

Today's speakers



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Disclaimer

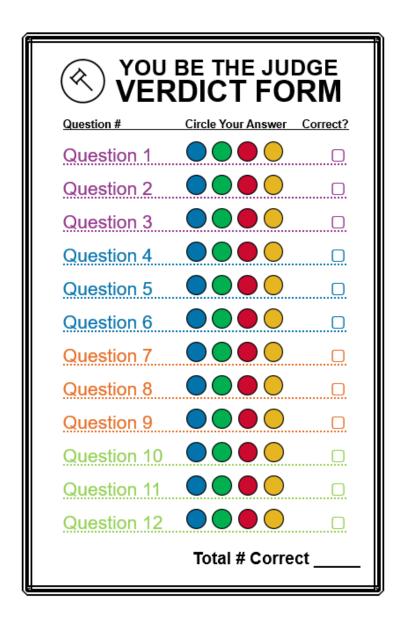
- This presentation is informational in nature and may not be relied upon as legal advice
- The opinions of the presenters do not necessarily represent the views of Reed Smith or any Reed Smith client



Step up to the bench! Here's how to play . . .

- We will provide you with the relevant facts from several recent cases
- For each case, you will be presented with e-discovery ethics questions faced by the judge—your role is to decide how the judge ruled, or should have ruled
- The hosts will prompt you to vote, at which time you will hold up the colored card (blue, green, red, or yellow) that corresponds to your answer
- There will be 12 questions total—be sure to mark your answer on your Verdict Form to track how often your answer matches the judge's decision
- Once everyone has marked their Verdict Forms, we will reveal the judge's ruling and discuss the relevant laws, rules, etc.
- At the end of the program, tally up how often the judges' rulings matched yours on your Verdict Form, and see how you did!

Verdict form



Relevant laws, rules, etc.

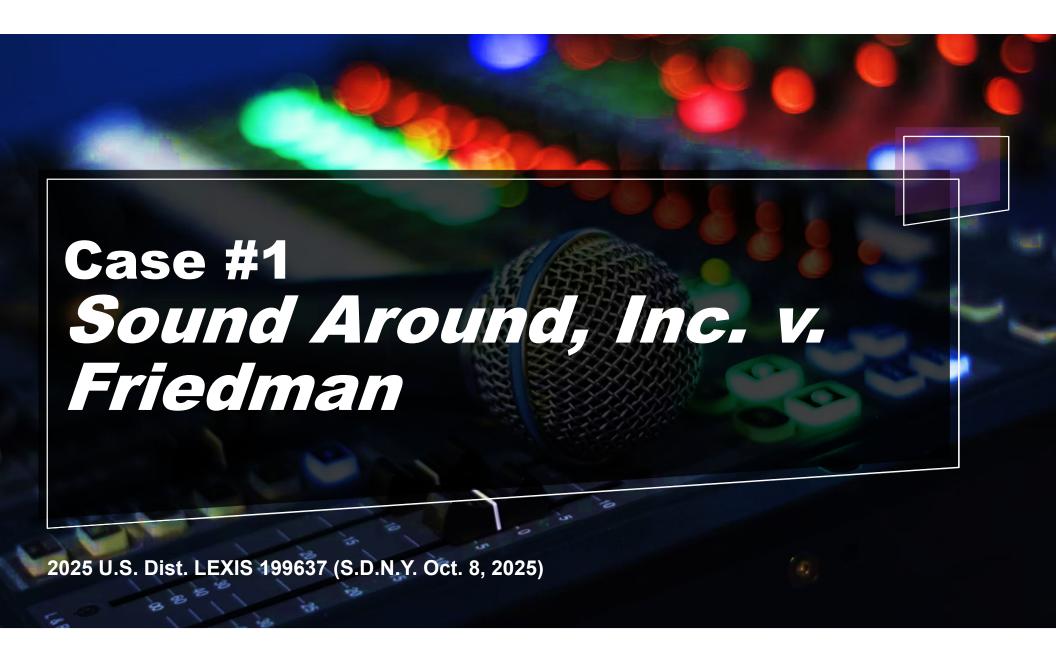
We have selected opinions in which the judges directly or implicitly rely on:

