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Ethics Issues for In-House Counsel Managing Third-Party Relationships:  
Law Firms, Other Vendors, and Joint Venture Relationships

# Panelists

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# **PART 1: ETHICS ISSUES IN MANAGING OUTSIDE COUNSEL**

# **SUPERVISION OF OTHER LAWYERS**

# Virginia Rule 5.1 – Supervisory Lawyers

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Are in-house lawyers supervisory to outside counsel?

## Virginia Rule 5.1(b)

“(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.”

## Virginia Rule 5.1(c)

Can have responsibility if you “ratify” the conduct involved – 5.1(c).

“(c) A lawyer shall be responsible for another lawyer’s violation ... (1) if the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved.”



# JOINT REPRESENTATIONS

# Joint Representations – Benefits

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- One of the first questions: who is your outside counsel going to represent in a particular matter?
- Why have a joint representation?
  - Cost efficient
  - Benefits of one voice





# Virginia Conflicts Rule – Current Clients

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## Virginia Rule 1.7(a)

- Except as provided in paragraph (b), a lawyer shall 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.

# Virginia Conflicts Rule – Current Clients

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## Virginia Rule 1.7(b)

- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph(a), a lawyer may represent a client if each affected client consents after consultation, and:
  - (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) the consent from the client is memorialized in writing.

# Conflict Scenarios – Scenario #1 – Employee Malfeasance

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- Company and employee are jointly represented by in a lawsuit where the plaintiff has brought a fraud claim alleging inflated invoices with padded costs, and named both the Company and the employee as defendants.
- Midway through the lawsuit, the company unearths evidence that the employee padded the invoices.
- Who should you talk to first – the outside counsel or the employee?
- Can you direct the law firm to withdraw from the employee?

# Conflict Scenarios – Scenario #2 – The Irate Former Employee

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- Company and former employee are jointly represented by a law firm in patent litigation. Shortly before the former employee's deposition, the former employee calls you and says actually he thinks he should have been named as an inventor on the patent he is about to testify about. Inventorship is not (currently) an issue in the case but he seems pretty worked up about it and you have no idea what he might say at the deposition.

# Conflict Scenarios – Scenario #2 – The Irate Former Employee

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Virginia Rule 1.7, comment 29

- For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the client's interests can be adequately served by common representation is not very good.

# Conflict Scenario – Scenario #3 – Employee on the Rocks

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- Your company has just been sued for employment discrimination. The plaintiff named the company and also her supervisor. Before retaining outside counsel, your internal fact-gathering reveals no evidence of discrimination, but that the supervisor who was named has had a series of poor performance reviews unrelated to discrimination. Her supervisors have begun looking for a replacement.

# Conflict Scenario – Scenario #3 – Employee on the Rocks

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Virginia Rule 1.7, comment 31

“As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect the client’s interests and the right to expect that the lawyer will use that information to that client’s benefit. See Rule 1.4.”

# Preventative Measures

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Is the employee someone you want to trust with at least some attorney-client privileged information?

Virginia Rule 1.7, comment 30

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



# Preventative Measures

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## Engagement letter language

- In the event of a conflict, the law firm sticks with the company client and can use any and all information obtained from the employee as it sees fit.

## Referral counsel for individual representations

- Have relationships with referral counsel so that you have a roster of people who are good and do not represent the company directly

# **GRANTING CONFLICT WAIVERS**

# General Rule – Adversity to Current Clients Not Permitted

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## Virginia Rule 1.7(a)

Except as provided in paragraph (b), a lawyer shall 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.

# Key Exception to the General Conflict Rule

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## Virginia Rule 1.7(b)

Notwithstanding the existence of a concurrent conflict of interest under paragraph(a), a lawyer may represent a client if each affected client consents after consultation, and:(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client....

and (4) the consent from the client is memorialized in writing.

