ETHICAL ISSUES FOR CORPORATE COUNSEL

Robert A. Angle
David N. Anthony
TROUTMAN SANDERS LLP
Richmond, VA

Presented To:
Virginia State Bar
Annual Meeting
June 17, 2011

Table of Contents

TOPIC NO. 1: Misdirected Faxes and Email

A few years ago, an outside lawyer for Eli Lilly & Co. mistakenly sent an e-mail to a reporter for the *New York Times* containing information about the client's negotiations of a $1 billion settlement with the federal government. The lawyer apparently had two people with the same last name in his e-mail address book: one was his co-counsel assisting in the negotiations, and the other was a reporter for the *New York Times*. This is but one of many stories which show the potential dangers to privileged communications by our ever increasing reliance on electronic means of communication.

The attorney-client privilege under Rule 1.6 applies to any "confidential communication between a client and lawyer" where the dominant purpose of the communication is to obtain or provide legal advice, regardless of whether it was made in anticipation of litigation. The party invoking the privilege bears the burden of showing the existence of the attorney-client relationship. Once the relationship is established, the communication is presumed to be privileged, and the burden shifts to the party seeking disclosure to show that the communication was not legal advice, that the privilege has been waived, or that an exception to the privilege applies.

Given lawyers' rampant use of e-mail communications, it is no surprise that courts have had to deal with the issue of inadvertent forwarding of e-mails to the wrong person. In *Delta Fin. Corp. v. Morrison*, Case No. 011118/2003, 831 N.Y.S. 2d 352 (2006), KPMG, one of the defendants, issued a subpoena *duces tecum* to a third party, BPA. BPA's production in response to the subpoena was inadequate in the opinion of KPMG, so its lawyer sent an e-mail to counsel for BPA complaining about it. BPA's lawyer forwarded the e-mail to BPA's president, who drafted an e-mail in response.

Instead of sending the response back to his attorney, BPA's president forwarded it to KPMG's lawyer. Upon receipt of the e-mail, KPMG's lawyer forwarded it to, among others, KPMG's in-house counsel and the discovery referee for the case. A few days later, counsel for BPA sent an e-mail to KPMG's lawyer stating that the e-mail containing the response of BPA's president was confidential and privileged, was inadvertently sent to KPMG's lawyer, and should be returned to BPA's counsel immediately. During a conference with the discovery referee, plaintiff's counsel announced his intention to use the e-mail at trial, arguing that e-mail did not seek any privileged legal advice, and even if it did, the privilege was waived by sending it to KPMG's lawyer.

The court held that while the e-mail contained statements of an offensive nature, it should be cloaked with the attorney-client privilege because the sender was intending to have confidential communications with his lawyer. "Without the attachment of the attorney-client privilege to such a communication, which was intended as a confidential communication to an attorney, unintended consequences would arise in an attorney's representation of his client, such as, less than candid discussion between attorney and client." *Id*. at *6; *see also Charm v. Kohn*, 27 Mass. L. Rep. 421 (Mass. Super. Ct. 2010) (holding that an attorney's practice of copying his client on emails with opposing counsel and his clients use of reply all did not result in waiver because "reasonable (although not maximum) steps to preserve the confidentiality" were taken, but warning that further carelessness on behalf of the party might compel a finding of waiver); *but see Joyner v. Southeastern Pa. Transp. Auth.*, 736 A.2d 35 (Pa. 1999) (holding that voicemail inadvertently left with opposing counsel was not privileged because plaintiff failed to establish the reasonableness of his subjective belief that he was communicating with his attorney). The court also held that BPA did not waive the privilege because the e-mail was inadvertently sent to

KPMG's lawyer and was clearly meant only for counsel for BPA. In addition, counsel for BPA took steps in a reasonable time frame to demand its return.

However, it is not only the party that sends a misdirected email that must be concerned with the implications of the inadvertent disclosure of privileged communication. A recent ruling out of the Northern District of California should serve as a stern warning to any attorneys who receive misdirected e-mails. In *Terraphase Engineering, Inc., et al. v. Arcadis, U.S., Inc.*, No. 3:10cv4647 (N.D. Cal. Dec 17, 2010), the attorney for certain former employees, while preparing to file suit against Arcadis, sent emails discussing litigation strategy to the former employees, unintentionally including an old company address for one of them. Arcadis, monitoring the former employees' old email accounts, saw the emails which were passed along not only to in-house counsel, but also were apparently shared with outside counsel. Once the former employees filed suit, information in the emails, some of which could not have been otherwise known, was allegedly used in drafting Arcadis's counterclaim. The former employees filed for a temporary restraining order, seeking dismissal of the counterclaim and disqualification of opposing counsel for using the privileged information. The District Court went a step further, not only immediately dismissing Arcadis counterclaim and disqualifying outside counsel, but also forbidding Arcadis's in-house counsel, including its general counsel, from having any interaction whatsoever with any substantive or strategic decision in the case moving forward. *Id*. The Court instructed Arcadis to immediately hire new counsel and required declarations from the new counsel that they had no knowledge of the contents of the emails. *Id*.

Since 2008, Federal Rule of Evidence 502 has given guidance on inadvertent disclosures in federal practice. Rule 502 states that a party does not waive the privilege if the disclosure was inadvertent and the party took reasonable steps to prevent disclosure and to rectify the error.

