Pulled from the headlines: An insider's view of ethical issues in high-profile investigations

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High-profile, politically charged investigations and lawsuits (whether civil, criminal, or congressional) have the potential to raise a variety of ethics issues for counsel. This presentation will prepare attendees to navigate a number of such issues including: client identification; balancing duties of cooperation and candor with client interests and directions; preserving attorney-client privilege and work product protections (even when called to provide information to Congress); managing joint defense agreements; and making public statements regarding ongoing investigations.

Below, we use several hypothetical scenarios as a starting point for analyzing these issues under the *Virginia Rules of Professional Conduct* (the "Virginia Rules"), the *D.C. Rules of Professional Conduct* (the "D.C. Rules"), and the *Maryland Rules of Professional Conduct* (the "Maryland Rules").[1]

SCENARIO I:
Your boss, General Counsel for a global defense contractor, informs you that she received a call from law enforcement informing her that your company is under investigation for allegedly coordinating bids for government contracts with other contractors. The allegations relate to contracts with the U.S. government and foreign governments. You are asked to manage the internal investigation.

1) What can you do at the outset to try to ensure your investigation is well-managed?

Considering a few key organizational questions can help put your investigation on the right path. You should keep your overarching goal – to assure that the facts are known so that informed judgments can be reached and a proper legal strategy can be identified – in mind when making early decisions.

As you proceed to develop an investigation plan, you should also consider your Company's need to; (a) identify whether there are any ongoing violations of law; (b) assure that the Company has a basis for taking personnel actions that may be necessary; (c) make sure that fact development is accomplished in a privileged and confidential manner and by or under the supervision of the right party or parties (e.g., in-house counsel, the Company's outside counsel, specially retained forensic accountants or other outside professionals, the audit committee or a special committee of the Company's Board of Directors and/or their independent counsel, etc.); (d) determine the extent of cooperation to be offered to the

[1]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, D.C. Rules, and Maryland Rules apply to particular situations. The Virginia rules are available at https://www.vsb.org/pro-guidelines/index.php/rules, the D.C. Rules are available at https://www.dcbar.org/bar-resources/legal-ethics/amended-rules/ and the Maryland rules can be accessed at https://govt.westlaw.com/mdc/Browse/Home/Maryland/MarylandCodeCourtRules.

governmental authority or authorities involved; (e) evaluate the prospect for parallel investigations and proceedings (e.g., enforcement actions by foreign governments, congressional hearings, shareholder litigation, a *qui tam* action, government contract suspension or debarment, etc.); and (f) as appropriate, take steps to assure the preservation of potentially relevant information (hard copy and electronic documents, including e-mails, etc.

You will also need to decide for whom the investigation will be carried out.

Role of Management and Directors: To ensure credibility in the eyes of the authorities (and often the eyes of a company's outside auditors), it is often critical that disinterested parties with adequate authority be in a position to commission and direct the investigation. For example, the alleged misconduct involves senior management, the Company or its Board may choose to initiate an independent investigation by the Company's audit committee or a committee of disinterested directors. Note that in some circumstances, such as when accounting issues are a focus, the audit committee may not be appropriate.

Inside or Outside Counsel: A decision will need to be made at the outset regarding who will take the lead in conducting the investigation – the Company or, as described above, an independent entity, such as the audit committee or a special Board committee. A related question is what set of lawyers will actually handle the investigation. In-house counsel? Regular outside counsel for the Company? Outside counsel who are independent of the Company (i.e., who do not currently work for the Company and are less likely to be considered to be beholden to the Company or Company management)? NOTE: In several high-profile cases (e.g., Enron and Global Crossing), outside counsel's investigations were alleged to have lacked independence because of an established relationship with the company.

Practical Tip: These are often complex, tricky, and sensitive issues to consider. If the wrong course is taken at the outset, it is often difficult or impossible to change things or undo the problem later.

2) Who is your client?

