Privilege and the Ethical Duty of Confidentiality in Daily Practice and the Deal Context

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Topics to be Covered

- Privilege and Confidentiality in Daily Practice
- Privilege and Confidentiality in the Corporate Context
- Privilege in the Deal Context

Protecting Privilege and Confidentiality: *An Attorney's Ethical Duty*

ABA Model Rule of Professional Conduct 1.6(a) Confidentiality of Information	N.Y. Rule of Professional Conduct 1.6(a) Confidentiality of Information
"A lawyer shall not reveal **information relating to the representation of a client** unless the client gives informed consent, [or] the disclosure is impliedly authorized in order to carry out the representation. . . ."	"A lawyer shall not knowingly reveal **confidential information** . . . or use such information to the disadvantage of the client or for the advantage of the lawyer or a third person . . . unless the client gives informed consent."

Protecting Privilege and Confidentiality: *Limits to the Duty of Confidentiality*

- A lawyer may reveal confidential information in only limited circumstances:

- **ABA Model Rule 1.6(b)**:
  - to prevent reasonably certain death or substantial bodily harm;
  - to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
  - to prevent, mitigate or rectify substantial injury to the financial interests or property of another . . .;
  - to secure legal advice about the lawyer's compliance with these Rules;
  - to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
  - to comply with other law or a court order; or
  - to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client."

- **N.Y. Rule 1.6(b)**:
  - to prevent reasonably certain death or substantial bodily harm;
  - to prevent the client from committing a crime;
  - to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;
  - to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm;
  - (i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or (ii) to establish or collect a fee; or
  - when permitted or required under these Rules or to comply with other law or court order."

Privilege and Confidentiality in Daily Practice

Protecting Privilege and Confidentiality: *The Use of Technology*

- Attorneys have an ethical obligation to protect confidentiality in the context of advancing technology and electronically stored information. The duty arises from several provisions in the ethical rules, among them the duty of competence and the duty of confidentiality.
- *See* **ABA Model Rule of Professional Conduct 1.1**, Comment [8] — Maintaining Competence:
  - "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology . . . ."

Protecting Privilege and Confidentiality: *The Use of Technology*

Compare ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 99-413 (1999):

- "A lawyer may transmit information relating to the representation of a client by unencrypted e-mail sent over the Internet without violating the Model Rules of Professional Conduct (1998) because the mode of transmission affords a reasonable expectation of privacy from a technological and legal standpoint."

with ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 11-459 (2011):

- "A lawyer sending or receiving substantive communications with a client via e-mail or other electronic means ordinarily must warn the client about the risk of sending or receiving electronic communications using a computer or other device, or e-mail account, where there is a significant risk that a third party may gain access. In the context of representing an employee, this obligation arises, at the very least, when the lawyer knows or reasonably should know . . . there is a significant risk that the communications will be read by the employer or another third party."
- "[A]s soon as practical after a client-lawyer relationship is established, a lawyer typically should instruct the employee-client to avoid using a workplace device or system for sensitive or substantive communications."

Protecting Privilege and Confidentiality: *The Use of Technology*

- Lawyers must make reasonable efforts to safeguard information or prevent access or disclosure.
- **ABA Model Rule 1.6(c)**, cmt. 18 *(adopted in 2012)*:
  - Sensitivity of the information
  - Likelihood of disclosure if additional safeguards are not employed
  - Cost of employing additional safeguards
  - Difficulty of implementing the safeguards
  - The extent to which the safeguards adversely affect the lawyer's ability to represent clients
- **N.Y. Rule 1.6(c)**, cmt. 16 *(as amended, effective Jan. 1, 2017)*:
  - Sensitivity of the information;
  - Likelihood of disclosure if additional safeguards are not employed
  - Cost of employing additional safeguards
  - Difficulty of implementing the safeguards
  - The extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or software excessively difficult to use)

