SUPPORTING MATERIALS

A DAY IN THE LIFE OF TAYLOR TRUTH:

Ethical Questions We Face in the Corporate World

ACC NCR CLE PRESENTATION
Thursday, October 3, 2019 | Noon – 2 p.m.

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SYNOPSIS

BigCo has continued to be a large and thriving public company doing business across the United States and around the globe. It is focusing on positioning its products and services as vital to its customers' healthy lifestyles.

Our hero, Taylor Truth, was recently promoted to General Counsel of BigCo due to her outstanding ethical successes last year. BigCo never filled her old position as Deputy General Counsel, so she's been covering some of her old roles in addition to the new responsibilities of being GC.

To add even more stress to Taylor's life, Big-A-Zon has signed a Non-Disclosure Agreement to explore buying BigCo. So she knows all eyes on her – everything she does is being watched carefully and could make or break her future personally and professionally.

Here are some of the ethical quandaries that Taylor faced one day in October 2019 . . . .

Scenario 1

7:30 a.m.

BigCo doesn't just promote health to its customers – it encourages its employees to be healthy by providing free access to the gym in its headquarters building (with all the free cable news you can consume). So Taylor has incorporated a regular morning workout before she gets to work into her schedule.

She flips through her 50 overnight emails while on the treadmill. Many of them are about BigCo's pending RFP to choose new "core counsel" law firms. She dictates her thoughts in a voicenote-to-email app on her SmartWatch she just bought about AlphaLaw and BetaLaw's proposals that accidentally sent them to Richard, the managing partner of AlphaLaw, because the app autopopulated his name instead of Robert, BigCo's Procurement Director.

She has a panicked moment and says to herself, "I knew I shouldn't have ever done anything other than work. Nothing good ever comes from it."

Questions:

- Poll Question 1: Is Taylor's panic justified?
  - Yes, she didn't adequately fulfill her obligation with respect to confidentiality of information.
  - No, it was just her thoughts on a matter unconnected to privileged legal advice.
- Poll Question 2: What should Taylor do?
  - She does not need to do anything.
  - She should report up the chain and disclose her mistake.
  - She should email the recipient and ask for deletion of the inadvertently-sent email.
- Poll Question 3: Does her comment about never doing anything but work raise any ethical issues?
  - Yes
  - No

Suggested References – Scenario 1

Poll Question 1: Is Taylor's panic justified?

- Confidentiality of Information (VRPC and MRPC 1.6)
    - In VPRC 1.6, Comment [2]: the law "recognizes the client's confidences must be protected from disclosure. The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance."
    - MRPC 1.6(c): A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.
- Competency with Technology
    - For Virginia, Rule 1.1, Comment [6]: To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education in the areas of practice in which the lawyer is engaged. *Attention should be paid to the benefits and risks associated with relevant technology.* The Mandatory Continuing Legal Education requirements of the Rules of the Supreme Court of Virginia set the minimum standard for continuing study and education which a lawyer licensed and practicing in Virginia must satisfy. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.
    - For ABA, Rule 1.1, Comment [8]: To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Poll Question 2: What should Taylor do?

- She should take reasonable steps to rectify the disclosure – this is what has long been embedded in our fax cover sheets & email signature blocks to external recipients – that the communication may contain confidential or privileged information and if it is sent to an unintended recipient that it should be deleted.

Poll Question 3: Does her comment about never doing anything but work raise any ethical issues?

- VRPC 1.1, Comment [7]: "A lawyer's mental, emotional, and physical well-being impacts the lawyer's ability to represent clients and aba to make responsible choices in the practice of law. Maintaining the mental, emotional, and physical ability necessary for the representation of a client is an important aspect of maintaining competence to practice law. *See also* Rule 1.16(a)(2)."

Scenario 2

8:30 a.m.

After Richard quickly emails Taylor back to say "didn't read it – I've deleted it," Taylor takes a shower and heads up to her office. She is just about to enjoy her first nitrogen-infused smoothie of the day (BigCo has a nitrogen-infused smoothie bar on every floor) when the company's Chief Culture Officer walks in to give her a heads up that a reporter from BigFeed just called him.

The reporter said she is planning to run a story about pictures from the CCO's Neighborhood Association newsletter purportedly showing him cooking at neighborhood barbecue – while smoking a flavored TastesGreatE-Puffer with children. This picture could embarrass BigCo given its corporate image.
The CCO pauses and says he's not sure it actually is him in the picture because the chef's hat in the picture is obscuring the person's face but wants help "get ahead of the issue." He asks Taylor for help but not to tell anyone else.

Questions:

- Poll Question 4: Does the fact that the conduct at issue occurred outside of the work environment preclude Taylor from getting involved?
    - No, the CCO's image reflects the company, so there is an appropriate basis for working with him.
    - Yes, Taylor should suggest that the CCO hire his own lawyer for a defamation case.
- Poll Question 5: Can Taylor help the CCO given the possibility that his interests will be adverse to the company's?
    - Yes, Taylor's representation extends to all high-level ranking BigCo employees no matter what.
    - No, Taylor's representation is for the company only and not individual employees.
    - Maybe – depending on its relationship to the company, clarity in explaining her role, and whether his interests diverge from the company's.
- Poll Question 6: Can Taylor honor the confidentiality request?
    - Yes
    - No, she may have to tell BigCo's Board or executives once she understands the situation more
    - No, she has to tell the Virginia State Bar

Suggested References – Scenario 2

Poll Question 4: Can Taylor help the CCO for things outside of work if they have the possibility of impacting the company?

- Scope of Representation (VRPC 1.2)
    - Under 1.2 Comment [6] The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client.

Poll Question 5: Could Taylor help the CCO given the possibility that his interests will be adverse to the company's?

- Conflict of Interest (VRPC 1.7a)
    - "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest."
- Organization as the Client (VRPC 1.13)
    - There is a difference between a "constituent" and the organization as a client.
        - Comment 10: "When the organization's interest may be or become adverse to those of one or more of its constituents, the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation."
    - Dual Representation
        - VRPC 1.13(e): A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.
        - VRPC 1.13(d): In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, **a lawyer shall explain the identity of the client** when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing

Poll Question 6: Can Taylor honor the confidentiality request?

- Communication (VRPC 1.4): (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information; (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation; (c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter

Scenario 3

9:30 a.m.

Right after the CCO leaves her office, a friend and former employee of BigCo who has heard rumors about the Big-A-Zon deal calls to say he knows BigCo has a problem. BigCo rigged bids with SmallCo a couple of years ago, but no one ever found out. The former employee has hired a lawyer, Chris Cartel, but felt that she should give Taylor a call because they are friends.

Taylor knows SmallCo is a key rival but doesn't remember if she took antitrust in law school. And given the short-staffing in the legal department there's no one with any experience in the area. She remembers seeing a blog article the other day about some kinds of joint bidding being totally fine. So she thinks maybe her friend is just seeing ghosts.

Questions:

- Poll Question 7: Can Taylor talk to her friend further knowing that the friend is represented by other counsel?
  - Yes, her friend reached out to her first, which waives any ethical obligations.
  - No, Taylor should only talk to her friend's attorney about the substance of this matter.
  - Maybe
- Poll question 8: Should Taylor recuse herself from any role of the investigation?
  - Yes
  - No
  - Maybe
- Poll Question 9: Since Taylor seems shaky on her antitrust knowledge, what should she do to handle this?
  - Just go with her gut instincts.
  - Get herself up to speed on bid rigging.
  - Seek outside counsel in the subject matter.
  - Either the second or third option, or both

Suggested References – Scenario 3

Poll Question 7: Can Taylor talk to her friend further knowing that the friend is represented by other counsel?

- Communications with Persons Represented by Counsel (VRPC 4.2)
    - In representing a client, a lawyer shall not communicate about the subject of the representation with a person 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.
    - VPRC 4.2 Comment [3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule. A lawyer is permitted to communicate with a person represented by counsel without obtaining the consent of the lawyer currently representing that person, if that person is seeking a "second opinion" or replacement counsel.

Poll Question 8: Should Taylor recuse herself from any role of the investigation?

Conflict of Interests (VRPC 1.7(a)(2))

- "A concurrent conflict of interest exists if . . . there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."

Poll Question 9: Since Taylor seems shaky on her antitrust knowledge, what should she do to handle this?

- Competence (VRPC 1.1) and Not Dabbling
    - "Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."
        - MRPC 1.1, Comment 2: an attorney can agree to represent a client in an unfamiliar area of practice, but the attorney needs to learn the area of practice and do so on the attorney's time and expense-not the client's.

