George Mason American Inn Of Court

October 14, 2015

AGENDA

TOPIC: Ethics Challenge: An Interactive Discussion Of Current Hypotheticals With Answers And Analysis

1. Opening Remarks and Introduction of Speakers (Robert J. Hartsoe)…… 2 Min.
2. Discussion of ABA Ethics Opinion on Social Media and Texas Legal Ethics Opinion (Michael W. Robinson)……...7 Min.
3. Ethics Hypotheticals
    a. Hypo # 5: Complications in Applying the Normal Conflicts Rules……. 15 min.
    b. Hypo # 6: Effect of Adversity Among Jointly-Represented Clients…… 10 min.
    c. Hypo# 8: Social Media & Advertising……. 10 min.
    d. Hypo # 9: Working Away from Home……. 10 min.
    e. Hypo # 10: Oops! Inadvertent Disclosure……..... 10 min.
4. Summary of New Rule 5:8, Proposed Amendments to Address Technology and Confidentiality In Digital Age, and New Rule 1:10 (Michael W. Robinson)…… 7 min.
5. Concluding Remarks…….. 2 min.

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II. Summary of New Rule 5:8, Proposed Amendments to Address Technology and Confidentiality In Digital Age, and New Rule 1:10

III. ABA Ethics Opinion No. 466

Iv. Professional Ethics Committee for the State Bar of Texas Opinion No. 648

HYPOTHETICAL # 1

Limited Scope Representation – Ghostwriting Pleadings

You have just met with a potential client, who has filed a *pro se* retaliation/wrongful discharge claim against her former employer. The opposing party is represented by able counsel and has filed a demurrer with a 20-page brief. Your potential client explains that she cannot afford to bring you into the matter to handle the case, but wishes to hire you to draft and prepare a written response to the demurrer. She insists that you will not have to enter an appearance, that she simply wants a brief prepared that she can file and argue to the Court.

Can you write a brief for your potential client and provide it to her to file with the court?

You fully discuss the facts of the dispute with your client, and realize that there is a potential claim under federal law, but are concerned that if those claims are added the case will be removed to the E.D.Va. Can you prepare pleadings for your potential client raising the new claim, if the case is then removable?

Answer and Analysis

A lawyer can write a brief or other appropriate pleadings that will be presented to the Court by a *pro se* client.

The Virginia State Bar Standing Committee on Legal Ethics issued LEO 1874 to address right of clients and counsel to limit the scope of a representation. LEO 1874 authorizes limited scope representation, including "ghostwriting" pleadings for a *pro se* litigant. The LEO overruled prior opinions which opined that ghostwriting would violate obligations of candor to the Court. The Committee opined that while disclosure to the court of the fact that a pleading was prepared with the substantial assistance of counsel may likely represent a "best practices" approach, a lawyer was not obligated to make such disclosure to the court or to require the client to make such a disclosure. Indeed, the representation could be considered a confidential matter subject to the requirements of Rule 1.6.

As recognized in the opinion, courts may address the appropriateness of ghostwriting through rules or potentially standing orders. As recognized in the opinion, a number of federal court opinions have expressly admonished counsel against ghostwriting or providing undisclosed assistance to *pro se* litigants. Counsel must be aware of local court requirements because even if limited assistance and ghostwriting are not ethically prohibited, a court may consider the practice prohibited. In response to LEO 1874, the United States District Court for the Eastern District of Virginia issued a new local rule prohibiting ghostwriting and providing that a lawyer providing substantial assistance to a *pro se* litigant has made a *de facto* appearance in the case and may be deemed counsel of record. *See E.D.Va. L.R. 83.1*.

HYPOTHETICAL # 2

Communication with a Represented Party.

You represent a client in a highly contested divorce and equitable distribution proceeding. You have been stonewalled in all of your efforts to engage opposing counsel in good faith settlement discussions; all efforts met only by resistance or silence. You conclude, objectively in your view, that opposing counsel is not presenting an accurate picture of the case to his client or discussing with his clients your active efforts to resolve the matter. Your client insists that if her spouse was presented with an appropriate opportunity, a settlement could be reached.

You write counsel a 10-page detailed analysis of all the issues, and close your letter with a very fair settlement offer.

Can you copy the opposing party on your settlement correspondence to counsel?

Before sending your correspondence, you receive an email from counsel indicating, once again, little desire in settlement. Counsel has cc'd both his client **and** your client on the email. You decide to respond with your expertly crafted analysis. Can you attach your analysis to a "reply all" email?

Answer and Analysis

No. Opposing counsel has violated **Rule 4.2** by copying your client on his e-mail to you without your prior consent. That does not "open the door" for you to do the same. Sending a "reply all" e-mail to opposing counsel's client is the electronic equivalent of copying opposing counsel's client on a letter mailed to opposing counsel. That opposing counsel may have contemporaneous knowledge of your communication with his client is not a substitute for the required "consent" of opposing counsel to the communication.

You should take some comfort in the fact that opposing counsel has an ethical duty under **Rule 1.4** to communicate your offer to his client, and that your own client remains free to communicate with the opposite spouse, unaffected by Rule 4.2. You must take care, however, that you not use your client as your agent in any communication with the opposing party by "orchestrating," "scripting," or "masterminding" any communications your client has with the opposing spouse. *See,* Rules 4.2 and 8.4(a).

HYPOTHETICAL # 3

Duty of Court-Appointed Counsel to Appeal.

In order to fulfill your obligation under Rule 6.1, you've agreed to take on a limited number of court appointed criminal matters. You are appointed to represent a defendant on a felony robbery charge. You investigate the facts, interview appropriate witnesses, and engage the Commonwealth Attorney in plea discussions. With a full understanding of the matter, you work out what you believe is a very favorable plea agreement. Your client pleads guilty in accordance with the plea agreement, and receives a sentence even lower than anticipated. You congratulate yourself on a job well done. A few days later, your client tells you that he wants you to appeal his conviction and insists upon an appeal.

What are your ethical obligations in light of your client's direction to appeal?

Answer and Analysis

You must file your client's appeal. A court-appointed attorney must file petitions for appeal to the Court of Appeals of Virginia and to the Supreme Court of Virginia, or the applicable federal appellate court, when directed to do so by an indigent client, even when such an appeal is to a conviction entered following a guilty plea, and is deemed frivolous by the attorney. This action is in required by *Anders v. California*, 386 U.S. 738 (1967), and Virginia cases decided thereunder.

By filing an "*Anders* brief" you protect your client's constitutional rights by activating an obligation of the appellate court to examine on its own the record of the client's case, afford the client himself an opportunity to present appellate issues to the court, and call for the court to determine if there are any grounds for appeal upon which the court-appointed attorney should be ordered to proceed. The court may grant the court-appointed attorney leave to withdraw, and dismiss the appeal in the event the court determines that there are no grounds for appeal. *See,* **LEO 1880**

Same facts as above. You convince your client not to appeal, and close your file. A few months later, you get a call from a lawyer in the Attorney General's office. Your former client has filed a habeas petition based on ineffective assistance of counsel, and the lawyer wants to meet to discuss your representation and obtain a copy of your file.

You must continue to protect your client's confidences under **Rule 1.6(a)** and should not disclose to the Attorney General's office more than is reasonably necessary to defend the petition, and should then only make disclosures *when* such disclosures are justified. Many habeas petitions are dismissed on legal or procedural grounds, which do not require disclosure of client confidences. *See,* **Rule 1.6(b)(2)** and **LEO 1859**.

What are your ethical obligations to your former client?

HYPOTHETICAL #4

Client Confidences regarding Prior False Testimony.

You have just taken over from prior counsel a new litigation matter, representing the majority owner of a closely held corporation in an ugly dispute with family members. The litigation will involve, among many other issues, disputes regarding corporate control and operation of the family business.

Your new client now advises you that during a preliminary injunction hearing held at the beginning of the case, he submitted false records and testified falsely about those records. He advises that he never told prior counsel about the false evidence.

1. What are your obligations regarding this conduct?

    (a) Say a silent thanks that you did not represent him at the PI hearing;

    (b) Encourage him to disclose the conduct to opposing counsel and the court;

    (c) Insist he disclose to the court on threat of your disclosure and withdrawal as counsel.

2. Same facts as above. After discussions with your client, he resists any course involving disclosure of his prior conduct, and discharges you as counsel. What are your obligations in light of his disclosure?

    (a) Say a silent thanks that you've been discharged;

    (b) Disclose to the court the perpetration of a fraud on the court;

    (c) Stay silent.

Answer and Analysis

1. The best answer is C. Addressing issues of potential client perjury or presentation of false evidence before a tribunal raises issues under Rules 1.6, 3.3, and 1.16.

First, Rule 1.6(c) requires a lawyer to disclose information that a client has – in the course of the representation– perpetrated a fraud related to the subject matter of the representation upon a tribunal. Under the hypothetical above, Rule 1.6(c) does not mandate disclosure because the client had not perpetrated a fraud in the course of the lawyer's representation.

However, the lawyer's continued representation implicates duties to the court under Rule 3.3(a) which prohibits a lawyer from "failing to disclose" information to a tribunal "necessary to avoid assisting a criminal or fraudulent act by the client, subject to Rule 1.6." Similarly, Rule 1.16 requires a lawyer to decline or terminate a representation if the continued representation will result in a violation of the Rules. As applied here, if the lawyer continues to represent the client without correcting the prior record, the lawyer is essentially assisting the continued perpetration of the fraud on the court. Thus, even though the Rule implicates confidentiality obligations, the lawyer's best course of action in these circumstances is to require the client to allow the lawyer to disclose the prior misconduct with the proviso that non-disclosure would require the lawyer to withdraw.

2. When the lawyer has been discharged, a different analysis is required. As noted, Rule 1.6(c) does not mandate disclosure because the fraud on the tribunal did not occur on the lawyer's watch, i.e., during the representation. Moreover, since the lawyer will not be representing the client further, the lawyer does not risk future violations of the Rule, or assist the client's continued perpetration.

Rule 3.3(d), which includes a general obligation to disclose information establishing a fraud upon the tribunal, does not mandate disclosure precisely because the conduct is that of a client and the lawyer's knowledge stems from confidential communications. Thus, the client's prior false testimony and introduction of false evidence is a client confidence subject to the full protection of Rule 1.6 and should not be disclosed. Thus, the best answer is (C): stay silent and maintain the client's confidences.

HYPOTHETICAL # 5

Complications in Applying the Normal Conflicts Rules.

After nearly five years of intense discovery and pre-trial motions, the largest case you have ever handled is moving toward trial. You received the other side's expert designations this morning. The adversary's main expert is your former client. While representing him years ago in an unrelated matter, you learned confidences that you could use now to destroy his credibility. What do you do?

(A) File a motion to preclude the other side's reliance on that expert?

(B) Arrange for "conflicts counsel" to cross-examine that expert at his deposition and at trial?

(C) Tell your current client that you have to withdraw as its counsel on the eve of trial?

(A) FILE A MOTION TO PRECLUDE THE OTHER SIDE'S RELIANCE ON THAT EXPERT (PROBABLY)

OR

(B) ARRANGE FOR "CONFLICTS COUNSEL" TO CROSS-EXAMINE THAT EXPERT AT HIS DEPOSITION AND AT TRIAL (PROBABLY)

Answer and Analysis

In the litigation context, lawyers sometimes face conflicts dilemmas because the adversary has designated fact witnesses or expert witnesses whom the lawyer currently or formerly represented. These scenarios can result in lawyers having to choose from among a number of unpalatable options.

This scenario itself can spawn a number of variations.

First, the conflicts issue can arise at various times. In some situations, lawyers know before they even take a litigation matter that a current or former client is likely to be a material witness for the adversary. This would force the lawyer to immediately confront a conflicts issue.

In contrast, the issue might arise later in the litigation when new issues require the involvement of new witnesses. For obvious reasons, the later the issue arises, the more troublesome for the lawyer.

Second, the pertinent witness whose presence creates the dilemma might be a fact witness or an expert witness. Expert witnesses present the most difficult problems. Adversaries cannot select fact witnesses with material pertinent information, but have that power when hiring testifying experts. This creates an enormous chance of mischief -- because it allows adversaries to deliberately select a lawyer's former client as his or her testifying expert. To make matters worse, the timing of the litigation schedule often results in both sides designing testifying experts very late in the process -- which can exacerbate the dilemma.

Third, the adverse fact or testifying expert witness could be the lawyer's current or former client. Most courts or bars would agree that cross-examining a current client involves adversity that normally requires consent. That is, the very act of cross-examination usually amounts to adversity, even if the lawyer does not possess confidential information that could be used against the adverse witness. The participation of former clients as adverse witnesses creates a more subtle issue. Lawyers' ability to be adverse to a former client depends on information that the lawyer learned while representing the client. So there is a chance that a lawyer could ethically cross-examine a former client, depending on the information the lawyer possesses.

Fourth, lawyers finding themselves in this unfortunate scenario might have to deal with one or both of the basic conflicts rules. As mentioned above, lawyers might have to assess the applicability of the pertinent state's parallel to ABA Model Rule 1.7(a)(1) -- which prohibits direct adversity to a client absent consent. A much more difficult dilemma could involve the pertinent state parallel to ABA Model Rule 1.7(a)(2) -which creates a conflict if there is a "significant risk"

that the lawyer's representation of a client will be "materially limited" by the lawyer's other responsibilities or interests. For instance, a lawyer prohibited from, or agreeing to refrain from, using a former client's confidential information in cross-examining the former client might confront this type of conflict, because the lawyer would find her duty of loyalty and diligence to her client "materially limited." In other words, the lawyer could not adequately serve the current litigation client because the lawyer would essentially have one arm tied behind her back.

All of these variables make this among the most difficult conflicts dilemma lawyers can face.

Lawyers confronting this scenario seem to have six choices.

First, lawyers can obtain former clients' consent to use the former clients' protected client information against their cross-examination. Courts and bars have acknowledged this possibility, but it seems implausible that any rational former client would ever grant such a consent.

Second, lawyers might be able to cross-examine former clients if they do not have any pertinent confidential information that they could use against the former client.

- State v. Frisco, 119 P.3d 1093, 1098 (Colo. 2005) (refusing to disqualify a criminal lawyer from representing a drug defendant even though the lawyer might be called upon to cross examine a former client named as a coconspirator and a possible prosecution witness; explaining that the former client had not established a "substantial risk that confidential factual information as would normally have been obtained by defense counsel in the prior representation would materially advance the position of the defendant in this prosecution").

Alternatively, such lawyers might be able to use harmful information they obtained from the former client to the former client's disadvantage during the cross-examination -- if the information is "generally known." ABA Model Rule 1.9 permits such use. In 2013, the Ohio Bar explained that lawyers may undertake such cross-examinations if the harmful information they would like to use has become generally known.

- Ohio LEO 2013-4 (10/11/13) ("When a lawyer learns that a current representation may require a cross-examination of an adverse witness who is a former client, the lawyer must analyze the potential conflict under Prof.Cond.R. 1.7 and 1.9. Prof.Cond.R. 1.7(a)(2) indicates that a conflict of interest is created in the current representation if there is a substantial risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for the client will be materially limited by the lawyer's responsibilities to the former client. The lawyer's responsibilities to the former client are articulated in Prof.Cond.R. 1.9. If a current representation involves the same or a substantially related matter and the current client's interests in the matter are materially adverse to the former client, Prof.Cond.R. 1.9(a) dictates that the lawyer may not continue the current representation without the former client's informed consent, confirmed in writing."; "If the current matter and the matter involving the former client are unrelated, the former client does not have to consent to the current representation, but the lawyer must comply with Prof.Cond.R. 1.9(c). That provision prohibits the lawyer from using information relating to the representation of the former client to the disadvantage of the former client unless the information has become generally known or the Rules of Professional Conduct permit or require such use. Prof.Cond.R. 1.9(c) also prohibits the lawyer from revealing information relating to the representation of the former client except as permitted or required by the Rules."; "In this opinion, the Board was asked whether a public defender may present evidence of a prior conviction to impeach a former client. The public defender represented the former client in the case that led to the conviction and did not learn of the former client's potential adverse testimony until the current representation was underway.