- The ethical rules and guidelines applicable to U.S. licensed attorneys and their delegees, such as the Model Rules of Professional Conduct (MRPC); and/or
- The Federal Rules of Civil Procedure (FRCP)



Today's docket

- 1. Sound Around, Inc. v. Friedman 2025 U.S. Dist. LEXIS 199637 (S.D.N.Y. Oct. 8, 2025)
- 2. L.D., et al. v. United Behavioral Health, et al. No. 4:20-CV-02254 (N.D. Cal. Oct. 7, 2025)
- 3. J.G. v. New York City Dept. of Ed. 719 F. Supp. 3d 293 (S.D.N.Y. Feb. 22, 2024)
- **4.** In re FirstEnergy Corp. No. 24-3654 (6th Cir. Oct. 3, 2025)



Sound Around, Inc. v. Friedman - Case facts, part 1

- In this case, Sound Around, Inc. sued its former employees for allegedly:
 - Misappropriating confidential/trade secret information;
 - Diverting corporate opportunities for Defendants' benefit;
 - Infringing on Plaintiff's trademark and trade dress; and
 - Stealing hundreds of thousands of dollars from Plaintiff to build their business, pay off personal debts, and compete directly with Plaintiff
- Defendants subsequently brought counterclaims for breach of contract
- Discovery had been contentious in this action, with both sides asserting that the other failed to conduct reasonable searches for documents and/or failed to produce all relevant/responsive documents

Sound Around, Inc. v. Friedman - Case facts, part 1

- Late in discovery, a deponent disclosed the existence of Sound Around's "Data Warehouse"
 - Data Warehouse allegedly stored sales, tariffs, and expense data relevant to commission calculations, which were at issue in the case
 - Sound Around's counsel had not identified or searched this repository prior to this
 disclosure
- Defendants filed a motion to compel production from the Data Warehouse
- Sound Around filed a brief in opposition of the motion, arguing that the Data Warehouse did not need to be produced because it was composed of "raw data" which is not subject to discovery under the FRCP

Question 1: Internal enterprise systems

Which statement best reflects Sound Around counsel's ethical and procedural duties regarding internal enterprise systems that likely contain responsive ESI, such as the "Data Warehouse"?

- No obligation. Raw data/warehouses are categorically outside the scope of discovery
- Demonstrated need. Raw data/warehouses are outside the scope of discovery, unless the requesting party can demonstrate a specific, material need for the data that is proportionate to the case
- Reasonable search. Counsel must understand their client's information systems (or involve someone who does) and certify a reasonable search of repositories that contain relevant data
- Specificity required. Counsel may decline to search raw data/warehouses unless the requesting party identifies the data required with reasonable particularity

Question 1: Answer



Reasonable search. Counsel must understand their client's information systems (or involve someone who does) and certify a reasonable search of repositories that contain relevant data



"... Sound Around's counsel is **absolutely wrong** that it is/was not required to produce responsive information stored as data in systems over which it has custody and control. **Federal Rule of Civil Procedure 34 has long required responding parties to conduct a reasonable search for documents and information relevant to the claims and defenses. Perhaps Sound Around's counsel has not read Rule 34 or case law interpreting it in the last twenty years or is simply unaware of their ethical duty under New York Rule of Professional Conduct 1.1 to stay up-to-date on technology relevant to their practice and requirements of applicable rules of Civil Procedure. . . . "**

Hon. Katharine H. Parker

Magistrate Judge, U.S. District Court for the Southern District of New York

FRCP 34 – Producing Documents, Electronically Stored Information, and Tangible Things . . .

Scope of Discovery—ESI

Requests seeking "any designated documents or **electronically stored information** . . . stored in any medium from which information can be obtained" are explicitly permitted by Rule 34

2006 Amendment Advisory Committee Notes

" it was obviously improper to allow a party to evade discovery obligations on the basis that the label had not kept pace with changes in information technology "

MRPC 1.1: Competence

Client-Lawyer Relationship

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 8 to MRPC 1.1

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...

