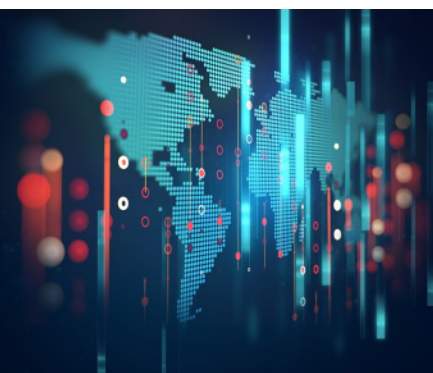


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# Conflicts, Confidentiality and Privilege

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## Speaker



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**Chuck Regan**, a partner in Mayer Brown's Chicago office, currently serves as the firm's lead conflicts attorney. He advises on legal and business conflict issues, as well as other professional responsibility matters, that arise in Mayer Brown's offices worldwide. He is also a member of the firm's Ethics and Loss Prevention Committee. Before taking on his conflicts responsibilities, Chuck was a litigator who focused on benefits and ERISA litigation, with extensive experience in pension class actions and commercial litigation. He earned an AB from the University of Chicago and a JD from Northwestern University School of Law, where he was Managing Editor of the *Northwestern University Law Review*. Before joining Mayer Brown, Chuck clerked for the Honorable Marvin E. Aspen of the United States District Court for the Northern District of Illinois.

## Agenda

- The basic conflict rules, their application to corporate families, and the use of conflict waivers
- The conflicts rules that apply to lateral lawyers, and how those rules can affect corporate legal departments
- The lawyer's duty of confidentiality
- The attorney-client privilege, and the different tests used to determine which corporate actors are deemed to speak for the client for purpose of the privilege

3

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## Rule 1.7(a)(1) – Direct Adversity to Current Clients

- Rule 1.7(a)(1) implements the duty of loyalty.
- It bars representation that “will be directly adverse to another client,” unless both affected clients consent.
- Two components:
  - Cannot be adverse to a client, even in an unrelated, non-contentious matter, unless both clients consent.
  - Where a firm represents a client against an adversary, the firm cannot take on representation of the adversary, even in an unrelated matter, without both clients' consent.
- Adversity does not turn on contentiousness.

4

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## Conflicts Outside the US

- Unlike US rules, ethics rules in Europe and Asia do not include duty of loyalty, and allow a law firm to be adverse to clients in matters not related to the firm's work for them.
  - Where US rules are client centered, rules in Europe and Asia are matter centered.
  - Cannot act for multiple parties in same or related matter if conflict or significant risk of conflict – generally not waivable.
  - Client relation considerations remain, especially in contentious matters.



5

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## Rule 1.7(a)(2) – Material Limitation on Representation

- Rule 1.7(a)(2) says a conflict exists, requiring consent from the affected client, when
  - “there is a 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.”
- “[S]ignificant risk” and “materially limited”
- Responsibilities to another client
- Personal interests of lawyer or firm



6

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## Corporate Family Issue – When Can a Law Firm Be Adverse to the Affiliate of a Client?

- This is probably the most difficult issue conflict lawyers face on a daily basis.
- By itself, corporate affiliation will not create a conflict.
  - Cmt [34] to Rule 1.7: “A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary.”
  - Similarly, ABA Op. 95-390: “The fact of corporate affiliation, without more, does not make all of a corporate client's affiliates into clients as well.”



7

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## Corporate Family Issue – When Can a Law Firm Be Adverse to the Affiliate of a Client?

- Exceptions:
  - Where “the circumstances are such that the affiliate should also be considered a client” – a fact and circumstances test
  - Where “the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client”
  - Where lawyer and client have an understanding that lawyer will avoid representation adverse to affiliates
    - When we do agree, we want to have clarity as to what is covered.



8

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## Waivers

- Under Rule 1.7(b), a lawyer may represent a client, notwithstanding a conflict, if four conditions are met:
  - (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.

9

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## Waivers

- Is the conflict one that can be waived?
  - Cmt [15] to Rule 1.7: “Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest.”
- Consent must be “informed.”
- Waivers are narrowly construed.
- Most jurisdictions require consent to be confirmed in writing.



10

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## Conflict Rules and In-House Counsel

- Conflicts that arise when the same attorney represents affiliated parties within an organization
  - Can someone claim, now or in the future, that the interests of the two parties were different, and that one lawyer cannot represent both because the representation of one client was materially limited by responsibilities owed to the other?
- Representing both sides in an intra-corporate dispute or transaction



11

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## Rule 1.13 – Representing Entity and Constituents

- The identity of the client affects many of the issues that both in-house and outside counsel face.
- Rule 1.13 – Representing Entity and Constituents
  - “(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”
  - Tension between duties to entity and relationship with persons who run it



12

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## Rule 1.13 – Representing Entity and Constituents

- Representing both entity and officer, director, or “other constituent” allowed as long as no conflict – Rule 1.13(g)
  - What to do if unforeseen adversity develops
  - Confidentiality and privilege considerations
- Necessary to alert constituents that you are representing the entity – Rule 1.13(f).
  - “In 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.”