  Impeachment of the former client violates Prof.Cond.R. 1.9(c) because the public defender would be using information relating to the prior representation to attack the credibility of the former client, which would disadvantage the former client. However, the public defender may proceed with the current representation if the former client's criminal conviction is generally known, the use of former-client information is permitted or required by the Rules of Professional Conduct, or the former client provides informed consent. Absent these conditions, the public defender must seek permission from the court to withdraw from the current representation." (emphasis added); "For purposes of this opinion, the Board is asked to assume that the public defender no longer represents the prosecution witness, that the witness was convicted in the prior case, and that the underlying crime is an impeachable offense under Evid.R. 609. As part of the current representation, the public defender may have to cross-examine the prosecution witness/former client regarding the prior offense in an effort to attack their credibility. Because the requester of this opinion is a public defender, we will address the issue presented in that context, but our analysis is also applicable in both private criminal and civil representations where .a lawyer must cross-examine a former client."; "Neither Prof.Cond.R. 1.7 nor Prof.Cond.R. 1.9 automatically ban a lawyer from representing a client when an adverse trial witness is a former client and the current matter is unrelated to the representation of the former client. Accord Ill. State. Bar Assn., Op. 05-01 (Jan. 2006); Md. State Bar Assn., Commt. On Ethics, Op. 2004-24 (May 14, 2004); Utah State Bar, Ethics Advisory

Op. Commt. Op. 02-06 (June 12, 2002)."; "[T]he starting point for any conflict of interest analysis, the public defender must determine whether his or her ability to carry out an appropriate course of action for the current client will be materially limited by the public defender's responsibilities to the former client . . . If the public defender concludes that the cross-examination does not required him or her to use information relating to the representation of the former client to the disadvantage of the former client or to reveal such information, the public defender does not run afoul of Prof. Cond. R. 1.9(c) and the current representation may continue absent other conflict of interest issues."; "The requester, though, indicates that the public defender may be required to use evidence of the former client's criminal conviction for impeachment purposes at trial. Because the public defender represented the former client in the criminal case providing the basis for impeachment, evidence of the conviction would be 'information relating to the representation' under Prof.Cond.R. 1.9(c)(1). Unlike the 'confidences and secrets' approach to confidentiality in the now-repealed Code of Professional Responsibility, information relating to the representation of a client includes both 'matters communicated in confidence by the client' and 'all information relating to the representation, whatever its source.' Prof.Cond.R. 1.6, Comment [3]."; "The phrase 'generally known,' however, is not defined in the Rules, Model Rules, or any of the accompanying comments. As a result, the following Restatement definition has been referenced when determining whether information relating to a representation is generally known: 'Whether information is generally known depends on all circumstances relevant in obtaining the information. Information contained in books or records in public libraries, public-record depositaries such as government offices, or in publicly accessible electronic-data storage is generally known if the particular information is obtainable through publicly available indexes and similar methods of access. Information is not generally known when a person interested in knowing the information could obtain it only by means of special knowledge or substantial difficulty or expense. Special knowledge includes information about the whereabouts or identity of a person or other source from which the information can be acquired, if those facts are not themselves generally known.' Restatement of the Law 3d, The Law Governing Lawyers, Section 59, Comment d (2001)."; "Upon review of motions for withdrawal or disqualification of counsel in criminal cases that are based upon former-client conflicts, courts have taken the view that a former client's criminal conviction is generally known because it is a matter of public record."; "In general, criminal convictions are matters of public record and are usually accessible through public databases not requiring any particular expertise to obtain the conviction information. Standard practice for prosecutors would be to obtain the criminal records of their witnesses, possibly from the witnesses themselves, and this information must be supplied to the public defender during discovery."; "Based upon the Restatement definition, the fact that criminal histories of witnesses are exchanged during discovery, and the case law on former-client conflict allegations, the Board's view is that as long as the public defender's cross-examination of the former client is limited to the existence of the prior conviction for impeachment, the public defender can satisfy the 'generally known' exception in Prof.Cond.R. 1.9(c)(1). If competent representation of the current client requires the public defender to use additional information relating to the

representation of the former client to their disadvantage, the public defender must make an individual determination as to whether this additional information is also generally known."; "Outside the context of the record of a criminal conviction in the scenario before the Board, lawyers are cautioned that the presence of information 'in the public record does not necessarily mean that the information is generally known within the meaning of Rule 1.9(c).' See Bennett, Cohen & Whittaker, Annotated Model Rules of Professional Conduct, 175 (7th Ed. 2011), citing Pallon v. Roggio, D.N.J. Nos. 04-3625 (JAP) and 06-1068 (FLW), 2006 WL 2466854 (Aug. 24 2006); Steel v. Gen. Motors Corp., 912 F. Supp. 724 (D.N.J. 1995); In re Anonymous, 932 N.E. 2d 671 (Ind. 2010). '[T]he fact that information has become known to some others does not deprive it of protection if it has not become generally known in the relevant sector of the public.' 1 Restatement, Section 59, Comment d. The following cases provide additional instruction on this issue: Disciplinary Counsel v. Cicero, 134 Ohio St. 3d 311, 2012-Ohio-5457, 982 N.E. 2d 650 (drug raid in which federal agents seized college football memorabilia was generally known, information learned during a meeting with a prospective client was not); In re Gordon Properties, L.L.C., U.S. Bankr. Ct., E.D. Va., Nos. 09-18086-RGM and 12-1562-RGM, 2013 WL 681430, f.n. 6 (Feb. 25, 2013), quoting Va. State Bar, Legal Ethics Commt., Op. 1609 (Sept. 4, 1995) ('information regarding a judgment obtained by a law firm on behalf of a client, 'even though available in the public record, is a secret, learned within the attorney-client relationship'); Emmanouil v. Roomio, D.N.J. No. 06-1068, 2008 WL 1790449 (Apr. 18, 2008) (information regarding civil defendant's testimony in a prior case was generally known when defendant disclosed the information to the plaintiff and the prior case was a matter of public record); Sealed Party v. Sealed Party, S.D. Tex. No. Civ. A. H-04-2229, 2006 WL 1207732 (May 4, 2006) (information in press release announcing a civil settlement that was in the public record was generally known, the fact that the case settled and the lawyer's impressions about the case were not); In re Adelphia Communications, supra, (list of properties owned by particular parties was not generally known information; information was publicly available, but would require substantial difficulty or expense to produce a list of the properties owned by the parties and related entities); Cohen v. Woglin, E.D. Pa. No. 87-2007, 1993 WL 232206 (June. 24, 1993) (magazine and newspaper articles, published court decisions, court pleadings, and public records in a government office are generally known; pleadings filed under seal and records of an international court are not). As evidenced by these cases, particularly in civil matters, whether information in a public record is generally known may require a review of the applicable facts and circumstances."; "When faced with the cross-examination of a former client that requires the use of information relating to the prior representation to the detriment of the former client, a public defender may conclude that he or she cannot satisfy either of the exceptions in Prof. Cond. R. 1.9(c)(1). That is, the information is not generally known and the use of the information is not permitted or required by the Rules. In this situation, the public defender may either obtain the former client's informed consent or seek permission to withdraw from the current representation." (emphasis added); "The public defender may not be able to obtain the former client's informed consent to the use of disadvantageous information about the former client's representation. Given that the former client is an adverse witness, competent and

diligent representation of the current client probably requires the cross-examination and potential impeachment of the former client. If the public defender is unable to fulfill this obligation to the current client, cannot satisfy one of the exceptions in Prof.Cond.R. 1.9(c)(1), or secure the former client's informed consent, the public defender must withdraw from the current representation."; "[E]ven when a different public defender in the same office represented the former client/adverse witness, if that public defender would be prohibited by Prof.Cond.R. 1.7 or 1.9 from representing the current client, all of the public defenders in the office are disqualified under Prof. Cond. R. 1.10." (emphasis added)).

A 2011 North Carolina legal ethics opinion also analyzed lawyers' ability to use generally known information in cross-examining a former client -- in contrast to a total prohibition on the inherent adversity involved in cross-examining a current client.

- North Carolina LEO 2010-3 (1/21/11) (holding that a criminal defense lawyer may not cross-examine a police officer whom the lawyer represents in an unrelated matter; "If Lawyer must cross-examine Officer in Defendant's criminal matter, Lawyer has a concurrent conflict of interest. Comment [6] to Rule 1.7 specifically provides that a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. Any attempt to discredit Officer's credibility through cross-examination would violate Lawyer's duty of loyalty to Officer. Conversely, the failure to challenge Officer's damaging testimony through rigorous cross-examination would violate Lawyer's duty to competently and diligently represent Defendant. Lawyer cannot cross-examine Officer without the risk of either jeopardizing Defendant's case by foregoing a line of aggressive questioning or breaching a duty of loyalty and/or confidentiality owed to Officer."; "If Lawyer must cross-examine Officer in Defendant's criminal matter, the resultant conflict of interest is nonconsentable."; "In the given fact scenario, Lawyer cannot reasonably conclude that he can protect the interests of each client, or competently and diligently represent each client, if Lawyer must cross-examine Officer in Defendant's criminal matter."; explaining that the lawyer could depose the Officer if he was a former client and any information that the lawyer had acquired from the client was generally known; "An exception to Rule 1.9(c) provides that a lawyer may use confidential information of a former client to the disadvantage of the former client when the information has become 'generally known.' Rule 1.9(c)(1). If certain information as to the internal affairs investigation is generally known, that information may be used to cross-examine Officer without obtaining the consent of Officer. *See* Rule 1.9, cmt. [8].").

Upon reflection, this type of analysis seems superficial at best. A lawyer cross-examining a former client by using "generally known" adverse information undoubtedly has more detailed information that is not "generally known." As a practical matter, there seems to be no way that a

lawyer could only use "generally known" information while adequately serving his or her current client.

Third, lawyers might cross-examine former clients about whom lawyers have adverse information -- but refrain from using that information.

The Restatement provides an illustration of this principle -- but reaching what some might see as an implausible conclusion.

> Lawyer, now a prosecutor, had formerly represented. Client in defending against a felony charge. During the course of a confidential interview, Client related to Lawyer a willingness to commit perjury. Lawyer is now prosecuting another person, Defendant, for a matter not substantially related to the former prosecution. In the jurisdiction, a defendant is not required to serve notice of defense witnesses that will be called. During the defense case, Defendant's lawyer calls Client as an alibi witness. Lawyer could not reasonably have known previously that Client would be called. Because of the lack of substantial relationship between the matters, Lawyer was not prohibited from undertaking the prosecution. Because Lawyer's knowledge of Client's statement about willingness to lie is confidential client information under § 59, Lawyer may not use that information in cross-examining Client, but otherwise Lawyer may cross-examine Client vigorously.

Restatement (Third) of Law Governing Lawyers § 312 cmt. f, illus. 6 (2000) (emphases added).

It is difficult to imagine that the prosecutor in this illustration could adequately serve the public while foregoing use of such valuable information

In 2009, a Vermont opinion explained that this tactic might work.

- Vermont LEO 2009-4 (2009) (holding that a law firm could represent a client adverse to the principal of a corporation which the law firm had previously represented, although the law firm could not use information obtained from the principal; explaining the situation: "The requesting attorney's firm represents A and has done so for a number of years. One matter handled by the requesting attorney was A's purchase of a parcel of land that adjoins lands owned by a corporation in which B is a principal. The firm has never represented the landowner corporation but has formed an LLC for B and has performed collection work for a different corporation in which B is also a principal. Both files are now closed. There are no open files in which

either B or any of his business entities are represented by the firm."; "Recently, on A's behalf, the firm sent a letter to the landowner corporation disputing the landowner corporation's claimed right of access onto A's adjoining property. In response to that letter, B has claimed a conflict of interest and requested that the firm refrain from representing A in connection with the dispute."; "In B's claim of conflict he asserts that the requesting attorney's firm's representation of A 'creates at least the appearance of conflict'. He also expresses a concern that his interest may have been compromised by dual loyalties. He goes on to claim that the firm is privy to financial and legal concerns that would compromise him in his negotiations with A. The firm has no active case files for B, and no retainer arrangement exists."; noting that the principal was never the law firm's client; "In the matter at hand, the firm has never actually represented the corporation which is the landowner. Rather, it has represented one of the principals of the landowner corporation in the formation of an LLC and it has performed collection work for an entirely different corporation. On these facts, we do not believe that the landowner corporation is even a former client. While this may seem an overly technical conclusion, clients should understand that they have separate legal identities from the entities they create so long as those entities have been properly formed and maintained."; warning the law firm that it could not use information obtained from the principal; "Having reached that conclusion, however[,] does not mean that the firm may use information obtained in the course of its work for B and B's other corporation in a manner which is adverse to B's interests. The firm has a continuing duty under Rule 1.9(c) to maintain the confidentiality of information obtained and not to use any information that it may have against B or B's interests."; "It is noted that Rule 1.9(c) does not preclude representation of A. Rather it prohibits the requesting attorney from using or revealing information relating to the former representation of B against B. Even if we (1) assume that the requesting attorney's firm has confidential or secret information obtained during the prior representations of B or B's other corporation; and (2) infer that the requesting attorney has access to all of the firm's files, Rule 1.9(c) does not preclude the requesting attorney from representing A. Rather it precludes the use of confidential or secret information to B's disadvantage." (emphases added)).

Not surprisingly, other courts and bars reject this as a possible solution to the lawyer's dilemma.

- In re Compact Disc Minimum Advertized Price Antitrust Litig., MDL Docket No. 1361, 2001 U.S. Dist. LEXIS 25818, at *11-12, *12-14 (D. Me. Mar. 12, 2001) (disqualifying Milberg Weiss because until just a few days earlier the law firm had been representing other retailers in a class action alleging essentially the same improper conduct; rejecting the law firm's argument that it would not be adverse to its former retail clients; "Milberg Weiss does not plan to name any of its retailer clients as defendants; it does not expect any other plaintiff to name these retailers (a consolidated amended complaint has been filed and does not name them); it does not expect to take any discovery from the retailers; and therefore, its expert says, the consumer class action will not have any adverse effects on the economic interests of

the retailers. Simon Report at 8-9. In addition, Professor Simon notes that 'Milberg Weiss has made it clear that it will not use (any confidential retailed information in consumer actions," (emphasis added) (footnote omitted); "These measures may eliminate any adverse effect on Milberg Weiss's prior retailer clients, but unfortunately they carry the distinct potential of reducing Milberg Weiss's effectiveness in representing the putative consumer plaintiff class vigorously here. The prior representation has created an incentive for Milberg Weiss not to name those retailers as defendants or to seek any information from them that may be helpful in prosecuting the consumer case: And it has already agreed not to use certain information it acquired in the earlier case. Milberg Weiss characterizes its former retailer clients as 'mom and pop operations,' thereby suggesting that there would be no reason to name them as defendants here. Given its interest, I cannot rely on the Milberg Weiss statement to make it so. Even if I treat the decision by other law firms not to name these four retailers as defendants in the Consolidated Amended Complaint as confirming the lack of any reason to name them as defendants, I cannot be confident that even 'mom and pop operations' would have no useful information to discover or, indeed, that Milberg Weiss is not already in possession of such information that it has agreed not to use. I conclude that the retailer and consumer representations are inescapably adverse. Therefore, Milberg Weiss must be disqualified." (emphasis added) (footnote omitted)).

- Los Angeles County LEO 463 (12/17/90) (analyzing the following situation: "Law Firm advised A to rectify its intentional concealment. A refused and made clear its desire that law firm not reveal A's securities fraud to anyone. La Firm withdrew from further representation of A, having represented it for a total of about six weeks. Corporation B has been a client of law firm for many years and has received various legal services. After Law Firm terminated its representation of A, B informed Law firm that it had received from A a proposal for the financing of one of B's ventures and that it wanted Law Firm's advice in responding to A."; holding that the new law firm could not disclose the former's security fraud, which would impact the firm's representation of the new client; "[W]ithout A's consent to reveal this information to B, Law Firm would be caught between the rock of protecting A's confidences and the hard place of zealously representing B. Knowing of A's dishonesty, law firm might be tempted to recommend that B take special precautions to protect itself, but would be forbidden from using A's confidences to its detriment in this matter. Thus, Law Firm would constantly have to second-guess whether its advice to B was affected by Law Firm's secret knowledge of A's dishonesty." (emphasis added); "[I]f Law Firm were to represent B without revealing its knowledge of A's dishonesty, it would create an impermissible appearance of impropriety. B would quite justifiably become upset if it later learned that Law Firm acted as its lawyer in the transaction without warning B that its proposed borrower lacked integrity. Law Firm's response that it was merely maintaining its

> obligation of confidentiality to A would be little solace to B, who had its lawyer conceal admittedly relevant information. Even if Law Firm provided exactly the same advice as would another law firm that was ignorant of A's wrongdoing, it would not dispel the appearance of impropriety." (emphasis added); "If A's consent is required and A declines to give consent for Law Firm to represent, B, it should be fairly easy for Law Firm to explain without revealing any confidential information why it cannot undertake the representation. Law Firm may simply tell B that it had previously represented A and that a conflict of interest prevents Law Firm from undertaking the representation. If B inquires further, Law Firm may say that it is bound not to say more for fear of revealing client confidences."; "[I]f A's dishonesty is deemed material to the representation, then Law Firm may not represent B without A's consent to disclose that information. On the other hand, if A's dishonesty is deemed not to be material for some reason, then it need not be disclosed for B's consent to be 'informed,' unless for some reason it appears that this information might adversely affect the representation.").