As in-house counsel, in general, you represent the company, not the CEO or any other board member or officer. D.C. Rule 1.13(a), Maryland Rule 19-301.13(a) and Virginia Rule 1.13(a) all provide that a lawyer "employed or retained by an organization represents the organization acting through its duly authorized constituents."

It is more complicated to identify a government lawyer's client. The Virginia Rules explain that "[d]efining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context." *See* Virginia Rule 1.13, Comment 9. Commentators have suggested that depending on the circumstances, the client for a government lawyer may be:

- The "public interest"
- The entire government
- The branch of government employing the lawyer
- The particular agency employing the lawyer

- A particular government official (either the office or the individual).[2]

In D.C., Rule 1.6(k) identifies the client of a government lawyer as generally "the agency that employs the lawyer." *See* D.C. Rule 1.6(k).

3) If you interview the CEO or other senior officers, must you warn them that you are not their personal counsel?

In Maryland and Virginia, you must warn a CEO or other corporate constituent that you represent the corporation and not him or her when you know "or reasonably should know that the organization's interests are adverse" to the constituent's. *See* Maryland Rule 19-301.13(d). *Accord* Virginia Rule 1.13(d).

D.C. Rules require lawyers to make such a warning before there is a known adversity "when it is apparent that the organization's interests *may be* adverse to those of the constituents with whom the lawyer is dealing." *See* D.C. Rule 1.13(c). Adversity is a possibility when "the corporation has not yet irretrievably committed itself to a position in the matter, but where one such position might be adverse to the employee."[3] There is no obligation to make such a disclosure "where the lawyer has no reason to believe that there was any possibility of adversity between corporation and employee when the interview was conducted."[4]

An opinion of the D.C. Bar Legal Ethics committee identifies the conflict the duty to warn attempts to address as follows:

> [I]n some settings, a lawyer for the corporation may have an incentive, grounded in the lawyer's desire to further his client's interests, to minimize any perception by the corporate constituent that the corporation and the constituent may have differing interests in the subject matter of the representation, lest such perception affect the willingness of the constituent to be candid and forthcoming with the lawyer.[5]

This opinion notes that the lawyer's obligation to zealously represent the corporation's interests is checked by an obligation to inform corporate constituents with whom the lawyer interacts that the corporation is the lawyer's client and that there is a potential for a conflict of interest. A potential for conflict exists when the person being interviewed was more than a "passive observer" of some act or omission that may be attributable to the corporation. This is because the corporation may wish to terminate or discipline any individual involved in conduct now under scrutiny in order to distance the corporation for the conduct at issue.[6]

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2 Kathleen Clark, *Conflicts, Confidentiality and the Client of the Government Lawyer,* The Public Lawyer, Winter 2013, Volume 21, Number 1 (2013).

3 D.C. Bar Legal Ethics Committee Op. 269 (1996).

4 *Id.*

5 *Id*.

6 *Id.*

Comments to MD Rule 1.13 and VA Rule 1.13 underscore that the duty to warn in those jurisdictions is more narrow, arising only when counsel finds the organizational constituent's interests are adverse to the company's. *See* Maryland Rule 19-301.13, Comment 6; VA Rule 1.13, Comment 9. With the publication of the Yates Memorandum in September 2015, the Department of Justice (DOJ) has reinforced its focus on seeking accountability from individuals. This clear linkage between cooperation credits and information about any individual misconduct underscores the potential for a conflict to arise between a company and a CEO.

It would thus be prudent to warn the CEO that any information he provides you about the investigation is privileged and confidential but that the privilege belongs to the Company and not the individual, that anything the lawyer learns from the CEO may be disclosed to and/or used by the Company to defend the Company to the detriment of the CEO, including through provision of such information to governmental or other third parties, and that the CEO should consider hiring personal, independent counsel. The D.C. Rules make it clear that "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." *See* D.C. Rule 4.3(b).