13

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## Lateral Lawyers and Conflicts – Lateral’s Duties to Former Clients

- Under Rule 1.9, lawyer cannot be adverse to former clients in matters that are substantially related to the work done for them, unless consent is obtained.
  - Rule 1.9(a): “A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.”
- A means of protecting client confidences
- “[S]ubstantially related” and “materially adverse”



14

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## Lateral Lawyers and Conflicts – Imputation of Conflicts to Others – General Rule

- As a general matter, if one lawyer in a “firm” has a conflict, all lawyers in the firm have a conflict.
  - Rule 1.10(a): “While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm . . . .”
- Rule 1.0(c) defines “firm” to include “lawyers employed in . . . the legal department of a corporation or other organization.”

15

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## Lateral Lawyers and Conflicts – Imputation in the Case of a Lateral Lawyer

- When lawyer leaves one firm to join another, lawyer may not, without consent, act adversely to first firm’s client in the same or substantially related matter, if lawyer has relevant confidential information.
  - Rule 1.9(b): A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
    - (1) whose interests are materially adverse to that person; and
    - (2) about whom the lawyer had acquired [protected confidential] information . . . that is material to the matter; unless the former client gives informed consent, confirmed in writing.
- Imputation rules vary from state to state.

16

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## Lateral Lawyers and Conflicts – Disqualification of Entire In-House Legal Department

- *Dynamic 3D Geosolutions, LLC v. Schlumberger Ltd.* (W.D. Tex. 2015), *aff'd*, 837 F.3d 1280 (Fed. Cir. 2016), applied these rules to in-house legal department.
  - Lawyer who was in-house patent counsel at Schlumberger went to Dynamic, which subsequently brought suit against Schlumberger, claiming it infringed Dynamic's patent.
  - Schlumberger moved to disqualify in-house lawyer, but also the rest of Dynamic's legal department and outside counsel.
  - Court found that Dynamic lawsuit was substantially related to work lawyer did at Schlumberger, so she was disqualified.
  - Court rejected argument that usual rules should not apply to rest of in-house lawyers, noting Model Rule definition of "firm".

17

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## Lateral Lawyers and Conflicts – Disqualification of Entire In-House Legal Department

- *Dynamic 3D Geosolutions v. Schlumberger* (cont'd)
  - Court therefore applied rebuttable presumption that lateral lawyer had shared confidential information learned at Schlumberger with her new colleagues at Dynamic.
  - Dynamic could not rebut this presumption, because despite a screen, there was evidence that lawyer had participated in meetings about action against Schlumberger with both in-house and outside counsel.
  - Both in-house legal department and outside firm disqualified.
  - Court dismissed case without prejudice, to allow filing of suit prepared by counsel to not be infected by conflict.
  - Federal Circuit affirmed in all respects.

18

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## Lateral Lawyers and Conflicts – Disqualification of Entire In-House Legal Department

- In light of *Dynamic 3D*, corporate legal departments need to consider whether new lawyers have been opposite the company in prior jobs.
  - If so, and depending on the jurisdiction, may need to get consent from adverse party, or face the possibility of a disqualification motion.
  - At minimum, an effective screen needs to be put in place.



19

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## Rule 1.6 - Confidentiality

- Under Model Rule 1.6, a lawyer is obliged to keep all “information relating to the representation of a client” confidential, unless information falls into a specific exception.
- In New York, by contrast, a lawyer is only barred from disclosing “confidential information,” that is, “information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential.”

20

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## Rule 1.6 - Confidentiality

- Rule 1.6(b) provides exceptions where disclosure is permitted, e.g., to prevent reasonably certain death or substantial bodily harm, or to prevent client from committing crime or fraud reasonably certain to result in substantial financial injury, where client has used or is using lawyer's services.
  - As conditions suggest, exceptions are not to be invoked lightly.
- States have adopted variations of Rule 1.6(b) exceptions, so check rules in your jurisdiction.

21

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## Attorney-Client Privilege – Definition

- Generally, attorney-client privilege protects
  - confidential communications
  - between lawyer and client
  - for the primary purpose of obtaining or rendering legal advice.
- The burden on the party seeking protection of privilege to show that requirements have been satisfied.
- Privilege is narrowly construed.
  - It is not as broad as the ethical duty of confidentiality, which protects all information relating to representation of a client.
- Where it applies, however, privilege will bar disclosure.

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## Attorney-Client Privilege – Policy Rationales

- Client needs to be comfortable in providing attorney with all facts.
- Attorney needs all facts to advise client.
- Attorney needs all facts to effect compliance with law.
- By barring further disclosure, privilege encourages client to disclose all facts to attorney.