Martin v. State Farm Mut. Auto. Ins. Co., No.: 3:10-cv-0144, 2011 U.S. Dist. LEXIS 36058, at *13 (S.D. W. Va. Apr. 1, 2011) (the privilege holder's "reasonableness . . . in protecting and asserting the privilege is paramount to overcoming the consequences of an inadvertent waiver"); *see also Spieker v. Quest Cherokee, LLC*, No. 07-1225, 2009 U.S. Dist. LEXIS 62073 (D. Kan. July 21, 2009) (Rule 502's "reasonable steps" are best determined on a case-by-case basis). Courts have utilized a multifactor tests to determine reasonableness, balancing "(1) the reasonableness of the precautions taken to prevent inadvertent disclosure; (2) the number of inadvertent disclosures; (3) the extent of the disclosures; (4) any delay in measures taken to rectify the disclosures; and (5) overriding interests in justice." *Martin*, 2011 U.S. Dist. LEXIS 36058, at *12-13 (citing *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 259 (D. Md. 2008) (finding counsel waived confidentiality of inadvertently disclosed materials due to failure to take reasonable steps to prevent disclosure)).

Last year, Virginia became one of the first states to adopt a counterpart to Rule 502 to govern inadvertent disclosures in state court proceedings. *See* Va. Code § 8.01-420.7 (largely mirroring Rule 502). Just weeks before the new Virginia law took effect, the Supreme Court of Virginia, applying a multifactor test similar to that above, found that the attorney-client privilege had been waived when a party took insufficient measures to safeguard privileged documents, inadvertently disclosing them, and then delayed before attempting to get them back. *Walton v. Mid-Atlantic Spine Specialists*, P.C., 280 Va. 113, 127, 131, 694 S.E.2d 545, 552 (2010) (citing *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co*., 104 F.R.D. 103, 105 (S.D.N.Y 1985)). In *Walton*, the Court noted that the standards it was articulating were consistent with the provisions of the new statute. *Id*. at 129 n.5.

With the increasing use of e-mail and smartphones for constant, instantaneous communication, there is little doubt that inadvertent disclosure issues will become more prevalent. Attorneys must take great care to protect privileged information and guard against mistaken emails to the wrong individuals. Counsel must not only diligently watch their electronic communication but must also be ever vigilant in how they respond when receiving such unintentional email communication, making sure not to misuse privileged material.

TOPIC NO. 2: The Auditors Privilege and Tax Accrual Work Papers

An ongoing question is whether information provided by a corporation to its outside auditors to allow them to perform properly their auditing function constitutes a waiver of any applicable privilege associated with the information. Securities laws require that the financial statements of publicly traded companies be audited and certified by an independent auditor. One item a company's financial statements must specifically reflect are the company's reserves or accruals for its potential exposure relating to items that, if identified and challenged by the IRS, may result in additional taxes being assessed against the company. To calculate the total amount of tax reserves, the company (usually its tax and legal personnel) create tax accrual work papers, which may include an analysis of the items for which the company is accruing tax reserves. These work papers often include analysis and opinions from in-house and/or outside legal counsel. In order for accounting firms to sign off on a corporation's financials, the Sarbanes-Oxley Act of 2002 requires corporations to turn over more information to auditors than in the past, including tax accrual work papers, internal investigation reports and legal opinions. These work papers, reports and opinions may then become the subject of discovery requests in litigation, raising issues of privilege and work product protection.

Several recent cases shed light on these issues. In *SEC v. Microtune*, No. 3-08-CV-1105-B, 2009 U.S. Dist. LEXIS 47091 (N.D. Tex. June 4, 2009), the court held that documents relating to an internal stock option investigation were not protected from discovery merely because they were made by or sent to outside counsel. According to the *Microtune* court, the corporate party waived any privilege it had by voluntarily disclosing the documents to third parties, including an outside auditing firm, a regulatory panel, and the SEC. *Id*. at *15-19.

Furthermore, the court determined that the documents were created for business purposes, rather than litigation, and, therefore, the work product doctrine did not preclude discovery either.

Similarly, in *United States v. Textron Inc.*, U.S. Court of Appeals for the First Circuit considered the discoverability of tax accrual work papers prepared by Textron, Inc. for a 2003 audit. These work papers included counsel's estimates as to the company's chance of prevailing in litigation against the IRS on several items. In an action brought by the IRS against Textron, the district court concluded that the company's accountants and attorneys would not have prepared the tax accrual work papers "but for" the fact that Textron anticipated the possibility of litigation with the IRS. On appeal, a divided panel of the First Circuit Court of Appeals affirmed the lower court's decision. In an about face, however, the First Circuit agreed to rehear the case *en banc* and held that the tax accrual work papers were ***not*** protected by any privilege or work product doctrine because the work papers were required by statutory and audit requirements. *In re Textron, Inc.*, 577 F.3d 21 (1st Cir. 2009). The majority of the First Circuit found that the tax accrual work papers could not have been prepared for litigation because they were required by the company's audit obligations. This decision has been attacked by critics and appears to adopt a new standard under which the work product doctrine may not apply to dual purpose documents that are prepared for both business and litigation purposes. In May 2010, the U.S. Supreme Court declined to review this decision, despite support for such review from the ABA, the Association of Corporate Counsel, and several other groups.

In June 2010, the U.S. Court of Appeals for the District of Columbia Circuit reached the opposite conclusion as the *Textron* court in *U.S. v. Deloitte LLP*, 610 F.3d 129, 143 (D.C. Cir. 2010). *Deloitte* arose out of tax litigation against Dow Chemical Co. which resulted in the government issuing a document subpoena to Deloitte, Dow's independent auditor. Deloitte refused to produce certain tax accrual work papers obtained during its audit of Dow, claiming they were protected by the work product doctrine, and the government initiated litigation to enforce its subpoena against Deloitte. The district court concluded that the tax accrual papers qualified as attorney work product because they were prepared because of the prospect of litigation, and that Dow did not waive its work product protection by providing the documents to Deloitte.

