the client communicated with the lawyer primarily for purposes of receiving legal advice. As indicated above, the paradigm is the client sending a contemporaneous non-factual internal document (not to be shared outside the corporation, for instance) to a lawyer with an explicit request for the lawyer's legal advice about that document. The client would have a more difficult time establishing privilege protection if the client sent the document to ten people, one of whom was the in-house lawyer. However, the cover transmittal memorandum might explicitly mention that the client is sending a copy to the lawyer and asking for the lawyer's legal advice. In that case, perhaps it would be appropriate to redact that portion of the cover memorandum, but does the underlying document deserve protection too? The document itself may not then deserve protection, but the lawyer's response to the client's inquiry might deserve privilege protection.

Thus, some courts find that the privilege cannot apply to drafts simultaneously sent to lawyers and nonlawyers, while other courts take a more fact-intensive approach. Lawyers would be wise to train their clients about the risk that a reviewing court will take the former approach. Ideally, clients and lawyers primarily engaged in a communication about legal advice should not include anyone else in that communication. This might run contrary to modern corporate culture (especially with the increasing use of email
within corporations), but lawyers might have some luck in convincing their clients to follow this best practices approach with especially sensitive issues.

**Effect of Clients Including Others in Their Communication of Drafts to Lawyers: Including Lawyers as Copy Recipients**

While clients sometimes send drafts directly to a lawyer and others, clients sometimes merely send a copy of a communication to a lawyer.

Courts take one of several approaches in this setting. First, courts obviously recognize that

> [r]outine, non-privileged communications between corporate officers and employees do not attain privileged status solely because counsel is copied on the correspondence.


This makes perfect sense, unless the client can establish through some other evidence that the client copied the lawyer because the client sought legal advice from the lawyer.

Second, although declining to adopt a per se test, some courts hold that an email simultaneously sent to a lawyer and nonlawyer "usually" does not deserve privilege protection.27

Unfortunately for courts and especially for the young associates and paralegals who normally handle privilege reviews, there is no way to make this job any easier by establishing an objective numerical standard (for instance, by saying that the privilege

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27  *In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 789, 805 (E.D. La. 2007) ("When, for example, Merck simultaneously sends communications to both lawyers and non-lawyers, it usually cannot claim that the primary purpose of the communication was for legal advice or assistance because the communication served both business and legal purposes.").
cannot apply unless at least one third of the recipients are lawyers). Given the risk that any client takes by sending documents like this to multiple recipients, wise lawyers try to train their clients to send such documents to the lawyers for review in separate communications, with a cover memorandum clearly articulating the client's request for legal advice about the attached document.

Third, some clients point to the face of the document to show that they sent a copy of the communication to the lawyer primarily for purposes of seeking legal advice. As with so many other issues involving the attorney-client privilege, content can trump the general context-based principle. One court assessed a privilege claim for a document in an antitrust case:

This is a memo in which a non-lawyer employee, George Jones, writes to eleven non-lawyer colleagues (with a 'cc' to in-house lawyer John Whyte). At issue is a sentence regarding market share and relating the advice on that issue received from outside counsel in New York. The sentence reveals not merely the advice but the information provided to counsel in order to have obtained that advice. It is privileged and an appropriate subject for redaction.


Similarly, some courts point to the absence of any request for legal advice as evidence that the client was not primarily motivated by the need for legal advice when copying the lawyer. This is also not surprising. Court obviously examine the content of the document to determine if the privilege is likely to protect that document.

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28 In re Avandia Mktg., Sales Practices & Prods. Liab. Litig., MDL No. 1871, No. 07-md-01871, 2009 U.S. Dist. LEXIS 113562, at *34 (E.D. Pa. Dec. 7, 2009) (“[T]hat information is not communicated to . . . co-workers for the purpose of obtaining legal advice, and although it was copied to [a lawyer], nothing in the document suggests that it was circulated for the purpose of obtaining legal advice from” the lawyer).

29 In re N.Y. Renu with Moistureloc Prod. Liab. Litig., MDL No. 1785, C/A No. 2:06-MN-77777-DCN, 2008 U.S. Dist. LEXIS 88515, at *46 (D.S.C. May 6, 2008) (“This email appears to be an expression of Barton’s opinion and an explicit request for business advice. Simply copying the email to the lawyer does
Fourth, courts examining the content of the document might point to the client’s explicit request for nonlegal advice demonstrating that the privilege did not apply.30

Fifth, some courts find that the privilege can protect a document copied to a lawyer even without such an explicit request for legal advice in the document.31

Sixth, at least one court has taken the somewhat surprising view that a client blind copying a lawyer as a communication rather than sending the communication directly to the lawyer makes it more likely rather than less likely that the document deserves privilege protection.32

Plaintiffs argue that emails cannot be privileged if the lawyer is only 'cc:d' on the email, as opposed to a direct recipient. Such a limitation would be inconsistent with the way that emails are sent. Sending an email by 'cc' is usually a question of convenience rather than an expression of some intent to delineate priorities. Moreover, given the law providing that an attorney need not be a recipient at all for the privilege to attach, it must surely be the case that a 'cc' to an attorney can qualify for the privilege.

30 In re Avandia Mkts., MDL No. 1871, No. 07-md-01871-CMR, 2009 U.S. Dist. LEXIS 122246, at *18 (E.D. Pa. Oct. 2, 2009) ("[The attorney] was copied on an e-mail sent to a non-attorney for the primary purpose of having that non-attorney fill gaps in a Q&A document for use with the media.").

31 TVT Records, Inc. v. Island Def Jam Music Group, 214 F.R.D. 143, 150-51 (S.D.N.Y. 2003) ("[T]o the extent the messages were not directed to or from counsel, they were at least copied to counsel for the purpose of allowing counsel to respond to ongoing developments with legal advice").

32 In re Vioxx Prods. Liab. Litig., 501 F. Supp. 2d 789, 805 (E.D. La. 2007) ("When, for example, Merck simultaneously sends communications to both lawyers and non-lawyers, it usually cannot claim that the primary purpose of the communication was for legal advice or assistance because the communication served both business and legal purposes. . . . When these simultaneous conveyances for mixed purposes are through an e-mail message that lists the lawyers' names in the header of the e-mail message, Merck is revealing the contents of the single message that may have been conveyed to its lawyer primarily for legal assistance. In that circumstance, the single message could have been withheld as a privileged communication had Merck sent blind copies to the lawyers, instead of electing this format. Through a blind copy, the content of what was communicated to its attorney would have remained confidential after future discovery of the document from the other recipient's files, its purpose would have been primarily legal, and the privilege would have been applicable."").
In re N.Y. Renu with Moistureloc, C/A No. 2:06-MN-77777-DCN, MDL. No. 1785, 2008

Unfortunately, there is no easy way to assess privilege protection based on the numerical number of copy recipients. Courts look at both the content and the context of the communication, colored by any additional evidence the client and the lawyer produce about the client's primary motivation.

(b) Lawyer-Created Drafts: Introduction

Surprisingly few courts have addressed the privilege status of non-factual contemporaneous documents prepared by a lawyer and sent to a client for review. Perhaps this is because fewer adversaries challenge the privilege claimed for a lawyer's draft of a document such as a contract than challenge a client's draft that is sent to the lawyer and to other non-lawyers for their review.

It would seem that the same analysis should apply to drafts that reflect a lawyer's legal advice without regard to who prepares the first draft.

Of course, the privilege only protects lawyer-created contemporaneous documents or a lawyer's changes on a client's documents if the changes reflect legal advice rather some other advice. At some point, the client and the lawyer might form the intent to disclose the document to third parties. At that time, the privilege normally evaporates.

Judicial Recognition of the Nature of Lawyer-Created Drafts

Courts properly analyzing their privileged nature recognize that "[i]t has become commonplace in the business world, and perhaps particularly so in the legal profession,
to use document drafts to facilitate discussion, thereby conserving time and money.\textsuperscript{33}

Properly seen, drafts exchanged between lawyers and clients can be considered as a form of communication rather than analogized to pre-existing documents that clients and their lawyers exchange.

One court offered an insightful and practical analysis of draft documents intended for disclosure to a third party.

Only three things can happen to a draft that a lawyer prepares in anticipation of litigation or for trial: She sends the draft without change, modifies it and then sends it, or never sends it at all. If she sends the draft without change, the draft is a mere copy of the original and, if one has the original, there is no need to have the draft. If she modifies the draft, comparing the draft with the modified final discloses her mental processes if the changes are more than typographical. If she files the draft and never sends it, the draft discloses her mental processes in the most obvious way.


Another court has applied this logical approach to draft SEC filings:

An appropriate analysis of this issue begins, in my view, with an attempt to focus on what information may be derivable from such drafts. Since plaintiff has available to it the publicly-filed documents, it is apparent that the only information available from prior drafts relates to matters appearing in prior drafts that were deleted, augmented or otherwise modified in the final product. Even a superficial understanding of the process by which SEC filings are prepared by lawyers and other advisors of a client permits one to understand that such modifications are made as a result of communications between a client or its representatives and its lawyers. Thus, new information disclosed from comparing drafts of SEC filings with the filed documents themselves necessarily relates to and may inferentially disclose communications between a client and its lawyers charged with preparing the final documents.

\textsuperscript{33} \textit{Kobluk v. University of Minn.}, 574 N.W.2d 436, 442 (Minn. 1998).
Communications of this kind are clearly made 'for the purpose of facilitating the rendition of professional legal services' and lie at the heart of the confidential communications that the lawyer-client privilege seeks to protect.


This common sense analysis provides a refreshing level of lucidity to the discussion of privilege principles.

**Protection for Lawyer-Created Drafts**

Many courts have protected lawyer-created contemporaneous drafts under the attorney-client privilege. As one court explained it, "[d]rafting legal documents is a core activity of lawyers, and obtaining information and feedback from clients is a necessary part of the process."35

Courts have applied these principles to the following draft documents reflecting the client's and lawyer's input:

- Legal memorandum;36
- Articles.37

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36 GenOn Mid-Atlantic, LLC v. Stone & Webster, Inc., No. 11 Civ. 1299 (HB) (FM), 2011 U.S. Dist. LEXIS 133724, at *43 (S.D.N.Y. Nov. 10, 2011) ("Documents 323-25 reflect an email thread that originates with in-house counsel's distribution of a draft legal memorandum to Shaw personnel for review. . . . Subsequent emails forward and comment on the draft memorandum. . . . The redactions on these emails consequently are proper.").
• Public statements, 38
• Letters, 39
• Board related documents, 40
• Public filings, 41
• Contracts 42

Protection for Lawyer Changes on Client-Created Drafts

Courts have also debated privilege protection for lawyers' comments on or revisions to a client-created contemporaneous document. Of course, the same standard would apply to a lawyer's changes to his or her own draft. If a lawyer sends a client a standalone document suggesting changes to a client-created draft, it is difficult to imagine any court denying privilege protection for such a separate document.

As might be expected, most courts take the same approach to comments or revisions that a lawyer makes in a client's contemporaneous draft document. As one court recognized, "[p]reliminary drafts may reflect not only client confidences, but also the legal advice and opinions of attorneys, all of which is protected by the attorney-client privilege." 43 Another court explained how this principle applies to a draft securities filing.

The email has an attached draft of proposed changes to the 10-K. The email indicates that the changes made to the

41 Id.
draft were the result of input by Amato and Jones Walker [outside law firm] attorneys with respect to the OSFI arrangement. The changes made on the document reflect suggestions by the attorneys on how Freeport should properly discuss the OSFI arrangement in the filing. The changes further reflect a suggestion on how to properly describe a certain trust agreement.


Other courts have taken the same approach. Some troubling decisions do not protect a client-created draft sent to the lawyer for purposes of receiving legal advice unless the lawyer has responded to the request and made some change to or comment about the draft.

Of course, the lawyer's input will deserve privilege protection only if a lawyer is acting as a legal advisor when providing the input. For instance, the District of Minnesota examined in camera drafts of a company's response to a critical television

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44 Acosta v. Target Corp., No. 05 C 7068, 2012 U.S. Dist. LEXIS 31655, at *20 (N.D. Ill. Mar. 9, 2012) ("Counsel's comments on, and revisions to, drafts of documents that are intended for ultimate disclosure to third parties can be privileged to the extent that the comments and revisions communicate legal advice and have been maintained confidential."); In re Chase Bank USA, N.A. “Check Loan” Contract Litig., MDL No. 2032, Case No. 3:09-md-2032 MMC (JSC), 2011 U.S. Dist. LEXIS 82706, at *18 (N.D. Cal. July 28, 2011) ("[T]he attorney's comments on the draft training materials would certainly be privileged."); SEC v. Wyly, No. 10 Civ. 5760 (SAS), 2011 U.S. Dist. LEXIS 87660, at *32 (S.D.N.Y. July 26, 2011) ("It should be noted that some of the IDR draft responses . . . contain bracketed comments by Kniffen that are explanatory and not intended to be part of the ultimate response to be submitted to the IRS. Those comments were clearly privileged when written and also went sent to Boucher and Keeley Hennington as necessary agents.").

45 United Food & Commercial Workers Union v. Chesapeake Energy Corp., No. CIV-09-1114-D, 2012 U.S. Dist. LEXIS 86913, at *30 (W.D. Okla. June 22, 2012) ("[T]he draft must have been prepared by the attorney or forwarded to the attorney with a request for legal advice concerning its content, or it must contain the attorney's notes and/or comments regarding its content. The fact that a copy of a document was distributed to the client's attorney, without a request for legal comment or advice and without responsive comments or notes made by the attorney, does not render it privileged.").
story. As a result of its in camera review, the court protected the drafts. The court explained that it

has examined the substantive differences between the drafts and concludes that counsel was acting primarily in a legal capacity, rather than simply in a public relations or business capacity, in making revisions to the document.

ADT Sec. Servs., Inc. v. Swenson, Civ. No. 07-2983 (JRT/AJB), 2010 U.S. Dist. LEXIS 74987, at *16 (D. Minn. July 26, 2010). Another similar issue is whether grammatical and typographical changes that a lawyer suggests in a client-created draft deserve privilege protection as legal advice or instead amount to some non-legal advice. A few courts protect even "merely ministerial changes." Most courts take the opposite approach. As one court explained it, "simple editing remarks do not equate to rendering legal advice."

Given the enormous difficulty of a court sorting through changes made by clients and lawyers in today's fast-paced world of exchanged drafts, it makes sense for a court to protect as privileged a draft that the client can establish reflects both the client's and the lawyer's input. In 2010, the Eastern District of New York explained that documents deserved privilege protection because "they consist of draft legal memorandums

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49 Id. at *30.
exchanged between [the client] and his attorney" and therefore "they are at the core of what the attorney-client privilege should protect."\(^{50}\)

### Intent to Disclose

At some point in the drafting process, clients and their lawyers might form the intent to disclose one of the drafts to third parties. The formation of that intent normally causes the privilege to "evaporate."

