

**Virginia State Bar
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THE ETHICS OF E-MAIL

Hypotheticals and Analyses

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Unsolicited E-Mails from Prospective Clients

Hypothetical 1

Your law firm website bio has a link allowing visitors to send you an e-mail. This morning you opened an e-mail 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 e-mail?

MAYBE

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

MAYBE

ANALYSIS

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

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

This well-recognized principle requires lawyers who meet with or otherwise receive information from prospective clients to walk a "tightrope" -- obtaining enough general information from the prospective client to run a conflicts search, while not acquiring so much information that the prospective client will be considered an actual

client for conflicts purposes. A number of law firms have learned to their regret that one of their partners or associates crossed the line and created a disabling conflict by acquiring too much information from a prospective client.

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

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

State Bar Opinions

Since the advent of e-mails, bars across America have dealt with this issue -- with mixed results.

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

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

¹ N.Y. City LEO 2001-1 (3/1/01) (essentially adopting the approach of ABA Model Rule 1.18; "Information imparted in good faith by a prospective client to a lawyer or law firm in an e-mail generated in 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 Hubble 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 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 e-mail 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. Where the web site does not adequately warn that information transmitted to the lawyer or firm will not be treated as confidential, the information should be held in confidence by the attorney receiving the communication and not disclosed to or used for the benefit of the other client even though the attorney declines to represent the potential client.

N.Y. City LEO 2001-1 (3/1/01). In discussing law firms' websites, the New York City Bar indicated that

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

Id. The New York City Bar assured lawyers that a law firm website disclaimer which

prominently and specifically warns prospective clients not to send any confidential information in response to the web site because nothing will necessarily be treated as confidential until the prospective client has spoken to an attorney who has completed a conflicts check -- would vitiate any attorney-client privilege claim with respect to information transmitted in the face of such a warning.

Id. (footnote omitted).

Several years later, the Nevada Bar took essentially the same approach. In 2005, the Nevada Bar indicated that prospective clients generally cannot create an

attorney-client relationship through a "unilateral act" such as "sending an unsolicited letter containing confidential information to the attorney." Nevada LEO 32 (3/25/05).²

The Nevada Bar explained that a lawyer's website disclaimer should be effective in eliminating any reasonable expectation of confidentiality by someone sending an unsolicited e-mail to the lawyer.

In 2006, the San Diego Bar also took this approach, but in a different factual context. In San Diego County LEO 2006-1,³ the San Diego Bar addressed a

² 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).

³ San Diego County LEO 2006-1 (2006) (addressing the ethical duties of a lawyer who receives an unsolicited e-mail 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 e-mail 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

hypothetical situation in which a lawyer received an unsolicited e-mail. The Bar started its analysis by assuming that the lawyer did not have a website and did not advertise, although the state Bar publicized her e-mail address. The majority indicated that the prospective client's

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.

San Diego County LEO 2006-1 (2006). The San Diego Bar held that the lawyer may continue to represent the other injured accident victim and use the information against the e-mail's author. The San Diego Bar indicated that it would be a "closer question" if the lawyer had included her e-mail address at the bottom of an advertisement without any disclaimers. In that situation, there would be an "inference that private information divulged to the attorney would be confidential."

A dissenting opinion argued 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.

Id. (Dissent).

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").

In 2007, the Massachusetts Bar took a dramatically different approach.⁴ 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.

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

⁴ Massachusetts LEO 07-01 (5/23/07) (addressing a situation in which a company seeking to retain a lawyer to sue another company used a law firm's web site biography link to e-mail one of the firm's lawyers and provide information about its claim; noting that the lawyer who received the e-mail declined to represent the company after determining that the law firm represented the proposed target on unrelated matters; explaining that "[w]hen a visitor to Law Firm's web site uses the link to send an e-mail, there is no warning or disclaimer regarding the confidentiality of the information conveyed"; concluding that the company's e-mail "did not result in the formation of an attorney-client relationship," but nevertheless created a duty of confidentiality -- which arises "when the lawyer agrees to consider whether a client-lawyer relationship shall be established" (quoting Massachusetts Rule 1.6); explaining that "[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 e-mail might "materially limit" the law firm's ability to represent the target -- depending on the substance of the e-mail sent to the Law Firm; "the information that ABC disclosed in the e-mail may have little long-term significance, especially once ABC has made its claim known to XYZ"; explaining that "[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").

Massachusetts LEO 07-01 (5/23/07). The Massachusetts Bar explained that depending on the kind of information conveyed in the unsolicited e-mail, 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 Virginia Bar adopted a majority approach in 2008 -- indicating that lawyers receiving confidential information in unsolicited e-mails or voicemails from prospective clients do not have a duty to keep that information confidential. Virginia LEO 1842 (9/30/08).⁵

⁵ 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").

The most recent bar to have dealt with this issue is the Florida Bar -- which also adopted the majority approach.

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.

Florida LEO 07-3 (1/16/09).

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") starts with the bedrock principle that a person will be considered a "prospective client" if the person discusses with a lawyer "the possibility of forming a client-lawyer relationship." ABA Model Rule 1.18(a). 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).

In a comment, ABA Model Rule 1.18 provides some guidance that could apply to unsolicited e-mails.

Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who 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, is not a "prospective client" within the meaning of paragraph (a).

ABA Model Rule 1.18 cmt. [2].

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

Best Answer

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

Ex Parte Contacts with Adversaries

Hypothetical 2

You have been representing a company for about six months in a contentious patent case brought by a wealthy individual inventor. This morning you received a short e-mail from the inventor. He thinks his lawyer is standing in the way of a settlement, and wants to deal directly with you.

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

NO

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

MAYBE

Analysis

Introduction

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

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

ABA Model Rule 4.2.

This prohibition rests on several basic principles.

This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled 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

Restatement (Third) of Law Governing Lawyers § 99 cmt. b (2000).

