



# **The Attorney-Client Privilege - Who Owns It After The Deal Is Done?**

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## **Two Important Features Of A Transaction Often Are Overlooked, Pre-Closing:**

- **Control Of Attorney-Client Privilege**
- **Representation In Post-Closing Disputes**



## **Sellers In A Transaction Should Not Presume:**

**1. That Attorney-Client Privileged Communications Regarding The Transaction Will Remain Controlled By The Seller, Post-Closing**

**Or**

**2. That Transaction Counsel Will Be Able To Represent The Seller In A Post-Closing Dispute**

**Unless**

**There Is Agreement That Privileged  
Communications Relating To The Transaction  
Will Remain In The Control Of The Seller**



**And**

**An Advance Conflict Waiver Based Upon Fully-Informed Consent, Confirmed In Writing, Is Secured, Pre-Closing, Permitting Counsel For The Seller To Be Adverse To The Entity Being Sold In A Post-Closing Dispute**

## Attorney-Client Privilege

- **Control Of Privilege, Post-Closing, Is Valuable**
- **Access To Privileged Communications Can Be Harmful In A Post-Closing Dispute**

## **Post-Closing Disputes**

- **While “Logic” and Argument May Dictate An Outcome Leaving The Privilege With the Seller’s Post-Closing . . .**
- **Why Take Risk?**
- **Instead, Bargain For Control Of the Privilege, Post-Closing**



## **If Control Over The Privilege Is In Doubt**

- **Wrongfully Accessing Privileged Communications, Whether By Outside Counsel Or By Inside Counsel, Can Have Serious Consequences, Including Sanctions And, Possibly, Bar Complaints**

*Stengart v. Loving Care*, 201 N.J. 300, 990 A. 2d 650 (N.J. 2010)

*Postorivo v. AG Paintball Holdings, Inc.*, 2008 WL 3876199 (Unpublished Opinion: Check Court Rules Before Citing)

- **Seek Judicial Direction, And Protection Through A Judicial Decision Regarding Access To Privileged Documents**



## **Post-Closing Matters And Legal Representation:**

- **Disputes Over “Holdback/Claim Baskets”**
- **Disputes Regarding Representations and Warranties**
- **Other Disputes**

**If**

**Counsel Represents The Company Sold, Post-Closing**

**Then**

**Counsel Will Need A Conflict Waiver, Whether In Advance Or In Real Time, To Be Adverse To A Current Client (NY Rule Of Professional Conduct 1.7)**

**If**

**The Company Sold Was Represented By The Law Firm In The Transaction, Even If There Is No Current Representation Of The Company:**

**Then**

**Counsel Will Need A Conflict Waiver To Be Adverse To A Former Client In The Same Or A Substantially Related Matter  
(NY Rule of Professional Conduct 1.9)**

## **Conflict Waivers**

**Each of the Conflicts Described, Whether A Current Client Conflict Or A Former Client Conflict, Can Be Waived:**

- **Waiver And Consent Must Be Fully Informed, Following A Consultation**
- **Waiver And Consent Must Be Confirmed In Writing (NY Rule 1.7(b))**
- **Advance Waivers Are Enforceable (*e.g.*, Rule 1.7, Comment [22])**