

# Legal Ethics

Maximizing Privilege Protection  
When You Wear Many Hats



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Northeast Corporate Counsel Forum 2016

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# Speakers

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# Preserving Privilege

for

# Internal Investigations



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## Scenario (In Three Stages)

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Internal Audit review of accounting irregularities at Malaysian division of Neverfear Covers, an international cellphone case manufacturer.

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# Attorney-Client Privilege

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- Requires communication with an **actual attorney**
- Must be a **request** for legal advice or a rendering of legal advice
- Intended to be kept **confidential**
- Privilege is **absolute** unless waived

# Work Product Doctrine

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- Materials must be created by **lawyer, client or its agent**
- In **anticipation** of litigation
- Protection is **not absolute** but subject to factual analysis

# Privilege Concerns for First Stage

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- Who is the client (Internal Audit or Legal)?
  - Once investigation goes **beyond routine audit concerns**, Legal should be closely involved.
  - Legal should retain any outside auditors.
    - There should be a formal retainer letter.
    - It should be clearly stated that the purpose of the retention is to assist Legal in providing legal advice.



# Privilege Concerns for First Stage

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- **Outside auditors should engage with Legal** closely on all steps of document gathering, including setting search parameters and identifying individuals to be considered.
- Since we are dealing with an issue in Malaysia, **local counsel** should be involved to advise on local privilege issues and questions of local law (employment, civil and criminal).



# Privilege Concerns for Second Stage

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## ➤ The Employee Interview

- Should the forensic investigator lead the interview?
- Employee should be given **Upjohn warning**.
  - Lawyer for company does not represent the individual.
  - Purpose of the interview is to learn about circumstances at issue in order to give legal advice to Neverfear.
  - Conversation will be privileged, but it is Neverfear's privilege, not the employee's.
  - Conversation should be kept confidential to avoid waiving privilege.
  - Issuance of warning should be part of the record of the investigation.

# Privilege Concerns for Third Stage

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- Drafting of the Interview Notes
  - Should **not be a literal transcript** and must reflect the opinions and impressions of the lawyer to be privileged.
- Drafting of Summary Report
  - Remember: the purpose of investigation was to assist in providing legal advice. Be careful about **non-legal conclusions** (e.g. termination of employment).
  - Limit distribution of Report to the greatest extent possible.

# Privilege Concerns for Third Stage

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- **Waiver.** There should be no expectation of selected waiver.
- **Disclosing facts** is fine, but opinions, impressions and legal conclusions should be protected.
  - In lieu of turning over summary and notes, **consider providing excerpts** or preparing a supplemental summary of facts.
  - Presentation can be oral, but should also **stick to the facts**.
  - Malaysian Government may not be the last entity knocking on your door (SEC/DOJ).
  - Privilege concerns extend to company's auditors.

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# Scenario

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- **You are in-house general counsel.** Your product is wildly successful. You and a handful of competitors for a variety of reasons, including but not limited to government regulation do not compete on price. You compete on market share.
  - The **government investigates and prosecutes a competitor** for improper marketing techniques. The techniques are common throughout your industry.
  - Your **competitor pleads guilty** and pays a fine in the hundreds of millions of dollars.
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# Scenario

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Your CEO asks you to determine whether or not your company is **susceptible to prosecution** and asks for an evaluation of your company's marketing practices.

Because of the size of the task, **employees from outside of the Law Department** are brought on to your staff to assist in the project.

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# Scenario

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Subsequently, **you and your competitors are sued** in a class action lawsuit over your marketing practices.

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# Privilege Issues re: Third-Party Vendors

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- During discovery, you are required to gather and produce documents. The **ESI vendor** is not selected by you, but is selected by the company as a **general contractor** for all of its' electronic information and document management needs.
- There is a contract in place with the vendor **prior to the filing of the lawsuit.**
- You are directed to use that vendor and **have no discretion.**



# Privilege Issues re: Third-Party Vendors

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The plaintiff **serves a subpoena** on the ESI provider seeking details about the conversations you, your subordinate lawyers and staff had with them about the case. You move to quash based on **attorney-client privilege**.