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

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

For instance, in Alaska LEO 2006-1, the Alaska Bar dealt with situations in which a lawyer has a consumer complaint about a local company, disagrees with a local newspaper's editorial policy, or has concerns as a homeowner with a municipal government's decision on a building permit. Among other things, the Alaska Bar discussed whether any of the scenarios involved a "matter" in which the store, newspaper or government is represented.

In the three examples set forth above, the key question posed in each instance is whether there is a "matter" that is "the subject of the representation." An initial contact to attempt to obtain information or to resolve a conflict informally rarely involves a matter that is known to be the subject of representation. Consequently, lawyers, representing clients or themselves, ordinarily are free to contact institutions that regularly retain counsel in an attempt to obtain information or to resolve a problem informally. These sorts of contacts frequently resolve a potential dispute long before it becomes a "matter" that is "the subject of representation." The above examples are all worded to suggest the inquiry occurs at the early stage of a consumer or citizen complaint. Inquiries directed to employees and managers would be proper in each instance.

. . . .

The line between permitted contacts at the early stage of a potential matter and forbidden contacts after a dispute has sharpened and become a "matter that is the subject of representation" depends on the question discussed in the preceding section: Until the lawyer knows that an opposing counsel has been asked by the party to deal with the particular new matter, the lawyer is not

prohibited from dealing directly with representatives of the party.

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

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

In some situations involving ex parte contacts, lawyers are not acting as client representatives. For instance, Maryland LEO 2006-7 held that a lawyer appointed by the court as guardian of the property of a disabled nursing home resident may communicate directly with the nursing facility, even though the facility is represented by a lawyer. The Maryland Bar contrasted the role of a guardian with that of a lawyer.

"A guardian is not an agent of a ward, because guardians are not subject to the ward's control; rather, the guardians serve a unique role as agents of the court. In reality the court is the guardian; an individual who is given that title is merely an agent or arm of that tribunal in carrying out its sacred responsibility. Thus, a ward may not select, instruct, terminate, or otherwise control his guardian."

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

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

Maryland LEO 2006-7 (2006) (citations omitted); Ohio LEO 2006-5 (6/9/06) ("The DR 7-104(A)(1) restraint on communication with represented persons and parties applies to an attorney who is appointed to serve in a dual role as guardian ad litem and attorney for a minor child. Thus, it is improper for an attorney, appointed to serve in a dual role as a child's attorney and guardian ad litem, to communicate on the subject of the representation with a represented person or party unless there is consent by counsel or authorization by law, such as through a court rule or court order. Communication that is administrative in nature, such as scheduling appointments or meetings, is not communication on the subject of the representation."); Arizona LEO 03-02 (4/2003) (addressing ex parte contact with debtors by lawyers who are acting as bankruptcy trustees; "The lawyer-trustee may communicate directly with persons who are represented by counsel concerning the subject matter of the bankruptcy case. This direct communication is limited to situations where an attorney is appointed to act exclusively as a bankruptcy trustee. If the attorney has dual appointment to act also as attorney for the trustee, then ER 4.2 applies and prohibits ex parte contacts and communications, unless otherwise authorized by law.").

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

A lawyer who does not represent a person in the matter and who is approached by an already-represented person seeking a second professional opinion or wishing to discuss changing lawyers or retaining additional counsel, may, without consent from or notice to the original lawyer, respond to the request, including giving an opinion concerning the propriety of the first lawyer's representation.

Restatement (Third) of Law Governing Lawyers § 99 cmt. c (2000); ABA Model Rule 4.2 cmt. [4] ("[N]or does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter.").

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

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

A lawyer who represents a client opposing a class in a class action is subject to the anticontact rule of this Section. For the purposes of this Section, according to the majority of decisions, once the proceeding has been certified as a class action, the members of the class are considered clients of the lawyer for the class; prior to certification, only those class members with whom the lawyer maintains a personal client-lawyer relationship are clients. Prior to certification and unless the court orders otherwise, in the case of competing putative class actions a lawyer for one set of representatives may contact class members who are only putatively represented by a competing lawyer, but not class representatives or members known to be directly represented in the matter by the other lawyer.

Restatement (Third) of Law Governing Lawyers § 99 cmt. 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

[t]he 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.

(a) Courts take Rule 4.2 very seriously.

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

The Oregon Supreme Court found that the lawyer had violated the ex parte contact prohibition, and suspended him for 120 days. The court noted in passing (but apparently found irrelevant) the fact that the lawyer ultimately won the lawsuit brought by his employees.

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

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

Restatement (Third) of Law Governing Lawyers § 99 cmt. f (2000).

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.

In re Users Sys. Servs., Inc., 22 S.W.3d 331, 334-35 (Tex. 1999).

(b) Analyzing the use of the "Reply to All" function highlights the unique nature of e-mail 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).

E-mail communications fall somewhere between these two examples. A New York City ethics opinion¹ recently explained that a lawyer's inclusion of her client as a