4) **When do you have a duty to report what you learn to higher ups?**

Rule 1.13, proscribes a lawyer's ethical responsibility to take action when he or she learns of an action or omission by a Company employee that: (1) is a violation of law; (2) that reasonably might be imputed to the organization; and (3) that is likely to subject the corporation to "substantial injury" to the organization. *See* D.C. Rule 1.13(b), Maryland Rule 19-301.13(b) and Virginia Rule 1.13(b).

If in-house counsel reports such concerns all the way up the ladder, but the Company continues to engage in illegal conduct, the rules may permit the lawyer to withdraw from the representation. *See* D.C. Rule 1.16 (b)(1)-(b)(2); Maryland Rule 19-301.16 (b)(2)-(b)(3). The Virginia Rules, however, provide another alternative, stating that if despite a lawyer's efforts to stop improper conduct by reporting up the ladder, "the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign or may decline to represent the client *in that matter* in accordance with Rule 1.16 [(Declining Or Terminating Representation)]." *See* Virginia Rule 1.13 (c) (emphasis added). This clause provides Virginia in-house counsel with an important option – rather than quitting their jobs entirely, they may instead choose to withdraw from the matter at issue *only*.

In all three jurisdictions, Rule 1.6 permits disclosure of information that is otherwise protected from disclosure when a client is committing a crime or fraud and other specified conditions are met. Maryland Rule 19-301.13(c) provides additional authority for lawyers to reveal information otherwise protected as confidential if the organization's highest authority "insists upon action, or refuses to take action, that is a clear violation of a legal obligation to the organization or a violation of law which reasonably might be imputed to the organization, and is reasonably certain to result in substantial injury to the organization" *and* the lawyer reasonably believes that: (1) the highest authority in the organization has acted to further the personal or financial interests of members of the authority which are in conflict with the interests of the organization; and (2) revealing the information is necessary in the best interest of the organization.

The Maryland and Virginia Rules may permit additional disclosures when the client is a government organization. They note that "when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved." See Virginia Rule 1.13(a), Comment 9. In contrast with D.C. Rule 1.6, this comment explains that a government client is usually the "government as a whole" but acknowledges that "in some circumstances the client may be a specific agency." Comment 9 goes on to explain that "in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances." Id. The Maryland Rules contain similar language. See Maryland Rule 19-301.13(a), Comment 8.

5) How does organizational client identification impact attorney-client privilege?

Generally the attorney-client privilege protects confidential communications between attorney and client if made for the purpose of obtaining or providing legal advice. However, it is well-recognized that this includes not only the lawyer's legal advice, but also communications to an attorney that provide information that will facilitate the provision of sound legal advice. Information provided by employees in course of investigation typically protected under *Upjohn Co. v. United States* if the communication is: (1) made to counsel acting as counsel not as a business manager; (2) at direction of management for the purpose of securing legal advice; (3) concerning a subject within the scope of employment; and (4) the employee knows the purpose of the communication is for corporation to procure legal advice.[7]

Note that several courts have held that the public mission of the government service dictates a different outcome when a government lawyer is gathering information for a criminal investigation from government employees. The D.C. Circuit, Seventh Circuit and the Eighth Circuit have held that the attorney-client privilege does not protect communications between a government lawyer and employees under such circumstances[8] but the Second Circuit has disagreed.[9]

Scenario II:
In the course of your investigation, you travel to China to interview a regional VP. He asks you not to take any notes documenting your conversation.

1) If you were to take notes documenting your interview, are they likely discoverable?

China largely does not recognize privilege protections that parallel the U.S. attorney-client privilege and work product doctrines. Chinese lawyers have a duty of confidentiality that is subject to a number of exceptions.[10] However, this duty of confidentiality likely would not apply to a U.S. lawyer visiting China

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7 449 U.S. 383 (1981).

8 *See In re: A Witness Before the Special Grand Jury,* 288 F.3d 289 (7th Cir. 2002); *In re Lindsey,* 158 F.3d 1263 (D.C. Cir. 1998); *In re Grand Jury Subpoena Duces Tecum,* 112 F.3d 910 (8th Cir. 1997).

9 *In re: Grand Jury Investigation,* 399 F.3d 527 (2d Cir. 2005).

