

## **In-House Counsel and Outside Help – Ethical Issues in Dealing with Advisors, Agents, Affiliates, and Associated Third Parties**

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Corporations increasingly tackle business challenges through an interdisciplinary, collaborative approach. Companies and their in-house counsel routinely work with all manner of outside advisors—such as management, marketing, operational and HR consultants. Companies also often turn to outside advisors when responding to legal troubles—and when seeking to avoid them—including crisis management firms, forensic accountants, data breach experts, and investigators. This trend towards collaboration with outside advisors can produce friction with the legal ethics rules defining the unique and confidential relationship between a client and in-house counsel. And companies themselves have increasingly complex corporate structures. Relations with affiliates, subsidiaries and joint venture partners present their own distinct ethical challenges for in-house counsel, particularly where joint ownership or work across national boundaries is involved.

This presentation will examine legal ethics issues that arise when counsel work with their client's non-lawyer advisors, agents, and consultants, and when their work involves affiliates, subsidiaries, partners and other associated third parties. These issues will include: client identification, conflicts of interest, privilege and waiver issues; common interest and joint representations, disputes and adversarial dealings with outside advisors and related entities.

Below, we use several hypothetical scenarios as a starting point for discussion of such issues under the *Virginia Rules of Professional Conduct* (the "Virginia Rules"), the *D.C. Rules of Professional Conduct* (the "DC Rules"), and the *Maryland Rules of Professional Conduct* (the "Maryland Rules").<sup>1</sup>

*Scenario 1:*

*Your boss, General Counsel for a retail company, informs you that she received a call from law enforcement reporting a 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.*

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<sup>1</sup>This presentation discusses some recurring issues and is meant to provide general guidance only. Individuals should seek legal counsel for guidance on how the Virginia Rules, DC Rules, and Maryland Rules apply to particular situations. A free PDF version of the Virginia rules is available at <http://www.vsb.org/site/regulation/guidelines>. The DC Rules are available on the DC Bar's website at <https://www.dcbar.org/bar-resources/legal-ethics/amended-rules/> and the Maryland rules can be accessed by Maryland Bar Association members at <https://www.msba.org/for-members/publications/rules-of-professional-conduct/>.

## **1. Are your communications with the computer forensics firm privileged?**

Possibly. The attorney-client privilege generally applies to protect disclosure of confidential communications between attorney and client if that communication was made for the purpose of obtaining or providing legal advice. Thus, the privilege protects not only the lawyer's advice, but also communications to an attorney if those communications provide information that will facilitate the provision of sound legal advice.

Generally, when attorney-client communications also include a third party, the inclusion of the third party may destroy confidentiality and thus waive the attorney-client privilege that would have otherwise applied. However, courts have held that an exception to the waiver rule applies where otherwise privileged material is disclosed to an "agent" of the client who serves as a type of "interpreter." Under this rule, many courts have found that the attorney-client privilege may extend to communications with consultants or contractors who provide services to counsel that are necessary for effective representation of the client's interests. This is the case when a third party evaluates information and in a sense "translates" it into a format the lawyer can use.<sup>2</sup>

This exception to the privilege waiver rule would not protect communications that were not privileged in the first instance—even if not disclosed to a third party. Thus, as a threshold determination, it's important to recall that not every communication between in-house counsel and employees is privileged. When asked to determine which communications with a lawyer are privileged, courts typically must determine whether the "primary purpose" of a particular communication is to obtain or provide legal advice. In a 2014 decision, *In re Kellogg Brown & Root, Inc.*, the D.C. Circuit Court of Appeals recognized that a single communication may be multi-purposed. The court explained that the primary purpose test "boils down to whether obtaining or providing legal advice was one of the significant purposes of the attorney-client communication."<sup>3</sup>

The U.S. District Court for the District of Minnesota applied this concept in a matter involving forensic investigators examining the Target data breach.<sup>4</sup> In that decision, the court denied class action plaintiffs access to documents prepared by Verizon Business Network Services, which Target had retained to investigate a data breach. The plaintiffs argued that the documents were not privileged because Target would have had to investigate and remedy the breach for business reasons even if no threat of litigation existed. Target argued that it had employed a two-track approach to the retention of forensic experts separating the business work from the legal work. First, at the request of its in-house and outside counsel, Target created a Data Breach Task Force to educate them about aspects of the breach in order

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<sup>2</sup> *Graco, Inc. v. PMC Glob., Inc.*, No. CIV.A. 08-1304 FLW, 2011 WL 666048, at \*16 (D.N.J. Feb. 14, 2011) (quoting *La. Mun. Police Employees Ret. Sys. v. Sealed Air Corp.*, 253 F.R.D. 300, 311 (D.N.J. 2008)). See also *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961) (accountant hired by tax counsel to assist in interpreting client conversations was considered privileged agent).