¹ N.Y. City LEO 2009-1 (2009) (explaining that lawyers might be permitted ethically to use the "reply to all" function on an e-mail that the lawyer receives from a lawyer representing an adversary, and on which the other lawyer has copied his or her client; "The no-contact rule (DR 7-104(A)(1)) prohibits a lawyer from sending a letter or email directly to a represented person and simultaneously to her counsel, without first obtaining 'prior consent' to the direct communication or unless otherwise authorized by law. Prior consent to the communication means actual consent, and preferably, though not necessarily, express consent; while consent may be inferred from the conduct or acquiescence of the represented person's lawyer, a lawyer communicating with a represented person without securing the other lawyer's express consent runs the risk of violating the no-contact rule if the other lawyer has not manifested consent to the communication."; "We agree that in the context of group email communications involving multiple lawyers and their respective clients, consent to 'reply to all' communications may sometimes be inferred from the facts and circumstances presented. While it is not possible to provide an exhaustive list, two important considerations are (1) how the group communication is initiated and (2) whether the communication occurs in an adversarial setting."; explaining a few considerations that affect the analysis; "Initiation of communication: It is useful to consider how the group communication is initiated. For example, is there a meeting where the lawyers and their clients agree to await a communication to be circulated to all participants? If so, and no one objects to the circulation of correspondence to all in attendance, it is reasonable to infer that the lawyers have consented by their silence to inclusion of their clients on the distribution list. Similarly, a lawyer may invite a response to an email sent both to her own client and to lawyers for other parties. In that case, it would be reasonable to infer counsel's consent to a 'reply to all' response from any one of the email's recipients."; "Adversarial context: The risk of prejudice and overreaching posed by direct communications with represented persons is greater in an adversarial setting, where any statement by a party may be used against her as an admission. If a lawyer threatens opposing counsel with litigation and copies her client on the threatening letter, the 'cc' cannot reasonably be viewed as implicit consent to opposing counsel sending a response addressed or copied to the represented party. By contrast, in a collaborative non-litigation context, one could readily imagine a lawyer circulating a draft of a press release simultaneously to her client and to other parties and their counsel, and inviting discussion of its contents. In that circumstance, it would be reasonable to view the email as inviting a group dialogue and manifesting consent to 'reply to all' communications."; "Because the rule requires the consent of opposing counsel, the safest course is to obtain that consent orally or in writing from counsel. A lawyer who proceeds on the basis of other evidence of consent, such as the opposing client's 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

copy recipient on an e-mail 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.

N.Y. 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.

[I]n a collaborative non-litigation context, one could readily imagine a lawyer circulating a draft of a press release simultaneously to her client and to other parties and their counsel, and inviting discussion of its contents. In that circumstance, it would be reasonable to view the email as inviting a group dialogue and manifesting consent to "reply to all" communications.

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

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

The New York City Bar's analysis highlights the complexity of e-mail communications. As indicated above, no bar has ever conducted a similar analysis in the case of hardcopy communications.

Best Answer

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

Inadvertent Transmission of Communications

Hypothetical 3

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

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

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

YES

- (b) Last week you opened an e-mail 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 e-mail from the other lawyer. After you read several paragraphs, you realize that the e-mail was intended for a governmental agency. The e-mail 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 e-mail?

NO (PROBABLY)

Analysis

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

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

ABA Approach

In 1992, the ABA issued a surprisingly strong opinion directing lawyers to return obviously privileged or confidential documents inadvertently sent to them outside the document production context.

In ABA LEO 368, the ABA indicated that

as a matter of ethical conduct contemplated by the precepts underlying the Model Rules, [the lawyer] (a) should not examine the [privileged] materials once the inadvertence is discovered, (b) should notify the sending lawyer of their receipt and (c) should abide by the sending lawyer's instructions as to their disposition.

ABA LEO 368 (11/10/92).

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

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

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

ABA Model Rule 4.4(b) (emphasis added).

Comment [2] to this rule reveals that in its current form the ABA's approach is both broader and narrower than the ABA had earlier announced in its Legal Ethics Opinions.

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

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

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

ABA Model Rule 4.4 cmt. [2].

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

Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer.

ABA Model Rule 4.4 cmt. [3].

Thus, the ABA backed off its strict return requirement and now defers to legal principles stated by other bars or courts.

As a result of these changes in the ABA Model Rules, the ABA recently took the very unusual step of withdrawing the earlier ABA LEO that created the "return unread" doctrine.¹

Restatement

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

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

¹ ABA LEO 437 (10/1/05) (citing February 2002 ABA Model Rules changes; withdrawing ABA LEO 368; holding that ABA Model Rule 4.4(b) governs the conduct of lawyers who receive inadvertently transmitted privileged communications from a third party; noting that Model Rule 4.4(b) "only obligates the receiving lawyer to notify the sender of the inadvertent transmission promptly. The rule does not require the receiving lawyer either to refrain from examining the materials or to abide by the instructions of the sending lawyer.").

which the information is relevant if the lawyer's own client would otherwise gain a substantial advantage A tribunal may also order suppression or exclusion of such information.

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

State Bar Opinions

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

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

First, some states have simply adopted the ABA version. See, e.g., Florida Rule 4-4.4(b).²

Second, some states have adopted a variation of the ABA Model Rule that decreases lawyers' responsibility upon receipt of an inadvertently transmitted communication or document. For instance, as of January 1, 2010, Illinois adopted a version of Rule 4.4(b) that only requires the receiving lawyer to notify the sending lawyer if the lawyer "knows" of the inadvertence -- explicitly deleting the "or reasonably should know" standard found in the ABA Model Rule 4.4(b).³

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

³ Illinois Rule 4.4(b) ("A lawyer who receives a document relating to the representation of the lawyer's client and knows that the document was inadvertently sent shall promptly notify the sender.").

Interestingly, Illinois formerly prohibited lawyers from reading and using inadvertently transmitted communication once the lawyer realized the inadvertence. Illinois LEO 98-04 (1/1999). Thus, Illinois moved from a variation of the "return unread" approach passed the ABA "simply notify the sender" approach to a much more harsh approach -- which requires the receiving lawyer to notify the sender of the receipt only if the receiving lawyer actually "knows" of the inadvertent nature of the communication.