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23

## Attorney-Client Privilege – Confidential Communications

- Communication must be confidential to be protected.
- As a result, where there is no reasonable expectation of confidentiality, privilege will not apply.
  - Importance of limiting dissemination of communications intended to be privileged.
- Privilege protects both oral and written communications.
- Privilege protects communications, not the facts underlying those communications.
- Privilege applies to both communication from client to lawyer, and communication from lawyer to client.



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24

## Attorney-Client Privilege – Between Lawyer and Client

- Is the party receiving the communication a lawyer?
  - Licensing of in-house counsel under state law
  - Differing admission requirements in various states
    - Unauthorized practice of law
  - Application of privilege if lawyer is not properly licensed
- In a corporation, whose communications count as the client's?
  - Different states apply different tests.
    - Subject matter test
    - Control group test



25

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## Attorney-Client Privilege – Between Lawyer and Client

- Subject Matter Test – *Upjohn v. US*, 449 U.S. 383 (1981):
  - Confidential communication between corporate counsel and corporate employees at any level is privileged if (a) communication was made by corporate employee to corporate counsel at direction of their superiors; (b) superior directed employee to communicate with counsel in order for corporation to obtain legal advice; (c) employee's responsibilities included subject matter of communication; and (d) employee was sufficiently aware that questioning was to allow corporation to obtain legal advice.
- Applies to all cases arising under federal law.
- Adopted by majority of states.

26

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## Attorney-Client Privilege – Between Lawyer and Client

- Control Group Test
  - Communication between lawyer and corporate representative is privileged only if representative is in a position to act on the advice rendered, or has authority to obtain legal representation on behalf of the corporation.
- Much narrower protection than subject matter test
- Adopted by minority of states
  - Illinois
- Some states have not explicitly chosen a test.
  - New York



27

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## Attorney-Client Privilege – For the Primary Purpose of Obtaining or Rendering Legal Advice

- Consultations with outside counsel are usually presumed to be for the purpose of obtaining or rendering legal advice.
- Answer is not so clear for in-house counsel, who often plays multiple roles.
  - If counsel has ability to make relevant decision for company, rather than just advising company's decision-makers on legal consequences of decision, court may conclude that primary purpose of communication was to obtain or provide business advice, not legal advice.
  - Company often held to have burden of showing that in-house lawyer gave advice in legal capacity.

28

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## Attorney-Client Privilege – For the Primary Purpose of Obtaining or Rendering Legal Advice

- Method of communication within company may also defeat privilege.
- Communication seeking advice from lawyer and non-lawyers in company may well not be considered for the primary purpose of obtaining or rendering legal advice.
  - Cannot copy lawyer to shield otherwise unprotected communication.
- To increase chances that privilege will be deemed to apply, specify that you are providing legal advice, and limit dissemination to appropriate actors within company.



29

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## Attorney-Client Privilege – Waiver

- Privilege belongs to client, and only client can waive it.
- Privilege can be deemed waived if client puts legal advice at issue in litigation, or if privileged material is used to prepare a witness.
- Failure to take appropriate steps to prevent inadvertent disclosure can also be considered waiver.
- In dual representation, privilege may be lost as to other represented party.
- Who controls privilege after sale of company or its assets?

30

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## Attorney-Client Privilege – Other Concerns

- Exceptions
  - Shareholder Derivative Actions (“Garner Exception”)
  - Fiduciary Exception
  - Crime-Fraud
- Foreign Law
  - Some jurisdictions do not recognize privilege between in-house counsel and company.
  - Case law regarding EC investigations rejects privilege for in-house counsel and lawyers not qualified in the jurisdiction, even if communication was made in jurisdiction that recognizes privilege.

31

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## Attorney-Client Privilege – Takeaways

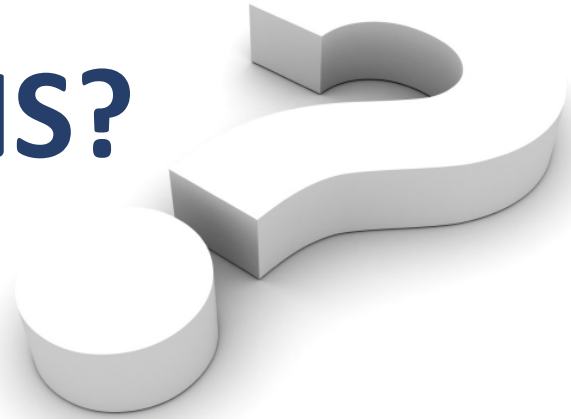
- Know applicable law.
  - Be aware of the varying protections under different U.S. jurisdictions
  - Be careful when foreign law may apply
- Consider whether persons with whom you are communicating will be considered the client for privilege purposes.
- When you are providing legal advice, make that clear.
- Limit dissemination of communications, and have procedures in place to preclude inadvertent disclosure.

32

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# QUESTIONS?



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