INTRODUCTION

In cross-border transactions, it can be challenging to determine which jurisdiction (country) serves as the source of law defining the attorney-client relationship. For example, it could be the country where:

(a) the attorney-client relationship was established;
(b) the transaction involved takes place, or is centered, or the assets subject to the transaction are located;
(c) a particular communication takes place, or was initiated or received (if the communication itself is cross-border); or
(d) the government investigation takes place.

Indeed, for different parts of a transaction-investigation scenario, different jurisdictions may provide the source of attorney-client law.

These concerns counsel in favor of making sure that clients appreciate attorney-client considerations as the transaction begins. Through the hypothetical set of facts that follow, this panel will probe application of principles governing the attorney-client relationship in a cross-border setting.
Part I: The Bid-Rigging Scheme Begins

After extensive negotiations, various countries on the continent agree to fund TransCon, a major highway project that will connect them. One of the countries, Mountainland, is selected to prepare the necessary bidding documents, which will be reviewed by all the countries involved. Once the winning bidder is selected, Mountainland will prepare the project contracts and administer the project. The bid material (the RFP) is prepared and sent to five leading highway construction firms.

After the RFP is distributed, one of the potential bidders, ShinyPath, calls a meeting of the other four bidders, ostensibly to discuss RFP ambiguities and either resolve them among the bidding firms or else seek clarification from Mountainland officials. At the meeting, however, ShinyPath proposes that the five agree to fix the bidding so that ShinyPath wins. In exchange, ShinyPath offers work to the others, as joint venture partners, in other projects that ShinyPath regularly handles worldwide. Three of other bidders agree to the fix, but the fourth—Honest Abby from TiradorDerecho, Inc.—topples the water pitcher on the conference room table and says loudly, “I’m out of here.”

ShinyPath’s rep quickly declares a meeting break and confronts Honest Abby outside the meeting room. Honest Abby, who has already is working with ShinyPath on many joint venture projects elsewhere, promises to keep quiet. The ShinyPath rep returns to the meeting and works out the bid rig with the three other companies.

Honest Abby reports fully on the meeting to her CEO, who is troubled by not only the bid-rig discussion, but also by Honest Abbly’s promise to keep quiet. The CEO calls in the company’s in-house General Counsel and wants advice. The CEO expresses to General Counsel suspicion that Honest Abby and ShinyPath may have made questionable arrangements on other projects.
1. **Does the Attorney-Client privilege include discussion between the CEO and the company’s in-house General Counsel?**

A. Basic elements of Attorney-Client privilege:

   (i) **Elements under US law:**

      (a) A communication;
      (b) Between an attorney and the attorney's actual or potential client;
      (c) Made in confidence; and
      (d) For the purpose of seeking or obtaining legal advice for the client.


B. In Latin America:

   (i) **Recognition through civil and criminal provisions. See, e.g.**:

      *Civil Code of the Republic of Guatemala (Decree 106 of the Congress of the Republic of Guatemala).*

      *Criminal Code of the Republic of Guatemala (Decree 17-73 of the Congress of the Republic of Guatemala).*

      *Salvadoran Criminal Code, Article 187 (prohibiting disclosure of communications covered by professional secrecy).*

   (ii) **Recognition through professional codes. See, e.g.**:


      *Costa Rican Bar, Code of Legal, Ethical and Moral Obligations for Legal Professionals (Código de Deberes Jurídicos, Morales y Éticos) (“Costa Rican Bar Code”).*
C. Applicability of the privilege to (a) companies, as well as to individuals, and (b) in house counsel, as well as outside counsel. The latter is recognized in the US, but not so universally. See:


2. What advice, if any, might the General Counsel give the CEO about reporting the bid-rigging meeting to Mountainland government officials?

[Brief discussion of leniency option]

Suppose that our jurisdiction does not extend the privilege in-house counsel, making it essential for the CEO to retain Outside Counsel. Outside Counsel embarks on an internal investigation, and wants to interview Honest Abby and individuals involved in other projects where Honest Abby is working with ShinyPath. Honest Abby is called to a meeting with Outside Counsel.

3. What does Outside Counsel say to Honest Abby about whom Counsel represents, and about the confidentiality of the conversation that Outside Counsel wants to have with Honest Abby?


4. Suppose that Honest Abby says she wants to have an attorney of her own, what should Outside Counsel do?
Joint or concurrent representation of company-employee: Actual or potential conflict of interest.

A. In the US: Permissibility of concurrent representation. See, e.g.:
   - New York Rules of Professional Responsibility, Rule 1.13(d) (“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”).
   - New York Rules of Professional Responsibility, Rule 1.7 (a) & (b) (4) (“a lawyer shall not represent a client if a reasonable lawyer would conclude that . . . (1) the representation will involve the lawyer in representing differing interests” unless, among other things, “each affected client gives informed consent, confirmed in writing”).

B. In Latin America: Permissibility of concurrent representation. See, e.g.:
   - Law of the Judicial Branch of the Republic of Guatemala, Article 201(g) (allowed as long and the company and employee are not counterparties in the same matter).
   - Criminal Code of the Republic of Guatemala, Article 466 (prohibiting concurrent representation if the company and employee are counterparties in the same matter).
   - Salvadoran Criminal Code, Article 314 (prohibiting representation of opposing parties in the same case, simultaneously or successively).
While Honest Abby is retaining a lawyer, Outside Counsel decides to move on to interview other employees of TiradorDerecho, Inc. to see what information, if any, they might have about possible questionable dealing between Honest Abby and ShinyPath.

5. **Does the Attorney-Client privilege apply to these interviews?**

Scope of privilege where company employees are involved in the investigation:

A. Recognized in the US by *Upjohn*. Elements:

- Communications directed by corporate superiors.
- Information communicated relates to the employee’s job activity in the matter under internal investigation.
- Employee informed that the interview was so that the company could receive legal advice.
- Communications between the investigating attorney and the employee were made on a confidential basis.

6. **Suppose that former employees of TiradorDerecho, Inc. are among those whom Outside Counsel wishes to interview. Is the interview privileged?**

Scope of privilege:


TiradorDerecho, Inc.’s General Counsel asks whether it can attend the interviews with other company employees.

7. **What advice should Outside Counsel give?**

Potential waiver of privilege if General Counsel is present, and waiver generally.
Part II: Back to the TransCon Highway Project

ShinyPath and the other three companies bid the project. ShinyPath is the low bidder. Mountainland is ready to accept the bid, but one of the other countries, Rainforest Central, hesitates. Rainforest Central had a difficult time with ShinyPath on an earlier, unrelated project. ShinyPath removes this potential obstacle using a consultant, Guy Shady, to make a really large payoff to the government decision-maker at Rainforest Central, Highway Superintendent Carlos Cash. Mountainland awards the highway development project, and the work begins.

Meanwhile, Carlos Cash wants to put his payoff in a safe place. He meets with his lawyer, Sara Proper, and asks her where he should open an account to keep the money safe, and what needs to be done to do so. Sara probes the facts more and finds out that the amount involved is large—much more that Carlos could have accumulated on a government official’s salary. She also realizes that the timing of Carlos’ request—following withdrawal of Rainforest Central’s opposition to the highway project and the award of the contract—appears suspicious.

1. Can Sara Proper give Carlos Cash the advice he has asked for? Should she?

2. Is the Attorney-Client privilege likely to cover this communication between the two?

3. If Sara forms the view that Sam has received a bribe, what, if anything, can she do about report her suspicion to Rainforest Central government officials?

Scope of Attorney-Client privilege: Legal Advice v. Business Advice:

A. In the US: Legal advice versus business advice. Communications with an attorney in furtherance of business advice tends not to be privileged.

B. In Latin America: Privilege can cover business advice.
C. Attorney’s obligation of maintaining client confidences and possible exceptions, including: Advice in furtherance of a crime or fraud (tort) as non-privileged:

D. In the US:

- *Clark v. United States*, 289 U.S. 1, 15 (1933) (“There is a privilege protecting communications between attorney and client. The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law.”).

- *In re Grand Jury Matter #3*, No. 15-2475, slip op. at 14 (3rd Cir. Jan. 12, 2017) (to invoke the exception to the privilege, there must be “a reasonable basis to suspect” both that (1) the lawyer or client “was committing or intending to commit a crime or fraud”, and (2) the attorney-client communication (or attorney work product) “was used in furtherance of that alleged crime or fraud.”).

- New York Rules of Professional Responsibility, Rule 1.2(d) (“A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.”).

E. In Latin America:

- Code of Ethics of the Republic of Guatemala, Tenet 1 (all attorney advice must be lawful)
- Costa Rican Bar Code, Sections 41 and 43 (attorney client privilege does not apply to communications by a client of the intent to commit a crime).

- El Salvador, Articles 32 and 37 (attorney must exercise his profession in an ethical and responsible manner, exposing attorney to criminal responsibility if an author, instigator or accomplice in a crime).
Part III: The Big-Rigging Discovered

Mountainland’s Department of Taxation has Guy Shady in its sights for tax evasion. He’s nailed, and his best alternative is to turn in a bigger fish, Carlos Cash. He tells Mountainland prosecutors about the payoff he made on behalf of ShinyPath. The prosecutors begin a criminal investigation against ShinyPath and the other three bidders. ShinyPath retains its outside attorney, Jennifer Jailfree, in the investigation, while the other three bidders also hire outside counsel.

Jailfree calls a meeting of only attorneys for the companies to discuss the investigation, and each attorney reports to the others the facts that each knows. Mountainland’s prosecutors learn about the meeting, and issues subpoenas to Jailfree and the other company attorneys to find out what transpired.

1. **Is there a privilege that Jailfree and the others could assert to bar the prosecutor’s inquiry?**

   Joint defense privilege?

   A. In the US: Communications between attorneys for individual clients subject to a government investigation can be protected from disclosure. *See, e.g., Continental Oil Co. v. United States*, 330 F.2d 347, 349-50 (9th Cir. 1964) (no waiver of privilege).

   B. In Latin America: Possible exposure for attorney who discloses matters subject to professional secrecy. *See, e.g.:*

      - Costa Rican Bar Code, Article 41 (if all clients acquiesce in disclosure by attorneys, communication may be subject to attorney-client privilege).
Suppose one of the defense attorneys present at the meeting prefers to tell the prosecutors what was said at the meeting, and to turn over his notes of the meeting.

2. May that attorney do so? Can the others assert a privilege to prevent the disclosure?

3. Is the attorney permitted to tell the prosecutors what the attorney has learned from its own client?

Scope of joint defense and waiver:
Part IV: Troubles between ShinyPath and TiradorDerecho, Inc.

The investigation of TiradorDerecho, Inc.’s Outside Counsel has resulted in probing an unrelated highway project, undertaken as a joint venture with ShinyPath in another country, Pampafields. As a result of major cost overruns there, TiradorDerecho, Inc. has gone to a leading construction lender, PesoStore, for additional financing that TiradorDerecho, Inc. needs to meet its share of the project costs.

PesoStore has conducted a due diligence review of TiradorDerecho, Inc.’s project files and discovered that ShinyPath has purchased a huge supply of substandard gravel—whereas the project specs called for premium gravel—while billing back to TiradorDerecho, Inc. its share of the gravel purchases at the inflated price for premium gravel. Besides overcharging TiradorDerecho, Inc., the substandard gravel also means that the Pampafields highway won’t last for its expected life.

PesoStores prepared a memo of its due diligence finding for TiradorDerecho, Inc. The memo, however, also reports various overcharges that TiradorDerecho, Inc. put back, apparently inadvertently, to ShinyPath.

TiradorDerecho, Inc. sues ShinyPath for the overcharges on the gravel. ShinyPath demands to see the PesoStores memo as part of the discovery in the case.

1. **Can TiradorDerecho, Inc. assert a “common interest” privilege as a ground to withhold the PesoStores memo?**

2. **Does it cover communications in furtherance of a business interest shared by TiradorDerecho, Inc. and PesoBank—here, the financing sought—as opposed to a legal interest?**

Scope of common interest privilege:
A. In the US: See Ambac Assurance Corp. v. Countrywide Home Loans, Inc., 27 N.Y.3d 616, 36 N.Y.S.3d 838 (2016) (there must be a common legal—not business—interest, and the communication must be made in the context of pending or anticipated litigation) (discussing divergent rulings).

3. **Does it matter here that ShinyPath and TiradorDerecho are joint venture partners?**

   TiradorDerecho, Inc. would prefer to settle the lawsuit, rather than face the risk that ShinyPath will discover amounts that it was overcharged. TiradorDerecho, Inc.’s CEO tells Outside Counsel to call ShinyPath’s attorney to say that, if ShinyPath refuses TiradorDerecho, Inc.’s reasonable settlement demand, TiradorDerecho, Inc. will report the use of substandard gravel to Pampafield government officials for criminal prosecution.

4. **Should Outside Counsel make that phone call to ShinyPath attorney?**

5. **Is this a threat to use criminal processes to obtain an advantage in the civil case against ShinyPath?**

   A. In the US: See New York Rules of Professional Responsibility, Rule 3.4(e)

   (“A lawyer shall not: . . . (e) present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.”).
Part V: Mountainland’s Secretary of the Interior Gets Into the Act

The TransCon project continued throughout the Mountainland investigation into bid-rigging, with ShinyPath being paid millions by Mountainland and the other countries as stages of the highway were completed. With millions more due to be paid, Mountainland’s Secretary of the Interior, the government official responsible for signing off on payment requisitions, cooks up a scheme of his own. Meeting alone with ShinyPath’s CEO, the Secretary suggests that delays in on-going payments can be avoided, provided that ShinyPath makes appropriate “contributions” along the way. ShinyPath is in dire financial condition—on the verge of insolvency—and desperately needs to assure prompt, if not expedited, payments as work proceeds.

After some haggling with the Secretary, ShinyPath’s CEO agrees to contribute an amount equal to 15% of each requisition—half to be paid to the campaign fund maintained by the Secretary’s political action committee, and half to an organization known as “Giant Otters United,” an environmental group whose Executive Director chairs the Mountainland Secretary’s campaign fund committee. After ShinyPath makes several such contributions, the Executive Director of Giant Otters United mentions his organization’s good fortune to ShinyPath’s General Counsel at a charitable event. The next day, the General Counsel asks ShinyPath’s CEO about the business justification for the payments, and the entire story unravels.