Being unaware of how technology works is *never* an excuse

Sound Around, Inc. v. Friedman - Case facts, part 2

- Counsel for Sound Around next suggested that Defendants, as the requesting parties, should have identified the Data Warehouse and proposed search terms for it
- The Court disagreed with this assertion, and instead found that Sound Around and its counsel:
 - Failed to identify the Data Warehouse as a relevant repository of electronically stored information (ESI);
 - Did not review the Court's published Rule 26(f) technology-competence expectations;
 - Were wrong about not having to produce data that is within Sound Around's possession, custody, and/or control

Question 2: Imposition of sanctions

Given the Court's findings, are sanctions against Sound Around's counsel appropriate?

- Yes, because the FRCP and MRPC support sanctions against counsel whose unreasonable certifications and discovery conduct necessitate motion practice
- Yes, but only if Defendants can establish that Sound Around's counsel acted in bad faith
- No, because sanctions for discovery failures can only be issued against the party, not counsel
- No, because Defendants were not prejudiced by Sound Around and its counsel's failures

Question 2: Answer



Yes, because the FRCP and MRPC support sanctions against counsel whose unreasonable certifications and discovery conduct necessitate motion practice



"Sanctions are now clearly warranted for Sound Around's conduct in discovery, because it is now clear that data does exist in the Data Warehouse relating to sales of products, tariffs and other expenses used to compute defendants' commissions."

Hon. Katharine H. Parker Magistrate Judge, U.S. District Court for the Southern District of New York

Applicable rules

MRPC 3.4: Fairness to Opposing Party & Counsel

A lawyer shall not:

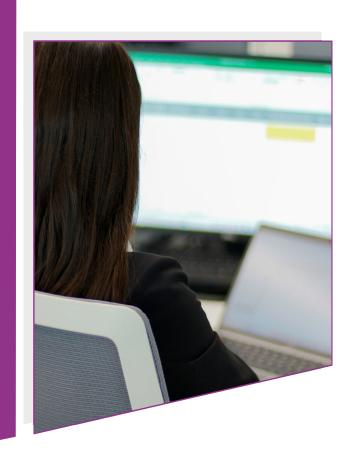
- Unlawfully obstruct another party's access to evidence
- Knowingly disobey an obligation under the rules of a tribunal

FRCP 26(g)(1) – Signature Required, Effect of Signature

An attorney's signature certifies that, to the best of their knowledge: (1) a disclosure is complete and accurate at the time it's made; and (2) a discovery request is not being brought for any improper purpose.

Sound Around, Inc. v. Friedman – Case facts, part 3

- Sound Around states that it recently contacted a vendor in India to assist with identifying and extracting responsive information from the Data Warehouse
- According to Sound Around, a spreadsheet with all the information that could be extracted from the Data Warehouse is now available to Defendants and the Court



Question 3: Proportional sanctions

Sound Around ultimately produced the requested data from the Data Warehouse. Since the data was ultimately produced, what sanctions – if any – are most appropriate against Sound Around, based on its counsel's discovery failures?

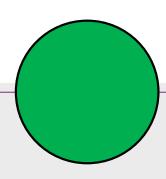
- None, because the data was ultimately produced
- Attorneys' fees regarding the motion to compel and remedial discovery
- Issue preclusion on the damages calculations
- Terminating sanctions

Question 3: Answer

The correct answer is:

Attorneys' fees regarding the motion to compel and remedial discovery







"... the Court finds that discovery sanctions in the form of attorneys' fees and costs associated with the original motion to compel, the motion for reconsideration, and the oral motion to compel are warranted ... That Sound Around within less than a week is now producing spreadsheets with information that has been sought for months does not avoid this result ..."

Hon. Katharine H. Parker Magistrate Judge, U.S. District Court for the Southern District of New York

Applicable rules

MRPC 3.4: Fairness to Opposing Party & Counsel

"A lawyer shall not . . . fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party"

Comment 1:

"Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence"

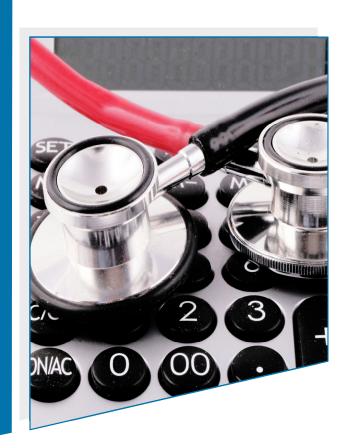
FRCP 37(a)(5) – Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