# Waiver Considerations

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- What kinds of situations are you asked for conflict waivers?
- When are you inclined or not inclined to give waivers?
- What kind of requirements or language do you seek when grant a conflict waiver?

# Advance Waivers

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## ABA Model Rule 1.7, comment [22]

“Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding.”

## No Virginia Rules analog. Virginia Rule 1.7, comment [19]

A client may consent to representation notwithstanding a conflict. However, 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.

## Example of Advance Waiver (Found Insufficient)

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- a) Unless we have your specific agreement that we may do so, we will not represent another client in a matter which is substantially related to a matter in which we represent you and in which the other client is adverse to you.
- b) In the absence of a conflict as described in subparagraph a) above, you acknowledge that we will be free to represent any other client either generally or in any matter in which you may have an interest, as long as such matters are not the same as or substantially related to matters in which we are, or have been, representing you.

*Lennar Mare Island, LLC v. Steadfast Ins. Co.*, 105 F. Supp. 3d 1100 (E.D. Cal. 2015)

# **CORPORATE COUNSEL AND UNREPRESENTED EMPLOYEES**



# Unrepresented Employees – Ethics Considerations

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## Virginia Rule 1.13(a)

Rule 1.13(a) states that: “[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”

## Virginia Rule 1.13(d)

“In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.”

# Unrepresented Employees – Ethics Considerations

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## Virginia Rule 4.3

“When dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.”

# Upjohn and Privilege Considerations

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- For the corporate interviews to be protected by the attorney-client privilege, the investigation should be undertaken “in order to secure legal advice from counsel.” *Upjohn Co. v. United States*, 449 U.S. 383, 394 (1981).
- Corporate counsel should explain to the employees from whom information is sought:
  - The information is being gathered in aid of providing legal advice to the company;
  - The attorney-client privilege is controlled only by the company and can be waived by the company.

## Lack of Upjohn

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- Sanford Ponzi scheme case (*Pendergest-Holt*) – attorney represented Sanford and accompanied an individual employee to her SEC deposition. Attorney said at the deposition he represented her in her capacity as an officer or director of a Sanford company. Resulted in malpractice claims against corporate counsel.
- Broadcom/*U.S. v. Ruehle* – parallel SEC investigation and civil litigation; outside counsel obtained statements from Broadcom executive that they then shared with the SEC. The executive believed the outside counsel represented him because there had been no Upjohn warning.

# Handling Employee Depositions

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- Are you going to have outside counsel represent the employee for purposes of the deposition?
- Virginia Rule 1.2(b) – limited scope representations  
“A lawyer may limit the objectives of the representation if the client consents after consultation.”
- Useful analytical opinion: NYC Formal Op. 2016-2.
- If the attorney is not going to represent the witness, what should the employee be told to expect to the deposition?

# Preventative Measures

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- Participate in initial meetings between witness and outside counsel
- Remind counsel to do *Upjohn* warnings, or do it yourself and document that it was done
- Decide how deposition representations will be handled to avoid employee confusion

# **MANAGING DOCUMENT PRESERVATION, RESPONSES, AND PRODUCTION**

# Document Preservation Steps

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## Virginia Rule 3.4(a)

A lawyer shall not:

- (a) Obstruct another party's access to evidence or alter, destroy or conceal a document or other material having potential evidentiary value for the purpose of obstructing a party's access to evidence. A lawyer shall not counsel or assist another person to do any such act.



# Document Preservation Steps

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- Identifying custodians who own data
- Identifying central or department systems that contain data
- Finding archives or older repositories
- Preservation memos
- Custodial interviews
- Locking systems vs. immediate collection
- Personal devices

# Review of Discovery Responses

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## Virginia Rule 3.4(e)

“A lawyer shall not: (e) make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.”

Same as ABA Model Rule and D.C. Rule 3.4(d)

# Document Production and Allocation of Supervision

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ABA Model Rule 5.3, comment 4

“Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer. See Rule 1.2.”

Virginia Rule 5.3 has no similar comment.