1. As General Counsel for ShinyPath, what advice would you give the company’s CEO?

Suppose that ShinyPath’s General Counsel tells the in-house counsel at Giant Otters United about the impetus for the organization’s good fortune. In-house counsel, in turn, informs the organization’s Executive Director, who—while a close friend of the Mountainland Secretary—professes total ignorance.
2. What advice should in-house counsel for Giant Otters United give the Executive Director?
<table>
<thead>
<tr>
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<th>Country</th>
<th>Applicable Legal framework</th>
<th>Governmental Entity Responsible to Enforce Attorney - Client Privilege</th>
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</thead>
<tbody>
<tr>
<td>1</td>
<td>El Salvador</td>
<td>There is not an specific applicable legislation that regulates Attorney - Client Privilege. Nevertheless there is a disposition contained in the Salvadoran Criminal Code. Additionally there is an Attorney's Ethics Code which establishes general principles and guidelines for the Attorneys conduct. Each Attorney may adhere to the dispositions established therein.</td>
<td>There is not a governmental entity in El Salvador that is in charge of the enforceability of Attorney - Client Privilege.</td>
<td>The Criminal Code of El Salvador establishes as a felony the revelation of any information that has been provided in reason of a profession.</td>
<td>Imprisonment from six months to two years and special disqualification from the applicable profession for two years.</td>
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<td>2</td>
<td>Costa Rica</td>
<td>The Attorney Client privilege is regulated by the Code of Legal, Ethical and Moral Obligations for Legal Professionals applied by the Costa Rican Bar (Código de Deberes Jurídicos, Morales y Éticos, hereinafter, the Code). Also relevant and applicable are the provisions of the Law for Non-Divulged Information, number 7597 (LNDI), whenever the relevant information constitutes valuable intellectual property, trade secrets and proprietary information.</td>
<td>The Costa Rican Bar Association, which is a public entity that is independent from the Government. It has independence and has organizational traits of private entities but has a purpose and functions that are public, specifically in relation to the regulation and supervision of legal professionals.</td>
<td>Section 41 of the Code regulates the scope and mandatory nature of the obligations derived from the attorney client privilege.</td>
<td>Temporary disbarment from three and for up to ten years. Disclosure of information protected under the LNDI, the wrongdoer will be liable for direct damages and will be subject to criminal prosecution for violation of intellectual property rights.</td>
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<td>Nicaragua</td>
<td>There is not an specific legislation that regulates the Attorney - Client Privilege. Nevertheless, there is a disposition that establishes the breach of the confidentiality or professional secrecy in the Nicaraguan Criminal Code.</td>
<td>There is not a governmental or public entity responsible of Attorney - Client Privilege matters in Nicaragua.</td>
<td>The Criminal Code of Nicaragua establishes that the revelation of any information without legitimate grounds that has been provided in reason of a profession or position and which can cause damages or losses, is a criminal offense.</td>
<td>Imprisonment from one year to three years and special disqualification from the applicable profession for two to five years.</td>
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<td>4</td>
<td>Honduras</td>
<td>Honduras does not have any explicit regulations applicable to Attorney-Client Privilege. However, the Honduran Bar Association has a Code of Ethics related to attorney - client regulations that is relevant and enforceable through lengthy and often difficult process. a) The Honduran Criminal Code defines various criminal behaviors considered as corrupt and establishes the corresponding sanctions and penalties. With respect to the crimes of bribery and corrupt practices that could produce criminal punishment of imprisonment 5-7 years.</td>
<td>Honduras does not have a governmental entity responsible to enforce Attorney - Client privilege.</td>
<td>a) The Honduran Civil Code states that professionals must provide diligent professional service related to the profession; and the professional acquires civil responsibility for disclosure of client’s secrets. b) According to the Criminal Code the disclosure or use of personal information and secrets obtained through professional relationships may not be disclosed. c) The Professional Ethics of the Honduran Bar Association states that professional secrets are a duty and a right for the attorney, which continues in effect after termination of services.</td>
<td>Suspension of license and criminal sanctions would be applicable if proven.</td>
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<td>5</td>
<td>Panamá</td>
<td>Law No. 9 of April 18, 1984, as amended by Law 8 of April 16, 1993 and the Code of Ethics and Professional Responsibility of 2011 (Article 31 y 37) rules the exercise of the legal profession. However, there is no legislation that specifically regulates the attorney-client privilege. Violation of professional secrecy is considered unethical. Thus, professional secrecy for lawyers is in some indirect way protected by law. Law 2 of February 1, 2011 adopts &quot;know your client&quot; policies for resident agents regarding creation of companies. Law 23 of 27 April 2015 includes measures to prevent (i) money-laundering, (ii) financing of terrorism and (iii) financing of proliferation of weapons of mass destruction.</td>
<td>There is no specific institution or regulatory body that has competence in matters related to Attorney-Client Privilege; however, the Supreme Court of Justice, and the Panama Bar Association has powers to ensure good practice and guard the exercise of the legal profession.</td>
<td>Law No. 9 of April 18, 1984, as amended by Law 8 of April 16, 1993 establishes as an offense the illegal exercise of the legal profession.</td>
<td>Penalties applicable to an attorney are: 1. Private reprimand. 2. Public reprimand. 3. Suspension, [prohibition to practice law] for a term not less than one month and no more than one year, in the case of primary offenders. 4. In case of re-offenders, prohibition to practice law for a minimum term of two years. The Supreme Court of Justice has wide discretion to impose the corresponding sanction, taking into account the nature, seriousness and modality of the crime, the personal and professional history of the lawyer.</td>
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<td>Guatemala</td>
<td>There is not a specific legislation that regulates Attorney-Client Privilege. Nonetheless, the following laws contemplate applicable dispositions for such matter: a) Civil Code of the Republic of Guatemala (Decree 106 of the Congress of the Republic of Guatemala), b) Criminal Code of the Republic of Guatemala (Decree 17-73 of the Congress of the Republic of Guatemala), c) Professional Code of Ethics of the Guatemalan Bar Association of the Republic of Guatemala.</td>
<td>There is not a governmental entity in Guatemala that is in charge of the enforceability of Attorney - Client Privilege.</td>
<td>a) The Civil Code of the Republic of Guatemala states the obligation for professionals to serve with diligence and to be dedicated in accordance with their profession. It also establishes civil responsibility for a professional if he/she discloses its client's secrets . b) The Criminal Code of the Republic of Guatemala states that it is a crime if a person (without valid justification) discloses or uses a secret that has been obtained in reason of a profession; regardless if the disclosure causes damages or not. c) The Professional Code of Ethics of Guatemala states that professional secrecy is both a duty and a right for the attorney. It is a duty to the clients that shall endure even after the services relationship is terminated. Before judges and other authorities, it is an inalienable right for the attorney. The Code, also states that the obligation of professional secrecy includes all confidences related to the main topic.</td>
<td>a) Civil responsibility: damages will be determined by a competent judge. b) Criminal responsibility: Imprisonment from six months to two years or a fine of (GTQ.2,500.00-GTQ. 25,000.00) c) Administrative penalty: The Tribunal of Honor of the Bar Association of Guatemala has the power to enforce penalties for non-compliance of Attorney-Client Privileges as per the Professional Code of Ethics. Such penalties may be: a financial penalty a private or public warning a provisional suspension from exercice of the profession (up to 1 year) or the definite suspension from the exercise of the profession (on this case the attorney is disbarred from the Guatemalan Bar Association).</td>
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<td>7</td>
<td>Peru</td>
<td>The Political Constitution of Peru, in its chapter 1 that regulates the fundamental rights of the person, there is a mention regarding professional secret. Likewise, there is an article in the Peruvian Criminal Code that discusses professional secrecy. Additionally, there is an Attorneys Code of Ethics and the Code of Ethics of Public Officials which establishes general principles and guidelines for the correct conduct of lawyers and public officials. Public officials are those attorneys who work in Public Administration offices such as Ministries, Judiciary, among others.</td>
<td>There is no one government entity that is legally responsible for enforcing the right to the confidentiality of the attorney/client relationship. However, it should be noted that there are autonomous and independent institutions of Internal Public Law such as the various Bar Associations whose function is to ensure the ethical control of the profession.</td>
<td>a) The Political Constitution of Peru, article 2, paragraph 18, regulates professional secrecy. b) The Peruvian Penal Code establishes in its Article 165 the penalty for the violation of professional secrecy. c) Law of the Code of Ethics of the Public Administration (Law 27815) in its article 8, paragraph 4 covers the misuse of privileged information by public officials. d) The Attorneys Code of Ethics in articles 30 to 37.</td>
<td>According to the Penal Code, for the violation of professional secrecy, the person will be punished with imprisonment of no more than two years and with sixty to one hundred twenty-day fine. Likewise, according to the Attorney's Code of Ethics, penalties in the event of disciplinary liability are as follows: a) Written warning, which will be recorded in the archives for a period of three (03) months. b) Warning with a fine, which will be recorded in the archives for a period of six (06) months. The fine may not exceed 10 Procedural Referencial Units. c) Disbarment for up to two (2) years. d) Disbarment for up to five (5) years. e) Permanent Disbarment. It should be noted that the sanction of permanent disbarment will be applied in cases where violations of fundamental rights and freedoms are incurred or promoted, regardless of the position held by the attorney at the time and in cases of illegal or criminal acts.</td>
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<td>8</td>
<td>Spain</td>
<td>There is no one specific legislation that regulates attorney/client privileges. On the other hand, there are laws that could be applied to safeguard the interests of both, as well as the right to privacy and professional secrecy. Also, there is the General Statutes of the Spanish Law, where professional secrecy is defined as an obligation and a right. Finally there is also a Code of Ethics for European Lawyers, which also protects professional secrecy.</td>
<td>In Spain, there is no government entity that is responsible for ensuring the confidentiality privileges between a lawyer and his client. However, according to the General Statute of Spanish Law, Article 119, paragraph 1, states that the &quot;Disciplinary Power&quot; over attorneys and professional partnerships shall be exercised by the very Bar Associations in whose jurisdiction the infraction was committed. Among some of its functions is to order all professional activities of its members, ensuring the deontology and the rule of professional conduct.</td>
<td>According to the Spanish Constitution, Article 18 guarantees the right to personal and family privacy. Art. 24 right to an attorney, meaning, in a legal procedure with due process, one cannot be forced to declare if said person is under &quot;professional secrecy&quot;. According to the Spanish penal code, Art. 199, the legal professional that breaches his obligation of confidentiality and reservation, may be held liable and subject to a fine, disbarment or sentenced to prison as well. The General Legal Statute states the following: Trust and confidentiality in dealing with the client imposes upon the attorney, the duty and the right to keep secret all the facts that they may know as a result of their interactions with their clients and through any means applicable, and under no circumstances, can they be forced to disclose them (Article 22).</td>
<td>According to Art. 199, subsection 2, of the Spanish penal code, a professional who fails to comply with his obligation to his client’s secrecy, may be subject to a prison sentence of 1 to 4 years, from 12 to 24 months of fine and special disbarment for a period between 2 to 6 years. It is a very serious violation to the duty of professional secrecy in accordance to the General Statute of Spanish Law, notwithstanding the fact that the infraction itself is not specifically defined in the general law.</td>
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<td>Exceptions for the applicability of the Attorney - Client Privilege</td>
<td>Extension of the Attorney - Client Privilege (to whom is applicable)</td>
<td>What type of information/documentation is protected by Attorney - Client Privilege</td>
<td>Protection to the lawyers in case of an investigation regarding client information</td>
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<td>1</td>
<td>El Salvador</td>
<td>There are no exceptions regarding the applicability of Attorney - Client Privilege contained in El Salvador legislation.</td>
<td>There is not a regulation that determines the extent of the Attorney - Client Privilege.</td>
<td>The privilege is applicable to any confidential information or documentation that is provided by the client.</td>
<td>If the lawyer has directly participated in the felony the privilege does not apply.</td>
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<td>2</td>
<td>Costa Rica</td>
<td>Sections 42 and 43 establish exceptions to the attorney client privilege obligations: 1) to the extent necessary for the attorney to defend himself in litigation, 2) to the extent necessary in litigation for claims and collection of fees, 3) to the extent necessary to hold a third party harmless from criminal conviction, and 4) inapplicable to the disclosure of the intent to commit a crime by a client.</td>
<td>The privilege can be claimed by clients. However, complaints for a violation of the duties under the Code can be filed by any third party or presented by the Comptroller of the Costa Rican Bar Association.</td>
<td>All communications by the client and all documentation furnished by the client in the course of legal representation.</td>
<td>Refer to our explanation of Sections 42 and 43 in the “Exceptions…” column of this chart.</td>
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<td>3</td>
<td>Nicaragua</td>
<td>There is no specific legislation that regulates exceptions regarding the applicability of Attorney - Client Privilege in Nicaragua.</td>
<td>There is no specific legislation or regulation that establishes the extent of the Attorney - Client Privilege.</td>
<td>The privilege is applicable to any confidential information or documentation that is provided by the client under the terms of the professional relationship.</td>
<td>There is no specific legislation or regulation that establishes the protection to the lawyers in case of an investigation regarding client information</td>
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<td>There is not a regulation that determines the extent of the Attorney - Client Privilege.</td>
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<td>There are no regulations applicable.</td>
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<td>5</td>
<td>Panamá</td>
<td>In Panama there are no exceptions regarding the Lawyer-Customer Privilege, since there is no specific regulation for this matter.</td>
<td>There is not a regulation that determines the extent of the Attorney - Client Privilege.</td>
<td>Lawyer must keep confidential information provided by his clients as indicated by article 13 of Law 9, 1984, this duty should last even after the conclusion of the legal services and extends to attorney’s employees. Confidentiality could only be overlooked in self defend of the lawyer.</td>
<td>Protection would not apply if the lawyer participates in the offense. According to the Law No. 2 of February 1, 2011, if an attorney is requested by an official authority, there is no legal or ethical liability in providing information regarding Corporations.</td>
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<td>Exceptions for the applicability of the Attorney - Client Privilege</td>
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<td>Protection to the lawyers in case of an investigation regarding client information</td>
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<td>Guatemala</td>
<td>There is only one exception for the applicability of the Attorney-Client Privilege: that a court/judicial injunction is presented to the attorney.</td>
<td>The privilege applies only to the Attorney and the Client who are parties to the professional services agreement.</td>
<td>There is no binding regulation that determines what type of information/documentation is protected by Attorney-Client Privilege, nonetheless, the Professional Code of Ethics of the Guatemalan Bar Association states that: &quot;the secret extends to every affair related to the matter subject to the professional services agreement.&quot;</td>
<td>The client attorney privilege will prevail unless there is a &quot;valid justification&quot; for the attorney to reveal it. Such justification will only be constituted through a Court/judicial injunction.</td>
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| 7 | Peru | In accordance to the Code of Ethics:  
a) Academic Reasons  
b) optional disclosure  
c) Mandatory disclosure | According to article 34 of the Code of Ethics, the lawyer who provides professional services in an associated manner, professional secrecy will reach all lawyers regardless of their role in the firm and their involvement in the case. It is important to emphasize that Professional Secrecy is permanent. It subsists even after the conclusion of the professional relationship, unless the client releases the attorney of their contractual obligations. | The privilege applies to any confidential information or documentation provided by the client. Except for information protected by professional secrecy that is necessary to prevent the client from causing serious physical or psychological harm to the life of another person (mandatory disclosure). | Attorney have the right and the obligation to oppose to revealing privileged information protected by professional secrecy when prompted to do so by any authority. |
### Attorney - Client Privileged in Latin America

#### COLUMNS 5 THRU 8

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<th>#</th>
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<td>8</td>
<td>Spain</td>
<td>According to the General Statute of Spanish Law: The authorization of the client does not relinquish the attorney of responsibility on professional secrecy (Article 23. Scope of professional secrecy). According to the Code of Ethics of Spanish Law, Article 5, paragraph 8. &quot;Professional secrecy is a primary right and duty of the Law. In the exceptional cases of dire seriousness in which the mandatory preservation of professional secrecy could cause irreparable damages or flagrant injustices, the President of the Bar will advise the attorney for the sole purpose of guiding and, if possible, determining alternative means or procedures for solving the problem at hand by weighing the conflicting legal situation. This does not affect the client’s rights not subject to professional secrecy, but whose consent alone does not excuse the lawyer for the preservation of it. However, according to Art. 18 of the General Statutes of Spanish Law, professional intervention is mandatory to safeguard the rights and freedoms and in compliance with the social function of the Law. Attorneys must carry out professional interventions that are established by law, or, by the Bar Associations. In summary, the obligation of notification provided for in article 18 is an exception to the obligation of professional secrecy. Finally, professional secrecy is fundamental to the practice of law, as well as an indispensable element for the protection of the right to privacy and defense, a right and a duty that cannot yield before authority, except in case of outweighing circumstances that call for said consideration.</td>
<td>The privileges of the attorney/client confidentiality reach both parties, since it is a duty and a right for them. Additionally, there is the duty of secrecy in association with respect to all staff and to any person who collaborates with the office. The duration of the secret remains even after the relationship of services has ceased with the client.</td>
<td>All sorts of confidential information provided by the client to the attorney for his representation, including the attorney’s notes, analysis, etc. The attorney’s duty and right of professional secrecy includes all facts, communications, data, information, documents and proposals that he has become aware of, issued or received in his professional capacity as an attorney. Art. 23 General statute of the Spanish legal profession.</td>
<td>The attorney is free to accept or reject a case without having to substantiate his decision. Moreover, independence allows the attorney to cease counselling clients in the event that discrepancies may arise with them and whenever circumstances exist that may affect their full freedom and independence in defense or the obligation of professional secrecy.</td>
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<td>1</td>
<td>El Salvador</td>
<td>The Attorney - Client Privilege only applies to information provided by the client under the professional relationship. If the Attorney has directly participated in the felony the Attorney - Client Privilege does not apply.</td>
<td>It is recommended that the Attorney only fulfills the advisory role of his profession.</td>
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<td>2</td>
<td>Costa Rica</td>
<td>The Costa Rican Bar Association. The Comptroller of the Costa Rican Bar will direct investigations and prosecute complaints. The Board of Directors will decide on the merits on complaints prosecuted by the Comptroller.</td>
<td>Document client conversations and delivery of documentation to the fullest extent possible. Classify and label information as &quot;confidential&quot; and &quot;non-confidential&quot;. Retain records indefinitely.</td>
<td>Invoke attorney client privilege. Only reveal information if so ordered by a court decision or order.</td>
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<td>3</td>
<td>Nicaragua</td>
<td>The General Directorate of Registry and Control of Attorneys and Public Notaries of the Supreme Court of Nicaragua is the entity in charge of any ethical and administrative issues of the attorneys, nevertheless they do not establish any regulation regarding Attorney- Client Privilege.</td>
<td>It is recommended that the Attorneys competently protect the confidential data and information of the client and comply with their ethical and legal obligations in the advisory and representation role of their profession, likewise, with their duties described in the law.</td>
<td>Until the attorney has a legitimate or legal reason to disclose the client information, the attorney or law firm is obligated to take competent and reasonable steps to assure that the client’s confidences are not disclosed to third parties.</td>
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<td>4</td>
<td>Honduras</td>
<td>The Honor Tribunal of the Honduras Bar Association.</td>
<td>None. The Attorney must be extremely professional in his dealings with clients; keep written and verbal evidence of all dealings and decisions with clients.</td>
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<td>5</td>
<td>Panamá</td>
<td>There is no specific legislations; however The National Bar Association of Panama, through the Code of Ethics and Professional Responsibility of Lawyers could disbar an attorney. The Supreme Court of Justice has wide discretion to impose sanctions, taking into account the nature, seriousness and modality of the crime, the personal and professional history of the lawyer.</td>
<td>It is recommended that the Attorney only fulfills the advisory role of his profession.</td>
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<td>6</td>
<td>Guatemala</td>
<td>The Tribunal of Honor of the Bar Association of Guatemala</td>
<td>All of the communications and agreements between the Attorney and the Client must be recorded by writing.</td>
<td>As stated in files number 729 and 744-2000 of the Constitutional Court of Guatemala: Attorneys and Public Notaries must be scrupulous in terms of disclosing of the documents they possess to the administrative authorities. It is the professional’s job not to endanger the secrecy or to enable access to documents that enjoy privacy or attorney client privilege. As stated by the Court: “in case of doubt, it may be acceptable that the professional demand the issuance of a court injunction to safeguard his/her responsibility and professional duties”. Therefore we recommend for the Attorney to proceed in accordance with stated by the Court: in case of a legal investigation regarding to a client, the Attorney shall request a court injunction to disclose the privileged information.</td>
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<td>7</td>
<td>Peru</td>
<td>The Bar Associations are Public Law institutions and watch over the ethical control of the profession.</td>
<td>Attorneys should be with legal counsel from their respective Bars.</td>
<td>Consider the possibility that based on the restrictions of the Bar regulations, the defense attorney who holds privileged information may be allowed recuse himself from the defense while the Bar he is a member of provides an interim oversite for the client.</td>
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<td>8</td>
<td>Spain</td>
<td>The Spanish Bar in general are able to protect the attorneys in cases of this nature.</td>
<td>Attorneys should be with legal counsel from their respective Bars.</td>
<td>Consider the possibility that based on the restrictions of the Bar regulations, the defense attorney who holds privileged information may be allowed recuse himself from the defense while the Bar he is a member of provides an interim oversite for the client.</td>
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Outline and Hypothetical: Cross-Border Attorney-Client Challenges

Attorney-Client Privilege in Latin America (Spreadsheet)

Lilian Arias, Client-Attorney Privilege: El Salvador, Costa Rica and Guatemala (Powerpoint)

New York Rules of Professional Conduct (excerpts)

Sally Quillian Yates, Individual Accountability for Corporate Wrongdoing


*In re Grand Jury Matter #3*, Docket No. 15-2475 (3rd Cir. Jan. 12, 2016)
IN RE: GRAND JURY MATTER #3

John Doe,
Appellant

On Appeal from the United States District Court for the Eastern District of Pennsylvania
(No. 2:14-gj-631-003)
District Judge: Honorable R. Barclay Surrick

Argued: January 12, 2016

Before: McKEE, Chief Judge*, AMBRO and SCIRICA, Circuit Judges

(Opinion filed: January 27, 2017)

* Judge Theodore McKee concluded his term as Chief of the United States Court of Appeals for the Third Circuit on September 30, 2016. Judge D. Brooks Smith became Chief Judge on October 1, 2016.
PER CURIAM.¹

¹ In response to Appellant John Doe’s Petition for En Banc Rehearing (which also requests panel rehearing, a
This appeal presents an unusual question of appellate jurisdiction: May we continue to exercise jurisdiction over an appeal of an evidentiary ruling in a grand jury proceeding even after the grand jury has returned both an indictment and a superseding indictment? We conclude that, so long as the grand jury investigation continues, we retain jurisdiction and thus can resolve the controversy.