This seems like a completely unworkable option. It is difficult to think that the former client would accept any of the lawyer's assurances that the lawyer would not use confidential information. In fact, the lawyer could not help but be affected by pertinent adverse information -- and would undoubtedly fashion the cross-examination in light of such information. And if the lawyer did not do that, he or she would almost undoubtedly fall short of adequately serving the current litigation client.

Fourth, lawyers might seek a court order precluding the adversary from calling a fact or expert witness whose participation creates this dilemma. This step would appear unavailable in the case of fact witnesses, although it is possible to imagine a court precluding the adversary from calling some redundant fact witness whose participation would create the conflict.

This scenario is more likely to occur in the case of one party hiring the other side's lawyer's former client as a testifying expert. This is the sort of mischief mentioned above.

One bar acknowledged this as a possible solution.

- Los Angeles County LEO 513 (7/18/05) (addressing an adverse party's designation (as an expert witness on its behalf) of a former client of a lawyer representing a litigant; "If an attorney is asked to accept representation of a client in a matter in which a former client of the attorney has already been designated as an expert witness, the attorney must determine if his or her present employment might require the attorney to use or disclose confidences obtained from the former client and now expert. If so, Rule 3-310(E) mandates that the attorney may accept the representation only with the informed written consent of the former client. Where the attorney's involvement in the matter preceded the former client/expert's designation, or if the former client does not consent to such involvement, the attorney has options other than asking for the consent of the former client. In such a case, the attorney may ethically seek an appropriate order from the court, which could include that the expert be precluded from testifying if another expert is available to the opposing party; that the former client's decision to serve as an expert constitutes a waiver of the privilege; or that the former client may not serve as an expert witness unless the former client agrees to a limited waiver of any duty of confidentiality as it pertains to the pending case." (emphasis added)).

Another bar has acknowledged the possibility of this solution working.

- Vermont LEO 2008-4 (2008) (holding that a lawyer cannot cross-examine a former client if the lawyer could use confidential information against the former client; explaining the following factual situation: A lawyer representing a mother who was seeking to terminate a guardianship, while the guardian sought to terminate the mother's parental rights; explaining that just before the third day of a hearing, one of the lawyer's clients (on an unrelated matter) came forward as a fact witness in support of the guardian and adverse to the lawyer's client; explaining that the lawyer had filed a motion seeking to preclude the fact witness' testimony as cumulative, but analyzing the lawyer's responsibility should the court deny that motion; "Law Firm A had acquired information regarding Witness C in the course of its prior and ongoing representation of her that would be extremely valuable for cross-examination (bearing directly upon credibility and truthfulness, among other things), meaning that Law Firm A's duties to Mother require that it be aired. However, this information is adverse to Witness C, meaning that exposing it would violate Law Firm A's duties of loyalty and confidentiality to Witness C, quite aside from the ethical conflict that would be presented by cross examining a current client." (emphasis added); "Law Firm A is correct in its understanding that if the current client/witness is called to testify, Law Firm A must resign from its representation. This conclusion applies not only to Rule 1.6 (governing confidentiality obligations) but also under Rule 1.7."; concluding that "[a] lawyer may not continue to represent a client in trial if another current client will be called as a directly adverse witness by opposing counsel and where the lawyer possesses confidential client information adverse to the client witness that should be used during cross-examination of the client witness"; also holding that "[w]hether the mid-trial disclosure of the client/witness requires preclusion of the witness, a new trial, or some other consequences is a legal question

for the court and outside the scope of this Section's authority"; explaining that. "we cannot opine on how to resolve the trial dilemma. The suggestion that has been made to use a special counsel for cross examination of the client witness strikes us as problematic [explaining that "[o]n these facts, for example, we note that the Mother is entitled to have her attorney attack the testimony of the client witness in closing argument as well as during cross examination."] At the same time, we are not in a position to weigh, let alone decide, whether the witness is cumulative, what the consequences of mid-trial notice of the witness ought to be, whether her exclusion would be prejudicial, or the host of other possible legal issues presented." (emphasis added); "In conclusion, we would like to reemphasize that there is no dilemma under the Rules. If the current client is permitted to testify as an adverse witness in the circumstances presented, Law Firm A must withdraw." (emphasis added)).

This seems like a logical solution that would preserve a lawyer's ability to continue representing the client. Ironically, however, precluding the adversary from calling a flawed testifying expert might actually harm the lawyer's current client. If another lawyer (unencumbered with a conflict) would ultimately discover the adversary's testifying expert's weaknesses, the client would be better off by retaining a new lawyer rather than precluding the adversary's designation of a testifying expert vulnerable to being destroyed by cross-examination.

Fifth, lawyers might seek to arrange for another lawyer (usually called "conflicts counsel") to cross-examine the testifying expert.

A surprising number of courts have permitted this solution.

- Corp. Express Ofc. Prods., Inc. v. Gamache (In re Motion to Quash Deposition Subpoena to Lance Wagarj, Civ. No. 1:06-MC-127 (LEK/RFT), 2006 U.S. Dist. LEXIS 90345, at *44-45 (N.D.N.Y. Dec. 13, 2006)
  (recognizing that co-counsel could handle a deposition if another counsel could not undertake the deposition because of a conflict; "[I]t is represented by the Defendants that Verrill Dana LLP has not been tainted by any proximity to Wagar's confidential information or him personally. Verrill Dana LLP has never represented Wagar, was not involved in the New Jersey Litigation, and avers that they have not received any of Wagar's confidential information. See generally, Dkt. No. 7, the Affidavit & Declarations. To have them conduct the deposition as opposed to Nixon Peabody and Rider would be efficacious safeguard.").

- United States v. Canty, Case No. 01-80571, 2006 U.S. Dist. LEXIS 86422, at *6 (E.D. Mich. Nov. 30, 2006) (recognizing that co-counsel could undertake a cross-examination if counsel had a conflict, as long as the client consented to the arrangement; "To the extent a conflict does exist, however, the court finds that it is not 'severe' and is remedied by (1) Mr. Lustig's representation that he will not cross-examine or be involved in the cross-examination of Mr. Jones; and (2) Mr. Canty's knowing, intelligent waiver of any such conflict in open court.").

- Sykes v. Matter, 316 F. Supp. 2d 630, 632, 633 & n.4, 636 (M.D. Tenn. 2004) (recommending use of conflicts counsel to depose the defendant's expert, after explaining that the plaintiff's law firm had represented the defendant's expert's employer; "This motion to disqualify must be denied. Boult Cummings is the conflicted party here, and the one to which the ethical rules cited in the motion apply. If anyone is to be disqualified because of an ethical dilemma, it would seem only logical that it should be those members of the profession whose rules present the dilemma. Moreover, the alternative argument that Mr. Kopra's voluntary appearance in this action impliedly waives any privilege held by LBMC is without merit, inasmuch as the rule relating to such use of information obtained during representation of a former client . . . clearly requires that such consent be given after consultation." (footnote omitted); "Lacking consent to reveal client confidences, counsel states that the continued participation of Mr. Kopra in this lawsuit leaves them with a Hobson's choice, between utilizing confidential information during cross-examination in violation of ethical duties on the one hand, and failing to zealously represent Mr. Sykes on the other hand, in violation of ethical duties, if potentially damaging confidential information is not so utilized. However, this argument ignores the third alternative that is always available to counsel laboring under, as the motion papers put it, 'an irreconcilable difficulty under the Rules of Professional Conduct': withdrawal from representation. While counsel argues that 'it is basically unfair to require Mr. Sykes or his counsel' to make this choice, inasmuch as this conflict was not of their making, such is the sometimes unfortunate reality of proper practice within the legal profession. However, giving due consideration to Mr. Sykes' substantial interest in retaining and proceeding with counsel of his choice, the undersigned concludes that withdrawal is not required here, inasmuch as the potential for conflict can be removed by allowing plaintiff to retain other counsel for purposes of cross-examining Mr. Kopra at his deposition and at trial." (emphasis added); explaining that "[c]ounsel also argued that requiring them to withdraw or disqualifying them would declare an 'open season' on lawyers who could be conflicted out by the deliberate selection of an expert they had represented in the past. This concern is a bit overstated. The circumstance in which counsel would have knowledge of an adversary's prior representation of an expert or his/her firm would seem to be rare."; "In sum, the undersigned finds that the ethical demands of the Tennessee Rules of Professional Conduct, as well as the competing interests of (1) plaintiff in being represented by counsel of his choosing, (2) defendants in going forward with the expert of their choosing, and (3) LBMC/Mr. Kopra in maintaining the confidentiality of information imparted to Boult Cummings during the course of the prior representation, will be adequately

complied with and best served by allowing defendants' expert and plaintiff's counsel to remain, but disqualifying Boult Cummings from participating in any manner in the cross-examination of Mr. Kopra at deposition and during the trial of this matter. Plaintiff's counsel is admonished that outside counsel shall have absolutely no exposure to any information of any kind relating to Boult Cummings' prior representation of LBMC and its affiliates, or obtained therefrom.").

- United States v. Fawell, No. 02 CR 310, 2002 U.S. Dist. LEXIS 10415, at *2425, *25, *28, *29-30 (N.D. III. June 11, 2002) (recognizing that counsel unable to cross-examine government witnesses can hire another lawyer to do so; "Yet another argument for disqualification of Altheimer & Gray relates to the Firm's representation of dozens of witnesses before the grand jury. Some five to ten of these individuals will, according to the government, be trial witnesses as well. The government asserts that their interests will be materially adverse to those of Defendant CFR, creating a conflict too significant to be subject to waiver."; "Defendant CFR has made a substantial effort to address this issue. First, as CFR notes, an attorney's prior representation of government witnesses does not always require disqualification, so long as appropriate waivers are obtained and appropriate safeguards are established. Since the filing of the motion to disqualify the Firm, CFR has hired Thomas M. Breen, an experienced former prosecutor and criminal defense attorney, to conduct cross-examinations of the ten persons identified by the government as potential trial witnesses. . . . This procedure -- of 'screening off' a conflicted attorney for purposes of cross-examination -- was approved by the Seventh Circuit only last month in United States v. Britton, 289 F.3d 976, 2002 U.S. App. LEXIS 8805, 2002 WL 922106 (7th Cir. 2002)."; "More troublesome is CFR's own waiver of the conflict created by its attorneys' inability to cross-examine, or even to argue the weight of, this damaging testimony."; "The court is concerned for protecting the, integrity of the process and the rights of each Defendant and witness. Under some circumstances, it might also be concerned about the wisdom of a defendant's decision to waive the right to have its own attorneys cross-examine critical government witnesses. In the circumstances presented here, however, the court believes CFR has made a competent and counseled decision concerning the issue and is not inclined to second-guess a determination made by a responsible official with full access to relevant information.").

- United States v. Britton, 289 F.3d 976, 979, 979-80, 982, 983 (7th Cir. 2002) (affirming criminal defendant's mail fraud conviction; rejecting defendant's argument that the trial court erred in denying her second-chair defense counsel's motion to withdraw because of a conflict; agreeing with the trial court that co-counsel could cross-examine a government witness that the second-chair defense counsel could not cross-examine because of the conflict; "On November 17, 2000, approximately two and one-half weeks before the scheduled start of the trial, Britton filed a motion to continue the trial date in order to allow second-chair defense counsel Christopher A. DeRango to withdraw. The motion stated that DeRango had a conflict of interest in that he

had previously represented a government witness named Bruce Swanson."; "[T]he court initially ruled that because the potential impeachment material related to a billing record, it was not covered by the attorney-client, privilege. The court noted that defendant's lead counsel, Daniel Cain, could obtain this record with a trial subpoena. Additionally, in order to avoid the 'appearance of impropriety' presented by an attorney cross-examining his former client, the court held that DeRango would not be allowed to participate in the cross-examination of Swanson or to disclose any information related to the billing record."; "Britton next contends that the district court erred by denying DeRango's motion to withdraw due to his conflict of interest. In the alternative, Britton contends that the district court erred by prohibiting DeRango from questioning Swanson."; "[W]e see no err [sic] in the district court's actions as the testimony that DeRango sought to give was easily available through another source, and we conclude that neither 'extraordinary circumstances' nor 'compelling reasons' existed to find otherwise. We also see no problem with the district court's screening off of DeRango as we have previously approved the use of such measures in order to avoid potential ethical violations." (footnote omitted)).

- Swanson v. Wabash, Inc., 585 F. Supp. 1094, 1097 (N.D. III. 1984) (recognizing that co-counsel could cross-examine a witness whom counsel could not undertake to cross-examine because of a conflict; "Assuming that the CUHS lawyers who dealt with Crawford have refrained from disclosing Crawford's confidences, no conflict of interest is possible in this case if Crawford is cross-examined at trial only by non-CUHS attorneys. Coffield and Flynn have indicated that such an arrangement could easily be made. Their present clients are aware of Crawford's concerns, yet they all desire Coffield and Flynn to continue as their counsel. Moreover, several attorneys from firms other than CUHS represent other defendants in this action; these lawyers might conduct any cross-examination of Crawford if he is called as a witness. Thus, disqualification of Coffield and Flynn (and other partners and associates of CUHS) is unnecessary if the following conditions are met: (1) attorneys Coffield, Carden, Slavin and Pope file affidavits with his Court stating that they have not revealed any of Crawford's confidences; and (2) the four defendants represented by Coffield and Flynn file written waivers of any right they may possess to have Coffield and Flynn cross-examine Crawford should he testify at trial. In addition, this Court hereby enters a protective order prohibiting the CUHS attorneys who dealt with Crawford from revealing to any of the other defendants' attorneys herein or to any other individual whomsoever any of Crawford's confidences in the future. Fulfillment of these conditions, coupled with the cross-examination of Crawford by non-CUHS lawyers, obviates the need for disqualifying any attorneys from this case." (footnote omitted)),

In 2002, a court blocked a conflicts lawyer from taking a deposition, but held out hope that he could conduct the trial examination.

- Advanced Mfg. Techs., Inc. v. Motorola, Inc., No. CIV 99-01219 PHX-MHM (LOA), 2002 U.S. Dist. LEXIS 12055, at *23 (D. Ariz. July 2, 2002) (prohibiting a lawyer from deposing a nonparty witness because it had a conflict, but putting off until later whether the lawyer could examine the witness at trial; "It is ordered that Non-Party M. Dean Corley's Rule 26(c) Motion For Protective Order (doc. #164) is **GRANTED.** Attorney Douglas L. Irish and the law firm of Lewis & Roca, LLP, are hereby precluded from taking or otherwise participating in M. Dean Corley's future deposition, if any, due to their impermissible conflict of interest between dual clients, Motorola and Corley, whose interests at this time appear to be materially adverse. Whether Irish' may be permitted to examine or cross examine Corley at time of trial will abide by further order of the trial judge.").

Arranging for conflicts counsel presents a tempting solution, but it might not always work. Presumably, the lawyer handling the case would have to brief conflicts counsel on the issues. During that briefing session, the lawyer possessing damaging confidential client communication about the adversary's expert would have to resist (through language or even body language) pointing conflicts counsel in the direction of the damaging information that the lawyer's existing client would want to use -- but which the lawyer's continuing confidentiality duty to the former client would prohibit the lawyer from using.

Not surprisingly, at least one bar has recognized that this tactic generally would not work.

