HWG

Ethical Issues in Internal Investigations and Representing Witnesses

Patrick O'Donnell, Jared Marx, and Deepika Ravi

HWG LLP

October 31, 2023

HWG

Agenda

- Representing Organizations
  - Basic Challenges
  - Dual Representation
  - The Ethics Rules and the *Upjohn* Warning
  - When and Where Might the Lawyer's Conduct Be Challenged?
  - Reputational Risk for Counsel
  - "Independent" Investigatory Counsel
- Contacting Witnesses
  - The Basic No Contact Rule
  - Client-to-Client Communications
  - Represented Organizations/Entities
  - Contacts with Non-Lawyer Government Officials

HWG

Representing Organizations

HWG

Representing Organizations: Basic Challenge

"A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." VA. RULES OF PRO. CONDUCT r. 1.13(a) (VA. BAR ASS'N 2022) ("Va. Rule").

- A lawyer can only talk to an artificial entity through the people who work there.
- Fraught in an internal investigation context:
  - Conversations are privileged and confidential
  - Goal is to investigate sensitive, possibly incriminating topics
  - Corporate goals often include identifying and taking action against individuals who have violated law or corporate policy
  - Possible conflict between interests of individuals and those of corporate clients

HWG

Dual Representation of the Organization and an Individual

- Joint representation is expressly allowed by Va. Rule 1.13(e), but subject to Rule 1.7's requirement:
  - "A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders." Va. Rule 1.13(e).
- But it is even more fraught in the context of an internal investigation.

HWG

Dual Representation of the Organization and an Individual

- First obligation to the organizational client is to uncover all the facts.
- The lawyer may uncover incriminating facts about the individual.
- The corporation's interest may be to "drop a dime" on the individual.
- The individual's interest may be to shift blame to others or to the corporation as a whole, or to earn cooperation credit by disclosing to law enforcement other, unrelated wrongdoing by the corporation.

Impossible to satisfy dual-representation requirements in the context of an internal investigation.

HWG

The Ethics Rules and the *Upjohn* Warning

- *Upjohn Co. v. United States*, 449 U.S. 383, 394–95 (1981) (finding that attorney-client privilege can protect counsel's communications with employees of corporate clients).
  - No discussion of warnings in *Upjohn*!
- Goals: To assert protection of privilege and encourage employees not to risk waiver by disclosing communications with counsel, but warn employees that they are not the lawyer's client.
- Risk: The warning can chill employee's candor.

HWG

The Ethics Rules and the *Upjohn* Warning

Q: Why give an *Upjohn* warning if it can make corporate witnesses less forthcoming?

A: It's sometimes required by law: "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*." Va. Rule 1.13(d) (emphasis added).

HWG

The Ethics Rules and the *Upjohn* Warning

The comments go further:

> *When the organization's interest may be or become adverse to those of one or more of its constituents, the lawyer should advise any constituent*, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, *that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that*, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that *discussions between the lawyer for the organization and the individual may not be privileged*. Va. Rule 1.13 cmt. 10 (emphasis added).

HWG

The Ethics Rules and the *Upjohn* Warning

- Outside of a dual representation, the lawyer does not represent the corporate witness personally.
- So, even though the corporate witness is a part of the lawyer's corporate client, the witness himself is not the client.

HWG

The Ethics Rules and the *Upjohn* Warning

(a) In 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.

(b) A lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interest of the client.

Va. Rule 4.3.

HWG

When and Where Might the Lawyer's Conduct Be Challenged?

- Corporations often cooperate with law-enforcement investigations.
- The corporation could instruct the lawyer to divulge information she'd otherwise be required to keep confidential under Va. Rule 1.6(a).
- Defense counsel for individuals have argued that, in the absence of an adequate *Upjohn* warning, corporate lawyers should be found to jointly represent both the corporation and the individuals.

HWG

When and Where Might the Lawyer's Conduct Be Challenged?

- In that case, the lawyer's disclosure of the substance of his interview with his own client could be a serious violation of Rule 1.6, despite a disclosure instruction from the corporate client.
- In fact, if a lawyer represents a corporate client and a corporate employee jointly, and they disagree on whether the individual's comments to the lawyer should be disclosed, the lawyer has a conflict under Va. Rule 1.7.

HWG

Reputational Risk for Counsel

[O]ur opinion should not be read as an implicit acceptance of the watered-down "*Upjohn* warnings" the investigating attorneys gave the appellants. It is a potential legal and ethical mine field. Had the investigating attorneys, in fact, entered into an attorney-client relationship with appellants, as their statements to the appellants professed they could, they would not have been free to waive the appellants' privilege when a conflict arose. It should have seemed obvious that they could not have jettisoned one client in favor of another. Rather, they would have had to withdraw from all representation and to maintain all confidences. Indeed, the court would be hard pressed to identify how investigating counsel could robustly investigate and report to management or the board of directors of a publicly-traded corporation with the necessary candor if counsel were constrained by ethical obligations to individual employees.

In re Grand Jury Subpoena: Under Seal, 415 F.3d 333, 340 (4th Cir. 2005)

HWG

“Independent” Investigatory Counsel

- In times of crisis, the organization may promise an “independent” investigation by counsel
- What is the goal and who is the client?
- Holding out an investigation as “independent” can undermine the organization’s later invocation of privilege to protect the results.