On appeal, the government argued that some of the tax accrual work papers could not be Dow's work product because they were prepared by Deloitte, not Dow, and that the other documents lost any work product protection when they were turned over to Deloitte. The D.C. Circuit rejected the government's arguments and affirmed the district court's ruling, finding that the Deloitte-prepared work papers could be the work product of Dow and that disclosure of the Dow-prepared work papers to Deloitte did not waive any work product protection associated with the documents. As to the Deloitte-prepared work papers, the D.C. Circuit found that the papers clearly contained the thoughts and opinions of counsel developed in anticipation of litigation. The early involvement of counsel and clear documentation of the risks of litigation helped strengthen the later work product claims. Likewise, the D.C. Circuit held that Dow's disclosure of its work product papers to Deloitte did not waive any work product protection because a company's independent auditor is not an adversary or a conduit to an adversary, and Dow had a reasonable expectation that Deloitte would keep its work papers confidential.

The Fourth Circuit has not yet addressed whether tax accrual work papers can be protected from discovery under the work product doctrine, and the split between *Textron* and *Dow Chemicals* leaves some uncertainty for companies. Moreover, with the erosion of the auditor privilege, difficult decisions will have to be made before turning documents over to auditors that may contain confidential information protected under the attorney-client privilege. Attorneys face an inherent conflict between protecting the confidentiality of communications with their clients under Model Rule of Professional Responsibility 1.6, while, at the same time, turning over documents to auditors knowing that this information may be discoverable in lawsuits. The alternative of not providing this sensitive information to auditors may prevent a corporation from receiving a clean audit from their accounting firm. A few steps that companies can take to help guard against the discoverability of tax accrual work papers and other documents containing legal analysis required by auditors include: (1) use a confidentiality agreement with independent auditors that requires them to advise the company of any subpoena, summons or other legal process that seeks such papers; (2) involve counsel early and clearly document the expected litigation risk; (3) instruct counsel and independent auditors to keep their respective analyses separate and to avoid combining legal opinions and analysis with the accounting for particular transactions; and (4) do not assume that all communications with the auditors are privileged.

TOPIC NO. 3: The Attorney-Client Privilege and Draft SEC Filings

Mandatory filings with the Securities and Exchange Commission (the "SEC") can frustrate an attorney's duty of confidentiality under Rule 1.6 of the Model Rules of Professional Procedure. In a January 2009 opinion, however, the United States District Court for the Northern District of Illinois ruled that the attorney-client privilege applies to communications and drafts relating to filings with the SEC. *See Roth v. Aon Corp.*, 254 F.R.D. 538 (N.D. Ill. 2009). The court held that an e-mail and attached draft of disclosure language circulated for comment among corporate employees and in-house counsel in connection with the preparation of an Annual Report on Form 10-K were protected from discovery by plaintiffs in a pending securities fraud action. *Id*. at 540.

The plaintiff filed the lawsuit on behalf of a class of investors who purchased Aon Corporation ("Aon") common stock between May 5, 2003 and October 13, 2004. *Id*. at 539. The plaintiff alleged that Aon misled investors during this period regarding contingent commission kickbacks and steering arrangements with insurers in violation of Section 10(b) and 20(a) of the Securities Exchange Act of 1934 (the "Act"). *Id*. The plaintiff filed a motion to compel the production of a two-page document consisting of an e-mail and attached memorandum dated March 1, 2004. *Id*. The memorandum was from Aon's then-Chief Financial Officer (the "CFO") to Aon's then-Chief Executive Officer and general counsel, and provided a draft section of Aon's Form 10-K to be filed with the SEC. *Id*. The e-mail was from the CFO to Aon's head of investor relations, deputy general counsel, controller and an employee in the controller's division seeking comments from the recipients on the attached memorandum. *Id*.

Typically, the preparation of disclosures to the SEC involves in-house and outside counsel communicating with company officers and employees to ensure that information contained in the disclosures is correct. Maintaining attorney-client privilege protection over preliminary drafts and discussions regarding information contained in those drafts theoretically promotes the protection of company information as well as the production of well-prepared disclosures.

The attorney-client privilege "is the oldest of the privileges for confidential communications known to the common law." *Upjohn v. United States*, 449 U.S. 383, 389 (1981). The essential elements for the creation and application of the attorney-client privilege are well-established: "(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at this instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived." *United States v. White*, 950 F.2d 426, 430 (7th Cir. 1991).

In *Aon*, the plaintiff argued that the e-mail constituted a business communication not protected by the attorney-client privilege. *Aon*, 254 F.R.D. at 540. Aon responded that the e-mail was provided to counsel for the purpose of obtaining legal advice, and therefore the e-mail and the memorandum were protected by the attorney-client privilege. *Id*. The court held that "[c]onsultation as to the scope of the provisions of the Act, as to language, and as to how best to legally comply with SEC regulations, for instance, are precisely the type of day-to-day guidance for which a corporation would likely rely on counsel." *Id*. The court further stated that "[t]he determination of what information should be disclosed for compliance is not merely a business operation, but a legal concern." *Id*.

The court's conclusion rejected the plaintiff's argument that, because the final filing would have been a public document, preliminary drafts and related communications could not be protected by the privilege. *Id*. at 540-41. In addition, the court held that the inclusion of non-lawyers as recipients on the e-mail did not waive the privilege so long as all other recipients were Aon employees. *Id*.

The *Aon* case provides guidance on the importance of legal judgment in the production of most SEC (or other administrative or regulatory) filings and the critical significance of maintaining privilege protection. A court is unlikely to extend the privilege to correspondence simply because it is addressed to counsel, however, the privilege can only apply if counsel is an addressee. The inclusion of a party other than counsel and company employees as a recipient will increase the likelihood that a court would find a waiver of the attorney-client privilege.

