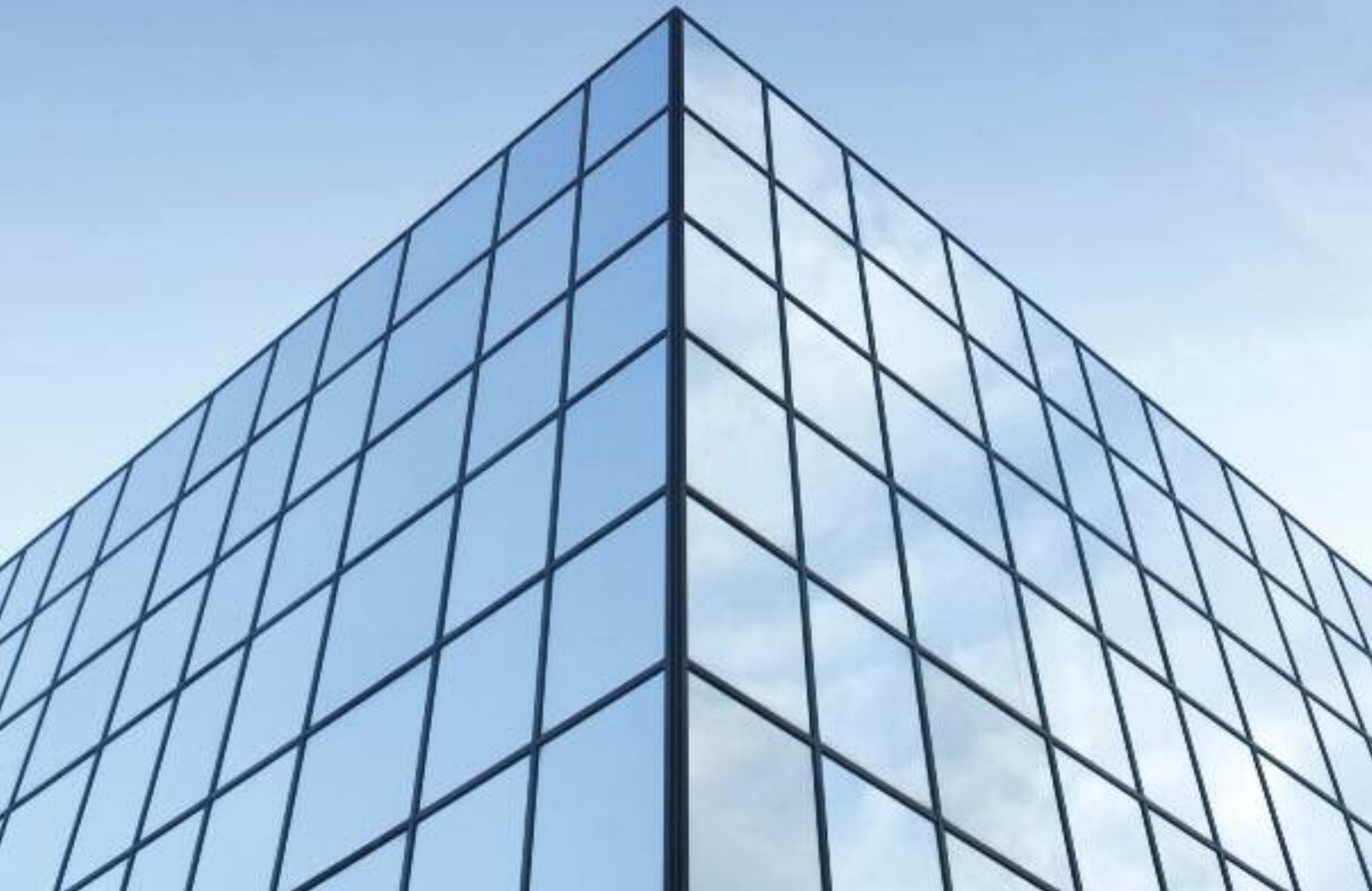


# Avoiding DISQUALIFICATION

10 Tips When Representing Corporate Clients

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Given the nature of modern legal practice, it is likely that at least one of the entities that pays your bills is a corporation, or a partnership, or a limited liability company—in other words, a separate but non-human legal entity.<sup>1</sup> When things go wrong for those entities, however, chances are good (if not inevitable) that the problem was caused, in whole or in part, by one of the people working for the entity. In your “diligent” pursuit of your corporate client’s interests (or “zealous” pursuit in other states),<sup>2</sup> just what can you do and say to the culpable employee? Surely, you can at least interview the employee about the facts of the matter without much worry.

Or can you?

Sometimes you can, and sometimes you can’t. In many cases, even if the employee could be personally liable along with the company, the employer’s and employee’s interests will be sufficiently aligned and an attorney may represent both employer and employee after obtaining appropriate conflict waivers. In such cases, only the standard ethical restrictions concerning attorney–client communications apply to the subsequent employee interviews.

But what if an attorney has only been retained to represent the corporate employer, not the employee(s) whose conduct created or contributed to the problem? What, if any, additional ethical restrictions govern the employee interviews? Does the attorney have any ethical obligations to the unrepresented employees, or are the attorney’s obligations owed solely to the client, the corporate employer? Do employee interviews under these circumstances present any traps for the unwary? Should an attorney even speak with an unrepresented employee if the employee personally faces potential civil or criminal liability?

These and other questions should be at the front of your mind when interviewing an unrepresented employee on behalf of the employer about conduct that may give rise to liability for both the employer and employee. Decisions in Arizona and other jurisdictions have demonstrated that what an attorney says and fails to say during such interviews may have significant repercussions for the corporate employer, the employee and the attorney. Consequently, when an employee’s actions give rise to potential liability for both the employer and