<sup>3</sup> *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 760 (D.C. Cir. 2014) (finding that the privilege applied to communications made in the course of an internal investigation of alleged violations of the False Claims Act because a significant purpose of the investigation was to obtain legal advice *even if* the investigation was also conducted pursuant to a company compliance program required by statute, regulation or other company policies.)

<sup>4</sup> *In re: Target Corporation Customer Data Security Breach Litigation*, MDL No. 14-2522 (PAM/JJK), 2015 WL 6777384 (D. Minn. Oct. 23, 2015).

to secure informed legal advice. For this purpose, Target’s outside counsel engaged Verizon Business Network Services to conduct a technical investigation as part of this task force. Separately, another team from Verizon conducted a non-privileged investigation into the data breach on behalf of several credit card companies so that they and Target could learn how the breach happened. The court concluded that the work done by Target’s Data Breach Task Force and Verizon at the behest of Target’s counsel was protected by the privilege and by the work product doctrine.

In so holding, the court appears to have accepted Target’s argument that the work of the Data Breach Task Force was privileged because it was created at the request of Target’s in-house lawyers and its outside counsel to educate them about aspects of the breach in order to secure informed legal advice.<sup>5</sup>

Perhaps importantly, the court noted that Target’s outside counsel engaged the privileged Verizon team.<sup>6</sup> Although the *KBR* decision recognized that internal investigation documents may be privileged even if the investigation involved only in-house counsel, the *Target* decision suggests that it may nonetheless be prudent to have outside counsel retain any external consultants whose expertise is necessary to allow outside counsel to provide effective legal representation to his or her clients. Using external counsel to retain consultants in preparation for potential litigation would enable you to clearly distinguish this work from any forensic work that may be done for business purposes. In-house counsel may be involved in both tracks of the investigation and, as in the *Target* case, having outside counsel in place may help a court distinguish the two parts of an investigation.<sup>7</sup>

## **2. Can communications with other types of outside consultants also be privileged?**

The “agency exception” may apply where the client had a reasonable expectation of confidentiality under the circumstances and the disclosure to the third party was necessary for the client to obtain informed legal advice.<sup>8</sup> Courts have relied on this reasoning to find that accountants, investment

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<sup>5</sup> Target’s Chief Legal Officer had submitted a declaration stating that shortly after discovering the possibility that a data breach had occurred, Target retained outside counsel to obtain legal advice about the breach and its possible legal ramifications. Once Target publicly announced the breach and it became clear that Target would face numerous class action lawsuits, the Data Breach Task Force was charged “to coordinate activities on behalf of [Target’s in-house and outside] counsel to better position the Target Law Department and outside counsel to provide legal advice to Target personnel to defend the company.” *Id.* at \*1. See also, Stuart Altman and Michelle Kisloff, Target Court Upholds Attorney-Client Privilege in Cyber Investigations, Chronicle of Data Protection, (Oct. 26, 2015), <http://www.hldataprotection.com/2015/10/articles/privacy-security-litigation/target-court-upholds-attorney-client-privilege-in-cyber-investigations/>.

<sup>6</sup> *Id.* at \*1.

<sup>7</sup> Another federal district court has observed that the fact that outside counsel conducted employee interviews during an internal investigation strengthens a claim that interview memoranda are privileged because it avoids the thorny issues that arise when in-house counsel serve in both business and legal roles. See *In re General Motors LLC Ignition Switch Litig.*, 80 F.Supp.3d 521, 528 (S.D.N.Y 2015). But see in substantially *In re Premera Blue Cross Customer Data Sec. Breach Litig.*, 296 F. Supp. 3d 1230, 1242 (D. Or. 2017) (“Having outside counsel hire a public relations firm is insufficient to cloak that business function with the attorney-client privilege.”)