On a day-to-day basis, draft or preliminary disclosures should be clearly labeled "draft" and "confidential" or "privileged." E-mails also should be labeled to prevent unintended mailings to outside or opposing parties. In-house and outside counsel should establish clear communication guidelines consistent with these types of controls and oversee compliance with them among working group members.

TOPIC NO. 4: "Full and Prompt" Disclosure verses Premature Disclosure: Ethical Considerations When Publicly Announcing a Corporate Merger

The timing and nature of publicly announcing a merger presents many pitfalls for both the prospective acquirers and the prospective targets in a merger. The failure to make full and prompt disclosure can result in liability under the federal securities laws. On the other hand, a premature announcement can "blow the deal" and also result in liability for the parties. Furthermore, potential conflicts exist between an attorney's duty of confidentiality to his or her client under Rule 1.6 of the Model Rules of Professional Responsibility and an attorney's duty to maintain truthfulness in statements to others. Thus, a party to a prospective merger should consider many factors before publicly disclosing the proposed merger.

While there is no general affirmative duty for corporations to disclose financial developments immediately, the federal securities laws impose certain duties on companies to disclose material developments. Furthermore, if a company chooses to make public statements, the statements must be complete and accurate. The general rationale behind the material disclosure requirements in Rule 10b-5 (17 C.F.R. § 240.10b-5) is to prevent any misleading statements made in a manner reasonably calculated to influence the investing public.

One issue that is heavily litigated involves the materiality of merger negotiations. A potential merger can be the most important event in the life of a corporation. Furthermore, public interest in a corporation's merger negotiations can be very high. Thus, preliminary discussions and negotiations relating to the potential merger are often considered material. In the seminal case of *Basic Inc. v. Levinson,* 485 U.S. 224 (1988), the United States Supreme Court announced a "probability/magnitude" test for determining the materiality of such negotiations. The Court held that the materiality of the negotiations depends on a balancing of both the facts and circumstances of a particular case, looking at the probability that the merger will be completed and the anticipated magnitude of the event. Involvement in the negotiations by the highest levels within the corporation, such as board resolutions, instructions to investment bankers, and actual negotiations between the parties, also can support a finding of materiality. Conversely, speculative or tentative discussions between companies will not usually require disclosure. *See Taylor v. First Union Corp.*, 857 F.2d 240 (4th Cir. 1989) (finding no material disclosure requirement due, in part, to no agreement as to the price or structure of the proposed deal).

Material disclosures are often made in the Management's Discussion and Analysis of Financial Condition and Results of Operation (the "MD&A"), which is required by Regulation S-K to be included in any publicly held company's annual and quarterly reports. The MD&A is intended to address past trends and future prospects. It should include all information that has impacted or might forseeably impact on the financial affairs of the corporation. Therefore, preliminary merger negotiations should be included in the MD&A. Failure to include the appropriate material disclosures in the MD&A may lead to an SEC enforcement action.

One area in which Congress has created a "safe harbor" from material disclosures involves "forward-looking statements." Prior to Congress enacting the safe harbor, some courts had ruled that a company that issued forward-looking statements had an affirmative duty to correct the statements which, due to subsequent events, become untrue or incomplete. This was found to have a chilling effect on issuers' willingness to make such statements. Accordingly, Congress created a safe harbor for statements which: (1) are identified as forward looking statements; and (2) contain "meaningful" cautionary language setting forth the risks relating to such statements. *See* 15 U.S.C. § 77z-2(c).

Issues involving the timing of material disclosures arise in many other situations, including disclosure to securities analysts, selective disclosures, and duties to disclose under stock exchange and state regulations. Corporations must, however, avoid premature disclosure for at least two reasons. First, the premature release of information may be materially misleading. Second, from a practical standpoint, premature disclosure may frustrate or even destroy a prospective merger. For example, premature disclosure may lead to outbidding by a competitor or raise unnecessary issues with shareholders. It should be noted, however, that once information regarding the prospective merger is inadvertently released, the company may have a duty to disclose promptly the preliminary discussions or incur liability under Regulation FD.

A final issue that often arises relating to material disclosures and mergers involves how a corporation responds to rumors and take-over speculation. Under federal securities laws, a company can: (1) say nothing, (2) make a "no comment" statement, or (3) make a public statement. Unless a corporation intends to admit the prospective merger, companies are advised to avoid any definite public statements. Otherwise, the corporation can run the risk of making a misleading statement and violating the federal securities laws. *See In re Columbia Securities Litigation*, 155 F.R.D. 466 (S.D.N.Y. 1994) (ruling that statement that "there's nothing on the table" could constitute a misleading statement). On the other hand, under the stock exchange rules, a corporation has an affirmative obligation to make a "frank and explicit announcement" to correct materially misleading information if rumors or unusual market activity indicates that information on impending developments has leaked out. *See New York Stock Exchange Listed Company Manual*, § 202.03.

TOPIC NO. 5: ***Ex Parte* Communications with Former Employees of an Adverse Company**

Several Rules of the Virginia Rules of Professional Conduct control communications with an opposing party outside the presence of its attorneys, including Rules 4.2 (Communication with Persons Represented by Counsel) and 4.3 (Dealing with Unrepresented Persons). Rule 4.2 prohibits *ex parte* communication with a represented party by opposing counsel.

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Comment 7 to Rule 4.2 addresses potential issues arising out of communications with an organization that is a party to the litigation.

> In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons in the organization's "control group" as defined in *Upjohn v. United States*, 449 U.S. 383 (1981)[1] or persons who may be regarded as the "alter ego" of the organization. The "control group" test prohibits *ex parte* communications with any employee of an organization who, because of their status or position, have the authority to bind the corporation. Such employees may only be contacted with the consent of the organization's counsel, through formal discovery or as authorized by law.