Third, some states have adopted the ABA Model Rule approach, but warn lawyers that case law might create a higher duty. For instance, the New York state courts adopted the ABA version of Rule 4.4(b), but the New York State Bar adopted comments with such an explicit warning.⁴

Fourth, some jurisdictions have explicitly retained a higher duty for the receiving lawyer. For instance, Washington, D.C. Rule 4.4(b) uses only a "knows" and not a "knows or reasonably should know" standard -- but require receiving lawyers who know of the inadvertence to stop reading the document. D.C. Rule 4.4(b) ("A lawyer who receives a writing relating to the representation of a client and knows, before examining the writing, that it has been inadvertently sent, shall not examine the writing, but shall notify the sending party and abide by the instructions of the sending party regarding the return or destruction of the writing.").⁵

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

Somewhat ironically, despite the Illinois Bar's move in that direction, one Illinois federal court pointed to the new Illinois rule's simply "notify the sender" approach in prohibiting lawyers receiving inadvertently produced documents in litigation from using the documents -- explaining that "[r]equiring the receiving lawyer to notify the sending lawyer is clearly at odds with any purported duty on the part of the receiving lawyer to use the information for the benefit of his or her client." Coburn Group, LLC v. Whitecap Advisors LLC, 640 F. Supp. 2d 1032, 1043 (N.D. Ill. 2009).

⁴ New York Rule 4.4 cmt. [2] (2009) "Although this Rule does not require that the lawyer refrain from reading or continuing to read the document, a lawyer who reads or continues to read a document that contains privileged or confidential information may be subject to court-imposed sanctions, including disqualification and evidence-preclusion."; New York Rule 4.4 cmt. [3] (2009) ("[T]his Rule does not subject a lawyer to professional discipline for reading and using that information." Nevertheless, substantive law or procedural rules may require a lawyer to refrain from reading an inadvertently sent document, or to return the document to the reader, or both.").

⁵ A comment to that rule provides more explanation. D.C. Rule 4.4 cmt. [2] ("Consistent with Opinion 256, paragraph (b) requires the receiving lawyer to comply with the sending party's instruction about disposition of the writing in this circumstances [sic], and also prohibits the receiving lawyer from reading or using the material. ABA Model Rule 4.4 requires the receiving lawyer only to notify the sender in order to permit the sender to take protective measures, but Paragraph (b) of the D.C. Rule 4.4 requires the receiving lawyer to do more.").

1702 (11/24/97) (adopting the reasoning of ABA LEO 368; explaining that once the lawyer recognizes a document as confidential, the lawyer "has an ethical duty to notify opposing counsel, to honor opposing counsel's instructions about disposition of the document, and not to use the document in contravention of opposing counsel's instructions"); Virginia LEO 1786 n.7 (12/10/04) (acknowledging that the ABA has changed its Model Rules to replace a "return unread" policy with a notice requirement, but reiterating Virginia's approach articulated in Virginia LEO 1702).

Courts' Approach

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

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

- Rico v. Mitsubishi Motors Corp., 171 P.3d 1092, 1096, 1097, 1099, 1099-1100, 1100-01 (Cal. 2007) (upholding the disqualification of a plaintiff's lawyer who somehow came into possession of and then used notes created by defendant's lawyer to impeach defendant's expert; noting that defendant's lawyer claimed that plaintiff's lawyer took the notes from his briefcase while alone in a conference room, while the plaintiff's lawyer claimed that he received them from the court reporter -- although she had no recollection of that and generally would not have provided the notes to one of the lawyers; agreeing with the trial court that the notes were "absolutely privileged by the work product rule" because they amounted to "an attorney's written notes about a witness's statements"; "When a witness's statement and the attorney's impressions are inextricably intertwined, the work product doctrine provides that absolute protection is afforded to all of the attorney's notes."; explaining that "[t]he document is not a transcript of the August 28, 2002 strategy session, nor is it a verbatim record of the experts' own statements. It contains Rowley's summaries of points from the strategy session, made at Yukevich's direction. Yukevich also edited the document in order to add his

own thoughts and comments, further inextricably intertwining his personal impressions with the summary."; not dealing with the attorney-client privilege protection; rejecting the argument that the notes amounted to an expert's report; "Although the notes were written in dialogue format and contain information attributed to Mitsubishi's experts, the document does not qualify as an expert's report, writing, declaration, or testimony. The notes reflect the paralegal's summary along with counsel's thoughts and impressions about the case. The document was absolutely protected work product because it contained the ideas of Yukevich and his legal team about the case."; adopting a rule prohibiting a lawyer from examining materials "where it is reasonably apparent that the materials were provided or made available through inadvertence"; acknowledging that the defense lawyer's notes were not "clearly flagged as confidential," but concluding that the absence of such a label was not dispositive; noting that the plaintiff's lawyer "admitted that after a minute or two of review he realized the notes related to the case and that Yukevich did not intend to reveal them"; ultimately adopting an objective rather than a subjective standard on this issue; also rejecting plaintiff's lawyer's argument that he could use the work product protected notes because they showed that the defense expert had lied; agreeing with the lower court and holding that "'once the court determines that the writing is absolutely privileged, the inquiry ends. Courts do not make exceptions based on the content of the writing.' Thus, 'regardless of its potential impeachment value, Yukevich's personal notes should never have been subject to opposing counsel's scrutiny and use.'"; also rejecting plaintiff's argument that the crime fraud exception applied, because the statutory crime fraud exception applies only in a law enforcement action and otherwise does not trump the work product doctrine).

- Conley, Lott, Nichols Mach. Co. v. Brooks, 948 S.W.2d 345, 349 (Tex. App. 1997) (although a lawyer's failure to return a purloined privileged document would not automatically result in disqualification, "what he did after he obtained the documents must also be considered"; disqualifying the lawyer in this case because his retention and use of the knowingly privileged documents amounted to "conduct [that] fell short of the standard that an attorney who receives unsolicited confidential information must follow").
- American Express v. Accu-Weather, Inc., Nos. 91 Civ. 6485 (RWS), 92 Civ. 705 (RWS), 1996 WL 346388 (S.D.N.Y. June 25, 1996) (imposing sanctions on a lawyer for what the court considered the unethical act of opening a Federal Express package and reviewing a privileged document after receiving a telephone call and letter advising that the sender had inadvertently included a privileged document in the package and asking that the package not be opened).