- Vermont LEO 2008-4 (2008) (holding that a lawyer cannot cross-examine a former client if the lawyer could use confidential information against the former client; explaining the following factual situation: A lawyer representing a mother who was seeking to terminate a guardianship, while the guardian sought to terminate the mother's parental rights; explaining that just before the third day of a hearing, one of the lawyer's clients (on an unrelated matter) came forward as a fact witness in support of the guardian and adverse to the lawyer's client; explaining that the lawyer .had filed a motion seeking to preclude the fact witness' testimony as cumulative, but analyzing the lawyer's responsibility should the court deny that motion; "Law Firm A had acquired information regarding Witness C in the course of its prior and ongoing representation of her that would be extremely valuable for cross-examination (bearing directly upon credibility and truthfulness, among other things), meaning that Law Firm A's duties to Mother require that it be aired. However, this information is adverse to Witness C, meaning that exposing it would violate Law Firm A's duties of loyalty and confidentiality to Witness C, quite aside

from the ethical conflict that would be presented by cross examining a current client." (emphasis added); "Law Firm A is correct in its understanding that if the current client/witness is called to testify, Law Firm A must resign from its representation. This conclusion applies not only to Rule 1.6 (governing confidentiality obligations) but also under Rule 1.7."; concluding that "[a] lawyer may not continue to represent a client in trial if another current client will be called as a directly adverse witness by opposing counsel and where the lawyer possesses confidential client information adverse to the client witness that should be used during cross-examination of the client witness"; also holding that "[w]hether the mid-trial disclosure of the client/witness requires preclusion of the witness, a new trial, or some other consequences is a legal question for the court and outside the scope of this Section's authority"; explaining that "we cannot opine on how to resolve the trial dilemma. The suggestion that has been made to use a special counsel for cross examination of the client witness strikes us as problematic [explaining that "[o]n these facts, for example, we note that the Mother is entitled to have her attorney attack the testimony of the client witness in closing argument as well as during cross examination."] At the same time, we are not in a position to weigh, let alone decide, whether the witness is cumulative, what the consequences of mid-trial notice of the witness ought to be, whether her exclusion would be prejudicial, or the host of other possible legal issues presented." (emphasis added); "In conclusion, we would like to reemphasize that there is no dilemma under the Rules. If the current client is permitted to testify as an adverse witness in the circumstances presented, Law Firm A must withdraw." (emphasis added)).

Sixth, lawyers finding themselves in this awkward position might have no choice but to withdraw.

Some bars have quickly reached this conclusion.

- Virginia LEO 1407 (3/12/91) (analyzing a situation in which a law firm represented a doctor in two malpractice cases; explaining that the doctor later appeared as an expert witness for plaintiff in a case defended by another of the firm's lawyers; further explaining that the doctor denied ever having been a defendant in a malpractice action, but the defense lawyer learned from a partner that the firm had earlier represented the doctor on two occasions; holding that this information was a "secret" (although it could be obtained from public records) because it was gained in a professional relationship; prohibiting the lawyer's continued representation of the client, because the lawyer could not effectively cross-examine the plaintiff's expert doctor (unless the doctor consented to disclosure of the confidential information).).

In 2007, a Philadelphia legal ethics opinion was not quite as blunt, but recognized this as the probable outcome.

- Philadelphia LEO 2007-11 (07/07) (declining to decide whether a law firm must be disqualified; explaining that the law firm was representing a plaintiff suing a medical professional who had previously been represented by one of the firm's lateral hires; noting that during the lateral hire's previous representation of the same medical professional, the lawyer concluded that the medical professional had provided incorrect testimony, and therefore had dismissed the medical professional's lawsuit with prejudice; "Significant concerns are however raised by the provisions of Rule 1.9c. The inquirer has confidential information about the defendant. First, that the defendant has lied under oath, not once but at least twice, the second time after he had been specifically directed to tell the truth. This could lead a reasonable attorney to conclude that the defendant might have a propensity to lie when giving sworn testimony. Second, the inquirer possesses at least some economic information about the defendant's earnings at the time of the first litigation. It is quite possible, depending on the outcome of the present matter[,] that there could be issues regarding the defendant's financial ability to pay an excess judgment. As such, the economic information gleaned from the first representation could in fact be material to the firm's representation of its present client."; "[E]ven assuming it can not [sic] be admitted at trial, there are a number of subtle, even unconscious ways in which awareness of this information could be used to the detriment of the inquirer's former client. The attorney handling the case, aware that the defendant has lied under oath in the past, might use a different form of cross examination knowing that the defendant is not truthful all the time. On the other hand, the lawyer might avoid certain issues in discovery that he normally might pursue because of the firm's obligation to protect the former client's confidentiality. If learned by a different attorney without the confidentiality constraint, it could be used in settlement negotiations on behalf of the current client, i.e.[,] an attempt could be made to admit it, resulting in a greater willingness on the part of the defendant to settle the matter. Should the inquirer believe that absent its confidential nature, is [sic] constrained from even considering its use, and this impacts the representation of the firm's current client, posing a conflict under Rule 1.7a2. Because of confidentiality, the firm's present client can not [sic] be told of the conflict, and thus the present client can not [sic] waive it based on informed consent"; "In conclusion, while the Committee is not prepared to conclude based on the limited facts as they are presently understood that the inquirer's firm must withdraw from the present matter, it is advising that the inquirer must go beyond simply positing that the firm could not and would not use the information. The inquirer must address whether the constraints imposed on him by his Rule 1.6 obligations to his former client potentially place his present firm at odds with its ethical obligations to its present client.").

The 2013 Ohio legal ethics opinion discussed above concluded that the lawyer would have to withdraw if the lawyer possessed protected client confidential information not generally known, which could be used against the witness.

- See Ohio LEO 2013-4 (10/11/13) (discussed above).

The Vermont legal ethics opinion mentioned above indicated that a lawyer would have to withdraw if unsuccessful in precluding the adversary from designating the lawyer's former client as a testifying expert.

- See Vermont LEO 2008-4 (2008) (discussed above).

Best Answer

The best answer to this hypothetical is **(A) FILE A MOTION TO PRECLUDE THE OTHER SIDE'S RELIANCE ON THAT EXPERT (PROBABLY) OR (B) ARRANGE FOR "CONFLICTS COUNSEL" TO CROSS-EXAMINE THAT EXPERT AT HIS DEPOSITION AND AT TRIAL (PROBABLY).**

HYPOTHETICAL # 6

Effect of Adversity Among Jointly-Represented Clients.

You formerly represented two co-defendants in litigating and ultimately settling a products liability case. One of your former clients has now sued the other for contribution and indemnity, and filed a third-party subpoena seeking all of your files. The other former client objected to the subpoena, claiming privilege protection for its unilateral communications with you and your colleagues during the joint representation.

Is the objecting former client likely to successfully assert privilege protection for the unilateral communications with you during the joint representation?

(B) NO

Answer and Analysis

As in nearly every other way, joint representations generate complicated and subtle issues involving the fate of the attorney-client privilege if the joint clients have a falling-out. In that situation, one former jointly represented client might try to block the other former jointly represented client's access to communications and documents reflecting his or her private communications with their joint lawyer.

Of course, a lawyer in this awkward situation does not face a dilemma if both of the former jointly represented clients agree to the lawyer's disclosure of the joint files to both clients or their new lawyers. A controversy arises only if one of the former clients objects to the lawyer providing such access to both of the former clients.

It is important to recognize that the privilege issue focuses on the ability of the former clients to obtain and then use communications and documents that deserved privilege

protection when created or made. [1] Most importantly, the privilege protection prevents third parties from obtaining access to those communications and documents -absent a waiver (discussed below). Thus, the privilege generally continues to shield the communications and documents from the world -- the issue is whether one former jointly represented client can shield the communications and documents from the other former jointly represented client. As explained more fully below, however, the issue of one former jointly represented client's access to the other's communication might affect what third parties will also be given access to them.

One might have thought that the privilege effect of a dispute among former jointly represented clients would simply mirror the arrangement they had during happier days. Although the ABA Model Rules seem to indicate (although not very clearly) that a lawyer for jointly represented clients must keep secrets absent an agreement to the contrary, both the Restatement and the ACTEC Commentaries apparently take the opposite approach (although, again, not very clearly).

If a court applied one of these general principles during a joint representation, one would expect a court to apply the same standard after a joint representation ends -whether the former jointly represented clients are in litigation with each other or not. And certainly if the law recognizes -- or the clients agree to -- a "no secrets" standard, there is no reason why the same standard would not apply after the joint representation ends. Thus, it is somewhat odd that the law developed a separate jurisprudence on the effect of former jointly represented clients' disputes with each other.

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[1] As a matter of ethics, a lawyer in this setting theoretically might have to resist one joint client's request for the communications or documents -- if the other client insists that the lawyer do so. This presumably would generate some dispute in court, with the normal fight over discovery. Even though the lawyer could properly predict that he or she would ultimately be compelled to turn over the communications or documents, doing so unilaterally (without the formal clients' unanimous consent or court order) might put the lawyer at risk.

Although the authorities differ somewhat in their approach, the bottom line is that most authorities allow the former jointly represented clients to obtain such access, and then use the privileged communications and documents in a dispute with the other former clients. Although some of the authorities and case law use the term "waiver" in discussing this approach, it would seem more accurate to use the term "evaporation" in describing what happens to the privilege in that situation. Neither former jointly represented client can disclose any jointly owned privileged communications to third parties even if there is a falling-out among the former clients. Still, their use of such communications or documents might provide access to such third parties, thus causing the privilege to essentially "evaporate."

ABA Model Rules. The ABA Model Rules provide some guidance about the attorney-client privilege implications of a joint representation.

> A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

ABA Model Rule 1.7 cmt. [30] (emphasis added).

Interestingly, this approach seems inconsistent with the ABA Model Rules' and an ABA legal ethics opinion's[2] statement that lawyers must maintain the confidentiality of

[2] ABA LEO 450 (4/9/08) ("When a lawyer represents multiple clients in the same or related matters, the obligation of confidentiality to each sometimes may conflict with the obligation of disclosure to each," Lawyers hired by an insurance company to represent both an insured employer and an employee must explain at the beginning of the representation whom the lawyer represents (which is based on state law). If there is a chance of adversity in this type of joint representation, "[a]n advance waiver from the carrier or employer, permitting the lawyer to continue representing the insured in the event conflicts arise, may well be appropriate." The lawyer faces a dilemma if he learns confidential information from one client that will cause that client damage if disclosed to the other client; "Absent an express agreement among the lawyer and the clients that satisfies the 'informed consent' standard of Rule 1.6(a), the Committee believes that whenever information related to the representation of a client may be harmful to the client in the hands of another client or a third person, . . . the lawyer is prohibited by Rule 1.6 from revealing that information to any person, including the other client and the third person, unless disclosure is permitted under an exception to Rule 1.6." It is "highly doubtful" that consents provided by the jointly represented clients "before the lawyer understands the facts giving rise to the conflict" will satisfy the "informed consent" standards. Absent a valid consent, a lawyer must withdraw from representing the other client if the lawyer cannot make the disclosure to the client, and cannot fulfill his other obligations without such a disclosure. In the case of a lawyer hired by an insurance company to represent an insured, "[t]he lawyer may not reveal the information gained by the lawyer from either the employee or the witness, or use it to the benefit of the insurance company, . . .

information obtained from each jointly represented client -- in the absence of an explicit "no secrets" agreement.

If the ABA's "default" position is that a lawyer jointly representing clients must keep confidences even in the best of times, one would expect a consistent approach if the joint clients have a falling-out. In other words, one would expect the ABA to allow now-adverse joint clients to withhold their privileged communications from the other, since that is what the ABA required (absent some agreement to the contrary) when the joint clients were not adverse to one another.

This inconsistency should come as no surprise -- the ABA Model Rules and the pertinent legal ethics opinions contain numerous internal inconsistencies.

Restatement. The Restatement takes the same basic approach as the ABA Model Rules.

> A lawyer may represent two or more clients in the same matter as co-clients either when there is no conflict of interest between them . . or when a conflict exists but the co-clients have adequately consented . . . . When a conflict of interest exists, as part of the process of obtaining consent, the lawyer is required to inform each co-client of the effect of joint representation upon disclosure of confidential information . . . , including both that all material information will be shared with each co-client during the course of the representation and that a communicating co-client will be unable to assert the attorney-client privilege against the other in the .event of later adverse proceedings between them.

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when the revelation might result in denial of insurance protection to the employee." "Lawyers routinely have multiple clients with unrelated matters, and may not share the information of one client with other clients. The difference when the lawyer represents multiple clients on the same or a related matter is that the lawyer has a duty to communicate with all of the clients about that matter. Each client is entitled to the benefit of Rule 1.6 with respect to information relating to that client's representation, and a lawyer whose representation of multiple clients is not prohibited by Rule 1.7 is bound to protect the information of each client from disclosure, whether to other clients or otherwise." The insured's normal duty to cooperate with the insurance company does not undermine the lawyer's duty to protect the insured's information from disclosure to the insurance company, if disclosure would harm the insured. A lawyer hired by an insurance company to represent both an employer and an employee must obtain the employee's consent to disclose information that might allow the employer to seek to avoid liability for the employee's actions (the employee's failure to consent to the disclosure would bar the lawyer from seeking the employer's consent to forego such a defense). A lawyer facing this dilemma may have to withdraw from representing all of the clients, but "[t]he lawyer may be able to continue representing the insured, the 'primary' client in most jurisdictions, depending in part on whether that topic has been clarified in advance.").

Restatement (Third) of Law Governing Lawyers § 60 cmt. I (2000) (emphasis added). The same concept appears in a later Restatement section.

> (1) If two or more persons are jointly represented by the same lawyer in a matter, a communication of either co-client that otherwise qualifies as privileged under §§ 68-72 and relates to matters of common interest is privileged as against third persons, and any co-client may invoke the privilege, unless it has been waived by the client who made the communication.
>
> (2) Unless the co-clients have agreed otherwise, a communication described in Subsection (1) is not privileged as between the co-clients in a subsequent adverse proceeding between them.

Restatement (Third) of Law Governing Lawyers § 75 (2000) (emphases added).

However, the Restatement includes more subtle provisions than found in the ABA Model Rules, which provides more useful guidance.

First, a jointly represented client's general power to seek the lawyer's communications or documents relating to the joint representation generally covers even communications of which the jointly represented client was unaware at the time.

> As stated in Subsection (2), in a subsequent proceeding in which former co-clients are adverse, one of them may not invoke the attorney-client privilege against the other with respect to communications involving either of them during the co-client relationship. That rule applies whether or not the co-client's communication had been disclosed to the other during the co-client representation, unless they had otherwise agreed.

Id. cmt. d (emphasis added).

An illustration explains how this principle works.

> Client X and Client Y jointly consult Lawyer about establishing a business, without coming to any agreement about the confidentiality of their communications to Lawyer. X sends .a confidential memorandum to Lawyer in which X outlines the proposed business arrangement as X understands it. The joint representation then terminates, and Y knows that X sent the memorandum but not its contents. Subsequently, Y files suit against X to

> recover damages arising out of the business venture. Although X's memorandum would be privileged against a third person, in the litigation between X and Y the memorandum is not privileged. That result follows although Y never knew the contents of the letter during the joint representation.

Id. illus. 1 (emphases added).

Second, the Restatement indicates that this general rule does not apply in all circumstances. The provision recognizes that the general rule governs "unless the co-clients have agreed otherwise." Restatement (Third) of Law Governing Lawyers § 75 (2000). Presumably this refers to a "keep secrets" approach to which the clients have earlier agreed.

> Co-clients may agree that the lawyer will not disclose certain confidential communications of one co-client to other co-clients. If the co-clients have so agreed and the co-clients are subsequently involved in adverse proceedings, the communicating client can invoke the privilege with respect to such communications not in fact disclosed to the former co-client seeking to introduce it. In the absence of such an agreement, the lawyer ordinarily is required to convey communications to all interested co-clients . . . .

Id. cmt. d (emphasis added). The clients apparently therefore have at least some power to mold the effect of a later dispute on their attorney-client privilege.

Thus, the Restatement follows the ABA Model Rules in prohibiting jointly represented clients from withholding communications or documents from each other based on the attorney-client privilege -- but then adds an exception if the clients have agreed to a different approach.

Numerous courts and bars have articulated the basic rule that former jointly represented clients cannot withhold privileged communications from each other in a later dispute between them.

- In re Equaphor Inc., Ch. 7 Case No. 10-20490-BFK, 2012 Bankr. LEXIS 2129, at *9-10 (Bankr. E.D. Va. May 11, 2012) (assessing a situation in which the same law firm jointly represented Equaphor and three individual codefendants in a derivative action; holding that the bankruptcy trustee for Equaphor could access law firm's

files; rejecting the individual clients' argument that in the derivative action Equaphor had only been a "nominal defendant"; noting that "while [Equaphor] may have been named as a nominal defendant, there is no such thing as a nominal client of a law firm," and that "there is no support in the case law for a 'nominal defendant exception' to the principle that all clients are entitled to an attorney's files." (emphasis added)).