With jurisdiction, we turn to an important question involving the limits of the exception to the confidentiality normally afforded to attorney work product. It loses protection from disclosure when it is used to further a fraud (hence the carve-out is called the crime-fraud exception). The District Court stripped an attorney’s work product of confidentiality based on evidence suggesting only that the client had thought about using that product to facilitate a fraud, not that the client had actually done so. Because an actual act to further the fraud is required before attorney work product loses its confidentiality and we know of none here, we reverse.

I.

Company A, John Doe, his lawyer, and Doe’s business associate are the subjects of an ongoing grand jury investigation into an allegedly fraudulent business scheme. After the Government obtained access to an email Doe claims

presumption in any event under Third Circuit Internal Operating Procedure 9.5.1), the panel grants panel rehearing, vacates its earlier opinion, and issues this opinion.

2 We use pseudonyms to refer to the grand jury subjects to protect the secrecy of the grand jury investigation and the anonymity of the subjects.
was privileged, it asked the District Court for permission to present it to the grand jury. The Court granted permission, finding that, although the email was protected by the work-product privilege, the crime-fraud exception to that privilege applied. Doe then filed an interlocutory appeal, requesting that our Court reverse the District Court’s order.

While the appeal was pending, the grand jury viewed the email in question. It then indicted Doe, his lawyer, and Doe’s business associate for conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act (“RICO”), conspiracy to commit fraud, mail fraud, wire fraud, and money laundering. Thereafter the grand jury was discharged and a new grand jury was empaneled. It too saw the disputed email, and in December 2016 returned a superseding indictment that did not contain new charges but revisions to the previous ones. The grand jury investigation, however, continues still. What follows fleshes out this factual and procedural backdrop.

Doe was the sole owner of Company A and its president. Nonetheless a November 2008 document purports to memorialize Doe’s sale of 100% of the shares of Company A to Company B for $10,000. Doe’s business associate is the sole owner of Company B. Following this purchase agreement, Doe claims that the business associate engaged Doe to be responsible for Company A’s day-to-day operations. However, numerous filings and tax documents suggested that Doe maintained control and ownership of Company A even after Doe’s stock in it was purportedly transferred.

Over the last decade and a half multiple individuals have sued Doe and his businesses in state courts around the country based on Doe’s business practices. One such lawsuit was a class action filed against Company A in Indiana state
court. In it the plaintiffs alleged that Company A’s business practices violated various Indiana state laws. They sought to hold Doe accountable for these violations. However, during this litigation Doe stated in a deposition in 2014 that he had transferred ownership of Company A to Company B. Doe’s business associate then represented that Company A was no longer in business and had limited assets. Shortly after Doe’s deposition, the Indiana plaintiffs settled their claims for approximately $260,000, about 10% of the value attorneys for the plaintiffs had put on them.

Thereafter the Government empaneled a grand jury to investigate Doe and his business associate. Its theory is that Doe owned Company A but tricked the plaintiffs into thinking that he had sold it to his business associate to encourage the plaintiffs to settle for a lower value. This relies on the premise that Doe has deep pockets but his business associate does not.

In the course of its investigation, the grand jury subpoenaed Doe’s accountant requesting that he provide the Government with Doe’s personal and corporate tax returns. Among other things, these tax documents revealed that Doe had claimed 100% ownership of Company A every tax year from 2008 through 2012. The accountant also told an IRS agent that, at some time in 2013, Doe’s lawyer informed him that Doe had sold Company A in 2008. He also informed investigators that he might have taken notes on this conversation. The Government requested them, and the accountant’s attorney sent the Government three documents.

One of the documents was an email Doe had sent to the accountant on July 16, 2013, forwarding an email that Doe’s lawyer had sent to Doe four days earlier that referenced an ongoing litigation. The attorney email advises Doe of the steps he needed to take to correct his records so that they
reflect that the business associate, not Doe, owned Company A since 2008. When Doe forwarded this email to his accountant, he simply wrote: “Please see the seventh paragraph down re; my tax returns. Then we can discuss this.” There is no evidence that Doe ever amended his returns or did anything else, apart from forwarding the email, to follow up on his attorney’s advice. Indeed, the accountant’s recollection is that Doe’s attorney later said not to go through with the amendments by telling the accountant to “stand by” for further guidance. It never came.

The day after the accountant provided this email to the Government, the accountant’s attorney sought to recall it on the ground that it was privileged and had been inadvertently included in his client’s production. The accountant’s counsel, however, also told the Government that his client believed the email was asking the accountant to perform an accounting service, not a legal service. The Government argued that under these circumstances Doe waived any privilege that might have otherwise attached to his lawyer’s email. It did, however, temporarily refrain from presenting it to the grand jury and asked the District Court in January 2015 for permission to do so, which Doe opposed.

The Court ruled in the Government’s favor. Its rationale was that Doe did not forward the email to his accountant to seek legal advice. Lacking that precondition, no attorney-client privilege attached to the document. However, the Court did find that the attorney work-product privilege attached to the email because the accountant could not be considered an adversary. It then concluded that the crime-fraud exception to the work-product privilege applied. On this basis, the Government could present the email to the grand jury.
Immediately after the District Court made its decision, Doe filed an interlocutory appeal requesting that we reverse its order. As noted above, while the appeal to our Court was pending the grand jury saw the email and later returned a 17-count indictment charging Doe, his lawyer, and Doe’s business associate with RICO conspiracy, conspiracy to commit fraud, mail fraud, wire fraud, and money laundering.

We requested supplemental briefing from the parties on whether Doe’s appeal was moot in light of the indictment. We also asked the Government to inform us whether the grand jury had been discharged. In response, it explained that the grand jury had been discharged shortly after it returned the indictment. The Government also informed us that a new grand jury had been empaneled, was investigating new charges against Doe and others, and it was considering a superseding indictment. Accordingly, both Doe and the Government asserted that the appeal was not moot due to the continuing investigation (though the Government still challenged our jurisdiction\(^3\)). We issued an opinion holding that we lacked jurisdiction, and Doe sought rehearing.

\(^3\) It argued that the collateral order doctrine does not supply a basis for appellate jurisdiction. We agree. The doctrine allows us to hear an appeal of an interlocutory order that “(1) conclusively determine[s] the disputed question; (2) resolve[s] an important issue completely separable from the merits of the action; and (3) [is] effectively unreviewable on appeal from a final judgment.” *Bines v. Kulaylat*, 215 F.3d 381, 384 (3d Cir. 2000) (internal quotation marks omitted). The third requirement cannot be met here because “flawed grand jury proceedings can be effectively reviewed by [our] court and remedied after a conviction has been entered and all criminal proceedings have been terminated in the district court.” *See In re Grand Jury Proceedings (Johanson)*, 632
Following the rehearing petition, the Government changed its mind and contends that Doe’s appeal is now moot. It has informed us that it showed the disputed email to the new grand jury in September 2016 (before the initial opinion of our panel issued), and the grand jury returned a superseding indictment in December 2016 (after our initial opinion). However, that grand jury is still investigating other charges relating to ownership of Company A, though the Government represents that it currently has no plans to seek additional charges based on the email.

II.

This appeal thus presents a novel procedural fact pattern that complicates the issue of our appellate jurisdiction. Generally, courts of appeals have jurisdiction over “final decisions” of the district courts. 28 U.S.C. § 1291. But “[w]hen a district court orders a witness—whether a party to an underlying litigation, a subject or target of a grand jury investigation, or a complete stranger to the proceedings—to testify or produce documents, its order generally is not considered an immediately appealable final decision under § 1291.” See In re Grand Jury (ABC Corp.), 705 F.3d 133, 142 (3d Cir. 2012) (internal alterations, citations, and quotation marks omitted). Thus disclosure orders are not final and cannot typically be challenged by an immediate—that is, interlocutory—appeal.

To obtain immediate appellate review of a disclosure order, the order’s target must ordinarily comply with what is known as the “contempt rule”: he “must refuse compliance, be held in contempt, and then appeal the contempt order.” Id.

F.2d 1033, 1039 (3d Cir. 1980). As we discuss below, however, a different doctrine confers appellate jurisdiction.
at 142-43 (citations and quotation marks omitted). The party may immediately appeal a district court’s contempt order because it is a final judgment imposing penalties on the willfully disobedient party in what is effectively a separate proceeding. \textit{Id.} at 143.

However, in \textit{Perlman v. United States}, 247 U.S. 7 (1918), the Supreme Court carved out an exception to the contempt rule. It applies when a “disinterested” third party controls a privilege holder’s documents and is ordered to produce them. \textit{See ABC Corp.}, 705 F.3d at 138. Because the third party is unlikely to risk contempt to obtain an immediate appeal, and because the privilege holder may not refuse to obey a court order to which he is not subject, \textit{Perlman} allows the privilege holder to take an immediate appeal. \textit{Id.}

In this context, \textit{Perlman} provided appellate jurisdiction at the beginning of our case. The email before us was produced in response to a subpoena addressed exclusively to Doe’s accountant, who “lack[s] a sufficient stake in the proceeding to risk contempt.” \textit{Id.} at 145. Indeed, the accountant gave the email to the Government without telling Doe, so Doe was “powerless to avert the mischief.”\footnote{The Government, in opposing rehearing, now argues that \textit{Perlman} does not apply because it already had possession of the document from the accountant and the District Court merely permitted the grand jury to read it. Thus “[n]obody ever faced a threat of contempt.” Pet. Reh’r. Opp. at 6. True enough, there was no threat of contempt because Doe never had the opportunity to challenge or prevent the accountant’s production to the Government in the first place. But if \textit{Perlman} permits a privilege holder to sue immediately without the threat of contempt in play because that holder cannot himself disobey a disclosure order not directed at him,} \textit{Id.} at 145.
144 (quoting Perlman, 247 U.S. at 13). The Government contends, however, that we should no longer exercise jurisdiction because the first grand jury returned an indictment and the succeeding grand jury returned a superseding indictment.

The grand jury proceedings have yet to conclude, however. On at least two occasions we have continued to exercise jurisdiction even after grand juries returned indictments. In the first case, the Government appealed an adverse ruling on a grand jury subpoena. At the outset of the appeal, our jurisdiction was clear because Congress had specifically given the Government the right to seek immediate review. See In re Grand Jury Proceedings (Johanson), 632 F.2d 1033, 1040 (3d Cir. 1980) (citing 18 U.S.C. § 3731). As the appeal was pending, however, the grand jury returned an indictment. We nonetheless concluded that, as long as the indictment did not render the appeal moot, we had jurisdiction to reach the merits. Because in that case the indictment “did not bring the grand jury’s proceedings to [their] conclusion,” a live controversy remained and our jurisdiction was intact. Id.

The second decision, which involved Congressman Chaka Fattah and was issued less than two years ago, is even more compelling because it, like our case, arose because of Perlman. At the time Fattah filed his Perlman appeal, he was, like Doe, being investigated by a grand jury. Just as in our case, his status changed when the grand jury, after oral arguments in our Court but before we reached a decision, returned an indictment. See In re Search of Elec. Commc’ns in the Account of chakafattah@gmail.com at Internet Serv.

the lack of a contempt threat here does not take this principle out of play.
Provider Google, Inc., 802 F.3d 516, 521 n.2 (3d Cir. 2015) ("Fattah"). However, because his appeal related to the still-ongoing review of his emails (thus giving us a live controversy), we continued to exercise jurisdiction per Perlman even after the indictment. Id. at 529–30.

Sound judicial efficiency concerns underlie our Johanson and Fattah decisions and weigh in favor of continuing to exercise jurisdiction even post-indictment. When we are able to dismiss an appeal for lack of jurisdiction as soon as it is filed, the process continues uninterrupted in the trial court, and we are able to wait until all the appellate issues are wrapped up after a final judgment. But because in limited circumstances we take pre-indictment appeals and begin to decide them, we should not reflexively dismiss those appeals—wasting the parties’ effort as well as ours—simply because an indictment is filed. Instead, if grand jury proceedings continue, we may still exercise jurisdiction in order to remedy future harm.

Consider our case, which has been on our docket since June 2015. By the time Doe was indicted nearly ten months had passed, and the parties had fully briefed the case and presented oral arguments to us. If we then send the case back to the District Court on the rationale that our jurisdiction was pulled by the indictment, we would do so with it likely that the issue would return if there is a conviction. And if Doe is convicted and files an appeal, the parties will need to re-brief and re-argue the same issue that we could have resolved already. Thus in cases where we accept an appeal when it is filed, efficiency favors finishing what we started.

To be sure, an intervening indictment can (and often will) moot an interlocutory appeal. For instance, through this appeal Doe asks us to prevent the grand jury from relying on an email that he argues is confidential. If after the indictment
the grand jury investigation had ended, any harm from exposure to the email already would have occurred. It would make sense in those circumstances to hold off until after the criminal proceedings are over before determining whether the grand jury proceeding were tainted.

But those are not our facts. The grand jury investigation continues, even after the new grand jury saw the email and issued a superseding indictment. Although the Government contends that the “grand jury easily can continue investigating questions relating to the ownership of [Doe’s company] without reexamining the email or considering any charges related to the email,” it may yet return another indictment based on the issue of the company’s ownership—the very subject of that email. Gov’t 28(j) Letter (Dec. 29, 2016). The grand jury cannot erase from its memory an email about Company A’s ownership while evaluating new charges relating to that issue. And though the Government contends it currently “has no plans” to put this email to further use during the continuing investigation, there is no guarantee that its plans will not change. Pet. Reh’g Opp’n at 4. Therefore, in our case, as in Johanson, these two indictments “did not bring the grand jury’s proceedings to [their] conclusion,” so there is still potential harm we can prevent. Johanson, 632 F.2d at 1040. The purpose of this appeal thus remains the same as when it was first filed: deciding whether an email that was inadvertently disclosed may be used as part of an ongoing grand jury investigation when that disclosure plausibly violates the attorney work-product privilege.

As long as we had jurisdiction at the outset, Doe’s case is guided by our analysis of the Government’s appeal in Johanson and by our decision in Fattah. As in those cases, the indictment and superseding indictment did not destroy
jurisdiction that properly existed beforehand. If the controversy is live enough that the case is not moot, we should decide it.

III.

Having concluded that our appellate jurisdiction continues, we now address the merits and hold that the crime-fraud exception to the attorney work-product doctrine does not apply to the email at issue. One of the exception’s two requirements—the use of the communication in furtherance of a fraud—is lacking. The use-in-furtherance requirement provides a key safeguard against intrusion into the attorney-client relationship, and we are concerned that contrary reasoning erodes that protection.

Without the crime-fraud exception allowing the Government to show it to the grand jury, the email from Doe’s lawyer is protected by the attorney work-product doctrine. That doctrine (often referred to as a privilege from or exception to disclosure), which is a complement to the attorney-client privilege, preserves the confidentiality of legal

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5 The Government also contends this appeal is moot for an unrelated reason. It argues that Doe has waived attorney-client protections because his pretrial memorandum indicates that he might rely on the advice-of-counsel defense. See Travelers Cas. & Sur. Co. v. Ins. Co. of N. Am., 609 F.3d 143, 164 (3d Cir. 2010) (recognizing that attorney-client confidentiality protections may be waived if the client asserts a defense based on his reasonable reliance on the attorney’s advice) (citation omitted). We disagree. That Doe’s trial strategy has changed given the development of this case does not mean he has waived the issues he continues to challenge on appeal.
communications prepared in anticipation of litigation. Shielding work product from disclosure “promotes the adversary system by enabling attorneys to prepare cases without fear that their work product will be used against their clients.” *Westinghouse Elec. Corp. v. Republic of Phil.*, 951 F.2d 1414, 1428 (3d Cir. 1991). Though Doe waived the attorney-client privilege by forwarding the email to his accountant, the document still retained its work-product status because it was used to prepare for Doe’s case against those suing him. *See id.*

Yet work-product protection, though fundamental to the proper functioning of the legal system, is not absolute. As relevant here, the crime-fraud exception operates to prevent the perversion of the attorney-client relationship. It does so by allowing disclosure of certain communications that would otherwise be confidential. “[A] party seeking to apply the crime-fraud exception must demonstrate that there is a reasonable basis to suspect (1) that the [lawyer or client] was committing or intending to commit a crime or fraud, and (2) that the . . . attorney work product was used in furtherance of that alleged crime or fraud.” *ABC Corp.*, 705 F.3d at 155.