Additional References

- VRPC 1.7, Comment [10]: *A lawyer may not allow business or personal interests to affect representation of a client.* For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See Rules 1.1 and 1.5. Similarly, a lawyer may not refer clients to an enterprise in which the lawyer has an undisclosed interest. A lawyer's romantic or other intimate personal relationship can also adversely affect representation of a client.
- Competence (VRPC 1.1) and Not Dabbling
    - "Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."
    - Comment [1]: In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general

practitioner. Expertise in a particular field of law may be required in some circumstances.

- Comment [2]: lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.
- Comment [4]: A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. *See also* Rule 6.2.

Scenario 4

10 a.m.

Upon further reflection, Taylor decides to hire outside counsel. She has used lawyers at GammaLaw's BigCity office recently and really liked them. She knows they have an antitrust group but remembers reading in the BigCityNews that GammaLaw represents Big-A-Zon in a slip and fall case brought by Ba Nanna Peel in BigCityCourt.

Questions:

- Poll Question 10: Can Taylor still hire GammaLaw as outside counsel?
  - Yes, it is important to like your outside counsel.
  - No, because they represent Big-A-Zon
  - Maybe

- Poll Question 11: If Taylor wants to hire GammaLaw, what can she do to satisfy ethical obligations?
  - She can get verbal approval from her Board.
  - She can get written consent from GammaLaw that they will represent BigCo without any issues.
  - She can provide written consent to GammaLaw that she understands that they have represented Big-A-Zon in unrelated matters.
  - She can just hire them.
  - It takes more than that.

Suggested References – Scenario 4

Poll Question 10: Can Taylor still hire GammaLaw as outside counsel?

Conflict of Interest, VRPC 1.7:

- Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
- (1) the representation of one client will be directly adverse to another client; or
- (2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Imputed Disqualification, VRPC 1.10(a):

- While lawyers are associated in a firm, none of them shall represent a client when the lawyer knows or reasonably should know that any one of them practicing alone would be prohibited from doing so by Rules 1.6, 1.7, 1.9, or 2.10(e).
  - Definition of "Firm": Comment [1] Whether two or more lawyers constitute a firm as defined in the Terminology section can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for the purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to the other.

Poll Question 11: If Taylor wants to hire GammaLaw, what can she do to satisfy ethical obligations?

- Conflict of Interest, VRPC 1.7(b):
  - Notwithstanding the existence of a concurrent conflict of interest under paragraph(a), a lawyer may represent a client if each affected client consents after consultation, and: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) the consent from the client is memorialized in writing.

Scenario 5

11:00 a.m.

After Taylor provides GammaLaw with written consent and GammaLaw receives written consent from Big-A-Zon, she asks GammaLaw to start interviewing employees as part of its internal investigation.

Question:

- Poll Question 12: What should Taylor make sure GammaLaw does during the investigation?
    - Protect privilege
    - Inform each of the interviewees about who the firm represents
    - Both A and B
    - Neither

Suggested References – Scenario 5

Poll Question 12: What should Taylor make sure GammaLaw does during the investigation?

- DEFINITION OF PRIVILEGE: "The rule which allows a client to prevent the disclosure of information which he gave to his attorney for the purpose of securing legal assistance is founded upon the belief that it is necessary 'in the interest and administration of justice'." *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 357 (D. Mass. 1950) *(*quoting *Hunt v. Blackburn*, 128 U.S. 464, 470, 9 S.Ct. 125, 127, 32 L.Ed. 488 (1888).).
- WHO HOLDS THE PRIVILEGE (client): "The privilege applies only if (1) the asserted holder of the privilege is or sought to be come a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the **[*359]** privilege has been (a) claimed and (b) not **waived by the client."** *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358 (D. Mass. 1950)
- VRPC 4.2, Comment [7]
  - "In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons in the organization's "control group" as defined in *Upjohn v. United States*, 449 U.S. 383 (1981) or persons who may be regarded as the "alter ego" of the organization. The "control group" test prohibits ex parte communications with any employee of an organization who, because of their status or position, have the authority to bind the corporation. Such employees may only be contacted with the consent of the organization's counsel, through formal discovery or as authorized by law. An officer or director of an organization is likely a member of that organization's "control group." The prohibition does not apply to former employees or agents of the organization, and an attorney may communicate ex parte with such former employee or agent even if he or she was a member of the organization's "control group." If an agent or employee of the organization is represented in the matter by separate counsel."
- VRPC 1.7(a): Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
  - (1) the representation of one client will be directly adverse to another client; or
  - (2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph(a), a lawyer may represent a client if each affected client consents after consultation, and:
  - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
  - (2) the representation is not prohibited by law;
  - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
  - (4) the consent from the client is memorialized in writing.
- VPRC 1.13: Organization as Client
  - (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

- (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:
    - (1) asking for reconsideration of the matter;
    - (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization;
    - (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.
- (c) If, despite the lawyer's efforts in accordance with paragraph (b), 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.
- (d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.
- (e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Scenario 6

Noon

Taylor runs to a lunch meeting to discuss strategy for defending a civil class action she formerly managed when she was Deputy GC. It concerns whether BigCo engaged in false advertising of its products on the online platform WhatsNew.

Discovery is just beginning (and Taylor knows it will be a bear because the class is represented by Contingent & Percentage). But one of BigCo's business unit leaders, Snoopy Sally, suggests she go on WhatsNew under the screenname "BigChatter" to start chats with some of the named plaintiffs and then friend them on the social media platform BookFace to see if they ever did or said things that could help BigCo's case.

Also, Snoopy Sally proposes to call up a named plaintiff and pretend to be a survey-taker and record the conversation without the plaintiff's knowledge.

Questions:

- Is "friend-ing" a litigation counterparty by an attorney unethical?
- If it is improper for an attorney to "friend" the target of research, can the attorney allow the business unit head to do it instead?
- What if the business unit head uses his or her actual profile, but doesn't disclose who she works for?

Suggested References and Answers – Scenario 6

Is "friend-ing" a litigation counterparty unethical?

- Communication with Persons Represented by Counsel (VRPC 4.2): "In representing a client, a lawyer shall not communicate about the subject of the representation with a person 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."
- Truthfulness in Statements to Others (VRPC 4.1)
    - In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of fact or law; or (b) fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.
- Several states allow you to "friend" a third party or an adverse party as long as you use your real name and you don't need to disclose the motive behind friending them.
    - NY City Opinion 2010-02: "we conclude that an attorney or her agent may use her real name and profile to send a "friend request" to obtain information from an unrepresented person's social networking website without also disclosing the reasons for making the request." https://www.nycbar.org/pdf/report/uploads/20071997-Formal_Opinion_2010-2.pdf
    - Oregon Opinion 2013-189: Lawyer may review a person's publicly available information on a social networking website. A lawyer may also request access to a nonpublic social media information if the person is not represented by counsel and the lawyer does not deceive person of the matter. https://www.osbar.org/_docs/ethics/2013-189.pdf
- Virginia Bar: **Quick Facts about Legal Ethics and Social Networking (**https://www.vsb.org/site/regulation/facts-ethics-social-networking)
    - **Pretexting:** Pretextually "friending" someone online to garner information useful to a client or harmful to the opposition violates Virginia Rule 8.4(c) prohibition against "dishonesty, fraud, deceit or misrepresentation." Even with a friendly pretext, Rules 4.2 and 4.3 apply to communications with persons represented by counsel or with unrepresented persons.

If it is improper for an attorney to perform social media research or to "friend" the target of research, can the attorney allow the business unit head to perform the research?

- Responsibilities Regarding Nonlawyer Assistance (VPRC 5.3)
    - (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
        - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
        - (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action

What if the business unit head uses his or her actual profile, but doesn't disclose who she works for?

- Truthfulness in Statements to Others (VRPC 4.1)
    - In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of fact or law; or (b) fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.
- Respect for Rights of Third Persons (MRPC 4.4): (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person. (b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.
- Virginia's wiretapping law is a "one-party consent" law. Virginia makes it a crime to intercept or record any "wire, oral, or electronic communication" unless one party to the conversation consents. Virginia Code § 19.2-62. Therefore, if you operate in Virginia, you may record a conversation or phone call if you are a party to the conversation or you get permission from one party to the conversation in advance. That said, if you intend to record conversations involving people located in more than one state, you should abide by the recording law of the most restrictive state involved or play it safe and get the consent of all parties. See dmlp.org/legal-guide/virginia-recording-law.
    - https://www.law.com/americanlawyer/2018/04/13/law-firms-rarely-have-policies-about-lawyers-recording-phone-calls/?kw=Law%20Firms%20Rarely%20Have%20Policies%20About%20Lawyers%20Recording%20Phone%20Calls&et=editorial&bu=The%20American%20Lawyer&cn=20180413&src=EMC-Email&pt=Afternoon%20Update

- Reporter's Committee for Freedom of the Press has published an excellent guide on the subject that could still be a starting point – see for example https://www.rcfp.org/wp-content/uploads/imported/RECORDING.pdf.