Conclusion

Thus, lawyers seeking guidance on the issue of inadvertently transmitted communications must check the applicable ethics rules, any legal ethics opinions analyzing those rules (remembering that some of the old legal ethics opinions might now be inoperative), and any case law applying the ethics rules, other state statutes, or any governing common law principles that supplement or even trump the ethics rules. Lawyers should remember that many judges have their own view of ethics and professionalism -- and might well consider lawyers seeking to diligently represent their clients in reviewing inadvertently transmitted communications as stepping over the line and thus acting improperly.

Best Answer

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

Evidence of an Adversary's Wrongdoing Transmitted Inadvertently or by an Unauthorized Person

Hypothetical 4

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

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

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

NO (PROBABLY)

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

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

MAYBE

Analysis

This hypothetical involves two related but distinct scenarios.

- (a) In ABA LEO 382 (7/5/94), the ABA indicated that lawyers who received unsolicited privileged or confidential materials from a third party should refrain from reviewing the documents, notify the adversary that the lawyer received them and either

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

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

Still, the ABA took the unusual step of withdrawing ABA LEO 382.¹ In the years between the ABA's promulgation and withdrawal of ABA LEO 382, several state bars endorsed the ABA approach.

- New York LEO 700 (5/7/98) ("A lawyer who receives an unsolicited and unauthorized communication from a former employee of an adversary's law firm may not seek information from that person if the communication would exploit the adversary's confidences or secrets. Where the

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

information communicated involves alleged criminal or fraudulent conduct in which opposing counsel may be assisting, the receiving lawyer should communicate with a tribunal or other appropriate authority to get further direction as to the use of the information.").

- Virginia LEO 1688 (12/9/96) (a client suing a former employer receives (from a former colleague at the company) a letter to the employer from its lawyer; the client gives a copy of the letter to the client's lawyer, who does not read it but instead seals it in an envelope; the client asks the lawyer to destroy the letter, because the client is worried that the former colleague will be punished if the letter is disclosed; the Bar holds that: the existence and contents of the letter constitute a client "secret"; the lawyer is not required to read the letter, because the "zealous representation" duty is outweighed by the client's instructions to destroy the letter; the lawyer is under no obligation to disclose the letter's existence because there is no "ongoing client crime or fraud involved"; the lawyer need not provide a copy of the letter to the employer (unless there is an outstanding discovery request, in which case the lawyer should object to the request but comply with any order to produce the letter); the lawyer need not withdraw from representing the client).

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

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

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

Best Answer

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

Metadata

Hypothetical 5

You just received an e-mail 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.

State Ethics Opinions

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

Interestingly, the New York State Bar followed up this legal ethics opinion with New York LEO 782 (12/8/04), indicating that lawyers have an ethical duty to "use reasonable care when transmitting documents by e-mail to prevent the disclosure of metadata containing client confidences or secrets."

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

ABA. In 2006, the ABA took exactly the opposite position -- holding that the receiving lawyer may freely examine metadata. ABA LEO 442 (8/5/06) (as long as the receiving lawyer did not obtain an electronic document in an improper manner, the lawyer may ethically examine the document's metadata, including even using "more thorough or extraordinary investigative measures" that might "permit the retrieval of embedded information that the provider of electronic documents either did not know existed, or thought was deleted"; the opinion does not analyze whether the transmission

of such metadata is "inadvertent," but at most such an inadvertent transmission would require the receiving lawyer to notify the sending lawyer of the metadata's receipt; lawyers "sending or producing" electronic documents can take steps to avoid transmitting metadata (through new means such as scrubbing software, or more traditional means such as faxing the document); lawyers can also negotiate confidentiality agreements or protective orders allowing the client "to 'pull back,' or prevent the introduction of evidence based upon, the document that contains that embedded information or the information itself").

Maryland. Maryland then followed this ABA approach. Maryland LEO 2007-09 (2007) (absent some agreement with the receiving lawyer, the sending lawyer "has an ethical obligation to take reasonable measures to avoid the disclosure of confidential or work product materials imbedded in the electronic discovery" (although not every inadvertent disclosure constitutes an ethics violation); there is no ethical violation if a lawyer or the lawyer's assistant "reviews or makes use of the metadata [received from 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." D.C. 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 D.C. LEO 341 is to allow ethics sanctions against an imprudent lawyer. Id.

Third, the D.C. 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.

D.C. 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 07-03,¹ the Arizona Bar first indicated that lawyers transmitting electronic documents had a duty to take "reasonable precautions" to prevent the disclosure of confidential information. The Arizona Bar nevertheless agreed with those states prohibiting the receiving lawyer from mining metadata -- noting that 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,

¹ 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).

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 offers a totally useless standard.

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

Pennsylvania LEO 2007-500 (2007). The Pennsylvania Bar's conclusion is equally useless.

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

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

New York County. Another legal ethics opinion on this issue came from the New York County Lawyers' Association Committee on Professional Ethics. In 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."²

Colorado. Colorado dealt with this issue in mid-2008. Relying on a unique Colorado rule, the Colorado Bar recently 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