<sup>8</sup> See *Homeward Residential Inc. v. Sand Canyon Corp.*, 2017 WL 476806, \*5 (S.D.N.Y. Oct. 17, 2017).

bankers, appraisers, public relations consultants, insurance brokers and others are serving as privileged agents when the facts supported such a finding.<sup>9</sup>

In contrast, information or reports prepared by consultants or experts in the ordinary course of business to assess compliance are less likely to be protected by the attorney-client privilege. For instance, in *Stender v. Lucky Stores, Inc.*, class plaintiffs sought discovery of information shared during a series of meetings between company managers and an attorney who had been hired as a consultant to train managers about the company's affirmative action plans. The court found this material was discoverable where the attorney was hired as a consultant and his consultant agreement did not designate him as an attorney.<sup>10</sup>

*Practice tip: When counsel needs the services of external consultants in order to render legal advice, counsel should engage such consultants directly, document confidentiality obligations, and explicitly state that the third party's assistance in understanding complex information is required in order for counsel to provide legal advice to his or her client.*

### **3. What if my legal assistant is the one communicating with the forensics team?**

The fact that a lawyer is not a direct sender or recipient of a confidential communication may generally weigh against, but not automatically defeat, a claim of privilege. Communications between non-lawyers relating to the collection of factual material — even material such as forensic analyses that may also be collected in the course of regular business affairs — may be protected if the corporation can document that the materials were prepared to inform counsel about facts necessary to provide legal advice.

By extension, communication between a non-lawyer corporate employee and a consultant who is serving as an agent for privilege purposes could also be privileged. However, the further removed such a communication is from the lawyer's provision of legal advice, the greater the risk that the communication will not be protected.

### **4. In the course of the investigation, you also need to interview a number of IT employees. One of the "employees" you wish to interview is actually a full-time contractor placed at your company through a technology staffing company. Will communications with this contract employee be privileged?**

A number of court decisions support claims of privilege when a contractor or consultant is so integrated in the company that he or she becomes the "functional equivalent" of an employee.<sup>11</sup> The test courts apply to determine when a non-employee is the "functional equivalent" of an employee varies by court.

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<sup>9</sup> See, e.g., *Williams v. Sprint/United Management Co*, 464 F. Supp. 2d 1100 (D. Kan. 2006) (adverse impact analysis prepared during a company reorganization and reduction-in-force was protected by the attorney-client privilege where the analysis was conducted at the direction of counsel and communications were made for purpose of securing legal advice); *In re OM Group Sec. Litig.*, 226 F.R.D. 579, 588-89 (N.D. Ohio 2005)(documents created by an accountant at the attorney's request to assist the attorney in providing legal advice to the client are protected by the attorney-client privilege).

<sup>10</sup> 803 F. Supp. 259 (N.D. Cal. 1992).

<sup>11</sup> See e.g. *In re Bieter Co.*, 16 F.3d 929 (8<sup>th</sup> Cir. 1994); *United States v. Graf*, 610 F.3d 1148 (9<sup>th</sup> Cir. 2010).

Some courts have asserted that determining functional equivalence “entails a broad practical analysis of the consultant’s relationship with the corporation.”<sup>12</sup> These courts may examine 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 have taken a more narrow approach to defining “functional equivalent” 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.<sup>13</sup>

*Practice tips: 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. The contract should also specify that the contractor will work with your company’s counsel and that communications with counsel are expected to remain confidential. Finally, consider providing some training or guidance to contractors about how to properly communicate with counsel to preserve privilege protections as much as possible.*

*Scenario II: You are an Associate General Counsel for a pharmaceutical company and are asked to investigate allegations made through a compliance hotline. The anonymous call alleges that sales representatives are distributing materials that illegally promote off-label prescription of an older prescription drug in violation of the Food, Drug and Cosmetic Act. You learn that much of the marketing material used by the sales force is prepared by a marketing consultant.*

**1. Can you interview and advise the consultant about FDCA compliance just as you would an employee?**

Perhaps. But there are some additional considerations. Virginia Rule 1.13(a), DC Rule 1.13(a), and Maryland Rule 19-301.13(a) all provide that that a “lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.” Therefore, a consultant retained by your organization is not your client. But neither are employees or officers of your organization.

Because the consultant may be considered a third party, you should carefully consider the risk that your conversation will not be protected by the attorney-client privilege. However, as noted above, the agency or functional-equivalent-to-an-employee exceptions may apply.

In addition to the privilege considerations, the fact that the consultant works for a separate organization requires that you consider (1) whether you must contact counsel for the consulting company before interviewing the consultant, and (2) whether the interests of the consulting company could become adverse to your company’s interest.

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<sup>12</sup> See e.g. *FTC v. Innovative Designs, Inc.* 2017 WL 4310236, \*6 (W.D. Pa Sept. 28, 2017) (citing *In re Flonase Antitrust Litig.*, 879 F.Supp.2d 454, 459-80 (E.D. Pa. 2012).