If a motion to compel is granted, or requested discovery is provided after the motion is filed, the Court must require the party, attorney, or both, whose conduct necessitated the motion to pay the movant's expenses in making the motion



L.D. v. United Behavioral Health – Case facts

- In this class-action lawsuit, Plaintiffs alleged that United Behavioral Health and MultiPlan, Inc. underpaid claims for out-of-network outpatient programs
- In May 2020, the parties entered a stipulated protective order governing the use and disclosure of confidential and "Attorneys' Eyes Only" discovery material



L.D. v. United Behavioral Health - Case facts

- While the class-action suit was pending, the U.S. Department of Labor (DOL)
 was conducting a separate investigation into Defendants concerning the same
 business practices
- DOL personnel approached Plaintiffs' counsel and requested that Plaintiffs
 enter into a Common Interest Agreement (CIA) with the DOL to assist the
 DOL in obtaining documents for its investigation
- The DOL indicated that it was against Department policy to sign protective orders in private cases, but that the CIA would offer similar protections
- Pursuant to the CIA, Plaintiff's counsel transmitted information which was designated "Confidential" or for "Attorneys' Eyes Only" under the protective order in the class-action lawsuit

Question 4: Exceptions to protective orders

Ethically and procedurally, which statement is most accurate regarding Plaintiffs' transmission of material designated as "Confidential" or for "Attorneys' Eyes Only" to the DOL?

- Legitimate Need. Disclosure was allowed because disclosure to a government regulator is permissible if counsel believes the regulator's need is legitimate
- Nonprejudicial. Disclosure was allowed because the disclosure was nonprejudicial and the materials could have been obtained through other avenues, such as a subpoena
- Government Exception. Disclosure was allowed to government regulators because counsel has an ethical duty not to engage in conduct that is prejudicial to the administration of justice
- Prohibited. Protective orders prohibit use and disclosure outside the litigation absent court authorization—counsel may not unilaterally create exceptions

Question 4: Answer

The correct answer is:

Prohibited. Protective orders prohibit use and disclosure outside the litigation absent court authorization—counsel may not unilaterally create exceptions

Question 5: Comparable protective measures

It is revealed that Plaintiffs' counsel shared Protected Material with the DOL subject to the CIA, and counsel asserts that the CIA "mirrors" the protective order and cooperation with DOL was appropriate

Was counsel's decision to disclose Protected Material to DOL excused because of the protections provided under the CIA?

- Yes; counsel acted in good faith under a comparable CIA, so ethics rules are not implicated
- Yes; disclosures to government regulators are implicitly permitted because counsel believed the government would protect the confidentiality of the information
- Yes; client consent authorizes and requires disclosure despite the court order
- No; lawyers must obey court orders—breaching a protective order violates duties
 of obedience to tribunal rules and integrity regardless of subjective intent

Question 5: Answer



No; lawyers must obey court orders—breaching a protective order violates duties of obedience to tribunal rules and integrity regardless of subjective intent



"Put simply, it was not for plaintiffs' counsel to decide whether the wholly separate CIA was 'tantamount' to this case's protective order, nor whether the DOL's investigative requests were 'appropriate.'"

Hon. Yvonne Gonzalez Rogers
District Judge, U.S. District Court for the Northern District of California

Applicable rules

MRPC 8.4: Misconduct

It is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice

MRPC 3.4: Fairness to Opposing Party & Counsel

A lawyer shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists

Note that there
was a valid
obligation to
follow the
protective order
here – there is no
exception for
government
regulators

Question 6: Proportional sanctions

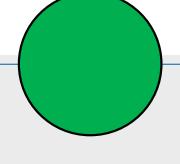
Which sanction best aligns with both ethical accountability and proportionality on these facts, if any?