# **INTERNAL INVESTIGATIONS AND USE OF OUTSIDE COUNSEL**

# Internal Investigations

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## Virginia Rule 2.1

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.

Comment [1]: A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront... [A] lawyer ... may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

# Internal Investigations – Key Decisions

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Who should run internal investigations?

Who should direct the internal investigation?

To whom should internal investigation reporting be done?

## **PART 2: ETHICS ISSUES IN DEALING WITH FORMER EMPLOYEES**

# Compensating for Former Employee Time

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## Virginia Rule 3.4 (c)

A lawyer shall not “offer an inducement to a witness that is prohibited by law,” but “a lawyer may advance, guarantee, or pay: (1) reasonable expenses incurred by a witness in attending or testifying; (2) reasonable compensation to a witness for lost earnings as a result of attending or testifying; (3) a reasonable fee for the professional services of an expert witness.”

## Virginia LEO 587 (1984)

It is not improper for an attorney to compensate a witness for the reasonable value of time expended in preparing for and giving testimony in litigation, when the compensation is not an inducement to testify and is not contingent upon the outcome of the case.

(Note that there remains some state variation on this issue)



# Compensating for Former Employee Time – Pros and Cons

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## Pros:

Better prepared witnesses

Witnesses who don't feel their time is being taken advantage of

## Cons:

Accusations of bias

It costs money

# Compensating for Former Employee Time – Logistics

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- Formal consulting agreement versus other documentation
- Who makes the retention
- Who gets billed
- Prep time versus testifying time

## Requests Not To Talk

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Scenario – your outside counsel has heard that opposing counsel is contacting former employees to interview them. Assume the applicable ethics rules don't prohibit this.\* Your outside counsel wants to tell former employee potential witnesses not to speak to opposing counsel and to call company counsel if anyone approaches them. Is this ok?

\* See Virginia Rule 4.2; D.C. Rule 4.2; D.C. Ethics Opinion 287.

## Requests Not To Talk

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Under Virginia Rule 3.4(h), a lawyer may not: “Request a person other than a client to refrain from voluntarily giving relevant information to another party unless: (1) the information is relevant in a pending civil matter; (2) the person in a civil matter is a relative or a current or former employee or other agent of a client; and (3) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.”

## Requests Not To Talk

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Comment [4] explains that section (h) “prohibits lawyers from requesting persons other than clients to refrain from voluntarily giving relevant information,” but notes that “[t]he Rule contains an exception permitting lawyers to advise current or former employees or other agents of a client to refrain from giving information to another party, because such persons may identify their interests with those of the client. The exception is limited to civil matters because of concerns with allegations of obstruction of justice (including perceived intimidation of witnesses) that could be made in a criminal investigation and prosecution.”

# Requests Not To Talk – What You or Your Outside Counsel Can Do

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- Encourage former employees to notify the company if an attorney contacts them.
- Remind former employees of their confidentiality obligations.
- Informing former employees or departing employees of rights or obligations

# Former Employee with Company Documents

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Scenario: Your company has for years had a clear policy that when employees leave, they cannot take any company documents with them. Your outside counsel is working with a former employee, who has revealed she has a box in her garage containing multiple printed powerpoints and a thumb drive containing presentations from a critical time period that is relevant to your patent litigation. Some of the documents contain highly proprietary company information. The other side is aware she was a key team member and sends her a subpoena for documents.

# Former Employees with Company Documents

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## Rule 3.4(a)

A lawyer shall not: obstruct another party's access to evidence or alter, destroy or conceal a document or other material having potential evidentiary value for the purpose of obstructing a party's access to evidence. A lawyer shall not counsel or assist another person to do any such act.