<sup>13</sup> See e.g. *In re Bristol Myers Squibb Securities Litig.*, 2003 WL 25962198 (D.N.J. 2003)

## **2. Must you contact the consulting firm's counsel prior to interviewing the consultant?**

Virginia Rule 4.2 provides: "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 by law to do so." The bolded phrases above indicate that the "no-contact rule" applies only where the contacting lawyer and the non-client's lawyer both are representing their respective clients **in the same matter**. *See* Opinion 69; ABA Comm. on Ethics and Prof'l Resp., Formal Op. 95-396, "Communications with Represented Persons" (1995) (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 a blanket representation of all of them"). Instead, the subject matter of the representation needs to have crystallized between the client and the lawyer before the no contact rule applies. Given that you are responding to a recent call to a compliance hotline, the consultant is unlikely to be represented by a lawyer **in this matter**. Note, however, that the Virginia rule specifies that the rule's application is not limited to instances where litigation or adjudication has begun. The no contact rule, at least in Virginia, is equally applicable where litigation is "merely under consideration . . . and the persons who are potentially parties to the litigation have retained counsel." Virginia Rule 4.2, cmt 8. The Maryland and D.C. rules don't speak to this overtly but could be interpreted to apply in similar circumstances.

If you determine that you need not contact counsel before interviewing this non-client, you must still consider whether the consulting company is an adverse or potentially adverse party. If so, "prior to communicating with any such nonparty employee, a lawyer must disclose to such employee both the lawyer's identity and the fact that the lawyer represents a party that is adverse to the employee's employer." *See* Virginia Legal Ethics Opinion 905; D.C. Rule 4.2(b). *Accord* Maryland Rule 19-304.2(b).

## **3. If your company was later investigating potential regulatory violations related to the off-label promotion, could you still interview the marketing consultant without going through the consulting firm's counsel?**

If you determine that the consulting firm is represented **in the matter**, you must then consider whether the no contact rule applies to the individual consultant you wish to interview. In this regard, DC Rule 4.2 specifies that "[f]or 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." Comments to the DC Rule make it clear that "the rule does not prohibit a lawyer from communicating with [such people] with respect to the matters underlying the representation if they do not also have authority to make binding decisions regarding the representation itself." DC Rule 4.2, cmt 4. 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 the employees do not have authority to make decisions about the organization's legal representation in that matter. *See also* D.C. Bar Legal Ethics Committee Opinion No. 129.

Maryland Rule 19-304.2 (b) similarly indicates that when an organization is represented by another attorney, the 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 organization's attorneys concerning or whose acts or omissions in the matter might bind the organization for civil or criminal liability. And a comment to the Virginia Rule defines persons impacted by the no contact rule to

be the “alter ego” of an organization and those meeting the “control group” test articulated in *Upjohn v. United States*, 449 U.S. 383 (1981). Virginia Rule 4.2., cmt 7.

Thus, if the consultant working for your corporation is a low-level employee with no management authority, the no contact rule probably does not require that you contact the consulting firm’s counsel before interviewing them. The Maryland Rule specifies that you may not initiate communication with a current agent or employee of another organization that is represented **in the matter** before first inquiring to ensure that they do not fall into the category of agents or employees with whom you are prohibited from communicating. Maryland Rule 19-304.2 (b). If you determine that contact with the consulting firm’s counsel is not required, be careful to treat the low-level employee as an unrepresented person. See below.

*Practice tip: you may wish to work through the consulting firm’s counsel to set up an interview even if you are not required to do so by the ethics rules in order to preserve good relations with the vendor and minimize risk.*

In sum, in D.C., Maryland, and Virginia you would not be required to contact counsel for the consulting firm before interviewing the consultant unless (1) the organization is represented **in the matter** you are investigating and (2) the consultant you seek to interview has the authority to make binding decisions **about legal representation** in the matter you are investigating.

#### **4. What if the marketing materials were prepared by a freelance writer instead of a consultant?**

In this instance, the marketing writer is less likely to be represented by counsel and you should consult your jurisdiction’s rule about dealing with unrepresented people. D.C., Maryland, and Virginia Rules require that counsel make it clear that he or she is not disinterested when talking to someone not represented by counsel. The Virginia Rule provides:

- (a) In dealing on behalf of a client with a person who is not represented by counsel, 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.

Virginia Rule 4.3; *accord* D.C. Rule 4.3; Maryland Rule 19-304.3.

In addition, the rules require where an unrepresented person’s interests are or have a reasonable possibility of being in conflict with your client’s interests, you may not offer that person any advice other than the advice to secure counsel. Virginia Rule 4.3 (b); D.C. Rule 4.3; Maryland Rule 19-304.3, cmt 2. A comment to the Maryland Rule underscores that it is only where an unrepresented person’s interest may be adverse to the attorney’s client’s interest that “the possibility that the attorney will compromise the unrepresented person’s interests is so great that the attorney should not give any advice, apart from the advice to obtain an attorney.” Given the possibility for adversity here, you should proceed very cautiously when interviewing an unrepresented freelance writer. You should disclose the fact that you represent your organization and that its interests could be or could become adverse to the writer’s interests. You should offer no advice to the writer except the advice to consider securing independent counsel.

