Cybersecurity risk – increasing technological complexity

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<td>Advanced Persistent Threat (APT)</td>
<td>Organized and state-funded groups methodically infiltrating the enterprise</td>
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<td>Industrial Control System Attack</td>
<td>Targeted attack that can disrupt activities of power plants and large-scale industrial control systems</td>
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<td>Cybercrime</td>
<td>Organized crime rings targeting corporations’ data for financial gain</td>
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<td>Ransomware</td>
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In-house counsel and outside help:
Ethical issues in dealing with advisors, agents, affiliates, and associated third parties

June 28, 2018
Agenda

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INTRODUCTION

Ethical issues in dealing with advisors, agents, affiliates, and associated third parties
Corporations increasingly work with outside parties

Management
• Management consultants
• Marketing consultants
• HR consultants

Legal
• Crisis management firm
• Forensic accountant
• Data breach expert
• Investigators

Corporate structure
• Affiliates
• Subsidiaries
• JV partners
Working with third parties raises unique ethical issues

Trend toward collaboration with third parties in tension with ethics rules based on unique client/lawyer relationship

- Possible waiver issues when disclosing to third parties
- Common interest doctrine and joint representation privilege

- Communications with represented party (Rule 4.2)
- Communications with unrepresented party (Rule 4.3)

- Consider duty to supervise under Rule 5.3 and duty of competence (including technological competence) under Rule 1.1

- Consider conflict of interest Rule 1.7 and duty of confidentiality
Scenario 1

Protecting privilege when working with outside consultants
Protecting privilege when working with outside consultants

Hypothetical facts

• Your boss, general counsel for retail company, received a call from law enforcement reporting possible hack into systems containing customer payment card information.

• You have begun an internal investigation and have retained an outside forensic firm to investigate the breach.
Question 1

Are your communications with the computer forensics firm privileged?
Attorney-client privilege

- Generally protects confidential communications between attorney and client if made for the purpose of obtaining or providing legal advice.
- Protects not only the lawyer’s legal advice, but also communications to attorney that provide information that will facilitate the provision of sound legal advice.
Generally, inclusion of third party in communication may destroy confidentiality and waive the attorney-client privilege.

Two theories reflected in court decisions extend privilege to consultants and contract employees.

- Third party serves as privilege agent
- Third party serves as “functional equivalent” to employee
Target privilege decision

U.S. District Court for the District of Minnesota

• Work by Target’s Data Breach Task Force and Verizon at the behest of Target’s counsel protected by privilege and work product doctrine

• Task force created at request of counsel to:
  – educate them about aspects of the breach
  – in order to secure informed legal advice

• Two tracks for forensic expert work separated business purposes from litigation purposes

Early engagement of outside counsel will enable outside counsel to engage a forensic team clearly distinguishing this work from any forensic work that may be done for business purposes.
In-house counsel: Limits to privilege?

• Work of in-house counsel is protected to the same degree as outside counsel

• But, more likely to work on business-oriented tasks not purely relating to the provision of legal advice
  – Thus, greater risk that communications with in-house counsel are not privileged
  – Courts typically examine the “primary purpose” of the particular communication at issue to determine whether privileged

• Beware: Outside U.S., privilege may not apply to in-house counsel
Question 2

Can communications with other types of outside consultants also be privileged?
Where else can agency exception apply?

- (1) client has a reasonable expectation of confidentiality under the circumstances; and
- (2) the disclosure to the third party was necessary for the client to obtain informed legal advice

But, information or reports prepared in the ordinary course of business to assess compliance are not likely to be protected

- See e.g. Stender v. Lucky Stores, Inc.

Courts have applied agency exception to communications with:

- accountants
- investment bankers
- appraisers
- public relations consultants
- insurance brokers
- others
Question 3

What if my legal assistant is the one communicating with the forensics team?
Privileged communication between two non-lawyers?

• The fact that a lawyer is not a direct sender or recipient may weigh against, but not automatically defeat, a claim of privilege.

• Communications between non-lawyers relating to the collection of factual material — even material provided by a consultant — necessary for effective representation of the client could be privileged.

• The further removed communication is from the lawyer’s provision of legal advice, the greater the risk that the communication will not be protected.
In the course of the investigation, you also need to interview a number of IT employees. One of the “employees” is actually a full-time contractor placed at your company through a technology staffing company. Will your communications with this contract employee be privileged?
Some courts conduct broad, practical analysis examining:

- whether the consultant acted for the corporation;
- had a similar role to that of an employee; and/or
- was an integral member of the team assigned to handle an issue related to litigation.