employee, the employer’s attorney should consider following (and may ethically be required to follow) one or more of the following 10 prudent practices.

## 1 Clearly Identify Your Client Before Interviewing an Unrepresented Employee

Studies and case law establish that employees who face personal liability often misunderstand the role of corporate counsel, believing that the employer’s attorney also represents them individually.<sup>3</sup> Are corporate counsel ethically permitted to take advantage of such misunderstandings in employee interviews in order to ensure that the employee is candid? Does corporate counsel’s duty to his client require him or her to take advantage of the employee’s misunderstanding?

The answer to both questions is “No.” Under ER 4.3, an attorney who “knows or reasonably should know” that an unrepresented employee misunderstands the attorney’s role must make “reasonable efforts to correct the misunderstanding.” Furthermore, whether or not the lawyer is aware of any misunderstanding, ER 1.13(f) requires the lawyer to explain that he or she represents the corporate entity “when the lawyer knows or reasonably should know that the organization’s interests are adverse to those” of the employee.<sup>4</sup> These ethical rules ensure that employees are not unfairly disadvantaged in an attorney’s diligent pursuit of the corporate client’s interests.<sup>5</sup>

As a practical matter, clarification of the attorney’s role may be prudent under all circumstances, even if an attorney is unaware that any misunderstanding exists or that any adversity will develop. This will prevent the inadvertent formation of an attorney–client relationship (and prevent costly litigation over whether an attorney–client relationship existed). For example, in *Advanced Mfg. Technologies, Inc. v. Motorola, Inc.*,<sup>6</sup> an ex-employee of Motorola, Merlin Corley, sought disqualification of Motorola’s outside litigation counsel on conflict-of-interest grounds, asserting that the firm had represented him personally at two depositions concerning his conduct while employed by Motorola and in interviews leading up to those depositions. Corporate counsel denied that it had ever represented Corley individually.<sup>7</sup>