10 Simon Hui and Cui Hailin, Privilege: China, Global Investigations Review (Oct. 11, 2018), https://globalinvestigationsreview.com/jurisdiction/1005267/china

nor extend to in-house counsel working for the company in China. Thus, it's not at all clear that your notes would be protected from discovery in Chinese litigation.

U.S. choice of law rules usually will dictate the degree to which your interview notes documenting a conversation with this VP are discoverable in U.S. litigation. Typically, U.S. courts apply a "touching-base" analysis to determine whether foreign communications are protected. Such an analysis would likely examine: (1) the jurisdiction with the "predominant interest in whether [the] communications should remain confidential," and (2) "the place where the allegedly privileged relationship was entered into."[11] Courts have found that communications that relate to legal proceedings in the U.S., or reflect the provision of advice regarding U.S. law, "touch base" with the U.S. and, therefore, are governed by U.S. law, even if the communication was with foreign attorneys.[12] Of course many communications, including the one in our example, touch base with more than one jurisdiction. In such circumstances, U.S. courts tend to follow foreign law when issues of foreign legal proceedings are involved, and U.S. law when U.S. legal advice or U.S. legal proceedings are at issue.

In some circumstances, public policy considerations dictate a different outcome than the "touching-base" analysis would initially suggest. In *Astra Aktiebolag v. Andrx Pharmaceuticals, Inc.*, the court struggled to apply a foreign country's privilege standards to a U.S. proceeding.[13] There, the dispute involved allegations of patent infringement and the court found that Korean law governed privilege claims for documents related to communications with Astra's outside counsel in Korea. The court found that Korea did not recognize an attorney-client privilege or work product doctrine. However, the court also determined that Korean law did not provide for any compelled discovery of documents. Thus, the court concluded that the absence of Korea's recognition of attorney-client privilege and work product protections did not require the court to order the production of all of the contested documents. The court explained that "to apply Korean privilege law, or the lack thereof, in a vacuum — without taking account of the very limited discovery provided in Korean civil cases — would offend the very principles of comity that choice-of-law rules were intended to protect."[14] Thus, even though the court found that the communications did not "touch base" with the U.S., it applied U.S. privilege law to protect the Korean documents that would not have been discoverable under Korean law or U.S. law.

Practical Tip: If U.S. law applies, U.S. courts generally draw no distinction between the roles of in-house counsel and outside counsel. However, many foreign jurisdictions do draw such a distinction and where foreign law applies, communications with in-house counsel may not be protected. Furthermore, even in foreign jurisdictions that afford privilege protections to in-house counsel, they may not apply if the in-house counsel does not hold a license to practice law (a common practice in some jurisdictions). In *Anwar v. Fairfield Greenwich Ltd.*, 982 F. Supp. 2d 260 (S.D.N.Y. 2013), the court compelled disclosure of communications between a party and an unlicensed Dutch in-house counsel. The court concluded that the communications touched base with both the Netherlands and the U.S. but was privileged in neither jurisdiction because (1) arguments for privilege under U.S. law failed because the party asserting the

11 *See e.g. Gucci America, Inc. v. Guess?*, 271 F.R.D.58, 65 (S.D.N.Y. 2010).

12 *Id.*

13 208 F.R.D. 92 (2002).

14 *Id.* at 102.

privilege knew the in-house counsel did not hold a license to practice; and (2) Dutch law did not recognize a privilege between an employer and unlicensed in-house counsel.

2) **What ethical considerations should shape your decision about whether you should or should not take notes?**

You have an obligation to provide competent representation to your client. *See* D.C. Rule 1.1, Maryland Rule 19-301.1, and Virginia Rule 1.1. This requires thoroughness and preparation reasonably necessary for the representation but not that you document every conversation. In fact, given the risk of discovery in this situation, doing so could undermine your client's interest. One approach is to take notes documenting anything you will need to recall for the client's benefit but refrain from recording anything else such as internal debate or background information.