An officer of director of the organization likely is a member of the organization's "control group," and, therefore, normally should be contacted through the organization's counsel.

Importantly, Comment 7 states that "[t]he prohibition does not apply to former employees or agents of the organization, and an attorney may communicate *ex parte* with such

[1] *Upjohn* defined a member of an organization's "control group" as an employee or agent of the organization that "could commit the [organization] to specific courses of action" or "bind the [organization] by their acts or admissions."

former employee or agent even if he or she was a member of the organization's 'control group.'" Under such circumstances, Rule 4.3 "Dealing with Unrepresented Persons" applies. Under Rule 4.3, an attorney dealing with an individual not represented by counsel "shall not state or imply that the lawyer is disinterested" in the matter in litigation. Furthermore, if the attorney knows or reasonably should know that the unrepresented person misunderstands the lawyer's role, then the lawyer "shall make reasonable efforts to correct the misunderstanding." To avoid any misunderstandings in situations involving former employees, the attorney should disclose that he or she represents a party in litigation against the individual's former employer. Furthermore, attorneys contacting former employees must avoid discussing topics and information "which 'may reasonably be foreseen as stemming from attorney/client communications [while the employee was employed by the opposing party] . . . or . . . us[ing] methods of obtaining evidence that violate the legal rights of such a person.'" *Bryant v. Yorktowne Cabinetry, Inc.*, 538 F. Supp. 2d 948, 953 (W.D. Va. 2008) (quoting Va. R. Prof'l Responsibility 4.4). However, there is no requirement that any advanced notice or warning be given to opposing counsel before engaging in communication with former employees. *In re Digitek Prod. Liab. Litig.*, 648 F. Supp. 2d 795, 799 (S.D. W. Va. 2009).

Thus, *ex parte* communication with an agent of an adverse represented organization is allowed only in the following instances: (1) the agent is not in the organization's "control group" or cannot be regarded as the organization's "alter ego" and the attorney discloses his adverse role in the litigation; (2) the communication is with a former agent of the organization; (3) the organizations' attorney consents to the communication; (4) separate counsel, independently retained by the agent in the matter, consents to the communication; (5) the communication does not involve the subject of the representation; or (6) the communication is authorized by law. *See*

Bryant, 538 F. Supp. 2d at 949-54; *Yukon Pocahontas Coal Co. v. Consolidation Coal Co.*, 72 Va. Cir. 75, 90 (Buchanan County 2006).

TOPIC NO. 6: Use of Metadata - Recent Developments

Electronic documents typically contain "metadata," which is hidden or encrypted information describing the history, tracking or management of the document. For example, metadata may allow a party to determine how many changes were made to the document, when they were made, and who made the changes. Thus, a document's metadata can prove to be a treasure trove of information, which is why parties usually "scrub" metadata from electronic documents that are produced in litigation. Ethical issues arise when a party intentionally or accidentally fails to remove metadata from the electronic documents they produce.

Can the receiving party ethically search the metadata? Although the Virginia State Bar has not dealt with this issue to date, several other bar associations have. The American Bar Association's Standing Committee on Ethics and Professional Responsibility has issued an opinion concluding that an attorney can examine a document's metadata, thus essentially placing the burden on the sender to remove all metadata before sending or producing electronic documents. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-442: *Review and Use of Metadata*. Maryland has adopted the same approach. *See* Md. State Bar Ass'n, Comm. on Ethics, Opinion 2007-092 (2006).

Other bar associations have reached the opposite conclusion. For instance, the New York Committee on Professional Ethics issued an opinion in which it determined that reviewing metadata violates New York's equivalent to Model Rule 8.4, which prohibits conduct "involving dishonesty or fraud" that is "prejudicial to the administration of justice." NYSBA Ethics Op. 749. The opinion compares the situation in which an attorney inadvertently receives privileged information except that, in the case of mining metadata, the lawyer is intentionally trying to discover an inadvertent disclosure of potentially confidential or privileged information. *See also*

Ala. State Bar Office of the Gen Counsel, Op. No. 2007-02 (same); D.C. Bar, Op. 341 (same). However, a party's mere use of metadata, without any improper invasion of the opposing party's confidentiality, will not support a claim of unethical behavior. *Steinbuch v. Cutler*, No. 07-31459, 2009 Bankr. LEXIS 2126, at *6-8 (Bankr. N.D.N.Y. June 5, 2009).

Similarly, the Florida Bar's Ethics Department has concluded that lawyers must abstain from mining metadata if the recipient knows or should have known that the information was not intended for them. *See* Prof'l Ethics of the Fla. Bar, Op. 06-2. Pennsylvania's Bar Association has opined that the ethical consequences related to the mining of metadata should be considered on a case-by-case basis and may depend on some of the following factors: (a) the judgment of the lawyer, (b) the nature of the information received, (c) how and from whom the information was received, and (d) common sense, reciprocity and professional courtesy. *See* Pa. Bar Ass'n Comm. on Legal Ethics and Prof. Resp. Op. 2007-500 (2008).

The Vermont Bar determined that lawyers who receive electronic documents from opposing counsel, in discovery or otherwise, do not violate any ethics rules by searching for confidential metadata that may have been inadvertently disclosed. Vermont Bar Ass'n Prof'l Responsibility Section, Op. 2009-1. However, a lawyer who receives an inadvertent disclosure must notify the sending lawyer. *Id*. Similarly, the DC Bar has concluded that an attorney is "prohibited from reviewing metadata sent by an adversary *only* where he has actual knowledge that the metadata was inadvertently sent." D.C. Bar Legal Ethics Comm., D.C. Op. 341 (2007) (emphasis added).