*Scenario III: You hire an e-discovery consultant to respond to a discovery request. You learn from employees identified as likely custodians of relevant materials that their electronic files have not yet been collected. The production deadline is less than two weeks away.*

**1. What obligation do you have to ensure the ESI consultant does an adequate job?**

D.C., Maryland and Virginia rules all provide that the attorney who has direct supervisory authority over any non-attorney “employed or retained by or associated” with the attorney, “shall make **reasonable efforts** to ensure that the person’s conduct is compatible with the professional obligations of the attorney.” A comment to this rule indicates that attorneys who utilize the assistance of non-lawyers in their practice, whether employees or independent contractors, must give appropriate instruction about ethical aspects of their work. Virginia Rule 5.3, cmt 1; D.C. Rule 5.3, cmt 1; Maryland Rule 19-305-3, cmt 1 (emphasis added).

Furthermore, if a consultant violates ethics rules, you may be responsible for such violations if “the 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 19-305.3 (c)(1).

A California State Bar ethics opinion specifically addressed the scope of an attorney’s responsibility to supervise an ESI consultant and has indicated that:

[The competence rule] permits an attorney to meet the duty of competence through association with another lawyer or consultation with an expert. This consultation or association, however, does not absolve an attorney’s obligation to supervise the work of the expert under [California’s competence rule], which is a non-delegable duty belonging to the attorney who is counsel in the litigation, and who remains the one primarily answerable to the court. 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.

State Bar of California’s Formal Opinion No. 2015–193 at 5.

Supervising ESI consultants is inherently difficult for lawyers who may lack the engineering or computer programming knowledge to intelligently interpret the consultant’s activities. But, such a lack of knowledge does not relieve lawyers of their ethical responsibility to supervise. In over half of the states, including Virginia, a lawyer’s duty of competence includes technological competence. In 2016, Virginia added Comment 6 to Virginia Rule 1.1, which explains that in order for a lawyer to achieve the necessary level of competence required by Rule 1.1, he or she should engage in continuing legal education and that “attention should be paid to the benefits and risks associated with relevant technology.” See Virginia Rule 1.1, cmt 6. This is similar to a comment added to the American Bar Association’s Model Rules in 2016,<sup>14</sup> but Maryland and DC have not yet incorporated any similar language into their Rules.

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<sup>14</sup> See MODEL RULES OF PROFESSIONAL CONDUCT R. 1.1 cmt 8 (AM. BAR ASS’N 2016).

**2. Could my company sue an e-discovery vendor if its failures subjected us to discovery sanctions?**

In 2008 Sullivan & Cromwell settled a contract claim against an e-discovery firm, Electronic Evidence Discovery Inc. (EED) for failing to communicate, missing deadlines and making other mistakes. See *Sullivan & Cromwell LLP v. Electronic Evidence Discovery Inc.*, No. 07-cv-11616 (S.D.N.Y.) The Complaint alleged that EED's repeated delays and inability to provide accurate information to the law firm regarding the progress of EED's work significantly impeded the lawyers' ability to efficiently review the data prior to the discovery deadline. The law firm claimed it was forced to divert resources from other projects to make up for EED's repeated failures.

Sullivan & Cromwell was billed a total of more than \$1.06 million for the discovery work and paid about 40% of those charges. EED subsequently sent a demand letter and the law firm filed a lawsuit for breach of contract claiming that no additional payment was required. The matter settled out of court and Sullivan & Cromwell neither disclosed what litigation matter was impacted by EED's failings nor whether any penalties or discovery sanctions resulted from EED's alleged delays and quality-control failures.

Although law firms and companies may be more inclined to pursue claims against ESI and other vendors when discovery sanctions are levied against a law firm or its client, negligence on the part of an ESI vendor will not eliminate a lawyer's ethical obligations. Note that even if your company prevailed against an ESI vendor on a contract claim, this would not relieve you of the ethical obligations to make "reasonable efforts" to ensure that the vendor's conduct is compatible with your professional obligations as an attorney.