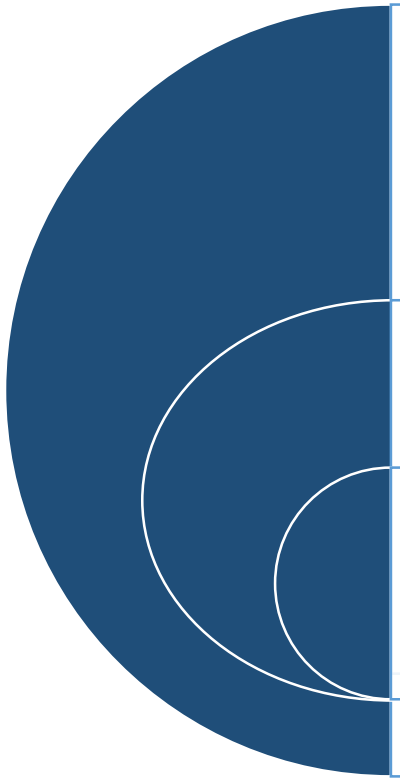
Case Study: Personal Email Addresses

QUESTION:

- You are an employee of Company A. You also serve as an outside director for Company B. You would like to use your Company email address, even for Company B-related, confidential communications. When is it acceptable to use your Company A email address for these purposes?

  A. It is never acceptable to use your Company A email address in this circumstance.
  B. It is acceptable so long as there are only board members on the email chain.
  C. It is acceptable if the email contains “Privileged and Confidential.”
  D. It is acceptable if Company A creates an expectation of privacy in its email addresses, or if you take steps to guard against access by Company A and other third parties.

In re WeWork (Del. Ch. Dec. 22, 2020)

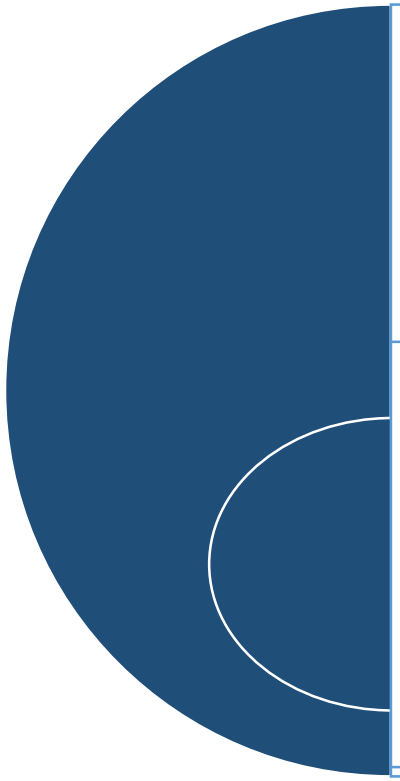


In *In re WeWork Litigation*, the Court of Chancery found that there was no expectation of privacy, as Sprint had a clear policy that employees would have no expectation of privacy in information they sent/received through their Sprint addresses, the Sprint execs were aware of these policies, and they took no effort to "defeat access" by Sprint, "such as shifting to a webmail account or encrypting their communications."

Thus, directors who serve on multiple boards or advise multiple companies must be cautious in using personal or non-company email addresses for company-related, privileged matters.

Companies looking to guard against the risk of waiver should consider implementing policies that either require the use of corporate email addresses for confidential communications, or create a reasonable expectation of privacy in non-corporate emails.

Theroux v. Resnicow (Sup. Ct. N.Y. Co. Dec. 16, 2020)



The action arose from an ongoing quarrel between an actor and his downstairs neighbor (an attorney) in a co-op apartment building who, per the Court, "do not get along, to put it mildly." At issue was whether emails sent by the downstairs neighbor to colleagues at his law firm using his firm-provided computer and email account could be viewed as privileged documents.

The Court held the emails could be privileged, applying a four-part test:

(1) whether the employer bans personal use of work computers and email accounts;

(2) whether the employer monitors the use of the employee's computer or email;

(3) whether third parties (such as other staff of the employer) may access the employee's work computer or work email;

(4) whether the employer notified the employee of its computer use and monitoring policies or whether the employee was otherwise aware of those policies.

Case Study: International Travel

QUESTION:

- You are traveling across the U.S. border, when a border agent instructs you to hand over your phone for inspection. Your phone contains clients' confidential information. What should you do?

A. Hand it over — a border agent's authority is absolute.
B. Throw your phone out of the window.
C. Assert the attorney-client privilege and do not permit inspection unless "reasonably necessary" to comply with the border agent's claim of lawful authority.
D. You should not have taken your phone, as you should never carry clients' confidential information across the border.

Case Study: International Travel

"An attorney should not carry clients' confidential information on an electronic device across the border except where there is a professional need to do so, and [] attorneys should not carry clients' highly sensitive information except where the professional need is compelling."

New York City Bar Ass'n Formal Op. 2017-5 (May 9, 2018)

The opinion also lists precautionary measures, including "using a blank 'burner' phone or laptop" and "uninstalling applications that provide local or remote access to confidential information."