You don't have an ethical obligation to document admissions of past improper conduct. However, a request that you not take notes should prompt you to consider if you are being asked to participate in ongoing misconduct. If so, you should consider whether you have a mandatory obligation to disclose misconduct to high-ups in the company pursuant to your jurisdiction's Rule 1.13.

Scenario III:
The U.S. House Armed Services Committee has opened an investigation and has issued a subpoena to your company. Counsel for that committee has asserted that Congress is not bound by common law rules protecting attorney-client privilege and work product from production in matters litigated before the courts because (1) Congress has broad inherent constitutional powers to investigate that have been recognized by the Supreme Court; and (2) the attorney-client privilege and work product doctrine are common law rules developed in the judiciary that Congress, a separate branch of government, is not bound by.

1) Is the committee staff right that the attorney-client privilege and work product protections do not necessarily extend to congressional investigations?

No court has squarely addressed this question.[15] Congress has consistently asserted that it is not required to recognize the attorney-client privilege and work product doctrines because (1) it has broad inherent constitutional powers to investigate that have been recognized by the Supreme Court;[16] and (2) the attorney-client privilege and work product doctrine are common law rules developed in the judiciary that Congress, a separate branch of government, is not bound by.[17]

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[15] Recent litigation involving an assertion of privilege in the face of a congressional subpoena ended when the matter was declared moot after the investigating committee had issued its final report and held its final hearing. *See Senate Permanent Subcomm. on Investigations v. Ferrer*, 856 F.3d 1080, 1084 (D.C. Cir. 2017).

[16] *See e.g. Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975).

[17] *See* Todd Garvey, Cong. Research Serv., RL 34097, *Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure*, (2017) at 63 (asserting that separation of powers considerations and Congress' Article I Section 5 rulemaking powers dictate that Congress is not obliged to abide by rules established by the judiciary).

In the absence of clear judicial guidance, congressional committees (in practice their chairpersons), have broad discretion to decide when to recognize these protections. According to a 2017 Congressional Research Service (CRS) report, "the process of committee resolution of claims of attorney-client privilege has traditionally been informed by weighing considerations of legislative need, public policy, and the statutory duty of congressional committees to engage in continuous oversight of the application, administration, and execution of laws that fall within their jurisdiction, against any possible injury to the witness."[18] Committees may consider factors such as:

- How pertinent the requested document is to the investigation;
- The availability of the privileged information from another source;
- The validity of the claim of privilege (i.e. would it be upheld in a judicial forum); and
- The general cooperation of the witness.

The CRS report notes that "in the end," "it is the congressional committee alone that determines whether to accept a claim of attorney-client privilege."[19]

2) Given the Committee's broad discretion, how should you proceed to protect privileged materials and work product as much as possible?

Because Congress asserts it is not bound by common law privilege and work product protections, an unyielding assertion of these protections may lead to a prolonged legal battle and anger the issuing congressional committee. Congress (like government agencies) may choose not to litigate this issue and instead may respond to a company's reluctance to produce documents by taking a more aggressive posture in the investigation. Companies generally want to avoid the stigma associated with a public fight to shield information from Congress and the American public. Thus, sometimes the best strategy is to resolve privilege assertions through negotiations and compromise.

In order to do so, a company should engage counsel as early as possible (ideally, before an investigation formally begins if the company becomes aware of the issues or the potential for an investigation). An effective strategy to negotiate production terms and minimize disclosure of privileged documents can include:

- **Examining the relevant committee or subcommittee's past practices.** The scope of disclosure demanded by congressional committees varies widely. Counsel should examine the committee's prior practices in order to gauge how receptive the committee may be to an assertion of privilege. Note, however, that the politics surrounding a particular investigation may shift a committee's posture in a direction that departs from past practices.

- **Raising early your concerns that disclosure could injure your witness.** Many members of Congress are lawyers and understand that disclosure to Congress may risk disclosures of

18 *Id.* at 60 (internal citation omitted).