As with client-created draft documents, courts must sometimes determine if a lawyer-created draft document represents the final version that the client intends to disclose to third parties. In 2011, a North Carolina court noted this issue.

> While drafts of potential employment agreements prepared by counsel for client review would be privileged up to the point at which they were intended to be given to Morris, the Court does not know how it could determine the time at which a document drafted by counsel for client approval had reached the stage at which the intent of confidentiality came to an end.


The main issue involving privileged drafts is whether the client can withhold the entire draft during discovery, or merely withhold portions of the draft that do not appear on the final document disclosed outside the attorney-client relationship. The same debate presumably applies to lawyer-originated drafts as to client-originated drafts.

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Privilege Protection for Draft Documents Where Final Version is Disclosed:
Introduction

(c) Given lawyers’ penchant for nearly endless tinkering with documents whose final version will be disclosed, courts must frequently wrestle with the privilege implications of preliminary drafts of such documents.

Courts properly analyzing the issue recognize that draft documents exchanged between clients and their lawyers can amount to a dialogue, some of which can deserve privilege protection. As one court explained, "[i]t has become commonplace in the business world, and perhaps particularly so in the legal profession, to use document drafts to facilitate discussion, thereby conserving time and money."51 Of course, the privilege can only apply if the dialogue primarily relates to the lawyer’s legal advice rather than some other advice.

Courts take one of three possible positions on privilege protection for preliminary drafts of an ultimately-disclosed document. First, some courts find that the privilege protects all of the preliminary drafts in their entirety. Second, some courts find that the privilege protects only those portions of the drafts not ultimately included in the disclosed document. This is called the Schenet doctrine. Third, some courts hold that the privilege does not protect any of the preliminary drafts. This seems incorrect. In fact, this distressingly widespread misconception is similar in its ill effects to such fallacies as: the privilege does not protect communications related to an ultimately-disclosed communication or document; and because facts are never privileged, the factual portion of a client-to-lawyer communication does not deserve privilege protection.

51 Kobluk v. University of Minn., 574 N.W.2d 436, 442 (Minn. 1998).
Courts Protecting Entire Preliminary Drafts

First, some courts protect the entire draft of a document if the draft reflects the client's request for legal advice and the lawyer's provision of such advice.

Typically insightful Magistrate Judge Facciola offered a logical and common sense explanation of this concept.

Only three things can happen to a draft that a lawyer prepares in anticipation of litigation or for trial: She sends the draft without change, modifies it and then sends it, or never sends it at all. If she sends the draft without change, the draft is a mere copy of the original and, if one has the original, there is no need to have the draft. If she modifies the draft, comparing the draft with the modified final discloses her mental processes if the changes are more than typographical. If she files the draft and never sends it, the draft discloses her mental processes in the most obvious way.


Over 20 years ago, a court applied this principle in protecting as privileged drafts of documents later filed with the SEC. That decision's analysis still makes sense.

An appropriate analysis of this issue begins, in my view, with an attempt to focus on what information may be derivable from such drafts. Since plaintiff has available to it the publicly-filed documents, it is apparent that the only information available from prior drafts relates to matters appearing in prior drafts that were deleted, augmented or otherwise modified in the final product. Even a superficial understanding of the process by which SEC filings are prepared by lawyers and other advisors of a client permits one to understand that such modifications are made as a result of communications between a client or its representatives and its lawyers. Thus, new information disclosed from comparing drafts of SEC filings with the filed documents themselves necessarily relates to and may inferentially disclose communications between a client and its lawyers charged with preparing the final documents. Communications of this kind are clearly made "for the purpose of facilitating the rendition of professional legal
services" and lie at the heart of the confidential communications that the lawyer-client privilege seeks to protect.


More recently, another court took the same approach in analyzing the same type of document.52 That court analyzed a draft section of a company's Form 10-K, which the company's CFO prepared, sent to the company's CEO and general counsel, and then circulated to another in-house lawyer and three company executives. The court concluded that (i) communications about complying with SEC regulations "are precisely the type of day-to-day guidance for which a corporation would likely rely on counsel," which meant that the privilege protected the communications and the draft; (ii) the circulation of the draft to those "directly concerned with the matter of the Form 10-K disclosures" did not destroy the privilege, because "[t]o disallow corporations the space to collectively discuss sensitive information with legal counsel would be to ignore the realities of large-scale corporate operation"; and (iii) "a draft of a document which becomes public record does not thereby lose that privilege."53

Several courts take this broad approach.54

53 Id.
54 Carter, Fullerton & Hayes, LLC v. FTC, 637 F. Supp. 2d 1, 6 (D.D.C. 2009) ("Draft documents leading up to the final speech were properly withheld in full because 'revelation of the facts themselves, or more specifically, what the author decided and selected as pertinent facts or information, would expose the deliberative process.' . . . Further, the 'documents leading up to the final speech should not be released because their disclosure would allow the public to reconstruct the predecisional judgments of the speaker and reveal his or her mental processes.' (internal citation omitted)); In re Mentor Corp., 632 F. Supp. 2d 1370, 1383 (M.D. Ga. 2009) ("Defendant has asserted that the documents in question were prepared by an attorney and reflect legal advice, that the information contained in these draft contracts was not disseminated to any third party, and that the draft letters postdated the final letter of intent already produced to Plaintiffs, further suggesting that the contents of the drafts were never published. . . .
Protecting a preliminary draft in its entirety certainly makes sense if the client never sends the final document outside the attorney-client relationship. This type of document most clearly deserves privilege protection. As one court explained:

Since the document was never actually sent to any other company, the question of whether the privilege was waived is not implicated.


However, the concept makes less sense if the client ultimately sends the final version of the document outside the attorney-client relationship. For instance, the client and the lawyer working on a document might quickly decide that everything in the draft document is exactly as they want it, except for the last paragraph. In that situation, the client has clearly formed the intent to disclose everything but the last paragraph to a third party. Thus, any privilege protection for that part of the document has evaporated.

The Court concludes that discovery of the draft letters of intent . . . are therefore privileged and not discoverable.

Ergo Licensing, LLC v. Carefusion 303, Inc., 263 F.R.D. 40, 45 (D. Me. 2009) ("[T]he privilege 'generally applies to draft patent applications.'" (citation omitted)); In re ConAgra Peanut Butter Prods. Litig., M.D.L. No. 1845, No. 1:07-MD-1845-TWT, 2009 U.S. Dist. LEXIS 31122, at *57 (N.D. Ga. Mar. 23, 2009) ("The document is an email to in-house counsel about a PowerPoint presentation to the FDA. The sender included a draft of the PowerPoint presentation as an attachment to the email. The email and the attachment are protected by the attorney-client privilege because the email seeks legal advice." (internal citation omitted)); Beryman v. Madison Sch. Dist., No. 265996, 2007 Mich. App. LEXIS 464, at *10 (Mich. Ct. App. Feb. 22, 2007) ("There is no indication that waiving the privilege to the final document waives the privilege to its rough drafts."); Smithkline Beecham Corp. V. Pentech Pharms., Inc., No. 00 C 2855, 2001 U.S. Dist. LEXIS 18281, at *13 (N.D. Ill. Nov. 5, 2001) ("The document is a draft letter from client to attorney and was not sent to third parties. The letter also expressly demonstrates an intention to keep the communication confidential. Therefore, it may be withheld as privileged."); Kobluk v. University of Minn., 574 N.W.2d 436, 442 (Minn. 1998) (protecting a draft patent application and the lawyer's notes on the draft).

Va. Elec. & Power Co. v. Westmoreland-LG&E Partners, 526 S.E.2d 750, 755 (Va. 2000) ("The attorney-client privilege does not attach to a document merely because a client delivers it to his attorney. However, the privilege does attach to a document prepared with the purpose of being sent to counsel for legal advice."); finding that the attorney-client privilege protected a draft letter sent to a lawyer for legal review and ultimately never sent out).
On the other hand, courts' broad approach has the advantage of simplicity and ease of application. Courts protecting entire preliminary drafts as privileged dialogue do not need to separate the portions which are disclosed from those which are not. As one court explained,

this Court finds that it need not conduct its own in camera review of the materials already reviewed in camera by the magistrate judge. It is undisputed that the materials in question are drafts of affidavits of an LMC employee that contain communications between counsel for LMC and that employee made for the purposes of determining how the facts in the affidavit should be presented. The Court need not know the exact content of the communications to hold as a matter of law that the magistrate judge did not commit clear error in applying the attorney-client privilege.


This approach also has an enormous logistical advantage. Allowing a litigant to withhold every draft but the final as-sent version saves the litigant effort without causing the adversary any prejudice. For instance, the producing party's files might contain numerous drafts of SEC filings, which deserve privilege protection because they reflect a lawyer's input. The files might also contain copies of the final version of the filing. The final SEC filings obviously are available to anyone. If the producing party had to produce final drafts of the SEC filings, it would have to conduct a careful word-by-word comparison of each draft document in its possession to make sure that it was not producing a preliminary (and privileged) draft. Although it might be possible in many situations to determine the status of a draft by looking for blanks, phrases such as "to be inserted," or red-line markings, it would be very difficult to confirm that what looks like a final draft is actually what the company filed with the SEC.
In 2011, the Southern District of Illinois acknowledged that the privilege protected preliminary versions of a publicly disclosed document, but then stated the obvious principle that the final as-sent version did not deserve protection.

[T]he Court will not require the production of a draft document (or a redacted draft document) simply because a portion of the draft was later included in a publicly-released final draft . . . . [D]oing so would effectively reveal the attorney's legal advice. If, however, a draft document was adopted as written and published to third persons, the document loses its confidentiality, and is no longer protected from disclosure under the attorney-client privilege. Thus, draft documents that were adopted as written and published are not subject to the attorney-client privilege and must be produced.


A ruling like this would require the producing party to check internal drafts against the final published version, and produce exact copies.

Requiring a producing party to undertake this burden seems unnecessary. The producing party should be able to argue that each of the drafts in its possession is either: (i) different from the final version, in which case the privilege protects it as a draft reflecting a lawyer's input; or (ii) identical to the filed document, in which case the adversary does not need it. Courts should be willing to accept such a "no harm, no foul" approach. It seems that the only justification for demanding production of such final drafts is to determine whether such a final draft was in a certain executive's possession. In some litigation, this might be very important, although normally it is not.
In 2011, the District of Colorado recognized this common sense principle.\textsuperscript{56} An adversary sought a litigant's draft contracts. The court acknowledged that "[i]n essence, a draft contract which was prepared by an attorney with the assistance of his client contains information communicated between attorney and client ought to be protected as such."\textsuperscript{57} The court acknowledged that it could order production of the draft terms that did not make it to the final version of the contract, but also recognized the futility of such a gesture.

While . . . the Court could order disclosure of the draft contracts with the terms not ultimately circulated during negotiations redacted, it is likely that such disclosure would be cumulative because, as noted above, Plaintiff already has access to the terms disclosed in negotiations.


\textbf{Courts Protecting Only Undisclosed Portions of Preliminary Drafts (the Schenet Doctrine)}

Second, some courts take what amounts to a middle ground between the two extremes mentioned immediately above and below. These courts find that the privilege protects those portions of preliminary drafts that are not ultimately incorporated into the final disclosed document.

This is usually called the Schenet doctrine, after a 1988 Eastern District of Michigan case.\textsuperscript{58} That case recognized that the privilege protected communications

\begin{itemize}
  \item \textsuperscript{57} \textit{Id.} at *13.
\end{itemize}
conveyed by clients to their attorneys for the purpose of drafting documents to be disclosed to third persons and all documents reflecting such information, to the extent that such information is not contained in the document published and is not otherwise disclosed to third persons.


Preliminary drafts may reflect not only client confidences, but also the legal advice and opinions of attorneys, all of which is protected by the attorney-client privilege. The privilege is waived only as to those portions of the preliminary drafts ultimately revealed to third parties.

Id. at 1284.

Although Schenet used "waiver" terminology, its approach really focused on the intent to disclose concept. The protected portions of a draft are never disclosed, and they cannot trigger a waiver. Instead, the client at some point formed the intent to disclose portions of preliminary drafts, which caused the privilege for those portions to evaporate.

A 2008 District of South Carolina decision provided perhaps the best explanation of what is called the "split of authority" on privilege protection for drafts, ultimately settling on the Schenet approach. In In re New York Renu with Moistureloc Product Liability Litigation, the court noted that some courts have "taken the position that an entire draft remains privileged if it is given to counsel with the proviso that counsel will provide suggestions on the draft." The court explained that this view is "overprotective" because "[i]t would mean that the draft would be protected even if the


60 Id. at *13.
lawyer made no changes, and even as to parts of the draft which were understood by both attorney and client to be an inevitable part of the public presentation.\textsuperscript{61}

The court then turned to the other extreme. It cited a Fourth Circuit case\textsuperscript{62} for the proposition that such a "draft is unprivileged in its entirety, as are any pertinent lawyer notes."\textsuperscript{63} The court explained that the Fourth Circuit view did not account for the client's intent to seek a lawyer's input before disclosing the final draft of such a document to third parties. As the court put it, "the Fourth Circuit rule thus deters the clients from communicating with counsel about what should or should not go into a public statement," and is therefore "contrary to the underlying principles of the attorney-client privilege," at least under New York law.\textsuperscript{64}

The court ultimately applied what it called the "compromise" Schenet doctrine\textsuperscript{65} (or the Schenet/Schlegel doctrine, for that Eastern District of Michigan case and an earlier District of Nebraska case).\textsuperscript{66} The court explained its reason for adopting this middle view.

The compromise view is that of Schenet/Schlegel -- if the draft is sent to the lawyer for legal-advice review, then any statements in the draft are privileged to the extent that they are not ultimately revealed to the public. Put the other way, only the portions of the draft that are ultimately disclosed in the final document are subject to disclosure. The problem with this view is that it requires a line-by-line redaction of the

\begin{itemize}
\item \textsuperscript{61} Id. at *16-17.
\item \textsuperscript{62} United States v. (Under Seal) (In re Grand Jury 83-2 John Doe No. 462), 748 F.2d 871, 875 (4th Cir. 1984).
\item \textsuperscript{63} In re New York Renu with Moistureloc, C/A No. 2:06-MN-77777-DCN, MDL. No. 1785, 2008 U.S. Dist. LEXIS 88515, at *15 (D.S.C. May 8, 2008).
\item \textsuperscript{64} Id. at *16.
\item \textsuperscript{65} Id. at *17.
\end{itemize}
draft. Arguably the costs of a line-by-line redaction might be considerable if the case involves hundreds of drafts. Yet despite its costs, the Schenet/Schlegel view is the one most consistent with the policy of the privilege. It allows and encourages the client to seek legal advice on the propriety of language in a draft, without overprotecting the draft in such a way that its disclosure is barred even as to portions that are clearly intended for public disclosure.


