

# The “Ethics” Game:

**Government Investigations Edition**



# Meet your speakers



**Deborah Yoon  
Jones**  
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Intuit



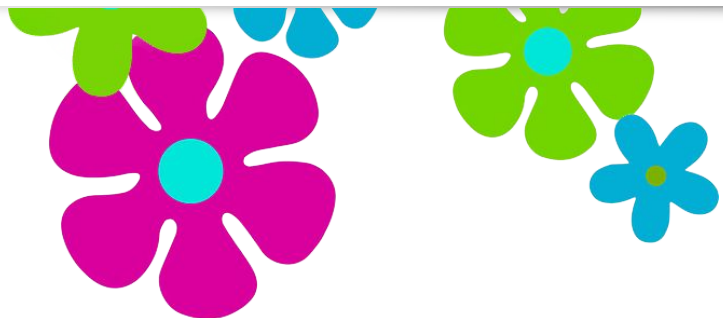
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**Nikolas Takacs**  
Visa



# Scenario 1:

## Responding to Grand Jury Subpoenas



# Scenario 1: Responding to Grand Jury Subpoenas

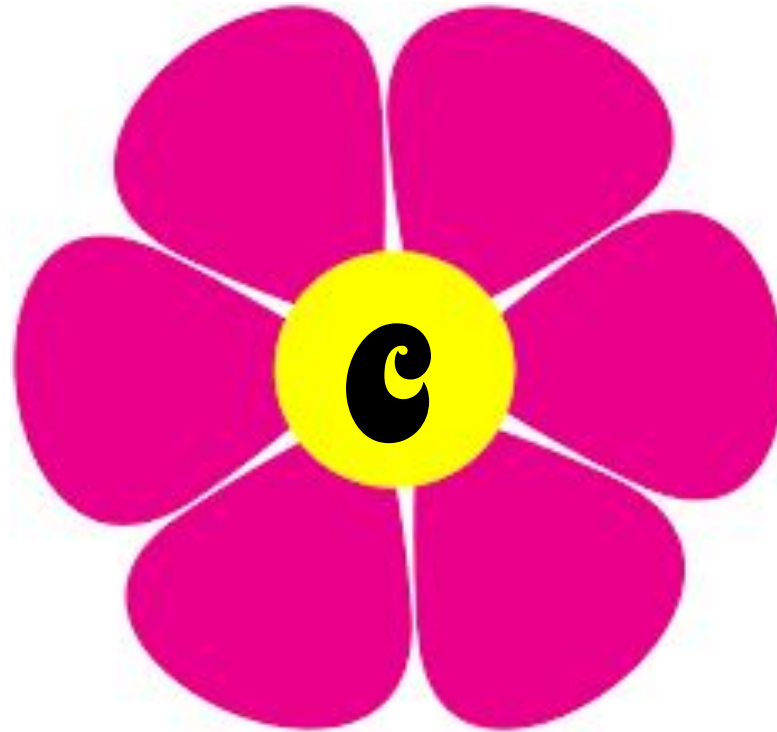
The local California US Attorney's Office has empaneled a grand jury to investigate fraudulent behavior by Company ABC in connection with several real estate projects. The grand jury investigating Company ABC has issued a lawful subpoena to your company for all documents, of any kind (including emails) and the testimony of any employees with relevant information, related to work Company ABC performed for your company on a real estate project. Employees of your company inform you, the General Counsel, that in complying with the grand jury subpoena, there may be bad documents that implicate your company employees in the allegedly fraudulent conduct committed by Company ABC. What do you have to do?

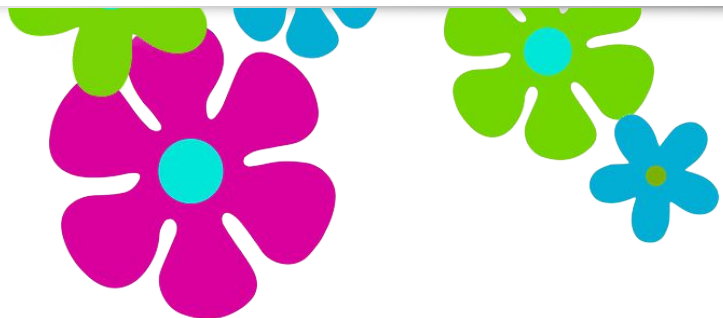
# Scenario 1: Responding to Grand Jury Subpoenas

What do you have to do?