*Scenario IV:*

*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 management team at the subsidiary seeks your advice about the ongoing compliance problems.*

**1. Can you advise the subsidiary manager on compliance?**

A comment to the D.C. Rules explains that when a lawyer represents an organizational client, "[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. However, the question of whether a corporation's attorney represents the corporation's affiliates and subsidiaries is a question of fact. Courts have weighted multiple factors to determine whether in-house counsel represents both the parent and subsidiary. These factors include the degree of financial and operational interdependence of the affiliated entities, the extent of any overlap in the management group for the two entities,<sup>15</sup> as well as the client's belief about whether an attorney has represented it.<sup>16</sup>

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<sup>15</sup> See *GSI Commerce Solutions, Inc. v. BabyCenter LLC*, 618 F3d 204, 210-12 (2d Cir. 2010); *Cascades Branding Innovation, LLC v. Walgreen Co.*, 2012 WL 1570774 at \*7-8 (N.D. Ill. May 3, 2012).

<sup>16</sup> See *Avocent Redmond Corp. v. Rose Elecs.*, 491 F.Supp. 2d 1000, 1003-4 (W.D. Wa. 2007); *Certain Underwriters at Lloyd's, London*, 264 F.Supp. 2d 914, 922-24 (N.D. Cal. 2003).

Some corporations may adopt policies that clearly assign responsibility for legal services. This can also be documented in a memorandum of understanding between the affiliated corporations. In-house counsel should have a clear understanding of which entities they represent and ensure the constituents of those entities share that understanding.

If you had previously understood that you represent both parent and the subsidiary, given the present facts, you should consult the conflicts rules. The conflicts rules generally absolutely prevent 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. For other conflicts, joint representation is typically allowed if:

- (1) Each potentially affected client provides informed consent to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation; and
- (2) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.

See D.C. Rule 1.7 (b). *Accord* Virginia Rule 1.7 (b); Maryland Rule 19-301.7 (b).

In addition, a comment to the Virginia Rules makes it clear that the duty of confidentiality makes representation of two separate clients unethical “if one client asks the lawyer not to disclose to the other client information relevant to the common representation.” See Virginia Rule 1.7, cmt. 31. Here it is a close call as to whether the potential sale of the subsidiary due to the compliance problems is information relevant to the compliance advice the subsidiary is seeking.

Even if you concluded that the duty of confidentiality you owe to both clients would not prevent you from providing them both diligent and competent representation, they are at least potentially adverse given the contemplated sale. Thus, you could only represent both entities under Rule 1.7 if each client gave you informed consent after full disclosure. Here, informed consent would be challenging to obtain and representation could be problematic.

*Practice tip: If you feel uncomfortable discussing a legal issue with management of a subsidiary, there may be an underlying conflict of interest and you should consult outside ethics counsel. If a parent and subsidiary need separate outside counsel, separate inside counsel should be assigned to coordinate with separate outside counsel.*

## **2. Assuming there was no conflict and you could advise the subsidiary, will your communications with the subsidiary's management team be privileged?**

For application of the attorney-client privilege rules, courts have concluded where a parent and subsidiary are closely affiliated or otherwise share the same legal interests, they benefit from a joint attorney-client privilege. In *United States v. American Telephone & Telegraph Co.*, the court explained that for privilege purposes, “a corporate ‘client’ includes not only the corporation by whom the attorney is employed or retained, but also parent, subsidiary, and affiliate corporations.”<sup>17</sup> Under this joint

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<sup>17</sup> 86 F.R.D. 603, 616 (D.C. 1980); *see also Crabb v. KFC National Management Co.*, 952 F.2d 403 (6th Cir. 1992) (refusing to find that a disclosure of a confidential communication to a sister subsidiary owned by a common parent waived the attorney-client privilege); *Admiral Insurance Co. v. United States District Court*, 881 F.2d 1486, 1493 n.6 (9th Cir. 1989) (rejecting argument that statements by an

privilege, disclosure of information from one entity to the next does not waive a privilege that would otherwise apply.

The basis for applying the attorney-client privilege to communications between related companies is that the companies share a common interest by reason of their common ownership.<sup>18</sup> However, the scope of the joint representation is fact specific and the parties' intent and expectations are key evidence about that scope. The Third Circuit recently noted that "finding too broad the scope of a joint representation gives the parties more control over each other's ability to waive the privilege than they intended, and it subjects them to losing it in litigation with one another."<sup>19</sup>

*Practice Tip: The requirement of a legal matter of common interest needed to assert the joint representation privilege should not be confused with the common interest privilege, which can be relied on when two entities use their own separate counsel but share a common interest.*<sup>20</sup>

**3. If you advise the subsidiary on compliance issues, could the subsidiary later gain access to the memo you draft for the general counsel that addresses similar issues?**

The joint client privilege ceases to apply when the interests of the parent and subsidiary are adverse to one another. When a joint representation ends and former co-clients become adverse, "the default rule is that all communications made in the course of the joint representation are discoverable."<sup>21</sup> This rule applies only when there is actual adversity as opposed to potential adversity between the two clients. Because there is always a possibility that two jointly represented clients will become adverse at some point in the future, if potential adversity was the touchstone, then the joint client privilege would be eviscerated. Even 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.<sup>22</sup>

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employee of a subsidiary to the attorney for the parent were not privileged); *Weil Ceramics & Glass, Inc. v. Work*, 110 F.R.D. 500, 503 (E.D.N.Y. 1986) ("[T]he attorney-client protection provided for corporate clients includes, the corporation who retained an attorney, its parent, and its wholly-owned and majority-owned subsidiaries considered collectively.")