Scenario 7

1 p.m.

Taylor returns from her lunch meeting, and the head of BigCo's IT Department, Bill Byte, sends her a concerning email:

"Uh oh. I learned one of our IT vendors just had his car broken into. All that was taken was a sticky note on his dashboard with our system admin password. You know why he had it, right? He was the tail car for BigCo's test of an autonomous scooter that could ride on the shoulder of I-66. That project hasn't launched, but with that password he can get into our whole system including our customers' names and emails. I remember you told me last year to put a statement on the website saying 'To Our Customers: Privacy? We'll do what we can.' And I remember you circulated some advisory from AlphaLaw on some new law in California about this, didn't you? What should I do?"

Questions:

- Poll Question 13: Did Taylor do anything wrong (without getting into data breach law)?
  - No, data breaches are bound to happen
  - No, there's no proof anything actually got disclosed
  - No, as long as scooters are involved you can't go wrong
  - Yes, she didn't adequately protect the company's interests

Suggested References and Answers – Scenario 7

Poll Question 13: Did Taylor do anything wrong (without getting into data breach law)?

- VRPC 1.1 Competence
  - A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
  - Comment [6]: To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education in the areas of practice in which the lawyer is engaged. Attention should be paid to the benefits and risks associated with relevant technology. The Mandatory Continuing Legal Education requirements of the Rules of the Supreme Court of Virginia set the minimum standard for continuing study and education which a lawyer licensed and practicing in Virginia must satisfy. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.
- VPRC 1.3 Diligence
  - A lawyer shall act with reasonable diligence and promptness in representing a client.
  - Note new California law going into effect 1/1/20 that will make data breach/privacy issues take on new importance -- https://www.alstonconsumerfinance.com/the-ccpa-could-reset-data-breach-litigation-risks/

Additional Data Breach Resources[1]

Breach Notification Rule, U.S. Dep't of Health & Human Services, https://www.hhs.gov/hipaa/for-professionals/breach-notification/index.html

Breach Notification Rule

The HIPAA Breach Notification Rule, 45 CFR §§ 164.400-414, requires HIPAA covered entities and their business associates to provide notification following a breach of unsecured protected health information. Similar breach notification provisions implemented and enforced by the Federal Trade Commission (FTC), apply to vendors of personal health records and their third party service providers, pursuant to section 13407 of the HITECH Act.

Definition of Breach

A breach is, generally, an impermissible use or disclosure under the Privacy Rule that compromises the security or privacy of the protected health information. An impermissible use or disclosure of protected health information is presumed to be a breach unless the covered entity or business associate, as applicable, demonstrates that there is a low probability that the protected health information has been compromised based on a risk assessment of at least the following factors:

1. The nature and extent of the protected health information involved, including the types of identifiers and the likelihood of re-identification;
2. The unauthorized person who used the protected health information or to whom the disclosure was made;
3. Whether the protected health information was actually acquired or viewed; and
4. The extent to which the risk to the protected health information has been mitigated.

Covered entities and business associates, where applicable, have discretion to provide the required breach notifications following an impermissible use or disclosure without performing a risk assessment to determine the probability that the protected health information has been compromised.

There are three exceptions to the definition of "breach." The first exception applies to the unintentional acquisition, access, or use of protected health information by a workforce member or person acting under the authority of a covered entity or business associate, if such acquisition, access, or use was made in good faith and within the scope of authority. The second exception applies to the inadvertent disclosure of protected health information by a person authorized to access protected health information at a covered entity or business associate to another person authorized to access protected health information at the covered entity or business associate, or organized health care arrangement in which the covered entity participates. In both cases, the information cannot be further used or disclosed in a manner not permitted by the Privacy Rule. The final exception applies if the covered entity or business associate has a good faith belief that the unauthorized person to whom the impermissible disclosure was made, would not have been able to retain the information.

Unsecured Protected Health Information and Guidance

Covered entities and business associates must only provide the required notifications if the breach involved unsecured protected health information. Unsecured protected health information is protected health information that has not been rendered unusable, unreadable, or indecipherable to unauthorized persons through the use of a technology or methodology specified by the Secretary in guidance.

. . .

Breach Notification Requirements

[1] Reprinted from 2018 ACC NCR program

Following a breach of unsecured protected health information, covered entities must provide notification of the breach to affected individuals, the Secretary, and, in certain circumstances, to the media. In addition, business associates must notify covered entities if a breach occurs at or by the business associate.

Individual Notice

Covered entities must notify affected individuals following the discovery of a breach of unsecured protected health information. Covered entities must provide this individual notice in written form by first-class mail, or alternatively, by e-mail if the affected individual has agreed to receive such notices electronically. If the covered entity has insufficient or out-of-date contact information for 10 or more individuals, the covered entity must provide substitute individual notice by either posting the notice on the home page of its web site for at least 90 days or by providing the notice in major print or broadcast media where the affected individuals likely reside. The covered entity must include a toll-free phone number that remains active for at least 90 days where individuals can learn if their information was involved in the breach. If the covered entity has insufficient or out-of-date contact information for fewer than 10 individuals, the covered entity may provide substitute notice by an alternative form of written notice, by telephone, or other means.

These individual notifications must be provided without unreasonable delay and in no case later than 60 days following the discovery of a breach and must include, to the extent possible, a brief description of the breach, a description of the types of information that were involved in the breach, the steps affected individuals should take to protect themselves from potential harm, a brief description of what the covered entity is doing to investigate the breach, mitigate the harm, and prevent further breaches, as well as contact information for the covered entity (or business associate, as applicable).

With respect to a breach at or by a business associate, while the covered entity is ultimately responsible for ensuring individuals are notified, the covered entity may delegate the responsibility of providing individual notices to the business associate. Covered entities and business associates should consider which entity is in the best position to provide notice to the individual, which may depend on various circumstances, such as the functions the business associate performs on behalf of the covered entity and which entity has the relationship with the individual.

Media Notice

Covered entities that experience a breach affecting more than 500 residents of a State or jurisdiction are, in addition to notifying the affected individuals, required to provide notice to prominent media outlets serving the State or jurisdiction. Covered entities will likely provide this notification in the form of a press release to appropriate media outlets serving the affected area. Like individual notice, this media notification must be provided without unreasonable delay and in no case later than 60 days following the discovery of a breach and must include the same information required for the individual notice.

Notice to the Secretary

In addition to notifying affected individuals and the media (where appropriate), covered entities must notify the Secretary of breaches of unsecured protected health information. Covered entities will notify the Secretary by visiting the HHS web site and filling out and electronically submitting a breach report form. If a breach affects 500 or more individuals, covered entities must notify the Secretary without unreasonable delay and in no case later than 60 days following a breach. If, however, a breach affects fewer than 500 individuals, the covered entity may notify the Secretary of such breaches on an annual basis. Reports of breaches affecting fewer than 500 individuals are due to the Secretary no later than 60 days after the end of the calendar year in which the breaches are discovered.

. . .

Administrative Requirements and Burden of Proof

Covered entities and business associates, as applicable, have the burden of demonstrating that all required notifications have been provided or that a use or disclosure of unsecured protected health information did not constitute a breach. Thus, with respect to an impermissible use or disclosure, a covered entity (or business associate) should maintain documentation that all required notifications were made, or, alternatively, documentation to demonstrate that notification was not required: (1) its risk assessment demonstrating a low probability that the protected health information has been compromised by the impermissible use or disclosure; or (2) the application of any other exceptions to the definition of "breach."
Covered entities are also required to comply with certain administrative requirements with respect to breach notification. For example, covered entities must have in place written policies and procedures regarding breach notification, must train employees on these policies and procedures, and must develop and apply appropriate sanctions against workforce members who do not comply with these policies and procedures.