Case Study: “Smart” Devices

QUESTION:

- You recently purchased an Alexa speaker that can respond to voice commands. You are considering installing it in your home office, where you occasionally join calls on which privileged and confidential information is discussed. Is that permissible?

  A. Yes — because the device requires a voice command to activate, client confidential information is safeguarded.
  B. Yes — because no human accesses the voice commands uploaded by the device, client confidential information is safeguarded.
  C. Yes — but only if you intend to use the device to assist in your work.
  D. No — use of the device creates an unnecessary risk of unauthorized access or hacking regardless of its intended use.

Case Study: “Smart” Devices

“Unless the technology is assisting the lawyer’s law practice, the lawyer should disable the listening capability of devices or services such as smart speakers, virtual assistants, and other listening-enabled devices while communicating about client matters. Otherwise, the lawyer is exposing the client’s and other sensitive information to unnecessary and unauthorized third parties and increasing the risk of hacking.”

ABA Formal Op. No. 498 (Mar. 10, 2021)

Case Study: Sharing Contacts

QUESTION:

- You have downloaded a handy new app on your company-provided smartphone that tracks your daily exercise habits. It asks you for access to your contacts, to allow you to compare and compete with others who have downloaded the app. What should you do?

  A. Grant access — incidental sharing of names and email addresses does not implicate ethical duty of confidentiality.

  B. Grant access — but only after checking the terms of use to confirm how the information will be used.

  C. Deny access — client contact information is strictly confidential, and cannot be shared regardless of the app provider's intended use.

Case Study: Sharing Contacts

"If 'contacts' on a lawyer's smartphone include any client whose identity or other information is confidential under Rule 1.6, then the lawyer may not consent to share contacts with a smartphone app unless the lawyer concludes that no human being will view that confidential information, and that the information will not be sold or transferred to additional third parties, without the client's consent."

New York City Bar Ass'n Formal Op. 1240 (Apr. 8, 2022)

Privilege and Confidentiality in the Corporate Context

Privilege and Confidentiality in the Corporate Context

- "Reporting up"
- Directors
- Controlling Shareholders
- Corporate Affiliates

Privilege and Confidentiality in the Corporate Context: *"Reporting Up" Rules*

- **Sarbanes-Oxley Act (2002)** commanded the SEC to issue rules:
  - "requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company . . . " and,
  - "if the counsel or officer does not appropriately respond to the evidence . . . requiring an attorney to report the evidence to the audit committee of the board of directors of the issuer . . . ."
- SEC issued **17 CFR Part 205**: Standards of Professional Conduct for Attorneys.
  - § 205.3 – Issuer as client.
    - "(b) If an attorney . . . becomes aware of evidence of a material violation by the issuer or by any officer, director, employee, or agent of the issuer, the attorney shall report such evidence to the issuer's chief legal officer . . . or to both the issuer's chief legal officer and its chief executive officer . . . forthwith. By communicating such information . . . an attorney does not reveal client confidences or secrets or privileged or otherwise protected information . . . ."
  - § 205.4 – Responsibilities of supervisory attorneys.
    - "(c) A supervisory attorney is responsible for complying with the reporting requirements in § 205.3 when a subordinate attorney has reported to the supervisory attorney evidence of a material violation."
  - § 205.5 – Responsibilities of a subordinate attorney.
    - "(b) A subordinate attorney shall comply with this part notwithstanding that the subordinate attorney acted at the direction of or under the supervision of another person."

Privilege and Confidentiality in the Corporate Context: *"Reporting Up" Rules*

ABA Model Rule 1.13(c)

"If (1) despite the lawyer's efforts . . . the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes the violation is **reasonably certain to result** in substantial injury to the organization, then the lawyer may reveal information relating to the representation **whether or not** Rule 1.6 permits such disclosure . . . ."

ABA Model Rule 1.13(d)

"Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law."