# **PART 3: ETHICS ISSUES IN DEALING WITH JOINT VENTURES**

# Joint Ventures – What Are They?

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*Roark v. Hicks*, 362 S.E.2d 711 (Va. 1987)

- “A joint venture exists where two or more parties enter into a special combination for the purpose of a specific business undertaking, jointly seeking a profit, gain, or other benefit, without any actual partnership or corporate designation.”
- The “rules of law governing the rights, duties, and liabilities of joint venturers are substantially the same as those which govern partnerships.”
- “Like partners, joint venturers have a fiduciary relationship among themselves which ‘begins with the opening of the negotiations for the formation of the syndicate, applies to every phase of the business which is undertaken, and continues until the enterprise has been completely wound up and terminated.’”

# Joint Venture – Retention of Counsel

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Can the parties hire one law firm to write the joint venture agreement for both of them? Virginia vs Model Rules:

ABA Model Rule 1.7, comment [8]

For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others.

Virginia Rule 1.7, comment [8] (less definitive than Model Rules)

A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

## Joint Venture – Retention of Counsel

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- Will the joint venture have its own in-house counsel?
- Retention decisions: will counsel be retained by the parties to the joint venture as a joint representation or only by the joint venture?



# Joint Venture – Loaning In-House Counsel

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- Can you loan corporate in-house counsel to the joint venture?
- What are the pros and cons of doing so?
- No Virginia authority directly addresses this question

Texas Ethics Op. 512, evaluates under Texas Rule 1.06

- “Under the facts presented, even though a conflict or potential conflict of interest exists in the lawyer's representation of the employing corporation and the joint venture to which the lawyer is loaned, such multiple representation is permissible if (1) the corporation and joint venture consent after full disclosure and (2) the lawyer reasonably believes that the lawyer's representations of the corporation and of the joint venture will not be materially affected.”

# Joint Venture – Conflict Issues

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Virginia LEO 1610 (1994) – Recognizes distinction between joint venture and its members.

Law firm could be adverse to one of the joint venture members with whom it did not deal directly.

- “The facts presented suggest that the joint venture is an entity distinct from the individual members. The ... facts presented do not indicate that the law firm has ever represented Client A individually, has had any contact with employees of Client A or any familiarity with the corporate structure of Client A, and has not acquired confidences or secrets from Client A.” (emphasis added)

Note the focus on receipt of client confidences to assess the conflict.



# Joint Venture Conflicts: Scenario #1

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Company A and Company B form a joint venture, JV Co. JV Co. has co-chief executives, and the CEO from the company making the largest annual investment in JV Co. has final decision-making authority for JV Co. For years, Company A has had control, and hired as the general counsel for JV Co. a former outside lawyer to Company A. (Joanna Ventura)

Company B then has a big investment year and its CEO gains decision making authority.

What issues may arise here?

## Joint Venture Conflicts: Scenario #2

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Companies C and D form a joint venture (C&D). Company D used outside counsel at Global Law Firm for years on many of its contracts, including deals to obtain financing. Global Law Firm does not, however, have any currently active representations for Company D. C&D took out a loan from Big Bank two years ago and has now defaulted. Global Law Firm emerges on behalf of Big Bank to sue on the loan.

## Joint Venture Conflicts: Scenario #3

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Companies E and F have formed a joint venture (EFJV) to commercialize a migraine drug. You represent company F.

The migraine drug requires a Specific Compound to make the active ingredient that only one supplier in the world can make at scale. Outside counsel to EFJV negotiates the terms of the supply agreement between EFJV and the supplier.

Outside counsel to EFJV subsequently represents Company E on a supply agreement negotiation to obtain the Specific Compound to make a different drug.

## Scenario #3: Legal Conflict or Competing Economic Interests?

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Virginia Rule 1.7, comment 6

As a result of the duty of loyalty, consent is required to be adverse to a current client. “[A] lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients.”

# Joint Venture Conflicts and Client Confidences

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What information should you be sharing with counsel for the joint venture?

Virginia Rule 1.7, comment [31].

“As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation.”

Limited exceptions: “For example, the lawyer may reasonably conclude that failure to disclose one client’s trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.”