Other courts apply a more narrow test requiring that consultants:

1. be retained to perform a corporate function that is necessary in the context of actual or anticipated litigation;
2. possess information needed by counsel to provide legal advice;
3. have authority to make decisions on behalf of the corporation; and
4. were hired because the corporation lacked sufficient internal resources or expertise within the consultant’s field.
Consider the criteria courts have examined to determine whether a contractor is the functional equivalent of an employee when drafting contracts with independent contractors.

You may wish to include language that specifies how the work of the contractor will assist the company with legal matters in such contracts.

Contracts should specify that the contractor will work with your company’s counsel and that communications with counsel are expected to remain confidential.

Consider providing some training or guidance to contractors about how to properly communicate with counsel to preserve privilege protections as much as possible.
Scenario 2

Interviewing a consultant
Scenario 2: Interviewing a consultant

Hypothetical facts

• Anonymous caller to compliance hotline alleges pharmaceutical sales representatives are distributing materials that promote off-label prescriptions

• Concern off-label promotion may violate Food, Drug, and Cosmetic Act (FDCA)

• Marketing material used by sales force is prepared by marketing consultant
Question 1

Can you interview and advise the consultant about FDCA compliance just as you would an employee?
Who’s your client?

- In Virginia, D.C., and Maryland a “lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”
  - Consultant is not your client but neither is employee
- Privilege implications
- Because consultant works for separate organization you must consider:
  - Whether you must contact counsel for consulting company before interviewing consultant
  - Whether interests of consulting company are adverse

Ethics rules:
- Virginia Rule 1.13(a)
- D.C. Rule 1.13(a)
- Maryland Rule 1.13(a)
Must you contact the consulting firm’s counsel prior to interviewing the consultant?
The “no contact rule”

Rule 4.2

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

• Here, representation of consultant has not likely crystalized in this matter

• At least in Virginia, rule equally applicable where litigation “merely under consideration.” Va. Rule 4.2, cmt. 8.

Model Rule 4.2 “does not contemplate that a lawyer representing the entity can invoke the rule’s prohibition to cover all employees of the entity, by asserting blanket representation of them all.” See ABA Comm. On Ethics and Prof’l Resp., Op. 95-396 (1995).
If a regulatory investigation follows the compliance hotline call, would you then need to contact the consulting firm’s attorney before interviewing the consultant?
Only if consulting firm is represented in the matter and consultant is covered person under rule

- The “no contact rule” only applies to specific individuals
- “For purposes of this rule, the term ‘party’ or ‘person’ includes any person or organization, including an employee of an organization, who has the authority to bind an organization as to the representation to which the communication relates.” See D.C. Rule 4.2.
- A lawyer may therefore communicate with employees of an organization that is represented by counsel in the matter without first notifying the organization’s lawyer if those employees do not have authority to make decisions about the organization’s legal representation in that matter. See D.C. Bar Legal Ethics Committee Opinion No. 129.
Similar rules in Virginia and Maryland

**Virginia**


**Maryland**

- No contact rule extends only to (1) current officers, directors, and managing agents; and (2) current agents or employees who supervise, direct, or regularly communicate with the organizations’ attorneys concerning the matter or whose acts or omissions in the matter might bind the organization for civil or criminal liability. Maryland Rule 19-304.2
Question 4

What if marketing materials were prepared by a freelance writer instead of a consultant?
Freelance writer less likely to be represented by counsel

When dealing with unrepresented person

• “A lawyer shall not state or imply that the lawyer is disinterested.”

• “When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.”

• Where person’s interests are or have a reasonable possibility of being in conflict with your clients, you may offer no advice other than advice to secure counsel.

• Virginia Rule 4.3
• D.C. Rule 4.3
• Maryland Rule 19-304.3
Scenario 3

Supervising an ESI consultant
Scenario 3: Supervising an ESI consultant

Hypothetical facts

- You retain an e-discovery consultant to respond to a discovery request
- Less than two weeks before production deadline, relevant material has not been collected from key custodians
What obligation do you have to ensure the ESI consultant does an adequate job?
Supervising non-attorneys

- “[A] lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer” Virginia Rule 5.3 (b).

- You may be responsible for violations committed by others if “lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved.” Virginia Rule 5.3 (c)(1); Accord D.C. Rule 5.3 (c)(1); Maryland Rule 5.3 (c)(1).
Supervising ESI consultants

- California State Bar ethics opinion specifically addresses the scope of an attorney’s responsibility to supervise an ESI consultant

  “An attorney must maintain overall responsibility for the work of the expert he or she chooses . . . by remaining regularly engaged in the expert’s work, by educating everyone involved in the e-discovery workup about the legal issues in the case, the factual matters impacting discovery, including witnesses and key evidentiary issues, the obligations around discovery imposed by law or by the court, and of any relevant risks associated with the e-discovery at hand.”