At the same time, parties *sending* electronic documents containing metadata may be running afoul of ethics rules. As discussed in the opinions from the ABA and Maryland, sending documents containing metadata may violate rules prohibiting the disclosure of clients' confidential information. *See, e.g.*, Va. R. of Prof. Conduct 1.1, 1.6 (A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information . . . that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client"). Similarly, the New Hampshire Bar Association Ethics Committee issued an Opinion on April 16, 2009 stating that lawyers sending electronic materials are ethically required to take reasonable care to avoid improper disclosure. N.H. Bar Ass'n, Ethics Comm. Op. 4 (2008-2009). Such "reasonable care" may involve training and education.

At bottom, attorneys need to be mindful to avoid inadvertent disclosure and improper use of confidential information contained in electronic communications. If parties properly remove metadata from electronic documents prior to their production, both the sender and the recipient of the documents can avoid these thorny ethical issues.

TOPIC NO. 7: The Crime-Fraud Exception

The attorney-client privilege protects confidential communications with counsel after the creation of an attorney-client relationship. *See* Va. Rule of Professional Conduct 1.6. In the Fourth Circuit, however, the attorney-client privilege is "strictly confined within the narrowest possible limits." *In re Grand Jury Proceedings*, 727 F.2d 1352, 1355 (4th Cir. 1984). One significant exception to the attorney-client privilege is the crime-fraud exception.

The crime-fraud exception, also known as the crime-fraud-tort exception, excludes communications from the attorney-client privilege where a client "sought the advice of counsel" to commit or further a crime or fraud, and the privileged materials are closely related to the client's existing or future criminal or fraudulent scheme. *Chaudhry v. Gallerizzo*, 174 F.3d 394, 403 (4th Cir. 1999). In the Fourth Circuit, the exception also applies to tortious conduct. *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982).

The party asserting the exception bears the burden of making a *prima facie* showing that the privileged communications fall within the exception. *Chaudhry*, 174 F.3d at 403-04. As the District Court for the Eastern District of Virginia has held, the crime-fraud exception does not require the court to decide the ultimate issue, since the party asserting the exception must show only "enough evidence to support a verdict in favor of the party making the claim." *Flexible Benefits Council v. Feldman*, No. 1:08cv371, 2008 U.S. Dist. LEXIS 79226, at *13-16 (E.D. Va. Oct. 8, 2008) (quoting *Duplan Corp. v. Deering Milliken, Inc.,* 540 F.2d 1215, 1220 (4th Cir. 1976)); *see also In re Grand Jury Proceedings*, 401 F.3d 247, 251 (4th Cir. 2005) (holding that the crime-fraud exception does not require the court to decide ultimate issue). *But see X Corp. v. Doe*, 816 F. Supp. 1086, 1091 (E.D. Va. 1993) (proponent must "clearly show" fraudulent activity for exception to confidentiality to apply). Accordingly, a party's burden for obtaining allegedly fraudulent communications between a client and counsel is much lower than the burden needed to assert a successful claim for fraud.

Nonetheless, to successfully assert the crime-fraud exception, the proponent must satisfy two tests: (1) the allegedly fraudulent client was engaged in or planning a criminal or fraudulent scheme when he sought the advice of counsel to further the scheme; and (2) the documents containing the privileged materials bear a close relationship to the client's existing or future scheme to commit a crime or fraud. *Billings v. Stonewall Jackson Hosp.*, 635 F. Supp. 2d 442, 446-447 (W.D. Va. 2009) (denying claim of crime-fraud exception based on "nothing more than speculation"); *In re Fresh Del Monte Pineapple Antitrust Litigation*, 04 MD 1628, 2007 U.S. Dist. LEXIS 1372, at *8-9 (S.D.N.Y. Jan. 9, 2007) ("[T]he controlling question is whether the communications at issue were undertaken to facilitate or conceal the commission of a crime or fraud."). However, when making the determination as to whether the challenged communication bears a "close relationship" to the alleged criminal or fraudulent activity, "courts must take into account that the party invoking the crime-fraud exception . . . does not know exactly what the material will show." *United States v. Under Seal (In re Grand Jury Investigation)*, 352 Fed. Appx. 805, 809 (4th Cir. 2009) (citing *In re Grand Jury Investigation*, 842 F.2d 1223, 1227 (11th Cir. 1987)). Clearly, corporate clients and in-house counsel are well advised to keep a vigilant watch for fraudulent activities from a liability perspective (particularly in the current corporate climate) as well as its impact on the attorney-client privilege.

TOPIC NO. 8: No Right to Appeal Order Compelling Production of Privileged Materials

In December 2009, the United States Supreme Court put to rest any hope of an automatic right to appeal a trial court decision compelling the production of attorney-client privileged materials in federal court. Prior to the Court's decision in *Mohawk Industries, Inc. v. Carpenter*, 130 S. Ct. 599 (2009), the circuits had been split, with three circuits permitting collateral order appeals of attorney-client privilege rulings, and five circuits finding such orders non-appealable. (The Fourth Circuit had not addressed the issue).

The *Mohawk* case arose in the context of a wrongful termination case in which plaintiff was allegedly fired when he refused to cooperate with Mohawk's counsel in rebutting allegations made in a separate class action against the company. Plaintiff sought to compel production of attorney-client communications relating to his meeting with Mohawk's counsel. The trial court agreed, finding that Mohawk had implicitly waived the privilege through representations made in the class action case. The trial court refused to certify its order for interlocutory appeal under 28 U.S.C. § 1292(b), but recognized the seriousness of its decision and agreed to stay the case to allow Mohawk to pursue other appeal routes.