Despite the absence of any express agree-

ment for representation or the payment of any fees by Corley, the district court concluded that an implied attorney–client relationship had existed between corporate counsel and Corley.<sup>8</sup> The key factor considered by the court in determining the existence of an attorney–client relationship was corporate counsel’s failure to clarify its role when Corley stated on the record at one of his depositions that he was represented by corporate counsel.<sup>9</sup> According to the court, that failure to “timely object to, or otherwise contest Corley’s explicit belief, whether reasonable or not, that he was being represented by [company counsel] in his deposition, manifested [company counsel’s] implied consent to an attorney–client relationship between them.”<sup>10</sup>

The Arizona Supreme Court also has held that “where a person holds an objectively reasonable belief that a lawyer is acting as his attorney, relies on that belief and relationship, and the lawyer does not refute that belief,” courts should “treat the relationship as one between attorney and client.”<sup>11</sup> Clarifying the identity of the attorney’s client is certainly one way that an attorney could not only “refute” any belief that an individual attorney–client relationship exists with the employee, but also render any such belief objectively unreasonable from the outset.<sup>12</sup> Consequently, attorneys should at least consider clarifying their capacity as corporate counsel to unrepresented employees facing potential personal liability, even if the employee’s interests seem to be aligned with the employer.

## 2 Advise Any Interviewed Employee of Conflicts of Interest and the Opportunity for Independent Representation

Where there is adversity between employer and employee, the ethical rules require corporate counsel to affirmatively inform the employee of the adversity and its implications. Comment [10] to ER 1.13 states that “when the organization’s interests may be or become adverse to those of” the employee, the organization’s attorney should notify the employee (1) that a “conflict or potential conflict of interest” exists, (2) that the attorney cannot represent the employee, and (3) that the employee “may wish to obtain independent representation.” This comment “was intended to require a

*Miranda*-type warning when it was likely a corporate [employee] could be confused over whether the corporate counsel was likewise representing his interests.”<sup>13</sup>

What if it is unclear whether any adversity will develop? Or, what if an employee asks the attorney’s advice concerning whether he or she should retain personal counsel?

These issues fall into a gray area that has not been explicitly addressed in the ethical rules or the case law. The ethical rules acknowledge that such a gray area might exist with respect to the “*Miranda*-type warning” and provide in Comment [11] that “[w]hether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.” Consequently, it is at least arguable that an attorney has no obligation to provide such a warning until adversity or the potential for adversity is apparent.<sup>14</sup>

Nevertheless, when in doubt, providing such a warning is prudent because it has the added benefit of mitigating the inadvertent formation of an attorney–client relationship with the employee. In *In re Grand Jury Subpoena*,<sup>15</sup> the Fourth Circuit analyzed statements made by corporate counsel for AOL to employees they interviewed during an internal investigation. The employees later attempted to prevent AOL from producing documents relevant to the internal investigation by arguing that they believed that the investigating attorneys who conducted the interviews were representing them personally.<sup>16</sup> The Fourth Circuit concluded that any such belief was objectively unreasonable, in part because the investigating attorneys informed one of the employees that he could “retain personal counsel at company expense” and told a second employee that “he was free to retain personal counsel.”<sup>17</sup> The employees were therefore unable to prevent AOL’s disclosure of the documents at issue to the government.<sup>18</sup>

How should an attorney respond when asked by the employee whether he or she should retain personal counsel?

The ethical rules provide that where there is actual or potential adversity, the attorney *may* advise the employee to consult with personal counsel, but the attorney is not *required* to say anything more than that the employee “may wish to obtain independent representation,” a statement that falls short of advising the employee to actually do so.<sup>19</sup>

Studies and case law establish that employees who face personal liability often misunderstand the role of corporate counsel.

Attorneys are therefore presented with a dilemma when questioned by an employee as to whether they should retain personal counsel. If they advise the employee that he or she should consult with independent counsel, then the employee may refuse to be interviewed by company counsel until consulting with another attorney first, or the employee may refuse to speak with corporate counsel at all. If they discourage an employee from consulting with independent counsel, however, then company counsel may be violating the spirit, if not the letter, of the ethical rules.