Not surprisingly, other courts also follow the Schenet doctrine.67

One possible drawback of the majority Schenet doctrine is the adversary's potential ability to "reverse engineer" the produced documents to discover the nature or even the specifics of the lawyer's legal advice. Under Schenet, a litigant presumably has to produce all of the draft documents that have been exchanged between a client and the lawyer, but with redaction of the language not ultimately disclosed to outsiders. In some situations, such a production might allow the adversary to discern the lawyer's advice. This concern has induced some courts to protect all of the preliminary drafts.

Courts adopting the Schenet approach seem not to be troubled by this, and most do not even assess the risk. One court has explicitly rejected such a concern.

67 SEC v. Wyly, 10 Civ. 5760 (SAS), 2011 U.S. Dist. LEXIS 87660, at *23 (S.D.N.Y. July 27, 2011) ("[T]he draft is not immune from discovery -- as a document intended for public disclosure, the draft would have to be produced, redacted only insofar as it contains statements that are, upon advice of counsel, not found in the final document."); In re Avandia Mktg., Sales Practices & Prod. Liab. Littig., No. 07-md-01871, MDL No. 1871, 2009 U.S. Dist. LEXIS 113562, at *42 (E.D. Pa. Dec. 7, 2009) ("If the draft documents do contain confidential information and/or legal advice not found in the final versions, that information should be redacted and the remainder of the document should be produced."); SEC v. Teo, Civ. A. No. 04-1815 (SDW), 2009 U.S. Dist. LEXIS 49537, at *61 (D.N.J. June 11, 2009) (not for publication) ("In any event, this Court finds that consistent with Schenet, Defendants have waived the privilege as to the first six of the last seven lines of notes on PJMCK 0411. The court in Schenet held that "[t]he privilege is waived only as to those portions of preliminary drafts ultimately revealed to third-parties." Schenet, 678 F. Supp. at 1283-84 [Schenet v. Anderson, 678 F. Supp. 1280 (E.D. Mich. 1988)]. As the filed May 10, 1999 Amendment reveals, the information contained in these six lines on PJMCK 0411 were ultimately included in the filing with the SEC. (See Murray Decl., at Exh. 19).") Brossard v. Univ. of Mass., No. 96-1036, 1998 Mass. Super. LEXIS 679 (Mass. Super. Ct. Sept. 29, 1998).
While there may be some truth in the claim that Merck makes about reverse engineering, the argument is not compelling for a number of reasons. First, the fact that legal departments recommend that certain actions be taken by their corporations does not mean that the corporations must follow that advice. Second, alterations can be made in the absence of recommendations from the legal department. Third, all recommendations prompting revisions are not necessarily proposed in writing. Fourth, if all proposed revisions had to be proposed in writing, and the legal departments were given control over public dissemination of communications, in that in-house lawyers could require that their revisions be incorporated (which apparently is true of Merck's legal department because it has the power to place holds on dissemination until its recommendations are incorporated or its concerns are otherwise satisfied), the role of legal counsel would change from legal advisor to corporate decision-maker. This is a role that the corporation does not have the right to delegate to attorneys and then insist that the decisions they make are immune from discovery. The tobacco industry attempted to do that with departments engaging in scientific research on its product and was unsuccessful. Certainly, when a corporate executive makes a decision after consulting with an attorney, his decision is not privileged whether it is based on that advice or even mirrors it.

In re Vioxx Prods. Liab. Litig., 501 F. Supp. 2d 789, 804-05 (E.D. La. 2007) (footnote omitted). Thus, courts following the Schenet doctrine seem to ignore litigants’ concerns that the doctrine might give the adversary insights into the lawyer's advice.

**Courts Not Protecting Preliminary Drafts**

Third, some courts inexplicably find that the privilege simply does not protect preliminary drafts of documents when the client intends to disclose the final draft of the document to third parties.

A sample of judicial statements taking this approach highlights how extreme this position can be.
• "[T]hese courts have required production of: (1) prior drafts of the petition and interview notes . . . ; (2) all documents used to prepare the petition and schedules . . . ; and [(3)]even production of the debtor-attorney's entire bankruptcy file."68

• "I have determined that drafts of documents prepared for eventual release to third parties -- such as loan documents, acceleration notices, and guarantee demands -- are not protected by the attorney work product doctrine or the attorney-client privilege."69

• "The Court concludes that draft bankruptcy filings are no more entitled to protection on the basis of privilege than are the filings actually made. By definition, they are not confidential communications between a client and an attorney; they and their contents are intended to be disclosed. They therefore are not protected from disclosure by the attorney-client privilege."70

• "Drafts of documents to be submitted to third parties, while prepared by counsel, are not generally privileged. In any event, submission of documents to a third party outside the attorney-client relationship removes any cloak of privilege."71

• "When documents are prepared for dissemination to third parties, neither the document itself, nor preliminary drafts, are entitled to immunity. Documents which the client does not reasonably believe will remain confidential are not protected."72

This illogical approach reached a crescendo when one court held that a lawyer's handwritten comments on draft public offering documents did not deserve privilege protection, because the final version of the public offering documents was to be disclosed.73

68 Order Denying Debtor/Defendants' Motion to Quash and For Protective Order, at 10, Taylor v. Wolbert (In re Wolbert), Ch. 7 Case No. 09-30765, Adv. No. 09-3177 (Bankr. W.D.N.C. Feb. 17, 2010), ECF No. 43.
To put it bluntly, this approach makes no sense. One court provided an example highlighting the error of this approach.

The fact that the final drafts were intended to be disclosed to the public does not render the privilege inapplicable. Surely defendants would not argue that prior drafts of the pleadings it has submitted to this court and filed in the public record are not protected from disclosure by the work-product privilege.


Conclusion

Some courts' approach to preliminary drafts represents one of the most illogical and worrisome line of cases in the privilege context. To the extent that a document's preliminary draft represents confidential communications between a lawyer and client reflecting the lawyer's legal input, it makes no sense to strip away their privilege protection simply because the final version of the document will ultimately be disclosed outside the attorney-client relationship. No court would ever apply this approach to a litigant's motion or brief ultimately intended to be filed in court.

Of all people, judges should understand this. Judges spend much of their time working on documents that will ultimately be disclosed to third parties: judicial opinions. Yet no judge would turn over preliminary drafts of his or her opinion merely because the final version will be disclosed. Although a lawyer obviously would have to raise this point delicately, such an analogy should carry the day.

It makes far more sense to consider protecting those portions of preliminary drafts that ultimately do not see the light of day outside the attorney-client relationship. But as much as this doctrine (the Schenet doctrine) makes some sense conceptually, it raises other problems. As explained above, it might allow the adversary to gain insights
into the lawyer's legal advice. On a more practical level, this approach does not make much sense logistically. The adversary already has the disclosed parts of the document, so there is little to be gained by giving the adversary other copies of the language that was ultimately disclosed. In return for this meager additional set of documents (which, after all, simply repeat what the adversary has already obtained in other discovery), the producing party faces a logistical nightmare. The Schenet doctrine requires the producing party to compare every word in every draft to make sure that it produces each word that ended up in the final disclosed version. Even within the context of one sentence, that could be an enormous task. For instance, the lawyer or the client might be obsessed with split infinitives. Just moving one word around in a sentence in various drafts means that the producing party will have to determine which word ended up in the final version. Even then the words might be in a different position in the final version than they were in the preliminary drafts. It is unclear under Schenet what the producing party does in that situation.

All in all, it seems more logical to protect the entire content of preliminary drafts. If the adversary already has the final version, why does the adversary need additional redacted documents that contain those same words, although they might be in a different order?

**Best Answer**

The best answer to (a) is **PROBABLY YES**; the best answer to (b) is **PROBABLY YES**; the best answer to (c) is **PORTIONS OF THE DRAFTS NOT ULTIMATELY DISCLOSED TO THIRD PARTIES (PROBABLY).**
Adverse Employees' Use of Company Property for Communications with Their Private Lawyers

Hypothetical 8

As part of your standard practice when an employee leaves your company and threatens a lawsuit, you asked your company's IT folks to examine the former employee's laptop for any pertinent communications. You just received a call from an IT colleague, who tells you that she has found several emails between the then-employee and a personal lawyer he was consulting about suing the company for discrimination in case he was terminated. The employee had tried to delete all of his emails on his last day at work, but the IT folks were able to retrieve them.

(a) Must you advise the former employee's lawyer that you have the emails?

**NO (PROBABLY)**

(b) May you read the emails?

**YES (PROBABLY)**

Analysis

Introduction

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.\(^1\) 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.\(^2\)

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.\(^3\)

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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.

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 emails 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 emails, etc. In investigating such improper conduct, the company might actively examine the employee's emails and find communications between the employee and a personal lawyer. Third, companies collecting and reviewing documents in a litigation setting might find emails 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
In 2005, the Southern District of New York Bankruptcy court articulated what has now become the standard means of analyzing this issue -- often called the In re Asia Global Crossing test, based on that decision's style.4

In 2009, the Eastern District of New York relied on this standard in carefully articulating 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 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.5

5 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 Dep't 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."); 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
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 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'n, Inc., No. 03CV6327 (DRH)(MLO), 2006 U.S. Dist. LEXIS 29387 (E.D.N.Y. May 16, 2006); 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.").
communications with her personal lawyer made "through her personal, password-protected, web-based e-mail account" -- using her company-issued laptop.\(^6\) The court found that the company's personnel policy did not specifically address such use of the company computer, and also explained that

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\text{[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.\(^7\)


\(^7\) Goldstein v. Colborne Acquisition Co., LLC, Case No. 10 C 6861, 2012 U.S. Dist. LEXIS 75743 (N.D. Ill. June 1, 2012); Hanson v. First Nat'l Bank, Civ. A. No. 5:10-0906, 2011 U.S. Dist. LEXIS 125935 (S.D. W. Va. Oct. 31, 2011); Holmes v. Petrovich Dev. Company, LLC, 119 Cal. Rptr. 3d 878 (Cal. Ct. App. 2011); Alamar Ranch, LLC v. County 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. Aquiar, 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. Elkin, 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 forensic computer expert, however, retrieved the document from the computer's hard drive. We held in Clagett 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 public employer has in the contents of his or her computer unreasonable."); Sims v. Lakeside Sch., Case No. C06-1412RSM, 2007 U.S. Dist. LEXIS 69568, at *2-3 (W.D. Wash. Sept. 20, 2007) ("Defendant's employee manual is unequivocally clear in regards to its policy on computer networks when stating that '[u]ser accounts are the property of Lakeside School.' . . . The policy repeats this assertion six paragraphs later when stating, '[a]ccounts are property of Lakeside School and are to be used for academic and administrative purposes only.' . . . Furthermore, where an employer indicates that it can inspect laptops that it furnished for use of its employees, the employee does not have a reasonable expectation of privacy over the employer-furnished laptop."); Long v. Marubeni Am. Corp., No. 05 Civ. 639 (GEL)(KNF), 2006 U.S. Dist. LEXIS 76594, at *2-3, *8, *9 (S.D.N.Y. Oct. 19, 2006) (assessing a situation in which a company's handbook "advised MAC employees to use MAC's automated systems for 'job-related purposes,' since 'use of the systems for personal purposes are prohibited.' The Handbook advised further, that MAC had the right to monitor its automated systems and that employees 'have no right of personal privacy in any matter stored in, created, received, or sent over the e-mail, voice mail, word processing, and/or internet systems provided' by MAC."); "The plaintiffs contend they used their private password-protected e-mail accounts to communicate with their attorney, and with each other, to protect the confidentiality of their communications.

However, when the plaintiffs determined to use MAC's computers to communicate, they did so cognizant that MAC's ECP was in effect and that under MAC's ECP: (a) use of MAC's automated systems for personal purposes was prohibited; (b) MAC employees 'have no right of personal privacy in any matter stored in, created, received, or sent over the e-mail, voice mail, word processing, and/or internet systems provided' by MAC; and (c) MAC had the right to monitor all data following through its automated systems."); "The ECP's admonishment to MAC's employees that they would not enjoy privacy when using MAC's computers or automated systems is clear and unambiguous. The plaintiffs disregarded the admonishment voluntarily and, as a consequence, have stripped from the e-mail messages referenced above the confidential cloak with which they claim those communications were covered."); Kaufman v. SunGard Invest. Sys., Civ. A. No. 05-cv-1236 (JLL), 2006 U.S. Dist. LEXIS 28149, at *11-12, *12 (D.N.J. May 9, 2006) (not for publication) (assessing a situation in which a company's policy 'provided that Company property included, for instance, 'information stored on computers' and 'e-mail.' . . . Therefore, all information and emails stored on SunGard's computer systems was SunGard property. SunGard policy also provided that all emails were subject to monitoring. SunGard warned: 'The Company has the right to access and inspect all electronic systems and physical property belonging to it. Employees should not expect that any items created with, stored on, or stored within Company property will remain private. This includes desk drawers, even if protected with a lock; and computer files and electronic mail, even if protected with a password.'."); also noting that the company "notified all employees that SunGard
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.8

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.9 This

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8 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."); 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.").

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.

In contrast, some courts find that an employee waives his or her personal
privilege by leaving privileged communications behind\(^\text{10}\) or by returning a laptop to a
former employer if the laptop contains privileged communications.\(^\text{11}\)

(a)-(b) The issue here is whether the then-employee's emails were "inadvertently"
transmitted to the company (and then to you). If so, you would have a duty to advise
the sender that you have the emails under ABA Model Rule 4.4(b).

In 2011, the ABA issued an opinion warning lawyers that they should educate
their clients (such as company employees) about the risks of communicating in a way
that privileged communications may fall into the wrong hands.

• 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.).

\(^{10}\) Pac. Coast Steel v. Leany, Case No. 2:09 cv 02190 KJD PAL, 2011 U.S. Dist. LEXIS 113849, at
*23-24 (D. Nev. Sept. 30, 2011) ("The court finds that Leany waived any privilege he may have had to
privileged or confidential materials he left on the Century computer he used by failing to take reasonable
means to preserve the confidentiality of the privileged matter.").

\(^{11}\) Aventa Learning, Inc. v. K12, Inc., 830 F. Supp. 2d 1083, 1106 (W.D. Wash. 2011) ("Any privilege
that may have existed with regard to these materials was extinguished by his unconditional
relinquishment of the laptop and cannot be subsequently resurrected.").
On the same day, 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.).

The ABA's conclusion that such emails are not "inadvertently" transmitted should mean that the company's lawyer: (1) does not have to advise the former employee's lawyer that the emails have been discovered; and (2) may read the emails. Under ABA Model Rule 4.4(b)

[a] lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.
ABA Model Rule 4.4(b). A comment to that rule makes it clear that such lawyers are not prohibited from reading the inadvertently transmitted communications.

Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it that it was inadvertently sent. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

ABA Model Rule 4.4 cmt. [3].

Careful lawyers might hesitate to read employees' personal emails, even those transmitted over company equipment. Among other things, the lawyers would check on the applicable ethics and privilege rules, as well as the attitude of any court that might assess the lawyer's conduct.