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# Privilege Issues re: Third-Party Vendors

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- Pursuant to *Upjohn v. U.S.* 449 U.S. 383 (1981), the corporation holds the privilege and **communications between counsel and employees** of the corporation made for the purposes of rendering or providing legal advice are privileged.
  - Generally, the privilege is between the **client and the lawyer** concerning communications during the course of the attorney-client relationship.
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# Privilege Issues re: Third-Party Vendors

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What are the parameters of the privilege when communications are made to a third party that is not a corporate employee?

# Privilege Issues re: Third-Party Vendors

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Normally communications between a client's agent and the attorney would be protected only if the **communications are authorized or ordered** by the attorney or otherwise created **in the course of the attorney-client privilege**.

**See for example:**

*Trachtenberg v. Township of West Orange*, 416 N.J. Super 354 (App. Div. 2010), and  
*State v. Kociolek*, 23 N.J. 400 (1957).

# Privilege Issues re: Third-Party Vendors

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The issue was recently addressed by a Florida Appeals Court in *Las Olas River House Condominium v. Lorch*, 181 So. 3d 556 (2015).

# Privilege Issues re: Third-Party Vendors

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## The test is whether:

- 1) the communication would not have been made **but for the contemplation** of legal services;
  - 2) the employee making the communication did so **at the direction** of his/her corporate superior;
  - 3) the superior made the request to the employee **as part of** the corporation's effort to support legal services or advice;
  - 4) the content of the communication relates to the legal services being rendered and the subject matter of the communications is **within the scope** of the employee's duties; and
  - 5) the communication is **not disseminated** beyond those persons who, because of the corporate structure, need to know its contents.
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# Privilege Issues re: Third-Party Vendors

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- It may very well be that in our example there would be no privilege attaching to the communications with the third-party vendor except to some limited extent.
- Even if it is a general vendor of the company, a separate engagement letter as a consultant to the attorney should be drafted and it should be drafted in a way that makes it clear that the vendor is being specifically engaged to provide litigation support services for the lawyer either in an advance or in anticipation of litigation or in assisting with actual litigation.

# Privilege Issues With Non-Lawyer Employees

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- It comes out during the latter phases of discovery that one of the employees on loan to your department was under the impression that **it was his job** to protect the company to the fullest extent possible. Therefore, unbeknownst to you, but perhaps through the negligent supervision of one of your assistant general counsels, this employee took **otherwise discoverable and damaging information** and forwarded it to your assistant general counsel in a confidential memorandum.
  - It was his opinion and his intent, that by forwarding this memorandum he **converted the documents to privileged documents**, a number of which appeared on a privilege log and were withheld during the litigation.
  - As a result, **an ethics grievance** is filed against you and the AGC for violating R.P.C. 5.3 -responsibilities regarding non-lawyer assistants.
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# Privilege Issues With Non-Lawyer Employees

## R.P.C. 5.3 states:

- With respect to a non-lawyer employed or retained by or associated with a lawyer; a) every lawyer, law firm or organization authorized by the Court Rules to practice law in this jurisdiction shall adopt and maintain **reasonable efforts to ensure that the conduct of non-lawyers retained or employed by the lawyer, law firm or organization is compatible with a professional obligations of the lawyer**; b) a lawyer hiring, having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the persons conduct is compatible with the professional obligations of the lawyer and the responsible conduct of such a person that would be a violation of the rules of professional conduct engaged in by a lawyer if; c) the lawyer has failed to make reasonable investigation of circumstances that would disclose past instances of conduct by the non-lawyer incompatible with the professional obligations.
- The **same language applies to subordinate lawyers** and the ethics complaint also charges you with violating the R.P.C. with respect to the conduct of the assistant general counsel supervising the litigation.

# Privilege Issues With Non-Lawyer Employees

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*In re Fusco*, 142 N.J. 636 (1995) where the Supreme Court imposed discipline on an attorney for **improperly delegating record keeping responsibilities** for his law firm's trust account to an associate over whom the Respondent had direct supervisor authority.