Mohawk filed a notice of appeal and a petition for a writ of mandamus to the Eleventh Circuit. The Court of Appeals dismissed the appeal for lack of jurisdiction under 28 U.S.C. § 1291(c), holding that the district court ruling did not qualify as an immediately appealable collateral order under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). Under *Cohen*, an order is immediately appealable if it:

(1) conclusively determines the disputed question;

(2) resolves an important issue completely separate from the merits of the action; and

(3) is effectively unreviewable on appeal from a final judgment.

The Eleventh Circuit found that, while the district court's ruling satisfied the first two factors, the third factor did not apply because a discovery order that implicates the attorney-client privilege can be adequately reviewed on an appeal from a final judgment. 541 F.3d at 1052. The Eleventh Circuit also rejected Mohawk's mandamus petition, finding no clear usurpation of power or abuse of discretion by the district court.

The Supreme Court granted certiorari to resolve the conflict in the circuits and endorsed the approach of the Eleventh Circuit and the five other circuits that have rejected immediate appeals of attorney-client rulings. While recognizing the "importance of the attorney-client privilege, which is 'is one of the oldest recognized privileges for confidential communications,'" the Supreme Court held that:

> The crucial question … is not whether an interest is important in the abstract; it is whether deferring review until final judgment so imperils the interest as to justify the cost of allowing immediate appeal of the entire class relevant orders. We routinely require litigants to wait until after final judgment to vindicate valuable rights, including rights central to our adversarial system….

Mohawk, 130 S. Ct. at 606. The Court went on to explain that:

> In our estimation, post judgment appeals generally suffice to protect the rights of litigants and assure the vitality of the attorney-client privilege. Appellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence.

Id. at 606-07.

In addition, the Court noted that, in exceptional or other appropriate cases, litigants could pursue other avenues of review, such as seeking certification of an interlocutory appeal under 28 U.S.C. § 1292(b), petitioning for a writ of mandamus, or defying a disclosure order and appealing any sanctions resulting from such defiance.

Thus, with the *Mohawk* decision, litigants should no longer have any expectation of a right to immediately appeal orders compelling the production of attorney-client privileged materials. Attorney's faced with an order to turn over documents they believe to be protected as privileged communications must consider their obligations under Rule 1.6 to keep attorney-client communications confidential with their obligations to obey the court's rulings and directives as described in Rule 3.4(d). While there are "other avenues" for seeking immediate appellate review, they are very narrow indeed and may force litigants to weigh carefully the costs of complying with or defying such disclosure orders.

TOPIC NO. 9: Advance Waivers of Conflict of Interest

Rule 1.7(a) of the Virginia Rules of Professional Conduct states that an attorney may not represent a client if the representation involves a concurrent conflict of interest. A "concurrent conflict of interest" exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." Subsection (b) allows an attorney to represent a client even though a potential conflict may arise if each affected client consents after consultation.

A proper waiver of potential conflicts of interest must meet the criteria set forth in Rule 1.7(b). The lawyer must reasonably believe that he or she will be able to provide competent and diligent representation to each affected client. The representation must not be prohibited by law. The representation must not involve the assertion of a claim by one client against the other in the same litigation or any other proceeding before a tribunal. Finally, each client's consent must be memorialized in writing. Rule 1.7(b)(1)-(4).

Counsel must provide each client with a full and adequate disclosure of any potential conflicts before entering into the waiver. A waiver entered into without adequate disclosure is ineffective. Further, as noted in Comment 19, an attorney's "obligation regarding conflicts of interest are not present solely at the onset of the attorney-client relationship; rather such obligations are ongoing such that a change in circumstances may require a lawyer to obtain new consent from a client after additional, adequate disclosure regarding that change in circumstances."

An advance waiver of potential conflicts does not control when the trial court determines that an actual or potential conflict creates an adverse interest between counsel and client. *United States v. Dancy*, No. 3:08CR189, 2008 U.S. Dist. LEXIS 59624, at *12 n. 1 (E.D. Va. July 23, 2008) (later *vacated by*, 2008 U.S. Dist. LEXIS 69651, at *5-7 (E.D. Va. Sept. 15, 2008) (finding the evidence ultimately insufficient to support a motion to disqualify)). According to Comment 19 to Rule 1.7, "when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent." *See Sanford v. Virginia*, 687 F. Supp. 2d 591, 605 (E.D. Va. 2009). Therefore, as in most other matters involving representation of clients, the propriety of a waiver depends on the best interests of the clients involved. Obviously, any attorney's overriding concerns should be for the best interests of his or her clients. Rule 1.7 recognizes the duty of loyalty an attorney owes the client. Not surprisingly, an advance waiver, entered into upon the advice of counsel, that is against the client's best interests will not preclude a motion disqualify the attorney. *See All American Semiconductor, Inc. v. Hynix Semiconductor, Inc.*, No. C 07-1200, 2008 U.S. Dist. LEXIS 106619, at *32-34 (N.D. Cal. Dec. 18, 2008) (counsel's advance waiver ineffective for failure to obtain client's "informed consent"); *Sanford*, 687 F. Supp. 2d at 601-606 (finding advanced waiver insufficient and disqualifying counsel when "neither reasonably could have believed that . . . they could represent all of the defendants whom they undertook to represent" jointly).