**Best Answer**

The best answer to (a) is PROBABLY NO; the best answer to (b) is PROBABLY YES.
Ex Parte Communications with Represented Adversaries

Hypothetical 9

You have been representing a company for about 18 months in an effort to negotiate the purchase of a patent from a wealthy individual inventor. The negotiations have been very cordial at times, but occasionally turn fairly contentious. You and your company's vice president have met several times with the inventor and his lawyer, both at the inventor's home and in a conference room in your company's headquarters. After some of the fruitful meetings, you and the other lawyer have exchanged draft purchase agreements, with both of you normally copying the vice president and the inventor. Last week things turned less friendly again, and you heard that the inventor's lawyer might be standing in the way of finalizing a purchase agreement. This morning you received a fairly cool email from the other lawyer, rejecting your latest draft purchase agreement and essentially threatening to "start all over again" in the negotiations given what he alleges to be your client's unreasonable position. As in earlier emails, the other lawyer showed a copy of the email to his client, the inventor.

May you respond to the other lawyer's email using the "Reply to All" function, and defending your client's positions in the negotiations?

MAYBE

Analysis

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 (2006) 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). Other bars have taken the same approach.

- 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. I (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 Knappenger, 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.

Using "Reply to All"

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. In 2009, a New York City ethics opinion\(^1\) explained that a lawyer's inclusion of her client as a copy

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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 email that the lawyer receives from a lawyer representing an adversary, and on which the other lawyer has copied his or her client; "The no-contact rule (DR 7-104(A)(1)) prohibits a lawyer from sending a letter or email directly to a represented person and simultaneously to her counsel, without first obtaining 'prior consent' to the direct communication or unless otherwise authorized by law. Prior consent to the communication means actual consent, and preferably, though not necessarily, express consent; while consent may be inferred from the conduct or acquiescence of the represented person's lawyer, a lawyer communicating with a represented person without securing the other lawyer's express consent runs the risk of violating the no-contact rule if the other lawyer has not manifested consent to the communication."); "We agree that in the context of group email communications involving multiple lawyers and their respective clients, consent to 'reply to all' communications may sometimes be inferred from the facts and circumstances presented. While it is not possible to provide an exhaustive list, two important considerations are (1) how the group communication is initiated and (2) whether the communication occurs in an adversarial setting."); 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
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 clients on the distribution list. Similarly, a lawyer may invite a response to an email sent both to her own client and to lawyers for other parties. In that case, it would be reasonable to infer counsel's consent to a 'reply to all' response from any one of the email's recipients."

"Adversarial context: The risk of prejudice and overreaching posed by direct communications with represented persons is greater in an adversarial setting, where any statement by a party may be used against her as an admission. If a lawyer threatens opposing counsel with litigation and copies her client on the threatening letter, the 'cc' cannot reasonably be viewed as implicit consent to opposing counsel sending a response addressed or copied to the represented party. By contrast, in a collaborative non-litigation context, one could readily imagine a lawyer circulating a draft of a press release simultaneously to her client and to other parties and their counsel, and inviting discussion of its contents. In that circumstance, it would be reasonable to view the email as inviting a group dialogue and manifesting consent to 'reply to all' communications."; "Because the rule requires the consent of opposing counsel, the safest course is to obtain that consent orally or in writing from counsel. A lawyer who proceeds on the basis of other evidence of consent, such as the opposing client's assurance that its counsel has consented, runs the risk of violating the rule if opposing counsel did not in fact consent."; "We are mindful that the ease and convenience of email communications (particularly 'reply to all' emails) sometimes facilitate inadvertent contacts with represented persons without their lawyers' prior consent. Given the potential consequence of violating DR 7-104(A)(1), counsel are advised to exercise care and diligence in reviewing the email addressees to avoid sending emails to represented persons whose counsel have not consented to the direct communication."].
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.

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.

In 2011, a California legal ethics opinion also recognized the possibility of a
lawyer's implied consent to the adversary's lawyer's ex parte communications with the
lawyer's client.

- California LEO 2011-181 (2011) ("Consent under the 'no contact' rule of
California Rule of Professional Conduct 2-100 may be implied. Such consent
may be implied by the facts and circumstances surrounding the
communication with the represented party. Such facts and circumstances
may include the following: whether the communication is within the presence
of the other attorney; prior course of conduct; the nature of the matter; how
the communication is initiated and by whom; the formality of the
communication; the extent to which the communication might interfere with
the attorney-client relationship; whether there exists a common interest or
joint defense privilege between the parties; whether the other attorney will
have a reasonable opportunity to counsel the represented party with regard to
the communication contemporaneously or immediately following such
communication; and the instructions of the represented party's attorney."; finding in certain circumstances that a lawyer can impliedly consent to ex
parte communications with his or her client; "Tacit consent to communications
with a represented party may be found more often in transactional matters as
compared with adversarial matters. Under certain circumstances, for
example, transactional matters may be more collaborative or neutral than
litigation matters. As a result, based on the totality of the facts and
circumstances, the nature of the matter may be a relevant factor."; "The more
formal the communication, the less likely it is that consent may be implied.
For example, whereas under the proper circumstances, a 'Reply to All' email
communication might be acceptable, copying the represented party in a
demand letter to the other attorney would be difficult to justify." (emphasis
added); "The existence of a common interest or joint defense privilege between the parties may be indicative of an implicit understanding that the attorneys be permitted to communicate with both parties."; "Where, for example, the communication is unilateral, coming from the other attorney to the represented party, and if such party's attorney has the opportunity to promptly dispel misinformation and otherwise counsel the client, there may be little impact on the attorney-client relationship and administration of justice."; "Certainly consent should not be inferred where the attorney expressly withholds such consent and/or instructs the other attorney not to communicate with his or her client.").

Best Answer

The best answer to this hypothetical is MAYBE.
Inadvertent Transmission of Communications

Hypothetical 10

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

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

May you open and read the attachment?

MAYBE

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

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

MAYBE

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

Must you refrain from reading the remainder of the email?

NO (PROBABLY)

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

YES (PROBABLY)

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

YES (PROBABLY)
Analysis

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

ABA Approach

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

In ABA LEO 368, the ABA indicated that

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

ABA LEO 368 (11/10/92).

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

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

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

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

ABA Model Rule 4.4(b) is \textit{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 \textit{narrower} than the earlier legal ethics opinion because it explains that:

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


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

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

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

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

**Restatement**

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

If the disclosure operates to end legal protection for the information, the lawyer may use it for the benefit of the lawyer's own client and may be required to do so if that would advance the client's lawful objectives. 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

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

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

State Bar Opinions

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

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

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

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

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

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

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

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

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

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

**Courts' Approach**

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

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

- Greg Mitchell, E-Mail "Oops" Ends With General Counsel Being Booted From Case, The Recorder, Jan. 4, 2011 ("Hagey represents a handful of engineers in Oakland who in September left engineering and design firm Arcadis to start their own shop. Apparently worried their former employer would try to interfere, they hired Braun Hagey and later conferred by e-mail -- with autocomplete inserting an old Arcadis address for one of the former employees. So four message threads, including one attaching a draft declaration, were delivered to Arcadis, where an e-mail monitoring system routed them to legal."); "In a declaration, Hagey said the plaintiffs didn't realize their e-mails had been intercepted until lawyers at Gordon & Rees filed a counterclaim that references the day the former employees held a meeting -- a date, he said, Gordon & Rees could only have learned from the e-mails. Reached Wednesday, Hagey declined to comment publicly."); "In a declaration, Elizabeth Spangler, an in-house lawyer at Arcadis, acknowledged
receiving the threads and reviewing the draft complaint -- at which point she said she realized the material was probably privileged. She said, however, that there were no great revelations in the material, and she didn’t share it with anyone. She did say, though, that she must have inadvertently given Gordon & Rees the date on which the exiting employees met. She also said she later learned her boss, Arcadis’ general counsel Steven Niparko, had also briefly reviewed the e-mail."; "On December 17, United States District Judge Jeffrey White ordered that Arcadis replace Gordon & Rees with new, untainted counsel. He also ordered Spangler off the case, and said the General Counsel must be 'removed from all aspects of the day-to-day management.' And he ordered Arcadis to pay fees and costs of $40,000.").

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

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

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

**Conclusion**

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

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

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

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

Under ABA Model Rule 1.4,

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

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

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

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

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

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

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

(e) Lawyers who accidentally transmit a communication to an adversary might have a duty to advise their client of the mistake. Under ABA Model Rule 1.4,

[a] lawyer shall . . . keep the client reasonably informed about the status of the matter.

ABA Model Rule 1.4(a)(3).

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

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

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

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

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

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

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

**Best Answer**

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

Hypothetical 11

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

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

**MAYBE**

**Analysis**

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

**Ethics Opinions**

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

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

ABA. In 2006, the ABA took exactly the opposite position -- holding that the receiving lawyer may freely examine metadata. ABA LEO 442 (8/5/06) (as long as the receiving lawyer did not obtain an electronic document in an improper manner, the lawyer may ethically examine the document's metadata, including even using "more thorough or extraordinary investigative measures" that might "permit the retrieval of embedded information that the provider of electronic documents either did not know existed, or thought was deleted"; the opinion does not analyze whether the transmission
of such metadata is "inadvertent,"¹ but at most such an inadvertent transmission would require the receiving lawyer to notify the sending lawyer of the metadata's receipt; lawyers "sending or producing" electronic documents can take steps to avoid transmitting metadata (through new means such as scrubbing software, or more traditional means such as faxing the document); lawyers can also negotiate confidentiality agreements or protective orders allowing the client "to 'pull back,' or prevent the introduction of evidence based upon, the document that contains that embedded information or the information itself").

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

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

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

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

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

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

Id.

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

Id. n.9 (citation omitted).

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

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

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

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

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

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

[It is the opinion of this Committee that each attorney must, as the Preamble to the Rules of Professional Conduct states, "resolve [the issue] through the exercise of sensitive and moral judgment guided by the basic principles of the Rules" and determine for himself or herself whether to utilize the metadata contained in documents and other electronic files based upon the lawyer's judgment and the particular factual situation.


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

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

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

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

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

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

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

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

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

Not surprisingly, the Maine Bar also held that

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

\(^5\) 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.").

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Id.

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

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

an attorney who receives such inadvertently transmitted information from opposing counsel may generally examine and use the metadata for the client's benefit without violating the Rules of Professional Conduct.


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

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

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

Because metadata is simply another form of information that can include client confidences, the Committee sees little difference between a receiving lawyer uncovering an opponent's metadata and that same lawyer peeking at opposing counsel's notes during a deposition or purposely eavesdropping on a conversation between counsel and client. There is a general expectation of honesty, integrity, mutual courtesy and professionalism in the New Hampshire bar. Lawyers should be able to reasonably assume that

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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.").
confidential information will not be sought out by their opponents and used against their clients, regardless of the ease in uncovering the information.


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

On the other hand,

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

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

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

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

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

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

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

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

The North Carolina Bar analogized the situation to a lawyer who receives "a faxed pleading that inadvertently includes a page of notes from opposing counsel." The North Carolina Bar concluded that a lawyer searching for metadata in an electronic document received from another lawyer would violate Rule 8.4(d)’s prohibition on conduct that is "prejudicial to the administration of justice" -- because such a search "interferes with the client-lawyer relationship of another lawyer and undermines the confidentiality that is the bedrock of the relationship."

\(^{10}\) 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.").
The North Carolina Bar did not explain why the receiving lawyer must do anything more than notify the sending lawyer of the inadvertently included confidential metadata -- which is all that is required in the North Carolina Rule 4.4(b). Like other parallels to ABA Model Rule 4.4(b), the North Carolina Rule does not prohibit receiving lawyers from searching for confidential information in a document or documents received from an adversary, and likewise does not address the receiving lawyer's use of any confidential information the receiving lawyer discovers.

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

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

> 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

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

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

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

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

Id. It is difficult to imagine how the receiving lawyer's decision is "fact specific." The Minnesota Bar did not even indicate where the receiving lawyer should look for ethics guidance.

Amazingly, the Minnesota Bar did not point to any other state's opinion on metadata, or even acknowledge the national debate.
Oregon. In November 2011, Oregon took a novel approach to the metadata issue, articulating an ethics standard that varies with technology.

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

The next scenario started with the same facts, but then added a twist. In that scenario, "shortly after opening the document and displaying the changes" the receiving lawyer received an "urgent request" from the sending lawyer asking the receiving lawyer to delete the document because the sending lawyer had "mistakenly not removed the metadata."

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

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\text{does not require the receiving lawyer to return the document unread or to comply with the request by the sender to return the document.}
\]

\textit{Id.} (emphasis added). In fact, the receiving lawyer's duty to consult with the client means that the receiving lawyer

\[
\text{should consult with the client about the risks of returning the document versus the risks of retaining and reading the document and its metadata.}
\]

\textit{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," \footnote{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).} but also pointed to other ethics rules requiring lawyers to consult with their clients.

The Oregon Bar then turned to a situation in which the sending lawyer has taken "reasonable efforts" to "remove or screen metadata from the receiving lawyer." The Oregon Bar explained that the receiving lawyer might be able to "thwart the sender's efforts through software designed for that purpose." The Oregon Bar conceded that it is "not clear" whether the receiving lawyer learning of the metadata's existence has a duty to notify the sending lawyer in that circumstance. However, the Oregon Bar concluded with a warning about the use of such "special software."
Searching for metadata using special software when it is apparent that the sender has made reasonable efforts to remove the metadata may be analogous to surreptitiously entering the other lawyer's office to obtain client information and may constitute "conduct involving dishonesty, fraud, deceit or misrepresentation" in violation in Oregon RPC 8.4(a)(3).

Id.

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

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

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

Fourth, it is frightening to think that some lawyer using "a standard word processing feature" to search for metadata is acting ethically, but a lawyer using "special software designed to thwart the metadata removal tools of common word processing software" might lose his or her license. It is difficult to imagine that the line between ethical and unethical conduct is currently defined by whether a word processing feature is "standard" or "special." And of course that type of technological characterization changes every day.
Washington. The Washington State Bar Association dealt with metadata in a 2012 opinion. Washington LEO 2216 (2012).\textsuperscript{14} 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. \textit{Id.}

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

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

In the second scenario,

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

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

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

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

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

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

Id.

Current "Scorecard"

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

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

2001
New York LEO 749 (12/14/01) -- NO

2004
New York LEO 782 (12/18/04) -- NO

2006
ABA LEO 442 (8/5/06) -- YES
Florida LEO 06-2 (9/5/06) -- NO

2007
Maryland LEO 2007-9 (2007) -- YES
Alabama LEO 2007-02 (3/14/07) -- **NO**

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

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


**2008**

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

Colorado LEO 119 (5/17/08) -- **YES**

Maine LEO 196 (10/21/08) -- **NO**

**2009**

Pennsylvania LEO 2009-100 (2009) -- **YES**

New Hampshire LEO 2008-2009/4 (4/16/09) -- **NO**

West Virginia LEO 2009-01 (6/10/09) -- **NO**

Vermont LEO 2009-1 (10/2009) -- **YES**

**2010**

North Carolina LEO 2009-1 (1/15/10) -- **NO**

Minnesota LEO 22 (3/26/10) -- **MAYBE**

**2011**

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

**2012**

Washington LEO 2216 (2012) -- **YES** (using "standard word processing features") and **NO** (using "special forensic software" designed to thwart metadata scrubbing).
Thus, states take widely varying approaches to the ethical propriety of mining an adversary's electronic documents for metadata.