The Government can readily satisfy the first requirement. Though ultimately it will be up to a jury to determine whether Doe committed fraud, there is at least a reasonable basis to believe he did. Even setting aside the email, the Government has a recording where Doe allegedly brags about defrauding the class action plaintiffs in the Indiana suit. He purportedly admits in that recording to telling his associate—the same one who was supposed to have already purchased Company A—“I’ll pay you ten grand a month if you will step up to the plate and say that you [own the company] and upon the successful completion of the lawsuit [I’ll] give you fifty grand.”
This evidence is strong, but it is not sufficient by itself to pierce the work-product protection. We have been clear that “evidence of a crime or fraud, no matter how compelling, does not by itself satisfy both elements of the crime-fraud exception.” In re Chevron Corp., 633 F.3d 153, 166 (3d Cir. 2011). Rather, the second requirement—use in furtherance—exists for the same reason that certain conspiracy statutes require proof that a defendant engaged in an overt act to further the crime. In both settings we want to make sure that we are not punishing someone for merely thinking about committing a bad act. Instead, as Justice Holmes noted in the conspiracy context, we ask for evidence that the plan “has passed beyond words and is [actually] on foot.” Hyde v. United States, 225 U.S. 347, 388 (1912) (Holmes, J., dissenting).

To illustrate, if a client approaches a lawyer with a fraudulent plan that the latter convinces the former to abandon, the relationship has worked precisely as intended. We reward this forbearance by keeping the work-product protection intact. If, by contrast, the client uses work product to further a fraud, the relationship has broken down, and the lawyer’s services have been “misused.” In re Grand Jury Investigation, 445 F.3d 266, 279 (3d Cir. 2006). Only in that limited circumstance—misuse of work product in furtherance of a fraud—does the scale tip in favor of breaking confidentiality.

Here the only purported act in furtherance identified by the District Court was Doe forwarding the email to his accountant. If he had followed through and retroactively amended his tax returns, we would have no trouble finding an act in furtherance. Even if Doe had told the accountant to amend the returns and later gotten cold feet and called off the plan before it could be effected, there might still be a case to be made. That is because the Government “does not have to
show that the intended crime or fraud was accomplished, only that the lawyer’s advice or other services were misused.” *Id.* (quoting *In re Public Defender Serv.*, 831 A.2d 890, 910 (D.C. 2003)).

But none of that happened. Doe merely forwarded the email to the accountant and said he wanted to “discuss” it. There is no indication he had ever decided to amend the returns, and before the plan could proceed further the lawyer told the accountant to hold off. Thus Doe at most thought about using his lawyer’s work product in furtherance of a fraud, but he never actually did so. What happened is not so different than if Doe merely wrote a private note, not sent to anyone, reminding himself to think about his lawyer’s suggestion. The absence of a meaningful distinction between these scenarios shows why finding an act in furtherance here lacks a limiting principle and risks overcoming confidentiality based on mere thought.

The District Court gave two reasons for its conclusion that Doe used his lawyer’s work product in furtherance of a fraud. First, it suggested that Doe, in forwarding the email to his accountant, “took [his lawyer’s] advice” about amending the tax returns. *J.A.* 16. It is not clear what the Court meant by this because, as it acknowledged, Doe “never followed through with amending” the returns. *Id.* Second, the Court said that the failure to follow through “is of no consequence” as long as Doe intended, as of the time he forwarded the email, to amend the returns. *Id.* This is no doubt an accurate statement of the law. *See ABC Corp.*, 705 F.3d at 155. The problem is that there is simply no record evidence suggesting that Doe had ever made up his mind.

None of this should suggest that, in the event Doe is convicted (based on the superseding indictment) and appeals, he should automatically get a new trial because the
Government used the protected work product. That is because the Government could avoid a retrial by showing the error was harmless. *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255–56 (1988). We express no opinion on that question.

* * * * *

Many appeals involving grand jury proceedings will become moot after the return of an indictment. But the presence of a new grand jury that is continuing to investigate even after issuing a superseding indictment makes this case out-of-lane. As a live controversy remains, an indictment does not automatically preclude us from deciding it. When we do so, we conclude that the crime-fraud exception to the attorney work-product privilege does not apply to the email at issue. We therefore reverse the decision allowing the breach of that privilege.
# NEW YORK RULES OF PROFESSIONAL CONDUCT

*Effective April 1, 2009*  
*As amended through January 1, 2017*  
*With Commentary as amended through January 1, 2017*

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RULE 1.2:
SCOPE OF REPRESENTATION AND
ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) Subject to the provisions herein, a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client’s decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer’s representation of a client, including representation by appointment, does not constitute an endorsement of the client’s political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.

(e) A lawyer may exercise professional judgment to waive or fail to assert a right or position of the client, or accede to reasonable requests of opposing counsel, when doing so does not prejudice the rights of the client.

(f) A lawyer may refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal.

(g) A lawyer does not violate these Rules by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, and by treating with courtesy and consideration all persons involved in the legal process.

Comment

Allocation of Authority Between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer’s professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer’s duty to communicate with the client about such decisions. The lawyer shall consult with the client with respect to the means by which the client’s objectives are to be pursued. See Rule 1.4(a)(2).
[2] Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. On the other hand, lawyers usually defer to their clients regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client’s objectives. Because of the varied nature of the matters about which a lawyer and client might disagree, and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(c)(4). Likewise, the client may resolve the disagreement by discharging the lawyer, in which case the lawyer must withdraw from the representation. See Rule 1.16(b)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client’s behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client, however, may revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer’s duty to abide by the client’s decisions is to be guided by reference to Rule 1.14.

Independence from Client’s Views or Activities

[5] Legal representation should not be denied to any person who is unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client’s views or activities.

Agreements Limiting Scope of Representation

[6] The scope of services to be 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. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to issues related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client’s objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[6A] In obtaining consent from the client, the lawyer must adequately disclose the limitations on the scope of the engagement and the matters that will be excluded. In addition, the lawyer must disclose the reasonably foreseeable consequences of the limitation. In making such disclosure, the lawyer should explain that if the lawyer or the client determines during the representation that additional services outside the limited scope specified in the engagement are necessary or advisable to represent the client adequately, then the client may
need to retain separate counsel, which could result in delay, additional expense, and complications.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client’s objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer’s services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted were not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.


Illegal and Fraudulent Transactions

[9] Paragraph (d) prohibits a lawyer from counseling or assisting a client in conduct that the lawyer knows is illegal or fraudulent. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the consequences that appear likely to result from a client’s conduct. Nor does the fact that a client uses advice in a course of action that is illegal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client’s course of action has already begun and is continuing, the lawyer’s responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. When the representation will result in violation of the Rules of Professional Conduct or other law, the lawyer must advise the client of any relevant limitation on the lawyer’s conduct and remonstrate with the client. See Rules 1.4(a)(5) and 1.16(b)(1). Persuading a client to take necessary preventive or corrective action that will bring the client’s conduct within the bounds of the law is a challenging but appropriate endeavor. If the client fails to take necessary corrective action and the lawyer’s continued representation would assist client conduct that is illegal or fraudulent, the lawyer is required to withdraw. See Rule 1.16(b)(1). In some circumstances, withdrawal alone might be insufficient. In those cases the lawyer may be required to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 1.6(b)(3); Rule 4.1, Comment [3].

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Paragraph (d) prohibits a lawyer from assisting a client’s illegal or fraudulent activity against a third person, whether or not the defrauded party is a party to the transaction.
Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise, but does preclude such a retainer for an enterprise known to be engaged in illegal or fraudulent activity.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law, or if the lawyer intends to act contrary to the client’s instructions, the lawyer must consult with the client regarding the limitations on the lawyer’s conduct. See Rule 1.4(a)(5).

Exercise of Professional Judgment

[14] Paragraph (e) permits a lawyer to exercise professional judgment to waive or fail to assert a right of a client, or accede to reasonable requests of opposing counsel in such matters as court proceedings, settings, continuances, and waiver of procedural formalities, as long as doing so does not prejudice the rights of the client. Like paragraphs (f) and (g), paragraph (e) effectively creates a limited exception to the lawyer’s obligations under Rule 1.1(c) (a lawyer shall not intentionally “fail to seek the objectives of the client through reasonably available means permitted by law and these Rules” or “prejudice or damage the client during the course of the representation except as permitted or required by these Rules”). If the lawyer is representing the client before a tribunal, the lawyer is required under Rule 3.3(f)(1) to comply with local customs of courtesy or practice of the bar or a particular tribunal unless the lawyer gives opposing counsel timely notice of the intent not to comply.

Refusal to Participate in Conduct a Lawyer Believes to Be Unlawful

[15] In some situations such as those described in paragraph (d), a lawyer is prohibited from aiding or participating in a client’s improper or potentially improper conduct; but in other situations, a lawyer has discretion. Paragraph (f) permits a lawyer to refuse to aid or participate in conduct the lawyer believes to be unlawful, even if the conduct is arguably legal. In addition, under Rule 1.16(c)(2), the lawyer may withdraw from representing a client when the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent, even if the course of action is arguably legal. In contrast, when the lawyer knows (or reasonably should know) that the representation will result in a violation of law or the Rules of Professional Conduct, the lawyer must withdraw from the representation under Rule 1.16(b)(1). If the client “insists” that the lawyer pursue a course of conduct that is illegal or prohibited under the Rules, the lawyer must not carry out those instructions and, in addition, may withdraw from the representation under Rule 1.16(c)(13). If the lawyer is representing the client before a tribunal, additional rules may come into play. For example, the lawyer may be required to obtain the tribunal’s permission to withdraw under Rule 1.16(d), and the lawyer may be required to take reasonable remedial measures under Rule 3.3 with respect to false evidence or other criminal or fraudulent conduct relating to a proceeding.

Fulfilling Professional Commitments and Treating Others with Courtesy

[16] Both Rule 1.1(c)(1) and Rule 1.2(a) require generally that a lawyer seek the client’s objectives and abide by the client’s decisions concerning the objectives of the representation; but those rules do not require a lawyer to be offensive, discourteous,
inconsiderate or dilatory. Paragraph (g) specifically affirms that a lawyer does not violate the Rules by being punctual in fulfilling professional commitments, avoiding offensive tactics and treating with courtesy and consideration all persons involved in the legal process. Lawyers should be aware of the New York State Standards of Civility adopted by the courts to guide the legal profession (22 NYCRR Part 1200 Appendix A). Although the Standards of Civility are not intended to be enforced by sanctions or disciplinary action, conduct before a tribunal that fails to comply with known local customs of courtesy or practice, or that is undignified or discourteous, may violate Rule 3.3(f). Conduct in a proceeding that serves merely to harass or maliciously injury another would be frivolous in violation of Rule 3.1. Dilatory conduct may violate Rule 1.3(a), which requires a lawyer to act with reasonable diligence and promptness in representing a client.
RULE 1.7:
CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

(1) the representation will involve the lawyer in representing differing interests; or

(2) there is a significant risk that the lawyer’s professional judgment on behalf of a client will be adversely affected by the lawyer’s own financial, business, property or other personal interests.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(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) each affected client gives informed consent, confirmed in writing.

Comment

General Principles

[1] Loyalty and independent judgment are essential aspects of a lawyer’s relationship with a client. The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties. Concurrent conflicts of interest, which can impair a lawyer’s professional judgment, can arise from the lawyer’s responsibilities to another client, a former client or a third person, or from the lawyer’s own interests. A lawyer should not permit these competing responsibilities or interests to impair the lawyer’s ability to exercise professional judgment on behalf of each client. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of “differing interests,” “informed consent” and “confirmed in writing,” see Rules 1.0(f), (j) and (e), respectively.

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer, acting reasonably, to: (i) identify clearly the client or clients, (ii) determine whether a conflict of interest exists, i.e., whether the lawyer’s judgment may be impaired or the lawyer’s loyalty may be divided if the lawyer accepts or continues the representation, (iii) decide whether the
representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable under paragraph (b); and if so (iv) consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include all of the clients who may have differing interests under paragraph (a)(1) and any clients whose representation might be adversely affected under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). See Rule 1.10(e), which requires every law firm to create, implement and maintain a conflict-checking system.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16(b)(1). Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer’s ability to comply with duties owed to the former client and by the lawyer’s ability to represent adequately the remaining client or clients, given the lawyer’s duties to the former client. See Rule 1.9; see also Comments [5], [29A].

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is acquired by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rules 1.16(d) and (e). The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

Identifying Conflicts of Interest

[6] The duty to avoid the representation of differing interest prohibits, among other things, undertaking representation adverse to a current client without that client’s informed consent. For example, absent consent, a lawyer may not advocate in one matter against another client that the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is adverse is likely to feel betrayed and the resulting damage to the client-lawyer relationship is likely to impair the lawyer’s ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken may reasonably fear that the lawyer will pursue that client’s case less effectively out of deference to the other client, that is, that the lawyer’s exercise of professional judgment on behalf of that client will be adversely affected by the lawyer’s interest in retaining the current client. Similarly, a conflict may arise when a lawyer is required to cross-examine a client appearing as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.
[7] Differing interests can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

[8] Differing interests exist if there is a significant risk that a lawyer’s exercise of professional judgment in considering, recommending or carrying out an appropriate course of action for the client will be adversely affected or the representation would otherwise be materially limited by the lawyer’s other responsibilities or interests. For example, the professional judgment of a lawyer asked to represent several individuals operating a joint venture is likely to be adversely affected to the extent that the lawyer is unable to recommend or advocate all possible positions that each client might take because of the lawyer’s duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will adversely affect the lawyer’s professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Lawyer’s Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer’s duties of loyalty and independence may be adversely affected by responsibilities to former clients under Rule 1.9, or by the lawyer’s responsibilities to other persons, such as fiduciary duties arising from a lawyer’s service as a trustee, executor or corporate director.

Personal-Interest Conflicts

[10] The lawyer’s own financial, property, business or other personal interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer’s own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer’s client or with a law firm representing the opponent, such discussions could materially limit the lawyer’s representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 5.7 on responsibilities regarding nonlegal services and Rule 1.8 pertaining to a number of personal-interest conflicts, including business transactions with clients.

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related, there may be a significant risk that client confidences will be revealed and that the lawyer’s family relationship will interfere with both loyalty and professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers, before the lawyer agrees to undertake the representation. Thus, a lawyer who has a significant intimate or close family relationship with
another lawyer ordinarily may not represent a client in a matter where that other lawyer is representing another party, unless each client gives informed consent, as defined in Rule 1.0(j).

[12] A lawyer is prohibited from engaging in sexual relations with a client in domestic relations matters. In all other matters a lawyer’s sexual relations with a client are circumscribed by the provisions of Rule 1.8(j).

Interest of Person Paying for Lawyer’s Services

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer’s duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer’s exercise of professional judgment on behalf of a client will be adversely affected by the lawyer’s own interest in accommodating the person paying the lawyer’s fee or by the lawyer’s responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. As paragraph (b) indicates, however, some conflicts are nonconsentable. If a lawyer does not reasonably believe that the conditions set forth in paragraph (b) can be met, the lawyer should neither ask for the client’s consent nor provide representation on the basis of the client’s consent. A client’s consent to a nonconsentable conflict is ineffective. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), notwithstanding client consent, a representation is prohibited if, in the circumstances, the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 regarding competence and Rule 1.3 regarding diligence.

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, federal criminal statutes prohibit certain representations by a former government lawyer despite the informed consent of the former governmental client. In addition, there are some instances where conflicts are nonconsentable under decisional law.

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client’s position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer’s multiple representation of adverse parties to mediation (because mediation is
Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances, including the material and reasonably foreseeable ways that the conflict could adversely affect the interests of that client. Informed consent also requires that the client be given the opportunity to obtain other counsel if the client so desires. See Rule 1.0(j). The information that a lawyer is required to communicate to a client depends on the nature of the conflict and the nature of the risks involved, and a lawyer should take into account the sophistication of the client in explaining the potential adverse consequences of the conflict. There are circumstances in which it is appropriate for a lawyer to advise a client to seek the advice of a disinterested lawyer in reaching a decision as to whether to consent to the conflict. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege, and the advantages and risks involved. See Comments [30] and [31] concerning the effect of common representation on confidentiality.

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one client refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation is that each party obtains separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client’s interests. Where the fact, validity or propriety of client consent is called into question, the lawyer has the burden of establishing that the client’s consent was properly obtained in accordance with the Rule.

Client Consent Confirmed in Writing

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of (i) a document from the client, (ii) a document that the lawyer promptly transmits to the client confirming an oral informed consent, or (iii) a statement by the client made on the record of any proceeding before a tribunal, whether before, during or after a trial or hearing. See Rule 1.0(e) for the definition of “confirmed in writing.” See also Rule 1.0(x) (“writing” includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. The Rule does not require that the information communicated to the client by the lawyer necessary to make the consent “informed” be in writing or in any particular form in all cases. See Rules 1.0(e) and (j). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to
avoid disputes or ambiguities that might later occur in the absence of a writing. See Comment [18].

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer’s representation at any time. Whether revoking consent to the client’s own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other clients, and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the conditions set forth in paragraph (b). The effectiveness of advance waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. At a minimum, the client should be advised generally of the types of possible future adverse representations that the lawyer envisions, as well as the types of clients and matters that may present such conflicts. The more comprehensive the explanation and disclosure of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the understanding necessary to make the consent “informed” and the waiver effective. See Rule 1.0(j). The lawyer should also disclose the measures that will be taken to protect the client should a conflict arise, including procedures such as screening that would be put in place. See Rule 1.0(t) for the definition of “screening.” The adequacy of the disclosure necessary to obtain valid advance consent to conflicts may also depend on the sophistication and experience of the client. For example, if the client is unsophisticated about legal matters generally or about the particular type of matter at hand, the lawyer should provide more detailed information about both the nature of the anticipated conflict and the adverse consequences to the client that may ensue should the potential conflict become an actual one. In other instances, such as where the client is a child or an incapacitated or impaired person, it may be impossible to inform the client sufficiently, and the lawyer should not seek an advance waiver. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, an advance waiver is more likely to be effective, particularly if, for example, the client is independently represented or advised by in-house or other counsel in giving consent. Thus, in some circumstances, even general and open-ended waivers by experienced users of legal services may be effective.