Consequently, when an employee whose interests are either actually or potentially adverse to the employer’s seeks advice on whether to consult with independent counsel, it may be best for corporate counsel to reiterate that the employee is permitted to do so and decline to provide a recommendation one way or the other.

### 3 Explain the Corporate Attorney-Client Privilege to Any Interviewed Employee

Arizona courts have been clear that two of the key factors relevant to the applicability of the corporate attorney–client privilege are whether the communication was “made in confidence” and whether the communication was “treated as confidential.”<sup>20</sup> Consequently, to ensure that the corporate attorney–client privilege attaches to the communications and that employees understand that they should treat the communications as privileged, corporate counsel should explain to employees that statements made during the interview are confidential and must be treated as such by the employee.

### 4 Inform the Employee That Communications Will Be Shared With the Employer

On the flip side, company counsel should always advise employees that while statements made during the interview are confidential as to third parties, all communications will be shared with the corporate client. Such disclosure may go a long way toward preventing the inadvertent formation of an attorney–client relationship with the employee. Courts have repeatedly held that an employee cannot reasonably believe that a personal attorney–client relationship exists with corporate counsel who has informed the employee that the organization is the client and that all communications will be shared with the organization.<sup>21</sup>

For example, in a federal district court case in New York, the trial court held that there was no personal attorney–client relationship between the campaign manager and campaign counsel where the campaign manager was “informed, prior to his making the communications ..., that [counsel] was speaking with him in the course of their investigation on behalf of the Carey Campaign” and that “his communications could be disclosed to others within the Carey Campaign, and that they would be disclosed to Carey.”<sup>22</sup>

### 5 Affirm That the Corporation Is the Holder of the Privilege

Where the corporate attorney–client privilege attaches to corporate counsel’s communications with unrepresented employees, corporate counsel should inform those employees that the corporation is the holder of the privilege.<sup>23</sup> Furthermore, corporate counsel should explain that as “holder” of the privilege, the corporation alone decides whether to waive the privilege. The employee has no authority to waive the privilege or to preclude the employer from waiving the corporate attorney–client privilege as it applies to the employee’s communications with corporate counsel.<sup>24</sup>

Explaining the nature of the privilege and the company’s right to waive that privilege may also help avert the formation of an implied attorney–client relationship. In *In re Grand Jury Subpoena*, the Fourth Circuit noted that the AOL employees could not have reasonably believed that they had an individual attorney–client relationship with the investigating attorneys, in part because

they were not only informed that the attorneys had been retained to represent AOL but also were warned that the “content of their communications during the interview ‘belonged’ to AOL” and that “the information they were giving could be disclosed at the company’s discretion.”<sup>25</sup> As the Fourth Circuit explained, “This protocol put the [employees] on notice that, while their communications with the attorneys were considered confidential, the company could choose to reveal the content of those communications at any time, without the [employees’] consent.”<sup>26</sup> In doing so, the attorneys made clear that their “loyalty was to the company.”<sup>27</sup>

### 6 Do Not Offer Personal Legal Advice to Any Employee

Under no circumstances should corporate counsel offer any legal advice to an unrepresented employee. This includes advice that personal counsel is not necessary. One of the key factors Arizona courts consider in determining the existence of a personal attorney–client relationship is whether an individual “sought and received advice and assistance” from the attorney “in matters pertinent to the legal profession.”<sup>28</sup> Even if a court did not believe that the advice gave rise to an attorney–client relationship, offering such advice could constitute an ethical violation under ER 4.3, which prohibits an attorney from giving “legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.”

### 7 Have the Employee Acknowledge Your Statements In Writing

Even if all of the foregoing advice is followed, failure to document the information given to the employee could lead to costly “he-said-she-said” litigation down the road. Consequently, company counsel should consider drafting a summary of statements made to the employee, in the nature of an *Upjohn* letter, that is signed by the employee.