- Ft. Myers Historic L.P. v. Economou (In re Economou), 362 B.R. 893, 896 (Bankr. N.D. III. 2007) ("When two or more clients consult or retain an attorney on matters of common interest, the communications between each of them and the attorney are privileged against disclosure to third parties. . . . However, those communications are not privileged in a subsequent controversy between the clients."; finding the common interest doctrine inapplicable because the situation did not involve joint clients hiring the same lawyer).

- Teleglobe Commc'ns Corp. v. BCE, Inc. (In re Teleglobe Commc'ns. Corp.), 493 F.3d 345, 366, 368 (3d Cir. 2007) (assessing efforts by a trustee for bankrupt second-tier subsidiaries to discover communications between the parent and the parent's lawyers; ultimately reversing a district court's finding that the trustee deserved all of the documents, and remanding for determination of whether the parent's lawyers jointly represented the now-bankrupt second-tier subsidiaries in the matter to which the pertinent documents relate; "The great caveat of the joint-client privilege is that it only protects communications from compelled disclosure to parties outside the joint representation. When former co-clients sue one another, the default rule is that all communications made in the course of the joint representation are discoverable."; rejecting the corporate parent's argument that the default rule could be the opposite when the lawyer jointly represents the parent company and its wholly owned subsidiaries; "Simply following the default rule against information shielding creates simpler, and more predictable, ground rules."; "We predict that Delaware courts would apply the adverse litigation exception in all situations, even those in which the joint clients are wholly owned by the same person or entity.").

- In re JDN Real Estate--McKinney L.P., 211 S.W.3d 907, 922 (Tex. App. 2006) ("Where the attorney acts as counsel for two parties, communications made to the attorney for the purpose of facilitating the rendition of legal services to the clients are privileged, except in a controversy between the clients.").

- Official Comm. of Asbestos Claimants of G-I Holding, Inc. v. Heyman, No. 01 Civ. 8539 (RWS), 2006 U.S. Dist. LEXIS 73272, at *8, *9-11 (S.D.N.Y. Oct. 6, 2006) (addressing efforts by the official. Committee of Asbestos Claimants to seek communication relating to the company's spin-off of a subsidiary; "It bears noting that waiver by one joint client of its communications with an attorney does not enable a third party to discover each of the other joint clients' communications with the same counsel. Rather, '[o]ne co-client does not have authority to waive the privilege with respect to another co-client's communications to their common lawyer.' Restatement (Third) of The Law Governing Lawyers, § 75 cmt. 3 (2000). In

instances where a communication involves 'two or more co-clients, all those co-clients must join in a waiver, unless a nonwaiving co-client's communication can be redacted from the document.' Id."; also analyzing the Committee's claim that what the court called the "joint client exception" applied; "The Committee contends that notwithstanding the above rule, the joint-client doctrine prohibits ISP from maintaining a privilege over materials relating to the 1997 Transactions that G-I also claimed as privileged. In other words, the Committee argues that prior to the spin-off, G-I and ISP were represented by the same attorney on a matter of common interest (the 1997 transactions) and that, as such, ISP and G-I jointly held the privilege. The Committee further contends that because G-I and ISP shared legal representation on a matter, neither can assert the privilege against the other. Under the joint client exception to the attorney-client privilege, 'an attorney who represents two parties with respect to a single matter may not assert the privilege in a later dispute between the clients.' . . . Under the general rule, the joint client exception may be invoked by one former joint client against another only in a subsequent proceeding in which the two parties maintain adverse positions. . . . In the instant case, G-I and ISP do not maintain adverse positions in the underlying litigation. Indeed, it is not G-I that here seeks to invoke the joint client doctrine, but rather the Committee, a third-party, that seeks to do so. The Committee highlights the adversity between G-I and ISP that results from the April 28 Opinion -namely that G-I's privilege with respect to materials surrounding the 1997 Transactions was eviscerated while ISP's was not. It is concluded that such adversity arising out of the application of the privilege or the production of documents does not warrant invocation of the joint client exception. Because ISP and G-I do not maintain adverse positions vis-A-vis [sic] the plaintiff Committee's claims, it is concluded that the joint client exception is inapplicable in the instant case.").

- Brandon v. W. Bend Mut. Ins. Co., 681 N.W.2d 633, 639 (Iowa 2004) ("[E]xceptions have been carved from the attorney-client privilege. . . . This exception is known as the 'joint-client' exception. Actual consultation by both clients with the attorney is not a prerequisite to the application of the joint-client exception. . . . The attorney is duty-bound to divulge such communications by one joint client to the other joint client. . . . Thus, when the same attorney acts for two parties, the communications are privileged from third persons in the controversy, but not in a subsequent controversy between the two parties.").

- Duncan v. Duncan, 56 Va. Cir. 262, 263, 263-64 (Va. Cir. Ct. 2001) (addressing efforts by a lawyer to avoid discovery sought by plaintiff (administrator of a daughter's estate) from the lawyer, who formerly represented both the plaintiff and his former wife (mother of the deceased , daughter); "Although no Virginia Court appears to have addressed this issue directly, the clear majority of reviewing courts has held that the attorney-client privilege does not preclude an attorney, who originally represented both parties in a prior matter, from disclosing information in a subsequent action between the parties."; "Plaintiff's exhibits establish that Greenspun's [lawyer] representation of Plaintiff and Defendant was joint in nature. The parties executed a joint agreement engaging Greenspun's services. He

represented both parties in an investigation related to the parties' common interest, namely criminal liability for their daughter's death and loss of parental rights. Furthermore, Greenspun freely shared information regarding elements of the case with, and between, both parties. The Defendant recognized that Greenspun was sharing information disclosed by the Defendant with Plaintiff during the parties' prior joint representation. Lastly, the parties did not have an implied or express agreement with Greenspun that he would maintain their respective confidences in this joint representation. Defendant's communications with Greenspun are not privileged in the absence of an agreement between the parties stipulating otherwise."; ordering the lawyer to answer deposition questions and produce documents to plaintiff).

- FDIC v. Ogden Corp., 202 F.3d 454, 461 (1st Cir. 2000) ("Despite its venerable provenance, the attorney-client privilege is not absolute. One recognized exception renders the privilege inapplicable to disputes between joint clients. . . . Thus, when a lawyer represents multiple clients having a common interest, communications between the lawyer and any one (or more) of the clients are privileged as to outsiders but not inter sese."; "In determining whether parties are 'joint clients,' courts may consider multiple factors, including but not limited to matters such as payment arrangements, allocation of decisionmaking roles, requests for advice, attendance at meetings, frequency and content of correspondence, and the like."; holding that the FDIC had established that it was a joint client of a law firm and therefore could obtain access to the law firm's documents in a dispute between the FDIC and the other clients).

- Ashcraft & Gerel v. Shaw, 728 A.2d 798, 812 (Md. Ct. Spec. App. 1999) (finding that a law firm which jointly represented clients must disclose privileged information if the clients later become adverse to one another; specifically finding that one of the clients may obtain information about communications between the other client and the joint lawyer even if the party was not present during those communications; "[T]he principles of duty, loyalty, and fairness require that when two or more persons with a common interest engage an attorney to represent them with respect to that interest, the attorney privilege against disclosure of confidential communications does not apply between them, regardless of whether both or all clients were present during the communication. To hold otherwise would be inconsistent with the high level of trust that we expect in an attorney-client relationship." (emphasis added)).

- Opus Corp. v. IBM, 956 F. Supp. 1503, 1506 (D. Minn. 1996) ("When an attorney acts for two different clients who each have a common interest, communications of either party to the attorney are not necessarily privileged in subsequent litigation between the two clients.'" (quoting Bituminous Cas. Corp. v. Tonka Corp., 140 F.R.D. 381, 387 (D. Minn. 1992))).

- Griffith v. Davis, 161 F.R.D. 687, 693 (C.D. Cal. 1995) (noting that the "'joint client doctrine' applies "where two clients share the same lawyer. . . . Under this

doctrine, communications among joint clients and their counsel are not privileged in disputes between the joint clients, but are protected from disclosure to others." (citation omitted)).

- Arce v. Cotton Club, No. 4:94CV169-S-0, 1995 U.S. Dist. LEXIS 21539 (N.D. Miss. Jan. 13, 1995) (holding that the dispute between jointly represented clients meant that none of the clients could assert the privilege as to communications shared with the joint lawyer).

- Scrivner v. Hobson, 854 S.W.2d 148, 151 (Tex. Ct. App. 1993) ("With regard to the attorney-client privilege, the general rule is that, as between commonly represented clients, the privilege does not attach to matters that are of mutual interest. . . . Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.").

- In re Grand Jury Subpoena Dated Nov. 26, 1974, 406 F. Supp. 381, 393-94 (S.D.N.Y. 1975) ("Relevant case law makes it clear that the rule thus described by McCormick . . . squarely applies when former joint clients subsequently face one another as adverse parties in litigation brought by any one of them. . . The rule may also be invoked in an action brought by or against a successor-in-interest to a former joint client where any one of the other former joint clients stands as an opposing party in such action. . . . On the other hand, it has been ruled that the privilege of one joint client cannot be destroyed at the behest of the other where the two have merely had a 'falling out' in the sense of ill-feeling or divergence of interests.").

Bars have reached the same conclusion.

- North Carolina RPC 245 ($^{4}/_{4}$/97) ("When there is a joint representation of parties in a particular matter, each party is entitled to access to the legal file after the representation ends.").

- North Carolina RPC 153 (1/15/93) (holding that a lawyer who represents multiple clients must provide access to the lawyer's files to all of the clients; also holding that a lawyer must withdraw if adversity develops between multiple clients; "When a lawyer undertakes representation of codefendants, an impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony or incompatibility of positions. Identifying and resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation and not the client's responsibility. Once Attorneys A and B determined that Nurse's and Hospital's interests were the same and, presumably, that no conflict of interest existed and then undertook joint representation of Nurse and Hospital, with the consent of Hospital and its insurance

> company, information gathered on behalf of Nurse and Hospital (who were deemed to have the 'same interest') lost its confidential nature as between Nurse and Hospital by implied authorization, if not actual consent, under Rule 4(c)(1) and (2). Since Nurse relied on reasonable attorney-client expectations of protection of her interests and access to information, Attorneys A and B are now estopped to negate consent to the rights inuring to Nurse's benefit from the joint representation. Nurse is entitled to immediate possession of all information in the joint representation file or files of Attorney. A and B accumulated to the date of termination of representation that would or could be of some value to her in protecting her interests. This includes the items specified in the inquiry and any others that would or could be of some help to Nurse. The information must be surrendered unconditionally by Attorneys A or B without regard to whether the cost of its acquisition was advanced by either attorney or client (hospital). RPC 79. The attempt by Attorneys A and B to revoke the implied or actual authority to share information with Nurse can only apply prospectively to information gathered and work done after termination of representation." (emphasis added)).

All of these cases recite the same basic principle -- jointly represented clients cannot claim privilege protection when one seeks privileged communications from the other in a later dispute among them. However, courts disagree about what type of dispute will trigger this rule.

Degree of Adversity

The key authorities and the case law take differing approaches in assessing the level of hostility between former jointly represented clients that must arise before the privilege evaporates.

The ABA Model Rules indicate that the privilege evaporates "if litigation eventuates" between the former jointly represented clients. ABA Model Rule 1.7 cmt. [30] (emphasis added). The Restatement indicates that the privilege evaporates "in a subsequent adverse proceeding" between the former jointly represented clients. Restatement (Third) of Law Governing Lawyers § 75 (2000) (emphasis added).

The "adverse proceeding" language seems broader than the "litigation" language. For instance, it might include administrative proceedings that do not count as litigation under some courts' standards. However, both the ABA Model Rules and the Restatement obviously require a high degree of adversity among the former joint clients before finding that the privilege "evaporates."

Courts have also taken differing positions on the degree of adversity among former jointly represented clients that triggers the privilege's evaporation. Some courts point to proceedings between the former clients.[3] However, other courts have found the same effect in the case of a dispute[4] or controversy[5] between the former jointly represented clients. One court used the phrase "truly becomes adverse to his former co-plaintiffs."[6]

Not many cases explain what type of adversity would not trigger this effect. One court provided at least some guidance.

> Relevant case law makes it clear that the rule thus described by McCormick [preventing one former jointly represented client from invoking the privilege in a dispute among the former jointly represented clients] . . . squarely applies when former joint clients subsequently face one another as adverse parties in litigation brought by any one of them. . . . The rule may also be invoked in an action brought by or against a successor-in-interest to a former joint client where any one of the other former joint clients stands as an opposing party in such action. . . On the other hand, it has been ruled that the privilege of one joint client cannot be destroyed at the behest of the other where the two have merely had a 'falling out' in the sense of ill-feeling or divergence of interests.

[3] See, e.g., Tekni-Plex, Inc. v. Meyner & Landis, 674 N.E.2d 663, 670 (N.Y. 1996).
[4] Griffith v. Davis, 161 F.R.D. 687, 693 (C.D. Cal. 1995)
[5] Brandon v. W. Bend Mut. Ins. Co., 681 N.W.2d 633, 642 (Iowa 2004) ("[W]hen the same attorney acts for two parties, the communications are privileged from third persons in the controversy, but not in a subsequent controversy between the two parties.")
[6] Anderson v. Clarksville Montgomery Cnty. Sch. Bd., 229 F.R.D. 546, 548 (M.D. Tenn. 2005) ("[U]ntil such time as a plaintiff withdraws and truly becomes adverse to his former co-plaintiffs, it appears appropriate to maintain the attorney-client privilege absent a waiver by all plaintiffs.").

In re Grand Jury Subpoena Dated Nov. 26, 1974, 406 F. Supp: 381, 393-94 (S.D.N.Y. 1975) (emphasis added).

Of course, if a former jointly represented client wanted to assure "evaporation" of the privilege, that client could turn a "dispute" or a "controversy" into "litigation" or a "proceeding." Thus, any of the former jointly represented clients has the power itself to cause the privilege to "evaporate."

Joint Clients' Power to Change the Rules

As explained above, the Restatement indicates that jointly represented clients can agree to change the general rules -- allowing them to withhold privileged communications from each other in the event of a dispute, and (apparently) even granting another jointly represented client a "veto power" over the client's waiver of its own personal communications with a joint lawyer. Restatement (Third) of Law Governing Lawyers § 75 cmt. d (2000).

Not many courts or authorities have dealt with this intriguing issue. In 2004, the New York City Bar issued a legal ethics opinion explaining that joint clients could affect the impact of any later adversity among them.

- N.Y. City LEO 2004-02 (6/2004) ("Multiple representations of a corporation and one or more of its constituents are ethically complex, and are particularly so in the context of governmental investigations. If the interests of the corporation and its constituent actually or potentially differ, counsel for a corporation will be ethically permitted to undertake such .a multiple representation, provided the representation satisfies the requirements of DR 5-105(C) of the New York Code of Professional Responsibility: (i) corporate counsel concludes that in the view of a disinterested lawyer, the representation would serve the interests of both the corporation and the constituent; and (ii) both clients give knowledgeable and informed consent, after full disclosure of the potential conflicts that might arise. In determining whether these requirements are satisfied, counsel for the corporation must ensure that he or she has sufficient information to apply DR 5-105(C)'s disinterested lawyer test in light of the particular facts and circumstances at hand, and that in obtaining the information necessary to do so, he or she does not prejudice the interests of the current client, the corporation.

> Even if the lawyer concludes that the requirements of DR 5-105(C) are met at the outset of a multiple representation, the lawyer must be mindful of any changes in circumstances over the course of the representation to ensure that the disinterested lawyer test continues to be met at all times. Finally, the lawyer should consider structuring his or her relationships with both clients by adopting measures to minimize the adverse effects of an actual conflict, should one develop. These may include prospective waivers that would permit the attorney to continue representing the corporation in the event that the attorney must withdraw from the multiple representation, contractual limitations on the scope of the representation, explicit agreements as to the scope of the attorney-client privilege and the permissible use of any privileged information obtained in the course of the representations, and/or the use of co-counsel or shadow counsel to assist' in the representation of the constituent client." (emphases added)).

One year later, the court dealing with a similar situation indicated otherwise, although there may have been extenuating circumstances.

- In re Mirant Corp., 326 B.R. 646 (Bankr. N.D. Tex. 2005) (rejecting the applicability of a "Protocol" entered into by a parent and a then-subsidiary which authorized their joint lawyer Troutman Sanders to keep confidential from one client what it learned from the other; noting that the general counsel of the subsidiary agreed to the Protocol after the subsidiary became an independent company, but also explaining that the general counsel had ties both to the parent and to Troutman).