[22A] Even if a client has validly consented to waive future conflicts, however, the lawyer must reassess the propriety of the adverse concurrent representation under paragraph (b) when an actual conflict arises. If the actual conflict is materially different from the conflict that has been waived, the lawyer may not rely on the advance consent previously obtained. Even if the actual conflict is not materially different from the conflict the client has previously waived, the client’s advance consent cannot be effective if the particular circumstances that have created an actual conflict during the course of the representation would make the conflict nonconsentable under paragraph (b). See Comments [14]-[17] and [28] addressing nonconsentable conflicts.
Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients’ consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by paragraph (a)(1). A conflict may exist by reason of substantial discrepancy in the parties’ testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal as well as civil cases. Some examples are those in which a lawyer is asked to represent co-defendants in a criminal case, co-plaintiffs or co-defendants in a personal injury case, an insured and insurer, or beneficiaries of the estate of a decedent. In a criminal case, the potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to represent more than one co-defendant. On the other hand, multiple representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer’s action on behalf of one client will materially limit the lawyer’s representation of another client in a different case; for example, when a decision favoring one client will create a precedent likely to weaken seriously the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of this risk include: (i) where the cases are pending, (ii) whether the issue is substantive or procedural, (iii) the temporal relationship between the matters, (iv) the significance of the issue to the immediate and long-term interests of the clients involved, and (v) the clients’ reasonable expectations in retaining the lawyer. Similar concerns may be present when lawyers advocate on behalf of clients before other entities, such as regulatory authorities whose regulations or rulings may significantly implicate clients’ interests. If there is significant risk of an adverse effect on the lawyer’s professional judgment, then absent informed consent of the affected clients, the lawyer must decline the representation.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1). Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Nonlitigation Conflicts

[26] Conflicts of interest under paragraph (a)(1) arise in contexts other than litigation. For a discussion of such conflicts in transactional matters, see Comment [7]. Regarding paragraph (a)(2), relevant factors in determining whether there is a significant risk that the lawyer’s professional judgment will be adversely affected include: (i) the importance of the
matter to each client, (ii) the duration and intimacy of the lawyer’s relationship with the client or clients involved, (iii) the functions being performed by the lawyer, (iv) the likelihood that significant disagreements will arise, (v) the likelihood that negotiations will be contentious, (vi) the likelihood that the matter will result in litigation, and (vii) the likelihood that the client will suffer prejudice from the conflict. The issue is often one of proximity (how close the situation is to open conflict) and degree (how serious the conflict will be if it does erupt). See Comments [8], [29] and [29A].

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present at the outset or may arise during the representation. In order to avoid the development of a disqualifying conflict, the lawyer should, at the outset of the common representation and as part of the process of obtaining each client’s informed consent, advise each client that information will be shared (and regardless of whether it is shared, may not be privileged in a subsequent dispute between the parties) and that the lawyer will have to withdraw from one or both representations if one client decides that some matter material to the representation should be kept secret from the other. See Comment [31].

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation if their interests are fundamentally antagonistic to one another, but common representation is permissible where the clients are generally aligned in interest, even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis. Examples include helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest, and arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties’ mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Common Representation

[29] In civil matters, two or more clients may wish to be represented by a single lawyer in seeking to establish or adjust a relationship between them on an amicable and mutually advantageous basis. For example, clients may wish to be represented by a single lawyer in helping to organize a business, working out a financial reorganization of an enterprise in which two or more clients have an interest, arranging a property distribution of an estate or resolving a dispute between clients. The alternative to common representation can be that each party may have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation that might otherwise be avoided, or that some parties will have no lawyer at all. Given these and other relevant factors, clients may prefer common representation to separate representation or no representation. A lawyer should consult with each client concerning the implications of the common representation, including the advantages and the risks involved, and the effect on the attorney-client privilege, and obtain each client’s informed consent, confirmed in writing, to the common representation.
Factors may be present that militate against a common representation. In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, absent the informed consent of all clients, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. See Rule 1.9(a). In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between or among commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, it is unlikely that the clients’ interests can be adequately served by common representation. For example, a lawyer who has represented one of the clients for a long period or in multiple matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced.

A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. It must therefore be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client’s interests and the right to expect that the lawyer will use that information to that client’s benefit. See Rule 1.4. At the outset of the common representation and as part of the process of obtaining each client’s informed consent, the lawyer should advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential even as among the commonly represented clients. For example, the lawyer may reasonably conclude that failure to disclose one client’s trade secrets to another client will not adversely affect representation involving a joint venture between the two clients and agree to keep that information confidential with the informed consent of both clients.

When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer’s role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitation on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).
Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

**Organizational Clients**

A lawyer who represents a corporation or other organization does not, simply by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Although a desire to preserve good relationships with clients may strongly suggest that the lawyer should always seek informed consent of the client organization before undertaking any representation that is adverse to its affiliates, Rule 1.7 does not require the lawyer to obtain such consent unless: (i) the lawyer has an understanding with the organizational client that the lawyer will avoid representation adverse to the client’s affiliates, (ii) the lawyer’s obligations to either the organizational client or the new client are likely to adversely affect the lawyer’s exercise of professional judgment on behalf of the other client, or (iii) the circumstances are such that the affiliate should also be considered a client of the lawyer. Whether the affiliate should be considered a client will depend on the nature of the lawyer’s relationship with the affiliate or on the nature of the relationship between the client and its affiliate. For example, the lawyer’s work for the client organization may be intended to benefit its affiliates. The overlap or identity of the officers and boards of directors, and the client’s overall mode of doing business, may be so extensive that the entities would be viewed as “alter egos.” Under such circumstances, the lawyer may conclude that the affiliate is the lawyer’s client despite the lack of any formal agreement to represent the affiliate.

Whether the affiliate should be considered a client of the lawyer may also depend on: (i) whether the affiliate has imparted confidential information to the lawyer in furtherance of the representation, (ii) whether the affiliated entities share a legal department and general counsel, and (iii) other factors relating to the legitimate expectations of the client as to whether the lawyer also represents the affiliate. Where the entities are related only through stock ownership, the ownership is less than a controlling interest, and the lawyer has had no significant dealings with the affiliate or access to its confidences, the lawyer may reasonably conclude that the affiliate is not the lawyer’s client.

Finally, before accepting a representation adverse to an affiliate of a corporate client, a lawyer should consider whether the extent of the possible adverse economic impact of the representation on the entire corporate family might be of such a magnitude that it would materially limit the lawyer’s ability to represent the client opposing the affiliate. In those circumstances, Rule 1.7 will ordinarily require the lawyer to decline representation adverse to a member of the same corporate family, absent the informed consent of the client opposing the affiliate of the lawyer’s corporate client.

**Lawyer as Corporate Director**

A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the
directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer’s resignation from the board, and the possibility of the corporation’s obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer’s professional judgment, the lawyer should not serve as a director or should cease to act as the corporation’s lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that, in some circumstances, matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer’s recusal as a director or might require the lawyer and the lawyer’s firm to decline representation of the corporation in a matter.
RULE 1.13:
ORGANIZATION AS CLIENT

(a) When a lawyer employed or retained by an organization is dealing with the organization’s directors, officers, employees, members, shareholders or other constituents, and it appears that the organization’s interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action or intends to act or refuses to act in a matter related to the representation that (i) is a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization, and (ii) is likely to result in substantial injury to the organization, then 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 reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to an appropriate authority in the organization; and

(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 in violation of law and is likely to result in a substantial injury to the organization, the lawyer may reveal confidential information only if permitted by Rule 1.6, and may resign in accordance with Rule 1.16.

(d) 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 concurrent 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.
Comment

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, members, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Rule apply equally to unincorporated associations. “Other constituents” as used in this Rule means the positions equivalent to officers, directors, employees, and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization’s lawyer in that person’s organizational capacity, the communication is protected by Rule 1.6. Thus, for example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews between the lawyer and the client’s employees or other constituents made in the course of that investigation are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[2A] There are times when the organization’s interests may differ from those of one or more of its constituents. In such circumstances, the lawyer should advise any constituent whose interest differs from that of the organization: (i) that a conflict or potential conflict of interest exists, (ii) that the lawyer does not represent the constituent in connection with the matter, unless the representation has been approved in accordance with Rule 1.13(d), (iii) that the constituent may wish to obtain independent representation, and (iv) that any attorney-client privilege that applies to discussions between the lawyer and the constituent belongs to the organization and may be waived by the organization. Care must be taken to ensure that the constituent understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent, and that discussions between the lawyer for the organization and the constituent may not be privileged.

[2B] Whether such a warning should be given by the lawyer for the organization to any constituent may turn on the facts of each case.

Acting in the Best Interest of the Organization

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer, even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer’s province. Paragraph (b) makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. Under Rule 1.0(k), a lawyer’s knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious. The terms “reasonable” and “reasonably” connote a range
of conduct that will satisfy the requirements of Rule 1.13. In determining what is reasonable in the best interest of the organization, the circumstances at the time of determination are relevant. Such circumstances may include, among others, the lawyer’s area of expertise, the time constraints under which the lawyer is acting, and the lawyer’s previous experience and familiarity with the client.

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer’s representation, the responsibility within the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Measures to be taken may include, among others, asking the constituent to reconsider the matter. For example, if the circumstances involve a constituent’s innocent misunderstanding of law and subsequent acceptance of the lawyer’s advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer’s advice, it may be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization. See Rule 1.4.

[5] The organization’s highest authority to which a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

[6] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer’s responsibility under Rule 1.6, Rule 1.8, Rule 1.16, Rule 3.3 or Rule 4.1. Rules 1.6(b)(2) and (b)(3) may permit the lawyer in some circumstances to disclose confidential information. In such circumstances Rule 1.2(d) may also be applicable, in which event withdrawal from the representation under Rule 1.16(b)(1) may be required.

[7] The authority of a lawyer to disclose information relating to a representation under Rule 1.6 does not apply with respect to information relating to a lawyer’s engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other person associated with the organization against a claim arising out of an alleged past violation of law. Having a lawyer who cannot disclose confidential information concerning past acts relevant to the representation for which the lawyer was retained enables an organizational client to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.
[8] A lawyer for an organization who reasonably believes that the lawyer’s discharge was because of actions taken pursuant to paragraph (b), or who withdraws in circumstances that require or permit the lawyer to take action under paragraph (b), must proceed as “reasonably necessary in the best interest of the organization.” Under some circumstances, the duty of communication under Rule 1.4 and the duty under Rule 1.16(e) to protect a client’s interest upon termination of the representation, in conjunction with this Rule, may require the lawyer to inform the organization’s highest authority of the lawyer’s discharge or withdrawal, and of what the lawyer reasonably believes to be the basis for the discharge or withdrawal.

Government Agency

[9] The duties defined in this Rule apply to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Defining or identifying the client of a lawyer representing a government entity depends on applicable federal, state and local law and is a matter beyond the scope of these Rules. See Scope [9]. Moreover, in a matter involving the conduct of government officials, a government lawyer may have greater authority under applicable law to question such conduct than would a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope [10].


Concurrent Representation

[12] Paragraph (d) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder, subject to the provisions of Rule 1.7. If the corporation’s informed consent to such a concurrent representation is needed, the lawyer should advise the principal officer or major shareholder that any consent given on behalf of the corporation by the conflicted officer or shareholder may not be valid, and the lawyer should explain the potential consequences of an invalid consent.

Derivative Actions

[13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.
[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer’s client does not alone resolve the issue. Most derivative actions are normal incidents of an organization’s affairs, to be defended by the organization’s lawyer like any other suits. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer’s duty to the organization and the lawyer’s relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.
RULE 3.4:
FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) (1) suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce;

(2) advise or cause a person to hide or leave the jurisdiction of a tribunal for the purpose of making the person unavailable as a witness therein;

(3) conceal or knowingly fail to disclose that which the lawyer is required by law to reveal;

(4) knowingly use perjured testimony or false evidence;

(5) participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false; or

(6) knowingly engage in other illegal conduct or conduct contrary to these Rules;

(b) offer an inducement to a witness that is prohibited by law or pay, offer to pay or acquiesce in the payment of compensation to a witness contingent upon the content of the witness’s testimony or the outcome of the matter. A lawyer may advance, guarantee or acquiesce in the payment of:

(1) reasonable compensation to a witness for the loss of time in attending, testifying, preparing to testify or otherwise assisting counsel, and reasonable related expenses; or

(2) a reasonable fee for the professional services of an expert witness and reasonable related expenses;

(c) disregard or advise the client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take appropriate steps in good faith to test the validity of such rule or ruling;

(d) in appearing before a tribunal on behalf of a client:

(1) state or allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence;

(2) assert personal knowledge of facts in issue except when testifying as a witness;

(3) assert a personal opinion as to the justness of a cause, the credibility
of a witness, the culpability of a civil litigant or the guilt or innocence of an accused but the lawyer may argue, upon analysis of the evidence, for any position or conclusion with respect to the matters stated herein; or

(4) ask any question that the lawyer has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person; or

(e) present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

Comment

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructionist tactics in discovery procedure, and the like. The Rule applies to any conduct that falls within its general terms (for example, “obstruct another party’s access to evidence”) that is a crime, an intentional tort or prohibited by rules or a ruling of a tribunal. An example is “advis[ing] or caus[ing] a person to hide or leave the jurisdiction of a tribunal for the purpose of making the person unavailable as a witness therein.”

[2] Documents and other evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Paragraph (a) protects that right. Evidence that has been properly requested must be produced unless there is a good-faith basis for not doing so. Applicable state and federal law may make it an offense to destroy material for the purpose of impairing its availability in a pending or reasonably foreseeable proceeding, even though no specific request to reveal or produce evidence has been made. Paragraph (a) applies to evidentiary material generally, including computerized information.

[2A] Falsifying evidence, dealt with in paragraph (a), is also generally a criminal offense. Of additional relevance is Rule 3.3(a)(3), dealing with use of false evidence in a proceeding before a tribunal. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

[3] Paragraph (b) applies generally to any inducement to a witness that is prohibited by law. It is not improper to pay a witness’s reasonable expenses or to compensate an expert witness on terms permitted by law. However, any fee contingent upon the content of a witness’ testimony or the outcome of the case is prohibited.

[3A] Paragraph (d) deals with improper statements relating to the merits of a case when representing a client before a tribunal: alluding to irrelevant matters, asserting personal
knowledge of facts in issue, and asserting a personal opinion on issues to be decided by the trier of fact. See also Rule 4.4, prohibiting the use of any means that have no substantial purpose other than to embarrass or harm a third person. However, a lawyer may argue, upon analysis of the evidence, for any position or conclusion supported by the record. The term “admissible evidence” refers to evidence considered admissible in the particular context. For example, admission of evidence in an administrative adjudication or an arbitration proceeding may be governed by different standards than those applied in a jury trial.

[4] In general, a lawyer is prohibited from giving legal advice to an unrepresented person, other than the advice to secure counsel, when the interests of that person are or may have a reasonable possibility of being in conflict with the interests of the lawyer’s client. See Rule 4.3.

[5] The use of threats in negotiation may constitute the crime of extortion. However, not all threats are improper. For example, if a lawyer represents a client who has been criminally harmed by a third person (for example, a theft of property), the lawyer’s threat to report the crime does not constitute extortion when honestly claimed in an effort to obtain restitution or indemnification for the harm done. But extortion is committed if the threat involves conduct of the third person unrelated to the criminal harm (for example, a threat to report tax evasion by the third person that is unrelated to the civil dispute).
THE ATTORNEY-CLIENT PRIVILEGE IN CORPORATE CRIMINAL INVESTIGATIONS IN THE UNITED STATES

CARRIE H. COHEN
MORRISON & FOERSTER LLP
Presented at the New York State Bar Association, International Section Seasonal Meeting, September 13, 2017, Antigua, Guatemala

For attorneys and corporate clients undertaking internal investigations in the United States, the application of the attorney-client privilege is a critical and significant issue. Set forth below are some basic guidelines for consideration.

THE ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege is designed to “encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.”\(^1\) The privilege applies to communications between attorney and client if such communication was intended to be and was in fact kept confidential, and was made for the purpose of obtaining or providing legal advice to the client. Accordingly and in general, the attorney-client privilege is well safeguarded in America and courts are reluctant to interfere with it.

THE ATTORNEY-CLIENT PRIVILEGE IN CORPORATE INVESTIGATIONS

As soon as a potential issue arises that requires an internal investigation of any sort, companies should think carefully about how best to structure the investigation to ensure that the attorney-client privilege is protected. To that end, companies need to make clear from the outset that the investigation is being conducted by counsel – either in-house or outside – for the purpose of obtaining or providing legal advice.\(^2\) Additionally, companies should make clear that the investigation is being conducted for the purpose of providing legal advice to the

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2. In re Kellogg Brown & Root, 756 F.3d 754, 757 (D.C. Cir. June 27, 2014) (“KBR’s assertion of the privilege in this case is materially indistinguishable from Upjohn’s assertion of the privilege in that case . . . KBR’s investigation was conducted under the auspices of KBR’s in-house legal department, acting in its legal capacity. The same considerations that led the Court in Upjohn to uphold the corporation’s privilege claims apply here.”); id. at 758-59 (“So 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 and even if the investigation was mandated by regulation rather than simply an exercise of company discretion.”).
company. As in-house counsel wear dual hats – as providers of both legal advice and business advice – engaging outside counsel at the outset may help to protect the attorney-client privilege and promote a fulsome investigation without fear of disclosure.