- A.** Respond to the grand jury but do not produce the bad documents that implicate your company employees
- B.** Just turn over everything
- C.** Conduct an internal investigation and produce to the government in response to the grand jury subpoena all relevant documentary information as well as the names of the employees with relevant information

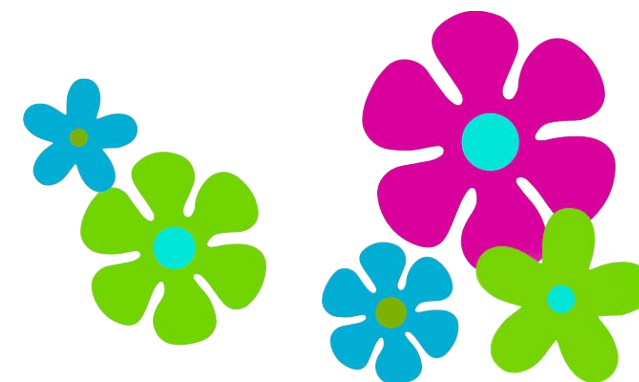
# Answer





# Scenario 2:

## *Upjohn Warnings*



## **Scenario 2: *Upjohn* Warnings**

As part of an FCPA investigation, you, along with outside counsel, will be interviewing several employees about whether they knew any bribes were being paid by your company's executives. You are about to interview a current mid-level manager. Should you give an Upjohn warning?

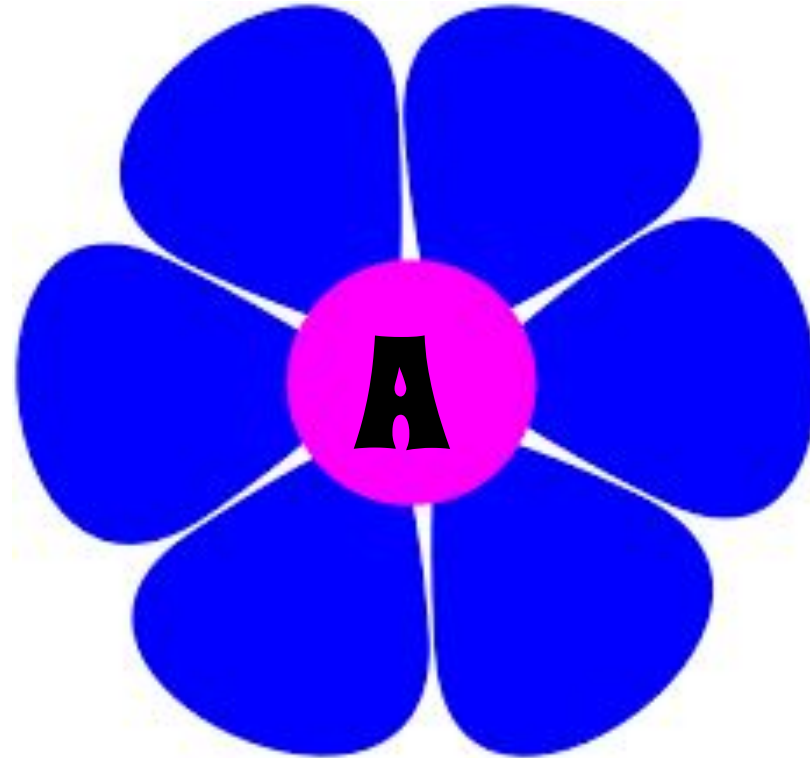


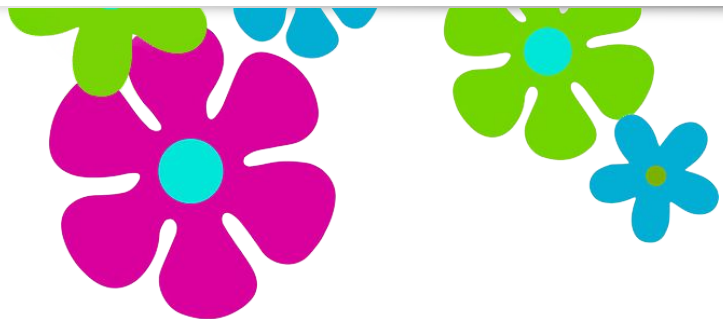
## Scenario 2: *Upjohn* Warnings

Should you give an *Upjohn* warning?