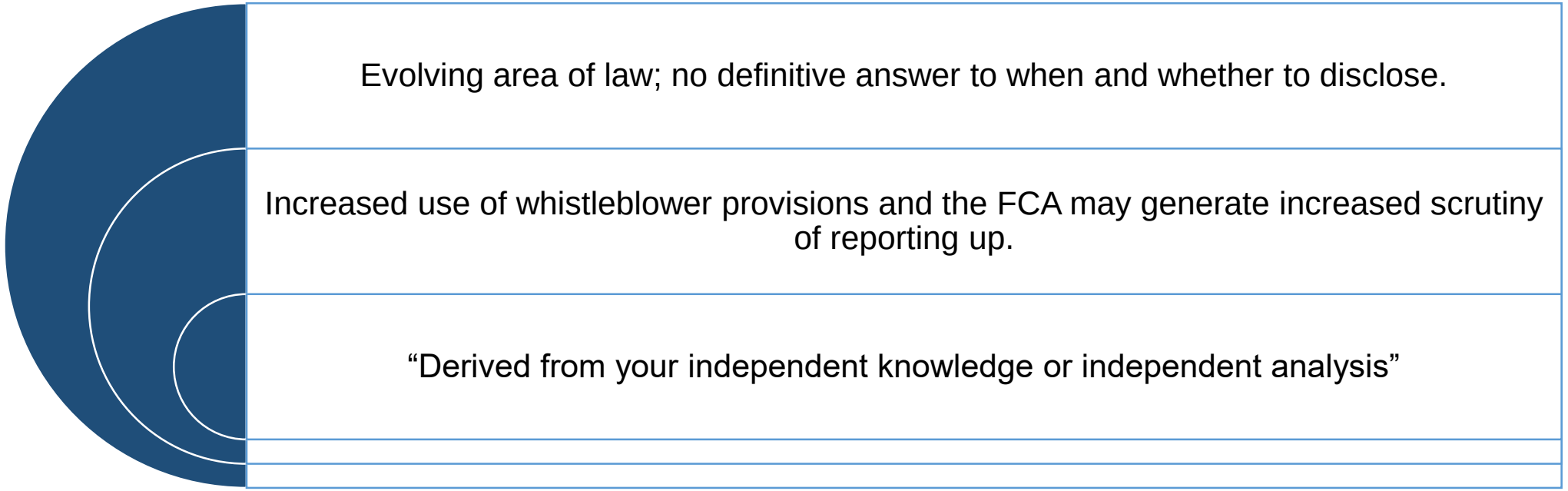
N.Y. Rule 1.13(c)

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.

Privilege and Confidentiality in the Corporate Context: *"Reporting Up" Rules* (cont'd)

Courts recognize a "tension between an attorney's ethical duty of confidentiality and the federal interest in encouraging 'whistleblowers' to disclose unlawful conduct harmful to the government."

– *United States* v. *Quest Diagnostics Inc.*, 734 F.3d 154, 157 (2d Cir. 2013)



Case Study

QUESTION

- Company's former General Counsel joins other former executives in bringing qui tam action alleging the Company was engaged in an illegal kickback scheme. Before leaving the Company, the GC brought concerns to CEO but did not share with Board of Directors. Did the former GC violate his ethical obligations?

  A. Yes. The GC should not have brought his concerns to the CEO — he should have immediately initiated the qui tam action instead.

  B. Yes. The GC revealed and used confidential information of a former client beyond the extent reasonably necessary to prevent the client from committing a crime.

  C. No. Once representation ends, a lawyer may reveal any confidential client information he wishes, even if it is to the disadvantage of that client.

  D. No. The GC's participation in the qui tam action made it reasonably necessary to disclose his former client's confidential information.

Case Study: *United States* v. *Quest Diagnostics Inc.*

- On similar facts, the Second Circuit found the former general counsel violated his ethical duties under the N.Y. Rules.
  - See *United States* v. *Quest Diagnostics Inc.*, 734 F.3d 154 (2d Cir. 2013).
- The court found that although the General Counsel could reasonably have believed the company intended to commit a crime, the disclosures were not "necessary" to prevent the crime because there were alternative sources of information—in fact, the court found his participation was not necessary to the qui tam action at all.

Privilege and Confidentiality in the Corporate Context: *New York County Lawyers' Association Opinion*

- **NYCLA Formal Opinion 746** (October 7, 2013) opined that a New York lawyer may not ethically participate in the Dodd-Frank whistleblower program.
  - "New York lawyers who are acting as attorneys on behalf of clients presumptively may not ethically serve as whistleblowers for a bounty against their clients . . . New York lawyers, in matters governed by the New York RPC, may not disclose confidential information under the Dodd-Frank whistleblower regulations, except to the extent permissible under the Rules of Professional Conduct. This conclusion is the same for current and former lawyers, whether in-house or outside counsel."

