

In-house counsel and outside help: Ethical issues in dealing with advisors, agents, affiliates, and associated third parties

June 28, 2018

Agenda

- 1 Introduction: Ethical issues working with third parties

- 2 Scenario 1: Protecting privilege when working with outside consultants

- 3 Scenario 2: Interviewing a consultant

- 4 Scenario 3: Supervising an ESI consultant

- 5 Scenario 4: Parent/subsidiary conflict of interest

- 6 Scenario 5: Representing a joint venture

- 7 Questions

INTRODUCTION

Ethical issues in dealing with
advisors, agents, affiliates, and
associated third parties

Corporations increasingly work with outside parties

Management

- Management consultants
- Marketing consultants
- HR consultants

Legal

- Crisis management firm
- Forensic accountant
- Data breach expert
- Investigators

Corporate structure

- Affiliates
- Subsidiaries
- JV partners

Working with third parties raises unique ethical issues

Trend toward collaboration with third parties in tension with ethics rules based on unique client/lawyer relationship

Privilege and waiver issues

- Possible waiver issues when disclosing to third parties
- Common interest doctrine and joint representation privilege

Client identification

- Communications with represented party (Rule 4.2)
- Communications with unrepresented party (Rule 4.3)

Duty to supervise non-lawyers

- Consider duty to supervise under Rule 5.3 and duty of competence (including technological competence) under Rule 1.1

Conflicts of interest

- Consider conflict of interest Rule 1.7 and duty of confidentiality

Scenario 1

Protecting privilege when
working with outside
consultants



Protecting privilege when working with outside consultants

Hypothetical facts

- Your boss, general counsel for retail company, received a call from law enforcement reporting possible hack into systems containing customer payment card information.
- You have begun an internal investigation and have retained an outside forensic firm to investigate the breach.

Question 1

Are your communications with the computer forensics firm privileged?

Attorney-client privilege

- Generally protects confidential communications between attorney and client if made for the purpose of obtaining or providing legal advice
- Protects not only the lawyer's legal advice, but also communications to attorney that provide information that will facilitate the provision of sound legal advice



Waiver and disclosure to consultants or contractors

Generally, inclusion of third party in communication may destroy confidentiality and waive the attorney-client privilege.

Two theories reflected in court decisions extend privilege to consultants and contract employees.

- Third party serves as privilege agent
- Third party serves as “functional equivalent” to employee

Target privilege decision

U.S. District Court for the District of Minnesota

- Work by Target's Data Breach Task Force and Verizon at the behest of Target's counsel protected by privilege and work product doctrine
- Task force created at request of counsel to:
 - educate them about aspects of the breach
 - in order to secure informed legal advice
- Two tracks for forensic expert work separated business purposes from litigation purposes

Early engagement of outside counsel will enable outside counsel to engage a forensic team clearly distinguishing this work from any forensic work that may be done for business purposes.

In-house counsel: Limits to privilege?


- Work of in-house counsel is protected to the same degree as outside counsel
- But, more likely to work on business-oriented tasks not purely relating to the provision of legal advice
 - Thus, greater risk that communications with in-house counsel are not privileged
 - Courts typically examine the “primary purpose” of the particular communication at issue to determine whether privileged
- Beware: Outside U.S., privilege may not apply to in-house counsel



Question 2

Can communications with other types of outside consultants also be privileged?

Where else can agency exception apply?

- 
- A Venn diagram consisting of two overlapping circles. The left circle is olive green and contains two bullet points. The right circle is light gray and contains a paragraph and a bullet point. The intersection of the two circles is the area where the text 'But, information or reports prepared in the ordinary course of business to assess compliance are not likely to be protected' is located.
- (1) client has a reasonable expectation of confidentiality under the circumstances; and
 - (2) the disclosure to the third party was necessary for the client to obtain informed legal advice

But, information or reports prepared in the ordinary course of business to assess compliance are not likely to be protected

- *See e.g. Stender v. Lucky Stores, Inc.*

Courts have applied agency exception to communications with:

- accountants
- investment bankers
- appraisers
- public relations consultants
- insurance brokers
- others

Question 3

What if my legal assistant is the one communicating with the forensics team?

Privileged communication between two non-lawyers?

- The fact that a lawyer is not a direct sender or recipient may weigh against, but not automatically defeat, a claim of privilege.
- Communications between non-lawyers relating to the collection of factual material — even material provided by a consultant — necessary for effective representation of the client could be privileged.
- The further removed communication is from the lawyer's provision of legal advice, the greater the risk that the communication will not be protected.