- A.** Yes, deliver the *Upjohn* warning at the outset, memorialize the warning, and ask the employee to acknowledge she understands that you and outside counsel represent the company and not the employee personally
- B.** No, because the employee is a current employee and is thus automatically represented by company counsel
- C.** No, because the employee is not a director or officer of the company

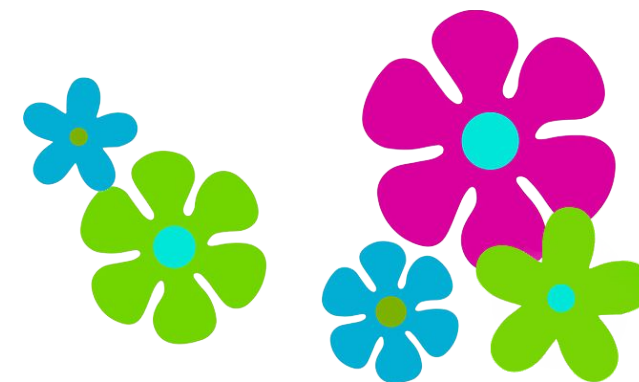
**Answer**





# Scenario 3:

## Friending the CFO



## Scenario 3: Friending the CFO

You are sitting at your dining room table working on the long to do list of items and trying not to get distracted by the last episode of the Sex and the City reboot. Your cell phone rings and you see the name of your business client and of course you pick up because hey, with COVID you work any time of the day!

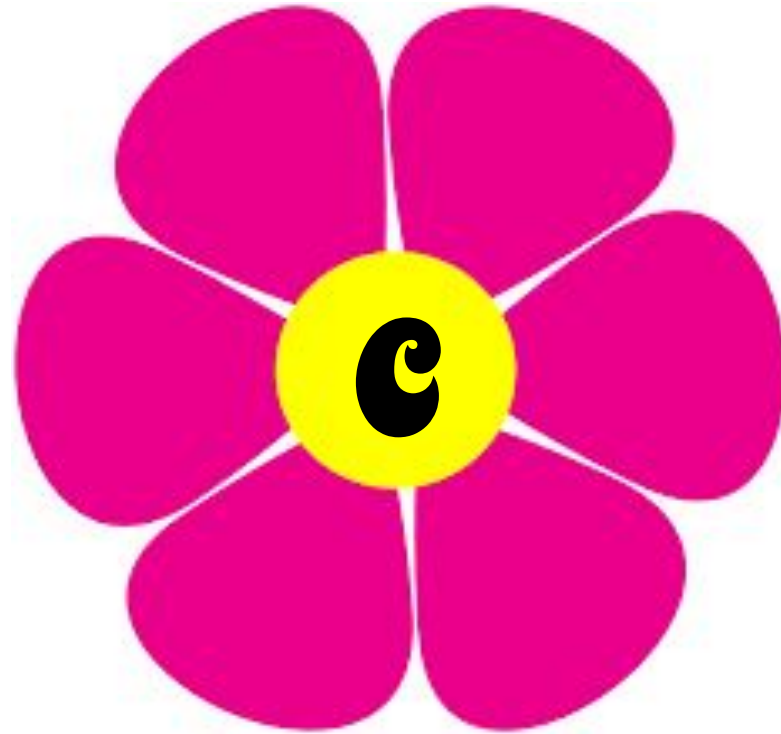
“Hey, got a minute?” she asks and not waiting for you to respond, says: “As you know, we’re doing this acquisition of notsohot.com and I heard they are involved in a government investigation. That makes me concerned. I’m also worried about the other side’s CFO. He might be stealing, and I feel like there are likely employment issues that we’re not finding about in our due diligence sessions with their outside counsel. He seems so sleazy. I want to find out more about him on social media. I’d like to have my friend, a paralegal who used to work here, send a “friend” request to the CFO and get access to his Facebook page. Then we wouldn’t have to identify the company and could find out what was there. I need your approval to go ahead with this approach. Can you also think of anything specific we should tell my friend to look for on the CFO’s Facebook page?”

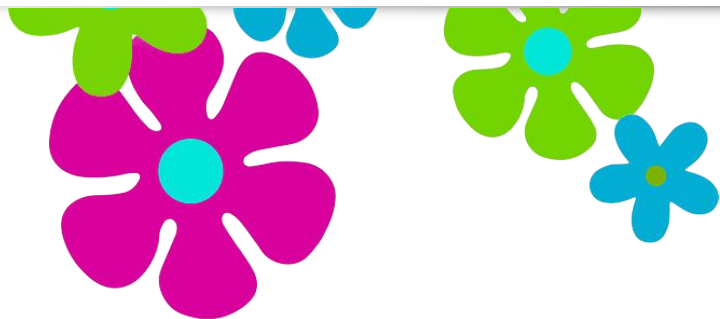
## Scenario 3: Friending the CFO

Is it okay to do this? Why or why not?