Privilege and Confidentiality in the Corporate Context: *Directors*

- Under Delaware law, directors are treated as a "joint client" when legal advice is rendered to the corporation through one of its officers or directors.
  - *Kirby* v. *Kirby*, C.A. No. 8604 (Del. Ch. 1987)
- Rationale: "the board of directors, in its capacity as the governing entity for a corporation, is equivalent to the corporation. Thus, a privilege proper to the corporation cannot be asserted against a person who, at the time, was himself properly representing and, indeed, in some sense, was the corporation."
  - *Dow Chem. Co.* v. *Reinhard*, No. 07-12012-BC, 2008 WL 2245007, at *7 (E.D. Mich. 2008)
- Exceptions:
  - By *ex ante* agreement
  - To appoint a special committee
  - Where sufficient adversity exists
- Former Directors: legal advice furnished ***during the director's tenure***.
- Plaintiff Directors: privilege generated ***in defense of litigation***.

Privilege and Confidentiality in the Corporate Context: *Controlling Shareholders*

- *Some courts have applied the common interest doctrine in the context of communications between a controlling shareholder and a controlled company*
- See *Eugenia VI Venture Holdings, Ltd.* v. *Chabra*, 2006 WL 1096825 (S.D.N.Y. Apr. 25, 2006).
  - The court held that the majority of the recording at issue was protected by the attorney-client privilege because, at the time of the meeting, the attorney's advice "was being received in a confidential setting by a limited group (the AMC directors) that shared a common legal interest with Mr. Glaser," who, while "not a director . . . ***shared similar responsibilities*** because he was Managing Partner of MapleWood, which had majority voting control of AMC."

Privilege and Confidentiality in the Corporate Context: *Corporate Affiliates*

- "Confidential documents shared between members of a corporate family do not waive the attorney-client privilege."
  - *In re JP Morgan Chase & Co. Sec. Litig.*, 2007 WL 2363311, at *6 (N.D. Ill. 2007)
- Under Delaware law, "courts have recognized that parents and their wholly owned subsidiaries have the same interests because all of the duties owed to the subsidiaries flow back up to the parent."
  - *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 366 (3d Cir. 2007)
- But context matters:
  - "Even in the parent-subsidiary context a joint representation only arises when common attorneys are ***affirmatively doing legal work for both entities on a matter of common interest***. . . . A broader rule would wreak havoc because it would essentially mean that in adverse litigation a former subsidiary could access all of its former parent's privileged communications because the subsidiary was, as a matter of law, within the parent entity's community of interest." *Id*. at 379.

Privilege in the Deal Context

Privilege in the Deal Context

- Common Interest
- Representation and Warranty Insurance
- Financial and PR advisors
- Post-Merger Control of Privileged Communications

Privilege in the Deal Context: *Common Interest*

Courts have applied different standards to determine whether parties share in a common interest:

- **Common interest where the parties "may be regarded as acting as joint venturers."** *3Com Corp.* v. *Diamond II Holdings*, 2010 WL 2280734, at *7 (Del. Ch. May 31, 2010)
  - *Delaware codified the privilege in Del. Uniform R. of Ev. 502(b)*
- **No common interest where there is no pending or anticipated litigation.** *Ambac Assur. Corp.* v. *Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 620, 57 N.E. 3d 30, 32 (2016).
- **No common interest between buyer and seller in an asset sale.** *Post* v. *Killington, Ltd., 262 F.R.D.* 393, 397-98 (D. Vt. 2009).
- **Common interest where, in a patent case, buyer and seller had aligned interests with respect to the strength of the patents.** *Crane Sec. Techs., Inc.* v. *Rolling Optics, AB*, 2017 WL 470890 (D. Mass. Feb. 3, 2017).

Privilege in the Deal Context: *Common Interest*

- The litigation requirement affirmed in the *Ambac* decision is not consistently required outside of New York.
  - Several courts have eliminated the requirement that communications must relate to pending or actual litigation.
    - *See, e.g.*, *Welby* v. *United States Health Dept.*, 2016 WL 1718263 (S.D.N.Y. April 27, 2016).
  - Others continue to require at least some likelihood of joint litigation.
    - *See, e.g.*, *Nidec Corp.* v. *Victor Co. of Japan*, 249 F.R.D. 575, 579-80 (N.D. Cal. 2007).
- Regardless of the litigation requirement, courts seem to agree that not only must there be a shared *legal interest*, but the communications must be designed to further that *legal interest*. A *commercial* interest—even where "a joint business strategy . . . include[s] as one of its elements a concern about litigation" is insufficient.
  - *Welby*, 2016 WL 1718263 at *7. *See also Nidec*, 249 F.R.D. at 579-80.