Question 4

In the course of the investigation, you also need to interview a number of IT employees. One of the “employees” is actually a full-time contractor placed at your company through a technology staffing company. Will your communications with this contract employee be privileged?

Functional equivalent of an employee

Some courts conduct broad, practical analysis examining:

- whether the consultant acted for the corporation;
- had a similar role to that of an employee; and/or
- was an integral member of the team assigned to handle an issue related to litigation.

Other courts apply a more narrow test requiring that consultants:

- (1) be retained to perform a corporate function that is necessary in the context of actual or anticipated litigation;
- (2) possess information needed by counsel to provide legal advice;
- (3) have authority to make decisions on behalf of the corporation; and
- (4) were hired because the corporation lacked sufficient internal resources or expertise within the consultant's field.

Contract employees: Practical tips to preserve privilege

Consider the criteria courts have examined to determine whether a contractor is the functional equivalent of an employee when drafting contracts with independent contractors.

You may wish to include language that specifies how the work of the contractor will assist the company with legal matters in such contracts.

Contracts should specify that the contractor will work with your company's counsel and that communications with counsel are expected to remain confidential.

Consider providing some training or guidance to contractors about how to properly communicate with counsel to preserve privilege protections as much as possible.

Scenario 2

Interviewing a consultant



Scenario 2: Interviewing a consultant

Hypothetical facts

- Anonymous caller to compliance hotline alleges pharmaceutical sales representatives are distributing materials that promote off-label prescriptions
- Concern off-label promotion may violate Food, Drug, and Cosmetic Act (FDCA)
- Marketing material used by sales force is prepared by marketing consultant

Question 1

Can you interview and advise the consultant about FDCA compliance just as you would an employee?

Who's your client?

- In Virginia, D.C., and Maryland a “lawyer employed or retained by an organization **represents the organization** acting through its duly authorized constituents.”
 - Consultant is not your client but neither is employee
- Privilege implications
- Because consultant works for separate organization you must consider:
 - Whether you must **contact counsel** for consulting company before interviewing consultant
 - Whether **interests** of consulting company are **adverse**

Ethics rules:

- Virginia Rule 1.13(a)
- D.C. Rule 1.13(a)
- Maryland Rule 1.13(a)

Question 2

Must you contact the consulting firm's counsel prior to interviewing the consultant?

The “no contact rule”

Rule 4.2

- “In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer **knows to be represented** by another lawyer **in the matter**, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or court order.”
- Here, representation of consultant has not likely crystalized **in this matter**
- At least in Virginia, rule equally applicable where litigation “merely under consideration.” Va. Rule 4.2, cmt. 8.

Model Rule 4.2 “does not contemplate that a lawyer representing the entity can invoke the rule’s prohibition to cover all employees of the entity, by asserting blanket representation of them all.” See ABA Comm. On Ethics and Prof’l Resp., Op. 95-396 (1995).

Question 3

If a regulatory investigation follows the compliance hotline call, would you then need to contact the consulting firm's attorney before interviewing the consultant?

Only if consulting firm is represented **in the matter** and consultant is **covered person** under rule

- The “no contact rule” only applies to specific individuals
- “For purposes of this rule, the term ‘party’ or ‘person’ includes any person or organization, including an employee of an organization, who has the authority to bind an organization as to the representation to which the communication relates.” *See* D.C. Rule 4.2.
- A lawyer may therefore communicate with employees of an organization that is represented by counsel **in the matter** without first notifying the organization’s lawyer if those employees do not have authority to make decisions about the organization’s legal representation in that matter. *See* D.C. Bar Legal Ethics Committee Opinion No. 129.

Similar rules in Virginia and Maryland

Virginia

- Limits persons impacted by the no contact rule to the “alter ego” of an organization and those meeting the “control group” test articulated in *Upjohn v. United States*, 449 U.S. 383 (1981). Virginia Rule 4.4., cmt 7.

Maryland

- No contact rule extends only to (1) current officers, directors, and managing agents; and (2) current agents or employees who supervise, direct, or regularly communicate with the organizations’ attorneys concerning the matter or whose acts or omissions in the matter might bind the organization for civil or criminal liability. Maryland Rule 19-304.2

Question 4

What if marketing materials were prepared by a freelance writer instead of a consultant?

Freelance writer less likely to be represented by counsel

When dealing with unrepresented person

- “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.”
 - Where person's interests are or have a reasonable possibility of being in conflict with your clients, you may offer no advice other than advice to secure counsel.
- Virginia Rule 4.3
 - D.C. Rule 4.3
 - Maryland Rule 19-304.3

Scenario 3

Supervising an ESI consultant



Scenario 3: Supervising an ESI consultant

Hypothetical facts

- You retain an e-discovery consultant to respond to a discovery request
- Less than two weeks before production deadline, relevant material has not been collected from key custodians

Question 1

What obligation do you have to ensure the ESI consultant does an adequate job?