19 *Id.* at 63.

otherwise privileged documents in ancillary litigation. Develop a clear case that specific documents would be protected in court and that disclosing them risks a waiver.

- **Promptly producing non-privileged, responsive documents.** Quickly producing non-privileged documents, even painful ones, will go a long way to establishing a record of cooperation and may decrease pressure to produce privileged documents.

- **Attempting to narrow the scope of the document request.** Engage with committee staff to clearly understand the key topics of their investigation and what they seek from your client in the narrowest terms possible. When possible, point out that documents the company seeks to protect are not pertinent to key investigative questions.

- **Clarifying the scope of any privilege claim**. Specify what documents or conversations you wish to protect while suggesting alternate, non-privileged, sources of information the committee seeks. Be prepared to provide a detailed privilege log identifying all responsive, privileged documents.

- **Negotiating the terms of any "in camera-like" review.** The information provided in a privilege log may help the committee narrow the list of documents deemed pertinent to the investigation. To the extent documents on the privilege log appear pertinent, committee counsel may ask to conduct a preliminary review of those documents to determine if the privilege claim is valid. If such a request is made, consider suggesting that an impartial special master—likely a retired judge—conduct the preliminary review instead and that the parties agree to be bound by his or her determination. Retaining a special master obviously entails additional costs for the producing party but it has the benefit of separating the privilege determination from the perceived relevance of the investigation. Unlike the committee counsel, the special master's privilege determination is not likely to be swayed by the importance of a particular document to the investigation.

- **Negotiating confidentiality.** Although congressional committees generally aim to provide information to the American public, they may agree to maintain confidentiality of limited documents in some circumstances. It's important to note that some courts have held that unlike the attorney-client privilege, work-product protections are not waived if an otherwise protected document is produced to *any* third party. Rather, work product protections are waived only if the disclosure is made to an adversary or the disclosure materially increases the likelihood of disclosure to an adversary.[20] Thus, it's possible that a confidentiality agreement with a congressional committee could preserve work product protections if the investigating committee is not an adversary.

Practical Tip: As suggested above, a similar approach may be appropriate when negotiating about providing potentially privileged documents to DOJ, the SEC or other enforcement agencies. These agencies may view a refusal to produce documents negatively and may even draw a negative inference

[20] *See e.g. Sec. Exch. Comm'n v. Beacon Hill Asst Mgmt*, *LLC,* 231 F.R.D. 134 (S.D.N.Y. 2004).

from your refusal to produce requested documents. Counsel must weigh these possibilities against any potential waiver risk.

3) **What should you do if you have reason to believe that a witness will provide false testimony to Congress or during a deposition?**

The D.C., Maryland and Virginia Rules all require "Candor Toward the Tribunal" that prevent lawyers from making "a false statement of fact or law to a tribunal" or from offering "evidence that the attorney knows to be false." D.C. Rule 3.3, Maryland Rule 19-303.3, Virginia Rule 3.3. However, a congressional hearing is not a "tribunal" as contemplated by these rules. The Maryland Rules define tribunal as:

> [A] court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

See Maryland Rule 19-301.0. Although counsel may not violate legal ethics rules by sitting behind a client who provides false testimony to Congress, such false testimony could cause a privilege waiver. The crime-fraud exception to the attorney-client privilege applies if the client was in the process of committing or intended to commit a crime or fraudulent act, and the client communicated to the lawyer an intent to further the crime or fraud, or to cover it up. This could be the case if a lawyer assists a client in preparing to provide false testimony to Congress. "Knowingly and willfully" making "any materially false, fictitious, or fraudulent statement or representation" in congressional testimony is a felony. *See* 18 USC 1001. Thus, if a client communicates with his or her counsel in the process of committing that crime, those communications may not be privileged.

If instead of a congressional hearing, counsel is concerned that a client will provide false testimony at a deposition, Rule 3.3 does apply. The Virginia rules explain that a deposition is recognized as an ancillary proceeding of a court and therefore covered by Rule 3.3. *See e.g.* Virginia Model Rule 3.3, comment 10.