- A.** That's a great idea!
- B.** Your business client should send the request
- C.** No friending the CFO!

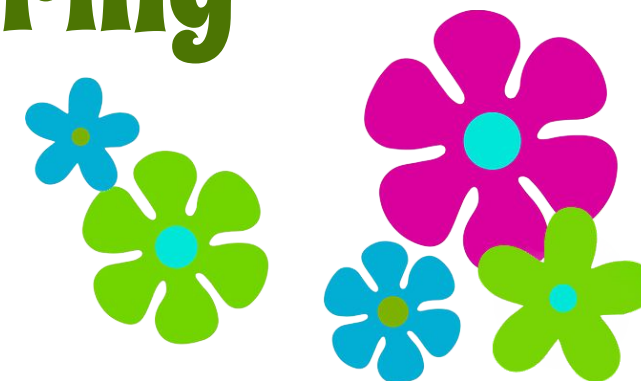
# Answer





# Scenario 4:

## Disclosing Information During Settlements



## **Scenario 4: Disclosing Information During Settlements**

In response to a Civil Investigative Demand, your client's company produced tens of thousands of documents and provided various excel spreadsheets of consumer data. You were able to negotiate a favorable settlement on behalf of your client with the government to settle a case for \$1.1 million even though there is nationwide exposure and the government's opening demand was \$900 million. In reaching the \$1.1 million figure, the government relied upon the spreadsheets that the company produced in response to the CID. You know the government got that figure from the first tab of one of the spreadsheets. But when you are finalizing the Consent Decree language you seek clarification from the client about what exactly the \$1.1 million amount represents and learn that they took an extremely narrow view of what that amount includes. You are told then that additional information was placed in a separate tab on the spreadsheet with amounts that should be added to the \$1.1 million so that the total amount should be \$2.3 million. You look back at the CID written responses (which were prepared by the company) and see that there is nothing there to confirm what the \$1.1 million represents. The government never asked you to clarify any of the figures.

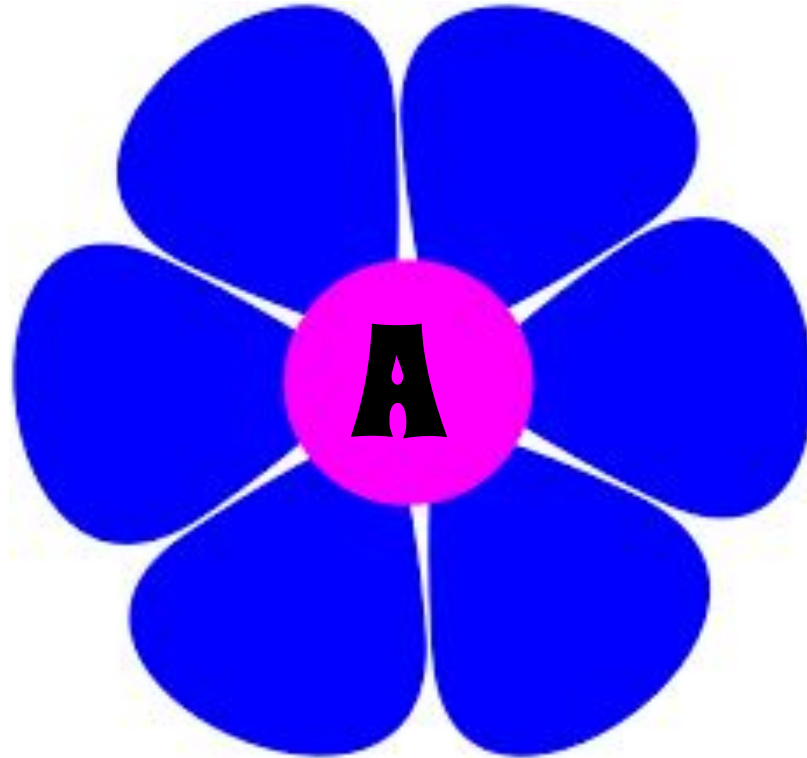


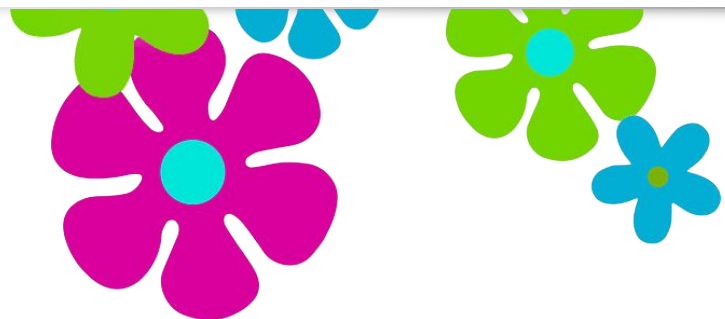
## **Scenario 4: Disclosing Information During Settlements**

Do you withhold the information or direct the government attorneys to the last tab?