Supervising non-attorneys

- “[A] lawyer having direct supervisory authority over the nonlawyer shall make **reasonable efforts** to ensure that the person's conduct is compatible with the professional obligations of the lawyer” Virginia Rule 5.3 (b).
- You may be responsible for violations committed by others if “lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved.” Virginia Rule 5.3 (c)(1); Accord D.C. Rule 5.3 (c)(1); Maryland Rule 5.3 (c)(1).



Supervising ESI consultants

- California State Bar ethics opinion specifically addresses the scope of an attorney's responsibility to supervise an ESI consultant

“An attorney must maintain overall responsibility for the work of the expert he or she chooses . . . by remaining regularly engaged in the expert's work, by educating everyone involved in the e-discovery workup about the legal issues in the case, the factual matters impacting discovery, including witnesses and key evidentiary issues, the obligations around discovery imposed by law or by the court, and of any relevant risks associated with the e-discovery at hand.”

State Bar of California's Formal Opinion No. 2015–193 at 5.

- In 2016, Virginia added comment 6 to Rule 1.1, which requires attorneys to engage in continuing legal education to maintain competence and notes that “attention should be paid to the benefits and risks associated with relevant technology.”

Scenario 4

Scenario 4: Parent/subsidiary
conflict of interest



Scenario 4: Parent/subsidiary conflict of interest

Hypothetical facts

- The general counsel asks you to confidentially draft a memo analyzing the pros and cons of selling a subsidiary that has been an ongoing compliance problem and has potential liabilities stemming from an international corruption investigation.
- Shortly thereafter, a member of the subsidiary's management team seeks your advice about the ongoing compliance problems.

Question 1

Can you advise the subsidiary manager on compliance?

Are both parent and subsidiary your client?

- A comment to the D.C. Rules explains that “[o]rdinarily that client’s affiliates (parents and subsidiaries), other stockholders and owners, partners, members, etc., are not considered to be clients of the lawyer” for determining when a lawyer has a conflict with a third party. *See* D.C. Rule 1.7, cmt. 21.
- But it’s a question of fact



Conflict of interest may prevent continued joint representation

If intent is that you represent both entities, conflict of interest may prevent joint representation in this instance.

Generally there is an absolute bar from representing multiple clients to advance adverse positions **in the same matter**. See Virginia Rule 1.7 (b); D.C. Rule 1.7 (a); Maryland Rule 19-301.7.

Question 2

Assuming there was no conflict and you could advise the subsidiary, will your communications with the subsidiary's management team be privileged?

Privilege between parent and subsidiary

- Joint client relationship
 - Disclosure of information from one entity to the other does not waive a privilege that would otherwise apply.
 - Scope of the joint representation is fact specific and the parties' intent and expectations are key evidence about that scope.

Destruction of joint client privilege

The joint client privilege ceases to apply when the interests of the parent and subsidiary become adverse to one another (actual adversity not potential).



When a joint representation ends, “the default rule is that all communications made in the course of the joint representation are discoverable.”



When two joint clients become adverse and all communications between them is no longer protected from **each other**, the communications would still be protected **as to third parties**.