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# Privilege Issues With Non-Lawyer Employees

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Law firms have the obligation to have a systemic and organized routine for **periodic review** of the work being handled by subordinate attorneys. *In re Yacavino*, 100 N.J. 50 (1985). The rule also requires that reasonable efforts be put in place to **supervise non-lawyer assistants** such as paralegals, bookkeepers or investigators. Under the R.P.C., lawyers and law firms are required to undertake reasonable efforts to ensure that the conduct by such employees does not violate the R.P.C. Here the conduct of the non-lawyer assistant violated a number of R.P.C.

# Privilege Issues With Non-Lawyer Employees

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## **R.P.C. 3.4, a lawyer shall not:**

a) unlawfully obstruct another parties' access to evidence, or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value or counsel, or assist another person to do any such act; and

b) in pre-trial procedure, make frivolous discovery requests, or fail to make reasonably diligent efforts to comply with legally proper discovery requests by an opposing party.

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# Privilege Issues With Non-Lawyer Employees

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*Smith-Bozarth v. CARA*, 329 N.J. Super 238 (App. Div. 2000).

An attorney is required to exercise **reasonable care** to prevent co-workers and employees from breaching ethical obligations such as attorney confidentiality. The *Smith-Bozarth* case also held that because non-lawyer assistants may confront ethical issues in daily practice on a wide variety of matters, reasonable efforts to ensure ethical conduct may include **in-house training or outside course work** offered in an increasing number of paralegal training programs.

# Privilege Issues With Non-Lawyer Employees

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Further, attorneys having direct supervisory authority over non-lawyer assistants must take reasonable action to oversee their conduct and may be held responsible for failing to do so.

*In re Stransky, 130 N.J. 38 (1992).*



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# Privilege Issues With Non-Lawyer Employees

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The attorney can be liable **if the misconduct is ordered or ratified by the lawyer**, or the lawyer **knows of the misconduct** but fails to take reasonable action to remediate it, at a time when it's consequences can be avoided or mitigated, or the lawyer is guilty of negligent hiring practices that fail to disclose past instances of misconduct of the non-lawyer. Lastly, the lawyer's reliance on the non-lawyer assistant, **does not mitigate** breaches of professional responsibility for which the lawyer is responsible.

*See In re Pomerantz, 155 N.J. 122 and In re Irizarry, 141 N.J. 189.*

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# Privilege Issues With Non-Lawyer Employees

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The ABA comment on the model Rule gives some suggestion that reasonable policies and procedures would be those designed to **detect and resolve** conflicts of interest, **identify dates** by which actions must be taken in pending matters, **account** for clients' funds and property and **ensure** that inexperienced lawyers are properly supervised.

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# The In-House Counsel Dilemma

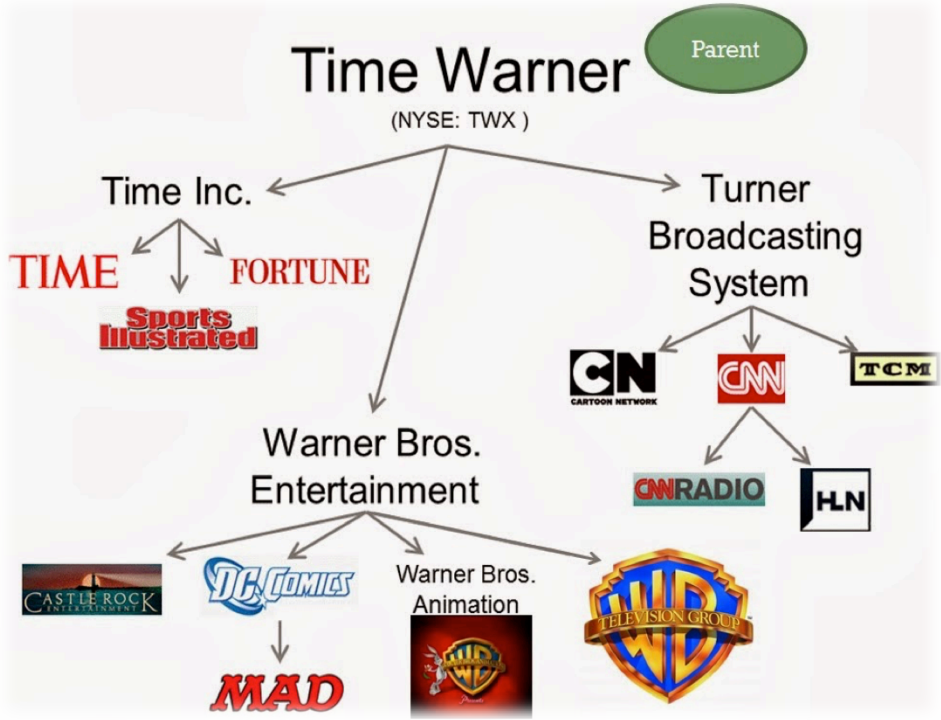
Who is your client?