45 C.F.R. § 164.412

If a law enforcement official states to a covered entity or business associate that a notification, notice, or posting required under this subpart would impede a criminal investigation or cause damage to national security, a covered entity or business associate shall:
(a) If the statement is in writing and specifies the time for which a delay is required, delay such notification, notice, or posting for the time period specified by the official; or
(b) If the statement is made orally, document the statement, including the identity of the official making the statement, and delay the notification, notice, or posting temporarily and no longer than 30 days from the date of the oral statement, unless a written statement as described in paragraph (a) of this section is submitted during that time.

Securities Laws
Chairman Jay Clayton's September 20, 2017 Public Statement:[2]
With respect to U.S. public company issuers, the SEC's primary regulatory role is disclosure based. To that end, the staff of the Division of Corporation Finance has issued disclosure guidance to help public companies consider how issues related to cybersecurity should be disclosed in their public reports.
. . .
The staff guidance is principles based and, while issued in 2011, remains relevant today.

Division of Corporation Finance Guidance[3]
The federal securities laws, in part, are designed to elicit disclosure of timely, comprehensive, and accurate information about risks and events that a reasonable investor would consider important to an investment decision. Although no existing disclosure requirement explicitly refers to cybersecurity risks and cyber incidents, a number of disclosure requirements may impose an obligation on registrants to disclose such risks and incidents. In addition, material information regarding cybersecurity risks and cyber incidents is required to be disclosed when necessary in order to make other required disclosures, in light of the circumstances under which they are made, not misleading. Therefore, as with other operational and financial risks, registrants should review, on an ongoing basis, the adequacy of their disclosure relating to cybersecurity risks and cyber incidents.

[2] https://www.sec.gov/news/public-statement/statement-clayton-2017-09-20#_ftn10.
[3] *CF Disclosure Guidance: Topic 2, Cybersecurity*, Securities and Exchange Commission, Division of Corporation Finance (Oct. 13, 2011), https://www.sec.gov/divisions/corpfin/guidance/cfguidance-topic2.htm.

Scenario 8

2 p.m.

Once Taylor is finished dealing with Bill Byte, she gets an alarming email from Big-A-Zon's attorney, Geoff Dazos:

"Taylor, I wanted to let you know that the documents you sent to me under the NDA were improperly redacted. We were able to copy and paste the pdf file, put it into Word, and remove the black highlighting from that stuff you marked as 'privileged.' Interesting that you have launched an internal investigation into bid rigging. Glad those guys at GammaLaw are on it – I just saw them at lunch. "

Question:

- Did Taylor break an ethical obligation?
  - Yes
  - No
  - Maybe

Suggested References – Scenario 8

- Competence with Technology, MPRC 1.1 Comment [8]
  - To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.
- VPRC 1.1, Comment [6]
  - To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education in the areas of practice in which the lawyer is engaged. Attention should be paid to the benefits and risks associated with relevant technology. The Mandatory Continuing Legal Education requirements of the Rules of the Supreme Court of Virginia set the minimum standard for continuing study and education which a lawyer licensed and practicing in Virginia must satisfy. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.
    - When a lawyer inadvertently receives confidential information, he is ethically obliged to return that information to the lawyer from whom the information was received, or to otherwise follow the sending lawyer's instructions, even if those instructions are to destroy the document. A lawyer's duty to represent his client diligently, according to LEO 1702, does not allow the lawyer who inadvertently received the privileged information to use the information to his client's benefit.
    - The applicable Rule of Professional Conduct is Rule 3.4(d)1 (Fairness to Opposing Party and Counsel) , along with Supreme Court of Virginia Rule 4:1(b)(6)(ii). The relevant Legal Ethics Opinion is 1702.
      - MRPC 3.4(d)(1): A lawyer shall not: (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
      - Supreme Court of Virginia Rule 4:1(b)(6)(ii): (ii) If a party believes that a document or electronically stored information that has already been produced is privileged or its confidentiality is otherwise protected the producing party may notify any other party of such claim and the basis for the claimed privilege or protection. Upon receiving such notice, any party holding a copy of the designated material shall sequester or destroy its copies thereof, and shall not duplicate or disseminate such material pending disposition of the claim of privilege or protection by agreement, or upon motion by any party. If a receiving party has disclosed the information before being notified of the claim of privilege or other protection, that party must take reasonable steps to retrieve the designated material. The producing party must preserve the information until the claim of privilege or other protection is resolved.
      - Legal Ethics Opinion 1702: LEO 1702 concludes that when a lawyer inadvertently receives confidential information, he is ethically obliged to return that information to the lawyer from whom the information was received, or to otherwise follow the sending lawyer's instructions, even if those instructions are to destroy the document. A lawyer's duty to represent his client diligently, according to LEO 1702, does not allow the lawyer who inadvertently received the privileged information to use the information to his client's benefit.
        https://www.vacle.org/opinions/1871.htm

- VIRGINIA LAW (No waiver extended to inadvertent disclosure):
  - § 8.01-420.7. Attorney-client privilege and work product protection; limitations on waiver.
    - A. When disclosure of a communication or information covered by the attorney-client privilege or work product protection made in a proceeding or to any public body as defined in § 2.2-3701 operates as a waiver of the privilege or protection, the waiver extends to an undisclosed communication or information only if:
      - 1. The waiver is intentional;
      - 2. The disclosed and undisclosed communications or information concern the same subject matter; and
      - 3. The disclosed and undisclosed communications or information ought in fairness be considered together.
    - B. Disclosure of a communication or information covered by the attorney-client privilege or work product protection made in a proceeding or to any public body as defined in § 2.2-3701 does not operate as a waiver of the privilege or protection if:
      - 1. The disclosure is inadvertent;
      - 2. The holder of the privilege or protection took reasonable steps to prevent disclosure; and
      - 3. The holder promptly took reasonable steps to rectify the error, including, if applicable, complying with the provisions of subdivision (b) (6) (ii) of Rule 4:1 of the Rules of the Supreme Court.
    - C. A court may order that the privilege or protection is not waived by the disclosure connected with the litigation pending before the court, in which case the disclosure does not operate as a waiver in any other proceeding.
    - D. An agreement on the effect of the disclosure in a proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.
    - E. This section shall not limit any otherwise applicable waiver of attorney-client privilege or work product protection by an inmate who files an action challenging his conviction or sentence.

Scenario 9

4:20 p.m.

Already exhausted by the chaos of the day, Taylor steps out for a much-needed Nitrogen-infused smoothie break when she sees an email from Tina Toke who heads BigCo's R&D Department. Tina asks Taylor whether she thinks BigCo might want to infuse cannabis into its products sold in Colorado to make them more popular. Taylor pops back a quick email saying she thinks there might be a way around federal law to do it, but asks: "Why would BigCo want to sell something to GenX 30-something consumers who don't even understand what BigCo does? There's no money to be made. I hate young people." Tina forwards Taylor's email to all of her direct reports, cc'ing Taylor. One of the direct reports, Whistle Blower, tells Tina she wants to file a grievance against Taylor based on what she said.

Questions:

- Is this a permissible business given federal and state law – or do we not know enough?
- Is the advice still privileged given the business comments? What does the forwarding of it with a cc mean for privilege?
- Does this implicate ABA Model Rule 8.4(g)?
- Without getting into whistle blower law (or issues these days), what avenues might BigCo consider having in place for the review of internal complaints concerning violations of its policies, law, or other duties?

Suggested References– Scenario 9

- VRPC 1.2: Scope of Representation: "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law."
- The Virginia Supreme Court recognizes that in-house lawyers can have privileged conversations with employees of companies they represent. *Va. Elec. & Power Co. v. Westmoreland-LG & E Partners*, 259 Va. 319, 326 (Va. 2000) (holding that the attorney-client privilege protected a draft letter sent for review to an in-house lawyer; explaining that "Communications between officers and employees of the same entity relayed to corporate counsel for the purpose of obtaining legal advice are entitled to attorney-client privilege.") (citing Owens-Corning Fiberglas Corp. v. Watson, 413 S.E.2d 630, 638 (Va. 1992)). Virginia Circuit Courts have also confirmed this principle. *Inta-Roto, Inc. v. Aluminum Co.*, 11 Va. Cir. 499, 500 (Henrico 1980) ("That such [attorney-client] privilege does apply to in-house counsel is clear."); *Gordon v. Newspaper Ass'n of Am*., 51 Va. Cir. 183, 186 (Richmond 2000) ("'[T]he privilege exists between a corporation and its in-house attorney.' The communications protected are those between employees and in-house counsel which aid counsel in providing legal services to the corporation.") (internal citations omitted).
- "[F]or the privilege to apply, the client's confidential communication "must be for the primary purpose of soliciting legal, rather than business, advice." *Henson v. Wyeth Labs., Inc.*, 118 F.R.D. 584, 587 (W.D. Va. 1987).
- "Accordingly, where a communication neither requests nor expresses legal advice, but rather involves the soliciting or giving of business advice, it is not protected by the privilege." *Adair v. EQT Prod. Co*., 285 F.R.D. 376, 380 (W.D. Va. 2012).