Effect of a Lawyer's Improper Joint Representation

Several cases have dealt with an exception to these general rules.

Under this rarely-applied principle, even if a lawyer was found to have engaged in some improper conduct by jointly representing multiple clients with adverse interests, that would not necessarily result in loss of the privilege in a later dispute between them.[7]

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

> The Restatement's conflicts rules provide that when a joint attorney sees the co-clients' interests diverging to an unacceptable degree, the proper course is to end the joint representation. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121 cmts. e(1)-(2). As the Court of Appeals for the D.C. Circuit noted in Eureka Inv. Corp. v. Chicago Title Ins. Co., 240 U.S. App. D.C. 88, 743 F.2d 932 (D.C. Cir. 1984) (per curiam), courts are presented with a difficult problem when a joint attorney fails to do that and instead continues representing both clients when their interests become adverse. Id. at 937-38. In this situation, the black-letter law is that when an attorney (improperly) represents two clients whose interests are adverse, the

The much older Eureka case did not receive much attention until Teleglobe cited it, but stands for the same proposition.

> Given Eureka's expectations of confidentiality and the absence of any policy favoring disclosure to CTI, Eureka should not be deprived of the privilege even if, as CTI suggests, the asserted attorney-client relationship should not have been created. We need not express any view on CTI's contention that Fried, Frank should not have simultaneously undertaken to represent Eureka in an interest adverse to CTI and continued to represent CTI in a closely related matter. As Wigmore's second principle expressly states, counsel's failure to avoid a conflict of interest should not deprive the client of the privilege. The privilege, being the client's, should not be defeated solely because the attorney's conduct was ethically questionable. We conclude, therefore, that Eureka was privileged not to disclose the requested documents.

Eureka Inv. Corp. v. Chi. Title Ins. Co., 743 F.2d 932, 937-38 (D.C. Cir. 1984).

Under this approach, joint clients can withhold from one another privileged communications if a lawyer has been improperly representing them (presumably in violation of the conflicts of interest rules). A fortiori, one would expect that a third party would not be able to pierce the privilege despite the adversity between the jointly represented clients.

Effect of Now-Adverse Former Jointly Represented Clients' Use of Privileged Communications

Surprisingly, few courts have dealt with the effect of now-adverse former joint clients using privileged communications against each other. Does such use allow third parties to access and use the same communications? Such a dramatic impact might give one of the former joint clients leverage in the dispute, and under any circumstance could harm one or all of the joint clients.

> communications are privileged against each other notwithstanding the lawyer's misconduct. Id.; see also 8 J. WIGMORE, EVIDENCE § 2312 (McNaughton rev. ed. 1961).

Teleglobe Commc'ns Corp. v. BCE Inc. (In re Teleglobe Commc'ns Corp.), 493 F.3d 345, 368 (3d Cir. 2007)

The Restatement takes the troubling position that now-adverse former joint clients' use of privileged communications against each other operates as a waiver as to the world -- thus allowing other third parties access to those communications.

See Appendix A, Chapter 24.306 from The Attorney-Client Privilege and the Work Product Doctrine: A Practitioner's Guide, by Thomas E. Spahn.

Best Answer

The best answer to this hypothetical is **(B) NO.**

HYPOTHETICAL # 7

Privileged Communications in the Corporate Context.

You recently represented shareholders in selling all of a corporation's stock to a competitor. The competitor now claims that your clients defrauded it during that transaction. The buyer's search of the computers and other files in its new acquisition's headquarters building has uncovered many confidential and privileged communications between you and your clients about the sale transaction. When the buyer's lawyer alerts you to that discovery, you claim privilege protection. The buyer claims that it owns all of those confidential and privileged communications -- because it purchased them when it purchased all of your former clients' stock. Does the buyer now own your privileged communications with your clients, even those related to the sale transaction?

MAYBE

Answer and Analysis

This issue generally arises in the context of the attorney-client privilege protection rather than the ethics confidentiality duty. This is not surprising, because the case law usually involves adversaries' efforts to obtain discovery of the lawyers' files in these circumstances. Thomas E. Spahn, The Attorney-Client Privilege and the Work Product Doctrine: A Practitioner's Guide, Ch. 6.4, 6.5 (3d. ed. 2013), published by Virginia CLE Publications.

This scenario arose in a 2013 Delaware case.

- Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP, 80 A.3d 155, 156, 160, 161 (Del. Ch. 2013) (analyzing a situation in which the buyer of a corporation claimed that the selling shareholders had defrauded it in the purchase transaction; noting that the buyer discovered privileged communications between the seller and its outside counsel Perkins Coie in the company's computer system;

> acknowledging that the seller had not removed those documents from its computer system before the closing, and had "done nothing to get these computer records back" since the closing a year earlier; noting that the sellers claimed that the attorney-client privilege nevertheless protected those communications "on the ground that it, and not the surviving corporation [buyer], retained control of the attorney-client privilege."; rejecting sellers' privilege claim -- relying on the Delaware General Corporation Law's clear statement that after a merger the surviving company (the buyer here) owns "'all'" property, privileges, etc.; holding that the buyer could read and use the communications; explaining how future sellers could avoid this situation; noting that an earlier Delaware decision had indicated that sellers can "negotiate[] special contractual agreements to protect themselves and prevent certain aspects of the privilege from transferring to the surviving corporation in the merger."; pointing to a 2008 Delaware decision approving a purchase transaction provision specifically excluding from a sale "'all rights of the Sellers under this Agreement and all agreements and other documentation relating to the transactions contemplated hereby.'" (quoting Postorivo v. AG Paintball Holdings, Inc., Consol. Civ. A. Nos. 2911- & 3111-VCP, 2008 Del. Ch. LEXIS 17, at *6 n.5 (Del. Ch. Feb. 7, 2008) (unpublished opinion)); reiterating that "the answer to any parties worried about facing this predicament in the future" is to "exclude from the transferred assets the attorney-client communications they wish to retain as their own.").

The case law is surprisingly muddled on whether transactional parties can affect ownership of the attorney-client privilege and the parallel ethics confidentiality duty. Thomas E. Spahn, The Attorney-Client Privilege and the Work Product Doctrine: A Practitioner's Guide, Ch. 6.7 (3d. ed. 2013), published by Virginia CLE Publications.

Best Answer

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

HYPOTHETICAL 8

Social Media & Advertising

You have fought long and hard for two years and won your first jury trial after an epic, two-week long, courtroom battle royale that included a Tom-Cruise-in-A-Few-Good-Men-esque cross examination of the opposing party, who did, in fact, order a "Code Red." You want to let the entire country, no, the world know the extent of your indefatigable legal prowess. You want to tell folks that this win makes you the next Clarence Darrow.

1. Can you tweet about this case on Twitter?
2. Can you post a public status update on Facebook about this great win?
3. Can you post a public status update on Facebook with a link to a local newspaper article about your underdog win?
4. Do the analyses in (2) and (3) change if you make the post accessible only to a list of your close friends, assuming you have personal relationships with all of them?
5. Can you "pin" a photo of you taken by a reporter mid-closing?

References: Rule 7.1; Rule 7.3

Answer and Analysis

Question 1

Generally, you can publish case results if they are truthful and placed in a context that is not misleading. Rule 7.1(b)(i). Comments [3] through [5] all address putting a statement in context that relates its truthfulness. An attorney should be wary of posting successful case results without giving other facts to place them in context, lest the attorney create a potentially misleading impression about the results a potential client could expect to receive. Hunter v. Virginia State Bar held that Rules 7.1 and former 7.2 applied to a blog that discussed an attorney's case results on the internet. 285 Va. 485, 492 (2013). Specifically, the Supreme Court found it to be advertising, thus rendering it commercial speech and not subject to heightened First Amendment protection. A fact that the Court repeated several times in finding the blog to be potentially misleading was that the blog only listed the successes of the attorney when it discussed case results.

This case differs from the situation in Hunter because you are posting about only one case. Remember that the required disclaimers must be used, and a label of "advertising material" may have to be used. See Rules 7.1(b)(ii); 7.1(b)(iii); 7.3 (c); Hunter v. Virginia State Bar, 285 Va. 485 (2013) (case results that omit disclaimer are "potentially misleading" and subject to regulation and discipline). Whether the tweet is potentially misleading will be a fact-intensive question considering all the factors. It is unlikely that the requisite disclaimers and facts necessary to place a tweet into context could be properly enunciated in 140 characters are less.

Question 2

The same analysis for Question 1 governs this question, except that you have more space to post something on Facebook. Thus, it is possible to give enough facts to place the case in context and to include the requisite disclaimers. Accordingly, it seems possible for you to do this ethically so long as you meet all the requirements of the rules regarding truthfulness in communications.

Question 3

A similar analysis for Questions 1 and 2 governs this hypothetical, except that the post contains a link to the communications of another. Comment [6] to rule 7.1 controls here; it says "[s]tatements or claims made by others about the lawyer's services are governed by this rule if the lawyer adopts them in his or her communications." Thus, the attorney should screen the article to ensure that it places the case in context to avoid being potentially misleading.

Question 4

This situation differs factually in that it implicates two different issues. First, the exception in Rule 7.3(c)(2) to the "advertising material" label applies to these facts. Second, this fact pattern may not involve advertising at all. This type of restricted communication may not be construed as advertising and solicitation, but rather an attorney informing their close friends of their success due to the nature of the post's closed audience (close friends). However, the content of the post would likely be closely scrutinized for any solicitations for recommendations

or other pitches for advertising, so the safest answer would be to anticipate this sort of communication being classified as advertising.

Question 5

The answer to this question depends, in part, in what you post along with the photo. If it has nothing to do with the case, or if you post no text with the photo, then the photo may not be an advertisement. If there is text posted with it, or has any links to outside sources, then the analyses from the answers above apply.

BEST ANSWER (1) PROBABLY NOT (2) MAYBE (3) MAYBE;(4) MAYBE; (5) PROBABLY

HYPOTHETICAL # 9

Working Away From Home.

You are taking a long-awaited Honeymoon cruise to the Bahamas that you have delayed for a year to save the money to pay for it. However, you don't want to come back to piles of files or a full e-mail box. You want to make the most of your layover time at the airport and "dead-time" on the plane, so you take your trusty Macbook.

Miraculously, you clear security in only five minutes without having to run your flip flops through the x-ray machine. To make matters even better, the airport has free Wi-Fi!

1. Can you use the public Wi-Fi connection while accessing confidential client files from your firm's server and for sending confidential emails?
2. Does the answer change if the Wi-Fi network is a "hotspot" from your iPhone?
3. Does the answer change if your data is encrypted?
4. Does the answer change if you are working from your home with your home's wireless Wi-Fi router attached to your internet provider? What should you do to make this permissible?

   References: Rule 1.6

Answer and Analysis

Question 1

A "reasonable care" standard for protecting client confidences lies in Rule 1.6(b)(6). That rule reads:

> (b) To the extent a lawyer reasonably believes necessary, the lawyer may reveal:…(6) information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, printing, or other similar office management purposes, provided the lawyer exercises due care in the selection of the agency, advises the agency that the information must be kept confidential and reasonably believes that the information bill be kept confidential.

Several issues arise in this hypothetical. First, a lawyer must determine if transmitting information over public Wi-Fi reveals client information. If it does then an attorney must follow the guidelines found in Rule 1.6(b)(6). When one sends materials over the internet, they are placing them into the stream of communications. Thus, if the transmitted information contains confidential information, is reasonably susceptible to interception, and is easily decipherable, the attorney has probably not exercised reasonable care. Given the ability of a third party to easily access and read informational traffic on a public Wi-Fi connection, using public Wi-Fi to transmit or access confidential information that is not encrypted probably violates a lawyer's duty under Rule 1.6. If the information is encrypted, using an "industry standard" form of encryption should meet the standard of care required under the rule.

Question 2

The use of a private, mobile phone "hotspot" that transmits your data over a secure line probably uses reasonable care provided your line is secure. This assumes, of course that your mobile services carrier does not "snoop" (read) your data.

Question 3

Furthermore, the use of encryption should qualify as exercising reasonable care in protecting client information because encryption prevents a third party from deciphering the information provided that the encryption is strong enough to resist reasonable efforts to defeat it.

Question 4

Using your home internet connection with a wireless router poses one additional wrinkle to the mobile phone "hotspot" assumption in question 2, and that is a wireless access point. Using this should be permissible if you **password-protect** access to your wireless router,

encrypt your communications, or do both. This assumes, as in the response to Question 2, that your internet service provider does not "snoop" your data.

BEST ANSWERS: (1) PROBABLY NOT; (2) YES; (3) YES; (4) Yes—if you password protect your Wi-Fi access or encrypt your data.

HYPOTHETICAL # 10

Oops! Inadvertent Disclosure

You are working on a deadline to submit a motion and brief in a hotly contested matter. You receive an email from in-house counsel of a client in another case. Her email attaches a memo summarizing conversations she has had with employees of your mutual client and providing insight into her analysis and strategy. In a rush, you hit the "forward" button to forward the email to your office colleagues working on the matter with you, type in their names and a quick "FYI" note and push "Send." You didn't realize that your email's "autocomplete" had actually included opposing counsel instead of one the intended recipients. You are finishing your motion and brief when your partner rushes in and asks, in colorful language, how and why you included opposing counsel on the email? Realizing your mistake, you dial the ethics hotline wondering what you can do…

1. Can opposing counsel use the email and its contents to file a show cause or start an investigation against your client? What can you do, if anything, to prevent counsel from using information?
2. Does the analysis change if instead of having been incorrectly forwarded by email, your client's memo was inadvertently produced in response to a discovery request and rushed production as the discovery deadline neared?
3. *References: Rule 1.6, LEO 1702, Rule 4:1(b)(6)(ii)*

Answer and Analysis

Question 1

LEO 1702 governs this analysis. LEO 1702 governs the inadvertent disclosure of confidential information to another lawyer. Specifically, it holds:

> …once the receiving lawyer discovers that he has a confidential document inadvertently transmitted by opposing counsel or opposing counsel's client, he 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.

Accordingly, opposing counsel must notify you of the discovery of that inadvertent communication. Furthermore, opposing counsel must follow your instructions as to how to dispose of that document and cannot use it against your wishes. You should probably notify them that the email was sent in error and tell them not to read it and to destroy it, as it contains confidential information about your client.

Question 2

The fact that the parties are engaging in discovery means that Rule 4:1(b)(6)(ii) may apply to this case. That rule reads:

> Rule 4:1(b) (6)(ii) [General Provisions Governing Discovery, Claims of Privilege or Protection of Trial Preparation Materials]: If a party believes that a document or electronically stored information that has already been produced is privileged or its confidentiality is otherwise protected the producing party may notify any other party of such claim and the basis for the claimed privilege or protection. Upon receiving such notice, any party holding a copy of the designated material shall sequester or destroy its copies thereof, and shall not duplicate or disseminate such material pending disposition of the claim of privilege or protection by agreement, or upon motion by any party. If a receiving party has disclosed the information before being notified of the claim of privilege or other protection, that party must take reasonable steps to retrieve the designated material. The producing party must preserve the information until the claim of privilege or other protection is resolved.

This is supported by the analysis of Legal Ethics Opinion 1871, which applied this Rule and LEO 1702 to a hypothetical where counsel discovered arguably privileged documentation in reviewing other counsel's file pursuant to a production of documents request. [See Appendix]

Accordingly, the first critical matter is whether this disclosure was a disclosure during discovery. While it was inadvertently sent during a discovery period, it was not part of discovery actually sent to the other attorney. If that reading of the law prevails, the analysis from question 1 applies. If it does not, the analysis below does.

There is a case on point as to inadvertent disclosure during discovery, Walton v. Mid-Atlantic Spine Specialists, P.C., 280 Va. 113, 694 S.E. 2d 545 (2010). A plaintiff lawyer in a medical malpractice case inadvertently received a privileged letter that the defendant doctor

wrote to his attorney regarding potential negligence in his examination of the plaintiff's x-rays. The letter was produced to the plaintiff during discovery. In considering whether the defendant doctor waived the attorney-client privilege upon inadvertent disclosure, the Court applied a five-factor test, weighing: (1) the reasonableness of precautions taken, (2) the time taken to rectify the mistake, (3) the scope of discovery, (4) the extent of disclosure, and (5) whether the party asserting the claim of privilege protection for the communication used its unavailability for a misleading or otherwise improper or overreaching purpose in the litigation. 694 S.E. at 552. Based on this analysis, the court found that privilege was waived and reversed the case, remanding it for another trial after the doctor escaped liability. 694 S.E. at 554.