TOPIC NO. 10: Unsolicited Emails or Voicemail Messages and the Creation of an Attorney-Client Relationship

As lawyers become more technologically savvy, their websites are becoming a primary tool for marketing and soliciting potential clients. Often, a firm's website will allow a potential client to send an unsolicited e-mail to the firm or a specific attorney. This marketing tool creates a unique – and hotly debated – ethical issue: Is information contained in an unsolicited e-mail to a lawyer subject to the confidentiality provisions of Rule 1.6 of Virginia's Rules of Professional Conduct?[2]

In 2008, the Virginia State Bar's Committee on Legal Ethics ("Committee") issued Legal Ethics Opinion 1842, which speaks directly to this issue. The Opinion concludes that "the lawyer does not owe a duty of confidentiality to a person who unilaterally transmits unsolicited confidential information via e-mail to the firm using the lawyer's e-mail address posted on the firm's website."[3] The Opinion further states that "[t]he mere inclusion of an e-mail address on a web-page is not an agreement to consider the formation of an attorney-client relationship; rather, the lawyer is simply advertising his or her general availability and how he/she may be reached."

The Committee considered two factors: (1) whether the law firm, by merely publishing contact information on its website that includes an e-mail address, creates a reasonable belief that the law firm is specifically inviting or soliciting the communication of confidential information; and (2) whether it is reasonable for the person providing the information to expect that it will be maintained as confidential. The Opinion cautions that an examination of the totality of the

[2] Rule 1.6 states, in part, that "[a] lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation . . ."

circumstances on a case-by-case basis, including the specific nature of the invitation on the website, is necessary to determine whether the prospective client could have a reasonable expectation of privacy in the information he sends to the attorney. For example, if the website invites the prospective client to include relevant information about his claims or the case in his e-mail, the confidentiality provisions of Rule 1.6(a) apply to the information provided, even if the law firm ultimately declines representation. Further, the Committee recommends that a law firm's website include a disclaimer on its website warning the prospective client not to disclose confidential or sensitive information in the e-mail.

The Committee's Opinion is consistent with the opinion of some other state bars. *See* Arizona State Bar Opinion No. 02-04. The Florida Bar has given one of the most unequivocal statements, saying a "person seeking legal services who sends information unilaterally to a lawyer has no reasonable expectation of confidentiality regarding that information" and an attorney who receives such unilaterally communication "may use or disclose the information." Prof'l Ethics of the Fla. Bar, Op. 07-3. Some other state bars dealing with this issue have concluded that, in the absence of an effective waiver, information contained in an unsolicited e-mail must be kept confidential. *See* Massachusetts Bar Opinion 2007-01; Association of the Bar of the City of New York Formal Opinion 2001-1; Nev. Comm. on Ethics and Prof'l Responsibility, Formal Op. 32 (2005) (holding that if unsolicited communication is in response to lawyer's website or internet advertisement, lawyer must take appropriate precautions such as warnings and disclaimers).

---

[3] The Opinion reaches the same conclusion with respect to information contained in an unsolicited voicemail: "Standing alone, publication of a telephone number in a yellow pages advertisement cannot reasonably be construed as an invitation by the lawyer of [a] firm to an individual to submit confidential information."

TOPIC NO. 11: Social Networking Pages and the Pitfalls of Social Media

In 2009, the District of Columbia Court of Appeals suspended a young attorney's bar license for sixty days after the attorney admitted to several violations of the D.C. Rules of Professional Conduct. *See In re: Stillwell*, 980 A.2d 430, 431 (D.C. 2009). Among the violations, the attorney had "inaccurately represented his status at the law firm where he was employed" and "made a false representation on behalf of a friend." Disciplinary proceedings for misrepresenting an attorney's services and qualifications are nothing new. However, in light of the recent increase in popularity of internet social networking websites, attorneys and law firms should ensure that any public communications on the internet do not contain false or misleading statements regarding concerning a lawyer's services.

Virginia Rule of Professional Conduct 7.1 states that a lawyer may not use any form of public communication containing a false, fraudulent, misleading, or deceptive statement or claim. Violations of Rule 7.1 include communications that

1. contain false or misleading information;
2. state or imply that the outcome of a particular legal matter was not or will not be related to its facts or merits;
3. compare the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated; or
4. are likely to create an unjustified expectation about results the lawyer can achieve, or state or imply that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law.

"Public communication" means any communication other than in-person communications, including internet social networking sites. Rule 7.1(b).

Rule 7.1's prohibition against false or misleading advertisements pre-dates the rise of the "internet age." However, attorneys may not always be mindful that a seemingly innocent internet posting could raise issues under the Rule. For example, one popular networking site that is specifically directed at business professionals allows members to post recommendations regarding other members. One example of a potential ethical problem that could arise is one attorney posting a recommendation containing false or misleading information on behalf of "any other lawyer affiliated with the lawyer or the firm." Thus, the attorney could violate Rule 7.1 if the recommendation contains deceptive information, even though the attorney may not have considered the internet posting to be a traditional "public communication."

Similarly, in December of 2009 the Federal Trade Commission adopted Guide Concerning the Use of Endorsements and Testimonials in Advertising. This guide makes clear that the FTC will scrutinize businesses that use social media to market or advertise their services. These rules are part of a broader effort by the FTC to police false, misleading, and unsubstantiated endorsements, claims, and testimonials.

Social networking sites, blogs and internet media also present other ethical concerns and pitfalls for attorneys. One must to take care engaging in legal discussions or giving responses to legal questions on such sites. Depending on the circumstances, even giving a simple message or response on a social networking site to an individual's legal query could be construed as giving legal advice, thus potentially establishing an attorney-client relationship. Additionally, giving such seemingly benign advice or making extensive commentary on a legal topic in another jurisdiction could expose an attorney to allegations of the unauthorized practice of law in a jurisdiction where they are not licensed.

With the advent of internet networking sites, attorneys are given even more opportunities to communicate with the public and potentially increase their client base. Counsel should be aware, however, that the Rules' prohibition against false or misleading statements continues to apply to electronic communications and should remember that communication via social medial, just as with any other communication, can impact an attorney's other ethical obligations.

2047136v6