SELECTED ETHICS AND PROFESSIONALISM HANDBOOK FOR LABOR AND EMPLOYMENT LAWYERS

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Selected Ethics and Professionalism Issues for Labor and Employment Lawyers[1]

I. CONFLICTS OF INTEREST

A lawyer owes his or her client a duty of zealous representation and loyalty, which may present problems when the client's interests are adverse or potentially adverse to those of the lawyer's present, former, or prospective clients.[2]

A. Adverse Representation Against a Current Client.

Absent waiver, if an attorney represents multiple parties in litigation and facts develop indicating that one of the parties has a cause of action against another party, the attorney may have to withdraw from representing both clients.[3] This may be true even where the two representations involve completely distinct and unrelated claims.[4] The prohibition encompasses all types of representation,[5] and does not depend on the relative importance of the lawyer's representation.[6]

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[1] This paper is excerpted from ETHICS AND PROFESSIONALISM HANDBOOK FOR LABOR AND EMPLOYMENT LAWYERS (30th Ed. 2026) (D. Duffy, Editor-in-Chief), with permission of Dennis P. Duffy and the National Employment Law Institute.

[2] *See* ABA MODEL RULES OF PROF'L CONDUCT 1.7 [hereafter ABA MODEL RULES] (absent informed consent, a lawyer shall not represent a client if the representation of that client will be directly adverse to another client or there is a significant risk that the representation of one or more clients will be materially limited by the lawyers' responsibilities to another client, a former client or a third person or by a personal interest of the lawyer). *Accord*: ABA MODEL CODE OF PROF'L RESPONSIBILITY DR 5-105 [hereafter ABA MODEL CODE].

[3] *See* Tex. Disciplinary R. Prof'l Conduct ("Tex. DRPC") 1.06; N.Y. Ethics Op. 1224 (2021) (when a lawyer is jointly representing two clients as joint purchasers in a transaction and one of them no longer wishes to proceed, the lawyer cannot continue to represent both clients without violating Rule 1.7). *Cf.* N.Y. Ethics Op. 1130 (2017) (nonconsentable conflict exists when one member of a law firm acts as Town Attorney on planning and zoning matters while another lawyer in same law firm seeks to represent an applicant before the Town's planning board.); N.Y.C. Ethics Op. 2024-1 (2024) (representing two or more bidders competing for the same asset will generally create a conflict of interests; for law firms, the conflicts may be waivable particularly where separate teams of lawyers represent the different bidders and appropriate information walls prevent the sharing of the respective bidders' confidential information. Lawyer firms may be able to obtain advance consent from clients to certain defined conflicts arising from the representation of multiple bidders competing for the same asset).

[4] ABA MODEL RULE 1.7 cmt.6. *See* N.J. Ethics Op. 679 (1995) (no per se ban on representing in a matter an attorney-adversary in an unrelated contract case for non-public entity clients, where the attorney reasonably believes representation will not be adversely affected, both clients consent after full disclosure and consultation).

[5] *See* N.C. 2019 Formal Ethics Op. 1 (2019) (lawyer may not jointly represent opposing clients in divorce case and prepare a separation agreement); *Disciplinary Bd. v. Stoller*, 879 N.W.2d 199 (Iowa 2016) (Attorney violated conflict of interest rules by representing new client in lawsuit, while knowing that lawsuit would eventually become adverse to existing client, who was in process of selling farm property to new client, and who attorney was representing in small claims matter, without obtaining written informed consent from either party); *Bryan Corp. v. Abrano*, 52 N.E.3d 95 (Mass. 2016) (Firm's defense of corporation in action for unpaid fees and representation of shareholder regarding corporation's alleged violation of Wage Act were directly adverse and thus violated prohibition against simultaneous representation of directly adverse clients; firm should have known when it agreed to represent shareholder that his interests were adverse to, or were likely to become adverse to, those of corporation, and it was apparent that firm was aware of potential for conflict, as it advised that changes in board's structure could have resulted in conflict of interest that would require it to withdraw from representing shareholder and company).

[6] *See In re Johnson*, 84 P.3d 637 (Mont. 2004) (attorney publicly censured for representing directly adverse clients without their consent, where he agreed to represent a wrongful death plaintiff and continued to represent her after he and his firm determined that one of its corporate clients was a potentially responsible party and the firm continued to

B. Simultaneous Representation of Potentially Adverse Clients.

There is no per se prohibition against representing multiple parties in litigation, and the propriety of such representation requires a case-by-case analysis.[7] After full disclosure of the

represent the corporate client on other matters, and later improperly terminated the corporate client); *Picker Int'l, Inc. v. Varian Assocs., Inc*., 670 F. Supp. 1363, 1365 (N.D. Ohio 1987) ("A law firm may not drop a client like a hot potato, especially if it is in order to keep happy a far more lucrative client."). *Cf.* ABA Formal Op. 520 (2026) (Model Rule 1.16(d) requires a lawyer to respond to requests for information from former clients or successor counsel in certain limited circumstances when doing so is necessary to protect client interests and reasonably practicable. Ordinarily, such a request will require a response when the requested information was acquired by the lawyer during the course of the representation, is unavailable from other sources, and is important to the client's interests in the matter in which the lawyer formerly represented the client. Rule 1.16(d) does not require a lawyer to take steps to acquire new information, generate written responses, or provide further legal services to the client in response to a request for information.); ABA Formal Op. 516 (2025) (Rule 1.16(b)(1) permits a lawyer to voluntarily end, or seek to end, an ongoing representation if "withdrawal can be accomplished without material adverse effect on the interests of the client." A lawyer's withdrawal would have a "material adverse effect on the interests of the client" if it would result in significant harm to the forward progress of the client's matter, significant increase in the cost of the matter, or significant harm to the client's ability to achieve the legal objectives that the lawyer previously agreed to pursue in the representation. A lawyer may be able to remediate these adverse effects and withdraw in a manner that avoids or mitigates the harm that the Rule seeks to prevent. For example, the withdrawing lawyer may help the client find a new lawyer, collaborate with successor counsel to bring the new lawyer up to speed, and/or return or forego legal fees for work that will have to be duplicated. Ideally, lawyers will exercise care and thoughtfulness in deciding whether to accept an engagement and will generally refrain from ending a relationship without good cause, whether out of a sense of obligation, loyalty to the client, or professional pride. But even careful lawyers may occasionally desire to end a representation for reasons other than those that constitute "good cause" under Rule 1.16. The lawyer's motivation is not relevant under Rule 1.16(b)(1). Therefore, under the Model Rules, if the lawyer's withdrawal does not cause "material adverse effect" to the client's interest, a lawyer may withdraw to be able to accept the representation of a different client, including to avoid the conflict of interest that might otherwise result.); D.C. Ethics Op. 380 (2021) (examining various conflict of interest issues related to: (i) issuing subpoenas to current or former clients; (ii) advising current or former clients who are potential witnesses about their Fifth Amendment rights; and (ii) cross-examining current or former clients); D.C. Ethics Op. 381 (2021) (a lawyer's representation of a prospective client in responding to a third-party subpoena that seeks information about a lawyer's existing client does not create a conflict of interest unless: (i) the lawyer knows, after performing reasonable diligence in evaluating the subpoena request, that the prospective client possesses responsive information that, if produced, is or likely will be adverse to the other client and such knowledge likely will adversely affect the lawyer's representation of either client; or (ii) the lawyer's professional judgment will or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or other interests as a result of the prospective engagement); Wis. Ethics Op. EF-20-02 (2020) (Lawyer faced with cross-examining a current client will have a conflict of interest that prevents the lawyer from continuing both representations unless both clients give written and signed informed consent. A lawyer faced with cross-examining a former client will have a conflict if the subject matter of the prior representation is the same or substantially related to the examination or there is a substantial risk the lawyer will use information relating to the representation of the former client to the disadvantage of the former client. In both situations, the conflict of interest would be imputed to other members of the firm).

[7] *See*, *e.g.*, *Chavez v. New Mexico*, 397 F.3d 826 (10th Cir. 2005) (district court did not abuse its discretion by refusing to disqualify defendants' attorney for potential conflicts resulting from the fact that one defense attorney represented both the agency and the multiple individual defendants in their individual and official capacities in employment discrimination action); Ill. Ethics Op. 12-12 (2012) (A lawyer may not continue to represent a school district against which the lawyer's partner has initiated an adverse proceeding. However, the school board may give informed consent to the lawyer's continued representation in unrelated matters if the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation despite the conflict of interest.); N.Y.C. Ethics Op. 2019-4 (2019) (A lawyer serving in the role as "pool counsel" (i.e., where the corporation offers to compensate a single lawyer (or law firm) to represent a pool of multiple employees (or several law firms to each represent different pools of employees)) may concurrently represent multiple individuals in connection with a governmental investigation or corporate internal investigation, subject to the rules governing conflicts of interest and confidentiality. Among other

inherent risks of simultaneous representation, clients may consent to such representation. However, if an actual conflict materializes, the attorney may be precluded from representing either side.[8] Multiple representation issues frequently arise in cases involving the potential joint representation of a corporate employer and an employee whose alleged conduct against the plaintiff employee forms the basis for the lawsuit. In most cases, if the corporation acknowledges that the employee was acting within the scope of his duties, no conflict exists and multiple representation is appropriate.[9] Similar conflict issues may arise when the lawyer is asked to represent its corporate client and a corporate affiliate that may have potentially divergent interests.[10] Simultaneous representation issues may also arise where a government official is being

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things, the lawyer/firm should obtain informed consent for actual/potential conflicts that may arise. Before interviewing a prospective client in the "pool," counsel must secure the individual's informed consent to allow disclosure of the individual's confidential information to others and use of the information with respect to representation of others in the pool); Ohio Ethics Op. 2019-1 (2019) (Absent informed consent, a lawyer may not represent an adverse party in an unrelated matter when the lawyer represents current clients with claims pending against the adverse party. A lawyer may not withdraw from the representation of a current client to undertake representation of an adverse party, even if the matters are unrelated. Absent informed consent, a lawyer may not represent a former adverse party in a new matter against a former client if the new matter is the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client. A lawyer who is unable to undertake representation of a prospective client due to a conflict may recommend another lawyer or list of lawyers, so long as the lawyer does so in good faith).

