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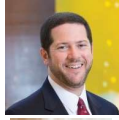
Another Day in the Life of Taylor Truth

The Ethical Questions We Face in the Corporate World

Tuesday, October 3, 2019 | Noon – 2 p.m.

9/27/19 DRAFT

Your Panelists



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Jeniffer M. De Jesus Roberts

- Vice President, Deputy General Counsel, Booz Allen Hamilton
- Former partner, Alston & Bird Construction & Government Contracts Group
- [THIRD BULLET?]



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- Corporate Counsel/Homeland and Law Enforcement Executive, E3/Sentinel
- Former Director of Policy, U.S. Customs and Border Protection
- Former attorney, O'Melveny and Myers

Introduction

- In-house counsel face a multitude of ethical issues
- In a rapidly evolving environment
- Today's objective: grow your toolkit under VSB RPC: scenarios, polling, discussion & perspectives
- Reminder for anonymous text polling: **Text ABEvent to 22333**

Thank you for those introductions. Our panelists today have served in a wide variety of legal roles, including in-house counsel, private practice, and as government lawyers. We know all too well that in-house counsel are faced with a variety of ethical quandaries that raise questions every day including topics such as:

- Who is your client
- When is a communication privileged
- How do you recognize and handle a conflict of interest internally or with your outside counsel?
- How do you decide when to initiate an internal investigation?
- How do you create a culture of ethical compliance?
- What is the interplay between technology and ethics?
- When do I have to "report up"?
- What is business advice vs. legal advice (and why does it matter)? and
- How best can we protect our client (i.e., the company)?

These are no small ethical issues, especially with rapidly changing technology and a regulatory environment that can move just as fast. The ethical questions and challenges being faced by in-house counsel can be endless and overwhelming.

We are going to spend the next two hours to give you more tools for your toolbox as you consider and grapple with these ethical issues. Building on last year's program, we are going to review a series of brand-new fictional scenarios that many of you may have encountered or will encounter (though hopefully not all in the same day). We will discuss the issues these scenarios under the governing Virginia State Bar Rules of Professional Conduct and other ethics authorities, with an eye toward the unique considerations associated with being in-house counsel, as well as providing tips and best practices from our various perspectives.

Please feel free to ask questions as we go along. The format is interactive and we are hoping that you all leverage the voting technology available to you so that we can make this a fun and interactive learning experience.

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 app on her SmartWatch about AlphaLaw and BetaLaw's proposals and accidentally sends 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."

Scenario 1 – Discussion Questions

Poll Question 1: Is Taylor's panic justified?

- Yes, she violated 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

Poll Question 1

The following rules are implicated in this scenario:

- Confidentiality of Information (VRPC and MRPC 1.6)
 - In VRPC 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.
- Issues to consider:
 - What was the nature of the information – even if not legal advice wasn't the subject matter intended to be confidential? [yes]
 - What did she do to **reasonably** protect those confidences-- was she in a public space where she could be overheard? [maybe not – maybe no one was in the gym at that hour] Did she know enough about the use the voiceapp and email system to be using it for confidential discussions [probably so re the email – just

a mistake; not sure re voiceapp]

- **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

- 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. [could also discuss duty of recipient not to use & comply with request]

Poll Question 3

- It is important that Taylor takes time out of her day to focus on her overall wellness because that feeds into her ability to be a competent attorney.
 - VRPC 1.1, Comment 7: “A lawyer’s mental, emotional, and physical well-being impacts the lawyer’s ability to represent clients and 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).”
- This is an emerging area of professional responsibility rules. Discuss ABA National Task Force on Lawyer Well Being, ABA Working Group to Advance Well Being in the Profession, ABA Well Being Pledge.

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 head up to her office. She pours 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 Juul 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.

Scenario 2 – Discussion Questions

- Poll Question 4: Can Taylor help the CCO for things outside of work if they have the possibility of impacting the company?
 - Yes, the CCO reflects the company, so it is necessary to assist him.
 - No, Taylor should suggest that the CCO hire his own lawyer for a defamation case.
- Poll Question 5: Could 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

The following rules are implicated by this scenario:

- Scope of Representation (VRPC 1.2)
 - INSERT 1.2 TEXT/COMMENTS PERTAINING TO HOW TAYLOR COULD DISCUSS/LIMIT SCOPE OF WORK TO THINGS RELATED TO THE COMPANY'S INTERESTS
 - Note that he is not necessarily being accused of illegal things, just things that could cause reputational injury.
- 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 is permissible
 - 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.