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

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

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

**Basis for States' Differing Positions**

In some situations, the bars' rulings obviously rest on the jurisdiction's ethics rules. For instance, the District of Columbia Bar pointed to its version of Rule 4.4(b), which the bar explained is "more expansive than the ABA version," because it prohibits the lawyer from examining an inadvertently transmitted writing if the lawyer "knows, before examining the writing, that it has been inadvertently sent." District of Columbia LEO 341 (9/2007).
On the other hand, some of these bars' rulings seem to contradict their own ethics rules. For instance, Florida has adopted ABA Model Rule 4.4(b)'s approach to inadvertent transmissions (requiring only notice to the sending lawyer), but the Florida Bar nevertheless found unethical the receiving lawyer's "mining" of metadata. 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).

- 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.

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

The best answer to this hypothetical is MAYBE.
Working with Service Providers

Hypothetical 12

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 legal ethics opinion 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).¹

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" -- the litigant's "knowing and voluntary release of privileged documents to a third party --

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 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 13

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.¹

State bars have also dealt with ethics issues implicated by lawyers employing "temps"² and "independent contractor" lawyers.³

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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 "[a]ssuming 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).

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
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.).

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 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 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 "outsourced 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."; "Whether 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.").

- New York 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 "by 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.
Discarding Electronic Files

Hypothetical 14

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 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
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).

Not surprisingly, lawyers using new forms of communication and data storage must take care when disposing of any device containing confidential client communications.

- **Florida LEO 10-2 (9/24/10)** ("A lawyer who 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.

In addition to the ethical risks, lawyers who are not careful might waive their clients' attorney-client privilege protection.

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.

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.  

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.

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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 public where it is subject to the possibility that it may be overheard by other persons."), cert. denied, 507 U.S. 1042 (1993).

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
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 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 15**

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.
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).


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.

Id.

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
conduct 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 16

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.

A party's or witness's postings on social media sites can be a rich source of useful evidence.

- Bill Archer, "Like" button leads to obstruction of justice charge, Bluefield Daily Telegraph, Sept. 14, 2012 ("A Tazewell County, Va., woman was charged with obstruction of justice Thursday morning, after lying to Tazewell County Sheriff's deputies who were searching for her boyfriend who was wanted in Maryland on sex offender charges."); "Samantha Nicole Dillow, 22, of Bluefield, Va., visited the Tazewell County Sheriff's Office Facebook Page, and pressed the like button according to Tazewell County Sheriff Brian Hieatt, who speculated that Dillow wanted to receive alerts of any developments related to the search for her boyfriend, Dyllan Otto Naecker, 29."); "We have been working with our Facebook page for quite a while now,' Hieatt said. "We use it to post pictures of missing persons, or fugitives we were looking for. It was very helpful when we tracked Chris Sturgill to Texas."); "Major (Harold) Heatley looks at the page regularly, and when he saw that she had pressed the like button, he looked at the photos on her page, and thought the male
she was pictured with might have been the person Maryland authorities were looking for.""); ""Major Heatley emailed a photograph of the male subject to Maryland, and they responded back that he was the fugitive they were searching for,' Hieatt said. ""We were able to trace her post back to her home. We felt that he was in hiding there with her so several deputies went to her residence.""; ""Hieatt said that Dillow denied that Naecker was in the residence. He said there were enough deputies to surround the residence while one of the deputies returned to Tazewell to obtain a search warrant. 'Before the deputy returned with the search warrant, Mr. Naecker walked outside the residence, and we took him into custody. I think he was surprised.'""; ""All of that came from Facebook,' Hieatt said.").

- 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.").

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)).

**Best Answer**

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

Hypothetical 17

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?

NO (PROBABLY)

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.

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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.

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 'friendning,' 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.").

At least some lawyers have faced bar scrutiny and perhaps discipline for such activities.

- Mary Pat Gallagher, When "Friending" is Hostile, N.J. L.J., Sept. 8, 2012 ("Two New Jersey defense lawyers have been hit with ethics charges for having used Facebook in an unfriendly fashion."; "John Robertelli and Gabriel Adamo allegedly caused a paralegal to 'friend' the plaintiff in a personal injury case so they could access information on his Facebook page that was not available to the public."; "The 'friend' request, made 'on behalf of and at the direction of' the lawyers, 'was a ruse and a subterfuge designed to gain access to non-public portions of [the] Facebook page for improper use' in defending the case, the New Jersey Office of Attorney Ethics (OAE) charges."; "The OAE says the conduct violated Rules of Professional Conduct (RPC) governing communications with represented parties, along with other strictures. The lawyers are fighting the charges, claiming that while they directed the paralegal to conduct general Internet research, they never told her to make the request to be added as a 'friend,' which allows access to a Facebook page that is otherwise private."; "At first, Cordoba [paralegal] was able to freely grab information from Hernandez's [plaintiff] Facebook page, but after he upgraded his privacy settings so that only friends had access, she sent him the friend request, which he accepted, the complaint says.").

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 **PROBABLY NO**.
Effect of an Inadvertent Production of a Privileged Document

Hypothetical 18

You recently have had problems with one of your paralegal's attention to detail, and just learned that he missed an obviously privileged document during a recent review. You discovered his oversight when the adversary introduced a very damaging but obviously privileged email as an exhibit during a deposition. Now you wonder about the effect of the soon-to-be-former paralegal's mistake.

(a) Will the inadvertent production of the email waive any privilege that otherwise protected the email?

MAYBE

(b) If the court finds that the paralegal's mistake waived the privilege, will it trigger a subject matter waiver?

NO

Analysis

Post-Production Privilege Assertions

(a) Federal Rule of Civil Procedure 26(b)(5)(B) indicates that a party producing information may make a post-production claim of privilege or work product protection by sending a notice to the receiving party.¹

The notice must specify the information claimed to be protected and describe the protection claim and the "basis for it."² The party receiving such a notice "must promptly return, sequester, or destroy" the information and any copies of it.³ The receiving party may not "use or disclose" the information until the protection claim is resolved.⁴ If the receiving party had disclosed the information before receiving the notice, it "must take

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³ Id.
⁴ Id.
reasonable steps to retrieve" it. The receiving party "may" present the information to a court under seal for a determination of the protection claim. This is a strange provision, because one would expect the Rule to require the producing party to take an affirmative step. Instead, it seems that the producing party can simply send the notice to freeze the receiving party’s use of the information and then wait to see what the receiving party does. Not surprisingly, the producing party must "preserve the information until the claim is resolved." This Rule essentially adopts a variation of the former ABA approach, which prevented the recipient of an unintentionally transmitted privileged communication from using that communication.

This Rule does not address whether the production has waived any protection. Any agreements reached under Rule 26(f)(4) and any orders entered under Rule 16(b)(6) "may be considered when a court determines whether a waiver has occurred." A number of states have adopted rules that parallel changes in the Federal Rules of Civil Procedure and the Federal Rules of Evidence, and which allow post-production privilege claims and adopt a fairly forgiving approach to inadvertent disclosures. Other states will undoubtedly move in this direction.

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5 Id.
6 Id.
7 Id.
9 Id.
Pre-Rule 502 Case Law

Under case law decided before adoption of Fed. R. Evid. 502, courts took one of three basic approaches when dealing with the unintentional production of privileged documents during a privilege review.

First, under what was called the Mendenhall approach, some courts found that there could be no waiver in such a situation because only the client could waive the privilege.

Second, at the other extreme, the In re Sealed Case rule took a very unforgiving approach. That standard automatically found a waiver, because something obviously went wrong. Some of the decisions in this area were remarkably harsh. For instance, one court held that a party waived the attorney-client privilege by making privileged documents available to the adversary during a document production, even though the producing party retrieved the documents before the adversary could copy them. The court then compounded the injury by finding that a subject matter waiver had occurred.

Third, the vast majority of courts followed what is usually called the Lois Sportswear rule. Under this middle-ground approach, the court conducted a fact-intensive analysis in determining whether the unintentional production of a privileged document caused a waiver. Although courts taking the Lois Sportswear approach agreed on the basic principles, they often created their own unique set of criteria. For

12 877 F.2d 976, 980 (D.C. Cir. 1989).
instance, in a span of just three days, the District of New Jersey articulated a five-part test, the Northern District of Illinois articulated a three-part test, and the Southern District of New York articulated a four-part test. Rule 502 adopted this "middle ground" standard, and even explicitly mentioned the Lois Sportswear decision.

Of course, this pre-Rule 502 case law continues to govern in those situations that Rule 502 does not cover, such as pre-litigation disclosures, production in state courts, disclosure to a state office or agency, etc.

**Reach of Rule 502**

Federal Rule of Evidence 502 applies in all state proceedings, in all federal proceedings (even if "state law provides the rule of decision"), and in all federal court-annexed and court-mandated arbitrations. A later provision in the Rule also covers disclosures made in state proceedings, if they are "not the subject of a State court order concerning waiver."

However, Rule 502 does not govern the waiver effect of the following disclosures:

- Occurring before or after a federal "proceeding";

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18 Fed. R. Evid. 502(f) ("Controlling effect of this rule. -- Notwithstanding Rules 101 and 1101, this rule applies to State proceedings and to Federal court-annexed and Federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if State law provides the rule of decision.").
19 Fed. R. Evid. 502(c).
20 Alpert v. Riley, 267 F.R.D. 202 (S.D. Tex. 2010) (holding that an arguably inadvertent disclosure occurring before litigation was not governed by Rule 502).
• During a federal proceeding but not "in" a federal proceeding, such as communications to the adversary or to third parties;

• In adversarial settings that are not "proceedings," such as administrative actions, arbitrations, etc.;

• To federal employees other than those in an "office or agency";

• To state offices, agencies, or other employees;

• In state proceedings that are the subject of a state court order "concerning waiver," presumably regardless of that order's provisions;

• During arbitrations.21

Rule 502's Provisions

Under Rule 502

[w]hen made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

Fed. R. Evid. 502(b).


The Rule expressly follows the "majority rule" in the federal courts governing the waiver effect of an inadvertent disclosure. However, the Rule's "distillation" of the majority rule "is not intended to foreclose notions of fairness from continuing to inform

21 Fuller v. Interview, Inc., No. 07 Civ. 5728 (RJS) (DF), 2009 U.S. Dist. LEXIS 93157, at *11 n.4 (S.D.N.Y. Sept. 30, 2009) ("[T]he Rule, by its terms, relates to the disclosure of materials in federal and state proceedings, and not in private proceedings, like the party's arbitration.").

application of the standard" applicable in any particular case. For example, courts can examine whether the producing party's remedial measures were "sufficiently prompt" in situations "where the receiving party has relied on the information disclosed."  

As courts began to apply Rule 502, they diverged in one main area. Some courts packed all of the Lois Sportswear factors into the "inadvertent" analysis under Rule 502(b)(1), while other courts looked at the Lois Sportswear factors under Rule 502(b)(2) and (3).

Another trend on which courts seem to agree has far more significance. Courts applying Rule 502 began to realize that they could essentially keep using their pre-Rule 502 analysis and case law. In 2009, the Southern District of New York recognized this.

In any event, the test contained in Rule 502 for determining when a waiver of privilege has occurred is effectively the same as the test that this Court generally employed prior to the Rule's enactment.


More recently, the Northern District of Illinois recognized exactly the same thing.

Despite the adoption of Rule 502(b), analysis of inadvertent disclosure and waiver remains mostly unchanged. The first step of the analysis still requires the court to determine whether the documents in question are privileged. If they are, the second step requires the court to determine whether disclosure was inadvertent. If disclosure is deemed to be inadvertent, at the third step it must be determined whether reasonable steps were taken to prevent disclosure. The fourth, and final, step requires courts to analyze whether the

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disclosing party took prompt and reasonable steps to rectify the disclosure error.

Kmart Corp. v. Footstar, Inc., No. 09 C 3607, 2010 U.S. Dist. LEXIS 116647, at *9-10 (N.D. Ill. Nov. 2, 2010) (footnotes omitted). Other courts have also recognized this principle.25

Interestingly, courts seem almost surprised by this development. Presumably they welcome the opportunity to continue using the principles and the case law with which they were already familiar. This recognition also makes it somewhat easier for practitioners, who can continue to rely on the traditional case law in analyzing the effect of their own or their adversary's production of privileged documents during discovery.

(b) Fed. R. Evid. 502 explicitly indicates that the inadvertent production of a privileged document does not cause a subject matter waiver. One would expect courts to apply the same concept in other settings, and state courts seem to be lining up with this approach as well.

Even before Rule 502, most courts held that the inadvertent production of a privileged document during litigation did not trigger a subject matter waiver.26

25 Alers v. City of Phila., Civ. A. No. 08-4745, 2011 U.S. Dist. LEXIS 137446 (E.D. Pa. Nov. 29, 2011); Pilot v. Focused Retail Prop. 1, LLC, 274 F.R.D. 212, 215 (N.D. Ill. 2011) ("[O]lder cases applying these factors remain relevant to the Rule 502(b) inquiry. The factors include the reasonableness of precautions taken; the time to rectify the error; the scope of discovery; the extent of disclosure; and the overriding issue of fairness."); Heriot v. Byrne, 257 F.R.D. 645, 655 & n.7 (N.D. Ill.) ("In applying FRE 502(b), the court is free to consider any or all of the five Judson [Judson Atkins Candies, Inc. v. Latini-Hohberger Dhimante, 529 F.3d 371 (7th Cir. 2008)] factors, provided they are relevant, to evaluate whether each element of FRE 502(b) has been satisfied."); ultimately using the Judson factors to "supplement" the analysis in Fed. R. Evid. 502); Am. Coal Sales Co. v. Nova Scotia Power Inc., Case No. 2:06-cv-94, 2009 U.S. Dist. LEXIS 13550, at *46-47 (S.D. Ohio Feb. 23, 2009).

26 Draus v. Healthtrut, Inc., 172 F.R.D. 384, 390 (S.D. Ind. 1997); Parkway Gallery Furniture, Inc. v. Kittinger/Pa. House Grp., Inc., 116 F.R.D. 46, 52 (M.D.N.C. 1987) ("The general rule that a disclosure waives not only the specific communication but also the subject matter of it in other communications is not appropriate in the case of inadvertent disclosure, unless it is obvious a party is attempting to gain an advantage or make offensive or unfair use of the disclosure.").
However, some courts found that even an inadvertent production of documents triggered a subject matter waiver.27 One cannot help but suspect that these judges have a vague memory from law school that "disclosure of some privileged communications requires disclosure of more privileged communications" and applied that rule without remembering the reason behind the rule: to prevent unfairness from a tactical disclosure of privileged communications to gain an advantage.