- A.** Maybe
- B.** Yes! We owe them nothing
- C.** No way, we should tell the other side

# Answer





# Scenario 5:

## Protection of Investigation Reports



## **Scenario 5: Protection of Investigation Reports**

As in-house counsel for a major cruise line, you learn that a person was injured on a sky pad attraction aboard a cruise ship. You immediately retain an outside consulting expert to inspect the sky pad and provide your company with a report that will help the company defend against any possible future litigation that may result. Your CEO asks if the report by this outside consulting expert will ever have to be turned over during discovery. You reply:

# Scenario 5: Protection of Investigation Reports

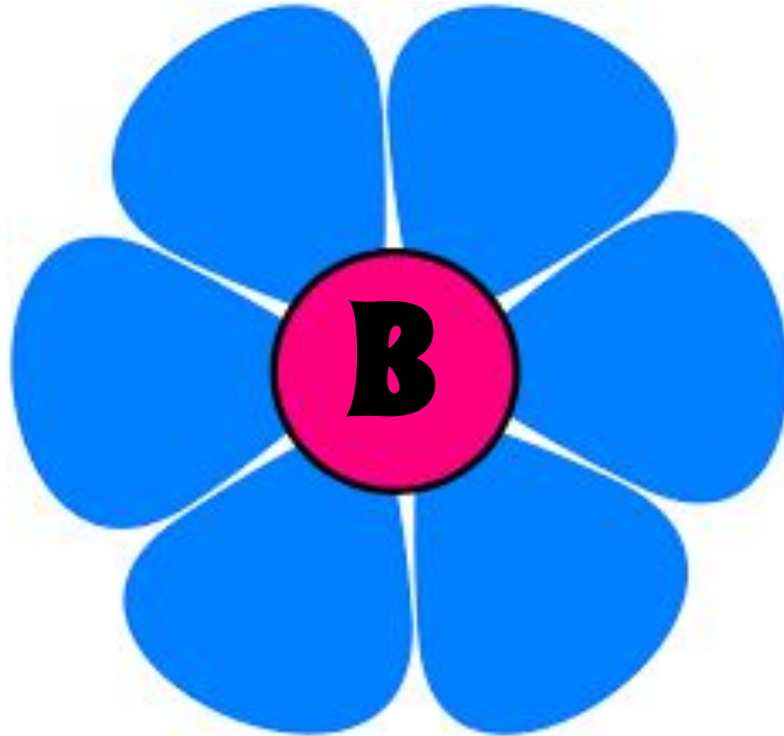
What is your reply?

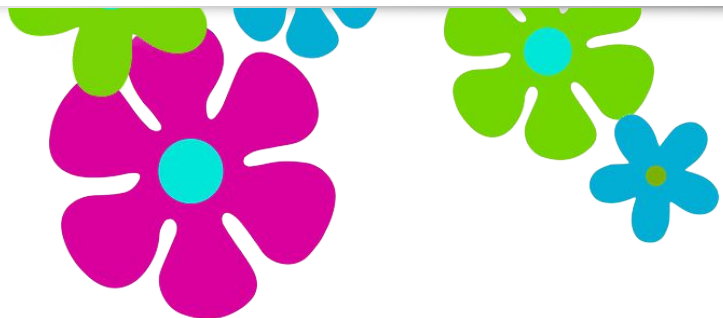
**A.** No

**B.** It depends

**C.** Yes

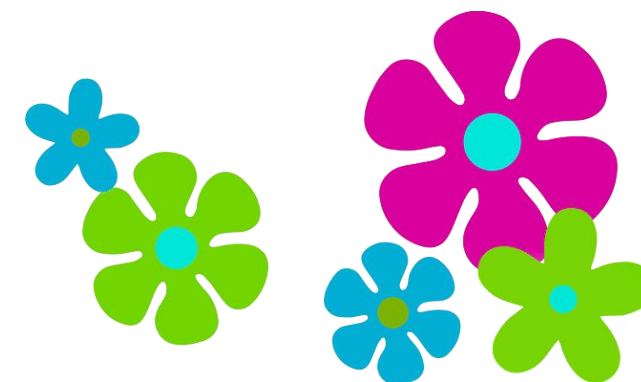
**Answer**





# Scenario 6:

## Required Disclosures



## **Scenario 6: Required Disclosures**

You are the GC of a company that is acquiring a target company. The target company becomes the subject of a governmental false claims act (civil) investigation between signing and closing. Your company has signed an NDA and is participating in a joint investigation with the target company's counsel. You discover an incriminating document in the course of the investigation. The target company's counsel has decided not to disclose it and directs you not to disclose it either pursuant to the NDA. The government sends your company a CID for all relevant documents relating to the target company. Do you produce or withhold the document?