<sup>18</sup> See *Glidden Co. v. Jandernoaa*, 173 F.R.D. 459, 472 (W.D. Mich. 1997) ("The universal rule of law, expressed in a variety of contexts, is that the parent and subsidiary share a community of interest, such that the parent (as well as the subsidiary) is the 'client' for purposes of the attorney-client privilege.")

<sup>19</sup> *In re Teleglobe Communications Corp.*, 493 F.3d 345, 363 (3rd. Cir. 2007).

<sup>20</sup> *Zapata Gulf Marine Corp. v. Puerto Rico Maritime Shipping Authority*, 1989 WL 149227 (E.D. La. 1989) (recognizing a "related companies" exception separate and independent from the common interest doctrine).

<sup>21</sup> *In re Teleglobe Communications Corp.*, 493 F.3d 345, 366 (3d Cir. 2007).

<sup>22</sup> See Restatement § 75(2). In *The Jordan (Bermuda) Investment Co. v. Hunter Green Investments Ltd.*, No. 00 Civ. 9214 (RWS), 2006 WL 2773022 (S.D.N.Y. Sept. 27, 2006), the plaintiff sought discovery of communications between the defendant and its former joint clients. The court denied plaintiff's motion and treated the subsequent adverse proceeding exception to privilege as irrelevant except "in an adverse proceeding between [former joint clients]." *Id.* at \*1. See also *Magnetar Tech. Corp. v. Six Flags Theme Park Inc.*, CA 07-127-LPS-MPT, 2012 WL 3609715 (D. Del. Aug. 22, 2012) (holding that "[w]aiving the joint privilege requires the consent of all joint clients" and denying third party's request for documents notwithstanding the pending adverse proceedings between former joint clients); *In re Crescent Resources, LLC*, 457 B.R. 506 (Bankr. W.D. Tex. 2011) ("any co-client privileged information can remain privileged as to third parties even if used in a future adversary proceeding between [former joint clients]").

Here, if your memo was deemed to relate to a legal matter in which you jointly represented the parent and the subsidiary, it would be discoverable by the subsidiary in the event the subsidiary becomes adverse to the parent about the same issue. For instance, if the subsidiary was later sold and litigation followed, the memo could possibly be discoverable in that litigation.

**4. Could the subsidiary waive the joint privilege allowing third parties access to the memo you've drafted for the general counsel?**

Communications that qualify as privileged under joint client privilege are protected by a jointly held privilege, which may generally be waived with regard to third parties only with the consent of both joint parties (here the parent and the subsidiary). Despite this general rule there is some risk that if the subsidiary is sold, the new owner of the subsidiary would gain control over the privileged material relating to the sale.

A Delaware statute has been interpreted to transfer all rights related to attorney client privilege to new entities following a merger where the merger document did not contain any provision that would reflect a different agreement.<sup>23</sup> This case did not specifically address the joint client privilege and at least one other court has suggested that “whether the attorney-client relationship transfers . . .to new owners, turns on the practical consequences rather than the formalities of the particular transaction.”<sup>24</sup> Nonetheless there is some risk that that following a sale of a subsidiary, the new owners will gain control over the attorney-client privilege.

*Practice tip: When in-house counsel work on a matter for an affiliated corporation, it is advisable to require that the affiliated corporation document the common interest that the work serves, documenting the scope of any joint representations. If companies' interests later diverge, the subsidiary should consider retaining separate counsel.*

*Scenario V:*

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

**1. Does the outside counsel representing the JV also represent your company?**

Possibly. If the outside counsel is retained to represent only the JV, he or she will not be presumed to also represent the JV partners. But, the JV partners could agree that outside counsel should represent all three entities as permitted under the conflict of interest rules discussed above. It's important to clearly document the scope of the outside counsel's representation to eliminate any ambiguity in this regard. The creation of the JV does not extinguish the ethical obligations counsel will owe to the JV partners. Thus, this counsel will need to be very conscious of what his or her obligations are with respect to communication, confidentiality, disclosures, decision-making, and conflicts of interest to each party. This requires vigilant evaluation and compliance throughout the operational phase of the venture.