When a client offers or intends to offer false evidence, it creates a conflict between counsel's obligation to keep a client's confidences and counsel's duty of candor to the tribunal. A comment to Virginia Rule 3.3 explains that:

> If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce evidence that is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

See Virginia Rule 3.3, Comment 6. *Accord* Maryland Rule 19-303.3, Comment 6. It's important to note that this obligation applies only if counsel *knows* the evidence provided (or intended to be provided) is false. A reasonable belief or suspicion of falsity is not enough. *See* Virginia Rule 3.3., Comment 8. Jurisdictions differ as to what remedial measures are required when counsel knows of false testimony.

- In Virginia and Maryland, counsel may withdraw from representation but if that is not permitted "or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done." *See* Virginia Rule 3.3, Comment 10; *Accord,* Maryland Rule 19-303.3, Comment 12.
- In D.C., the remedial measures counsel should take are similar; however, a lawyer may not disclose information otherwise protected by Rule 1.6, unless the facts trigger one of the exceptions outlined in that rule. *See* D.C. Rule 3.3 (d). For instance, under Rule 1.6(d), counsel may disclose client confidences if the lawyer's services have been used to further a crime or fraud. Disclosure is also permitted by Rule 1.6(c) to disclose fraud on the tribunal involving bribery or witness intimidation. The D.C. Rules also outline a different course of action when a client and criminal defendant offers testimony counsel knows is false. If a lawyer learns that a client and criminal defendant plans to provide false testimony, he or she must (1) make a good-faith effort to dissuade the client from presenting the false evidence; (2) if the lawyer is unable to dissuade the client, the lawyer shall seek leave of the tribunal to withdraw; (3) If the lawyer is unable to dissuade the client or to withdraw without seriously harming the client, the lawyer may put the client on the stand to testify in a narrative fashion, but the lawyer shall not examine the client in such manner as to elicit testimony which the lawyer knows to be false, and shall not argue the probative value of the client's testimony in closing argument *See* D.C. Rule 3.3 (b).

Scenario IV:
Early in the investigation the company enters a joint defense agreement (JDA) with a regional sales manager who was responsible for bidding on the U.S. contracts at issue and is alleged to have coordinated his bids with those of other bidders.

1) When, if ever, should this joint defense agreement be severed?

Joint defense agreements are contracts through which two parties agree to exchange confidential information for their mutual benefit. Such agreements typically aim to take advantage of the common interest doctrine, which operates to prevent a waiver of attorney-client privilege protections that would protect these communications if they were not shared with a third party. When parties share a "commonality of interest" with respect to a litigation matter, the common interest doctrine allows them to share these privileged communications without triggering a waiver.[21] 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;

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[21] 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").

(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.[22]

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.

Members of a joint defense agreement that hope to benefit from the common interest doctrine do not have to have perfectly aligned interests, but they must be "substantially similar."[23] Thus, if the interests of the company and the regional sales manager significantly diverge, the common interest privilege will no longer apply. When this happens, continuing to share information could waive otherwise applicable privileges. In this hypothetical, it's possible the interests of the company and the sales manager were never aligned and no joint defense agreement was ever appropriate.

2) What other ethical issues can be raised by JDAs?

Withdrawal from a JDA raises an additional issue. If one member withdraws from a JDA because they have become a cooperating witness with the government, any information provided to that member thereafter is not protected by the common interest privilege joint defense privilege.[24]

Some courts also have held that information obtained from a party who withdraws from a JDA prior to such withdrawal may not be used in the cross-examination of that cooperating witness by counsel for the remaining parties to the JDA. This is because these courts have found that JDAs at issue created an implied attorney-client relationships between counsel and all participants to the agreement — precluding the ability to cross-examine the defector and forcing disqualification.[25]

Beyond the privilege and waiver considerations related to a joint defense agreement, it is also possible that certain actions taken by the company to encourage continued cooperation with a former employee could be viewed as obstructing justice. For instance, promising payment of legal fees, a coveted job, or other thing of value to a former employee who is a potential witness, could be viewed as an attempt to obstruct justice if such offers are tied to cooperation with the company. In fact, the D.C. Rules specifically permit counsel to reveal client confidences or secrets in order to prevent the bribery or

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[22] 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

[23] *See* Restatement (Third) of the Law Governing Lawyers Section 76, cmt. e.; *Teleglobe Communications v. BCE*, 493 F.3d 345, 365 (3d Cir. 2007).