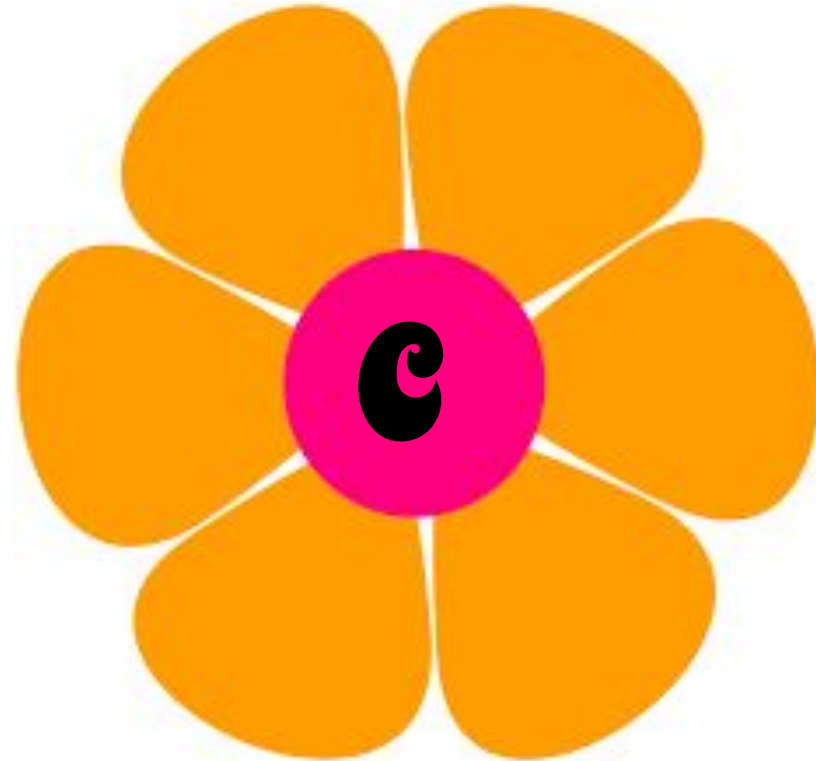


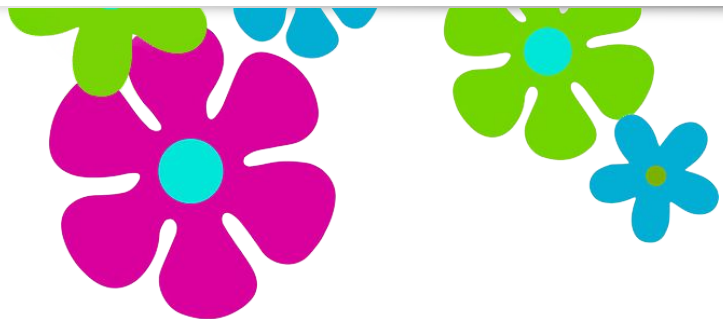
## Scenario 6: Required Disclosures

Do you produce or withhold the document?

- A.** Do not produce the document because there is an NDA in place and your company will be sued for breach of that agreement
- B.** You have to produce it because a Civil Investigative Demand excuses any obligations owed under an NDA
- C.** Check the NDA for language regarding documents requested by the government and let the target company know.

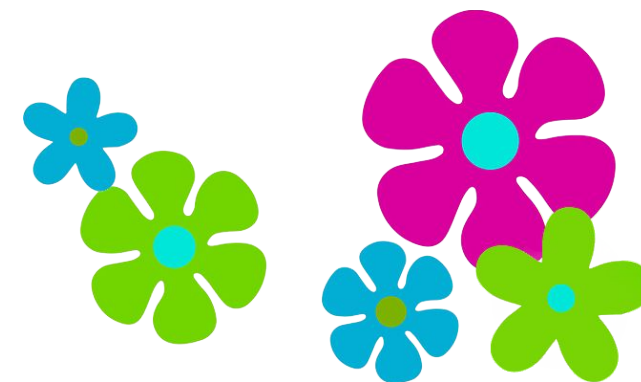
# Answer





# Scenario 7:

## Privileged Emails



# Scenario 7: Privileged Emails

This conversation happens to you one day:

**Smart:** “Hello there, this is Assistant U.S Attorney Albert Smart. I am calling to see if you would accept service of a grand jury subpoena for documents on behalf Your Company. If so, it will save a trip by the FBI to serve it on you in person.”