A party accidentally producing a privileged document normally is not attempting to gain an advantage. In fact, such a party has harmed itself by the disclosure. It is difficult to imagine that a party would "pretend" to unintentionally produce a privileged document, hoping to gain an advantage by the fabricated "mistake." Even if a party attempted such a remarkable strategy, the court could easily prevent any abuse by simply preventing the producing party from using the privileged communication in the litigation or at the trial. The only remaining risk is the far-fetched notion that a party might seek to sow "disinformation" by pretending to mistakenly produce a privileged document. Such a tactic might work for World War II allies planting fake papers on a corpse to mislead the Germans about the invasion of southern Europe, but no sane litigant would ever try such a tactic.

Under Federal Rule of Evidence 502, disclosure of a privileged or work product "communication or information" in a "Federal proceeding" or "to a Federal office or agency" triggers a subject matter waiver only if the disclosure is "intentional."28

legislative history also makes it explicitly clear that "an inadvertent disclosure of
information can never result in a subject matter waiver."\(^{29}\)

Thus, Rule 502 adopts what was always the majority view of this issue, and
trumps some federal courts' previous unforgiving approach.\(^{30}\) As the District of
Columbia district court explained in 2009, adoption of Rule 502 meant that "an
inadvertent disclosure no longer carries with it the cruel cost of subject-matter waiver."\(^{31}\)

Rule 502's language has created some interesting judicial analysis of particular
words. In 2012, the District of New Jersey found that a litigant's disclosure of protected
documents in litigation was not inadvertent, but was unintentional.\(^{32}\) This finding meant
that the producing party could not retrieve the document, but did not suffer a subject
matter waiver.

While the Court has determined that the Borough
Defendants' disclosure of the privileged Ryan/McKenna
documents was not inadvertent, meaning the Borough
Defendants shall not be permitted to reclaim same, the Court
has also determined that the Borough Defendants'
disclosure was unintentional. Clearly, the Borough
Defendants in unintentionally disclosing over 800 pages of
otherwise privileged information were not attempting to use
the attorney-client privilege as both a sword and a shield.
Indeed, this does not represent a case where a purposeful,
selective disclosure was made. As a result, the Court shall
limit the waiver to the actual documents disclosed and shall
not require a broad subject matter waiver.

\(^{29}\) Fed. R. Evid. 502 Explanatory Note, subdiv. (a).

\(^{30}\) Williams v. District of Columbia, 806 F. Supp. 2d 44, 48 (D.D.C. 2011) ("In this Circuit, it used to
be the case that virtually any disclosure of a communication protected by the attorney-client privilege,
even if inadvertent, worked a waiver of the privilege. . . . . However, Congress partially abrogated this
relatively strict approach to waiver by enacting Rule 502(b) of the Federal Rules of Evidence, which
addresses the extent to which a waiver may be found based upon an inadvertent disclosure in a federal
proceeding." (footnote omitted)).


\(^{32}\) D'Onofrio v. Borough of Seaside Park, Civ. A. No. 09-6220 (AET), 2012 U.S. Dist. LEXIS 75651

Of course, Rule 502 does not apply in all state courts, and likewise does not apply to the inadvertent disclosure of privileged communications in settings other than those explicitly listed in the rule. Although the inadvertent disclosure in those other places and settings does not fall under the Rule 502 approach, one might expect courts to apply the philosophy of Rule 502 (which always made sense) wherever a privilege's owner inadvertently discloses privileged communications.

**Best Answer**

The best answer to (a) is MAYBE; the best answer to (b) is NO.
Researching Jurors' Social Media

Hypothetical 19

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 that 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 LEO 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 be 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...").

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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)).

These legal ethics opinions highlight the frequent difficulty that lawyers face when using new technologies. The opinions mention almost in passing that jurors may become aware of a lawyer's visit to the juror's website -- which would then constitute an impermissible communication and presumably an ethics violation. Yet few if any lawyers would have a clue whether a juror could learn that a lawyer has visited the juror's website.

**Best Answer**

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

Hypothetical 20

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. Inappropriate juror research can have a wide-ranging impact.

- United States v. Lawson, 677 F.3d 629, 639-40, 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."; "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)).

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.

Best Answer

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

Hypothetical 21

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

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!, Va. Law. Wkly, 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 the 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.

- Steve Eder, Jurors' Tweets Upend Trials, Wall St. J., Mar. 5, 2012 ("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 'friending' 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 Bus. Rev., 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**, 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 & Jessica M. Sawyer, Twelve Angry Tweets, Law360, 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

  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.
Judges' Independent Research

Hypothetical 22

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 (emphasizes 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

... 

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

... 

"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

... 

"'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."\(^4\)

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 sexes," the Supreme Court quoted from one of the sources that Brandeis had included in his brief.

"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.").

Courts have also criticized judges' improper personal Internet research.

- **United States v. Lawson**, 677 F.3d 629, 639-40, 650, 650 n.28 (4th Cir. 2012) ("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' (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'). . ."; "We note, however, that this Court has cited Wikipedia as a resource in three cases.").

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**.
Judges' "Friending" of Lawyers Who Appear Before Them

Hypothetical 23

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 handling the case, and there was no need to recuse. Although the prosecutor apprised defense counsel
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 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

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.

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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 publicly 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 part 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.**
Ethics Duty to Disclose Unpublished Case Law

Hypothetical 24

One of your newest lawyers has proven to be a very skilled legal researcher, and can find decisions that more traditional research might not have uncovered. However, her thorough research has generated some ethics issues for you.

Must you advise the trial court of the following decisions:

(a) A decision by one of your state's appellate courts that is directly adverse to your statutory interpretation argument, but which that court labeled as "not for publication"?

YES (PROBABLY)

(b) A decision by one of your state's appellate courts that is directly adverse to your statutory interpretation argument, but which that court labeled as "not to be used for citation"?

NO (PROBABLY)

Analysis

(a)-(b) The story of unpublished opinions involves both substantive law and ethics -- with an interesting twist of evolving technology.

The ABA Model Rules do not deal with the lawyer's duty to disclose case law that has not been published, or that the court has indicated should not be cited (although the ABA issued a legal ethics opinion dealing with that issue -- discussed below).

The Restatement contains a comment dealing with this issue.

Case-law precedent includes an unpublished memorandum opinion, . . . an unpublished report filed by a magistrate, . . . and an adverse federal habeas corpus ruling . . . . The duty to disclose such unpublished materials may be of great practical significance, because they are less likely to be discovered by the tribunal itself. . . . Such a requirement should not apply when the unpublished decision has no force as precedent. Nor should it apply, of course, in
jurisdictions prohibiting citation of certain decisions of lower courts. Typical would be the rule found in some states prohibiting citation of intermediate-appellate-court decisions not approved for official publication.


(emphases added).

The history of this issue reflects an interesting evolution. One recent article described federal courts' changing attitudes.

Although some federal circuits, in the 1940s, considered issuing unpublished opinions as a means to manage its [sic] burgeoning caseload, the federal courts of appeals continued to publish virtually every case decision well into the early 1960s. In 1964, however, because of the rapidly growing number of published opinions and the reluctance of federal courts to issue unpublished decisions, the Judicial Conference of the United States resolved that judges should publish "only those opinions which are of general precedential value and that opinions authorized to be published be succinct." In the early 1970s, after the federal circuits failed to respond to this original resolution and many circuits had continued to publish most of their opinions, the Judicial Conference mandated that each circuit adopt a "publication plan" for managing its caseload. Furthermore, in 1973, the Advisory Council on Appellate Justice urged the federal circuits to issue specific criteria for determining which opinions to publish. The Advisory Council hoped that limiting publication would preserve judicial resources and reduce costs by increasing the efficiency of judges.


(emphases added; footnotes omitted).

Another article pointed out the ironic timing of the Judicial Conference's recommendation.
In 1973, just one year after the Judicial Conference recommended adoption of circuit publication plans, Lexis began offering electronic access to its legal research database; Westlaw followed suit soon after in 1975.


One commentator explained the dramatic effect that these rules had on circuit courts' opinions.

Into the *early 1980s*, *federal courts of appeals were publishing nearly 90% of their opinions*. However, by the *mid-1980s*, the publication rates for federal court of appeals decisions changed dramatically. By *1985*, *almost 60% of all federal court of appeals decisions were unpublished*. Today [2007], *more than 80% of all federal court of appeals decisions are unpublished*.


As federal and state courts increasingly issued unpublished opinions, the ABA found it necessary to explain that

*[i]t is ethically improper for a lawyer to cite to a court an unpublished opinion of that court or of another court where the forum court has a specific rule prohibiting any reference in briefs to an opinion that has been marked, by the issuing court, "not for publication."

ABA LEO 386R (8/6/94; revised 10/15/95). The ABA noted that as of that time (1994) several states (including Indiana, Kansas, Wisconsin, and Arkansas) prohibited lawyers from citing unpublished cases. In closing, the ABA explained that -- not
surprisingly -- lawyers' ethics duties had to mirror the tribunal's rules about unpublished cases.

[T]here is no violation if a lawyer cites an unpublished opinion from another jurisdiction in a jurisdiction that does not have such a ban, even if the opinion itself has been stamped by the issuing court "Not for Publication," so long as the lawyer informs the court to which the opinion is cited that that limitation has been placed on the opinion by the issuing court. Court rules prohibiting the citation of unpublished opinions, like other procedural rules, may be presumed, absent explicit indication to the contrary, to be intended to govern proceedings in the jurisdiction where they are issued, and not those in other jurisdictions. Thus, the Committee does not believe that a lawyer's citing such an opinion in a jurisdiction other than the one in which it was issued would violate Rule 3.4(c).

Id.

By the mid-1990s, authors began to question courts' approach, given the evolving technology that allowed lawyers to easily find case law.

These historic rationales for the limited publication/no-citation plans warrant re-examination in light of current technology. Increased access to both published and unpublished legal opinions through the computer brings to the forefront new concerns while relegating some old concerns to the past. Further, as technology alters the available body of law, it exacerbates some of the practical problems with current limited publication/no-citation plans.

In 2000, the Eighth Circuit found unconstitutional a court rule that did not allow courts to rely on unpublished opinions. *Anastasoff v. United States*, 223 F.3d 898 (8th Cir.), *vacated as moot*, 235 F.3d 1054 (8th 2000) (en banc).

The ABA joined this debate shortly after *Anastasoff*. In August 2001, the American Bar Association adopted a resolution urging the federal courts of appeals uniformly to:

1. Take all necessary steps to make their unpublished decisions available through print or electronic publications, publicly accessible media sites, CD-ROMs, and/or Internet Websites; and

2. Permit citation to relevant unpublished opinions.


The *Anastasoff* opinion began a dramatic movement in the federal courts against issuing unpublished opinions that lawyers could not later cite.

A 2003 article reported on this shift. Stephen R. Barnett, *Developments and Practice Notes: No-Citation Rules Under Siege: A Battlefield Report and Analysis*, 5 J. App. Prac. & Process 473 (Fall 2003). As that article reported, within a few years, nine federal circuits began to allow citation of unpublished opinions. Of those nine federal circuits, six circuits allowed unpublished opinions to be cited for their "persuasive" value, two circuits adopted hybrid rules under which some unpublished opinions were binding precedent and some unpublished opinions were persuasive precedent, and one circuit did not specify the precedential weight to be given to unpublished opinions. Of course,
this also meant that four federal circuits still absolutely prohibited citation of unpublished opinions.

The 2003 article also listed all of the many state variations, including:

- States that did not issue unpublished opinions or did not prohibit citation of unpublished opinions (Connecticut, Mississippi, New York, and North Dakota).

- States allowing citation of unpublished opinions as "precedent" (Delaware, Ohio, Texas, Utah, and West Virginia).

- States allowing citation for "persuasive value" (Alaska, Iowa, Kansas, Michigan, New Mexico, Tennessee, Vermont, Wyoming, Virginia, Minnesota, New Jersey, and Georgia).

- States (25 as of that time) prohibiting citation of any unpublished opinion.

- States too close to call (Hawaii, Illinois, Maine, Oklahoma, and Oregon).

Id. at 481-85. The article even noted that there was disagreement among authors about how to categorize the states' approach. As the crescendo of criticism built, authors continued to explain why the rules limiting publication and citation of decisions made less and less sense.

No-citation rules artificially impose fictional status on unpublished opinions, contrary to the overarching ethical duty, shared by attorneys and judges alike, to protect the integrity of the American judicial system. To pretend that no-citation rules can be reconciled with norms of professional conduct and rules of ethics is to defend a surreal netherworld that imposes an outmoded and unjustified double bind on the federal bar.

J. Lyn Entrikin Goering, Legal Fiction of the "Unpublished" Kind: The Surreal Paradox of No-Citation Rules and the Ethical Duty of Candor, 1 Seton Hall Cir. Rev. 27, 34 (2005) (footnotes omitted).
This article also explained the dilemma (including the ethical dilemma) facing lawyers in these jurisdictions.

No-citation rules put attorneys in a double bind: If appellate counsel conscientiously abides by the duty of candor to the tribunal, the attorney risks the imposition of sanctions by that very court for citing opinions designated as "unpublished," in violation of the rules of the court and the ethical rules requiring attorneys to follow them. On the other hand, if appellate counsel abides by local rules that prohibit or disfavor the citation of "unpublished" opinions, the attorney risks the imposition of sanctions for violating the ethical duty of candor, the requirements of Fed. R. Civ. P. 11, the obligations on appellate counsel set forth in Fed. R. App. P. 46, and the duty to competently represent the client.

Id. at 79 (footnote omitted).

The constant drumbeat of criticism eventually changed the Judicial Conference's approach.

The controversy ultimately induced the Judicial Conference in 2005 to propose Federal Rule of Appellate Procedure 32.1, which was recently adopted by the Supreme Court. The rule allows lawyers to cite unpublished opinions issued on or after January 1, 2007 in federal courts nationwide. If unaltered by Congress, the rule will take effect beginning in 2007.


New Federal Rule of Appellate Procedure 32.1 had some effect, but did not end the debate.

One article described the continuing issue.

From 2000 to 2008, more than 81% of all opinions issued by the federal appellate courts were unpublished. See Judicial Business of the United States Courts: Annual Report of the Director, tbl. S-3 (2000-2008). During that period, the Fourth Circuit had the highest percentage of unpublished opinions
(92%), and more than 85% of the decisions in the Third, Fifth, Ninth and Eleventh circuits were unpublished. Even the circuits with the lowest percentages during that period -- the First, Seventh and District of Columbia circuits -- issued 54% of their opinions as unpublished. Id. . . . Unpublished decisions are much more accessible today -- on Westlaw, Lexis and West's Federal Appendix -- than they were years ago. Still, given the federal circuits' treatment of unpublished decisions as having limited or no precedential value, practitioners who receive a significant but unpublished appellate decision may wish to ask the court to reconsider and issue a published opinion. The federal circuit rules on moving for publication vary. The Fourth, Eighth and Eleventh circuits allow only parties to petition for publication, while the District of Columbia, First, Seventh and Ninth Circuits allow anyone to petition. Two states, California and Arizona, have an extraordinary practice of allowing their state supreme courts, on their own motion, to 'depublish' intermediate appellate court decisions. In California, anyone can petition the state Supreme Court to depublish any appellate court opinion. See California R. Ct. 8.1125; Arizona R. Civ. App. P. 28(f).