- In 2016, Virginia added comment 6 to Rule 1.1, which requires attorneys to engage in continuing legal education to maintain competence and notes that “attention should be paid to the benefits and risks associated with relevant technology.”
Scenario 4: Parent/subsidiary conflict of interest
Scenario 4: Parent/subsidiary conflict of interest

Hypothetical facts

• The general counsel asks you to confidentially draft a memo analyzing the pros and cons of selling a subsidiary that has been an ongoing compliance problem and has potential liabilities stemming from an international corruption investigation.

• Shortly thereafter, a member of the subsidiary’s management team seeks your advice about the ongoing compliance problems.
Can you advise the subsidiary manager on compliance?
Are both parent and subsidiary your client?

- A comment to the D.C. Rules explains that “[o]rdinarily that client’s affiliates (parents and subsidiaries), other stockholders and owners, partners, members, etc., are not considered to be clients of the lawyer” for determining when a lawyer has a conflict with a third party. See D.C. Rule 1.7, cmt. 21.
- But it’s a question of fact
If intent is that you represent both entities, conflict of interest may prevent joint representation in this instance.

Generally there is an absolute bar from representing multiple clients to advance adverse positions in the same matter. See Virginia Rule 1.7 (b); D.C. Rule 1.7 (a); Maryland Rule 19-301.7.
Assuming there was no conflict and you could advise the subsidiary, will your communications with the subsidiary’s management team be privileged?
Privilege between parent and subsidiary

• Joint client relationship
  – Disclosure of information from one entity to the other does not waive a privilege that would otherwise apply.
  – Scope of the joint representation is fact specific and the parties’ intent and expectations are key evidence about that scope.
Destruction of joint client privilege

The joint client privilege ceases to apply when the interests of the parent and subsidiary become adverse to one another (actual adversity not potential).

When a joint representation ends, “the default rule is that all communications made in the course of the joint representation are discoverable.”

When two joint clients become adverse and all communications between them is no longer protected from each other, the communications would still be protected as to third parties.
Could the subsidiary waive the joint privilege allowing third parties access to the memo you’ve drafted for the general counsel?
Waiver of joint client privileged materials

- Waiver as to third parties requires consent of both parties to relationship (i.e., parent and subsidiary)
Scenario 5: Representing a joint venture
Scenario 5: Representing a joint venture

Hypothetical facts

- You are general counsel for a construction company that has agreed to enter a joint venture with a partner to bid on a multimillion-dollar public construction project.
- The JV partners have agreed they will retain outside counsel to represent the JV.
Question 1

Does the outside counsel representing the JV also represent your company?
Does JV counsel represent both JV partners as well?

- No presumption JV’s counsel represents JV partners
- JV partners could agree that outside counsel should represent all three entities
- Must consider conflict of interest rules:
  - Absolute bar from representing multiple clients to advance adverse positions in the same matter.
  - Where other conflicts exist, joint representation may be allowed after (1) informed consent by all parties after full disclosure if (2) lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.

See Virginia Rule 1.7.; D.C. Rule 1.7 (b); Maryland Rule 19-301.7.
Question 2

If outside counsel was retained to represent only the JV, and the JV is later sued for breach of contract, are communications shared between outside counsel, yourself, and in-house counsel for the other JV partner protected by the attorney-client privilege?
Attorney-client privilege over JV communications

- Attorney-client communications between counsel and the client (or its constituents)
- Common interest doctrine
Scope of common interest privilege unclear

Jurisdictions vary in regard to:

- Definition of "common interest" (e.g. similar, identical, or congruent)
- When may it be invoked? (e.g. only during litigation, when litigation is anticipated, or at any time there is a common interest)
- Whether writing is required to formalize common interest agreement

*Practice tip: JV partners should enter a joint defense agreement in addition to executing the joint venture formation documents in order to minimize risk of privilege waiver.*
Question 3

What if outside counsel represents the JV and both JV partners, and the JV partners disagree about whether a settlement offer should be accepted?
The “Aggregate Settlement Rule” applies when counsel represents multiple clients. Requires informed, unanimous, consent of all clients to any settlement or the offer of any settlement of claims. See Virginia Rule 1.8 (g); D.C. Rule 1.8(f); Maryland Rule 19-301.8(g).

Does disagreement about settlement create conflict of interest that requires termination of joint representation? Not if interests still “generally aligned”
How to proceed in the face of disagreement?

- Consider advising jointly represented clients to consult separate counsel regarding settlement.
- In any case, “Aggregate Settlement Rule” requires detailed, written disclosure to the clients of the material terms of the proposed settlement and the effect of the proposed settlement on clients (collectively and individually).
  - Must include information about what the other clients will pay if the settlement is accepted.
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