Of course, outside counsel need not be engaged in every stage of the investigation to ensure protection of the privilege. However, as explained by the D.C. Circuit in In re Kellogg Brown & Root, this does mean that the investigation should be “conducted under the auspices of” counsel. In light of this, where non-attorneys conduct interviews, it should be clear that it is being done at the behest of either in-house or outside counsel. Ultimately, it is best for attorneys to guide the investigation, including deciding whom to interview, which documents to collect and review, and determining the ultimate scope and decisions to be made.

OUTSIDE CONSULTANTS AND EXPERTS

If the investigation requires outside consultants and/or experts, they should be engaged by counsel under the term of a detailed engagement letter that clearly indicates that the consultant is being retained to assist in the provision of legal advice. The engagement letter should avoid any stated purpose that can be deemed solely a business purpose.

Moreover, both the attorneys and the third parties should take steps to protect the privilege in their communications, for example, by indicating when appropriate that the communications are privileged and are being prepared under the direction of counsel.

UPJOHN AND INTERNAL INVESTIGATIONS

The seminal case in the United States for the application of the attorney-client privilege in the corporate internal investigation context is Upjohn Company v. United States. Upjohn holds that communications between counsel and non-management employees are privileged but that such privilege belongs to the company not the employee. Company witness interviews are usually protected by the privilege if the interview is necessary for the representation, relevant to the employee’s duties, and confidential.

The Upjohn case led to what are known as “Upjohn warnings,” which take a variety of forms but should be carefully adhered to in order to protect the privilege. In general, Upjohn warnings should be given at the start of an interview and should cover the following topics:

1. The attorney represents the company and not the individual employee;
2. Any findings from the interview will be reported to the company;
3. The interview’s contents are privileged, but that privilege belongs to the company;
4. The company may elect to waive the privilege thereby disclosing the contents of the interview to third parties, including government regulators; and
5. The employee must keep the interview and its contents confidential.

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3 Id. at 758 (“Upjohn does not hold or imply that the involvement of outside counsel is a necessary predicate for the privilege to apply. On the contrary, the general rule, which this Court has adopted, is that a lawyer’s status as in-house counsel ‘does not dilute the privilege.’”) (quoting In re Sealed Case, 737 F.2d 94, 99 (D.C. Cir. 1984)); id. (“[T]he investigation here was conducted at the direction of the attorneys in KBR’s Law Department. And communications made by and to non-attorneys serving as agents of attorneys in internal investigations are routinely protected by the attorney-client privilege.”).
4 Id. at 757.
Even though not best practice, courts in the United States have upheld less formal versions of these warnings as valid so long as employees do not reasonably believe that they have an attorney-client relationship with company counsel. Attorneys are well advised to memorialize the provision of Upjohn warnings in their contemporaneous post-interview notes and memoranda to avoid subsequent waiver of the privilege in the event that someone seeks their disclosure. It also may be advisable to require the employee to date and sign a form acknowledging receipt of the warning prior to continuing the interview. This written evidence of the warning will be useful in subsequent proceedings, and it also provides the employee an opportunity to read the warning himself to better understand the risks and benefits before proceeding.

**ETHICAL CONSIDERATIONS**

The Model Rules of Professional Conduct (“the Model Rules”) for attorneys in the United States provide guidelines for understanding an attorney’s ethical duties to corporate clients and individual employees within the company. Under Model Rule 1.13, “the organization acting through its duly authorized constituents” is the client. In light of that, “[i]n dealing with an organization’s directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.”

As in other instances in which an attorney interacts with an unrepresented individual, corporate counsel should be clear that they are not the individual employee’s counsel. To that end, attorneys must clearly communicate that they represent the interests of the company – their client – not the individual, and therefore, the company owns the privilege. A failure to provide a sufficient warning has negative implications for the attorney’s obligations to both the unrepresented individual and the organization. The importance of providing a sufficient warning may be particularly important where the interests of the company and the unrepresented individual employee may not align, either at the time of the interview or in the future. In these situations, if the attorney has failed to provide adequate warnings to the employee, there is a risk of creating an accidental attorney-client relationship with said employee whose interests are adverse to the client company, which may result in additional violations of the attorney’s ethical obligations.

**CONSIDERATIONS IN INTERNAL INVESTIGATIONS**

Employee interviews are a necessary component of internal investigations and can shape the outcome of the investigation, including the advice of counsel to the client. As the Supreme Court explained in *Upjohn*, “full and frank communication between attorneys and their clients . . . promote[s] broader public interests in the observance of law and administration of justice.” But the very privilege that is designed to promote “full and frank” discussions often can have a chilling effect in witness interviews because employees may be concerned that

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6 See, e.g., *United States v. Ruehle*, 583 F.3d 600, 609 (9th Cir. 2009) (finding that a warning that an employee was being interviewed “on behalf of” the company was sufficient because subsequent actions by the employees indicated that they understood that the privilege belonged to the company).

7 State-level ethical rules may differ from the Model Rules.

8 *Model Rule 1.13*.

9 *Model Rule 1.13*.

10 See, e.g., *N.Y. Rules of Professional Conduct Rule 1.7*.

11 *Upjohn*, 449 U.S. at 389.
they lack the benefit of attorney-client privilege and thus will be unable to invoke the benefits of the privilege later if necessary (i.e., in seeking an advice of counsel defense to avoid liability). Moreover, attorneys should be cognizant that as the interview and/or investigation proceeds, new developments may change the dynamics. For example, it may later become apparent that the interests of the individual employee and the company are adverse, which may require advising the individual to retain separate counsel.

THE ADVICE OF COUNSEL DEFENSE

Privilege considerations may become particularly important in the litigation context. A company may wish to invoke the advice of counsel defense to defend itself in litigation. While such defense may provide broad protections in certain proceedings (i.e., False Claims Act and criminal cases), it also can have certain risks. These risks include a waiver of the attorney-client privilege for all communications regarding the alleged misconduct and not just those specific communications necessary to make the defense. The potential waiver also can extend to work product, including materials never provided to the client, such as attorney interview notes.

With respect to individual employees seeking to invoke the advice of counsel defense, the defense may not be available to them. Recently, a federal judge in the Southern District of New York held that an employee could not disclose the privileged information necessary to support his advice of counsel defense. This decision emphasizes the fact that the privilege may only be waived by the holder of the privilege even where the advice of counsel defense may be the primary defense available to an individual employee to guard against liability.

CONCLUSION

Attorneys and companies undertaking internal investigations in the United States must be cognizant from the beginning on how to conduct the investigation to ensure protection of the attorney-client privilege where applicable. In interactions with individual employees, attorneys need to be mindful of their ethical duties to their corporate clients and provide sufficient warnings to the individual interviewees to protect the client and the attorney, as well as to properly instruct the interviewee.

CARRIE H. COHEN
Partner, New York, (212) 468-8049, ccohen@mofo.com

Carrie H. Cohen has a distinguished record of success in the courtroom handling high stakes litigation, with a particular focus on white-collar and securities cases. Prior to joining the firm, she was an Assistant United States Attorney in the Southern District of New York, where she tried public corruption, investment fraud, and securities cases, including securing the conviction of Sheldon Silver, the longtime Speaker of the New York State Assembly, on corruption and money laundering charges. Ms. Cohen also served in the New York State Attorney General’s Office, as Chief of the Public Integrity Unit in the Criminal Division, and as an Assistant Attorney General in the Civil Rights Bureau, receiving the Louis J. Lefkowitz Memorial Award for outstanding service.

Ms. Cohen is an experienced trial attorney, having tried both criminal and civil cases, and has vast experience conducting large and complex criminal and civil investigations involving federal, state, and local agencies and regulators. In addition to being the lead prosecutor in the Sheldon Silver case, Ms. Cohen has been lead or co-lead counsel on other significant public corruption cases, including the prosecution of then-state Comptroller Alan Hevesi for personal use of state employees’ time, and on investment and securities fraud trials, including a significant multi-stock securities fraud case and an $80 million Ponzi scheme case. As a former federal and state prosecutor, Ms. Cohen focuses on white-collar criminal matters, securities and investment fraud cases, internal investigations, regulatory enforcement proceedings, and bribery, procurement, money laundering, and enterprise corruption cases. Prior to her government service, Ms. Cohen spent six years in private practice, including as a litigation associate at Morrison & Foerster.

Ms. Cohen is a bar association leader and regular speaker at white-collar and bar association programs. Among her many public service roles, Ms. Cohen has held numerous bar leadership positions, including serving as the past Vice President of the New York City Bar, chair of its Executive Committee and a

EDUCATION
Cornell University (B.A., 1989)
University of Pennsylvania Law School (J.D., 1993)

RANKINGS
New York Law Journal
2016 Top Women in Law
National Law Journal
2016 Litigation Trailblazer
New York State Bar Association
Commercial & Federal Litigation Section of the 2016 Hon. Shira A. Scheindlin Award for Excellence in the Courtroom
Adjunct Professor
University of Pennsylvania Law School

5 Morrison & Foerster LLP
CARRIE H. COHEN

member of its Nominating Committee, and former Chair of the Federal & Commercial Litigation Section of the New York State Bar Association. Ms. Cohen currently serves on the Advisory Group to the New York Federal-State Judicial Council, as a representative to the New York State Bar Association House of Delegates, and as a member of the Federal Bar Council, American Inns of Court. Ms. Cohen also has been a leader in advancing women in the legal profession both in the United States and globally, and she currently serves as a member of the New York City Bar’s Cyrus R. Vance Center for International Justice, where she spearheads a professional development program for women attorneys in Latin America.

Carrie Cohen is also an Adjunct Professor at the University of Pennsylvania Law School.

REPRESENTATIVE MATTERS

- Represent a privately held company in a class action in the Eastern District of New York alleging consumer fraud and RICO claims.

- Represent a transportation company at trial in the Southern District of New York for a civil case brought by the New York State Attorney General’s Office and the City of New York alleging illegal transportation of untaxed cigarettes.

- Represent an investment adviser charged in the Eastern District of New York with alleged investment fraud.

- Represent a real estate executive charged by the New York State Attorney General’s Office with alleged bid-rigging.

- Represent a New York State judge charged with bribery in state court by the New York State Attorney General’s Office.

- Represent a venture capital fund manager charged in the Southern District of New York with securities fraud; obtained a significantly below-guidelines sentence.

PRESENTATIONS


- Lecturer and Critique Faculty, “Trial Academy: Lecture on Direct Examinations,” New York State Bar Association, Young Lawyers Section (April 2017)
CARRIE H. COHEN

- Panelist, Women in the Profession (WIP) Program: Annual Conference 2017, New York City Bar’s Vance Center for International Justice (March 2017)


- Guest Lecturer, New York University Law School, “Ethics in Government: Investigation and Enforcement” (November 2016)

- Speaker, “A Jill of All Trades: Female Attorneys in the Public and Private Sectors,” University of Pennsylvania Law School (October 2016)


- Speaker, “The Current Wave of Public Corruption Cases: Hot Topics and Recent Developments,” American Bar Association, Criminal Justice Section: White Collar Crime Committee (May 2016)


- Panelist, “Lessons from Recent Trials,” New York City Bar Association’s Fifth Annual White Collar Crime Institute (May 2016)

UPJOHN CO. ET AL.

v.

UNITED STATES ET AL.

No. 79-886.

Supreme Court of United States.

Argued November 5, 1980.
Decided January 13, 1981.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

*385 Daniel M. Gribbon argued the cause and filed briefs for petitioners.

Deputy Solicitor General Wallace argued the cause for respondents. With him on the brief were Solicitor General McCree, Assistant Attorney General Ferguson, Stuart A. Smith, and Robert E. Lindsay.

William W. Becker filed a brief for the New England Legal Foundation as amicus curiae.

*386 JUSTICE REHNQUIST delivered the opinion of the Court.

We granted certiorari in this case to address important questions concerning the scope of the attorney-client privilege in the corporate context and the applicability of the work-product doctrine in proceedings to enforce tax summonses. 445 U. S. 925. With respect to the privilege question the parties and various amici have described our task as one of choosing between two "tests" which have gained adherents in the courts of appeals. We are acutely aware, however, that we sit to decide concrete cases and not abstract propositions of law. We decline to lay down a broad rule or series of rules to govern all conceivable future questions in this area, even were we able to do so. We can and do, however, conclude that the attorney-client privilege protects the communications involved in this case from compelled disclosure and that the work-product doctrine does apply in tax summons enforcement proceedings.

I

Petitioner Upjohn Co. manufactures and sells pharmaceuticals here and abroad. In January 1976 independent accountants conducting an audit of one of Upjohn's foreign subsidiaries discovered that the subsidiary made payments to or for the benefit of foreign government officials in order to secure government business. The accountants so informed petitioner Mr. Gerard Thomas, Upjohn's Vice President, Secretary, and General Counsel. Thomas is a member of the Michigan and New York Bars, and has been Upjohn's General Counsel for 20 years. He consulted with outside counsel and R. T. Parfet, Jr., Upjohn's Chairman of the Board. It was decided that the company would conduct an internal investigation of what were termed "questionable payments." As part of this investigation the attorneys prepared a letter containing a questionnaire which was sent to "All Foreign General and Area Managers" over the Chairman's signature. The letter *387 began by noting recent disclosures that several American companies made "possibly illegal" payments to foreign government officials and emphasized that the management needed full information concerning any such payments made by Upjohn. The letter indicated that the Chairman had asked Thomas, identified as "the company's General Counsel," "to conduct an investigation for the purpose of determining the nature and magnitude of any payments made by the Upjohn Company or any of its subsidiaries to any employee or official of a foreign government." The questionnaire sought detailed information concerning such payments. Managers were instructed to treat the investigation as "highly confidential" and not to discuss it with anyone other than Upjohn employees who might be helpful in providing the requested information. Responses were to be sent directly to Thomas. Thomas and outside counsel also interviewed the recipients of the questionnaire and some 33 other Upjohn officers or employees as part of the investigation.

On March 26, 1976, the company voluntarily submitted a preliminary report to the Securities and Exchange Commission on Form 8-K disclosing certain questionable payments. A copy of the report was simultaneously submitted to the Internal Revenue Service, which immediately began an investigation to determine the tax consequences of the payments. Special agents conducting the
investigation were given lists by Upjohn of all those interviewed and all who had responded to the questionnaire. On November 23, 1976, the Service issued a summons pursuant to 26 U. S. C. § 7602 demanding production of:

"All files relative to the investigation conducted under the supervision of Gerard Thomas to identify payments to employees of foreign governments and any political contributions made by the Upjohn Company or any of its affiliates since January 1, 1971 and to determine whether any funds of the Upjohn Company had been improperly accounted for on the corporate books during the same period.

"The records should include but not be limited to written questionnaires sent to managers of the Upjohn Company's foreign affiliates, and memorandums or notes of the interviews conducted in the United States and abroad with officers and employees of the Upjohn Company and its subsidiaries." App. 17a-18a.

The company declined to produce the documents specified in the second paragraph on the grounds that they were protected from disclosure by the attorney-client privilege and constituted the work product of attorneys prepared in anticipation of litigation. On August 31, 1977, the United States filed a petition seeking enforcement of the summons under 26 U. S. C. §§ 7402 (b) and 7604 (a) in the United States District Court for the Western District of Michigan. That court adopted the recommendation of a magistrate who concluded that the summons should be enforced. Petitioners appealed to the Court of Appeals for the Sixth Circuit which rejected the magistrate's finding of a waiver of the attorney-client privilege, 600 F. 2d 1223, 1227, n. 12, but agreed that the privilege did not apply "[t]o the extent that the communications were made by officers and agents not responsible for directing Upjohn's actions in response to legal advice . . . for the simple reason that the communications were not the 'client's.'" Id., at 1225. The court reasoned that accepting petitioners' claim for a broader application of the privilege would encourage upper-echelon management to ignore unpleasant facts and create too broad a "zone of silence." Noting that Upjohn's counsel had interviewed officials such as the Chairman and President, the Court of Appeals remanded to the District Court so that a determination of who was *389 within the "control group" could be made. In a concluding footnote the court stated that the work-product doctrine "is not applicable to administrative summonses issued under 26 U. S. C. § 7602." Id., at 1228, n. 13.

Federal Rule of Evidence 501 provides that "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience." The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961). Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. As we stated last Term in Trammel v. United States, 445 U. S. 392 (1980): "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." And in Fisher v. United States, 425 U. S. 391, 403 (1976), we recognized the purpose of the privilege to be "to encourage clients to make full disclosure to their attorneys." This rationale for the privilege has long been recognized by the Court, see Hunt v. Blackburn, 128 U. S. 464, 470 (1888) (privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure"). Admittedly complications in the application of the privilege arise when the client is a corporation, which in theory is an artificial creature of the law, and not an individual; but this Court has assumed that the privilege applies when the client is a corporation, United States v. Louisville & Nashville R. Co., 236 U. S. 318, 336 (1915), and the Government does not contest the general proposition.

The Court of Appeals, however, considered the application of the privilege in the corporate context to present a "different problem," since the client was an inanimate entity and "only the senior management, guiding and integrating the several operations, . . . can be said to possess an identity analogous to the corporation as a whole." 600 F. 2d, at 1226. The first case to articulate the so-called "control group test" adopted by the court below, Philadelphia v. Westinghouse Electric Corp., 210 F. Supp. 483, 485 (ED Pa.), petition for mandamus and prohibition denied sub nom. General Electric Co. v. Kirkpatrick, 312 F. 2d 742 (CA3 1962), cert. denied, 372 U. S. 943 (1963), reflected a similar conceptual approach:

"Keeping in mind that the question is, Is it the corporation which is seeking the lawyer's advice when the asserted privileged communication is made?, the most satisfactory solution, I think, is that if the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision

https://scholar.google.com/scholar_case?q=upjohn+co+v+united+states&hl=en&as_sdt=2006&case=5153750416071396937&scilh=0
about any action which the corporation may take upon the advice of the attorney, ... then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply." (Emphasis supplied.)

Such a view, we think, overlooks the fact that the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice. See Trammel, supra, at 51; Fisher, supra, at 403. The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts "with an eye to the legally relevant. See ABA Code of Professional Responsibility, Ethical Consideration 4-1:

"A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance."