State courts have also continued to debate whether their courts can issue unpublished decisions, or decisions that lawyers cannot cite.

For instance, on January 6, 2009, the Wisconsin Supreme Court changed its rules (effective July 1, 2009) to allow lawyers to cite some but not all unpublished opinions.

[An] unpublished opinion issued on or after July 1, 2009, that is authored by a member of a three-judge panel or by a single judge under s. 752.31(2) may be cited for its persuasive value. A per curiam opinion, memorandum opinion, summary disposition order, or other order is not authored opinion for purposes of this subsection. Because an unpublished opinion cited for its persuasive value is not precedent, it is not binding on any court of this state. A court
need not distinguish or otherwise discuss an unpublished opinion and a party has no duty to research or cite it.

Wis. Stat. § 809.23(3)(b) (effective July 1, 2009); In re Amendment of Wis. Stat. § 809.23, Sup. Ct. Order No. 08-02 (Wis. Jan. 6, 2009). The accompanying Judicial Council Note provided an explanation.

Section (3) was revised to reflect that unpublished Wisconsin appellate opinions are increasingly available in electronic form. This change also conforms to the practice in numerous other jurisdictions, and is compatible with, though more limited than, Fed. R. App. P. 32.1, which abolished any restriction on the citation of unpublished federal court opinions, judgments, orders, and dispositions issued on or after January 1, 2007. The revision to Section (3) does not alter the non-precedential nature of unpublished Wisconsin appellate opinions.

Id. Judicial Council Note, 2008. Interestingly, the court indicated that it will convene a committee that will identify data to be gathered and measured regarding the citation of unpublished opinions and explain how the data should be evaluated. Prior to the effective date of this rule amendment, the committee and CCAP staff will identify methods to measure the impact of the rule amendment and establish a process to compile the data and make effective use of the court's data keeping system. The data shall be presented to the court in the fall of 2011.

Id.

One of the Wisconsin Supreme Court justices dissented -- noting that "[t]his court has faced three previous petitions to amend the current citation rule" and that "[n]o sufficient problem has been identified to warrant the change." In re Amendment of Wis. Stat. § 809.23, Sup. Ct. Order No. 08-02 (Wis. Jan. 6, 2009) (Bradley, J., dissenting).

The dissenting justice indicated that she "continue[d] to believe that the potential increased cost and time outweigh any benefits gained." Id.
One recent article explained the remaining issue facing lawyers litigating in courts that no longer prohibit citation of unpublished opinions.

For federal circuits with unpublished opinions issued after January 1, 2007, and for all other jurisdictions which have banned no-citation rules, attorneys may now cite to unpublished opinions. But does this mean that attorneys must cite to unpublished opinions if those opinions are directly adverse?

Although unclear, the word "authority" in the Model Rule leads to the conclusion that whether an attorney must disclose an adverse unpublished opinion depends upon how the jurisdiction treats unpublished opinions and, more particularly, whether it treats the unpublished opinion as precedent, or rather, as "authority." Furthermore, the comment to the Model Rule 3.3 states that the duty to disclose only relates to "directly adverse authority in the controlling jurisdiction." Therefore, unless the unpublished opinion is adverse controlling authority, the attorney would not be obligated to cite it. An attorney's obligation to cite to an unpublished opinion adverse to her client's opinion does not rest upon the rationale that the other side may not have equal access to unpublished opinion, as some commentators have argued.

Shenoa L. Payne, The Ethical Conundrums of Unpublished Opinions, 44 Willamette L. Rev. 723, 757 (Summer 2008) (emphases added). Although this article erroneously concluded that the disclosure obligation applied to controlling authority (as opposed to authority from the controlling jurisdiction), it accurately described lawyers' continuing difficulty in assessing their ethics obligations.

Recent decisions have also highlighted the confusing state of the ethics rules governing lawyers in states that continue to limit citation of published opinions.

Subsection (a)(3) speaks to a different issue, because it requires a lawyer to disclose court opinions and decisions that constitute "legal authority in the controlling jurisdiction," even if that authority is directly contrary to the interest of the client being represented by the attorney. The obligation to
disclose case law, however, is limited somewhat by the impact of Rule 1:36-3, which provides that "[n]o unpublished opinion shall constitute precedent or be binding upon any court." Even that limitation, however, is not unbounded, as an attorney who undertakes to rely on unpublished opinions that support his or her position must, in compliance with the duty of candor, also disclose contrary unpublished decisions known to the attorney as well. Nevertheless, this Rule continues to define the demarcation line between opinions considered to be "binding" authority and other opinions, even though the latter, in many cases, are now readily available through the internet or through media outlets in printed format.


In that case, the court also noted that New Jersey courts "have recognized that the decision of one trial court is not binding on another." Id. at 957. Relying both on this principle and on an earlier decision's status as "unpublished," the court concluded that a lawyer litigating a case before the court did not have a duty to bring the earlier decision to the court's attention.

[If we were to conclude that an attorney has an affirmative duty to advise his adversary or the court of every unpublished adverse ruling against him, we would create a system in which a single adverse ruling would be the death knell to the losing advocate's practice. And it would be so even if the first adverse ruling eventually were overturned by the appellate panel or by this Court. Such a system would result in a virtual quagmire of attorneys being unable to represent the legitimate interests of their clients in any meaningful sense. It would not, in the end, advance the cause of justice because the first decision on any issue is not necessarily the correct one; the first court to speak is just as likely to be incorrect in novel or unusual matters of first impression as it is to be correct.

Id. at 968.

In 2011, the Northern District of California addressed the constitutionality of a rule prohibiting citations to unpublished cases.
- **Lifschitz v. George**, No. C 10-2107 SI, 2011 U.S. Dist. LEXIS 8505, at *2 (N.D. Cal. Jan. 29, 2011) (finding that the U.S. Constitution did not prohibit a rule prohibiting lawyers from citing unpublished California court opinions; noting that under the California rule lawyers are "only permitted to cite or mention opinions of California state courts that have been designated as 'certified for publication' or ordered officially published ('published' cases), and are forbidden from citing or even mentioning any other cases to the California state or any other courts."; upholding the provision).

California lawyers' ethics requirements presumably parallel the substantive law governing citations of such opinions.

**Best Answer**

The best answer to (a) is **PROBABLY YES**; the best answer to (b) is **PROBABLY NO**.
End of an Attorney-Client Relationship

**Hypothetical 25**

Folks in charge of your law firm’s marketing effort have urged you to send email "alerts," "law updates," etc. to one-time clients, even those 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.

**Determining When an Attorney-Client Relationship Ends**

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 besmires 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.

**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.

**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).

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.4, at 58 (4th ed. 2006),
http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf.

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.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.8, at 113-14 (4th ed. 2006),
http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf
(emphasis added).
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.

**Effect of Lawyer Marketing**

Lawyer marketing can affect both lawyers' willingness to clearly terminate an attorney-client relationship, and courts' analysis.

Most lawyers would find "termination letters" contrary to their marketing instincts. In fact, many lawyers continue to send email 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. Lawyer marketing has always tended to have this possible impact, but the ease of electronic marketing has certainly exacerbated the potential risks.

The widespread availability of lawyers' electronic marketing can also provide fertile grounds for an adversary seeking to prove a continuing attorney-client relationship. A 2011 Western District of Texas Bankruptcy decision highlighted this risk.
Crescent Resources

In In re Crescent Resources, LLC, 457 B.R. 506 (Bankr. W.D. Tex. 2011), the Litigation Trust for bankrupt Crescent Resources sought the files of the Robinson, Bradshaw & Hinson law firm.

The Litigation Trust claimed that Robinson, Bradshaw had jointly represented Crescent and its parent Duke Ventures, LLC -- in a transaction that allegedly left Crescent insolvent after a transfer of over $1 billion to Duke. If there had been a joint representation, universally recognized principles would entitle either of the jointly represented clients to the law firm's files. As the undeniable successor to Crescent Resources, the Litigation Trust would therefore be entitled to the law firm's files -- including all communications between the law firm and Duke about the transaction, even if no Crescent representative participated in or received a copy of those communications.

The court succinctly stated the issue.

The major issue before the Court is whether the Trust is to be considered a joint or sole client, or no client at all, of RBH [Robinson, Bradshaw & Hinson] with respect to the Project Galaxy files.

Id. at 516.

The court also teed up the parties' positions.

The Trust argues that RBH did represent Crescent Resources, while Duke would have the Court believe that RBH jointly represented Crescent Resources before the 2006 Duke Transaction and after the 2006 Duke Transaction, but not during the 2006 Duke Transaction. Duke further alleges that Crescent Resources was not represented by counsel at all during the 2006 Duke Transaction. Duke is arguing, essentially, that for the purposes of the 2006 Duke Transaction only, RBH did not
represent Crescent Resources. So the issue to be resolved is whether RBH represented Crescent Resources with respect to the 2006 Duke Transaction.

Id.

Duke and Robinson, Bradshaw staked out a firm position, and both provided sworn testimony that Duke was RBH's sole client for Project Galaxy. Mr. Torning ["Duke's in-house attorney responsible for Project Galaxy and attorney in charge of outside counsel for Duke for Project Galaxy"] testified that it was his understanding "that at all times during Project Galaxy, RBH represented Duke, not Crescent."

Id. at 520. Thus, both Duke and Robinson, Bradshaw stated under oath that the law firm represented only Duke -- and did not represent Crescent.

The court looked at all the obvious places in assessing whether Robinson, Bradshaw solely represented Duke in the transaction, or jointly represented Duke and Crescent in the transaction.

First, the court found that a 2004 Robinson, Bradshaw retainer letter was somewhat ambiguous.

"The Firm is retained to represent Duke Energy (or any of its subsidiaries or affiliates) and to render legal advice or representation as directed and specified by a Duke Energy attorney . . . with respect to a given matter . . . However, the Duke Energy Office of General Counsel has the ultimate responsibility and authority for handling all decisions in connection with the Services."

Id. at 519. A Robinson, Bradshaw lawyer testified that the firm "was unable to locate any engagement letter . . . in which Crescent Resources was a signatory." Id. Thus, there was no specific retainer letter for the pertinent transaction, but the earlier general retainer letter was not inconsistent with Robinson, Bradshaw's joint representation of Crescent in the transaction.
Second, the court pointed to Duke's payment of Robinson, Bradshaw's invoices.  

*Id.* at 520. The court explained that Duke's payment of Robinson, Bradshaw's legal fees did not necessarily preclude the firm's joint representation of Duke and Crescent.  

The evidence shows that Duke, not Crescent, paid for the legal services provided in connection with Project Galaxy. However, that is not dispositive, as there can still be an implied attorney-client relationship independent of the payment of a fee.  

*Id.* at 522.  

Third, the court noted Duke's argument that Robinson, Bradshaw "took direction from, reported to, and provided legal services to Duke." *Id.* at 520. In analyzing the direction issue, the court pointed to a Robinson, Bradshaw lawyer's testimony.  

Mr. Buck testified that neither he nor any RBH attorneys represented Crescent in the Project Galaxy transaction. . . . Mr. Buck additionally testified that he did not report to Crescent nor take direction from Crescent during Project Galaxy.  

*Id.* at 521. Of course, the Robinson, Bradshaw lawyers had interacted with Crescent employees in connection with the transaction.  

Duke acknowledged that RBH worked with Crescent Resources on Project Galaxy, but downplayed that by stating that "of course [RBH interacted with Crescent], because they're representing Duke in the sale of . . . its 49 percent sharehold interest in Crescent. And of course, when you're providing information to the buyer--the prospective buyer--you're going to work with the company in which you're selling a portion of your shares." . . . Duke argues that this contact between RBH and Crescent Resources is not the same as RBH representing Crescent Resources with respect to Project Galaxy.  

*Id.* at 519.
Thus, Duke and Robinson, Bradshaw argued that the firm had not jointly represented Duke and Crescent in the transaction, relying on sworn statements to that effect from both Duke and the law firm; the lack of a specific retainer letter with Crescent; Duke's payment of the legal bills; and Duke's direction to the law firm in connection with the transaction.

The court then turned to contrary evidence presented by the Litigation Trust.

First, the court pointed to evidence clearly establishing that Robinson, Bradshaw had represented Crescent before the transaction. Id. at 518. The court also noted the firm's failure to run conflicts when undeniably representing Crescent in a number of matters before the transaction.

Ironically, the court also pointed to Crescent's own application to retain Robinson, Bradshaw as its law firm in the bankruptcy -- which described the law firm's long-standing representation of Crescent.

The Trust presented the Application to Employ RBH submitted to this Court on June 11, 2009 (the "Application") . . . . That document details RBH's pre-petition relationship with the Debtors. "RB&H has been representing Crescent and many of its debtor and non-debtor subsidiaries since 1986 and has served as Crescent's primary corporate counsel for several years." . . . . The Application states that "RB&H represented Crescent in connection with the formation, in 2006, of its current parent holding company, incident to a change in Crescent's historical ownership structure as a wholly-owned, indirect subsidiary of Duke Energy Corporation." . . . . The Application also contains the Declaration of Robert C. Sink in Support of Application to Employ (the "Sink Declaration") . . . . Mr. Sink is a shareholder with RBH and the declaration was made on RBH's behalf. In the Sink Declaration, Mr. Sink echoes the Application and states that "RB&H has represented Crescent Resources and many of its debtor and non-debtor subsidiaries in various matters since 1986 and has served as Crescent's primary corporate counsel for several years."
Id. at 517-18 (emphasis added). The court concluded that

RBH represented both Crescent and Duke prior to Project Galaxy. There was no end to the attorney-client relationship and RBH attorneys were going through Crescent files in performing the due diligence for Project Galaxy. It is reasonable that a current client would believe that an attorney was representing them if the attorney showed up to that current client's office and started going through files.

Id. at 522 (emphasis added).

The court also noted Robinson, Bradshaw's representation of Crescent after the transaction.

Duke provided no evidence which would have given RBH cause to terminate their relationship with Crescent, nor did Duke provide any evidence that RBH gave notice to Crescent that RBH was terminating their relationship. Further, Duke acknowledges that RBH and Crescent continued to maintain an attorney-client relationship post Project Galaxy, which would negate any potential argument by Duke that RBH and Crescent's relationship may have terminated by implication.

Id. at 523.

Second, the court noted that Crescent did not have any other law firms represent it in connection with the transaction.

RBH had a long-term relationship with Crescent before Project Galaxy. Additionally, there was no other representation of Crescent during Project Galaxy.

Id. at 521 (emphasis added).