- Make sure the CCO knows you represent the company as a client and not the constituents
 - 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
- 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. It 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 even 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 some blog article the other day about some kinds of joint bidding being totally fine. So she thinks maybe her friend is just seeing ghosts.

Scenario 3 – Discussion 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
- Poll Question 9: Since Taylor is pretty shaky on her antitrust knowledge, what should she do to handle this?
 - Just go with her gut instincts.
 - Take time to read a lot about bid rigging.
 - Seek outside counsel.

The following rules are implicated in this scenario:

- 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.
- 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.”
- Competence (VRPC 1.1) and Not Dabbling [see comments about ability to learn]
 - “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.
- Launching point for discussion about practical realities of launching an internal investigation [level of suspicion/proof necessary, ground rules to protect privilege, who does it, etc.]

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.

Scenario 4 – Discussion 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.

This scenario implicates the following rule:

Conflict of Interest, 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.

- Launching point for how to analyze a whether adversity exists, whether it is waivable, what you need to do to get waivers, and discussion of how firms consider “business conflicts” besides legal conflicts in their analysis

Scenario 5 – 11 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.

Scenario 5 – Discussion Questions

- Poll Question 12: What should Taylor make sure GammaLaw does during the investigation?
 - Protect privilege
 - Inform each interviewees who the firm represents
 - Remind them to be aware of when they might have to identify separate counsel for certain individuals
 - [INSERT OTHER BEST PRACTICES]
 - All of the above

VRPC 1.7, 1.13 [RAISES ISSUES OF UPJOHN DISCLOSURES AND CONFLICTS WITH COMPANY]

[DUTY TO OVERSEE OUTSIDE COUNSEL?]

Launching point also for discussion of investigative privilege, DOJ priorities on individual prosecutions/corporate cooperation that can raise conflicts, plus potential for individual leniency at DOJ Antitrust Division

RE PRIVILEGE:

When the significant purpose of the communication is legal advice, then the communication is protected by attorney-client privilege.

“Although corporate investigations conducted by outside counsel often combine legal and business advice, the D.C. Circuit recognizes that “[s]o long as obtaining or providing legal advice was one of the significant purposes of the internal investigation, the attorney-client privilege applies, even if there were also other purposes for the investigation[.]” *Smith v. Ergo Sols., LLC*, 2017 U.S. Dist. LEXIS 94337, 2017 WL 2656096 at *8 (quoting *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 758-59, 410 U.S. App. D.C. 382 (D.C. Cir. 2014)).

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.

Scenario 6 – Discussion Questions

- Is “friend-ing” a litigation counterparty unethical?
- Is social media research proper if the individual’s posts and pictures are all public?
- 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?
- What if the business unit head uses his or her actual profile, but doesn’t disclose who she works for?
- What about “friend-ing” a potential juror or witness in a litigation matter?
- What about contacting an unrepresented party with a potential claim against your client through social media?

This scenario implicates the following rules:

- 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.
- 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.

- 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
- Launching point for application to social media contexts, as well as ability to record conversations under federal, VA and other state laws (give RCFP resource)

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?"

Scenario 7 – Discussion 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

This scenario implicates the following rules:

VRPC 1.1 [COMPETENCE], 1.3 [DILIGENCE], XX [PROTECT CLIENT INTERESTS] – launching point to discuss GC's role in sufficiently understanding/analyzing legal risks to her client and adequately representing company by exploring/implementing reasonable measures

[related to but different from personal tech competence in MRPC 1.1 Comment 8 * VRPC 1.1 Comment 6 re knowledge re technology]

- Launching point for brief discussion of issues that can arise re data breaches, including governmental notifications, disclosures, FTC investigations for policy breaches, new CCPA law coming into effect in CA in 1/20 creating cause of action for negligent failure to prevent data breach (even without damages) - see <https://www.alston.com/en/insights/publications/2019/08/ccpa-could-reset-data-breach>

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. "

Scenario 8 – Discussion Question

- Did Taylor break an ethical obligations?
- [MAYBE DO DISPLAY OF A FEW HEADLINES ABOUT BAD REDACTIONS OCCURRING ROUTINELY IN FEDERAL COURT FILINGS]

This scenario implicates the following rules:

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.
- Launching point also for (1) what did the other side do wrong – ethical for them to do that if it was marked privileged

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.