Question 3

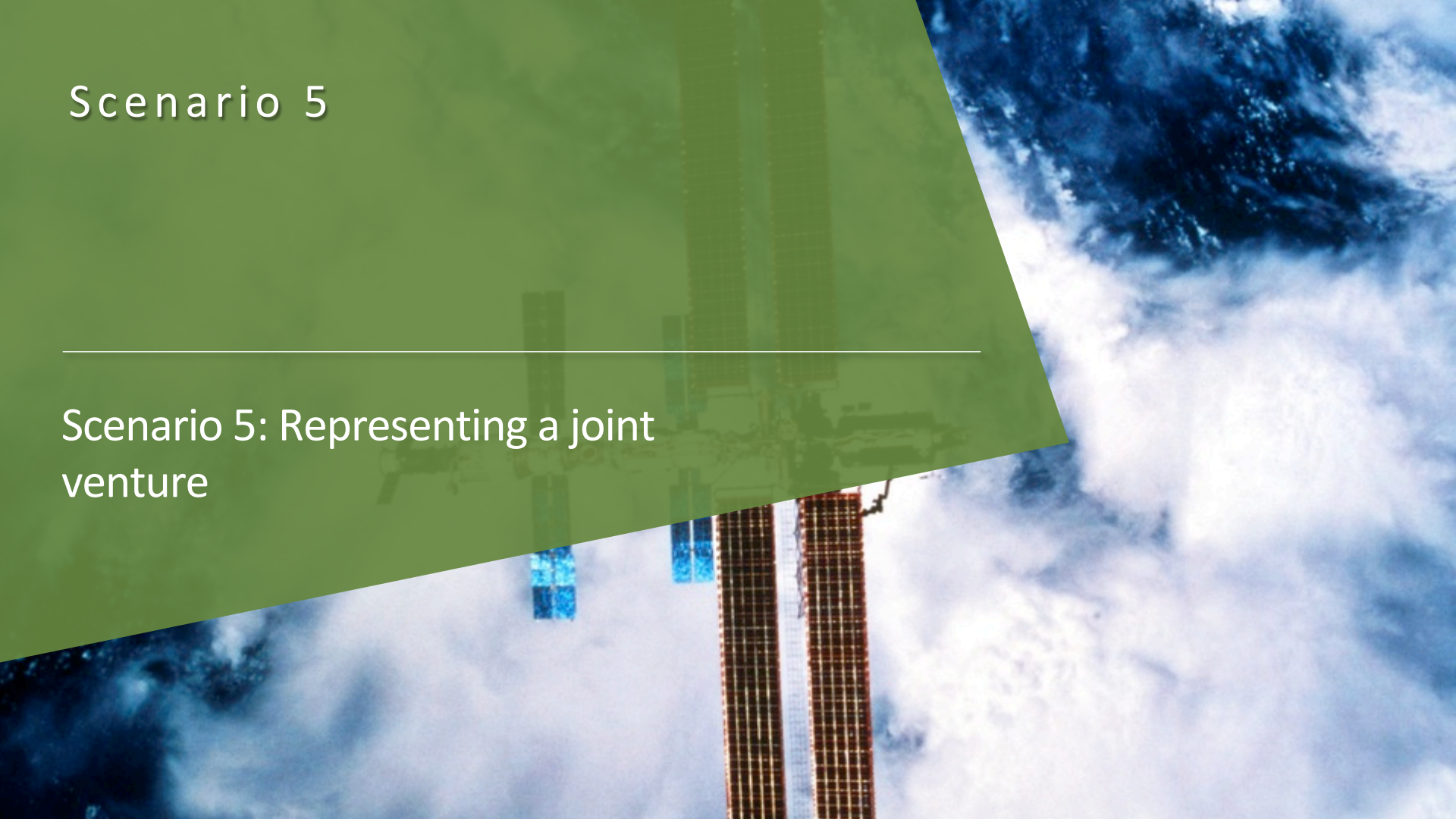
Could the subsidiary waive the joint privilege allowing third parties access to the memo you've drafted for the general counsel?

Waiver of joint client privileged materials

- Waiver as to third parties requires consent of both parties to relationship (i.e., parent and subsidiary)

Scenario 5

Scenario 5: Representing a joint venture



Scenario 5: Representing a joint venture

Hypothetical facts

- You are general counsel for a construction company that has agreed to enter a joint venture with a partner to bid on a multimillion-dollar public construction project.
- The JV partners have agreed they will retain outside counsel to represent the JV.

Question 1

Does the outside counsel representing the JV also represent your company?

Does JV counsel represent both JV partners as well?

- No presumption JV's counsel represents JV partners
- JV partners could agree that outside counsel should represent all three entities
- Must consider conflict of interest rules:
 - Absolute bar from representing multiple clients to advance adverse positions **in the same matter**.
 - Where other conflicts exist, joint representation may be allowed after (1) informed consent by all parties after full disclosure if (2) lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.

See Virginia Rule 1.7.; D.C. Rule 1.7 (b); Maryland Rule 19-301.7.

Question 2

If outside counsel was retained to represent only the JV, and the JV is later sued for breach of contract, are communications shared between outside counsel, yourself, and in-house counsel for the other JV partner protected by the attorney-client privilege?

Attorney-client privilege over JV communications

- Attorney-client communications between counsel and the client (or its constituents)
- Common interest doctrine

Scope of common interest privilege unclear

Jurisdictions vary in regard to:

Definition of
“common
interest” (e.g.
similar, identical,
or congruent)

When may it be
invoked?
(e.g. only during
litigation, when
litigation is anticipated,
or at any time there is a
common interest)

Whether writing is
required to formalize
common interest
agreement

Practice tip: JV partners should enter a joint defense agreement in addition to executing the joint venture formation documents in order to minimize risk of privilege waiver.