HWG

"Independent" Investigatory Counsel

- Absence of an *Upjohn* warning has been cited as evidence that an investigating lawyer was not acting as counsel for the organization that hired her and commissioned investigation. *See Purdue Univ. v. Wartell*, 5 N.E.3d 797, 807–08 (Ind. Ct. App. 2014).
- Consider Va. Rule 1.1 (Competence) in advising an organizational client regarding scope and structure of internal investigation:
  - "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Va. Rule 1.1.

HWG

Contacting Witnesses

HWG

The Basic No Contact Rule

- A lawyer cannot:
  - in the course of representing a client on a matter,
  - communicate about that matter,
  - directly or through others,
  - with a person known by the lawyer to be represented by another lawyer in the matter,
  - absent the prior consent of that lawyer.

See Va. Rule 4.2(a).

HWG

The Basic No Contact Rule

- The prohibition does not change if the represented person initiated the call or consents to the contact.
  - *See* Va. Rule 4.2 cmt. 3.
- If the opposing party in a litigation calls and says that she is the client and has instructed her lawyer to allow the communication, it is still a violation to speak with the represented person.

HWG

The Basic No Contact Rule

- If a lawyer does not know at the outset of a contact that the person is represented but discovers that the person is represented in the course of the contact, the lawyer must **immediately terminate the call.**
  - *See* Va. Rule 4.2 cmt. 3 ("A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.").

HWG

The Basic No Contact Rule

- The no-contact rule prohibits a lawyer from giving advice to a represented party in the presence of her lawyer, where the lawyer has not provided advance consent.
- *See* Va. Legal Ethics Comm., Formal Op. 1752 (2001) ("Such a 'surprise' contact would not afford the opposing counsel the opportunity to decline the communication, but only to comment upon it afterward. Rule 4.2 requires consent of opposing counsel, not merely his presence.").

HWG

The Basic No Contact Rule

- The prohibition is matter-specific. *See* Va. Rule 4.2 cmt. 4 ("This Rule does not prohibit communication with a represented person, or an employee or agent of a represented person, concerning matters outside the representation.")
- That means that a lawyer cannot talk to a represented person about the subject of the representation but *can* discuss unrelated topics or issues.

HWG

The Basic No Contact Rule

- For the prohibition to apply, the lawyer engaged in the contact must do so "in representing a client." Va. Rule 4.2(a).
- This allows a lawyer who has no current client in the matter to speak with a represented person about replacing their current lawyer.

HWG

The Basic No Contact Rule

- *See* Va. Rule 4.2 cmt. 3 ("A lawyer is permitted to communicate with a person represented by counsel without obtaining the consent of the lawyer currently representing that person, if that person is seeking a 'second opinion' or replacement counsel").
- *See also* D.C. Legal Ethics Comm., Formal Op. 215 (1990) ("There is no provision . . . which prohibits an attorney from conferring with a potential client who is already represented by counsel on the matter.").

HWG

The Basic No Contact Rule

- The rule allows contacts with the permission of the lawyer for the represented person.
- Although the rule does not require the permission to be written, confirming the permission in writing is prudent.

HWG

Client-to-Client Communications

- The rule permits “parties to a matter [to] communicate directly with each other.” Va. Rule 4.2 cmt. 4.
- The lawyer may advise a client concerning a communication the client is legally entitled to make.
- However, the client’s communication cannot be for the sole purpose of evading the restrictions of Rule 4.2.

HWG

Client-to-Client Communications

- D.C. Legal Ethics Opinion 258 provides that an attorney who is a party to a matter (and is proceeding pro se) cannot communicate directly with a represented adverse party (without first receiving consent from the adverse party's lawyer). *See* D.C. Legal Ethics Comm., Formal Op. 258 (1995).
- *See also* ABA Comm. on Ethics & Pro. Resp., Formal Op. 502 (2022); Va. Legal Ethics Comm., Formal Op. 1890 (2021) ("Rule 4.2 prohibits a self-represented lawyer from directly contacting a represented person.")

HWG

Represented Organizations/Entities

When an organization is represented in a matter, who, if anyone, can you speak with (absent permission from counsel) about that matter?

HWG

Represented Organizations/Entities

- The no-contact rule covers "constituents" of the organization who:
  - supervise, direct, or regularly consult with the organization's lawyer concerning the matter; or
  - have authority to obligate the organization with respect to the matter; or
  - whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.
- *See* Va. Rule 4.2 cmt. 7.

HWG

Represented Organizations/Entities

- In Virginia, the standard is sometimes referred to as the “alter ego” or “control group” test.
- Va. Legal Ethics Comm., Formal Op. 1670 (1996) (“Under the control group test it is not improper for an attorney to communicate directly with the employee of an adverse party if that employee is not a member of the control group and is not able to commit the organization to specific courses of action that would lead one to believe the employee is the corporation's alter ego.”)