- MRPC 8.4(g) with respect to comment about GenXers
    - MRPC 8.4(g) "It is professional misconduct for a lawyer to . . . engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law."

Case Law on Business Advice Versus Legal Advice

Ohio	The advice at issue **must be legal advice** for the privilege to apply. *Nageotte v. Boston Mills Brandywine Ski Resort*, 2012-Ohio-6102, ¶ 8 (9th Dist. Summit). **Business advice that is unrelated to legal advice** generally is not privileged. *See Mickel v. Huntington Bank of Toledo*, 6th Dist. Lucas No. L-82-099, 1982 WL 6496, *2 (July 2, 1982). Advice **relating to litigation has obvious legal character**, but communications concerning legal advice need not necessarily relate to litigation for the privilege to apply. The only requirement is that the communication relate to legal advice. *Nageotte v. Boston Mills Brandywine Ski Resort*, 2012-Ohio-6102, ¶ 8 (9th Dist. Summit). Legal advice of any kind may be the subject of the attorney-client privilege. *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St.3d 261, 267, 2005-Ohio-1508, 824 N.E.2d 990, 997, ¶ 29 (2005). The fact that an attorney was involved in a communication (for example, present at a board meeting) does not make otherwise non-privileged communications privileged. *See Maddox v. Greene Cty. Bd. of Commrs.*, 2nd Dist. Greene No. 2013–CA–71, 2014-Ohio-1541, ¶ 7.
Pennsylvania	Attorney-client privilege can protect communications to or from legal counsel, whether outside or in-house counsel, **so long as they are not acting principally as business advisors** giving only incidental legal advice. *In Re: Westinghouse Electric Corporation Uranium Contracts Litigation*, 76 F.R.D. 47, 2 Fed. R. Evid. Serv. 87 (W.D. Pa., Jul 19, 1977). Pennsylvania courts will not protect communications unless they are made for the **purpose of obtaining or giving legal advice**. *Maleski by Chronister v. Corporate Life Ins. Co.*, 641 A.2d 1 (Pa. Cmwlth. 1994); *Yi v. Commonwealth*, 646 A.2d 603 (Pa. Cmwlth. 1994) (attorney was asked to translate, not to provide legal advice); *Okum v. Commonwealth*, 465 A.2d 1324 (Pa. Cmwlth. 1983) (attorney was asked by administrator to clarify his administrative authority, not for legal advice); Leonard Packel & Anne Bowen Poulin, PENNSYLVNIA EVIDENCE § 521-1(c), at 391.
Virginia	Generally, the attorney-client privilege does not attach to a communication merely because it is communicated between a client and her attorney, but the privilege does attach to a communication **made with the purpose of delivering legal advice**. *Robertson v. Commonwealth*, 181 Va. 520, 539-40, 25 S.E.2d 352, 360 (1943). Communications between officers and employees of the same entity relayed to corporate counsel for the purpose of obtaining legal advice are entitled to the attorney-client privilege. *Owens-Corning Fiberglas Corp. v. Watson*, 243 Va. 128, 141, 413 S.E.2d 630, 638 (1992) (citing *Upjohn Co. v. United States*, 449 U.S. 383, 101 S. Ct. 677, 66 L.Ed.2d 584 (1981)). The Virginia Supreme Court recognizes that **in-house lawyers can have privileged conversations with employees of companies** they represent. *Va. Elec. & Power Co. v. Westmoreland-LG & E Partners*, 259 Va. 319, 326 (Va. 2000) (holding that the attorney-client privilege protected a draft letter sent for review to an in-house lawyer; explaining that "Communications between officers and employees of the same entity relayed to corporate counsel for the purpose of obtaining legal advice are entitled to attorney-client privilege.") (citing *Owens-Corning Fiberglas Corp. v. Watson*, 413 S.E.2d 630, 638 (Va. 1992)). Virginia Circuit Courts

	have also confirmed this principle. Inta-Roto, Inc. v. Aluminum Co., 11 Va. Cir. 499, 500 (Henrico 1980) ("That such [attorney-client] privilege does apply to in-house counsel is clear."); Gordon v. Newspaper Ass'n of Am., 51 Va. Cir. 183, 186 (Richmond 2000) ("'[T]he privilege exists between a corporation and its in-house attorney.' The communications protected are those between employees and in-house counsel which aid counsel in providing legal services to the corporation.") (internal citations omitted). The Virginia Supreme Court has held that the attorney-client privilege applies **when corporate employees share a communication that is initially protected as a communication between a corporate employee and in-house counsel**. *See Va. Elec. & Power Co. v. Westmoreland-LG & E Partners*, 259 Va. 319, 326 (Va. 2000) (holding that the attorney-client privilege protected a draft letter sent for review to an in-house lawyer and shared between corporate employees of same parent corporation).
Indiana	Communications between a client seeking advice from an attorney in his professional capacity are strictly confidential. This privilege applies to "all communications made to an attorney for the purpose of professional advice or aid, regardless of any pending or expected litigation." *Groth v. Pence*, 67 N.E.3d 1104, 1118 (Ind. Ct. App.), *transfer denied*, 86 N.E.3d 172 (Ind. 2017). To establish attorney-client privilege, the communication must occur "in the course of an effort to obtain legal advice or aid, on the subject of the client's rights or liabilities, from a professional legal advisor acting in his or her capacity as such." *Techna-Fit, Inc. v. Fluid Transfer Prod., Inc.*, 45 N.E.3d 399, 411 (Ind. Ct. App. 2015). The privilege may not be claimed when the attorney is acting as an ordinary business person. *Hartford Fin. Servs. Grp., Inc. v. Lake Cty. Park & Recreation Bd.*, 717 N.E.2d 1232, 1236 (Ind. Ct. App. 1999).
Nebraska	Attorney-client privilege applies to communications that are confidential in character and relate "to the subject matter upon which advice was given or sought." *State ex rel. Stivrins v. Flowers*, 273 Neb. 336, 342, 729 N.W.2d 311, 317 (2007). For a communication to be privileged, it must have been made between an attorney and client, during the course of professional employment, and must reference the subject matter of that employment. *State v. Spidell*, 194 Neb. 494, 233 N.W.2d 900 (1975).
Florida	The lawyer-client privilege only protects confidential communications made for the purpose of obtaining or rendering legal services. § 90.502(1)(b), Fla. Stat. The privilege applies to attorney-client communications involving either legal advice or information that enables the lawyer to render legal advice. *Hagans v. Gatorland Kubota, LLC/Sentry Ins.*, 45 So. 3d 73, 78 (Fla. 1st DCA 2010). Communications that fall outside of this scope do not qualify for privilege protection. See, for example, *Waffle House v. Scharmen*, 981 So. 2d 1266, 1267 (Fla. 1st DCA 2008) (privilege does not protect attorney's mere recitation of statutory language to the client, such as telling a client the statute of limitations or statutory work search requirements); *Valliere v. Florida Elections Com'n*, 989 So. 2d 1242, 1243 (Fla. 4th DCA 2008)