- None, because no harm resulted from the disclosure of the documents
- Monetary sanctions against counsel to compensate costs
- Terminating sanctions against the clients
- Public admonition only

Question 6: Answer

The correct answer is:

Monetary sanctions against counsel to compensate costs



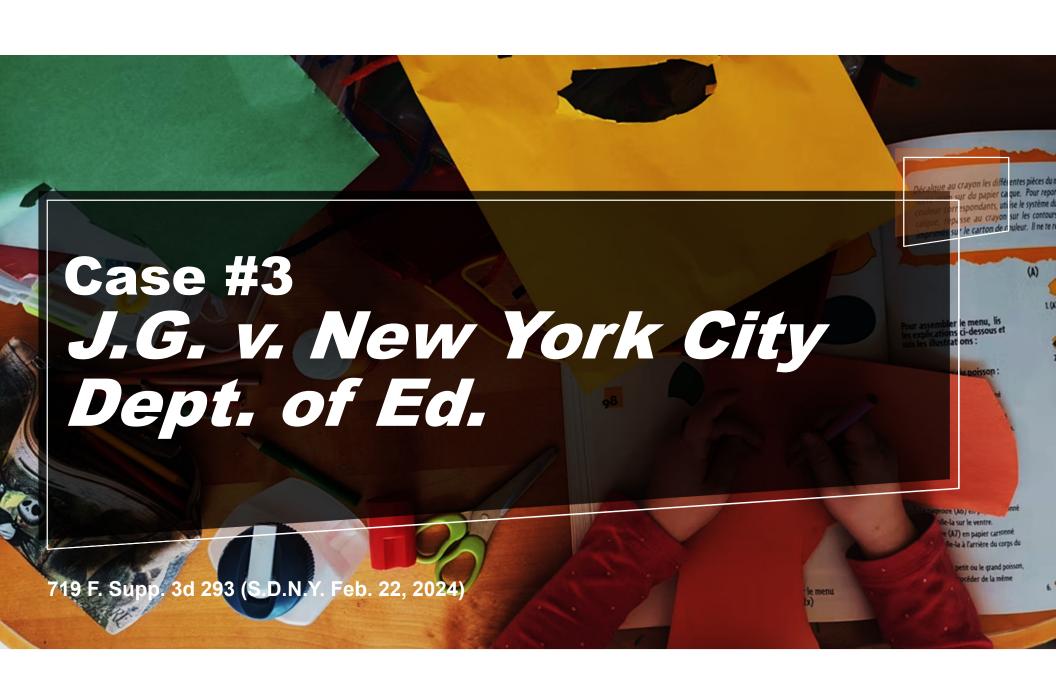


"... the Court orders the firm of Arnall Golden Gregory LLP to reimburse defense counsel \$50,000 for the cost of investigating and prosecuting this breach. The Court finds this award sufficient to deter future conduct but not punitive....

. . . [the Court also] orders that every lawyer at the firm of Arnall Golden Gregory LLP shall read this order. Counsel of record shall distribute the order and confirm in writing within seven days of this order that each lawyer has complied."

Hon. Yvonne Gonzalez Rogers

District Judge, U.S. District Court for the Northern District of California

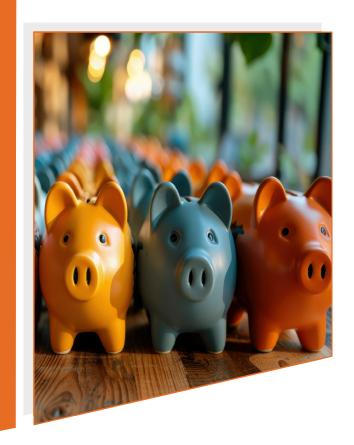


J.G. v. New York City Dept. of Ed. - Case facts

- This motion for attorney's fees and costs originated from two administrative hearings concerning a child with a disability covered by the Individuals with Disabilities Education Act (IDEA)
- The child's guardian initiated due process hearings on his behalf, asserting that the New York City Department of Education (DOE) failed to conduct annual timely reviews and evaluations and provide appropriate educational services as required under the IDEA
- After the administrative hearings, and following several fee demands, the child's guardian filed a complaint seeking reasonable attorney's fees and costs under the IDEA in the amount of \$113,484.62

J.G. v. New York City Dept. of Ed. – Case facts

- The DOE agreed to attorney's fees and requested that the fees be based on a "reasonable fair-market rate, and not excessive"
- DOE offered to settle the suit for \$54,300, but the child's guardian declined
- The Court ultimately granted the motion for attorney's fees, but reduced the fees to \$53,050.13



Question 7: Ethical duties regarding billing and fees

Which ethical duty most directly governs the firm's billing judgments and staffing reflected in the Court's reductions?