Walton conducted the five-factor analysis. First, while a copying company was hired to produce the documents, the court mentioned that no additional privilege review was done before copying and disclosing the documents and implied that this step could and should have been done. 694 S.E. 2d at 553. Second, the court subsequently stated that the doctor should have taken immediate action upon discovering the disclosure. Id. Third, the court said that less leeway is given to non-expedited and non-intensive discovery. 694 S.E. 2d at 554. Fourth, the court held that the letter was completely disclosed, and that return would not cure the destruction of the privilege. Id. Finally, the court held that the interests of justice weighed against the doctor because it would suppress impeachment evidence.

Thus, in this case you should act ***immediately*** to notify the opposing counsel of your mistake. Applying the other factors to the analysis, a court may hold that you did not take reasonable precautions in not having a delayed send feature on an email, and it would probably hold that the transmission by an attorney meant that the attorney had an opportunity to review it. A court would also assess discovery's scope for any intensity or deadlines, and a court would probably find that disclosure was complete and that returning or destroying the document may not remedy the situation. Finally, the interests of justice would probably weigh against you as it contains harmful admissions from your client.

Recent Developments: New Rule 5:8, Proposed Amendments and New Rule 1:10

The moderator and presenters acknowledge and thank Tom Spahn, James McCauley, and Kellam T. Parks for their great contribution in allowing certain hypotheticals and corresponding analysis prepared by them to be used in this program.

A. New Rule 5:8 Addresses Obligations for Departing Lawyers And Firm Dissolution

The Virginia Supreme Court adopted Rule 5.8 effective May 1, 2015.

The Rule is focused on client protection/notification concerns when a lawyer leaves a firm or a firm dissolves. The Rule seeks to encourage communication between a firm and a departing lawyer or lawyers, with mandates for prompt client notification and communication.

The Comments recognize the myriad business and legal issues that can be raised when lawyers depart to join a new firm or start a new practice, and does not displace common law or other legal obligations, or try to address the obligations among partners or lawyers in a firm. The Rule focuses on the timing and content of client notification.

First and foremost, the Rule encourages communication and agreement between the lawyer and firm regarding client notification, and seeks to chill any view of the client as an asset to be protected or acquired.

Absent agreement:

(1) Neither departing lawyer nor firm may unilaterally contact clients about the departure or to solicit representation unless the departing lawyer and an authorized representative of the firm have conferred or attempted to confer to discuss a *joint* client communication;

(2) A lawyer in a dissolving firm may not unilaterally contact clients unless authorized firm members have met or attempted to meet to confer on the communication.

In all cases, whether by agreement or unilaterally, client must be given timely notice in accordance with Rule.

Permissive or unilateral contact with clients cannot contain false or misleading information and must provide client with available options regarding continued representation by the firm, departing lawyer, or other lawyers.

If a client fails to provide timely selection of counsel for ongoing representation, the client is deemed a client of the firm until the firm provides written notice terminating the representation.

Prior LEO's are not supplanted and continue to provide guidance. See: LEO 1403 (law firm cannot require departing lawyer to refrain from contact and allow firm to make initial contact); LEO 1506 (discussing firm's obligation to provide contact information of departing lawyer and rights regarding client file).

B. Proposed Amendments Address Technology and Confidentiality In Digital Age

The Virginia State Bar has proposed amendments to the Rules of Professional Conduct in light of the changes foisted upon us by ever-shifting advances in technology. The proposed amendments have been submitted to the Virginia Supreme Court for review and action. Regardless of the status and ultimate action on the proposed amendments, technology has so fundamentally changed the way we practice and deliver legal services that legal ethics considerations must be addressed whether we are communicating with clients via wireless networks, storing information via the cloud, developing or communicating with a network of friends, colleagues, and business contacts on social media platforms, or working away from the office, assuming we have more than a "virtual" office.

Rule 1.1—Competence. The VSB has proposed adding a sentence to Comment 6 of Rule 1.1:

> To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education in the areas of practice in which the lawyer is engaged. Attention should be paid to the benefits and risks associated with relevant technology.

The underscored sentence has been proposed because competency in substantive areas of law cannot be isolated from the manner in which we practice and deliver legal services.

Rule 1.6—Confidentiality. The VSB also has proposed a new paragraph to Rule 1.6 addressing the lawyer's duty to take steps to protect confidential client information in the digital age. Proposed sub-paragraph (d) provides:

> (d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information protected under this Rule.

The proposed Rule does not require or identify specific measures that must be taken. This approach was criticized by some as a shortcoming for failing to give lawyers a sufficiently clear mandate. However, requirements dependent on reasonableness are already established in the Rules, and given the pace of technological change, a fact-specific requirement deemed unrealistic.

The proposed Rule requires reasonable steps, and the comments to the proposed Rule provide numerous factors that can or may need to be considered in determining whether particular security steps are necessary. See Proposed Comment 19. The Rule provides lawyers flexibility in addressing the security of networks, and electronically stored information, premised on the requirement for reasonable steps.

Likewise, the Rule does not recognize a "strict liability" approach when information had been inadvertently disclosed or obtained by unauthorized access. The Rule recognizes a "safe harbor" if reasonable steps were taken by the lawyer.

C. Rule 1:10 Amended Addressing Imputation of Conflicts.

Rule 1:10 was amended effective 7/31 to change the standard of knowledge for imputation of conflicts from actual knowledge to "knows or reasonably should know."

New Rule 1:10 and the new comment are below:

Rule 1.10. Imputed Disqualification: General Rule.

(a) While lawyers are associated in a firm, none of them shall represent a client when the lawyer knows or reasonably should know that any one of them practicing alone would be prohibited from doing so by Rules 1.6, 1.7, 1.9, or 2.10(e).

* * *

Comment

[2a] A lawyer or firm should maintain and use an appropriate system for detecting conflicts of interest. The failure to maintain a system for identifying conflicts or to use that system when making a decision to undertake employment in a particular matter may be deemed a violation of Rule 1.10(a) if proper use of a system would have identified the conflict.

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AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 466 **April 24, 2014**
Lawyer Reviewing Jurors' Internet Presence

Unless limited by law or court order, a lawyer may review a juror's or potential juror's Internet presence, which may include postings by the juror or potential juror in advance of and during a trial, but a lawyer may not communicate directly or through another with a juror or potential juror.

A lawyer may not, either personally or through another, send an access request to a juror's electronic social media. An access request is a communication to a juror asking the juror for information that the juror has not made public and that would be the type of ex parte communication prohibited by Model Rule 3.5(b).

The fact that a juror or a potential juror may become aware that a lawyer is reviewing his Internet presence when a network setting notifies the juror of such does not constitute a communication from the lawyer in violation of Rule 3.5(b).

In the course of reviewing a juror's or potential juror's Internet presence, if a lawyer discovers evidence of juror or potential juror misconduct that is criminal or fraudulent, the lawyer must take reasonable remedial measures including, if necessary, disclosure to the tribunal.

The Committee has been asked whether a lawyer who represents a client in a matter that will be tried to a jury may review the jurors' or potential jurors'[1] presence on the Internet leading up to and during trial, and, if so, what ethical obligations the lawyer might have regarding information discovered during the review.

Juror Internet Presence

Jurors may and often will have an Internet presence through electronic social media or websites. General public access to such will vary. For example, many blogs, websites, and other electronic media are readily accessible by anyone who chooses to access them through the Internet. We will refer to these publicly accessible Internet media as "websites."

For the purposes of this opinion, Internet-based social media sites that readily allow account-owner restrictions on access will be referred to as "electronic social media" or "ESM." Examples of commonly used ESM at the time of this opinion include Facebook, MySpace, LinkedIn, and Twitter. Reference to a request to obtain access to

1. Unless there is reason to make a distinction, we will refer throughout this opinion to jurors as including both potential and prospective jurors and jurors who have been empaneled as members of a jury.

another's ESM will be denoted as an "access request," and a person who creates and maintains ESM will be denoted as a "subscriber."

Depending on the privacy settings chosen by the ESM subscriber, some information posted on ESM sites might be available to the general public, making it similar to a website, while other information is available only to a fellow subscriber of a shared ESM service, or in some cases only to those whom the subscriber has granted access. Privacy settings allow the ESM subscriber to establish different degrees of protection for different categories of information, each of which can require specific permission to access. In general, a person who wishes to obtain access to these protected pages must send a request to the ESM subscriber asking for permission to do so. Access depends on the willingness of the subscriber to grant permission.[2]

This opinion addresses three levels of lawyer review of juror Internet presence:

1. passive lawyer review of a juror's website or ESM that is available without making an access request where the juror is unaware that a website or ESM has been reviewed;

2. active lawyer review where the lawyer requests access to the juror's ESM; and

3. passive lawyer review where the juror becomes aware through a website or ESM feature of the identity of the viewer;

Trial Management and Jury Instructions

There is a strong public interest in identifying jurors who might be tainted by improper bias or prejudice. There is a related and equally strong public policy in preventing jurors from being approached ex parte by the parties to the case or their agents. Lawyers need to know where the line should be drawn between properly investigating jurors and improperly communicating with them.[3] In today's Internet-saturated world, the line is increasingly blurred.

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2. The capabilities of ESM change frequently. The committee notes that this opinion does not address particular ESM capabilities that exist now or will exist in the future. For purposes of this opinion, key elements like the ability of a subscriber to control access to ESM or to identify third parties who review a subscriber's ESM are considered generically.

3. While this Committee does not take a position on whether the standard of care for competent lawyer performance requires using Internet research to locate information about jurors that is relevant to the jury selection process, we are also mindful of the recent addition of Comment [8] to Model Rule 1.1. This comment explains that a lawyer "should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." *See also* Johnson v. McCullough, 306 S.W.3d 551 (Mo. 2010) (lawyer must use "reasonable efforts" to find potential juror's litigation history in Case.net, Missouri's automated case management system); N. H. Bar Ass'n, Op. 2012-13/05 (lawyers "have a general duty to be aware of social media as a source of potentially useful information in litigation, to be competent to obtain that information directly or through an agent, and to know how to make effective use of that information in litigation"); Ass'n of the Bar of the City of N. Y. Comm. on Prof'l Ethics, Formal Op. 2012-2 ("Indeed, the standards of competence and diligence may require doing everything reasonably possible to learn about jurors who will sit in judgment on a case.").

For this reason, we strongly encourage judges and lawyers to discuss the court's expectations concerning lawyers reviewing juror presence on the Internet. A court order, whether in the form of a local rule, a standing order, or a case management order in a particular matter, will, in addition to the applicable Rules of Professional Conduct, govern the conduct of counsel.

Equally important, judges should consider advising jurors during the orientation process that their backgrounds will be of interest to the litigants and that the lawyers in the case may investigate their backgrounds, including review of their ESM and websites.[4] If a judge believes it to be necessary, under the circumstances of a particular matter, to limit lawyers' review of juror websites and ESM, including on ESM networks where it is possible or likely that the jurors will be notified that their ESM is being viewed, the judge should formally instruct the lawyers in the case concerning the court's expectations.

Reviewing Juror Internet Presence

If there is no court order governing lawyers reviewing juror Internet presence, we look to the ABA Model Rules of Professional Conduct for relevant strictures and prohibitions. Model Rule 3.5 addresses communications with jurors before, during, and after trial, stating:

> A lawyer shall not:
>
> (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
>
> (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;
>
> (c) communicate with a juror or prospective juror after discharge of the jury if:
>
> (1) the communication is prohibited by law or court order;
>
> (2) the juror has made known to the lawyer a desire not to communicate; or
>
> (3) the communication involves misrepresentation, coercion, duress or harassment . . .

Under Model Rule 3.5(b), a lawyer may not communicate with a potential juror leading up to trial or any juror during trial unless authorized by law or court order. *See, e.g., In re Holman*, 286 S.E.2d 148 (S.C. 1982) (communicating with member of jury selected for trial of lawyer's client was "serious crime" warranting disbarment).

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4. Judges also may choose to work with local jury commissioners to ensure that jurors are advised during jury orientation that they may properly be investigated by lawyers in the case to which they are assigned. This investigation may include review of the potential juror's Internet presence.

A lawyer may not do through the acts of another what the lawyer is prohibited from doing directly. Model Rule 8.4(a). *See also In re Myers*, 584 S.E.2d 357 (S.C. 2003) (improper for prosecutor to have a lay member of his "jury selection team" phone venire member's home); *cf.* S.C. Ethics Op. 93-27 (1993) (lawyer "cannot avoid the proscription of the rule by using agents to communicate improperly" with prospective jurors).

Passive review of a juror's website or ESM, that is available without making an access request, and of which the juror is unaware, does not violate Rule 3.5(b). In the world outside of the Internet, a lawyer or another, acting on the lawyer's behalf, would not be engaging in an improper ex parte contact with a prospective juror by driving down the street where the prospective juror lives to observe the environs in order to glean publicly available information that could inform the lawyer's jury-selection decisions. The mere act of observing that which is open to the public would not constitute a communicative act that violates Rule 3.5(b).[5]

It is the view of the Committee that a lawyer may not personally, or through another, send an access request to a juror. An access request is an active review of the juror's electronic social media by the lawyer and is a communication to a juror asking the juror for information that the juror has not made public. This would be the type of ex parte communication prohibited by Model Rule 3.5(b).[6] This would be akin to driving down the juror's street, stopping the car, getting out, and asking the juror for permission to look inside the juror's house because the lawyer cannot see enough when just driving past.

Some ESM networks have a feature that allows the juror to identify fellow members of the same ESM network who have passively viewed the juror's ESM. The details of how this is accomplished will vary from network to network, but the key feature that is

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5. Or. State Bar Ass'n, Formal Op. 2013-189 ("Lawyer may access publicly available information [about juror, witness, and opposing party] on social networking website"); N.Y. Cnty. Lawyers Ass'n, Formal Op. 743 (2011) (lawyer may search juror's "publicly available" webpages and ESM); Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Ethics, *supra* note 3 (lawyer may use social media websites to research jurors); Ky. Bar Ass'n, Op. E-434 (2012) ("If the site is 'public,' and accessible to all, then there does not appear to be any ethics issue."). *See also* N.Y. State Bar Ass'n, Advisory Op. 843 (2010) ("A lawyer representing a client in pending litigation may access the public pages of another party's social networking website (such as Facebook or MySpace) for the purpose of obtaining possible impeachment material for use in the litigation"); Or. State Bar Ass'n, Formal Op. 2005-164 ("Accessing an adversary's public Web [sic] site is no different from reading a magazine or purchasing a book written by that adversary"); N.H. Bar Ass'n, *supra* note 3 (viewing a Facebook user's page or following on Twitter is not communication if pages are open to all members of that social media site); San Diego Cnty. Bar Legal Ethics Op. 2011-2 (opposing party's public Facebook page may be viewed by lawyer).

6. *See* Or. State Bar Ass'n, *supra* note 5, fn. 2, (a "lawyer may not send a request to a juror to access non-public personal information on a social networking website, nor may a lawyer ask an agent to do so"); N.Y. Cnty. Lawyers Ass'n, *supra* note 5 ("Significant ethical concerns would be raised by sending a 'friend request,' attempting to connect via LinkedIn.com, signing up for an RSS feed for a juror's blog, or 'following' a juror's Twitter account"); Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Ethics, *supra* note 3 (lawyer may not chat, message or send a "friend request" to a juror); Conn. Bar Ass'n, Informal Op. 2011-4 (friend request is a communication); Mo. Bar Ass'n, Informal Op. 2009-0003 (friend request is a communication pursuant to Rule 4.2). *But see* N.H. Bar Ass'n, *supra* note 3 (lawyer may request access to witness's private ESM, but request must "correctly identify the lawyer . . . [and] . . . inform the witness of the lawyer's involvement" in the matter); Phila. Bar Ass'n, Advisory Op. 2009-02 (lawyer may not use deception to secure access to witness's private ESM, but may ask the witness "forthrightly" for access).

relevant to this opinion is that the juror-subscriber is able to determine not only that his ESM is being viewed, but also the identity of the viewer. This capability may be beyond the control of the reviewer because the notice to the subscriber is generated by the ESM network and is based on the identity profile of the subscriber who is a fellow member of the same ESM network.