	(social conversation with attorney unrelated to legal advice not protected); *State v. Branham*, 952 So. 2d 618, 621 (Fla. 2d DCA 2007) (same). Advice relating to litigation has obvious legal character, but communications concerning legal advice need not relate to litigation for the privilege to apply. Transactional advice may also qualify for privilege protection. For example, the attorney-client privilege protects discussions with an attorney concerning preparation and drafting of a will during the lifetime of the client where the will was not disclosed to third parties. *Compton v. W. Volusia Hosp. Auth.*, 727 So. 2d 379, 382 (Fla. 5th DCA 1999). Attorneys may play various roles, giving not only legal advice but at times business advice or general information. Although legal advice concerning a client's business may be protected by the privilege, purely business advice unrelated to legal advice generally is not privileged. Mixed-purpose (for example, business and legal) advice may be privileged if legal advice is the primary purpose of the communication. *Preferred Care Partners Holding Corp. v. Humana, Inc.*, 258 F.R.D. 684, 689 (S.D. Fla. 2009) (applying Florida law).
Iowa	Under Iowa's common law, "any confidential communications between an attorney and the attorney's client is absolutely privileged from disclosure against the will of the client." *Squealer Feeds v. Pickering*, 530 N.W.2d 678 (Iowa 1995). Attorney-client privilege is also codified at Iowa Code Section 622.10, which states in pertinent part: A practicing attorney…who obtains information by reason of the [attorney's] employment shall not be allowed, in giving testimony, to disclose any confidential communication properly entrusted to the [attorney] in the [attorney's] professional capacity, and necessary and proper to enable the [attorney] to discharge the functions of the [attorney's] office.
Kentucky	In Kentucky, the basic rule of the privilege allows a client "to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client." KRS 503(b). The communication must be "[b]etween the client or a representative of the client and the client's lawyer or a representative of the lawyer," "[b]etween the lawyer and a representative of the lawyer," "[b]etween representatives of the client or between the client and a representative of the client," or "[a]mong lawyers and their representatives representing the same client." KRE 503(b)(1)–(5).
Wisconsin	When a communication relates to a business, it does not mean that it cannot also be a communication for purpose of rendering legal services. *Dyer v. Blackhawk Leather LLC*, 758 N.W.2d 167, 313 (Wis. App. 2008). The Court in Dyer also recognized that "virtually all legal advice involves a modicum of business advice." *Id.*
Louisiana	Louisiana Code of Evidence, Article 506 provides that "[a] client has a privilege to refuse to disclose, and prevent another person from disclosing, a confidential communication, whether oral, written, or otherwise, made for the purpose of facilitating the rendition of professional legal services to the client."

	Louisiana Code of Evidence, Article 506 comment d provides that "The definition of 'lawyer' does not specifically address the matter of 'house counsel.' By not specifically excluding 'house counsel' from the definition, this Article does not automatically exclude the application of the attorney-client privilege to communications between an attorney and the attorney's employer. The availability of a privilege in this context will depend upon the general principles set forth in this Article." Communications from a lawyer to a client providing "business advice divorced from its legal implications" would not be privileged. *Exxon Mobil Corp. v. Hill*, 751 F.3d 379 (5th Cir. 2014).

Scenario 10

4:45 p.m.

GammaLaw calls Taylor to tell her some bad news. They found some evidence about the bid rigging as a result of their witness interviews and calls. They discovered that a number of BigCo employees were taking public officials and rivals to lunch during the relevant time period, and people seemed a little sketchy about the motivation behind the meetings.

Taylor calls BigCo's CEO about it. The CEO nonchalantly tells her "Don't worry about it. Don't write anything down (or if you do mark it "work product"). Don't tell Big-A-Zon if they ask about it when we meet with them next week. If the judge in that advertising class action asks any questions about whether we've got any problems, just tell them everything's fine."

Question:

- What potential issues does this scenario raise for Taylor?

Suggested References – Scenario 10

- Work Product definition & waiver
    - *Hickman v. Taylor*, 329 U.S. 495 (1947): Work Product Doctrine is a rebuttable presumption: adverse party may not have access to materials prepared by a party's lawyers in anticipation of litigation.
        - Presumption may be overcome when a party has relevant and non-privileged facts which would be essential to the preparation of the adverse party's case.
- Truthfulness in Statements to Others, VRPC Rule 4.1
    - In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of fact or law; or (b) fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.
- Supreme Court of Virginia was the first court to recognize the joint defense privilege, and it did so by extending the attorney-client privilege to communications between criminal codefendants made in the presence of counsel.
    - https://www.vsb.org/docs/valawyermagazine/vl0211_common-interest.pdf
- Common Interest Doctrine Checklist:
    - Does the communication, before being shared with a third party, satisfy either the attorneyclient privilege or the work product doctrine?
    - Do the parties seeking to enter a common interest agreement share a common interest?
    - Is the common interest legal in nature with respect to the actions of the attorney(s)? In other words, is the purpose of the communication that is to be shared with a third party to secure primarily either an opinion on law or legal services or assistance in a legal proceeding?
    - Is litigation at least contemplated against a potential identifiable adverse party?
    - Is an attorney on at least one side of the communication?
    - Is there an express agreement between the parties that a common interest exists between them?
    - Is the communication made after there is an express agreement between the parties and in furtherance of the common interest?
    - Is the communication made in confidence?

- Candor to tribunal, VRPC Rule 3.3:
    - (a) A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal; (2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; (3) fail to disclose to the tribunal controlling legal authority in the subject jurisdiction known to the lawyer to be adverse to the position of the client and not disclosed by opposing counsel; or (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.
    - (b) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.
    - (c) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

- (d) A lawyer who receives information clearly establishing that a person other than a client has perpetrated a fraud upon the tribunal in a proceeding in which the lawyer is representing a client shall promptly reveal the fraud to the tribunal.
- (e) The duties stated in paragraphs (a) and (d) continue until the conclusion of the proceeding, and apply even if compliance requires disclosure of information protected by Rule 1.6.

Case Law Regarding the Common Interest Doctrine

Ohio	**The common interest doctrine is not a separate privilege.** *Condominiums at Stonebridge Owner's Assn., Inc. v. K & D Group, Inc.*, 8th Dist. Cuyahoga No. 100261, 2014-Ohio-503, ¶ 15. It merely allows for the sharing of privileged information among separately represented parties. *See State ex rel. Bardwell v. Ohio Atty. Gen.*, 181 Ohio App.3d 661, 680, 2009-Ohio-1265, 910 N.E.2d 504, ¶ 87 (10th Dist.). For the common interest doctrine to apply, **the underlying communication still must satisfy the elements of the attorney-client privilege**. *Condominiums at Stonebridge Owner's Assn., Inc. v. K & D Group, Inc.*, 8th Dist. Cuyahoga No. 100261, 2014-Ohio-503, ¶ 16. In Ohio, the common interest doctrine **applies to communications between attorneys or parties with a common litigation opponent in a joint defense situation**, and may include both civil and criminal litigation. *State ex rel. Bardwell v. Ohio Atty. Gen.*, 181 Ohio App.3d 661, 2009–Ohio–1265, 910 N.E.2d 504, ¶ 87 (10th Dist.). Ohio courts **narrowly construe the common interest exception**, limiting it to communications involving **a common legal strategy in the course of a joint defense effort**. *Buckeye Corrugated, Inc. v. Cincinnati Ins. Co.*, 9th Dist. Summit No. 26634, 2013-Ohio-3508, ¶ 15. If the common interest parties' **interests later become adverse**, **information that was already shared under the agreement generally may not be withheld on privilege in subsequent litigation between those parties**. *See Buckeye Corrugated, Inc. v. Cincinnati Ins. Co.*, 9th Dist. Summit No. 26634, 2013-Ohio-3508, ¶ 16 (noting that the exception applies to prevent disclosure to third parties.). However, common-interest participants who later become adversaries **generally need not disclose to the other participants, communications that they did not already share with those other participants**. *See Buckeye Corrugated, Inc. v. Cincinnati Ins. Co.*, 9th Dist. Summit No. 26634, 2013-Ohio-3508, ¶ 16. After a merger or other succession, the **new entity's management may waive the privilege with respect to the predecessor entity's communications with counsel**. *See* R.C. 1701.82 (granting to the new entity all rights and privileges previously belonging to the former entity); *Commodity Futures Trading Comm. v. Weintraub*, 471 U.S. 343, 349, 105 S.Ct. 1986, 85 L.Ed.2d 372 (1985).
Pennsylvania	In *In re Condemnation by City*, the Commonwealth Court of Pennsylvania held that Pennsylvania law recognizes the common interest privilege in criminal and civil cases, but that few cases have addressed the limits of that privilege. 981 A. 2d 391, 397 (2009). In that case, the court held that adverse parties to a condemnation proceeding did not share a "common legal interest" as required under this doctrine. The court also cited favorably to federal case law holding that solely commercial common interests are insufficient to warrant application of the privilege. *Katz v. AT & T Corp.*, 191 F.R.D. 433 (E.D. Pa. 2000).