[8] *See In re Vaile*, 707 P.2d 52, 55 (Ore. 1985); *Marguiles v. Upchurch*, 696 P.2d 1195, 1204 (Utah 1985).

[9] *See Madison Cnty. v. Hopkins*, 857 So.2d 43 (Miss. 2003) (no conflict of interest for lawyers representing county and sheriff in his official capacity in FLSA suit against county and sued sheriff in his individual capacity seeking indemnification, and thus sheriff was not entitled to partial reimbursement for cost of retaining separate counsel to represent him, where sheriff, in his official capacity, had no stake in the outcome of the FLSA litigation).

[10] *See* N.Y.C. Ethics Op. 2007-3 (2007) (when law firm is approached to represent a client adversely to a corporate affiliate of a current corporate client, the firm should first determine whether its engagement letter with the current corporate client excludes affiliates as entities that the firm also represents, or whether the engagement letter contains an applicable advance conflicts waiver from the current corporate client; if not, the firm must determine whether there is a corporate-family conflict by considering whether (1) the circumstances of the firm's dealings with the affiliate during the firm's representation of the corporate client give rise to an objectively reasonable belief on the part of the affiliate that the law firm represented it, (2) there is a risk that the firm's representation of either client would be materially limited by the potential engagement, and (3) during the current representation the firm learned confidences and secrets from either the current client or the affiliate that would be so material to the adverse representation as to preclude the firm from proceeding; if any of the conditions exist, the firm must seek informed consent before accepting the engagement; firms may seek to avoid corporate-family conflicts by defining the scope of the engagement in advance and by employing advance waivers when appropriate); Ohio Ethics Op. 2008-2 (2008) (lawyer who sits on the board of directors of a corporation but not as corporate counsel has a material limitation conflict of interest prohibiting the lawyer from representing a client in a lawsuit against the corporation.). *See Liquor Bike, LLC v. Iowa Dist. Court for Polk Cnty.*, 959 N.W.2d 693 (Iowa 2021) (There was no significant risk that law firm's representation of medical professional corporation in a certificate-of-need matter would materially limit the representation of its other client, who sought resolution of a boundary dispute, as would support disqualification of law firm in boundary dispute matter; the certificate-of-need would be resolved in a regulatory proceeding in which all information filed in support of the application was accessible to the public, and the boundary-dispute litigation, which involved former property of the professional corporation's owner, was not at all related to the professional corporation's medical practice); *Dr. Falk Pharma GmbH v. GeneriCo, LLC*, 916 F.3d 975 (Fed. Cir. 2019) (Due to shared high degree of operational commonality and financial interdependence between patentee and its affiliates, law firm's appellate representation of generic drug manufacturer in patentee's infringement action against manufacturer presented concurrent conflicts of interest as result of attorneys joining law firm after previously having represented patentee's affiliate, requiring disqualification due to corporate affiliate conflict; affiliates had common infrastructure whereby one provided administrative and general support services to other, including accounting, cash management, employee benefits, finance, human resources, travel, computer systems, insurance, and payroll services, they shared same in-house legal department, and one affiliate contributed over $1 billion to other affiliate's reported revenues).

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sued in her official and individual capacities because in most cases the official's "employer" controls the litigation regarding the "official" capacity, and the government official has a separate (and potentially conflicting) interest regarding her "personal" exposure in the litigation.[11] Similar conflict issues may arise when a lawyer represents multiple plaintiffs since advancing the claim of one plaintiff might necessarily undermine or diminish the claim of the others.[12] A lawyer may represent multiple clients in a single matter if the lawyer reasonably believes he/she can competently and diligently represent each client, the representation does not involve assertion of claims by one client against another, and each client gives informed consent, confirmed in writing.[13] Such informed consent should explain the nature of the potential conflict and describe advantages and disadvantages of common representation in sufficient detail so that each client can understand why separate counsel may be desirable.[14] The lawyer should also address in advance,

[11] *See* Ill. Ethics Op. 01-07 (2002) (two lawyers in same firm may continue to simultaneously represent two government agencies where agencies' interests potentially conflict but there is no current direct adversity); N.Y. Ethics Op. 1285 (2025) (lawyer who is employed by a law firm that represents various municipalities may accept appointments as assigned counsel to represent indigent persons in criminal court provided the lawyer complies with the rules regarding conflicts of interest. If the law firm represents a municipality that is or was a party to a potential assignment as appointed counsel, then a conflict of interest may exist, and any conflict will be imputed to the entire law firm. If the conflict is a waivable conflict and the parties wish to proceed with the representation, then the personally conflicted lawyer and the law firm must obtain informed consent to the conflict, confirmed in writing, pursuant to Rule 1.7.); R.I. Ethics Op. 2007-08 (2008) (multiple representation of agency employee in an employment matter against the agency and corporate client seeking license from the same agency does not constitute a conflict of interest). *Cf. State v. Giese*, 900 S.E.2d 881 (N.C. 2024) (Professional relationship between county manager and district attorney (DA) for that county, in that county manager had sway over peripheral administrative and budgetary matters related to DA's office, did not amount to an actual conflict of interest and, thus, did not support disqualifying DA from defendant's prosecution for cyberstalking and making harassing phone calls, in which county manager was alleged victim; nothing suggested that anyone in DA's office ever represented defendant and either acquired confidential information or betrayed any confidences.).

[12] *See* D.C. Ethics Op. 248 (1997) (involving attorney representation of joint plaintiffs denied same position in discrimination case); Vt. Ethics Op. 2006-5 (2006) (A lawyer may represent a former manager and a former employee in separate actions against the company that employed both, but if the former manager is later called as a witness by the company to testify against the former employee, such circumstance may require the lawyer to withdraw from further representation of one or both clients depending on the circumstances existing at the time and whether each client consents to the lawyer's continued representation of both clients.).

[13] *See* Colo. Ethics Op. 135 (2018) (if conflicts are consentable, the lawyer may undertake joint representation only after obtaining the informed consent of each client and confirming each consent in writing, which should alert them to issues relating to confidentiality and privilege; the lawyer should address each item, providing appropriate written advisement, in a waiver, retention agreement, or other appropriate collateral documentation); D.C. Ethics Op. 140 (1984) (joint representation of potentially adverse interests permitted if: (a) the co-parties agree to a single comprehensive statement of facts describing the occurrence; (b) the attorney reviews the statement from the perspective of each of the parties and determines that it does not support a claim by one against the other; (c) the attorney determines that no additional facts are known by each party which might give rise to an independent basis of liability against the other or against themselves by the other; (d) the attorney advises each party as to the possible theories of recovery or defense which may be arise through this joint representation based on the disclosed facts; (e) each party agrees to forego any claim or defense against the other based on the facts known by each at the time; (f) each party agrees that the attorney is free to disclose to the other party, at the attorney's discretion, all facts obtained by the attorney; (g) the attorney outlines potential pitfalls in joint representation, and advises each party of the opportunity to seek the opinion of independent counsel as to the advisability of the proposed multiple representation; (h) each party consults separate counsel or advises that no separate consideration is desired; (i) each party acknowledges that the facts not mentioned now but later discovered may reveal differing interests, which, if they do not compromise these differences, may require the attorney to withdraw from the representation of both without injuring either; and (j) each party agrees to the joint representation). Accord: Md. Ethics Op. 2021-05 (2022).

[14] *See* Ariz. Ethics Op. 07-04 (2007) (Representation of multiple clients in a single litigation generally permissible

and, where possible, in writing, the impact of joint representation on the lawyer's duty to maintain client confidences and to keep each client reasonably informed, and to obtain each client's