See also Hickman v. Taylor, 329 U. S. 495, 511 (1947).

In the case of the individual client the provider of information and the person who acts on the lawyer's advice are one and the same. In the corporate context, however, it will frequently be employees beyond the control group as defined by the court below—"officers and agents . . . responsible for directing [the company's] actions in response to legal advice" —who will possess the information needed by the corporation's lawyers. Middle-level—and indeed lower-level—employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties.

This fact was noted in Diversified Industries, Inc. v. Meredith, 572 F. 2d 596 (CA8 1978) (en banc):

"In a corporation, it may be necessary to glean information relevant to a legal problem from middle management or non-management personnel as well as from top executives. The attorney dealing with a complex legal problem is thus faced with a 'Hobson's choice'. If he interviews employees not having 'the very highest authority', "392 their communications to him will not be privileged. If, on the other hand, he interviews only those employees with 'the very highest authority', he may find it extremely difficult, if not impossible, to determine what happened." Id., at 608-609 (quoting Weinschel, Corporate Employee Interviews and the Attorney-Client Privilege, 12 B. C. Ind. & Com. L. Rev. 873, 876 (1971)).

The control group test adopted by the court below thus frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation. The attorney's advice will also frequently be more significant to noncontrol group members than to those who officially sanction the advice, and the control group test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy. See, e. g., Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1164 (SC 1974) ("After the lawyer forms his or her opinion, it is of no immediate benefit to the Chairman of the Board or the President. It must be given to the corporate personnel who will apply it").

The narrow scope given the attorney-client privilege by the court below not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law. In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, "constantly go to lawyers to find out how to obey the law," Burnham, The Attorney-Client Privilege in the Corporate Arena, 24 Bus. Law. 901, 913 (1969), particularly since compliance with the law in this area is hardly an instinctive matter, see, e. g., United States v. United States Gypsum Co., 438 U. S. 422, 440-441 (1978) ("the behavior proscribed by the [Sherman] Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct"). The test adopted by the court below is difficult to apply in practice, though no abstractly formulated and unvarying "test" will necessarily enable courts to decide questions such as this with mathematical precision. But if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all. The very terms of the test adopted by the court below suggest the unpredictability of its application. The test restricts the availability of the privilege to those officers who play a "substantial role" in deciding and directing a corporation's legal response. Disparate decisions in cases applying this test illustrate its unpredictability. Compare, e. g., Hogan v. Zletz, 43 F. R. D. 308, 315-316 (ND Okla. 1967), aff'd in part sub nom. Natta v. Hogan,
The communications at issue were made by Upjohn employees to counsel for Upjohn acting as such, at the direction of corporate superiors in order to secure legal advice from counsel. As the Magistrate found, "Mr. Thomas consulted with the Chairman of the Board and outside counsel and thereafter conducted a factual investigation to determine the nature and extent of the questionable payments and to be in a position to give legal advice to the company with respect to the payments." (Emphasis supplied.) 78-1 USTC ¶ 9277, pp. 83,598, 83,599. Information, not available from upper-echelon management, was needed to supply a basis for legal advice concerning compliance with securities and tax laws, foreign laws, currency regulations, duties to shareholders, and potential litigation in each of these areas. The communications concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice. The questionnaire identified Thomas as "the company's General Counsel" and referred in its opening sentence to the possible illegality of payments such as the ones on which information was sought. App. 40a. A statement of policy accompanying the questionnaire clearly indicated the legal implications of the investigation. The policy statement was issued "in order that there be no uncertainty in the future as to the policy with respect to the practices which are the subject of this investigation." It began "Upjohn will comply with all laws and regulations," and stated that commissions or payments "will not be used as a subterfuge for bribes or illegal payments" and that all payments must be "proper and legal." Any future agreements with foreign distributors or agents were to be approved "by a company attorney" and any questions concerning the policy were to be referred "to the company's General Counsel." Id., at 165a-166a. This statement was issued to Upjohn employees worldwide, so that even those interviewees not receiving a questionnaire were aware of the legal implications of the interviews. Pursuant to explicit instructions from the Chairman of the Board, the communications were considered "highly confidential" when made, id., at 39a, 43a, and have been kept confidential by the company. Consistent with the underlying purposes of the attorney-client privilege, these communications must be protected against compelled disclosure.

The Court of Appeals declined to extend the attorney-client privilege beyond the limits of the control group test for fear that doing so would entail severe burdens on discovery and create a broad "zone of silence" over corporate affairs. Application of the attorney-client privilege to communications such as those involved here, however, puts the adversary in no worse position than if the communications had never taken place. The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney:

"[T]he protection of the privilege extends only to communications and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, "What did you say or write to the attorney?" but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communications to his attorney."


See also Diversified Industries, 572 F. 2d at 611; State ex rel. Dudek v. Circuit Court, 34 Wis. 2d 559, 580, 150 N. W. 2d 387, 399 (1967) ("the courts have noted that a party cannot conceal a fact merely by revealing it to his lawyer"). Here the Government was free to question the employees who communicated with Thomas and outside counsel. Upjohn has provided the IRS with a list of such employees, and the IRS has already interviewed some 25 of them. While it would probably be more convenient for the Government to secure the results of petitioner's internal investigation by simply subpoenaing the questionnaires and notes taken by petitioner's attorneys, such considerations of convenience do not overcome the policies served by the attorney-client privilege. As Justice Jackson noted in his concurring opinion in Hickman v. Taylor, 329 U. S., at 516: "Discovery was hardly intended to enable a learned profession to perform its functions. . . . on wits borrowed from the adversary."

Needless to say, we decide only the case before us, and do not undertake to draft a set of rules which should govern challenges to investigatory subpoenas. Any such approach would violate the spirit of Federal Rule of Evidence 501. See S. Rep. No. 93-1277, p. 13 (1974) ("the recognition of a privilege based on a confidential relationship . . . should be determined on a case-by-case basis"); Trammel, 445 U. S., at 47; United States v. Gillock, 445 U. S. 360, 367 (1980). While such a "case-by-case" basis may to some slight extent undermine desirable certainty in the boundaries of the attorney-client "privilege, it obeys the spirit of the Rules. At the same time we conclude that the narrow "control group test" sanctioned by the Court of Appeals in this case cannot, consistent with "the principles of the common law as . . . interpreted. . . . in the light of reason and experience," Fed. Rule Evid. 501, govern the development of the law in this area.
Our decision that the communications by Upjohn employees to counsel are covered by the attorney-client privilege disposes of the case so far as the responses to the questionnaires and any notes reflecting responses to interview questions are concerned. The summons reaches further, however, and Thomas has testified that his notes and memoranda of interviews go beyond recording responses to his questions. App. 27a-28a, 91a-93a. To the extent that the material subject to the summons is not protected by the attorney-client privilege as disclosing communications between an employee and counsel, we must reach the ruling by the Court of Appeals that the work-product doctrine does not apply to summonses issued under 26 U. S. C. § 7602. 6

The Government concedes, wisely, that the Court of Appeals erred and that the work-product doctrine does apply to IRS summonses. Brief for Respondents 16, 48. This doctrine was announced by the Court over 30 years ago in Hickman v. Taylor, 329 U. S. 495 (1947). In that case the Court rejected "an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties." Id., at 510. The Court noted that "it is essential that a lawyer work with "a certain degree of privacy" and reasoned that if discovery of the material sought were permitted

"much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." Id., at 511.

The "strong public policy" underlying the work-product doctrine was reaffirmed recently in United States v. Nobles, 422 U. S. 225, 236-240 (1975), and has been substantially incorporated in Federal Rule of Civil Procedure 26 (b) (3). 7

As we stated last Term, the obligation imposed by a tax summons remains "subject to the traditional privileges and limitations."

United States v. Euge, 444 U. S. 707, 714 (1980). Nothing in the language of the IRS summons provisions or their legislative history suggests an intent on the part of Congress to preclude application of the work-product doctrine. Rule 26 (b) (3) codifies the work-product doctrine, and the Federal Rules of Civil Procedure are made applicable "to summonses enforcement proceedings by Rule 81 (a) (3). See Donaldson v. United States, 400 U. S. 517, 528 (1971). While conceding the applicability of the work-product doctrine, the Government asserts that it has made a sufficient showing of necessity to overcome its protections. The Magistrate apparently so found, 78-1 USTC ¶ 9277, p. 83,605. The Government relies on the following language in Hickman:

"We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and nonprivileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. . . . And production might be justified where the witnesses are no longer available or can be reached only with difficulty." 329 U. S., at 511.

The Government stresses that interviewees are scattered across the globe and that Upjohn has forbidden its employees to answer questions it considers irrelevant. The above-quoted language from Hickman, however, did not apply to "oral statements made by witnesses . . . whether presently in the form of [the attorney's] mental impressions or memoranda." Id., at 512. As to such material the Court did "not believe that any showing of necessity can be made under the circumstances of this case so as to justify production. . . . If there should be a rare situation justifying production of these matters, petitioner's case is not of that type." Id., at 512-513. See also Nobles, supra, at 252-253 (WHITE, J., concurring). Forcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes, 329 U. S., at 513 ("what he saw fit to write down regarding witnesses' remarks"); id., at 516-517 ("the statement would be his [the "400 attorney's] language, permeated with his inferences") (Jackson, J., concurring). 8

Rule 26 accords special protection to work product revealing the attorney's mental processes. The Rule permits disclosure of documents and tangible things constituting attorney work product upon a showing of substantial need and inability to obtain the equivalent without undue hardship. This was the standard applied by the Magistrate, 78-1 USTC ¶ 9277, p. 83,604. Rule 26 goes on, however, to state that "][]In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation." Although this language does not specifically refer to memoranda based on oral statements of witnesses, the Hickman court stressed the danger that compelled disclosure of such memoranda would reveal the attorney's mental...
processes. It is clear that this is the sort of material the draftsmen of the Rule had in mind as deserving special protection. See Notes of Advisory Committee on 1970 Amendment to Rules, 28 U. S. C. App., p. 442 (“The subdivision . . . goes on to protect against disclosure the mental impressions, conclusions, opinions, or legal theories . . . of an attorney or other representative of a party. The Hickman opinion drew special attention to the need for protecting an attorney against discovery of memoranda prepared from recollection of oral interviews. The courts have steadfastly safeguarded against disclosure of lawyers’ mental impressions and legal theories . . . ”).

401 Based on the foregoing, some courts have concluded that no showing of necessity can overcome protection of work product which is based on oral statements from witnesses. See, e. g., In re Grand Jury Proceedings, 473 F. 2d 840, 848 (CA8 1973) (personal recollections, notes, and memoranda pertaining to conversation with witnesses); In re Grand Jury Investigation, 412 F. Supp. 943, 949 (ED Pa. 1976) (notes of conversation with witness "are so much a product of the lawyer's thinking and so little probative of the witness's actual words that they are absolutely protected from disclosure"). Those courts declining to adopt an absolute rule have nonetheless recognized that such material is entitled to special protection. See, e. g., In re Grand Jury Investigation, 599 F. 2d 1224, 1231 (CA3 1979) (“special considerations . . . must shape any ruling on the discoverability of interview memoranda . . . ; such documents will be discoverable only in a "rare situation"”); cf. In re Grand Jury Subpoena, 599 F. 2d 504, 511-512 (CA2 1979).

We do not decide the issue at this time. It is clear that the Magistrate applied the wrong standard when he concluded that the Government had made a sufficient showing of necessity to overcome the protections of the work-product doctrine. The Magistrate applied the "substantial need" and "without undue hardship" standard articulated in the first part of Rule 26 (b) (3). The notes and memoranda sought by the Government here, however, are work product based on oral statements. If they reveal communications, they are, in this case, protected by the attorney-client privilege. To the extent they do not reveal communications, they reveal the attorneys' mental processes in evaluating the communications. As Rule 26 and Hickman make clear, such work product cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship.

402 While we are not prepared at this juncture to say that such material is always protected by the work-product rule, we "402 think a far stronger showing of necessity and unavailability by other means than was made by the Government or applied by the Magistrate in this case would be necessary to compel disclosure. Since the Court of Appeals thought that the work-product protection was never applicable in an enforcement proceeding such as this, and since the Magistrate whose recommendations the District Court adopted applied too lenient a standard of protection, we think the best procedure with respect to this aspect of the case would be to reverse the judgment of the Court of Appeals for the Sixth Circuit and remand the case to it for such further proceedings in connection with the work-product claim as are consistent with this opinion.

Accordingly, the judgment of the Court of Appeals is reversed, and the case remanded for further proceedings.

It is so ordered.

CHIEF JUSTICE BURGER, concurring in part and concurring in the judgment.

I join in Parts I and III of the opinion of the Court and in the judgment. As to Part II, I agree fully with the Court's rejection of the so-called "control group" test, its reasons for doing so, and its ultimate holding that the communications at issue are privileged. As the Court states, however, "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected." Ante, at 393. For this very reason, I believe that we should articulate a standard that will govern similar cases and afford guidance to corporations, counsel advising them, and federal courts.

The Court properly relies on a variety of factors in concluding that the communications now before us are privileged. See ante, at 394-395. Because of the great importance of the issue, in my view the Court should make clear now that, as a "403 general rule, a communication is privileged at least when, as here, an employee or former employee speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment. The attorney must be one authorized by the management to inquire into the subject and must be seeking information to assist counsel in performing any of the following functions: (a) evaluating whether the employee's conduct has bound or would bind the corporation; (b) assessing the legal consequences, if any, of that conduct; or (c) formulating appropriate legal responses to actions that have been or may be taken by others with regard to that conduct. See, e. g., Diversified Industries, Inc. v. Meredith, 572 F. 2d 596, 609 (CA8 1978) (en banc); Harper & Row Publishers, Inc. v. Decker, 423 F. 2d 487, 491-492 (CA7 1970); aff'd by an equally divided Court, 400 U. S. 348 (1971); Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1163-1165 (SC 1974). Other communications between employees
and corporate counsel may indeed be privileged—as the petitioners and several amici have suggested in their proposed formulations[^1]—but the need for certainty does not compel us now to prescribe all the details of the privilege in this case.

Nevertheless, to say we should not reach all facets of the privilege does not mean that we should neglect our duty to provide guidance in a case that squarely presents the question in a traditional adversary context. Indeed, because Federal Rule of Evidence 501 provides that the law of privileges "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience," this Court has a special duty to clarify aspects of the law of privileges properly "^404 before us. Simply asserting that this failure "may to some slight extent undermine desirable certainty," ante, at 396, neither minimizes the consequences of continuing uncertainty and confusion nor harmonizes the inherent dissonance of acknowledging that uncertainty while declining to clarify it within the frame of issues presented.


[1] On July 28, 1976, the Company filed and amendment to this report disclosing further payments.

[2] The Government argues that the risk of civil or criminal liability suffices to ensure that corporations will seek legal advice in the absence of the protection of the privilege. This response ignores the fact that the depth and quality of any investigations to ensure compliance with the law would suffer, even were they undertaken. The response also proves too much, since it applies to all communications covered by the privilege; an individual trying to comply with the law or faced with a legal problem also has strong incentive to disclose information to his lawyer, yet the common law has recognized the value of the privilege in further facilitating communications.

[3] Seven of the eighty-six employees interviewed by counsel had terminated their employment with Upjohn at the time of the interview. App. 33a-38a. Petitioners argue that the privilege should nonetheless apply to communications by these former employees concerning activities during their period of employment. Neither the District Court nor the Court of Appeals had occasion to address this issue, and we decline to decide it without the benefit of treatment below.

[4] See id., at 26a-27a, 103a, 123a-124a. See also In re Grand Jury Investigation, 599 F. 2d 1224, 1229 (CA3 1979); In re Grand Jury Subpoena, 599 F. 2d 504, 511 (CA2 1979).

[5] See Magistrate's opinion, 78-1 USTC ¶ 9277, p. 83,599: "The responses to the questionnaires and the notes of the interviews have been treated as confidential material and have not been disclosed to anyone except Mr. Thomas and outside counsel."

[6] The following discussion will also be relevant to counsel's notes and memoranda of interviews with the seven former employees should it be determined that the attorney-client privilege does not apply to them. See n. 3, supra.

[7] This provides, in pertinent part:

"[A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b) (1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

[8] Thomas described his notes of the interviews as containing "what I considered to be the important questions, the substance of the responses to them, my beliefs as to the importance of these, my beliefs as to how they related to the inquiry, my thoughts as to how they related to other questions. In some instances they might even suggest other questions that I would have to ask or things that I needed to find elsewhere." 78-1 USTC ¶ 9277, p. 83,599.

[^1] See Brief for Petitioners 21-23, and n. 25; Brief for American Bar Association as Amicus Curiae 5-6, and n. 2; Brief for American College of Trial Lawyers and 33 Law Firms as Amici Curiae 9-10, and n. 5.

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MEMORANDUM FOR THE ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION
THE ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION
THE ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION
THE ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND
NATURAL RESOURCES DIVISION
THE ASSISTANT ATTORNEY GENERAL, NATIONAL
SECURITY DIVISION
THE ASSISTANT ATTORNEY GENERAL, TAX DIVISION
THE DIRECTOR, FEDERAL BUREAU OF INVESTIGATION
THE DIRECTOR, EXECUTIVE OFFICE FOR UNITED STATES
TRUSTEES
ALL UNITED STATES ATTORNEYS

FROM: Sally Quillian Yates
Deputy Attorney General

SUBJECT: Individual Accountability for Corporate Wrongdoing

Fighting corporate fraud and other misconduct is a top priority of the Department of Justice. Our nation's economy depends on effective enforcement of the civil and criminal laws that protect our financial system and, by extension, all our citizens. These are principles that the Department lives and breathes—as evidenced by the many attorneys, agents, and support staff who have worked tirelessly on corporate investigations, particularly in the aftermath of the financial crisis.