Virginia	"Whether an action is civil or criminal, potential or actual, whether the commonly interested parties are plaintiffs or defendants, 'persons who share a common interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims.'" *Hicks v. Com.*, 439 SE 2d 414, 416 (Va. Ct. App. 1994) (internal citation omitted).
Indiana	The common interest privilege allows parties who have coinciding legal interests to share privileged materials in order to help prosecute or defend claims. *Groth v. Pence*, 67 N.E.3d 1104, 1119 (Ind. Ct. App.), *transfer denied*, 86 N.E.3d 172 (Ind. 2017). It is an exception to the rule that privilege is waived by disclosure to third parties. *Id.* The common interest privilege treats all attorneys and clients as a single-unit, as the privilege relates to the specific common issue. *Price v. Charles Brown Charitable Remainder Unitrust Tr.*, 27 N.E.3d 1168, 1173 (Ind. Ct. App. 2015). The common interest doctrine may apply among Plaintiffs even when counsel is not present. *Reginald Martin Agency, Inc. v. Conseco Med. Ins. Co.*, 460 F. Supp. 2d 915, 919 (S.D. Ind. 2006).
Nebraska	Under Nebraska law, "a communication is confidential if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." Neb. Rev. Stat. § 27-503. Nebraska law is not developed as to the common interest doctrine.
Florida	The common interest doctrine requires: • Multiple attorneys representing separate parties. • Clients with some interests in common. • A sharing of information between attorneys for different clients or a client and the attorney for another client in the group. • Circumstances where it is reasonable to assume that disclosure to third parties is not intended. • Information exchanged for the limited purpose of assisting in the common cause. *Visual Scene, Inc. v. Pilkington Bros., plc.*, 508 So. 2d 437, 441 (Fla. 3d DCA 1987). The common interest doctrine is not a separate privilege. It merely allows for separately represented parties with common legal interests to share information with each other and their respective attorneys without destroying the attorney-client privilege. For the doctrine to apply, the underlying communication must still satisfy the elements of the attorney-client privilege. *See Visual Scene, Inc. v. Pilkington Bros., plc.*, 508 So. 2d 437, 440 (Fla. 3d DCA 1987) (traditional privilege rules apply to a common interest arrangement, such as waiver by disclosure of privileged information to a non-member of the common interest group).

	If the parties invoking the common interest exception later become adversaries, information that was already shared under the agreement generally may not be withheld on privilege grounds in subsequent litigation between those parties. *MapleWood Partners, L.P. v. Indian Harbor Ins. Co.*, 295 F.R.D. 550, 606 (S.D. Fla. 2013) (applying Florida law).
Iowa	An attorney cannot waive the attorney-client privilege, unless the client gives informed consent as to that waiver, disclosure is impliedly authorized in order to represent the client, or disclosure is permitted or required by the Iowa Professional Rules of Conduct. IRPC 32:1.6. Generally, attorney-client privilege may be waived. *Miller v. Continental Ins. Co.*, 392 N.W.2d 500, 504 (Iowa 1986); Iowa Code § 622.10 (1993). Waiver may be express or implied. An express waiver occurs when a client voluntarily discloses the content of privileged communications. *Miller*, 392 N.W.2d at 504. An implied waiver occurs where the client has placed in issue a communication which goes to the heart of the claim in controversy. *Squealer Feeds v. Pickering*, 530 N.W.2d 678, 684 (Iowa 1995). Any waiver is limited to attorney-client communications on the matter disclosed or at issue. *Miller*, 392 N.W.2d at 504-05.
Kentucky	Revelation of the statements to a third party who is neither a representative of the client or the attorney would amount to a waiver of the privilege. *Lexington Public Library v. Clark*, 90 S.W.3d 53, 61 (Ky. 2002)
Wisconsin	Where an attorney's services are rendered to several persons, confidential communications to him in regard thereto, in which all such persons are interested, cannot be disclosed unless all join in consenting thereto. *Herman v. Schlesinger*, 90 N.W. 460 (Wis. 1902).
Louisiana	Louisiana Code of Evidence Art. 506 provides, in part, that "A client has a privilege to refuse to disclose, and to prevent another person from disclosing, a confidential communication . . . made for the purpose of facilitating the rendition of professional services to the client . . . when the communication is . . . by the client or his lawyer, or a representative of a lawyer, who represents another party concerning a matter of common interest."

Case Law Regarding Waiver

Ohio	An intentional express waiver occurs when the privilege holder intentionally discloses privileged communications to a third party who is outside the attorney-client relationship. *See Surovec v. LaCouture*, 82 Ohio App.3d 416, 421, 612 N.E.2d 501 (2d Dist.1992).
Pennsylvania	Under Pennsylvania law, the client waives the attorney-client privilege when the **client discloses a privileged communication to a third party who is outside the protected attorney-client relationship**. *Smith v. St. Luke's Hosp.*, 40 Pa. D. & C.3d at 60 ("there can be no claim of privilege as to facts which have already been publicly disclosed by the client"); *Bonds v. Bonds*, 689 A.2d 275, 615 (Pa. Super. Ct. 1997) ("the appellate courts of this jurisdiction have found waiver when the communication is

	made in the presence of or communicated to a third party or to the court…."). Traditionally, the voluntary disclosure of an attorney-client privileged communication to a third party waives the attorney-client privilege for the communication that is disclosed, **even if the third party agrees not to disclose the communication to others**. *Bagwell v. Pennsylvania Dept. of Education,* 103 A.3d 409, 418 (Pa. Commw. Ct. 2014); *Joe v. Prison Health Servs., Inc.*, 782 A.2d 24 (Pa. Commw. Ct. 2001); *Adhesive Specialists, Inc. v. Concept Sciences, Inc.*, 59 Pa. D. & C.4th 244, 262 (Pa. Com. Pl. 2002), citing *Westinghouse Electric Corporation*, 951 F.2d 1414, 1427 (3d Cir. 1991).
Virginia	Privileged communications may be expressly waived by the client or a waiver may be implied from the client's conduct. *Banks v. Mario Industries of Virginia,* 650 SE 2d 687, 696 (Va. Supreme Ct. 2007). Waiver belongs to the client, not the attorney. *Com v. Edwards*, 370 SE 2d 296, 301 (Va. Supreme Ct. 1988) (also holding that "[w]hen a client communicates information to his attorney with the understanding that the information will be revealed to others, the disclosure to others effectively waives the privilege "not only to the transmitted data but also as to the details underlying that information.")
Indiana	Attorney-client privilege can be expressly or implicitly waived. *Waterfield v. Waterfield*, 61 N.E.3d 314, 324 (Ind. Ct. App. 2016), *transfer denied,* (Ind. Jan. 12, 2017), and *transfer denied,* 76 N.E.3d 141 (Ind. 2017). The privilege belongs to the client and can only be waived by the client. *Brown v. Katz*, 868 N.E.2d 1159, 1166 (Ind. Ct. App. 2007). Although Indiana courts recognize the common interest doctrine, they have not clarified what constitutes waiver. *Bitler Inv. Venture II, LLC v. Marathon Ashland Petroleum LLC*, No. 1:04-CV-477, 2007 WL 465444, at *3 (N.D. Ind. Feb. 7, 2007). The Court of Appeals looked at the various ways of approaching inadvertent disclosure of privileged communications. It considered the objective approach, "which concludes that inadvertent disclosure forfeits the protection of the privilege without regard to the particular circumstances," the subjective approach, "which concludes that the privilege if forfeited only if the disclosure was intentional;" and the balancing approach, "which examines several factors in determining whether the privilege is forfeited." *Id.* Those factors include "the reasonableness of the precautions to prevent inadvertent disclosure, the time taken to rectify the error, the scope of discovery," the extent of the disclosure, and "an overreaching issue of fairness and the protection of an appropriate privilege which, of course, must be judged against the care or negligence with which the privilege is guarded with care and diligence or negligence and indifference."