- Model Rule 1.5: fees must be reasonable in relation to factors like skill, time, and results
- Model Rule 7.1: communications and descriptions about the lawyer's services must be accurate and not misleading
- Model Rule 1.2: follow client objectives to maximize fee recovery
- Model Rule 5.1: obligation to supervise activities of more junior lawyers, including billing practices

Question 7: Answer

The correct answer is:

Model Rule 1.5: fees must be reasonable in relation to factors like skill, time, and results

Model Rule of Professional Conduct 1.5: Fees

a. A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

. . .

3. the fee **customarily charged** in the locality for similar legal services;

Question 8: ChatGPT

Plaintiff's firm used **ChatGPT** to determine its billing rates and cited specifically to its use and reliance on ChatGPT in its application

Was it ethical, on these facts, for counsel to rely on ChatGPT to support its requested rates?

- Yes; use of AI is ethical so long as counsel discloses its use to the Court and opposing counsel
- Yes; use of AI is ethical so long as counsel has reason to believe the information provided is accurate
- No; without independent verification and transparency, relying on an AI output to advocate for rates violates competence and candor duties
- No; any use of AI in court filings is per se unethical

Question 8: Answer



No; without independent verification and transparency, relying on an Al output to advocate for rates violates competence and candor duties



"It suffices to say that the Cuddy Law Firm's invocation of ChatGPT as support for its aggressive fee bid is utterly and unusually unpersuasive. As the firm should have appreciated, treating ChatGPT's conclusions as a useful gauge of the reasonable billing rate for the work of a lawyer with a particular background carrying out a bespoke assignment for a client in a niche practice area was misbegotten at the jump."

Hon. Paul A. Engelmayer

District Judge, U.S. District Court for the Southern District of New York

Question 9: Fee petitions

The Court found inefficiencies, overstaffing, and hours unrelated to the fee litigation (e.g., administrative logistics) included in the fee application.

What is the best ethical framing of counsel's obligations when submitting time records and supporting declarations for a fee petition?

- Counsel fee applications must be prepared by the lawyer involved and supported with reasonable documentation and with sufficient detail to understand the work performed
- Counsel must ensure accurate, non-misleading submissions and avoid seeking compensation for unrelated tasks
- Where the firm prevailed in the litigation, fees will be awarded and inefficiencies in the fee application are immaterial
- Counsel fee applications may be prepared by support staff with knowledge of the matter provided that the supervising attorney signs off

Question 9: Answer

The correct answer is:

Counsel must ensure accurate, non-misleading submissions and avoid seeking compensation for unrelated tasks



Ethical rules on candor & supervision

MRPC 3.3: Candor Toward the Tribunal

A lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer

MRPC 5.1: Responsibilities of Partners, Managers, and Supervisory Lawyers

A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct



In re FirstEnergy Corp. - Case facts, part 1

- After the federal government brought charges against a former Ohio House Speaker implicating FirstEnergy in a bribery scheme, FirstEnergy and one of its independent Board committees engaged separate outside counsel to conduct two internal investigations
- Soon after, shareholders sued FirstEnergy alleging that FirstEnergy and its executives defrauded investors in violation of federal securities laws
- In the litigation, the parties stipulated that no party needed to log communications with outside counsel if dated after the government's criminal complaint
- During discovery, the shareholders moved to compel "all previously withheld"
 documents related to the two internal investigations, which First Energy had
 withheld on privilege and work product grounds; FirstEnergy did not produce
 a privilege log with these documents

In re FirstEnergy Corp. - Case facts, part 1

- A special master recommended that the Court grant claimant's motion to compel and order FirstEnergy to produce the documents
- The special master specifically faulted FirstEnergy for not producing a privilege log for the withheld documents
- The District Court accepted the special master's recommendation
- FirstEnergy subsequently filed a petition for mandamus relief with the Sixth Circuit Court of Appeals

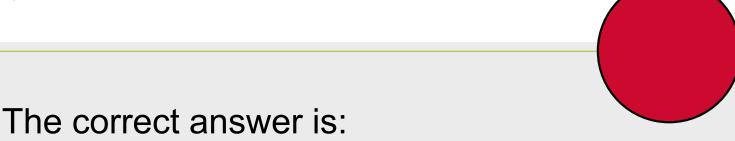
A writ of mandamus is a court order that commands a lower court to perform a mandatory / ministerial duty

Question 10: Privilege assertions and logging

Which answer best reflects counsel's ethical obligations regarding privilege assertions and logging under these circumstances?