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so long as lawyer reasonably believes he/she can competently and diligently represent each client, the representation does not involve assertion of claims by one client against another, and each client gives informed consent, confirmed in writing. Informed consent usually requires lawyer to explain advantages and disadvantages of common representation in sufficient detail so that each client can understand why separate counsel may be desirable); D.C. Ethics Op. 343 (2008) (by agreeing only to represent a client as to a discrete legal issue or with respect to a discrete stage in the litigation, a lawyer may be able to limit the scope of the representation such that the new matter is not substantially related to the lawyer's representation of another client in a prior matter); Miss. Ethics Op. 251 (2003) (a lawyer may obtain a waiver of conflict of interest that does not exist where the ramifications of the potential conflict of interest cannot be fully explained to the client at the time of execution of the consent so that each client can make a knowing and informed decision at that time, but the representation must be reevaluated after a conflict of interest arises after the commencement of the representation); N.Y. Ethics Op. 1141 (2017) (separate law firms that act as co-counsel in discrete matters are not associated with the same firm for purpose of imputing all conflicts of each firm to each other; thus, when firms serve as co-counsel, the rules require each firm to clear conflicts individually and separately, and only in matters in which the two serve as co-counsel); N.Y. Ethics Op. 990 (2013) (lawyer may represent a client despite the presence of differing interests, so long as, among other things, the lawyer reasonably believes he/she will be able to provide competent and diligent representation to each affected client and each affected client gives informed consent, confirmed in writing; whether each affected client can give informed consent depends on the extent to which the lawyer can explain adequately the material risks of the proposed course of conduct and reasonably available alternatives, and on the sophistication of the client); N.Y. Ethics Op. 901 (2011) (simultaneously representing both a corporation and a director, officer or shareholder of the same corporation can create conflicts, but if the conflicts are consentable, then the conflicts can be cured by obtaining informed written consent from each affected client); N.Y. Ethics Op. 823 (2008) (A lawyer cannot continue to represent joint clients in litigation if their strategies significantly diverge, but can continue to represent one of the joint clients if the former client provides informed consent to the future representation and the lawyer can represent the current client zealously and competently); N.Y. Ethics Op. 778 (2004) (lawyer representing insurer may not represent two defendants, one of whom has a potential indemnification claim against the other, unless a disinterested lawyer would believe the lawyer can competently represent the interests of each, the one defendant waives the right to assert indemnification as cross-claim, and both defendants otherwise consent after full disclosure). *See* Colo. Ethics Op. 143 (2022) (outlining best practices with respect to contents of client engagement letters, such as using plain language, and addressing issues such as specifics of the fee arrangement, client identify, scope of representation, among other subjects); Neb. Ethics Op. 24-02 (2024) (attorney's continued representation of a client in a personal injury lawsuit while the attorney and clients are co-defendants in a separate lawsuit arising out of the litigation of the personal injury lawsuit creates a concurrent conflict of interest, but the attorney may ethically continue to represent the client if the client provides informed consent in writing); Pa. Ethics Op. 2025-100 (2025) (explaining the importance of written fee agreements and outlining best practices for same); Pa. Ethics Op. 2023-100 (2023) (When a derivative action is brought on behalf of a corporation by minority shareholders against individual corporate defendants and the corporate entity, a nominal defendant, a lawyer must carefully assess whether joint representation of the corporation and the individual corporate defendants is ethically permissible. While joint representation is generally authorized under Rule 1.13(e), as with any joint representation, potential concurrent conflicts under Rule 1.7(a)(1) or (2) may preclude such representation. The first step in the Rule 1.7 analysis is to determine whether either a Rule 1.7(a)(1) or (a)(2) conflict exists. If a conflict exists, the lawyer can only proceed if all four requirements in Rule 1.7(b) can be satisfied. Whether the same lawyer may represent the corporation and the individual defendants in a derivative action depends upon the nature of the allegations against the individual defendants. Allegations involving "serious charges of wrongdoing," such as fraud, self-dealing or other intentional acts, unless patently frivolous, give rise to a non-consentable conflict under Rule 1.7(b)(1), which preclude such joint representation. On the other hand, if the allegations involve mere "mismanagement," such as misjudgment or other negligent acts or omissions, joint representation may be permissible under Rule 1.7(b)(1). Even if Rule 1.7(b)(1) is satisfied, all of the other elements in Rule 1.7(b) must be satisfied, including Rule 1.7(b)(4)'s requirement that the lawyer obtain the informed consent of all proposed clients. Even where joint representation is otherwise permissible under Rule 1.7, the lawyer must comply with Rule 1.13(e). This rule requires that informed consent to such representation on behalf of the corporation must be granted by a disinterested and authorized representative of the corporation who is not accused of wrongdoing. If there is no disinterested person who is authorized to give informed consent on the corporation's behalf, then joint representation is precluded.).

informed consent to the arrangement. The mere fact of joint representation, without more, does not provide a basis for implied authorization to disclose one client's confidences to another.[15] Where express consent to share client confidences has not been obtained and one client shares in confidence relevant information that the lawyer should report to the non-disclosing client to keep that client reasonably informed, the lawyer should seek consent of the disclosing client to share the information with the other client or ask the client to disclose the information directly to the other client. If the lawyer cannot disclose, a conflict of interest is created that may require withdrawal.[16] Some authorities provide that the attorney must withdraw from the representation of

[15] Colo. Ethics Op. 135 (2018) (if conflicts between two potential clients are consentable, lawyer may undertake joint representation only after obtaining informed consent from each client, confirmed in writing. The lawyer's discussion with the clients should alert them to issues relating to confidentiality and privilege. The lawyer may wish to address each issue, providing appropriate written advisement in a waiver, retention agreement or other appropriate documentation); Mass. Ethics Op. 2017-2 (2017) (lawyer asked to represent multiple plaintiffs against the same defendant, whether or not on the same claim, should consider and discuss with potential clients whether confidentiality or conflict problems exist before undertaking the representation); N.H. Ethics Op. 2014-15/10 (2015) (lawyer should obtain the consent of both parties in joint representation in estate planning, preferably in writing, that their information will be shared.); N.Y.C. Ethics Op. 2017-7 (2017) (when a joint representation does not involve a conflict of interest between joint clients, such that "informed consent" is not required under Rule 1.7, Rule 1.4(b) still requires the lawyer to explain the potential implications of being represented jointly, to the extent an explanation is "reasonably necessary to permit the client[s] to make informed decisions regarding the representation." This may require the lawyer to explain that information disclosed to the lawyer by one joint client cannot be withheld from the other joint client(s) if it is material to the representation, and that if a dispute between the joint clients arises, information that would otherwise be protected by the attorney-client privilege as against third parties will not be protected as between the joint clients). Accord: D.C. Ethics Op. 296 (2000); D.C. Ethics Op. 290 (1999); Fla. Ethics Op. 92-5 (1992); N.Y.C. Ethics Op. 1999-07 (1999). *Cf.* ABA Formal Ethics Op. 479 (2017) (Lawyer may use information relating to representation of a former client that is generally known to a former client's disadvantage without the former client's informed consent. To be generally known, information must previously have been revealed by a source other than the lawyer or the lawyer's agents. Information is not generally known simply because it has been discussed in open court, or is available in court records, or in other public repositories of information); Me. Ethics Op. 225 (2022) (A lawyer may not, without their clients' consent, use a former client's confidential information, except where it is generally known; information that is available in court records, the subject of court hearings, or available in public records is not, standing alone, information that is generally known); Mo. Informal Ethics Op. 2022-01 (2022) (information about a former client becomes "generally known" and thus can be used to a former client's disadvantage if it is generally known outside just the public records, meaning it would be more recognizable by members of the public in the community or in the industry of the former client, not simply because it was discussed in open court such that there are court records available); N.Y. Ethics Op. 1249 (2023) (In a joint representation, there is a presumption that the lawyer will share confidential information received from each co-client with the other co-client, but that presumption does not extend to confidential information the lawyer received prior to the start of the joint representation.); N.Y. Ethics Op. 1070 (2015) (in a joint representation there is a presumption that lawyer will share information disclosed by one co-client with other co-clients; but if a co-client requests the file and asks the lawyer not to disclose the request to the co-client, and the lawyer believes the request is material to the other co-clients, the lawyer may not comply and should counsel the requesting co-client that he may not comply unless the other co-clients are informed of the request.).

[16] ABA Formal Ethics Op. 2008-450 (2008) (Absent informed consent, lawyer representing two clients in a matter that learns key information potentially damaging to one of the clients generally may not disclose the harmful secrets to the other one and may need to withdraw from representing one or both clients; at the outset of the representation, lawyer should clarify the scope of the representation and the clients' intentions concerning the lawyer's duty of confidentiality); D.C. Ethics Op. 296 (2000) (law firm not allowed to advise an employer, who paid the law firm to obtain a work trainee visa from the INS for its alien employee, of its subsequent discovery that the employee had fabricated the credentials that qualified her for the visa unless advance express consent is obtained; alternatively, the firm should encourage the employee to divulge the facts to the employer); Mass. Ethics Op. 09-03 (2009) (lawyer representing both foreign worker and his employer in obtaining employment authorization must inform the employer when the government revokes the authorization, even though the worker instructs the lawyer not to do so and the lawyer believes the employer would rather not know). *Cf.* D.C. Ethics Op. 327 (2005) (where one client has consented

all conflicted clients when an actual conflict arises.[17] Other courts analyze the issue under the "former clients" rule.[18]

C. Prospective Waiver of Conflicts of Interests.

Several jurisdictions hold that an attorney may obtain a prospective waiver of potential conflicts that may arise during simultaneous representation of a corporation and an employee. Thus, the attorney may secure the employee's advance consent to the continued representation of the corporation in the lawsuit and in any dispute with or litigation against the employee arising out of the same transaction if the firm withdraws from representing the employee. The rules permit such advance waivers if the lawyer can represent the corporation and the employee competently