Question 3

What if outside counsel represents the JV and both JV partners, and the JV partners disagree about whether a settlement offer should be accepted?

The Aggregate Settlement Rule and disagreements

The “Aggregate Settlement Rule” applies when counsel represents multiple clients

Requires informed, unanimous, consent of all clients to any settlement or the offer of any settlement of claims.

*See Virginia Rule 1.8 (g);
D.C. Rule 1.8(f); Maryland Rule
19-301.8(g).*

Does disagreement about settlement create conflict of interest that requires termination of joint representation?

Not if interests still “generally aligned”

How to proceed in the face of disagreement?

- Consider advising jointly represented clients to consult separate counsel regarding settlement
- In any case, “Aggregate Settlement Rule” requires detailed, written disclosure to the clients of the material terms of the proposed settlement and the effect of the proposed settlement on clients (collectively and individually).
 - Must include information about what the other clients will pay if the settlement is accepted.

Presenters



N. Thomas Connally, III

Office Managing Partner, Northern Virginia

T +1 703 610 6126

tom.connally@hoganlovells.com

Tom Connally is a trial lawyer representing businesses and individuals in complex commercial litigation, and has extensive experience in handling cases in regulated industries. He handles disputes for companies in the technology, government contracts, communications, media, energy, aerospace, automotive, aviation, pharmaceutical, health care, and real estate industries, as well as important matters for associations, colleges, and universities. In addition to trial work in federal and state courts, Tom handles appeals, administrative proceedings, arbitrations, and mediations.

Areas of Focus

Commercial Litigation
Corporate and Shareholder
Litigation
Class Actions and Group
Litigation
Real Estate Litigation and
Disputes
Media and Entertainment
Litigation



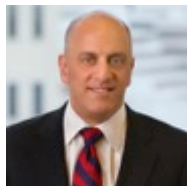
Chuck Neff

Director of Compliance, Huntington Ingalls Industries, Inc.

charles.neff@hii-co.com

Chuck Neff serves as the Newport News Shipbuilding (NNS) and Huntington Ingalls Industries, Inc. (HII) Director of Compliance and Assistant General Counsel. HII is the world's largest builder of U.S. Navy warships and provides various services to U.S. Government agencies and every branch of the U.S. Military. Chuck assists HII's Chief Compliance Officer in overseeing HII's compliance program and annual compliance plans, and he is the primary legal advisor to the President of NNS on compliance matters. The ACC selected Chuck as the "Outstanding In-House Counsel" for the National Capital Region in 2017 for his proactive approach to managing legal and compliance risks at HII.

Presenters



Jon Talotta

Partner, Northern Virginia

T +1 703 610 6156

jon.talotta@hoganlovells.com

Jon Talotta is Global Co-Group Leader for Corporate/Shareholder Litigation. He has significant background experience in corporate governance, securities, cybersecurity, consumer protection, technology, and other business issues. He has represented U.S. and multinational clients from a variety of industries in trial and appellate courts across the U.S.; in arbitrations and mediations; and in administrative proceedings and investigations before numerous federal and state agencies. Jon also chairs the firm's Electronic Information Group, which focuses on U.S. and cross-border electronic discovery and information governance.

Areas of Focus

Corporate and Shareholder
Litigation



Tom Trucksess

Counsel, Northern Virginia

T +1 703 610 6181

thomas.trucksess@hoganlovells.com

Experienced in helping clients navigate business disputes and complex commercial litigation, Tom Trucksess advocates for favorable outcomes while advancing his clients' business objectives. He has represented major health insurers and clients from a wide range of other industries in commercial litigation matters spanning many areas of substantive law, including antitrust, real and intellectual property rights, disputes arising out of commercial contracts, employment disputes, and claims arising under federal and state law.

Areas of Focus

Litigation
Health Law
Employment
Insurance



www.hoganlovells.com

"Hogan Lovells" or the "firm" is an international legal practice that includes Hogan Lovells International LLP, Hogan Lovells US LLP and their affiliated businesses.

The word "partner" is used to describe a partner or member of Hogan Lovells International LLP, Hogan Lovells US LLP or any of their affiliated entities or any employee or consultant with equivalent standing.. Certain individuals, who are designated as partners, but who are not members of Hogan Lovells International LLP, do not hold qualifications equivalent to members.

For more information about Hogan Lovells, the partners and their qualifications, see www.hoganlovells.com.

Where case studies are included, results achieved do not guarantee similar outcomes for other clients. Attorney advertising. Images of people may feature current or former lawyers and employees at Hogan Lovells or models not connected with the firm.

© Hogan Lovells 2018. All rights reserved