Privilege in the Deal Context: *Representation and Warranty Insurance*

Privilege law has not yet been tested in the context of disclosures to insurers as part of the R&W insurance process.

Confidentiality agreements with R&W insurers make clear that the provision of information to the insurer is not intended to result in a waiver, and that the parties believe they share a common interest.

Practical suggestions for protecting privilege when conducting diligence. . . .

Privilege in the Deal Context: *Financial and PR Advisors*

Traditionally, disclosure to a third party will waive privilege. However, courts have generally found two major exceptions to this rule:

Assisting in Understanding and Interpreting Complex Principles (*Kovel* Doctrine)

- Consulted for the purpose of ***improving the attorney's comprehension*** of relevant factual information or the client's comprehension of legal advice rendered by the attorney.
- Must act in an ***interpretive*** function.
- The communication must be made in confidence for the purpose of obtaining ***legal*** advice from the attorney

U.S. v. *Kovel*, 296 F.2d 918 (2d Cir. 1961)

Functionally Acting as an Employee (Functional Equivalent Doctrine)

- The individual is, ***functionally speaking, acting as a corporate employee*** rather than a fully independent contractor.
- Not hired to assist the attorney; rather essentially ***integrated*** into the company.
- Courts look various criteria such as the person's responsibility and role in the company, relationship with principals, and access to information.

Case Study

QUESTION:

- Your company has retained an investment banker ("Advisor") and outside legal counsel to assist with a merger. Advisor assists in facilitating the transaction in a number of ways, including by performing due diligence, assisting in negotiations, and communicating with in-house and outside legal counsel. Are communications between Advisor and the lawyers protected by the attorney-client privilege under *Kovel*?

  A. Yes. Communications with a financial advisor are always privileged as long as a lawyer is on the email chain.
  B. No. Communications with between a financial advisor and outside counsel are never privileged.
  C. It depends. Communications are privileged as long as Advisor writes "Privileged and Confidential" at the top of the email.
  D. It depends. Communications are privileged as long as the communications are made for the purpose of obtaining or providing legal advice.

Case Study: *Stafford Trading, Inc.* v. *Lovely* (N.D. Ill. Feb. 22, 2007)

On similar facts, the court in *Stafford Trading* held that the communications were privileged where the communications were confidential and made for the purpose of **obtaining or providing legal advice**.

Determinations are made on a document-by-document basis:

Privileged: An email from GS forwarding to Kirkland term sheets for blacklining. The court explained that, "[b]ecause GS was acting as [the party's] agent, seeking legal advice necessary to facilitate the transaction," the document was privileged.

Not Privileged: Emails regarding whether certain business information should be disclosed to the other side. Counsel was neither asked for nor provided legal advice, but merely forwarding the information to the chain. Thus, the substance of the communications was **business**, not **legal** in nature.

Privilege in the Deal Context: *Post-Merger Control of Privileged Communications*

- Where a successor succeeds to the rights of a predecessor corporation by merger, it controls the privilege with respect to certain matters arising before the merger.

New York

Tekni-Plex (1996)

A surviving corporation claimed that it controlled privilege over pre-merger communications between the target corporation (which had merged into the surviving corporation) and its law firm. The Court of Appeals held that although privilege over general business communications vests in the surviving corporation, privilege over **communications relating to the merger negotiations does not.**

Tekni-Plex, Inc. v. *Meyner & Landis*, 89 N.Y.2d 123 (1996)

Delaware

Great Hill (2013)

In contrast to the court in *Tekni Plex, Great Hill* held that, under § 259 of the DGCL and **in the absence of express contractual provisions otherwise**, privilege over ***all*** the target's pre-closing communications—**including communications relating to the merger itself**—vests in the surviving corporation upon the merger (absent any contractual provision to the contrary). To rule otherwise, the court concluded, would be in clear contradiction of Delaware statutory law.

Great Hill Equity Partners IV, LP v. *SIG Growth Equity Fund I, LLLP*, 80 A.3d 155 (Del. Ch. 2013)

- Takeaway: Parties should contract for express provisions regarding post-merger control of pre-closing communications.