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to disclosure of confidential information to another client, the lawyer may reveal the information; however, the lawyer must do so if the information is relevant or material to the lawyer's representation of the other client; because the disclosing client previously has waived confidentiality, there is nothing to weigh against either the lawyer's duty of loyalty to the non-disclosing client or the lawyer's obligation to keep that client reasonably informed of anything bearing on the representation that might affect that client's interests.); Ga. FAO 16-1 (2016) (obligation of confidentiality applies as between two jointly represented clients. An attorney must honor one client's request that information be kept confidential from the other jointly represented client; honoring the request will almost always require the attorney to withdraw from the joint representation); N.Y.C. Ethics Op. 2005-2 (2005) (the fact that a lawyer possesses confidences or secrets that might be relevant to a matter the lawyer is handling for another client but the lawyer cannot use or disclose, does not without more create a conflict of interest barring dual representation; the existence of a conflict will depend on whether the lawyer can avoid using one client's confidential information in the representation of another client and whether possession of that information may reasonably affect the lawyer's professional judgment in the representation of the other client). *See* Cal. Ethics Op. 2015-192 (2015) (Attorney may disclose to the court only as much as is reasonably necessary to demonstrate her need to withdraw; ordinarily it will be sufficient to say that ethical considerations require withdrawal or that there has been an irreconcilable breakdown in the attorney-client relationship. To the extent the court orders an attorney to disclose confidential information, once an attorney has exhausted reasonable avenues of appeal or other review of such an order, the attorney must evaluate the relevant authorities and the circumstances, including potential prejudice to the client, to determine how to proceed.); N.Y. Ethics Op. 1198 (2020) (A former government lawyer permitted to disclose confidential information of a former client if the lawyer reasonably believes it is necessary to comply with a court order. Upon receiving the subpoena or court order, the lawyer must first consult with the former client and, until otherwise instructed by former client, the lawyer should seek to limit the demand or disclosure prior to disclosing any confidential information.). *See also* ABA Formal Op. 519 (2025) (When moving to withdraw from representation under Rule 1.16, a lawyer's disclosure to the tribunal is limited by Rule 1.6(a); unless an explicit exception applies or the client provides informed consent, the lawyer may not reveal "information relating to the representation" in support of a withdrawal motion, even if withdrawal is mandatory. However, to the extent withdrawal is because the lawyer's physical or mental condition materially impairs the ability to represent the client, the lawyer will not ordinarily need to reveal information protected by Rule 1.6 to provide a fulsome explanation for the basis of the motion.); Mich. Ethics Op. RI-387 (2023) (A lawyer may not ethically reveal confidences or secrets protected by Rule 1.6 in support of a motion to withdraw unless ordered by the court or tribunal to do so. If the court requests additional information that would require disclosure of confidences or secrets, the lawyer should invoke Rule 1.6 and not make disclosure. If the court orders disclosure of protected information, the lawyer may reveal only such information as is reasonably necessary to comply with the court's order.); Wash. Ethics Op. 201701 (2017) (when filing a motion to withdraw, lawyer may inform the court that the lawyer believes there is a basis for withdrawal pursuant to Rule 1.16 or that the lawyer believes professional considerations make it appropriate for the lawyer to seek leave to withdraw; lawyer may make other similar statements as long as lawyer does not disclose the particular reasons or basis for withdrawal; lawyer cannot provide further explanation on the record but will do so in camera if the court so requires).

[17] ABA MODEL RULE 1.7, cmt. 4 (if a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of each affected client in writing). *Cf.* N.Y.C. Ethics Op. 2005-5 (2005) (factors to consider in deciding which matter a lawyer should withdraw from in the case of unforeseeable concurrent client conflicts that arise through no fault of the lawyer).

[18] Fla. Ethics Op. 87-1 (1987).

and both the corporation and the employee give their informed consent.[19] This rule also applies when the same law firm is asked to represent both governmental and private sector clients.[20] General and open-ended consent is more likely to be effective when the client is an experienced user of legal services, particularly if the client has independent counsel advising it on the consent and the consent is limited to future conflicts unrelated to the subject of the representation.[21]

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[19] *See Reich v. Muth*, 34 F.3d 240 (4th Cir. 1994) (law firm representing both employer being investigated by OSHA and subpoenaed employees not required to be disqualified where both clients waived potential conflict problems, there was no evidence that the employees were coerced into the representation, and the employees had no liability exposure); *In re Cerberus Cap. Mgmt.*, L.P., 164 S.W.3d 379 (Tex. 2005) (trial court abused its discretion in disqualifying defense counsel in shareholder derivative action where written waiver of any potential conflict of interest by defense counsel fully and accurately disclosed the conflict from its work on draft asset purchase agreement for corporation and, therefore, corporation knowingly waived any conflict); Ill. Ethics Op. 21-03 (2021) (law firm may represent employees of corporate entity in immigration matters at corporate entity's request while suing the same corporate entity in an unrelated matter, but only if the firm can comply with Rule 1.7 and the appropriate parties provide informed consent); Ohio Ethics Op. 2020-04 (2020) (law firm must withdraw from concurrent representation of multiple clients or seek their informed written consent when the clients' disparate interests as to the outcome of the same matter materially interferes with the firm's lawyers' independent professional judgment in representing either client). *Cf. Victorinox AG v. B&G Sys.*, 709 F. App'x 44 (2d Cir. 2017) (district court did not abuse discretion in refusing to disqualify counsel for plaintiff based on concurrent representation of plaintiffs and one of the defendants (B&F), where the concurrent representation began approximately eleven months after the court entered judgment against defendants and there was no evidence that plaintiffs' litigation team obtained any material information from the B&F litigation team; court noted it was troubled by aspects of the record including: (1) the absence of informed consent for the concurrent representation, (2) the fact that counsel only conducted client screens for only those clients who had recently generated more than $100,000 of revenue, and (3) the fact that the letter counsel sent to B&F to notify them that the firm was ceasing representation was facially misleading); N.Y.C. Ethics Op. 2017-6 (2017) (subpoenaing a current client on behalf of another current client ordinarily entails a conflict of interest that requires that attorney obtained informed consent from both clients; attorney should therefore run a conflict check before preparing and issuing subpoena); *NuStar Farms v. Zylstra*, 880 N.W.2d 478 (Iowa 2016) (Attorney had directly adverse concurrent conflict of interest in representation of both plaintiff and defendants, for which he did not properly obtain consent from defendants to represent plaintiff, and therefore attorney should have been disqualified from representing plaintiff in action; even though attorney ended attorney-client relationship with defendants in e-mail, he demonstrated intent to pursue future, adverse action against defendants on plaintiff's behalf in same e-mail; thus, intent to pursue legal action against defendants arose before representation of defendants ended); Ohio Ethics Op. 2020-10 (2020) (Concurrent representation of directly adverse clients in the same transaction raises conflict of interest concerns. Law firm cannot avoid imputation of a conflict of interest arising from the concurrent representation of two clients in the same transaction by screening separate lawyers assigned to each client). *Cf.* Conn. Ethics Op. 23-02 (2023) (it likely would not be permissible under Rules 1.10 and 1.7 of the Rules of Professional Conduct for staff attorneys employed by the same union to simultaneously represent the subject of an investigation and a potential witness to the same investigation with potentially conflicting legal interests.); Mass. Ethics Op. 2024-1 (2024) (lawyer being asked to draft an estate plan that includes a testamentary gift to a non-profit organization for which the lawyer serves as an officer or board member must obtain the client's informed written consent, which should include advising the client of the enhanced risk that an undue influence claim based on the lawyer's relationship with the non-profit mat be asserted).

[20] *See* ABA Formal Ethics Op. 97-405 (1997) (lawyer representing government entity may not agree to simultaneously represent a party against her government client, absent informed consent of both clients; however, the lawyer may represent a private client against another government entity in the same jurisdiction in an unrelated matter, if the two governmental entities are not considered the same client, and if informed consent is obtained).

[21] ABA Formal Ethics Op. 05-436 (2005). *See* Nev. Ethics Op. 58 (2021) (prospective conflict waivers may be permitted if the waiver meets all the requirements for waiving a present conflict of interest under Rule 1.7(b), which would include an analysis of whether the conflict can be consented to and whether the client has given truly informed consent; Committee declines to opine on what the waiver must contain to be effective and, instead, attorney should make an independent assessment of each client and each situation to ensure the client fully appreciates the significance of the waiver being sought, in line with the attorney's obligations); N.Y.C. Ethics Op. 2006-1 (2006) (law firm may ethically request a client to waive future conflicts if (1) the firm makes appropriate disclosure of, and the client is in the position to understand, the relevant implications, advantages, and risks, so that the client may make an informed

Similarly, an advance waiver given by a client having independent counsel available to review it is presumptively valid, even if general.[22] Advance waivers are not valid where the two matters are substantially related.[23] Although the better practice is to obtain waivers in advance, courts have approved waivers after joint representation has commenced, so long as the timing of the waiver does not impair the effectiveness of the consent.[24] Even where both potentially adverse clients consent to representation, a court may order disqualification.[25] Conversely, some courts have rejected disqualification where prejudice is not established even where the attorney failed to fully inform the clients of the risks of joint representation.[26] If a waiving client later changes its mind and there has been detrimental reliance by another waiving client or the lawyer, the lawyer should

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decision whether to consent, and (2) a disinterested lawyer would believe that the firm can competently represent the interests of all affected clients; "blanket" or "open-ended" advance waivers, and advance waivers that permit the firm to act adversely to the client on matters substantially related to the firm's representation of the client should be limited to sophisticated clients, and the latter advance waiver should be limited to transactional matters that are not starkly disputed and ensure that client confidences and secrets be safeguarded.); N.Y.C. Ethics Op. 2004-2 (2004) (approving the use of advance waiver for potential conflicts of interest in multiple representations of a corporation and its constituents in government investigation; advance waivers should be as specific as possible regarding the types of possible future adverse representations, the types of matters that might present conflicts, and at least the class of potentially conflicted clients); Ore. Ethics Op. 2025-205 (2025) (nothing in the rules of professional conduct prohibits requesting and obtaining a blanket or advance waiver so long as the lawyer adequately explains the material risks and available alternatives).

[22] D.C. Ethics Op. 309. *Accord* ABA MODEL RULE 1.7, cmt. 22 ("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 [of the material risks that the waiver entails].").

[23] D.C. Ethics Op. 309.

[24] *See Klemm v. Super. Ct.*, 75 Cal. App. 3d 893 (1977) (written consents given after full disclosure approved even though they were obtained long after joint representation was undertaken).