	The court found the balancing approach to be the most reasonable. *P.T. Buntin, M.D., P.C. v. Becker*, 727 N.E.2d 734, 740–41 (Ind. Ct. App. 2000).
Nebraska	Generally, "it has long been the rule that communications between client and attorney made in the presence of others do not constitute privileged communications." *State v. Lynch*, 196 Neb. 372, 376, 243 N.W.2d 62, 65 (1976). "Fairness is an important and fundamental consideration in assessing the issue of whether there has been a waiver of the lawyer-client privilege." *League v. Vanice*, 221 Neb. 34, 44, 374 N.W.2d 849, 856 (1985). The District Court of Nebraska noted that state courts were silent on the issue of waiver and predicted that Nebraska courts would take a "middle of the road" approach using a five step analysis that considers "(1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of document production, (2) the number of inadvertent disclosures, (3) the extent of the disclosures, (4) the promptness of measures taken to rectify the disclosure, and (5) whether the overriding interest of justice would be served by relieving the party of its error." *Seger v. Ernest-Spencer Metals, Inc.*, No. 8:08CV75, 2010 WL 378113, at *6 (D. Neb. Jan. 26, 2010) (citations omitted).
Florida	The attorney-client privilege belongs to the client. § 90.502(2), Fla. Stat. Generally, only the client or certain client-representatives, such as a personal representative or guardian, can waive the privilege. §§ 90.507 and 90.502(3), Fla. Stat. Attorneys do not own the client's privilege. However, an attorney has implied authority from the client to act on its behalf. Therefore, an attorney's conduct may waive the client's privilege. §§ 90.502(3)(e) and 90.507, Fla. Stat.; *see also Nova Se. Univ., Inc. v. Jacobson*, 25 So. 3d 82, 86 (Fla. 4th DCA 2009) (an attorney's failure to demand return of inadvertently produced privileged documents may waive the client's privilege). The conduct of an attorney's employee, such as a secretary, may also waive the client's privilege because the privilege extends to the attorney's necessary intermediaries and agents. *Stevenson v. Stevenson*, 661 So. 2d 367, 369-70 (Fla. 4th DCA 1995). Although the privilege may attach to corporate counsel's communications with virtually any type of employee, only the corporation's present management (typically its officers and directors) may waive the corporation's privilege. *Rogan v. Oliver*, 110 So. 3d 980, 983 (Fla. 2d DCA 2013). However, no individual stockholder, officer, or director has the authority to waive or assert the privilege against the wishes of the corporation's board of directors. *Tail of the Pup, Inc. v. Webb*, 528 So. 2d 506, 507 (Fla. 2d DCA 1988). A corporation's former executives, managers, and employees cannot waive the corporation's privilege over the wishes of current managers. Rogan, 110 So. 3d at 983.

	When the control of a corporation passes to new management, so does the authority to assert and waive the attorney-client privilege. Newly installed managers, resulting from a takeover, merger, or normal succession, may therefore waive the attorney-client privilege regarding communications made by former officers and directors. Rogan, 110 So. 3d at 983. Other corporate successors, such as assignees, trustees in dissolution, or similar representatives may waive or assert the corporation's attorney-client privilege even if the corporation has been dissolved. § 90.502(3)(d), Fla. Stat.
Iowa	An attorney cannot waive attorney-client communications except to "establish a claim or defense" against a client in an attorney-client dispute. Iowa Rule 1.6(b)(5). In an attorney-client relationship between a corporation and a corporate attorney, the corporation is the client, owns the privilege, and has the sole authority to waive the privilege. *See Keefe v. Bernard*, 774 N.W.2d at 669-70.
Kentucky	Under KRE 503, employees of a client can be treated as "representatives" of the client. So, generally speaking, and assuming they meet a few additional requirements, confidential statements made by a client's employees to the client's legal counsel are protected as much as statements by the client itself. Likewise, statements by the lawyer to the client or to the client's employees, again assuming they meet the additional requirements, are also protected. *Collins v. Braden*, 384 S.W.3d 154, 161 (Ky. 2012).
Wisconsin	A lawyer, without the consent or knowledge of a client, cannot waive the attorney-client privilege by voluntarily producing documents, which the attorney does not recognize as privileged. *Harold Sampson Children's Trust v. The Linda Gale Sampson*, 679 N.W.2d 794 (Wis. App. 2003). The client is the holder of the attorney-client privilege, only the client or someone authorized by the client to do so may waive the privilege. *State v. Meeks*, 666 N.W.2d 859 (Wis. 2003).
Louisiana	"A privilege is waived if the holder discloses the communication or consents to its disclosure, unless the disclosure was compelled or the holder did not have opportunity to claim the privilege." Louisiana Civil Law Treatise, § 8.2.

Scenario 11

5:30 p.m.

On her way out the door, Taylor's phone rings and it's a DeltaLaw partner and he tells her:

"I know we're your usual defense counsel, but we also do opt-out plaintiff's litigation that can improve your bottom line. And I hear those Nitrogen-infused smoothie machines BigCo bought are defective because the nitrogen makes you sleepy instead of being more productive. We could do a contingent fee case for you. Or we can recommend a good litigation funding company. Either way, won't have to foot the bill until the cash comes rolling in."

Taylor just wants her day to end so she just says. *"Fine get going on this based on my word. We'll figure out the details later."*

Question:

- What could go wrong here?

<u>This scenario brings up the following topics:</u>

- Contingency Fees:
  - VRPC 1.5 and MRPC 1.5
    - (c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall state in writing the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.
  - Independence with litigation funding, VRPC 1.8(f): Fees
    - (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
      - (1) the client consents after consultation;
      - (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
      - (3) information relating to representation of a client is protected as required by Rule 1.6

What a day! Here are some "Taylor-ed" Takeaways

- Protect Client's Confidences From Disclosure
  - Treadmill Scenario 1: Confidentiality of Information (MRPC and VRPC 1.6)
- Keep Your Wellness In Mind
  - Treadmill Scenario 1: Competency (VRPC 1.1, Comment 7)
- Know Who/What Your Client Is
  - CCO's BBQ Picture Scenario 2: Scope of Representation (VRPC 1.2)
  - Organization as the Client (VRPC 1.13)
- Watch Out for Adverse Interests To Your Current Client
  - Taylor's Friend's Tip + Bid-Rigging Scenario 3: Conflict of Interest (VRPC 1.7a)
- Appropriately Communicate with your Organization
  - CCO's BBQ Picture Scenario 2: Communication (VRPC 1.4)
- But, Don't Communicate with Represented Parties (even on social media!)
  - Internal Investigation Scenario 5: Communications with Persons Represented by Counsel (VRPC 4.2)
- And, Don't Misrepresent Yourself When Communicating with Others (including non-lawyers)
- Litigation/Social Media Scenario 6: Truthfulness in statements to Others (VRPC 4.1)
- Respect for Rights of Third Persons (MRPC 4.4)
- Make Sure You Know What You're Talking About
  - Hiring Outside Counsel Scenario 4: Competence and Not Dabbling (VRPC 1.1; MRPC 1.1, Comment 2)
- Check with Outside Counsel Regarding Representation of Opposing Parties
  - Hiring Outside Counsel Scenario 4: Conflict of Interest (VRPC 1.7)
- Ensure Ethical Obligations Followed by Outside Counsel
  - Hiring Outside Counsel Scenario 4: Conflict of Interest (VRPC 1.7, 1.13)
- Keep in Mind the Difference Between Legal and Business Advice
  - Cannabis Scenario 9: *Owens-Corning Fiberglas Corp. v. Watson*, 243 Va. 128, 141, 413 S.E.2d 630, 638 (1992) (citing *Upjohn Co. v. United States*, 449 U.S. 383, 101 S. Ct. 677, 66 L.Ed.2d 584 (1981)).
- Stay Up to Date on Technology to Keep Information Safe
  - Privacy Policy/Breach Scenario 7: Competence (VRPC 1.1, Comment 6; MPRC 1.1, Comment 8)
  - Diligence (VRPC 1.3)
- Don't Advise Criminal or Illegal Conduct
  - Cannabis Scenario 9: Scope of Representation (VRPC 1.2)
- Be Mindful of Conduct that Could Be Considered Misconduct (Harassment, Discrimination, Etc.)
  - Cannabis + GenXers Comment Scenario 9: Misconduct (MRPC 8.4(g))
- Don't Lie to a Court
  - Suspicion of Wrongdoing Scenario 10: Candor to Tribunal, (VRPC 3.3)
- Be Careful with Contingency Fees
  - Pitch to do Plaintiff's Case Scenario 11: Fees (VRPC 1.5; MRPC 1.5)

Relevant Virginia State Bar Rules of Professional Conduct

- Rule 1.1– Competence
- Rule 1.2 – Scope of Representation
- Rule 1.3 – Diligence
- Rule 1.4 – Communication
- Rule 1.5 – Fees
- Rule 1.6 – Confidentiality of Information
- Rule 1.7 – Conflict of Interest: General Rule
- Rule 1.10 – Imputed Disqualification
- Rule 1.13 – Organization as Client
- Rule 1.15 – Safekeeping Property
- Rule 3.3 – Candor to Tribunal
- Rule 4.1 – Truthfulness in Statements to Others
- Rule 4.2 – Communications with Persons Represented by Counsel
- Rule 4.4 – Respect for Rights of Third Persons
- Rule 5.3 – Responsibilities Regarding Nonlawyer Assistants
- Rule 8.4 – Misconduct

Relevant Model Rules of Professional Conduct

- Rule 1.1 – Competence
- Rule 4.4 – Respect for Rights of Third Persons
- Rule 8.4 – Misconduct
    - 8.4(g): Discriminatory misconduct