### 8 Keep Detailed Notes of Any Employee Interview

Absent a signed acknowledgment by the employee, company counsel should take

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detailed notes of statements made to the employee concerning the attorney’s role, the application and holder of the privilege, the right to independent counsel, and so forth. A signed acknowledgment would be preferable, given that notes taken by corporate counsel would likely constitute work product. Nevertheless, detailed notes saved the day for corporate counsel in *In re Grand Jury Subpoena* when the three interviewed employees claimed that they had individual attorney–client relationships with corporate counsel. In holding that no attorney–client relationships existed with the employees, the Fourth Circuit relied on “memoranda” from the interviews that set forth in detail the warning statements that corporate counsel gave the employees at the outset of the interviews.<sup>29</sup> Absent such evidence, the court may have ruled differently.

### 9 Clearly Identify Your Client at All Proceedings Involving the Employee

Case law demonstrates that an attorney’s appearance on behalf of an employee at a legal proceeding may give rise to an implied attorney–client relationship.


This happened in *Motorola*, as discussed above. Corporate counsel accompanied a former employee to a deposition and stated on the record that he was present on behalf of Motorola.<sup>30</sup> However, during his deposition testimony, the ex-employee stated that he was being represented by corporate counsel, and the attorney failed to correct the employee or clarify the relationship on the record.<sup>31</sup> The court explained that the attorney should have known that his failure to correct the employee’s expressed belief that he was being represented by corporate

counsel “would cause confirmation and further reliance on the belief that corporate counsel represented him.”<sup>32</sup> On this basis, the court held that an implied attorney–client relationship existed between the ex-employee and corporate counsel.

Similarly, in *E.F. Hutton v. Brown*,<sup>33</sup> a corporate officer argued that corporate counsel had “represented him individually when he testified in hearings before the SEC and bankruptcy court about activities he had undertaken as vice president for Hutton.”<sup>34</sup> The district court agreed, holding that it was “reasonable and natural” for the officer to believe that he was being represented by corporate counsel who accompanied him to the hearings because “he faced potential civil liability as well as the possibility of criminal charges” and was therefore “entitled to and in need of counsel.”<sup>35</sup> The court was also “impressed” by the fact that when the officer testified on two separate occasions that he was being represented by corporate counsel, neither the corporation nor corporate counsel made any effort to correct the record.<sup>36</sup> Consequently, the court granted the motion to disqualify corporate counsel, holding, “Their appearance now against [the officer] can only appear unseemly, regardless of the amount of representation they afforded him, or the secrecy of their discussions and advice to him at the time.”<sup>37</sup>

The court noted that corporate counsel could have avoided the creation of an implied attorney–client relationship and the subsequent disqualification by informing the officer that they would appear at the hearings solely on Hutton’s behalf, and that if the officer “had any interest which failed to coincide with some interest of Hutton’s his interest would go unprotected unless he employed personal counsel.”<sup>38</sup>

### 10 Anticipate the Worst—Murphy’s Law is Rampant

One lesson that can be drawn from many of the cases discussed here is that a lawyer may often serve his or her client’s interests best by anticipating adversity, and indeed assuming that it will arise between a corporate client and an employee whose conduct has exposed the company to potential liability. By expecting the worst, a lawyer is not likely to be disappointed or, more importantly, not disqualified from further representation of the corporate client. 