[25] *See Coaker v. Geon Co.*, 890 F. Supp. 693, 695 (N.D. Ohio 1995) (conflict of interest required attorney representing two corporate defendants in ADEA action to withdraw from representing either defendant despite informed consent, since first defendant was division of second when plaintiff worked for division, but became separate corporate entity after plaintiff's discharge, raising issue of successor liability among co-defendants.). *Compare Cedar Rapids Bank & Trust Co. v. Mako One Corp.*, 919 F.3d 529 (8th Cir. 2019) (Counsel for mortgagee that previously had prepared mortgagor's tax credit bonds should have been disqualified in action against mortgagor to foreclose without redemption under Iowa law on property encumbered by those very same bonds; although mortgagor consented to waive conflict of interest, counsel's letter requesting waiver of conflict of interest did not attempt to explain advantages, disadvantages, risks, or benefits to mortgagor that it would confront by allowing counsel to represent mortgagee. However, error was harmless since counsel did not compromise ability of mortgagee to settle with mortgagor, mortgagor did not point to any change in its settlement posture because of improper representation, counsel did not use confidential information gained from preparing mortgagor's tax credit bonds during its representation of mortgagee in foreclosure suit, mortgagor's loss was more directly attributable to its own counsel's failure to act than anything its former counsel did or did not do, and there was no reason to believe that mortgagor's lawyers would have acted any differently had mortgagee been represented by different firm.); *Sheppard, Mullin, Richter & Hampton, LLP v. J-M Mfg. Co.*, 6 Cal. 5th 59 (Cal. 2018) (in fee dispute litigation between law firm and manufacturer, law firm's undisclosed conflict of interest rendered engagement agreement with the manufacturer, including its arbitration clause, unenforceable as against public policy; although the manufacturer signed a conflicts waiver, the waiver was not effective because the law firm failed to disclose a known conflict with a current client before it entered into the engagement agreement; however, that ethical violation does not categorically disentitle the law firm from recovering the value of the services it rendered to the manufacturer).

[26] *See Frontline Commc'ns Int'l, Inc. v. Sprint Commc'ns Co.*, 232 F. Supp. 2d 281 (S.D. N.Y. 2002) (disqualification not required based on counsel's failure to inform employee of risks of joint representation or advising him to obtain independent counsel after becoming aware of possible conflict of interest associated with resellers' contract action, where counsel's conduct did not prejudice employee's defense of third-party action).

continue to represent the other client. Otherwise, the parties should normally be restored to the *status quo ante*.[27] Thus, the conflict waiver should address the consequences of a change of heart.[28]

D. Taking Opposing Stances on an Issue—Positional Conflicts.

The mere fact that a lawyer takes a legal position on behalf of one client that might create precedent adverse to the interests of a lawyer's other client in an unrelated matter in a different tribunal does not create a conflict of interest. However, a conflict of interest may exist if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending; whether the issue is substantive or procedural; the temporal relationship between the matters; the significance of the issue to the immediate and long-term interests of the clients involved; and the clients' reasonable expectations in retaining the lawyer. If there is a significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.[29] At least one ethics panel suggested that

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[27] D.C. Ethics Op. 317 (2002). *See* N.C. 2007 Formal Ethics Op. 11 (2007) (lawyer not prohibited from continuing to represent one client if the other client revokes consent without good reason and evaluation of the factors set out in comment [21] and the *Restatement of the Law Governing Lawyers* favors continued representation).

[28] D.C. Ethics Op. 317 (2002). *See also* N.Y. Ethics Op. 903 (2011) (same).

[29] ABA MODEL RULE 1.7, cmt. 24. *See* ABA Formal Ethics Op. 93-377 (1993) (when a lawyer is asked to advocate a position with respect to a substantive legal issue that is directly contrary to the position being urged on behalf of another client in a different and unrelated matter which is being litigated in the same jurisdiction, the lawyer, in the absence of informed consent by both clients, should refuse to accept the second representation if there is a substantial risk that the lawyer's advocacy on behalf of one client will create a legal precedent which is likely to materially undercut the legal position being urged on behalf of the other client); Cal. Ethics Op. 1989-108 (1989) (a lawyer may take opposite positions on the same legal issue in representing two separate clients before the same court); D.C. Ethics Op. 305 (2001) (if a new representation would require the lawyer to advance two adverse positions in a single matter, Rule 1.7(a) prohibits the representation); N.Y. Ethics Op. 826 (2008) (No per se rule prohibits a lawyer from representing plaintiffs in declaratory judgment actions against a carrier and simultaneously defending that carrier against other insureds in other declaratory judgment actions, or from obtaining advance waivers of the conflict. Where the actions involve related issues of law, however, whether the clients can validly consent depends on, among other things, potential "positional conflicts," the possibility that the lawyer may need to cross examine employees of a client, and the possibility that confidential information derived from one representation may be of use in another); Or. Ethics Op. 2007-177 (2007) (A conflict of interest is not present solely because one or more lawyers in a firm assert conflicting legal positions on behalf of different clients whom the lawyers represent in factually unrelated cases. However, if a lawyer actually knows or reasonably should know of the assertion of the conflicting positions and actually knows or reasonably should know that an outcome unfavorable to one client in one case will or is at least highly likely to affect the client adversely in another case, a conflict is present and no waiver is permissible). *Cf. Thompson v. State*, 296 A.3d 872 (Del. 2023) (Defense counsel's concurrent representation of police witness who testified at defendant's murder trial, in separate prosecution for falsifying time sheets, while defendant's case was on direct appeal, was not a positional conflict of interest that required counsel's disqualification; counsel was not required to argue both sides of the same argument to effectively and successfully represent both defendant and witness in their respective cases.); Ohio Ethics Op. 2013-4 (2013) (A lawyer may not cross-examine a former client who is an adverse witness in a current representation if it would violate Rule 1.9. If the lawyer cannot satisfy one of Rule 1.9(c)(1) exceptions or obtain the former client's informed consent, the lawyer must withdraw from the current representation and request permission to withdraw if required.); N.Y. Ethics Op. 1174 (2019) (attorneys at a law firm are not permitted to submit amicus briefs for both sides of a litigation when representing a client as amicus for one or the other side, but, in the absence of a represented client may do so solely on a pro bono basis); R.I. Ethics Op. 2024-05 (2025) (where witness in a slip-and-fall case handled by attorney for another client is the attorney's client in an unrelated workers compensation matter, attorney must withdraw from representing both the client and the witness, and must take all reasonable steps to mitigate the consequences to them of the withdrawal); Wis. Ethics Op. EF-10-

the conflict might be attenuated in the case of a large multi-national firm.[30]

E. Conflicts of Interest Involving Lawyer's Personal Interests.

Lawyer's personal interests can create conflicts, such as personal relationships;[31] the lawyer's

01 (2019) (when lawyer has active and material role in representation of a client, the lawyer ordinarily has a conflict of interest when the lawyer sends a targeted, specific expression of interest in employment to an opposing firm or party in the matter, or agrees to substantive discussions concerning possible employment with that firm or party).

[30] *See* D.C. Ethics Op. 265 (1996).

[31] *See* ABA Formal Ethics Op. 494 (2020) (A lawyer's relationship with opposing counsel may create a conflict of interest and lawyers must examine the nature of the relationship to determine if there is a significant risk the lawyer's representation of the client will be materially limited by the personal relationship and, if so, whether the lawyer reasonably believes the lawyer will be able to provide competent and diligent representation to each affected client, who must then give informed consent, in writing. Lawyers should evaluate whether the relationship is a close personal or intimate relationship, a friendship, or the adversary is merely an acquaintance. Cohabitation and other similar intimate relationships with opposing counsel must be disclosed, and the lawyers ordinarily may not represent clients in the matter, unless each client gives informed consent confirmed in writing. Because friendships exist in a wide variety of contexts, friendships need to be examined closely. Close friendships with opposing counsel should be disclosed and, where appropriate, their informed consent, confirmed in writing, obtained. By contrast, some friendships and most relationships that fall into the category of acquaintances need not be disclosed, nor is informed consent required, although the lawyer may choose to disclose the relationship and disclosure may be advisable to maintain good client relations); Cal. Ethics Op. 2019-197 (2019) (A lawyer's seeking advice concerning ethical obligations owed to a client does not by itself create a conflict of interest with the client. Once a lawyer becomes aware that he/she has committed an error that could prejudice the client, the lawyer ethically may seek legal advice concerning obligation to the client and options available, but must comply with the rules governing disclosure to clients and conflicts of interests.); N.Y. Ethics Op. 1278 (2025) (Under Rule 3.8(b), a prosecutor is required to timely disclose her past romantic relationship with a law enforcement officer in any case where the officer is to be a witness whose testimony could be subject to challenge. Rules 3.3(a)(1) and 3.4(a)(3) may also be implicated if New York's discovery law requires disclosure of the past romantic relationship. Whether a lawyer's past romantic relationship with a witness implicates a personal interest that would create a "significant risk" of adversely affecting the lawyer's judgment within the meaning of Rule 1.7(a)(2) depends on the facts and circumstances of that prior relationship and its likely impact on the objectivity and conduct of the lawyer in question.); N.C. 2019 Formal Ethics Op. 3 (2019) (ongoing sexual relationship between opposing counsel creates a conflict of interest in violation of Rule 1.7(a)); N.Y. Ethics Op. 1255 (2023) (Where a criminal defense attorney is in a romantic relationship with a county deputy sheriff, the attorney must determine if a reasonable lawyer would conclude there is a significant risk the attorney's independent professional judgment on behalf of the client will be adversely affected. If such a significant risk exists but the attorney reasonably believes he or she can provide competent and diligent representation, the attorney may request client consent to the conflict. If such a belief would be unreasonable, the conflict would be nonconsentable. If the lawyer is disqualified, the disqualification is imputed to the lawyer's firm, but the imputed conflict may be waived with client consent, even if the inquirer's conflict is nonconsentable as to the inquirer, so as to allow other lawyers in the firm to accept or continue the representation.); Ohio Ethics Op. 2022-06 (2022) (Spouses may not represent opposing parties without informed, written consent of the affected clients. Other lawyers in the lawyer-spouse's law firm may represent criminal defendants without disclosure and consent so long as the lawyer does not have a close personal relationship with the specific prosecutor assigned to the case. Domestic partners, individuals in an intimate relationship, close friends, and roommates have the same duties as those in spousal relationships in evaluating potential conflicts of interest. Lawyers in domestic partnerships or intimate relationships are advised to follow the consent and disclosure obligations applicable to married lawyers. Lawyers in other relationships should consider the characteristics present in the relationship and exercise professional judgment regarding client disclosure and consent.).