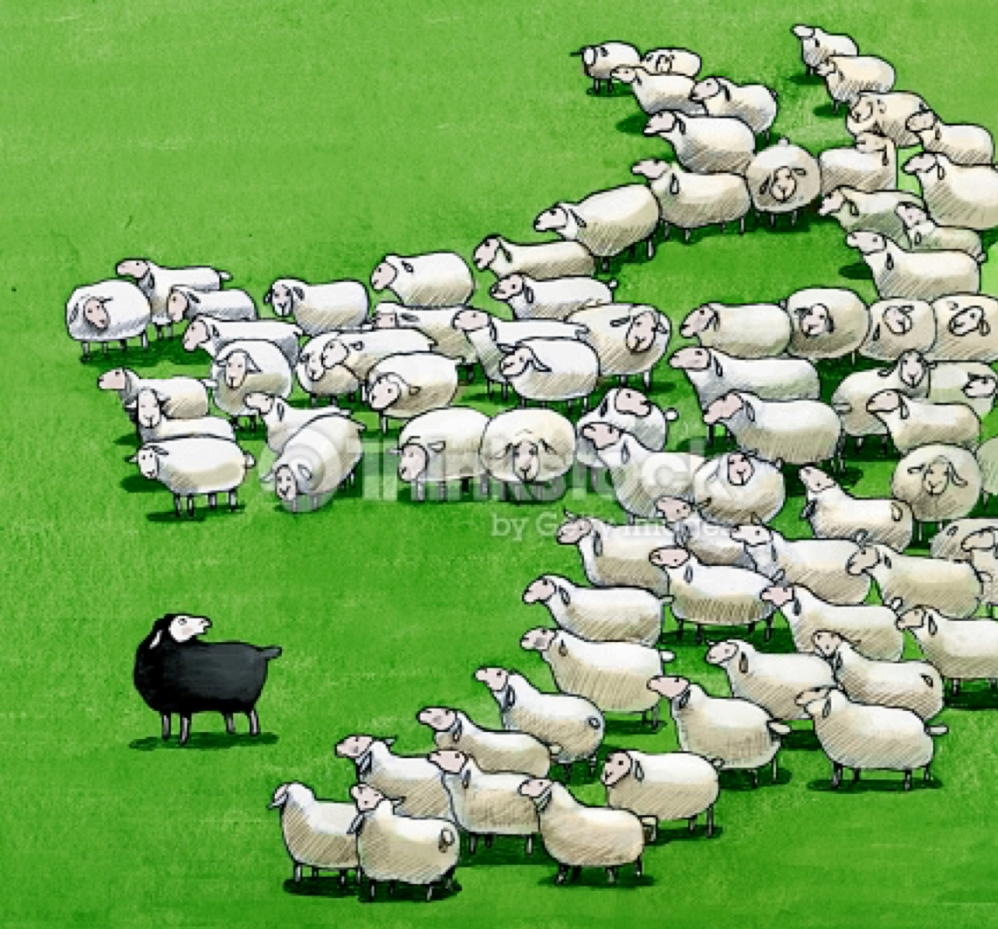


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# All in the Family





# Family Feud

There are  
Families and  
then there  
are Families



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# Family Feud

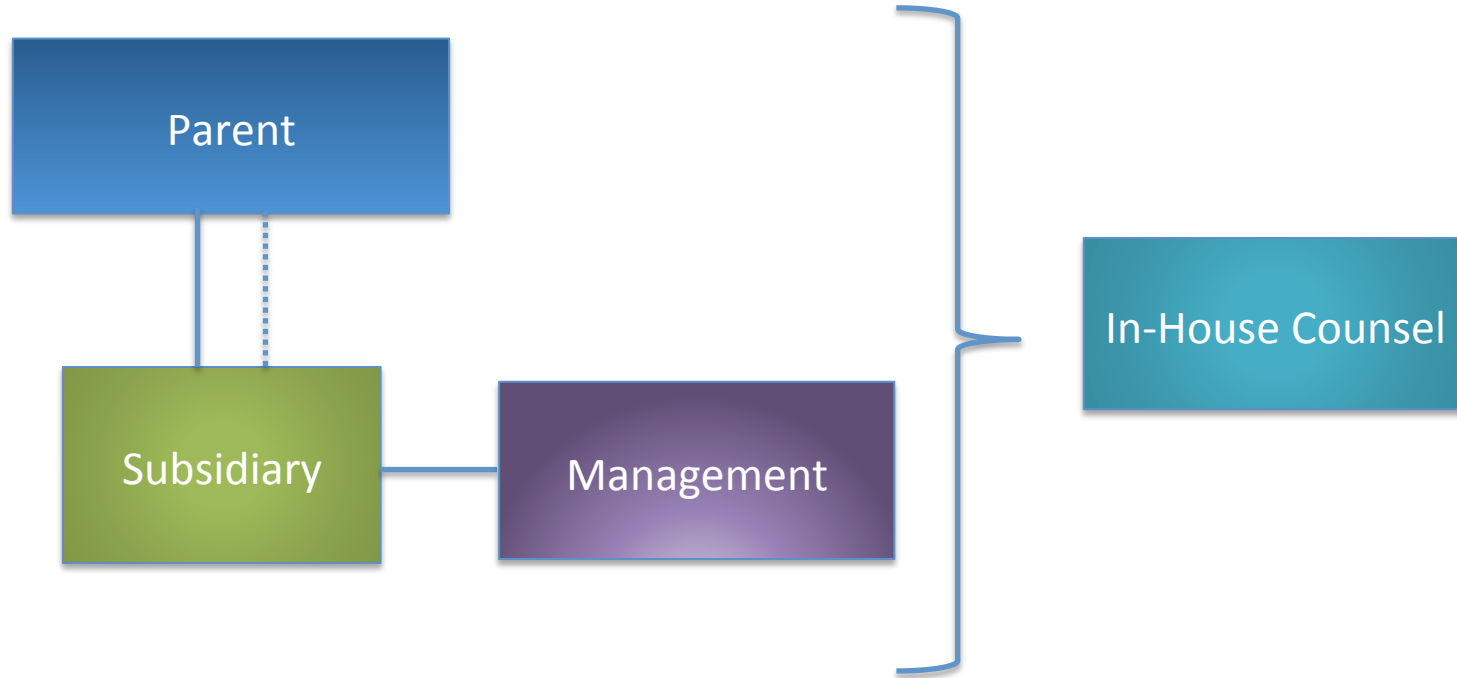
There are  
Families and  
then there  
are Families



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# Breaking Up: It's Not Easy



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## Scenarios that can arise

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- Conflict of interest at the spinoff level
- Future litigation between your now current client (parent) and your former client (subsidiary)

Whose Side Are You Going To Take?

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Cannot practice under  
'veil of ignorance'

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## Family Lessons

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- Pick your poison
  - Ensure informed waivers are signed and followed
  - Limited scope representation
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*“But I already asked the other parent company. They told me to ask you.”*



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