1. See Marc Galanter, "Old and in the Way": *The Coming Demographic Transformation of the Legal Profession and Its Implications for the Provision of Legal Services*, 1999 Wis. L. REV. 1081, 1088-1089 ("An ever-increasing share of the ever-growing legal services 'pie' is purchased by businesses and governments rather than individuals.").
2. See ER 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client") and cmt. 1 ("A lawyer should ... take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor").
3. A 1998 study concluded that approximately 50 percent of the Fortune 500 officers and employees interviewed by company lawyers mistakenly assumed that corporate counsel represented both the corporation and its employees on matters that could give rise to corporate and personal liability. See Paul R. Rice, *Influence of Personal Liability on Candor of Corporate Agents* (1998), available at [www.acc.com/public/article/privilege/ricesurvey.html](http://www.acc.com/public/article/privilege/ricesurvey.html); see also *Advanced Mfg. Technologies, Inc. v. Motorola, Inc.*, 2002 WL 1446953, \*4 (D. Ariz. 2002) (ex-employee asserted that he "believed that as a Motorola employee, he would be included, on an individual basis, in the legal representation Motorola secured in the case to defend against" claims arising out of his conduct while employed as a manager of one of Motorola's machine shops).
4. Adversity between the employee and corporation could exist, for example, if the corporation intends to discipline or terminate the employee or if the corporation intends to "endeavor to distance itself from the person's conduct, such as by acknowledging the conduct but denying responsibility for it, or by characterizing the conduct as that of an employee acting contrary to company policy or direction." District of Columbia Bar Ethics Op. No. 269, at 2.
5. See *Professional Service Indus., Inc. v. Kimbrell*, 758 F. Supp. 676, 683 (D. Kan. 1991) (holding that Model Rule 1.13, substantially similar to ER 1.13, establishes a guideline of fairness for functioning with a legal fiction); see also 1 GEOFFREY C. HAZARD & W. WILLIAM HODES, *THE LAW OF LAWYERING* (1985) § 1.13:501 at 430 (disagreeing with notion "that the lawyer's duty of diligent representation requires him to discover as much information as he can from [an employee] with interests potentially adverse to those of the entity, even if that person is severely disadvantaged").
6. 2002 WL 1446953 at \*1.
7. *Id.*
8. *Id.* at \*4 ("[T]he fact that Corley never signed any fee agreement nor paid [the] firm for his representation at his depositions is not controlling and do not preclude the Court from concluding that an attorney-client relationship was impliedly created between them.").
9. *Id.* Interestingly, corporate counsel had stated at the outset of both depositions that he was appearing at the depositions on Motorola's behalf. *Id.* at \*1.
10. *Id.* at \*5.
11. *Matter of Pappas*, 768 P.2d 1161-62, 1166-67 (Ariz. 1988); see also *Paradigm Ins. Co. v. Langerman Law Offices, P.A.*, 24 P.3d 593, 596 (Ariz. 2001).
12. See, e.g., *Manion v. Nagin*, 394 F.3d 1062, 1069 (8th Cir. 2005) (finding implied attorney-client relationship: "If Nagin was truly working exclusively as BDA's lawyer, he should have responded to Manion's questions by clarifying that he worked only for BDA" rather than providing legal advice); *Home Care Indus., Inc. v. Murray*, 154 F. Supp. 2d 861, 869 (D.N.J. 2001) (finding implied attorney-client relationship: "The record is clear that the Skadden Firm failed to inform Murray that its client was HCI and not Murray. ... An explanation of the Skadden Firm's position as counsel for HCI exclusive of its officers, would have gone a long way to avoid the position that said firm finds itself defending in the instant matter. ... [T]he Skadden Firm should have taken precautions to clarify any ambiguity concerning its duty to represent HCI as separate and distinct from its officers."); *E.F. Hutton & Co. v. Brown*, 305 F. Supp. 371, 391 (S.D. Tex. 1969) (finding existence of attorney-client relationship after corporate counsel failed to take reasonable steps to correct misunderstanding that became evident when employee indicated at two court proceedings that he was personally represented by corporate counsel); *United States v. Int'l Brotherhood of Teamsters*, 961 F. Supp. 665, 672 (S.D.N.Y. 1997) (finding that a campaign employee's belief that he had a personal attorney-client relationship with the campaign's counsel was not reasonable in part because the campaign's counsel informed the employee that they were "speaking with him in the course of their investigation on behalf of the ... Campaign").