personal beliefs;[32] the lawyer's cultural and language differences;[33] the lawyer's personal financial interests;[34] the lawyer's personal health and safety;[35] responding to negative client reviews;[36]

[32] N.Y.C. Ethics Op. 2025-5 (2025) (Although in some circumstances, a lawyer's strongly and deeply held religious, philosophical, political, or public policy views create a conflict of interest such that the lawyer is required under Rule 1.7 to decline or withdraw from representing a client, such circumstances should be the exception. Fair representation is served by lawyers cultivating and exercising detachment so as to provide clients with objective, reasoned advice. It also is served by cultivating the tradition, reflected in Rule 1.2(b), that a lawyer's representation of a client does not constitute an endorsement of the client's political, economic, social or moral views or activities. By the same token, no lawyers need endorse a client's personal beliefs to provide professionally competent legal services to such client.).

[33] Ore. Ethics Op. 2024-203 (2024) (lawyer may undertake representation of client despite cultural and language differences so long as the lawyer is able to fulfill the ethical duty to effectively communicate and consult with client; lawyers should take care when using a client's relatives or friends as translators because of the risk that an individual in a close relationship with the client may be biased by a personal interest in the outcome of the representation); Wash. Ethics Op. 202601 (2026) (Lawyers have an ethical duty to make reasonable use of qualified interpreters, translators, or other translation services to bridge any language gaps with clients who are unable to fully communicate with the lawyer due to communication barriers. In utilizing these services, the lawyer also has an ethical duty to be careful to preserve client confidences, including reasonable oversight of any translator or interpreter.).

[34] *See* N.J. Ethics Op. 743 (2022) (lawyer in firm who owns 50% of the client entity has a personal financial stake in the legal services to be provided by the firm to the client and thus has a conflict of interest under Rule 1.7(a)(2) and the affected lawyer's conflict of interest is imputed to the firm under Rule 1.10(a). The exception for imputing personal interest conflicts is narrow and generally includes only interests arising due to family relationships or personal beliefs, not business or investment interests.); N.Y. Ethics Op. 1280 (2025) (Under the New York Rules of Professional Conduct a lawyer may in some circumstances proceed *pro se* while also representing individual co-plaintiffs or co-defendants in the same matter. But whether a lawyer could proceed *pro se* as a class representative and also represent the class is a question that is governed by class action law and not by the Rules of Professional Conduct, and thus is a question that is beyond the Committee's jurisdiction.); *Dayton Bar Ass'n v. Daley*, 268 N.E.3d 379 (Ohio 2025) (Attorney's conduct in disclosing confidential information he learned about client during his representation of client to police officer, when seeking to recover a missing necklace that attorney believed client had stolen, including information that client was staying with a drug dealer, that client was having sex with drug dealer daily so she would have a place to stay, that client was engaging in prostitution out of the house, and that client was driving a vehicle that had tags registered to another person, violated the professional rule that prohibited a lawyer from revealing information related to the representation of a client, including information protected by the attorney-client privilege under applicable law, unless the client gave informed consent).

[35] *See* Mo. Informal Ethics Op. 2020-29 (2020) (in deciding whether withdrawal is required an attorney with a medical condition that prevents him conducting upcoming depositions, hearings and participating in trial on the schedule date should consider the expected duration of the condition, the impact of the requested continuance on the interests of the client and the possibility of involving other lawyers; attorney must communicate with client so that client may make informed decision regarding withdrawal; withdrawal is not required if, after client consultation, it is determined that reasonable steps can be taken to prevent the attorney's condition from materially impairing the representation); N.Y.C. Ethics Op. 2020-5 (2020) (A lawyer who is required to return to court in person during a public health crisis may have serious health and safety concerns which could create a conflict of interest for the lawyer continuing the representation. Whether such a conflict exists is a fact-specific inquiry and will depend on the lawyer's personal health concerns as well as the available alternatives for proceeding with the representation); N.Y. Ethics Op. 1203 (2020) (attorney may withdraw from representation, with the permission of the Immigration Court, based on fear of contracting COVID-19 as a result of in-person appearances in the proceeding, where such fear renders it difficult for the attorney to carry out the representation effectively).

[36] *See* ABA Formal Ethics Op. 496 (2021) (lawyers who are the subject of online criticism may request that the website or search engine host remove the information but may not disclose information relating to any client's representation, or information that could reasonably lead to the discovery of confidential information by others.); Colo. Ethics Op. 136 (2019) (lawyers must be cautious in deciding whether and in what fashion to respond to online criticism by a client; endorsing a proposed response suggested by the Pennsylvania Bar to use out of an abundance of caution); Fla. Ethics Op. 21-1 (2021) (lawyer may not disclose information concerning a client's representation without a client's informed consent when responding to negative online reviews posted by individuals who are not current clients or former clients; if accurate, the lawyer may state that the person who made the post is not a current

sharing contact information containing client information;[37] publishing client information in

or former client, and lawyer may generally note that the comments in the review are inaccurate, but that the lawyer's response is constrained by the lawyer's ethical obligations); Fla. Ethics Op. 20-01 (2020) (lawyer may not disclose information relating to a client's representation in response to a negative online review, but may respond with a general statement that the lawyer is not permitted to respond as the lawyer would wish but that the online review is neither fair nor accurate); Ky. Ethics Op. KBA E-448 (2019) (a lawyer may not reveal client confidential information to respond to a former client's public criticism on the internet; the self-defense exception to the duty of confidentiality is triggered by claims or disciplinary complaints against a lawyer, and does not apply to internet criticism); Mich. Ethics Op. R-26 (2022) (lawyer may not disclose client confidences or secrets in responding to negative online reviews as such disclosures violate Rule 1.6(b); the exception for responding to an accusation of wrongful conduct does not apply to negative online reviews); Miss. Ethics Op. 268 (2025) (the exceptions to Rule 1.6(b) to a lawyer's duty of confidentiality do not allow a lawyer to respond to online criticism using information related to a client's representation, even if that information is available in public filings or was revealed by the client in the original post); N.J. Ethics Op. 738 (2020) (lawyers may respond to negative online reviews posted by current, former or prospective clients by stating that they disagree with the facts presented by the viewer, but they may not disclose information relating to the representation except information that is generally known); N.C. 2020 Formal Ethics Op. 1 (2020) (lawyer not permitted to include confidential information in response to a client's negative online review, but is not barred from responding in a professional manner); Or. Ethics Op. 2022-201 (2022) (Any response to a client's online criticism is not a case or controversy and the self-defense exception will be applied sparingly, if at all; moreover, a broad view should be taken as to whether information would be "embarrassing" or likely "detrimental" to the client. Even if information is publicly available elsewhere, the redisclosure of that information may cause further harm and embarrassment to the client, and confirming embarrassing information may provide additional gravitas to the disclosure. Lawyer may ethically respond to a negative review by asking the poster to contact the lawyer to discuss any problems or by directing the reader to positive reviews by other clients. The lawyer may also report that the person posting was not a client if this statement is accurate. The lawyer may also make generic, truthful statements about the lawyer's practice so long as it does not reveal information relating to the representation of the client. The lawyer may acknowledge publicly that the attorney does not respond to posts due to ethical obligations. The lawyer may also seek the client's informed consent enabling the attorney to respond.); In *re Conduct of Conry*, 491 P.3d 42 (Or. 2021) (Attorney's online responses to former client's negative online reviews of him, in which attorney disclosed client's full name and that client had been convicted of two crimes, which he specifically identified, constituted "information relating to the representation of a client" which attorney "revealed" within the prohibition of the Rule of Professional Conduct governing confidentiality of information; it was undisputed that attorney obtained client's name and information about his criminal convictions during the course of the representation, the nature of the disclosures was embarrassing in light of the audience, namely, members of the public reading online reviews of attorneys, and client's testimony that he was in fact embarrassed by the information because he feared that it would become known to his employer and to members of his wife's family, and attorney revealed the information by making it known to readers) Pa. Ethics Op. 2014-200 (2014) (lawyers must be cautious in deciding whether and in what fashion to respond to online criticism by a client; endorsing a proposed response suggested by the Pennsylvania Bar to use out of an abundance of caution). *Accord*: Tex. Ethics Op. 662 (2016); W. Va. Ethics Op. L.E.O. 2013-02 (2013); Wis. Ethics Op. EF-23-01 (2023). *Cf.* Ariz. Ethics Op. EO-19-0010 (2022) (in limited circumstances, a lawyer may reveal confidential client information to the extent reasonably necessary to respond to a former client's specific allegations against the lawyer that constitute a facially credible accusation of serious misconduct or incompetency); N.Y. Ethics Op. 1286 (2025) (A lawyer may ask a former client to write a Google review of the lawyer's services, and may offer the former client a nominal gift for doing so, provided the lawyer does not draft the Google review for the client or condition the gift on the content of the review. The lawyer may not use the former client's confidential information to the disadvantage of the former client.). *Cf.* R.I. Ethics Op. 2026-01 (2026) (lawyer not required to destroy files at direction of client after representation ends; lawyer entitled to retain files as permitted by law).