² N.Y. County Law. Ass'n LEO 738 (3/24/08) (holding that a lawyer "has the burden to take due care" in scrubbing metadata before sending an electronic document, but that the receiving lawyer may not seek to discover the metadata; "By actively mining an adversary's correspondence or documents for metadata under the guise of zealous representation, a lawyer could be searching only for attorney work product or client confidences or secrets that opposing counsel did not intend to be viewed. An adversary does not have the duty of preserving the confidences and secrets of the opposing side under DR 4-101 and EC 4-1. Yet, by searching for privileged information, a lawyer crosses the lines drawn by DR 1-102(A)(4) and DR 1-102(A)(5) by acting in a manner that is deceitful and prejudicial to the administration of justice. Further, the lawyer who searches an adversary's correspondence for metadata is intentionally attempting to discover an inadvertent disclosure by the opposing counsel, which the Committee has previously opined must be reported to opposing counsel without further review in certain circumstances. See NYCLA Op. 730 (2002). Thus, a lawyer who seeks to discover inadvertent disclosures of attorney work product or client confidences or secrets or is likely to find such privileged material violates DR 1-102(A)(4) and DR 1-102(A)(5)."; specifically excluding from its analysis electronic documents produced during litigation discovery; specifically rejecting the ABA approach, and instead agreeing with New York LEO 749 (12/14/01); "While this Committee agrees that every attorney has the obligation to prevent disclosing client confidences and secrets by properly scrubbing or otherwise protecting electronic data sent to opposing counsel, mistakes occur and an attorney may neglect on occasion to scrub or properly send an electronic document. The question here is whether opposing counsel is permitted to take advantage of the sending attorney's mistake and hunt for the metadata that was improperly left in the document. This Committee finds that the NYSBA rule is a better interpretation of the Code's disciplinary rules and ethical considerations and New York precedents than the ABA's opinion on this issue. Thus, this Committee concludes that when a lawyer sends opposing counsel correspondence or other material with metadata, the receiving attorney may not ethically search the metadata in those electronic documents with the intent to find privileged material or if finding privileged material is likely to occur from the search.").

reviewing metadata ignores the fact that, in many circumstances, metadata do not contain Confidential Information."³

Maine. The next state to have voted on metadata is Maine. In Maine LEO 196,⁴ 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

³ 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.").

⁴ 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.").

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.

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.⁵

⁵ 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

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 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.

Pennsylvania LEO 2009-100 (2009).

New Hampshire. New Hampshire dealt with metadata in early 2009. In an April 16, 2009 legal ethics opinion,⁶ the New Hampshire Bar indicated that receiving

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.").

⁶ 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

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

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

Because metadata is simply another form of information that can include client confidences, the Committee sees little difference between a receiving lawyer uncovering an opponent's metadata and that same lawyer peeking at opposing counsel's notes during a deposition or purposely eavesdropping on a conversation between counsel and client. There is a general expectation of honesty, integrity, mutual courtesy and professionalism in the New Hampshire bar. Lawyers should be able to reasonably assume that confidential information will not be sought out by their opponents and used against their clients, regardless of the ease in uncovering the information.

New Hampshire LEO 2008-2009/4 (4/16/09) (emphasis added).

West Virginia. In West Virginia LEO 2009-01,⁷ 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,

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.").

⁷ 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.";

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

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

[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). Although it is easy to understand the debate about the receiving lawyer's ability to ethically "mine" metadata, it would seem that Rule 8.4(c) has little to do with that issue. Reading the sending lawyer's metadata does not seem to involve "fraud, deceit or misrepresentation."

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").

Vermont. The most recent state to deal with metadata is 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.⁸

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.

⁸ 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).

2001

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

2004

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

2006

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

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

2007

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

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

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

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

Pennsylvania LEO 2007-500 (2007) -- **YES**

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**

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.⁹

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.

⁹ Florida LEO 06-2 (9/16/06).

Best Answer

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

Working with Service Providers

Hypothetical 6

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 e-mail at least several hours each day. The supplier from whom you purchased the servers seems incapable of fixing the problem, and you want to quickly retain another consultant to fix the problem.

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

YES (PROBABLY)

Analysis

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

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

In its recent decision generally approving outsourcing of legal services, the ABA reminded lawyers that they should consider conducting due diligence of the foreign legal providers -- such as "investigating the security of the provider's premises,

computer network, and perhaps even its recycling and refuse disposal procedures."

ABA LEO 451 (8/5/08).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" --

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

the litigant's "knowing and voluntary release of privileged documents to a third party -- the copying service -- with whom it had no confidentiality agreement. Having taken the time to review the documents and tab them for privilege, RSE's counsel should have simply pulled the documents out before turning them over to the copying service. RSE also failed to protect its privilege by promptly reviewing the work performed by the outside copying service."; refusing to order the adversary to return the inadvertently produced documents).

Best Answer

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

Donating Electronic Files to Institutions

Hypothetical 7

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

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

NO (UNLESS EACH CLIENT CONSENTS)

Analysis

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

A number of state legal ethics opinions have explained that lawyers may not -- without consent following full disclosure of every client -- donate their files to research libraries or other third parties. Virginia LEO 1664 (2/9/96) (because a lawyer's duty to maintain confidences and secrets survives the client's death, a lawyer may not provide a former client's historically significant files to a university without either obtaining the client's consent or determining that the files contain no confidences or secrets; a lawyer may give limited information to an outside agency if it is necessary for the lawyer to perform the lawyer's job, but the lawyer must be careful in selecting the agency and instruct the agency that the information must be kept confidential; information is no longer confidential once it becomes a matter of public record unless it is a "secret"; "an

implied (though not formal) attorney-client relationship can arise whenever a lawyer receives confidences or secrets from a person who had an expectation of confidentiality even if no representation resulted"); Virginia LEO 928 (6/11/87) (the ethical duty of confidentiality continues after a client's death, and the lawyer may not turn over the client's files to an institution).

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

Best Answer

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

Discarding Electronic Files

Hypothetical 8

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.

In its recent decisions 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 compatible with that in the U.S. -- which may affect the level of scrutiny with which the lawyer must review

In this hypothetical, giving away the computers without scrubbing the hard drives could be seen as an inadvertent express waiver of the attorney-client privilege, and cause both the ethics violation and the privilege waiver.

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.²

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).

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).

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

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

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

Outsourcing of Discovery Work

Hypothetical 9

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

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).

Law firms hiring such lawyers and those lawyers themselves must also follow the unauthorized practice of law rules of the jurisdiction in which they will be practicing.

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

In recent years, a number of state bars have approved foreign 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."; "[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,

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

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.").