One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing. Such accountability is important for several reasons: it deters future illegal activity, it incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their actions, and it promotes the public's confidence in our justice system.
There are, however, many substantial challenges unique to pursuing individuals for corporate misdeeds. In large corporations, where responsibility can be diffuse and decisions are made at various levels, it can be difficult to determine if someone possessed the knowledge and criminal intent necessary to establish their guilt beyond a reasonable doubt. This is particularly true when determining the culpability of high-level executives, who may be insulated from the day-to-day activity in which the misconduct occurs. As a result, investigators often must reconstruct what happened based on a painstaking review of corporate documents, which can number in the millions, and which may be difficult to collect due to legal restrictions.

These challenges make it all the more important that the Department fully leverage its resources to identify culpable individuals at all levels in corporate cases. To address these challenges, the Department convened a working group of senior attorneys from Department components and the United States Attorney community with significant experience in this area. The working group examined how the Department approaches corporate investigations, and identified areas in which it can amend its policies and practices in order to most effectively pursue the individuals responsible for corporate wrongs. This memo is a product of the working group’s discussions.

The measures described in this memo are steps that should be taken in any investigation of corporate misconduct. Some of these measures are new, while others reflect best practices that are already employed by many federal prosecutors. Fundamentally, this memo is designed to ensure that all attorneys across the Department are consistent in our best efforts to hold to account the individuals responsible for illegal corporate conduct.

The guidance in this memo will also apply to civil corporate matters. In addition to recovering assets, civil enforcement actions serve to redress misconduct and deter future wrongdoing. Thus, civil attorneys investigating corporate wrongdoing should maintain a focus on the responsible individuals, recognizing that holding them to account is an important part of protecting the public fisc in the long term.

The guidance in this memo reflects six key steps to strengthen our pursuit of individual corporate wrongdoing, some of which reflect policy shifts and each of which is described in greater detail below: (1) in order to qualify for any cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct; (2) criminal and civil corporate investigations should focus on individuals from the inception of the investigation; (3) criminal and civil attorneys handling corporate investigations should be in routine communication with one another; (4) absent extraordinary circumstances or approved departmental policy, the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation; (5) Department attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases, and should
memorialize any declinations as to individuals in such cases; and (6) civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual’s ability to pay.¹

I have directed that certain criminal and civil provisions in the United States Attorney’s Manual, more specifically the Principles of Federal Prosecution of Business Organizations (USAM 9-28.000 et seq.) and the commercial litigation provisions in Title 4 (USAM 4-4.000 et seq.), be revised to reflect these changes. The guidance in this memo will apply to all future investigations of corporate wrongdoing. It will also apply to those matters pending as of the date of this memo, to the extent it is practicable to do so.

1. To be eligible for any cooperation credit, corporations must provide to the Department all relevant facts about the individuals involved in corporate misconduct.

In order for a company to receive any consideration for cooperation under the Principles of Federal Prosecution of Business Organizations, the company must completely disclose to the Department all relevant facts about individual misconduct. Companies cannot pick and choose what facts to disclose. That is, to be eligible for any credit for cooperation, the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct. If a company seeking cooperation credit declines to learn of such facts or to provide the Department with complete factual information about individual wrongdoers, its cooperation will not be considered a mitigating factor pursuant to USAM 9-28.700 et seq.² Once a company meets the threshold requirement of providing all relevant facts with respect to individuals, it will be eligible for consideration for cooperation credit. The extent of that cooperation credit will depend on all the various factors that have traditionally applied in making this assessment (e.g., the timeliness of the cooperation, the diligence, thoroughness, and speed of the internal investigation, the proactive nature of the cooperation, etc.).

This condition of cooperation applies equally to corporations seeking to cooperate in civil matters; a company under civil investigation must provide to the Department all relevant facts about individual misconduct in order to receive any consideration in the negotiation. For

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¹ The measures laid out in this memo are intended solely to guide attorneys for the government in accordance with their statutory responsibilities and federal law. They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States.

² Nor, if a company is prosecuted, will it support a cooperation-related reduction at sentencing. See U.S.S.G. USSG § 8C2.5(g), Application Note 13 (“A prime test of whether the organization has disclosed all pertinent information” necessary to receive a cooperation-related reduction in its offense level calculation “is whether the information is sufficient ... to identify ... the individual(s) responsible for the criminal conduct”).
example, the Department’s position on “full cooperation” under the False Claims Act, 31 U.S.C. § 3729(a)(2), will be that, at a minimum, all relevant facts about responsible individuals must be provided.

The requirement that companies cooperate completely as to individuals, within the bounds of the law and legal privileges, see USAM 9-28.700 to 9-28.760, does not mean that Department attorneys should wait for the company to deliver the information about individual wrongdoers and then merely accept what companies provide. To the contrary, Department attorneys should be proactively investigating individuals at every step of the process – before, during, and after any corporate cooperation. Department attorneys should vigorously review any information provided by companies and compare it to the results of their own investigation, in order to best ensure that the information provided is indeed complete and does not seek to minimize the behavior or role of any individual or group of individuals.

Department attorneys should strive to obtain from the company as much information as possible about responsible individuals before resolving the corporate case. But there may be instances where the company’s continued cooperation with respect to individuals will be necessary post-resolution. In these circumstances, the plea or settlement agreement should include a provision that requires the company to provide information about all culpable individuals and that is explicit enough so that a failure to provide the information results in specific consequences, such as stipulated penalties and/or a material breach.

2. **Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation.**

Both criminal and civil attorneys should focus on individual wrongdoing from the very beginning of any investigation of corporate misconduct. By focusing on building cases against individual wrongdoers from the inception of an investigation, we accomplish multiple goals. First, we maximize our ability to ferret out the full extent of corporate misconduct. Because a corporation only acts through individuals, investigating the conduct of individuals is the most efficient and effective way to determine the facts and extent of any corporate misconduct. Second, by focusing our investigation on individuals, we can increase the likelihood that individuals with knowledge of the corporate misconduct will cooperate with the investigation and provide information against individuals higher up the corporate hierarchy. Third, by focusing on individuals from the very beginning of an investigation, we maximize the chances that the final resolution of an investigation uncovering the misconduct will include civil or criminal charges against not just the corporation but against culpable individuals as well.

3. **Criminal and civil attorneys handling corporate investigations should be in routine communication with one another.**

Early and regular communication between civil attorneys and criminal prosecutors handling corporate investigations can be crucial to our ability to effectively pursue individuals in
these matters. Consultation between the Department’s civil and criminal attorneys, together with agency attorneys, permits consideration of the full range of the government’s potential remedies (including incarceration, fines, penalties, damages, restitution to victims, asset seizure, civil and criminal forfeiture, and exclusion, suspension and debarment) and promotes the most thorough and appropriate resolution in every case. That is why the Department has long recognized the importance of parallel development of civil and criminal proceedings. See USAM 1-12.000.

Criminal attorneys handling corporate investigations should notify civil attorneys as early as permissible of conduct that might give rise to potential individual civil liability, even if criminal liability continues to be sought. Further, if there is a decision not to pursue a criminal action against an individual – due to questions of intent or burden of proof, for example – criminal attorneys should confer with their civil counterparts so that they may make an assessment under applicable civil statutes and consistent with this guidance. Likewise, if civil attorneys believe that an individual identified in the course of their corporate investigation should be subject to a criminal inquiry, that matter should promptly be referred to criminal prosecutors, regardless of the current status of the civil corporate investigation.

Department attorneys should be alert for circumstances where concurrent criminal and civil investigations of individual misconduct should be pursued. Coordination in this regard should happen early, even if it is not certain that a civil or criminal disposition will be the end result for the individuals or the company.

4. Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals.

There may be instances where the Department reaches a resolution with the company before resolving matters with responsible individuals. In these circumstances, Department attorneys should take care to preserve the ability to pursue these individuals. Because of the importance of holding responsible individuals to account, absent extraordinary circumstances or approved departmental policy such as the Antitrust Division’s Corporate Leniency Policy, Department lawyers should not agree to a corporate resolution that includes an agreement to dismiss charges against, or provide immunity for, individual officers or employees. The same principle holds true in civil corporate matters; absent extraordinary circumstances, the United States should not release claims related to the liability of individuals based on corporate settlement releases. Any such release of criminal or civil liability due to extraordinary circumstances must be personally approved in writing by the relevant Assistant Attorney General or United States Attorney.
5. **Corporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitations expires and declinations as to individuals in such cases must be memorialized.**

If the investigation of individual misconduct has not concluded by the time authorization is sought to resolve the case against the corporation, the prosecution or corporate authorization memorandum should include a discussion of the potentially liable individuals, a description of the current status of the investigation regarding their conduct and the investigative work that remains to be done, and an investigative plan to bring the matter to resolution prior to the end of any statute of limitations period. If a decision is made at the conclusion of the investigation not to bring civil claims or criminal charges against the individuals who committed the misconduct, the reasons for that determination must be memorialized and approved by the United States Attorney or Assistant Attorney General whose office handled the investigation, or their designees.

Delays in the corporate investigation should not affect the Department’s ability to pursue potentially culpable individuals. While every effort should be made to resolve a corporate matter within the statutorily allotted time, and tolling agreements should be the rare exception, in situations where it is anticipated that a tolling agreement is nevertheless unavoidable and necessary, all efforts should be made either to resolve the matter against culpable individuals before the limitations period expires or to preserve the ability to charge individuals by tolling the limitations period by agreement or court order.

6. **Civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual’s ability to pay.**

The Department’s civil enforcement efforts are designed not only to return government money to the public fisc, but also to hold the wrongdoers accountable and to deter future wrongdoing. These twin aims – of recovering as much money as possible, on the one hand, and of accountability for and deterrence of individual misconduct, on the other – are equally important. In certain circumstances, though, these dual goals can be in apparent tension with one another, for example, when it comes to the question of whether to pursue civil actions against individual corporate wrongdoers who may not have the necessary financial resources to pay a significant judgment.

Pursuit of civil actions against culpable individuals should not be governed solely by those individuals’ ability to pay. In other words, the fact that an individual may not have sufficient resources to satisfy a significant judgment should not control the decision on whether to bring suit. Rather, in deciding whether to file a civil action against an individual, Department attorneys should consider factors such as whether the person’s misconduct was serious, whether
it is actionable, whether the admissible evidence will probably be sufficient to obtain and sustain a judgment, and whether pursuing the action reflects an important federal interest. Just as our prosecutors do when making charging decisions, civil attorneys should make individualized assessments in deciding whether to bring a case, taking into account numerous factors, such as the individual’s misconduct and past history and the circumstances relating to the commission of the misconduct, the needs of the communities we serve, and federal resources and priorities.

Although in the short term certain cases against individuals may not provide as robust a monetary return on the Department’s investment, pursuing individual actions in civil corporate matters will result in significant long-term deterrence. Only by seeking to hold individuals accountable in view of all of the factors above can the Department ensure that it is doing everything in its power to minimize corporate fraud, and, over the course of time, minimize losses to the public fisc through fraud.

**Conclusion**

The Department makes these changes recognizing the challenges they may present. But we are making these changes because we believe they will maximize our ability to deter misconduct and to hold those who engage in it accountable.

In the months ahead, the Department will be working with components to turn these policies into everyday practice. On September 16, 2015, for example, the Department will be hosting a training conference in Washington, D.C., on this subject, and I look forward to further addressing the topic with some of you then.

7
Client – Attorney Privilege
El Salvador, Costa Rica and Guatemala
Client – Attorney Privilege

The concept Client – Attorney Privilege is a concept and a matter that is still evolving in Latin America, given that there is little legislation regarding the subject. Nevertheless, we have prepare some scenarios regarding the Client – Attorney Privilege application in the jurisdiction of El Salvador, Costa Rica and Guatemala with the purpose to understand the applicability of said privilege in each of the aforementioned jurisdiction.
Applicability of Client – Attorney privilege in El Salvador, Costa Rica and Guatemala.
Recognition of the professional Attorney-Client Privilege in El Salvador, Costa Rica and Guatemala.

A company is requiring legal advice regarding certain matter, simultaneously an individual requires the same, can an attorney establish the privilege for both?
El SALVADOR

• The Client-Attorney Privilege is not regulated under Salvadoran law, however, the Salvadoran Criminal Code in Article 187 sanctions as a crime the disclosure of professional secrecy. It is established that anyone who reveals a secret that has been imposed by reason of its profession will be sanctioned with imprisonment from six months to two years and special disqualification from the applicable profession for two years. Nevertheless, the lack of regulation in El Salvador does not prevent a client and an attorney from entering into a confidentiality agreement, in which it is determined that the attorney must keep strict confidentiality regarding the information that will have access in view of the legal services that will be rendered.
COSTA RICA

• The privilege is recognized in Costa Rican law and custom. Both companies and individuals can establish the privilege. The Attorney Client privilege is regulated by the Code of Legal, Ethical and Moral Obligations for Legal Professionals applied by the Costa Rican Bar (Código de Deberes Jurídicos, Morales y Éticos, hereinafter, the Code). Also relevant and applicable are the provisions of the Law for Non-Divulged Information, number 7597 (LNDI), whenever the relevant information constitutes valuable intellectual property, trade secrets and proprietary information.
GUATEMALA

• Yes. Both a company and an individual can establish the privilege. There is not a specific legislation that regulates Attorney-Client Privilege.

However, the following laws contemplate applicable dispositions on such matters:


Multiple representation/conflict of interest.

When a company and some of its employees have legal exposure, who does the attorney represent? Can the attorney represent both the company and one or more employees?
• In El Salvador, there is no legal prohibition for an attorney to represent a company and one or more of its employees involved in a legal proceeding, as long as the company and the employee are not counterparts in the matter, given that Article 314 of the Salvadoran Criminal Code establishes as an offense the representation of opposing parties in the same case, simultaneously or successively.
COSTA RICA

- There is no specific rule on the involvement of a company and its employees, nor is there a hierarchy or prioritization of whom the representation duties go to. It is possible for attorneys to assume multiple representations, provided the interests of the company and the employees do not conflict. Per Section 44 of the Code, a conflict of interests is a situation were the attorney represents a client against another in the same process, or a client that has an adverse position to another client in two or more different judicial or administrative processes.
Regarding on trial legal advice, as per article 201 section "g" of the Law of the Judicial Branch of the Republic of Guatemala there is no legal prohibition for an attorney to represent a company and one or more of its employees involved in a legal matter, as long as the company and the employee are not counterparts in the same matter. If the company and the employee are counterparts in the same matter and the attorney represents both parties, the attorney would commit a "dual representation crime" as per article 466 of the Criminal Code of the Republic of Guatemala.
Regarding off-trial legal advice, as per article 12 section c) of the Professional Code of Ethics of the Republic of Guatemala, in the scenario where an attorney has already advised party A, if said attorney has any type of relationship with party B (employee of party A) or may be influenced adversely towards party A, the attorney must notify this circumstances immediately to party A, who will ultimately determine whether to continue or not with the legal assessment (conflict check review.)
Joint defense activity

Two independent companies are involved in difficulties, and they both required an attorney. If the two attorneys talk to each other about what their individual clients are telling them, will the communications between the two of them will be privileged?
• There is no regulation that establish or regulates that the communication between the two attorneys is consider privileged. However, if the conversation between both attorneys reveals sensitive information that could harm the client, such action may constitute the crime of disclosure of professional secrecy mentioned above.
COSTA RICA

Costa Rica has no regulations to specifically establish that the communication between two attorneys is considered privileged. On the contrary, under Attorney-Client Privilege rules, communications of such information may constitute unauthorized disclosure of information of an individual client. If multiple clients of multiple attorneys all acquiesce to such disclosure and discussions, such communications may be interpreted to be covered by the attorney-client privilege under Section 41 of the Code. There is no precedent on this matter.
GUATEMALA

• There is no specific regulation in Guatemala regarding joint defense activity. However, regarding in and off trial legal advice, they will both be breaching the professional secrecy of their clients, and committing the crime of professional secrecy disclosure as per article 223 of the Criminal Code of the Republic of Guatemala.
Privilege information.

What advice is privileged—legal advice rather than business advice.
**EL SALVADOR**

Given that there is no regulation in El Salvador that may be applicable, we recommend to have both categories established as confidential in the NDA.

**COSTA RICA**

Costa Rica has rules on both legally privileged information (i.e., attorney client privilege under the Code) and confidential and proprietary information (i.e., under the LNDI). Both categories of advice, legal and business, should be considered to be privileged.

**GUATEMALA**

There is no specific regulation in Guatemala regarding a privileged advice. Any type of advice, whether legal or business, should be considered as privileged.
How much advice can a lawyer give?

Difference between advising a client on legal exposure for past conduct and advising the client on how to engage in or continue in an unlawful activity.
• The attorney must exercise his profession in an ethical and responsible manner. Suggesting a client a certain action that goes against the law could lead to the attorney in criminal responsibility as an author, instigator or accomplice, for the crime that is applicable. Of which we can mention bribery, simulation of influence, among others.
COSTA RICA

• Per the Code, lawyers are subject to ethical standards that bind them to provide lawful advice to all clients. Attorneys should not provide advice that constitutes a breach of the laws, and, if they do, other legal provisions on participation in criminal conduct may apply (i.e., advice instrumental in the commission of a crime may constitute direct or accessory participation in criminal conduct, or may be itself a crime). Moreover, per Sections 41 and 43 of the Code, attorney client privilege does not apply to communications by a client of the intent to commit a crime.
GUATEMALA

- All advice given by an attorney, as per tenet 1 of Code of Ethics of the Republic of Guatemala, must be lawful. Moreover, an attorney cannot guarantee the results of a legal process, in accordance with article 12 section b) of the Code of Ethics.
THANK YOU

Contact
San Salvador Office
Calle La Mascota 533
San Benito, San Salvador
El Salvador, CA.

Lillian Arias
Tel. + 503 2257 0900
Fax   + 503 2257 0901

Lillian.arias@ariaslaw.com