Third, the court pointed to several Robinson, Bradshaw lawyers' website bios boasting that they had represented Crescent in the transaction.

The Trust also discussed statements made by various RBH lawyers on RBH's website. Stephan J. Willen's page, under "Representative Experience" includes "Representing a real estate developer, as borrower, in connection with a $1.5
billion revolving and term loan letter of credit facility used to recapitalize the developer." The Trust stated that this represents the 2006 Duke Transaction and shows Mr. Willen's understanding that Crescent Resources was RBH's client with respect to the 2006 Duke Transaction. Additionally, William K. Packard's page, under "Representative Experience" states "Representation of Crescent Resources, as borrower, in connection with a $1.5 billion revolving and term loan letter of credit facility."

Id. at 518 (emphases added).

After examining both side's arguments, the court turned to the legal standard.

The court pointed to the Third Circuit's extensive analysis of this very issue in Teleglobe Communications Corp. v. BCE, Inc. (In re Teleglobe Communications Corp.), 493 F.3d 345 (3d Cir. 2007). The court noted that

Teleglobe, relied on by both parties, reads almost as an instructional manual to in-house counsel on how to avoid tangled joint-client issues. Teleglobe instructs that a court should consider the testimony from the parties and their attorneys on the areas of contention.

Id. at 524. The court also pointedly noted that

RBH and in-house counsel for Duke should have heeded the warnings in Teleglobe and taken greater care to have in place an information shielding agreement or ensured that Crescent was represented by outside counsel.

Id.

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1 Id. at 516 ("The various cases cited by both the Trust and Duke involve cases where a parent corporation and subsidiary were represented by the same attorney during a spin-off, sale, or divestiture. See e.g. In re Teleglobe Communications Corp., 493 F.3d 345 (3d Cir. 2007) (in-house counsel of the parent corporation represented both the subsidiary and parent companies); Polycast Tech. Corp. v. Uniroyal, Inc., 125 F.R.D. 47 (S.D.N.Y. 1989) (in-house counsel of the parent corporation represented both the subsidiary and parent in the sale of the subsidiary); Medcom Holding Co. v. Baxter Travenol Labs., Inc., 689 F. Supp. 841 (N.D. Ill. 1988); In re Mirant Corp.,[,] 326 B.R. 646 (Bankr. N.D. Tex. 2005) (same law firm representing both parent and subsidiary in a public stock offering of the subsidiary). In those cases, the courts determined the parties were joint clients. The issue remaining before this Court is whether RBH represented Crescent Resources with respect to the 2006 Duke Transaction.").
The court ultimately concluded that Robinson, Bradshaw had jointly represented Duke and Crescent in the transaction. The court therefore held that the Litigation Trust was entitled to Robinson, Bradshaw's files generated during the firm's joint representation of Duke and Crescent in the transaction.²

In looking ahead to litigation between Litigation Trust and Duke, the court also held that

Duke cannot invoke an attorney-client privilege to stop the Trust from using the joint-client files in adversary proceedings between Duke and the Trust.

Id. at 528. In contrast, the court held that

the Trust may not unilaterally waive the joint-client privilege and use jointly privileged information in proceedings involving third parties, absent a waiver from Duke.

Id. at 530.³ The court's conclusions follow the majority rule when joint clients become adversaries. The law generally allows either joint client access to their common law firm's files, and permits either joint client to use any of those documents in litigation with another joint client.

**Best Answer**

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

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² Id. at 524.

³ Id. at 529-30 ("The Restatement [Restatement (Third) of Law Governing Lawyers § 75 cmt. e (2000)] says co-client communication is not privileged as between the co-clients. The Trust's reading of the Restatement appears to state that if co-client communication is then used in an adversary [sic] between the former co-clients, it would then waive the privilege as to third parties. This would effectively make the privilege superfluous. Protections can be placed on any future hearings between Duke and the Trust, and any co-client privileged information can remain privileged as to third parties even if used in a future adversary proceeding between Duke and the Trust.")
"Blog" Descriptions of Past Successes

Hypothetical 26

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 re Hunter, Virginia State Bar Doc. No. 11-032-084907 (Nov. 8, 2011) ("[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**.
Daily Deals

Hypothetical 27

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 one of her recommendations.

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

MAYBE

Analysis

In 2011 and 2012, several states explicitly approved law firms' use of "daily deals" in their marketing efforts.

- Nebraska LEO 12-03 (2012) ("The use of a Groupon for discounted, prepaid legal services does not violate Rule 5.4 as an improper sharing of legal fees, but the amount charged as an advertising fee must be reasonable otherwise it may be deemed to be in the nature of fee-splitting. In addition, the following ethical safeguards must be taken: (1) the Groupon must clearly identify the service being offered and cannot be false, deceptive, or misleading; (2) the Groupon must clearly disclose that no lawyer-client relationship is established until after a conflicts check has been performed; (3) the Groupon must state that it is 'advertising material[;] (4) payment received from Groupon must be placed in the attorney's trust account until earned; (5) if the services cannot be performed due to conflicts, or if the customer later decides not to utilize the service, the entire fee paid by the customer must be refunded.").

- Maryland LEO 2012-07 (2012) ("With the drastic change in technology and the advent of the internet, lawyers are presented with new ways to market their services as well as a host of ethical implications of such use. In addition to several social media websites such as LinkedIn, Facebook, and Twitter, lawyers are now looking to daily deal websites as a creative way to sell legal services. Several other jurisdictions have looked at this issue and some have answered in the affirmative that such advertising is permissible, so long as attorneys proceed with caution and contemplate special considerations, including Missouri, New York, North Carolina, Oregon, and South Carolina. Other jurisdictions like Pennsylvania, recently issued an opinion prohibiting its attorneys from utilizing Groupon-type websites . . . " (footnote omitted); "First, lawyers should recognize that internet based advertising is governed by the same rules which govern print or public media advertisements.").
transaction of the coupon discount website retaining a percentage of the fee paid by the prospective client may, upon first glance, look like a legal splitting arrangement, but this Committee believes that this arrangement is the cost of the advertising. Even though the website company collects the fees upfront and retains a percentage of the purchase price that each prospective client/consumer pays, the use of such a website does not violate Rule 5.4(a). Additionally, the website company does not interfere with the professional judgment of the lawyer. In the scenario you present, the daily deal website is not directing, regulating, or interfering with the lawyer's professional judgment in rendering legal services to another."

"The lawyer, of course, is still responsible for the content of the advertisement as well as the necessary disclosures that need to be made to the prospective client before an attorney-client relationship can be established. The lawyer must spell out that the 'daily deal' offered is subject to certain conditions. . . . If the prospective client waits until after the expiration of the coupon period to engage the lawyer's services, or never actually engages the lawyer's services, the lawyer still has the responsibility to refund those fees to the prospective client. If, after consultation, an attorney-client relationship is established, the lawyer should provide the client with a written fee agreement which sets forth the rate or basis of the fee as well as the scope of the representation, pursuant to MRPC 1.5 (Fees), as advertised by the lawyer on the website.";

"The remaining ethical issue involves the lawyer's role as fiduciary to the client. At the point and time that the lawyer collects payment for the legal services advertised, the lawyer must deposit entrusted funds into an attorney trust account pursuant to MRPC 1.15(a) (Safekeeping Property). The payments received by the lawyer from the daily deal website company are advance payments of legal fees that must be deposited in the lawyer's trust account and may not be paid to the lawyer or transferred to the law firm operating account until earned by the provision of the legal services. Maryland's 'default' position is that unearned fees belong in trust, absent informed consent, confirmed in writing by the client, to a different arrangement. See MRPC 1.15(c). Although the lawyer may charge a flat fee for services to be rendered in the future, that fee is deemed unearned and property of the client until such time that the attorney has performed the legal service. Lawyers must take care not to confuse this arrangement with an engagement retainer which is a fee for the purpose of ensuring the attorney's availability to the client, usually for a specific period of time, which is earned upon receipt. See Ethics Opinion 1993-24. Here, in the scenario that you present, the client has paid a pre-determined flat fee for a specific legal service to be done in the future.";

"Lastly, the lawyer will be responsible for keeping and maintaining complete accounting records for each prospective and actual client gained through the use of such daily deal websites pursuant to MRPC 1.15(a). At any given time, a lawyer should be able to demonstrate whose funds that they are in possession of.";

"Because the issue of lawyer advertising on daily deal websites is relatively new, this Committee warns that this Opinion does not address every scenario that could arise from such advertisement but rather
focused on the proposed use of advertising a flat fee paid in advance for a basic will package as presented.

• 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.").

• New York LEO 897 (12/13/11) ("A lawyer may properly market legal services on a 'deal of the day' or 'group coupon' website, provided that the advertisement is not false, deceptive or misleading, and that the advertisement clearly discloses that a lawyer-client relationship will not be created until after the lawyer has checked for conflicts and determined whether the lawyer is competent to perform a service appropriate to the client. If the offered service cannot be performed due to conflicts or competence reasons, the lawyer must give the coupon buyer a full refund. The website advertisement must comply with all of the Rules governing attorney advertising, and if the advertisement is targeted, it must also comply with Rule 7.3 regarding solicitation.").

• 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 emails local '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 emails 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").

In 2012, Indiana warned 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."

In 2012, two states explicitly prohibited the use of such "daily deals." Among other things, these bars condemned: what they consider to be the fee-splitting aspect of such marketing arrangements; the inability of lawyers to check for conflicts before taking on new clients; the inherently ambiguous or even deceitful phrases lawyers seem to use (such as offering to write a "simple will" without defining that term); the possible incompetence of a lawyer to handle the sort of matters that might come in; the lawyer's inability to control his or her case load (possibly resulting in a lack of diligence).

- Pennsylvania LEO 2011-027 (7/27/11) ("The described Groupon procedure would appear to violate Rule 5.4(a) which prohibits sharing legal fees with a non lawyer. Groupon keeps a portion of the amount paid by each of the 'clients' who 'sign up for the deal' and remits the remainder to you. This appears to be a straightforward sharing of a legal fee."; "Furthermore, the Groupon procedures raise issues involving a number of other Pennsylvania Rules of Professional Conduct.": "Rule 1.7, prohibits concurrent conflicts of interest. There appears to be no procedure by which Groupon permits you to evaluate whether the prospective client would cause a conflict of interest. The Groupon procedure does not appear to provide for treating those who sign up for the deal of the day as 'prospective clients.' Rules 7.1 and 7.2, prohibit, inter alia, 'false or misleading communications . . . about a lawyer's services.' In the Groupon ad which you and I reviewed, a 'simple will' was advertised for $99, and it was stated that the 'normal price' was $750, for an '87% discount.' Is that accurate? What is a 'simple will?' Do the lawyer and the Groupon customer have the same understanding of, could it be misleading?[;] Suppose the Groupon customer does not need a 'simple will'
but needs different advice? How can any of that be determined without talking directly to the 'client.' Indeed a Groupon is a buffer between you and your 'client' for a considerable period of time which could be problematic if the 'client' needs immediate assistance.[;] The Groupon procedures (but not the advertisement which we reviewed) indicate that no 'deal' is made unless a sufficient number of individuals sign up. However, someone who accepts the offer in the advertisement might immediately reasonably believe that they have counsel, and might become your 'client[.]' Thus, the offer of a fee of $99 is misleading in the sense that it is really a contingent fee, contingent not in on the result of the matter, but contingent on enough other 'clients' signing up.

- Alabama LEO R0 2012-01 (2012) ("Groupon and other similar sites do not charge a flat rate fee or even a fee based on the website's traffic. Instead, as noted by the Indiana State Bar Ass'n Ethics Committee, Groupon and other sites take a percentage (usually 50%) of each and every purchase. The percentage taken by the site is not tied in any manner to the 'reasonable cost' of the advertisement. As a result, the Disciplinary Commission finds that the use of such sites to sell legal services is a violation of Rule 5.4 because legal fees are shared with a non-lawyer."); "The use of sites like Groupon would also violate a number of other ethics rules. For example, it is well-settled that pursuant to Rule 1.15(a), all unearned fees must be placed into a lawyer's trust account until earned. . . . However, under the fee model employed by Groupon, half of the legal fee paid by the purchaser is claimed by Groupon at the time of the purchase making it impossible for the lawyer to place the entire unearned legal fee into trust as required by Rule 1.15(a). Further, if the purchaser were to demand a refund prior to any services being performed by the lawyer, the purchaser would be entitled to a complete refund regardless of the fact that half of the fees were claimed by Groupon. Failure to make a full refund would be considered charging a clearly excessive fee in violation of Rule 1.5(a) . . . ."; "Another ethical Dilemma created by the use of daily deal websites is the inability of the lawyer to perform any conflict check prior to the payment of legal fees by the potential client. Under the Groupon model, the lawyer is selling future legal services and receiving the fees for such future services without ever having spoken with or having met with the client. Because the lawyer cannot perform a conflict check prior to being retained, the potential for conflicts of interest among the lawyer's former and current clients is great."); "Additionally, the Disciplinary Commission is concerned that the use of such daily deal sites could result in violations of Rule 1.1 . . . . Because there is no meaningful consultation prior to the payment of legal fees, the purchaser may be retaining a [lawyer] that does not possess the requisite skills or knowledge necessary to competently represent the purchaser. There is no opportunity for the lawyer to determine his own competence or ability to represent the client prior to his being hired."); "Likewise, the lawyer is also unable to judge whether he will be able to diligently represent the client. Unless the lawyer places restrictions on the
type of services offered and on the number of deals available for purchase, the lawyer may find that his caseload become unmanageable."; "If a large number of purchases are made through Groupon, the lawyer may not have the time or resources to diligently represent each new client resulting in violations of Rules 1.1 . . . ").

**Best Answer**

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

n 11/12
Characterizing the Intrusiveness of Electronic Marketing

Hypothetical 28

After attending an excellent seminar entitled "The Ethics of Email and Social Media: A Top Ten List," 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)

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 "[a]fter 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.

Other states have also dealt with new forms of marketing.

- 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. 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)).

- North Carolina LEO 2006-17 (1/19/07) ("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. Thank 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."; "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."

(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.

States have struggled with deciding which rules to apply in such circumstances.

A few early opinions found that emails should be governed by the in-person solicitation rules.

- 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.
One ethics opinion concluded that emails should not be covered by the rules governing in-person solicitation, but that they were also different from more traditional direct mail delivered to a mailbox -- so that lawyers would have to consider the different impact of various ethics rules.

- **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)).

Most states hold that an email must comply with the direct mail requirements -- not the far more restrictive in-person 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 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.").

- 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 (4/97) ("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
adressee by following the same ethics rules applicable to general and direct mail solicitation.

(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 dealt with real time "chat rooms" or similar electronic communications in the late 1990s 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.

In contrast, one state declined at that time to apply the in-person solicitation rules to chat rooms.

- 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 listserv 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 2004, a California legal ethics opinion followed the majority rule from that earlier round of opinions.

- 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").

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

- 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.").
Best Answer

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