# Common Interest Privilege Between Joint Venturers

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Virginia:

*Chahoon v. Commonwealth*, 62 Va. (21 Gratt.) 822 (1871); *Hicks v. Commonwealth* (Va. Ct. App. 1994) (“persons who share a common interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims.”) (emphasis added).

4<sup>th</sup> Circuit:

*American Mgt. Servs., LLC v. Dep’t of the Army*, 703 F.3d 724 (4th Cir. 2013) (doctrine “permits parties whose legal interests coincide to share privileged materials with one another ... to more effectively prosecute or defend their claims”) (emphasis added).

# Common Interest Privilege Between Joint Venturers – Transactional Matters

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- Differing lines on common interest privilege in the non-litigation or transactional context.
- *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 364 (3d Cir. 2007) (often cited as recognizing common interest in transactional matters, but more about joint representations)
- *In re Regents of Univ. of California*, 101 F.3d 1386 (Fed. Cir. 1996) (common interest for patent prosecution)
- *Ambac Assurance Corp., v. Countrywide Home Loans, Inc.*, 57 N.E.3d 30 (N.Y. 2016) (common interest doctrine does not extend beyond actual or contemplated litigation)

# Common Interest Privilege Between Joint Venturers – Transactional Matters

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Status in Virginia and Fourth Circuit:

No clear recognition of common interest doctrine outside of litigation context





# Joint Venture Common Interest – What Can You Do?

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Do the following things matter and are they good ideas:

- Written versus oral discussions
- Limiting communications to clearly aligned “legal interests”
- Express common interest agreements
- Choice of law provisions
- Invoking work product protection

# **PART 4: ETHICS ISSUES IN DEALING WITH VENDORS**

# **DATA VENDORS AND DATA SECURITY**

# Data Security - Client Confidences

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Virginia Rule 1.6 protects client confidences.

Rule 1.6(d):

A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information protected under this Rule.

# Data Security – Client Confidences

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Virginia Rule 1.6, comments [19, 20]

- Comments outline “factors” for deciding the reasonableness of efforts, including the sensitivity of the information, cost considerations, and the burden of implementing safeguards.
- “[A] lawyer is not subject to discipline under this Rule if the lawyer has made reasonable efforts to protect electronic data . . . . Perfect online security and data protection is not attainable....Nevertheless, security and data breaches have become so prevalent that some security measures must be reasonably expected of all businesses, including lawyers and law firms.”

# Virginia Rule 1.15 – Duty to Protect Client Property

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## Virginia Rule 1.15(a) (1)

All funds received or held by a lawyer or law firm on behalf of a client or a third party, or held by a lawyer as a fiduciary, other than reimbursement of advances for costs and expenses shall be deposited in one or more identifiable trust accounts; all other property held on behalf of a client should be placed in a safe deposit box or other place of safekeeping as soon as practicable.

Compare ABA Model Rule 1.15(a):

A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property.







# Data Security – Protective Steps

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- Impress on outside counsel the importance of data security
- Due diligence on vendors
- Industry-standard security certifications
- Review of vendor contractual terms

# VENDOR SUPERVISION

# Virginia LEO 1850 (2010) – Outsourcing of Legal Services

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## Virginia Rule 5.1

Updated and amended Jan. 2021

Raises categories of considerations:

- “A lawyer’s ethical duties when outsourcing tasks fall into four categories: supervision of nonlawyers, including unauthorized practice of law issues, client communication and the need for consent to outsourcing arrangements, confidentiality, and billing and fees. This opinion will address each of these categories in order.”

# Vendor Supervision - Common Categories

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- Business consultants
- Financial intermediaries
- Competitive intelligence
- Private investigators
- PR Companies

# Vendor Supervision – Options

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- Pros and cons of using reporting hotlines
- Identifying red flags when supervising a vendor
- Front end prevention: due diligence on vendors

**Questions?**

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