- and (2) what should she do next (re return/destruction)

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.

Scenario 9 – Discussion 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?

- Scope of Representation
- Issues with cannabis:
 - 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.”
 - So note the continued illegality of cannabis under federal law regardless of state law – do not want to be knowingly encouraging breaking of federal law (regardless of state legality). However, it is important to note that (1) not all cannabis is federally prohibited such as hemp or cannabidiol (CBD) oil; ifusing the cannabis into products might be legal depending on its characteristics and other facts, and (2) your advice might not be about violating federal law (perhaps it might be about permits for zoning for office?) [KAELYNE CONFIRM THIS IS WHAT OPINION ALLOWED AND IS NOT “ASSISTANCE” WITH ILLEGAL ACTIVITY]
- INSERT RULES/CASES RE BUSINESS/LEGAL ADVICE AND IMPACT ON PRIVILEGE
- REPEAT THIS (OR BETTER AUTHORITY?)

When the significant purpose of the communication is legal advice, then the communication is protected by attorney-client privilege.

“Although corporate investigations conducted by outside counsel often combine legal and business advice, the D.C. Circuit recognizes that “[s]o long as obtaining or providing legal advice was one of the significant purposes of the internal investigation, the attorney-client privilege applies, even if there were also other purposes for the investigation[.]” *Smith v. Ergo Sols., LLC*, 2017 U.S. Dist. LEXIS 94337, 2017 WL 2656096 at *8 (quoting *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 758-59, 410 U.S. App. D.C. 382 (D.C. Cir. 2014))

- 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.”
 - Discuss the debate over this new rule & VA’s non-adoption of it
- The different ways for people to report things up when GC’s office is implicated and promotes compliance
 - Launching point for creating culture of compliance – policies, anonymity, training, hotline, independent ombudsman (still Upjohn issues)

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."

Scenario 10 – Discussion Question

What issues does this scenario raise for Taylor?

This scenario deals with the following topics:

- Sounds like something is amiss and might need to consider DOJ leniency program
- Side note: antibribery/FCPA laws (and policies/training on them) about when employees can/can't give things of value to government officials or business parties is important – Ted)
- But CEO's comments raise issues of:
 - Work Product definition & waiver
 - Misrepresentation to adversary
 - 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.
- Potential common interest doctrine with Big-A-Zon (or not)
 - 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/valawyer magazine/vl0211_common-interest.pdf

Common Interest Doctrine Checklist:

The following checklist may be used to determine whether courts within the Fourth Circuit

would apply the common interest doctrine to a communication:

- Does the communication, before being shared with a third party, satisfy either the attorney-client 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?
- Have the parties collectively waived the privilege?
- Candor to tribunal, VARPC Rule 3.3
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.

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.”*

Scenario 11 – Discussion Question

- What could go wrong here?

This scenario brings up the following topics:

- Contingency Fees (though not proposed here):
 - 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.
- INSERT QUANTUM MERUIT ISSUE (IF YOU RELIEVE CONTINGENT FEE ENTITY BEFORE RECOVERY)
- Issues re litigation funding:
 - Stake in the litigation ie are litigation funding folks conflicted themselves? See

rail shipper case in DDC re investment of expert in litigation funding entity

- Are litigation funding folks gaining too much control over litigation?

Further Questions?

Thank you!



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Appendix

Relevant Virginia State Bar Rules of Professional Conduct

Rule 1.1– Competence

Rule 1.2 – Scope of Representation

Rule 1.3 – Diligence

<http://www.vsb.org/pro-guidelines/index.php/rules/>

Rule 1.5 – Fees

Rule 1.6 – Confidentiality of Information

Rule 1.7 – Conflict of Interest: General Rule

Rule 1.13 – Organization as Client

Rule 1.15 – Safekeeping Property

Rule 4.1 – Truthfulness in Statements to Others

Rule 4.2 – Communications with Persons Represented by Counsel

Rule 5.3 – Responsibilities Regarding Nonlawyer Assistants

Rule 8.4 – Misconduct