**You:** “Yes,” you say, because you want to be cooperative.

**Smart:** “Great. By the way, does Your Company’s email policy inform its employees that the email system belongs to Your Company, and therefore, the employee has no expectation to privacy in their email?”

**You:** “Yes,” you reply cautiously.

**Smart:** “Good,” says Smart, “because you will notice the subpoena asks for emails pertaining to the XYZ Association, and your CEO is on its Board. Just so the government is clear on this, we want any emails that your CEO’s company computer has relating to the XYZ Association, even if the emails are from XYZ’s Association’s lawyers.”

**You:** “Ok but those emails may be privileged . . .”

The AUSA hangs up before you can finish. . .

## Scenario 7: Privileged Emails

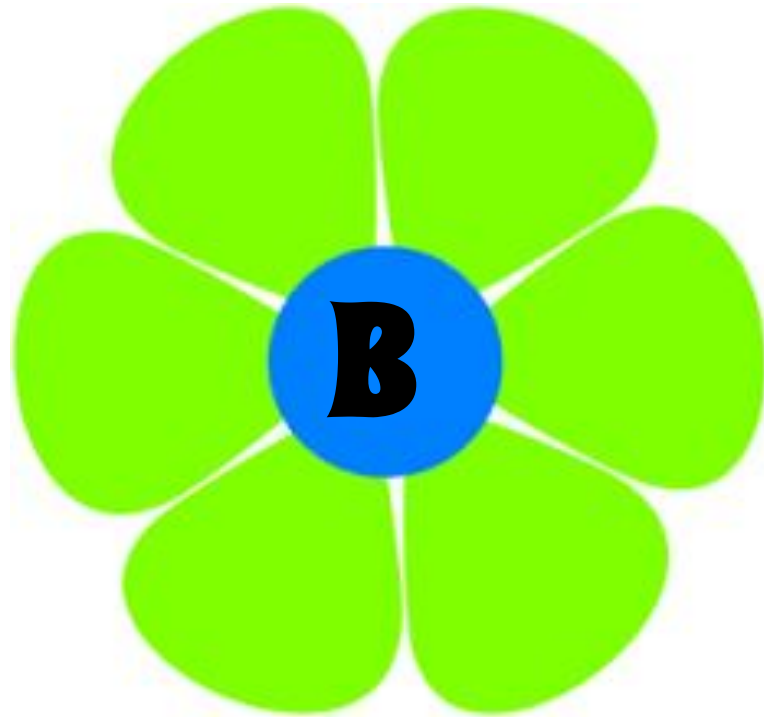
What are you going to tell the CEO if he asks if the emails are privileged?

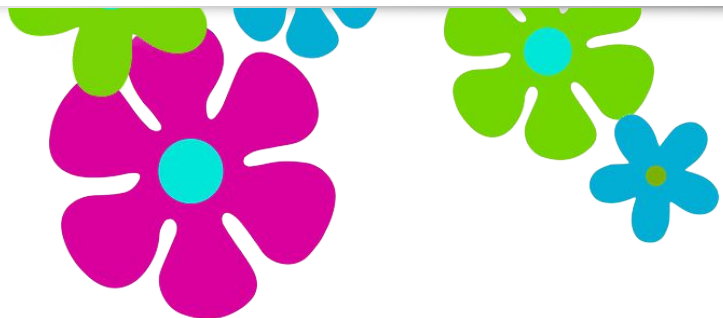
**A.** Don't worry about it!