[37] *See* N.Y. Ethics Op. 1240 (2022) (If "contacts" on a lawyer's smartphone include any client whose identity or other information is confidential under Rule 1.6, then the lawyer may not consent to share contacts with a smartphone app unless the lawyer concludes that no human being will view that confidential information, and that the information will not be sold or transferred to additional third parties, without the client's consent.); *see* D.C. Ethics Op. 383 (2022) (absent informed consent, lawyer may not disclose to a client or prospective client information about another client or prospective client that is protected by Rule 1.6 or Rule 1.18; even requesting or agreeing to a commitment to make

articles, listservs, or in books;[38] issues implicating the lawyer's prior work for the client;[39] advising clients engaged in activities that are allowed by state law but prohibited by federal law;[40] issues

such disclosures, whether pursuant to outside counsel guidelines or otherwise, may constitute a prohibited inducement to another to violate, or attempt to violate, the rules of professional conduct).

[38] ABA Formal Ethics Op. 511R (2024) (Rule 1.6 prohibits a lawyer from posting questions or comments relating to a representation to a listerv, even in hypothetical or abstract form, without the client's informed consent if there is a reasonable likelihood that the lawyer's questions or comments will disclose information relating to the representation that would allow a reader then or later to infer the identity of the lawyer's client or the situation involved. A lawyer may, however, participate in listserv discussions such as those related to legal news, recent decisions, or changes in the law, without a client's informed consent if the lawyer's contributions will not disclose, or reasonably be likely to lead to the disclosure of, information relating to the representation); N.Y. Ethics Op. 1268 (2024) (After termination of the representation, a lawyer may publish an article that discusses the legal issues in the representation, as long as the article does not reveal confidential information without the consent of the client. Confidential information does not include a lawyer's "legal knowledge or legal research" or information that is "generally known" in the local community or in the trade, field or profession to which the information relates. But information is not generally known merely because it is available in court files); *Matter of Disciplinary Proceedings Against Merry*, 5 N.W.3d 285 (Wis. 2024) (Attorney's conduct in writing and publishing book regarding former client without client's consent, which revealed confidential information and caused client psychological harm, violated professional rules that prohibited lawyers who had formerly represented clients from using information related to representation to disadvantage of former client except when information had become generally known, or from revealing information related to representation, except as rules would permit or require.).

[39] *See* D.C. Ethics Op. 390 (2025) (When a lawyer's prior work may be at issue in a subsequent matter for the same client, the lawyer should carefully consider whether ethical considerations permit the lawyer to represent the client in the subsequent matter. This includes whether the lawyer's personal judgment might be adversely affected by the lawyer's personal interests, and whether the lawyer is likely to be a necessary witness at the trial and, if so, whether Rule 1.7 or Rule 3.7 affects the lawyer's ability to represent or continue to represent the client).

[40] *See* Colo. Ethics Op. 124 (2012) (lawyers permitted to use cannabis, provided the use does not impair the lawyer's ability to provide competent representation); Me. Ethics Op. 214 (2017) (notwithstanding current federal laws regarding sale and use of marijuana, Rule 1.2 prohibiting lawyers from assisting in client crime or fraud does not bar attorneys from assisting clients to engage in conduct a lawyer reasonably believes is permitted by Maine laws concerning recreational and medical marijuana use, although panel cautions that because the DOJ guidance on prosecutorial discretion is subject to change, lawyers providing advice should be up to date on federal enforcement policy and any modifications of federal or state law and regulations and advise their clients of same); Md. Ethics Op. 2021-04 (2021) (attorney's mere use or possession of medical cannabis in compliance with state medical cannabis statute does not violate ethics rules, although attorneys may be subject to discipline if such use interferes with their ability to competently practice law); Minn. Ethics Op. 23 (2015) (lawyer may advise client about the Medical Marijuana Law and may represent, advise and assist clients in all activities relating to and in compliance with the Law, including the manufacture, sale, distribution and use of medical marijuana, without violating the ethics rules, so long as the lawyer also advises his or her client that such activities may violate federal law); Miss. Ethics Op. 265 (2022) (attorney may ethically provide legal services, representing, counseling and assisting a client in activities relating to compliance with the state's Medical Cannabis Act, provided the lawyer also advises the client of relevant law, including but not limited to the federal Controlled Substances Act); Neb. Ethics Op. 22-03 (2022) (a Nebraska licensed attorney is permitted to advise Nebraska clients on employment issues that arise surrounding medial cannabis where the client has employees who live in a state where cannabis is legal, but whose employees are employed in Nebraska); N.J. Ethics Op. 744 (2022) (while the conduct remains technically illegal under federal lawyer, lawyers use of regulated cannabis and operation or investment in a regulated cannabis business does not violated Rule 8.4(b) which prohibits lawyers from committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects); N.Y. Ethics Op. 1225 (2021) (in light of current federal policy, the Rules permit a lawyer to assist a client in conduct designed to comply with New York's Recreational Marijuana Law and its implementing regulations, notwithstanding that federal law prohibits activities authorized by that law; lawyer may use marijuana for recreational purposes and may, when the law becomes fully effective, cultivate an authorized amount of marijuana plants at home for personal use; finally, subject to compliance with Rules 1.7 and 1.8(a), an attorney may accept an equity ownership interest in a cannabis business in exchange for legal services); N.Y. Ethics Op. 1177 (2019) (in light of current federal policy, the Rules permit a lawyer to assist a client in conduct designed to comply with state

involving client (or lawyer) possession of contraband;[41] and a number of other contexts.[42]

medical marijuana law); Ohio Ethics Op. 2016-6 (2016) (lawyer cannot provide legal services necessary for a client to establish and operate a medical marijuana enterprise or to transact business with a person or entity engaged in a medical marijuana enterprise. A lawyer may provide advice as to the legality and consequences of a client's proposed conduct under state and federal law and explain the validity, scope, meaning and application of the law); Pa. Ethics Op. 2015-100 (2015) (attorney may advise clients engaged in the marijuana business regarding related federal law and policy; a lawyer may not advise a client to engage in conduct that violates federal criminal statutes, or assist a client in such conduct, even if conduct is authorized by state law); Wash. Ethics Op. 201501 (2015) (no prohibition for lawyers to engage in legal cannabis businesses); Cal. Ethics Op. 2020-202 (2020) (same). *Cf.* Mo. Informal Ethics Op. 2021-02 (2021) (if lawyer representing client pursuant to the Missouri medical marijuana law would be in conflict with federal law, the lawyer should advise client of that fact, but the lawyer cannot undertake conduct that would violate federal law or counsel or assist client as to how to perform an act that would violate federal law even if the conduct would be lawful under state law); Phila. Ethics Op. 2015-100 (2015) (same).

[41] *See, e.g.*, N.C. 2021 Formal Ethics Op. 4 (2022) (lawyer may not take possession of a client's contraband—such as child pornography—if possession is itself a crime; upon discovering the contraband in the lawyer's email inbox, the lawyer must promptly review the law on the duty to report to law enforcement and other authorities; if the law requires the lawyer to disclose the location of the contraband to the authorities, lawyer must do so after notifying the client and explaining the legal consequences to the client); Mich. Ethics Op. RI-390 (2024) (lawyers and their staff should only accept client property that is legal to possess and only when it relates directly to the underlying representation. Lawyers should not accept illegal property from a client prior to having a discussion regarding confidentiality, the lawyer's duties to courts and opposing parties, and the lawyer's obligation to hand over illegal property to the proper authorities. Prior to accepting any client property, lawyers must inform clients about the law regarding possession of their property and provide a straightforward assessment of the risks and consequences of maintaining said property so that clients may make an informed decision as to what to do with the property at issue.); Mo. Informal Ethics Op. 2020-28 (2020) (attorney should exercise caution in transferring, disposing or retaining what the attorney may reasonably believe is an illegal substance. If concealing or destroying the substance would be unlawful, attorney may not do so. Attorney may have temporary possession of evidence of a crime for the purpose of conducting a limited examination that will not alter or destroy the substance if applicable law allows him to do so.).