- Colorado LEO 121 (adopted 5/17/08) (approving outsourcing of legal services to lawyers licensed only in other states or only in other countries; warning Colorado lawyers that they must undertake certain steps; "Reasonable efforts include: (a) confirming that the Domestic or Foreign Lawyer is licensed and in good standing in his or her home jurisdiction; (b) confirming that the Domestic or Foreign Lawyer is competent to undertake the work to be assigned; and (c) supervising the work of any nonlawyer hired by the Colorado lawyer to assist in assigned tasks."; also warning that "in general, the Colorado lawyer must determine whether the activities of the Domestic or Foreign Lawyer constitute the practice of law in Colorado, and, if so, whether and to what extent those activities are authorized by virtue of the Colorado lawyer's supervision of and responsibility for the Domestic or Foreign Lawyer's work."; advising the Colorado lawyer to assure that the temporary lawyer does not have a conflict of interest; finding that the fee-splitting rules do not apply "if the firm is responsible for paying the Domestic or Foreign Lawyer regardless of whether the client pays the firm, and if the Domestic or Foreign Lawyer's compensation is not a percentage or otherwise directly tied to the amount paid by the client. If the payment to a Domestic or Foreign Lawyer under this analysis constitutes the division of a fee, then the hiring Colorado Lawyer must comply with Colo. RPC 1.5(d)."; "Whether the delegation of tasks to a Domestic or Foreign Lawyer constitutes a significant development that the Colorado Lawyer must disclose to the client depends on the circumstances. If the lawyer reasonably believes that a client expects its legal work to be performed exclusively by Colorado Lawyers, the Colorado Lawyer may be required to disclose the fact of delegation, as well as its nature and extent. The Committee continues to conclude that a Colorado lawyer is not required to

affirmatively disclose the amount of fees paid to, and profits made from, the services of Domestic and Foreign Lawyers, even where the mark-up is substantial."; "[W]hether the Colorado Lawyer must inform a client of the use of Foreign or Domestic Lawyers will depend upon the facts of the matter, particularly the client's expectations. At least as of this writing, the Committee is of the opinion that most clients of Colorado Lawyers do not expect their legal work to be outsourced, particularly to a foreign county. Thus in the vast majority of cases, a Colorado Lawyer outsourcing work to a Foreign Lawyer who is not affiliated with the Colorado law firm would constitute a 'significant development' in the case and disclosure to the client would be required.").

- North Carolina LEO 2007-12 (4/25/08) (analogizing foreign outsourcing and lawyers' reliance on the services of "any nonlawyer assistant"; 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) ("A lawyer is not prohibited from engaging the services of an overseas provider to provide paralegal assistance as long as the lawyer adequately addresses ethical obligations relating to assisting the unlicensed practice of law, supervision of nonlawyers, conflicts of interest, confidentiality, and billing. The lawyer should be mindful of any obligations under law regarding disclosure of sensitive information of opposing parties and third parties."; "The committee believes that the law firm should obtain prior client consent to disclose information that the firm reasonably believes is necessary to serve the client's interests. Rule 4-1.6 (c)(1), Rules Regulating The Florida Bar. In determining whether a client should be informed of the participation of the overseas provider an attorney should bear in mind factors such as whether a client would reasonably expect the lawyer or law firm to

personally handle the matter and whether the non-lawyers will have more than a limited role in the provision of the services."; "The law firm may charge a client the actual cost of the overseas provider, unless the charge would normally be covered as overhead.").

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

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

outsourcing, plus a reasonable allocation of overhead expenses directly associated with providing that service."; (6) obtain the client's consent when necessary, as "there is little purpose in requiring a lawyer to reflexively inform a client every time that the lawyer intends to outsource legal support services overseas to a non-lawyer. But the presence of one or more additional considerations may alter the analysis: for example, if (a) non-lawyers will play a significant role in the matter, e.g., several non-lawyers are being hired to do an important document review; (b) client confidences and secrets must be shared with the non-lawyer, in which case informed advance consent should be secured from the client; (c) the client expects that only personnel employed by the law firm will handle the matter; or (d) non-lawyers are to be billed to the client on a basis other than cost, in which case the client's informed advance consent is needed.").

The ABA joined this chorus in July 2008.

- 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 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).

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.**

Duty to Retain E-Mail Communications

Hypothetical 10

One of your senior vice presidents recently read about the severe sanctions companies have faced for not preserving their electronic communications. He just e-mailed you with two quick questions, and wants an answer as soon as you can get back to him.

- (a) Does your company have to preserve all of its electronic communications, because they might be relevant in some future litigation?

NO

- (b) Does your company's duty to preserve electronic communications begin when your company files a lawsuit, or is sued by a plaintiff?

NO

Analysis

(a)-(b) The obligation of any litigant (or possible litigant) to preserve potentially responsive evidence obviously does not present a new issue -- but the enormous volume of electronic communications clearly makes the analysis more difficult, and exacerbates the possible burden.

It should go without saying that litigants must preserve potentially responsive documents (including electronic documents). The duty obviously arises before a discovery request arrives -- and can also arise before litigation begins.

The most widely quoted standard comes from the Southern District of New York. Zubulake v. UBS Warburg LLC, 220 F.R.D. 212 (S.D.N.Y. 2003). In Zubulake, the court held that

[t]he obligation to preserve evidence arises . . . when a party should have known that the evidence may be relevant to future litigation.

Id. at 216 (internal quotations and citation omitted). The court found that officials at UBS Warburg were on notice that the plaintiff might sue the company for gender discrimination -- thus triggering the preservation duty.

In discussing the scope of a company's duty to preserve, the court rejected a blanket duty.

Must a corporation, upon recognizing the threat of litigation, preserve every shred of paper, every e-mail or electronic document, and every backup tape? The answer is clearly, "no". Such a rule would cripple large corporations, like UBS, that are almost always involved in litigation. As a general rule, then, a party need not preserve all backup tapes even when it reasonably anticipates litigation.

Id. at 217 (footnote omitted).