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<sup>23</sup> *Great Hill Equity Partners v. SIG Growth*, 80 A.3d 155, 161-62 (Del. Ch. 2013).

<sup>24</sup> *TekniPlex Inc. v. Meyner and Landis*, 89 N.Y.2d 663, 668 (N.Y. 1996).

**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 this outside counsel, yourself, and in-house counsel for the other JV partner protected by the attorney-client privilege?**

The attorney-client privilege protects representation-related communications between counsel and the client (or its constituents) from discovery by third parties. If the outside counsel represents only the JV, confidential communications with constituents made for the purpose of securing or providing legal advice for the JV would be covered. If you are acting as the legal decision maker for the JV, you are acting as constituent of the JV and the communications may be protected. But, if the conversation expanded to include managers at your company who are not constituents of the JV, that breach of confidentiality could risk waiving the privilege.

The common interest doctrine is likely to mitigate that risk. The common interest doctrine generally applies to prevent waiver as to otherwise privileged communications between various parties and their counsel where such parties share a “commonality of interest” with respect to the matter.<sup>25</sup> Though certain elements vary by jurisdiction, courts typically require parties invoking this protection to demonstrate that:

- (1) an underlying privilege (such as the attorney-client privilege) protects the communication;
- (2) the parties disclosed the communication at a time when they shared a common interest;
- (3) the parties shared the communication in furtherance of that common interest; and,
- (4) the parties have not waived the privilege.<sup>26</sup>

The parameters of the protection provided by the common interest doctrine vary by jurisdiction, but typically, the “common interest” must be a legal one, not solely a business interest, and it must relate to a collaboration in pending or future litigation.

JV partners naturally share a common interest that was advanced by the JV creation. They therefore often select one lawyer to represent that interest when attacked by a third party. But, if they instead

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<sup>25</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76 (2000) (recognizing the common interest doctrine, and stating that “[i]f two or more clients with a common interest in a litigated or nonlitigated matter agree to exchange information concerning the matter,” and their communication of such information “otherwise qualifies as privileged,” then the communication “is privileged as against third persons”).

<sup>26</sup> Matthew D. LaBrie, The Common Interest Privilege, American Bar Association, Sept. 30, 2014, <http://apps.americanbar.org/litigation/committees/trialevidence/articles/fall2014-0914-common-interest-privilege.html>

retain their own lawyers to defend a claim lodged against the JV, the common interest doctrine will enable those individual lawyers to share information and assist each other in the defense without waiving privilege protection.

*Practice Tip: JV partners should enter a joint defense agreement in addition to executing the joint venture formation documents in order to minimize ethical concerns about the disclosure of confidential information and any related privilege waiver. Such an agreement may also indicate whether the parties have an affirmative duty to share information if such sharing is merely permitted. The agreement may also identify attorneys with authority to make representations on behalf of the group as a whole and should specifically identify the clients represented by each attorney.*

**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?**

D.C. Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement" while the "Aggregate Settlement Rule" effectively require informed, unanimous, consent of all clients to any settlement or the offer of any settlement of claims where a settlement involves multiple parties represented by the same counsel. See Virginia Rule 1.8 (g); D.C. Rule 1.8 (f); Maryland Rule 19-301.8(g).

As noted above, Rule 1.7 governs concurrent conflicts of interest. Though conflicts may arise over the course of a joint project, as long as the respective interests of all clients to a joint representation are "generally aligned" and not "fundamentally antagonistic" the conflict does not necessitate the termination of the joint representation. See Virginia Rule 1.7, cmt. 27; Maryland Rule 1.7, cmt 28. The D.C. Rules explain that the absolute bar of representing adverse positions in the **same matter** does not apply when "clients' positions are only nominally but not actually adverse." See D.C. Rule 1.7, cmt 6.

Outside counsel would be wise to advise the jointly represented clients to consult separate counsel about the settlement but the rules do not appear to require he or she terminate the joint representation. Whether or not a client consults separate counsel, the "Aggregate Settlement Rule" requires the attorney to make detailed, written disclosure to the clients of the material terms of the proposed settlement and the effect of the proposed settlement on the clients (collectively and individually). This disclosure must include information about what the other clients will pay if the settlement is accepted.

*Practice Tip: Any joint representation agreement should include an agreement about whether a lawyer who represents multiple parties in a matter may continue to represent one of the parties if a conflict terminates the joint representation. Without such an agreement, continued representation after such a conflict is prohibited Rule 1.9 (a).*