**B.** I need to see your emails, we may have a problem...

**C.** You are screwed!

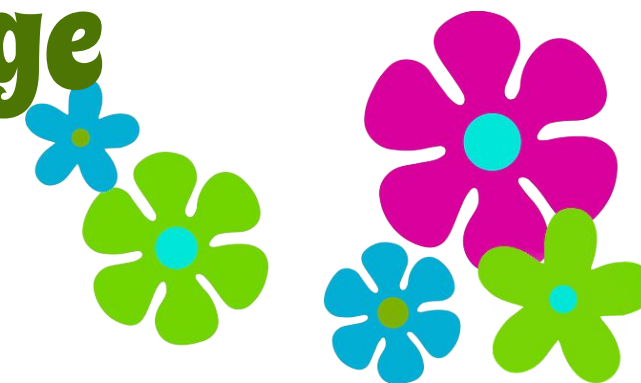
**Answer**





# Scenario 8:

## Attorney-Client Privilege



## Scenario 8: Attorney-Client Privilege

You are in-house counsel at Fintech Co which has just received a CID from the Department of Justice about a particular project that your business client, George, worked on. You have pulled emails in response to the CID and some include communications between you and George relating to the new product initiative for your enterprise clients and your advice on issues that you saw with launching the product. You find the following e-mails:

### **E-Mail 1: You to George:**

George,

Thanks to you and your team for giving me the presentation on the new product you're developing. As I mentioned during the presentation, this is a new business for Fintech Co. and this type of activity generally requires a license from State Regulatory Agency under the Fintech Licensing Act. I looked into it, and in our case, I believe we have a reasonable argument that we qualify for a license exception. If we choose not to obtain a license, however, I would expect that State Regulatory Agency may challenge that position so we should be prepared to engage early with the agency so that we can reduce the chance of potential delays.

Best,

You



# Scenario 8: Attorney-Client Privilege

## **E-Mail 2: George Forwarding this Advice to Samantha:**

Samantha,

See below from Counsel 1. I know you're working on a similar product and wanted to make sure you also considered this advice.

Best,

George

## **E-Mail 3: You Follow-Up E-mail to George**

George,

One other point that I wanted to make given that this is an area that I'm very familiar with from my previous job. In my experience, this is a very challenging market with low margins and I'm not sure we have the resources to make this a profitable opportunity. Let's give this some more thought before we decide to proceed.

Best,

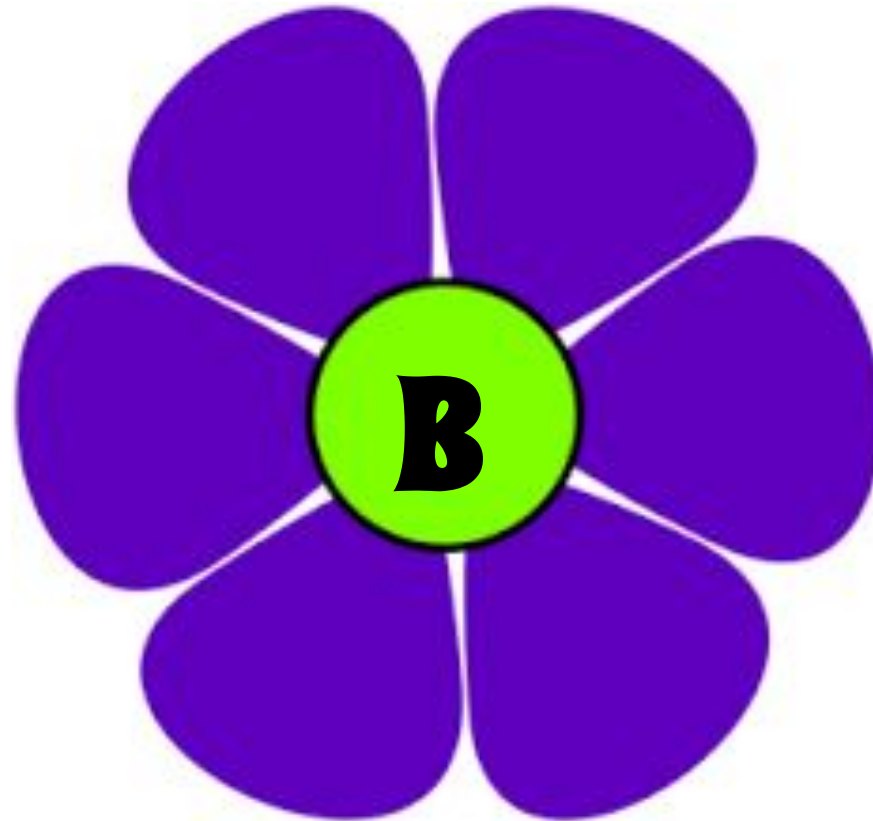
You

## Scenario 8: Attorney-Client Privilege

In responding to the CID which requests all communications relating to the development of the project, which of these three e-mails would likely be protected by privilege?

- A.** All of the e-mails
- B.** E-mail 1 only
- C.** E-mails 1 and 3 only

**Answer**





**Thank you for playing  
The “Ethics” Game:**

**Government Investigations Edition**