Instead, the court explained that a company which anticipates being sued "must not destroy unique, relevant evidence that might be useful to an adversary." Id. The court held that the preservation duty extends to all "key players" in the anticipated litigation. Id. at 217-18.

The Zubulake court found that UBS should have preserved electronic documents that were ultimately destroyed. It ordered UBS Warburg to pay the cost of the plaintiff's motion, directed the company to reimburse plaintiff for the costs of any depositions or re-depositions necessitated by the document destruction, and approved a jury instruction containing an adverse inference about the destroyed back-up tapes. Zubulake v. UBS Warburg LLC, 229 F.R.D. 422 (S.D.N.Y. 2004).

Other courts have adopted essentially the same standard, although sometimes using different language. E*Trade Sec. LLC v. Deutsche Bank AG, 230 F.R.D. 582, 588 (D. Minn. 2005) (assessing a spoliation claim against Deutsche Bank; explaining that a

litigant asserting a spoliation claim must show bad faith if its adversary destroyed documents before the appropriate "trigger date," but need not show bad faith if documents are destroyed after that date; defining the "trigger date" as the date "when a party knows or should have known that the evidence is relevant to future or current litigation"). Broccoli v. Echostar Commc'ns Corp., 229 F.R.D. 506, 512, 510-11 (D. Md. 2005) (holding that a company had engaged in spoliation, and approving "an adverse spoliation of evidence instruction in the jury instructions"; "[T]he evidence in this case amply supports the finding that Echostar was placed on notice of potential litigation arising out of plaintiff's allegations of sexual harassment and retaliation as early as January 2001. Beginning in January 2001, Broccoli informed two of his supervisors at Echostar, Chip Paulson and Larry Goldman (as each testified on deposition and at trial), both orally and via email, of Andersen's sexually harassing behavior. Paulson and Goldman testified that Broccoli made numerous complaints to them regarding Andersen's inappropriate behavior throughout 2001 and that they subsequently relayed, verbally and via email, the complaints to their superiors at Echostar."; finding that the company should have started saving document as of that time).

Large companies have found themselves severely punished for destroying electronic documents under this standard.

For instance, a court ordered Philip Morris to pay \$2.75 million as a sanction for not preserving relevant e-mails, and also prohibited Philip Morris from relying on the testimony of any of its executives who had not saved their e-mails. United States v. Philip Morris USA Inc., 327 F. Supp. 2d 21 (D.D.C. 2004). Morgan Stanley lost a highly publicized Florida state court case involving allegations of document spoliation. The

verdict against Morgan Stanley was approximately \$1.5 billion. Landon Thomas Jr., Jury Tallies Morgan's Total at \$1.45 Billion, N.Y. Times, May 19, 2005, at C-1. See also Morgan Stanley \$1.45B Judgment Points to E-Mail Peril, Reuters, May 20, 2005.

In perhaps the most frightening new development, a court pointed to a litigant's work product claim (reflected on its privilege log) as triggering a duty to have preserved pertinent documents -- starting on the day that the company created the purportedly work-product protected document. Anderson v. Sotheby's Inc. Severance Plan, No. 04 Civ. 8180 (SAS), 2005 U.S. Dist. LEXIS 23517, at *16, *15-16 (S.D.N.Y. Oct. 11, 2005) (assessing an ERISA claim by a former Sotheby's employee; declining to grant plaintiff an adverse inference instruction based on what he alleged to have been Sotheby's wrongful spoliation of evidence; noting that the Sotheby's Severance Plan Committee Secretary routinely destroyed her handwritten meeting notes after she prepared a typewritten Committee Report, so plaintiff had not proven that the ERISA Administrator had "intentionally destroyed notes of the Committee meetings to prevent plaintiff from obtaining them"; however, also noting that the Committee's Chair and the Plan Administrator's outside lawyer interviewed several employees (of Sotheby's successor Cendant) regarding the plaintiff's claims, and that Sotheby's lawyers O'Melveny & Myers had withheld the interview notes during discovery by asserting both attorney-client privilege and work product protection; although the Magistrate Judge had earlier found that the notes were prepared in the ordinary course of business and therefore did not deserve either protection, "because the Administrator claimed that it reasonably anticipated litigation as of July 6, 2004 [the date of the interview], the Administrator's duty to preserve the documents arose as of that date." (emphases added)).

Another court addressed a situation in which a defendant accused of spoliation argued that it had not anticipated litigation until 2002 -- after it had destroyed the pertinent documents. When the defendant later claimed work product protection for documents created before 2002, the plaintiff argued against such protection. Albemarle Corp. v. Great Lakes Chem. Corp., Civ. A. No. 02-505-A-M3 c/w Civ. A. No. 02-506-A-M3, 2008 U.S. Dist. LEXIS 4710 (M.D. La. Jan. 22, 2008).

The court rejected plaintiff's argument -- noting that "the court made no finding with regard to alleged spoliation or anticipation of litigation that would serve to penalize [defendant] Great Lakes from making any claim of work-product privilege for documents created prior to filing suit." Id. Although perhaps not stated as bluntly as it could, this decision essentially declined to equate the mental states: (1) required to assert work product protection, and (2) triggering the duty to save responsive documents.

The law in this area is evolving, but unfortunately has not yet reached a point where companies can make rational decisions about exactly when to begin preserving e-mails, and the scope of the preservation. No court seems to have required companies to preserve all of their e-mails simply because they might at some point be sued. On the other hand, a company's duty to preserve electronic communication begins before a company files a lawsuit, or is sued by a plaintiff.

It appears that courts might use the same "trigger" date for the duty to preserve electronic communication as they use when assessing a work product claim. Companies should keep this in mind before picking an aggressively early date to begin a work product protection claim.

Recent changes to Fed. R. Civ. P. 16 and Fed. R. Civ. P. 26 presumably will focus companies' attention on this matter, which might reduce the likelihood that companies will find themselves in this position.

Best Answer

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