13. *Professional Service Indus.*, 758 F. Supp. at 684 (discussing Model Rule 1.13, which is substantially similar to ER 1.13).
14. The Second Circuit has held that attorneys are required "to highlight potential conflicts of interest to all concerned as early as possible." *United States v. International Brotherhood of Teamsters*, 119 F.3d 210, 217 (2d Cir. 1997).
15. 415 F.3d 333 (4th Cir. 2005).
16. *Id.* at 338.
17. *Id.* at 339.
18. *Id.* at 341.
19. See ER 1.13; ER 4.3.
20. *Roehrs v. Minnesota Life Ins. Co.*, 228 F.R.D. 642, 646 (D. Ariz. 2005).
21. See, e.g., *Teamsters*, 961 F. Supp. at 672; *Nilavar v. Mercy Health System-Western Ohio*, 143 F. Supp. 2d 909, 917 (S.D. Ohio 2001) (finding that no attorney-client relationship existed between physician and the attorney retained by his practice where physician established only that he believed that his communications with corporate counsel were "confidential vis-à-vis" third parties but "not vis-à-vis" the practice and its principals).
22. *Teamsters*, 961 F. Supp. at 672.
23. Arizona and federal case law is clear that the organization alone is the holder of the corporate attorney-client privilege. See *Samaritan Found. v. Goodfarb*, 862 P.2d 870, 877 (Ariz. 1993) ("In the corporate context, the privilege belongs to the corporation and not the person making the communication."); *In re Grand Jury Subpoenas*, 144 F.3d 653, 658 (10th Cir. 1998) ("Any privilege resulting from communications between corporate officers and corporate attorneys concerning matters within the scope of the corporation's affairs and the officer's duties belongs to the corporation and not to the officer."); *Teamsters*, 119 F.3d at 215 ("[C]ourts have held that any privilege that attaches to communications on corporate matters between corporate employees and corporate counsel belongs to the corporation, not to the individual employee"); *In re Beville, Bresler & Schulman Asset Management Corp.*, 805 F.2d 120, 124 (3rd Cir. 1986) ("Any privilege that exists as to a corporate officer's role and functions within a corporation belongs to the corporation, not the officer.").
24. See *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348-349 (1985) ("[T]he power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors. The managers, of course, must exercise the privilege in a manner consistent with their fiduciary duty to act in the best interests of the corporation and not of themselves as individuals."); *United States v. Chen*, 99 F.3d 1495, 1502 (9th Cir. 1996) ("[A] corporate employee cannot waive the corporation's privilege."); *In re Beville*, 805 F.2d at 125 ("A corporate official ... may not prevent a corporation from waiving its privilege arising from discussions with corporate counsel about corporate matters."); *Teamsters*, 119 F.3d at 215 ("[E]mployees generally may not prevent a corporation from waiving the attorney-client privilege arising from" communications "on corporate matter between corporate employees and corporate counsel."); *In re Grand Jury Proceedings*, 219 F.3d 175, 184 (2nd Cir. 2000) ("[C]ourts have found that a corporate employee or officer could not assert the attorney-client privilege when the corporation has already waived the privilege"); *Williams v. Sprint/United Mgmt. Co.*, 2006 WL 1867478, \*8 (D. Kan. 2006) ("A mere employee 'cannot waive the corporation's privilege.'").
25. *In re Grand Jury Subpoena*, 415 F.3d at 339-40.
26. *Id.* at 340.
27. *Id.*
28. *Hrudka v. Hrudka*, 919 P.2d 179, 184 (Ariz. Ct. App. 1995); see also *Manion*, 394 F.3d at 1069-1070 (finding that implied attorney-client relationship arose when shareholder "sought and received legal advice" on personal matters from corporate counsel).
29. *In re Grand Jury Subpoena*, 415 F.3d at 336-337.
30. *Motorola*, 2002 WL 1446953 at \*1.
31. *Id.*
32. *Id.* at \*5.
33. 305 F. Supp. at 371.
34. *Id.* at 376.
35. *Id.* at 390-91.
36. *Id.* at 391.
37. *Id.* at 398.
38. *Id.* at 397.