- Privilege Log Required. Counsel acted unethically by not serving privilege logs; Rule 26(b)(5) requires logs and stipulations cannot circumvent the rules
- Overbroad Request. Counsel was not required to log any privilege documents because the request for "all previously withheld documents" was unreasonable and overbroad
- Reasonable Reliance. Counsel acted ethically by relying on a negotiated stipulation dispensing with logs
- No Logging. Counsel had the right to both refuse both logging and production without engaging the Court because privilege is absolute

Question 10: Answer



Reasonable Reliance. Counsel acted ethically by relying on a negotiated stipulation dispensing with logs and resisting the overbroad demand for "all withheld" materials

FRCP 26(b) – Discovery Scope and Limits

When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must expressly make the claim and describe the nature of the documents without revealing the privileged or protected information

meded to log any privileged communications" with outside counsel concerning the bribery litigation and noted Plaintiffs' broad demand for "all previously withheld documents."

Question 11: Resisting a court order

From an ethics perspective, did counsel act properly in resisting the order via a stay and mandamus petition to protect privileged communications?

- Yes; counsel appropriately protected client confidences and work product by seeking immediate appellate relief and a stay
- Yes; but only if counsel first produced a substantial portion to show good faith
- No; once ordered, counsel had to produce immediately, then appeal after final judgment
- No; counsel should have defied the order to force a contempt route for appellate review

Question 11: Answer

The correct answer is:

Yes; counsel appropriately protected client confidences and work product by seeking immediate appellate relief and a stay



FirstEnergy "could have waited to appeal the district court's order until a final judgment. But this path would require FirstEnergy to produce its investigative materials, at which point, 'damage to the attorney-client relationship will have already been done by the disclosure itself.' There is no way to unring those disclosure bells."

Hon. Jeffrey Sutton, Chief Judge Hon. Alice Batchelder and Hon. John Nalbandian, Circuit Judges U.S. Court of Appeals for the Sixth Circuit

In re FirstEnergy Corp. – Case facts, part 2

- FirstEnergy shared portions of its internal investigation with its independent auditor (PwC), including documents sought by the shareholders
- FirstEnergy stated that only non-privileged portions of the internal investigation were shared with PwC; internal PwC memoranda reflected that "responsive documents have been withheld... based on the assertion of attorney-client or other legal privilege"
- Claimants argued that FirstEnergy waived any attorney-client privilege and work product protection associated with the internal investigation by sharing portions of the internal investigation with PwC

Question 12: Waiver of privilege

Ethically, was it permissible for counsel to provide PwC with non-privileged materials while asserting privilege and work product over other internal investigation communications?

- Yes; carefully limiting disclosures to non-privileged information is consistent with confidentiality and does not waive privilege or work product
- Yes; counsel can send everything, privileged or not, because auditors are fiduciaries that owe a duty of confidentiality
- No; disclosure to any third party automatically waives both attorney-client privilege and work product
- No; auditors are always "adversaries," so any protections are categorically waived once the information is disclosed

Question 12: Answer

The correct answer is "A"

Yes; carefully limiting disclosures to non-privileged information and maintaining controls is consistent with confidentiality and does not waive privilege or work product

MRPC & case law on confidentiality and disclosure

MRPC 1.6: Confidentiality of Information

Unless an exception applies, a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent or the disclosure is impliedly authorized to carry out the representation

In re Grand Jury Subpoena 220 F.3d 406, 409 (5th Cir. 2000)

"[B]ecause the work product privilege looks to the vitality of the adversary system rather than simply seeking to preserve confidentiality, it is not automatically waived by the disclosure to a third party."

How did you do?

# Matching Court	Verdict
0-3	Consider an alternative career path
4-6	Can you write persuasive dissenting opinions?
7-9	You may be nominated
10-12	All rise!



Thank you!



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