Two recent ethics opinions have addressed this issue. The Association of the Bar of the City of New York Committee on Professional Ethics, in Formal Opinion 2012-2[7], concluded that a network-generated notice to the juror that the lawyer has reviewed the juror's social media was a communication from the lawyer to a juror, albeit an indirect one generated by the ESM network. Citing the definition of "communication" from Black's Law Dictionary (9th ed.) and other authority, the opinion concluded that the message identifying the ESM viewer was a communication because it entailed "the process of bringing an idea, information or knowledge to another's perception—including the fact that they have been researched." While the ABCNY Committee found that the communication would "constitute a prohibited communication if the attorney was aware that her actions" would send such a notice, the Committee took "no position on whether an inadvertent communication would be a violation of the Rules." The New York County Lawyers' Association Committee on Professional Ethics in Formal Opinion 743 agreed with ABCNY's opinion and went further explaining, "If a juror becomes aware of an attorney's efforts to see the juror's profiles on websites, the contact may well consist of an impermissible communication, as it might tend to influence the juror's conduct with respect to the trial."[8]

This Committee concludes that a lawyer who uses a shared ESM platform to passively view juror ESM under these circumstances does not communicate with the juror. The lawyer is not communicating with the juror; the ESM service is communicating with the juror based on a technical feature of the ESM. This is akin to a neighbor's recognizing a lawyer's car driving down the juror's street and telling the juror that the lawyer had been seen driving down the street.

Discussion by the trial judge of the likely practice of trial lawyers reviewing juror ESM during the jury orientation process will dispel any juror misperception that a lawyer is acting improperly merely by viewing what the juror has revealed to all others on the same network.

While this Committee concludes that ESM-generated notice to a juror that a lawyer has reviewed the juror's information is not communication from the lawyer to the juror, the Committee does make two additional recommendations to lawyers who decide to review juror social media. First, the Committee suggests that lawyers be aware of these automatic, subscriber-notification features. By accepting the terms of use, the subscriber-notification feature is not secret. As indicated by Rule 1.1, Comment 8, it is important for a lawyer to be current with technology. While many people simply click their agreement to the terms and conditions for use of an ESM network, a lawyer who uses an ESM network in his practice should review the terms and conditions, including privacy

7. Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Ethics, *supra*, note 3.
8. N.Y. Cnty. Lawyers' Ass'n, *supra* note 5.

features – which change frequently – prior to using such a network. And, as noted above, jurisdictions differ on issues that arise when a lawyer uses social media in his practice.

Second, Rule 4.4(a) prohibits lawyers from actions "that have no substantial purpose other than to embarrass, delay, or burden a third person . . ." Lawyers who review juror social media should ensure that their review is purposeful and not crafted to embarrass, delay, or burden the juror or the proceeding.

Discovery of Juror Misconduct

Increasingly, courts are instructing jurors in very explicit terms about the prohibition against using ESM to communicate about their jury service or the pending case and the prohibition against conducting personal research about the matter, including research on the Internet. These warnings come because jurors have discussed trial issues on ESM, solicited access to witnesses and litigants on ESM, not revealed relevant ESM connections during jury selection, and conducted personal research on the trial issues using the Internet.[9]

In 2009, the Court Administration and Case Management Committee of the Judicial Conference of the United States recommended a model jury instruction that is very specific about juror use of social media, mentioning many of the popular social media by name.[10] The recommended instruction states in part:

> I know that many of you use cell phones, Blackberries, the internet and other tools of technology. You also must not talk to anyone at any time about this case or use these tools to communicate electronically with anyone about the case . . . You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, including Facebook, Google+, My Space, LinkedIn, or YouTube. . . . I expect you will inform me as soon as you become aware of another juror's violation of these instructions.

These same jury instructions were provided by both a federal district court and state criminal court judge during a three-year study on juries and social media. Their research found that "jury instructions are the most effective tool to mitigate the risk of juror misconduct through social media."[11] As a result, the authors recommend jury instruction on social media "early and often" and daily in lengthy trials.[12]

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9. For a review of recent cases in which a juror used ESM to discuss trial proceedings and/or used the Internet to conduct private research, read Hon. Amy J. St. Eve et al., *More from the #Jury Box: The Latest on Juries and Social Media*, 12 Duke Law & Technology Review no. 1, 69-78 (2014), *available at* http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1247&context=dltr.

10. Judicial Conference Committee on Court Administration and Case Management, *Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research on or Communicate about a Case*, USCOURTS.GOV (June 2012), http://www.uscourts.gov/uscourts/News/2012/jury-instructions.pdf.

11. *Id.* at 66.

12. *Id.* at 87.

Analyzing the approximately 8% of the jurors who admitted to being "tempted" to communicate about the case using social media, the judges found that the jurors chose not to talk or write about the case because of the specific jury instruction not to do so.

While juror misconduct via social media itself is not the subject of this Opinion, lawyers reviewing juror websites and ESM may become aware of misconduct. Model Rule 3.3 and its legislative history make it clear that a lawyer has an obligation to take remedial measures including, if necessary, informing the tribunal when the lawyer discovers that a juror has engaged in criminal or fraudulent conduct related to the proceeding. But the history is muddled concerning whether a lawyer has an affirmative obligation to act upon learning that a juror has engaged in improper conduct that falls short of being criminal or fraudulent.

Rule 3.3 was amended in 2002, pursuant to the ABA Ethics 2000 Commission's proposal, to expand on a lawyer's previous obligation to protect a tribunal from criminal or fraudulent conduct by the lawyer's client to also include such conduct by any person.[13]

Model Rule 3.3(b) reads:

> (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures including, if necessary, disclosure to the tribunal.

Comment [12] to Rule 3.3 provides:

> Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Part of Ethics 2000's stated intent when it amended Model Rule 3.3 was to incorporate provisions from Canon 7 of the ABA Model Code of Professional

13. Ethics 2000 Commission, *Model Rule 3.3: Candor Toward the Tribunal*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule33.html (last visited Apr. 18, 2014).

Responsibility (Model Code) that had placed an affirmative duty upon a lawyer to notify the court upon learning of juror misconduct:

> This new provision incorporates the substance of current paragraph (a)(2), as well as ABA Model Code of Professional Responsibility DR 7-102(B)(2) ("A lawyer who receives information clearly establishing that a person other than the client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal") and DR 7-108(G) ("A lawyer shall reveal promptly to the court improper conduct by a venireperson or juror, or by another toward a venireperson or juror or a member of the venireperson's or juror's family, of which the lawyer has knowledge"). *Reporter's Explanation of Changes, Model Rule 3.3*.[14]

However, the intent of the Ethics 2000 Commission expressed above to incorporate the substance of DR 7-108(G) in its new subsection (b) of Model Rule 3.3 was never carried out. Under the Model Code's DR 7-108(G), a lawyer knowing of "improper conduct" by a juror or venireperson was required to report the matter to the tribunal. Under Rule 3.3(b), the lawyer's obligation to act arises only when the juror or venireperson engages in conduct that is *fraudulent or criminal*.[15] While improper conduct was not defined in the Model Code, it clearly imposes a broader duty to take remedial action than exists under the Model Rules. The Committee is constrained to provide guidance based upon the language of Rule 3.3(b) rather than any expressions of intent in the legislative history of that rule.

By passively viewing juror Internet presence, a lawyer may become aware of a juror's conduct that is criminal or fraudulent, in which case, Model Rule 3.3(b) requires the lawyer to take remedial measures including, if necessary, reporting the matter to the court. But the lawyer may also become aware of juror conduct that violates court instructions to the jury but does not rise to the level of criminal or fraudulent conduct, and Rule 3.3(b) does not prescribe what the lawyer must do in that situation. While considerations of questions of law are outside the scope of the Committee's authority, applicable law might treat such juror activity as conduct that triggers a lawyer's duty to take remedial action including, if necessary, reporting the juror's conduct to the court under current Model Rule 3.3(b).[16]

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14. Ethics 2000 Commission, *Model Rule 3.3 Reporter's Explanation of Changes*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule33rem.html (last visited Apr. 18, 2014).

15. Compare MODEL RULES OF PROF'L CONDUCT R. 3.3(b) (2002) to N.Y. RULES OF PROF'L CONDUCT, R. 3.5(d) (2013) ("a lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror….").

16. *See, e.g.*, U.S. v. Juror Number One, 866 F.Supp.2d 442 (E.D. Pa. 2011) (failure to follow jury instructions and emailing other jurors about case results in criminal contempt). The use of criminal contempt remedies for disregarding jury instructions is not confined to improper juror use of ESM. U.S. v. Rowe, 906 F.2d 654 (11th Cir. 1990) (juror held in contempt, fined, and dismissed from jury for violating court order to refrain from discussing the case with other jurors until after jury instructions delivered).

While any Internet postings about the case by a juror during trial may violate court instructions, the obligation of a lawyer to take action will depend on the lawyer's assessment of those postings in light of court instructions and the elements of the crime of contempt or other applicable criminal statutes. For example, innocuous postings about jury service, such as the quality of the food served at lunch, may be contrary to judicial instructions, but fall short of conduct that would warrant the extreme response of finding a juror in criminal contempt. A lawyer's affirmative duty to act is triggered only when the juror's known conduct is criminal or fraudulent, including conduct that is criminally contemptuous of court instructions. The materiality of juror Internet communications to the integrity of the trial will likely be a consideration in determining whether the juror has acted criminally or fraudulently. The remedial duty flowing from known criminal or fraudulent juror conduct is triggered by knowledge of the conduct and is not preempted by a lawyer's belief that the court will not choose to address the conduct as a crime or fraud.

Conclusion

In sum, a lawyer may passively review a juror's public presence on the Internet, but may not communicate with a juror. Requesting access to a private area on a juror's ESM is communication within this framework.

The fact that a juror or a potential juror may become aware that the lawyer is reviewing his Internet presence when an ESM network setting notifies the juror of such review does not constitute a communication from the lawyer in violation of Rule 3.5(b).

If a lawyer discovers criminal or fraudulent conduct by a juror related to the proceeding, the lawyer must take reasonable remedial measures including, if necessary, disclosure to the tribunal.

THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 648

April 2015

QUESTION PRESENTED

Under the Texas Disciplinary Rules of Professional Conduct, may a lawyer communicate confidential information by email?

STATEMENT OF FACTS

Lawyers in a Texas law firm represent clients in family law, employment law, personal injury, and criminal law matters. When they started practicing law, the lawyers typically delivered written communication by facsimile or the U.S. Postal Service. Now, most of their written communication is delivered by web-based email, such as unencrypted Gmail.

Having read reports about email accounts being hacked and the National Security Agency obtaining email communications without a search warrant, the lawyers are concerned about whether it is proper for them to continue using email to communicate confidential information.

DISCUSSION

The Texas Disciplinary Rules of Professional Conduct do not specifically address the use of email in the practice of law, but they do provide for the protection of confidential information, defined broadly by Rule 1.05(a) to include both privileged and unprivileged client information, which might be transmitted by email.

Rule 1.05(b) provides that, except as permitted by paragraphs (c) and (d) of the Rule:

> "a lawyer shall not knowingly:
> (1) Reveal confidential information of a client or former client to:
> (i) a person that the client has instructed is not to receive the information; or

> (ii) anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm."

A lawyer violates Rule 1.05 if the lawyer knowingly reveals confidential information to any person other than those persons who are permitted or required to receive the information under paragraphs (b), (c), (d), (e), or (f) of the Rule.

The Terminology section of the Rules states that "'[k]nowingly' . . . denotes actual knowledge of the fact in question" and that a "person's knowledge may be inferred from circumstances." A determination of whether a lawyer violates the Disciplinary Rules, as opposed to fiduciary obligations, the law, or best practices, by sending an email containing confidential information, requires a case-by-case evaluation of whether that lawyer knowingly revealed confidential information to a person who was not permitted to receive that information under Rule 1.05.

The concern about sending confidential information by email is the risk that an unauthorized person will gain access to the confidential information. While this Committee has not addressed the propriety of communicating confidential information by email, many other ethics committees have, concluding that, in general, and except in special circumstances, the use of email, including unencrypted email, is a proper method of communicating confidential information. See, e.g., ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 99-413 (1999); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 11-459 (2011); State Bar of Cal. Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. 2010-179 (2010); Prof'l Ethics Comm. of the Maine Bd. of Overseers of the Bar, Op. No. 195 (2008); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 820 (2008); Alaska Bar Ass'n Ethics Comm., Op. 98-2 (1998); D.C. Bar Legal Ethics Comm., Op. 281 (1998); Ill. State Bar Ass'n Advisory Opinion on Prof'l Conduct, Op. 96-10 (1997); State Bar Ass'n of N.D. Ethics Comm., Op. No. 97-09 (1997); S.C. Bar Ethics Advisory Comm., Ethics Advisory Op. 97-08 (1997); Vt. Bar Ass'n, Advisory Ethics Op. No 97-05 (1997).

Those ethics opinions often make two points in support of the conclusion that email communication is proper. First, the risk an unauthorized person will gain access to confidential information is inherent in the delivery of any written communication including delivery by the U.S. Postal Service, a private mail service, a courier, or facsimile. Second, persons who use email have a reasonable expectation of privacy based, in part, upon statutes that make it a crime to intercept emails. See, e.g., Alaska Bar Ass'n Ethics Comm. Op. 98-2 (1998); D.C. Bar Legal Ethics Comm., Op. 281 (1998). The statute cited in those opinions is the Electronic Communication Privacy Act (ECPA), which makes it a crime to

intercept electronic communication, to use the contents of the intercepted email, or to disclose the contents of intercepted email. 18 U.S.C. § 2510 *et seq.* Importantly, the statute provides that "[n]o otherwise privileged . . . electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character." 18 U.S.C. § 2517(4).

The ethics opinions from other jurisdictions are instructive, as is Texas Professional Ethics Committee Opinion 572 (June 2006). The issue in Opinion 572 was whether a lawyer may, without the client's express consent, deliver the client's privileged information to a copy service hired by the lawyer to perform services in connection with the client's representation. Opinion 572 concluded that a lawyer may disclose privileged information to an independent contractor if the lawyer reasonably expects that the independent contractor will not disclose or use such items or their contents except as directed by the lawyer and will otherwise respect the confidential character of the information.

In general, considering the present state of technology and email usage, a lawyer may communicate confidential information by email. In some circumstances, however, a lawyer should consider whether the confidentiality of the information will be protected if communicated by email and whether it is prudent to use encrypted email or another form of communication. Examples of such circumstances are:

1. communicating highly sensitive or confidential information via email or unencrypted email connections;
2. sending an email to or from an account that the email sender or recipient shares with others;
3. sending an email to a client when it is possible that a third person (such as a spouse in a divorce case) knows the password to the email account, or to an individual client at that client's work email account, especially if the email relates to a client's employment dispute with his employer (see ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 11-459 (2011));
4. sending an email from a public computer or a borrowed computer or where the lawyer knows that the emails the lawyer sends are being read on a public or borrowed computer or on an unsecure network;
5. sending an email if the lawyer knows that the email recipient is accessing the email on devices that are potentially accessible to third persons or are not protected by a password; or
6. sending an email if the lawyer is concerned that the NSA or other law enforcement agency may read the lawyer's email communication, with or without a warrant.

In the event circumstances such as those identified above are present, to prevent the unauthorized or inadvertent disclosure of confidential information, it may be appropriate for a lawyer to advise and caution a client as to the dangers inherent in sending or accessing emails from computers accessible to persons other than the client. A lawyer should also consider whether circumstances are present that would make it advisable to obtain the client's informed consent to the use of email communication, including the use of unencrypted email. See Texas Rule 1.03(b) and ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 11-459 (2011). Additionally, a lawyer's evaluation of the lawyer's email technology and practices should be ongoing as there may be changes in the risk of interception of email communication over time that would indicate that certain or perhaps all communications should be sent by other means.

Under Rule 1.05, the issue in each case is whether a lawyer who sent an email containing confidential information knowingly revealed confidential information to a person who was not authorized to receive the information. The answer to that question depends on the facts of each case. Since a "knowing" disclosure can be based on actual knowledge or can be inferred, each lawyer must decide whether he or she has a reasonable expectation that the confidential character of the information will be maintained if the lawyer transmits the information by email.

This opinion discusses a lawyer's obligations under the Texas Disciplinary Rules of Professional Conduct, but it does not address other issues such as a lawyer's fiduciary obligations or best practices with respect to email communications. Furthermore, it does not address a lawyer's obligations under various statutes, such as the Health Insurance Portability and Accountability Act (HIPAA), which may impose other duties.

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, and considering the present state of technology and email usage, a lawyer may generally communicate confidential information by email. Some circumstances, may, however, cause a lawyer to have a duty to advise a client regarding risks incident to the sending or receiving of emails arising from those circumstances and to consider whether it is prudent to use encrypted email or another form of communication.