[24] *See United States v. LeCroy*, 348 F. Supp. 2d 375, 384 (E.D. Pa. 2004).

[25] *See, e.g.*, *United States v. Henke*, 222 F.3d 633, 637 (9th Cir. 2000); *see also United States v. Stepney*, 246 F. Supp. 2d 1069, 1083, 1086 (N.D. Cal. 2003) (anticipating this conflict issue, requiring a waiver provision in each JDA that permitted every participant to cross-examine any cooperating former participant.).

intimidation of witnesses. *See* D.C. Rule 1.6(c). Thus, it is prudent to advise your client to avoid offering anything of value to a potential witness in exchange for cooperation or continued participation in a joint defense agreement. Similarly, they should not express any threats or hostility to a witness who reports that their interests have diverged from the company's and therefore they must withdraw from a joint defense agreement.

Practical Tip: A company may want to preserve its right to disclose information learned from employees or former employees to the government or third parties. For instance, it may be in the company's interest to disclose illegal or wrongful conduct to the government in order to obtain cooperation credit. Thus, some counsel include language in JDAs explicitly authorizing the corporation to disclose joint defense materials at its sole discretion. Taking this approach decreases the incentive an employee has to cooperate with a corporation. It could also be argued that such a provision makes the JDA illusory by negating the central requirement for an effective JDA—that the parties actually have a common interest. Instead, some might view a JDA with such a provision as nothing more than a written *Upjohn* warning. As a practical matter, however, employees and former employees may have little choice but to agree such an agreement to obtain information and documents he or she needs to present a defense.

Scenario V:
The CEO feels the company is getting beat up in the press and wants you to do a series of interviews with legal and business news outlets.

1) What ethical issues should you consider when talking to the press?

First and foremost, any public comments should be truthful. A lawyer's obligations of candor are not strictly limited to communications with a tribunal. Lawyers also have a general obligation to avoid engaging in conduct involving "dishonesty, fraud, deceit, or misrepresentation." *See* D.C. Rule 8.4(c), Maryland Rule 19-308.4(c), Virginia Rule 8.4(c). In addition, Rule 4.1 in VA, D.C., and MD all prohibit counsel from knowingly making "a false statement of material fact or law" to third parties in the course of representing a client. *See* D.C. Rule 4.1; Maryland Rule 19-304.1; Virginia Rule 4.1.

Beyond an ethical duty to avoid dishonest and misleading statements, counsel must be careful not to waive any privilege by discussing client communications publicly. For example, Michael Cohen's lawyer, Lanny Davis, has publicly asserted that Rudy Giuliani's public comments about a recorded conversation between President Trump and his personal lawyer, Michael Cohen, waived any claim that the conversation was privileged.[26] A client can, of course, decide to waive a privilege but if counsel does so without client consent, counsel could open themselves up to a malpractice claim.

Finally, you should be careful that none of your public comments could be viewed as an effort to intimidate witnesses or otherwise obstruct justice. In addition to possible criminal prosecution for obstruction of justice, the D.C. Rules and Maryland Rules also require that lawyers avoid engaging in

[26] Mitchell Alva, Trump lawyer Giuliani 'confused' in claiming attorney-client privilege, Michael Cohen's attorney says, ABC News (July 29, 2018 1:49 PM), https://abcnews.go.com/Politics/trump-lawyer-giuliani-confused-claiming-attorney-client-privilege/story?id=56889559

conduct that ""interferes with the administration of justice." *See* D.C. Rule 8.4(d), *accord* Maryland Rule 19-308.4(d).