HWG

Represented Organizations/Entities

- Former employees can be contacted without contravening Va. Rule 4.2.
  - *See* Va. Rule 4.2 cmt. 7 ("Consent of the organization's lawyer is not required for communication with a former constituent.").
  - *See also* D.C. Legal Ethics Comm., Formal Op. 287 (1998) ("A lawyer may contact unrepresented former employees of a party-opponent without obtaining consent from that party irrespective of the position formerly held by the ex-employee in the opposing organization.").

HWG

Represented Organizations/Entities

- The D.C. rules require that, if contacting a current "nonparty" employee of an entity, the lawyer must disclose his or her identity and the fact that the lawyer represents a party adverse to the entity.
  - D.C. RULES OF PRO. CONDUCT r. 4.2(b) (D.C. BAR ASS'N 2018) ("D.C. Rule") ("If the organization is an adverse party . . . prior to communicating with any such nonparty employee, a lawyer must disclose to such employee both the lawyer's identity and the fact that the lawyer represents a party that is adverse to the employee's employer.").
  - *See also* Va. Legal Ethics Comm., Formal Op. 1670 ("[I]t is permissible to contact, ex parte, employees of an adverse corporation as long as the attorney first discloses their role as an adversary to the corporation in litigation[.]").
  - It is preferable to make this disclosure in writing. *See* D.C. Rule 4.2 cmt. 4.

HWG

Represented Organizations/Entities

- In contacting current or former employees, a lawyer must avoid receiving protected information.
  - *See, e.g.*, Va. Rule 4.2 cmt. 7 ("In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization."); *see also* D.C Rule 4.2 cmt. 6 ("In making such contact . . . the lawyer may not seek to obtain information that is otherwise protected.").
  - For example, a lawyer could not request, "Tell me about your discussions with company counsel." *See* Va. Legal Ethics Comm., Formal Op. 1749 (2001).

HWG

Represented Organizations/Entities

- A lawyer can contact in-house counsel concerning a matter, even when the entity is represented by outside counsel. *See* Va. Legal Ethics Comm., Formal Op. 1890 (2021) (Compendium Opinion) ("[T]he fact that an organization has outside counsel in a particular matter does not prohibit another lawyer from communicating directly with in-house counsel for the organization.").
  - However, *see* D.C. Rule 4.2 cmt. 5 ("If individual in-house counsel is represented separately from the organization, however, consent of that individual's personal counsel is required before communicating with that individual in-house counsel.").
  - *See also* D.C. Legal Ethics Comm., Formal Op. 331 (2005).

HWG

Represented Organizations/Entities

- So, if a current or former employee, including in-house counsel, is separately and individually represented, a lawyer cannot contact that individual absent consent from the individual's lawyer.

HWG

Represented Organizations/Entities

- The no-contact rule does not apply to efforts to obtain information generally available to the public.
- A lawyer may review the website of a represented person or entity, request a copy of a press release, or attend meetings or presentations open to the public.
- The lawyer need not disclose his or her identity, etc.
- *See* D.C. Rule 4.2 cmt. 9.

HWG

Contacts with Non-Lawyer Government Officials

- D.C. adopted a rule that permits a lawyer to contact any government official who has "the authority to redress the grievances of the lawyer's client" without consent (or even notice to) the lawyer representing the government.
  - D.C. Rule 4.2(d); *see id.* cmt. 10–11.
  - *See also* D.C. Legal Ethics Comm., Formal Op. 340 (2007) (explaining the background to the adoption of this rule and noting that "[t]he lawyer cannot . . . contact government officials either within the agency involved in the litigation or elsewhere concerning routine discovery matters, scheduling issues or the like, absent the consent of government counsel.").

HWG

Contacts with Non-Lawyer Government Officials

- The contact must be substantive contact about genuine grievances. It cannot relate to "ordinary discovery disputes," scheduling matters, or "similar routine aspects" of litigation.
  - D.C. Rule 4.2 cmt. 11.
- As with contacts with employees of an organization, the lawyer must disclose his or her role and the fact that he or she is adverse to the government.
  - *See* D.C. Rule 4.2 cmt. 10.

HWG

Hypo #1

You need to talk to a key witness in a civil case. The witness has hired her own counsel.

You contact that lawyer and ask to speak with the lawyer's client. The lawyer says no.

You hire a private investigator and have the investigator pose as a reporter (the case has been in the press). The investigator obtains a long statement from the witness.

Does this violate the Virginia Rules?

HWG

Hypo #2

Same facts as above, except that the witness calls you directly against the advice of her lawyer, and you have a long discussion about the case.

Does this violate the Virginia Rules?

HWG

Hypo #3

Same facts as above, except that the witness calls you directly against the advice of her lawyer, and you explain that her lawyer has said that you and she should not communicate.

The witness insists that it is her decision and that she wants to talk to you. You have a long discussion about the case.

Does this violate the Virginia Rules?

HWG

Hypo #4

Same facts as above, except you know that the witness is very close to a particular third party. Without the permission from the witness's lawyer, you hire an investigator to interview the third party about her conversations with the witness.

Does this violate the Virginia Rules?

HWG

THANK YOU!

Patrick O'Donnell, Jared Marx, and Deepika Ravi

HWG LLP

October 31, 2023