[42] *See* ABA Formal Op. 515 (2025)(A lawyer who is the victim of a crime by a client or prospective client may disclose information relating to the representation to the appropriate authority in order to seek an investigation and potential prosecution of the alleged offender or other services, remedy, or redress. To the extent that the information would otherwise be subject to the lawyer's duty of confidentiality under Model Rule of Professional Conduct 1.6, the information is subject to an implicit exception to the Rule. This implicit confidentiality exception also applies when someone associated with the lawyer or related to the lawyer is a victim of the client's crime and the lawyer is a witness to that crime.); Alaska Ethics Op. 2020-2 (2020) (personal injury lawyer's testimonials disclosing amounts of recoveries are consistent with the Rules of Professional Conduct only if the clients provide informed consent); *In re Paul*, 292 A.3d 779 (D.C. 2023) (Thirty-day suspension from the practice of law was the appropriate sanction for attorney's conduct in disclosing the secrets and confidences of former client, who was a member of the bar, in disciplinary complaint attorney filed against former client; in prior cases where attorneys disclosed client confidences or secrets public censures or informal admonitions were imposed, however, attorney's conduct was more egregious as attorney acted in retaliation by filing his disciplinary complaint against former client after former client had filed a disciplinary complaint against him.); D.C. Ethics Op. 367 (2014) (when lawyer seeking employment with an entity or person adverse to his client or with an adversary's lawyer, a conflict of interest may arise if the lawyer's professional judgment on behalf of the client will be, or reasonably may be, adversely affected by the lawyer's own financial, business, property or personal interests; in such cases, the lawyer's options are to: (a) disclose the nature of the conflict and seek the client's informed consent to the representation; (b) withdraw from the representation; or (c) discontinuing seeking employment with the client's adversary or the adversary's lawyer until all pending matters relating to the potential new employment have been completed); *In re Smith*, 991 N.E.2d 106 (Ind. 2013) (Attorney engaged in misconduct by revealing confidential information relating to his representation of a former client by publishing the information in a book for personal gain.); N.Y. Ethics Op. 1205 (2020) (Lawyer serving as in-house counsel for federal agency may not negotiate for private employment with an organization that is an adverse party in litigation before the agency where the lawyer is participating personally and substantially in the litigation); N.Y. Ethics Op. 1161 (2019) (When a lawyer rather than a broker prepares a contract of sale in a real estate transaction, a copy of which the broker

The conflict between personal and client interests also arise with respect to government attorneys. Thus, several state ethics opinions considered the extent to which a government attorney may advise the agency concerning furloughs or other employment decisions to which the attorney may also be subject.[43] Similarly, the government lawyer may have an obligation to refuse orders

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has requested, the contract is confidential information that the lawyer is obliged to protect absent informed client consent. A lawyer's own personal, financial, or business interest in resisting disclosure creates a conflict of interest, subject to waiver, which the lawyer must disclose to the client in seeking consent to disclosure of the confidential information); N.Y. Ethics Op. 991 (2013) (if a lawyer perceives a significant risk that the lawyer's own persons interests will adversely affect the lawyer's professional judgment on the client's behalf, then the lawyer may not continue the representation unless the conflict is consentable and the client gives informed consent in writing); N.C. 2016 Formal Ethics Op. 4 (2017) (lawyer may not disclose financial information obtained during the representation of a former client to assist the sheriff with the execution on a judgment for unpaid legal fees); N.C. 2016 Formal Ethics Op. 3 (2017) (lawyer may not negotiate for employment with another firm if the firm represents a party adverse to the lawyer's client unless both clients give informed consent); Okla. Ethics Op. 327 (2009) (if it is in an insured's best interests to settle case, insurance staff counsel may not take matter to trial to qualify for a bonus under insurer program requiring a minimum number of jury trials before counsel would be eligible for increased compensation); Ore. Ethics Op. 2024-204 (2024) (In making a pitch to a potential new client or in a CLE presentation, lawyer may not reveal information concerning its representation of another client without that client's consent. Similarly, lawyer may not respond to an inquiry about the accuracy of a news report of the arrest of the lawyer's former client without the client's consent, even if the legal work he performed did not involve the arrest, since the accuracy of information relating to the arrest is likely detrimental or embarrassing to the client); Pa. Ethics Op. 2021-200 (2021) (ethical considerations relating to an attorney's use of medical marijuana); Pa. Ethics Op. 2020-600 (2020) (addressing ethics issues raised when lawyer asks a client for a waiver relinquishing the right to receive compensation for injuries resulting from exposure to the COVID-19 virus). *Cf. Pietrangelo v. Wilmer Cutler Pickering Hale & Dorr, LLP*, 68 A.3d 697 (D.C. 2013) (Counsel for law firm that represented former client in suit challenging federal statute was not disqualified from representing firm in client's subsequent suit against firm for legal malpractice and other claims simply because counsel learned information during course of representation of firm); Alaska Ethics Op. 2019-1 (2019) (A lawyer may not solicit or accept evidence from a person if he/she knows or reasonably should know that doing so violates the rights of a third person, which may include obtaining evidence in violation of confidentiality obligations. If obtaining the evidence violates the rights of a third person, it follows that the lawyer may also not pay for obtaining such evidence). *See also In re Cross*, 500 P.3d 958 (Wash. 2021) (lawyer suspended from practice for disclosing his former client's litigation decisions to another lawyer); ABA Formal Ethics Op. 500 (2021) (same); N.Y.C. Ethics Op. 2025-2 (2025) (Acts are still "illegal" or "fraudulent" or "dishonest" or "deceitful" for purposes of the Rules if the perpetrator cannot otherwise be held legally liable for them? The Rules make no special allowance for lawyers or clients with legal immunity. Illegal or fraudulent conduct remains so even when the client is immune, and a lawyer may be disciplined for advising or assisting in such client's acts. Likewise, conduct that adversely reflects on a lawyer's fitness as a lawyer, including those detailed in Rule 8.4, does not become less so if the lawyer has legal immunity for them. Lawyers must always act according to the Rules, both on their own behalf and when on behalf of a client. That they or their client are legally immune implies no exceptions to that overarching principle.).

[43] *See, e.g.,* D.C. Ethics Op. 365 (2013) (even if the government client consents, government lawyer cannot represent agency employer in defending agency from furlough-related complaints brought by other agency employees when the lawyer was also furloughed and is pursuing her own complaint in which the allegations are substantially similar to those in the complaint she is defending if the lawyer does not believe she can provide competent and diligent representation to her agency client in the furlough matters while pursuing her own claims). Accord: N.J. Ethics Op. 726 (2013); N.Y. Ethics Op. 968 (2013); Md. Ethics Op. 2013-09 (2013); S.C. Ethics Op. 13-06 (2013); Va. Ethics Op. 1875 (2015); W.Va. Ethics L.E.O. 2013-02 (2013). Ethics opinion have addressed the issue in other, non-furlough contexts. *See* Neb. Ethics Op. 23-02 (2023) (lawyer may represent a client before a state agency or commission led by an official who is also associated with the firm, but the official must recuse from any direct involvement in the matter if it would materially limit the interests of the client and the official must have no access to information regarding the matter and no direct or indirect interest from the firm regarding the matter. But the lawyer may not represent a client before the agency or commission if the official or commission is unable to recuse due to the required duties of the role the official or commissioner has been appointed. The lawyer also may not represent a client before an agency or commission if such representation states or implies an improper influence on the agency or commission, regardless of whether recusal is available.); N.Y. Ethics Op. 1274 (2024) (A lawyer employed in the counsel's office

from their agency superiors if doing so would violate the government lawyer's applicable ethical obligations.[44]

F. Imputed Disqualification.

If a lawyer is disqualified from representing a client, disqualification is generally imputed to the other attorneys in the lawyer's firm since it is presumed that the attorney has access to confidential information about firm clients represented by other firm attorneys.[45] Issues may also arise when a lawyer is asked to refer a potential client (or a current or former client) to another

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of a state agency would not have a conflict in representing the agency in an enforcement action against a client the lawyer had formerly represented in private practice unless the lawyer would normally be expected to have acquired confidential information in the course of the lawyer's prior representation that was material to the enforcement action. If there were a conflict, the conflict would be imputed to the counsel's office, and screening would not suffice to avoid imputation, absent consent of the former client.); N.Y. Ethics Op. 1272 (2024) (part-time Department of Social Services attorney may not represent private clients in Family Court in matters in which Department has an interest or otherwise plays a meaningful role even if Department and the attorney's client which to consent, because that situation presents a non-consentable conflict of interest); N.Y. Ethics Op. 1216 (2021) (A government agency lawyer doing work on behalf of the government in connection with a software contract with a private company may not also work as a consultant to the private company to help it provide such software to other agencies unless there is a law expressly allowing such work. Such consulting work could also be prohibited by rules on conflicts of interest or by the rule prohibiting a lawyer from accepting benefits intended to influence the actions of public officials); N.Y. Ethics Op. 1149 (2018) (An agency shop member of a union of State employees union may represent a State agency in disciplinary matters against union-represented employees if the lawyer reasonably believes that no significant risk exists that the lawyer's professional judgment on behalf of the State agency will be adversely affected by the lawyer's personal interests. If in a particular circumstance a reasonable lawyer would conclude that there is a significant risk that the lawyer's professional judgment on behalf of the government employer might be adversely affected by the lawyer's agency-shop membership, then the lawyer may undertake the representation if the lawyer reasonably concludes that the lawyer can provide competent and diligent representation and the agency gives its informed consent, confirmed in writing.); Tex. Ethics Op. 649 (2015) (agency lawyer may represent agency in defending claims brought by agency employees regarding an employment decision made by the agency, when that decision may also adversely affect the lawyer personally and result in the lawyer's having the same or a substantially similar claim against the agency, if the agency consents after full disclosure and the lawyer reasonably believes that her representation of the agency will not be materially affected by the lawyer's own interests).

[44] *See* N.Y.C. Ethics Op. 2025-1 (2025) (A lawyer representing a government officer or agency, such as the U.S. Department of Justice or other federal, state or local executive, may not violate the New York Rules of Professional Conduct (the "Rules") and may refuse orders from superiors that could, in the lawyer's independent judgment, result in such a violation. This Opinion clarifies that a government lawyer who carries out a directive of a senior official, regardless of who that official is, that would violate the Rules may be professionally disciplined for doing so.); N.Y. Ethics Op. 751 (2002) (Government staff attorney may not comply with direction of an agency official to "just show up" or "just do the best you can" without preparation, if the result will be to represent the department incompetently. Staff attorney has an independent professional obligation to carry out the department's legal responsibilities in judicial and administrative proceedings in which the staff attorney represents the department, and cannot comply with instructions that would require the lawyer to act unethically to the law and to the general ethical responsibility to "seek justice."). *See also* Department of Justice- Ethical Standards for Attorney for the Government, at 28 C.F.R. § 77.4(e) ("Each attorney, including supervisory attorneys, must assess his or her ethical obligations with respect to particular conduct. Department attorneys shall not direct any attorney to engage in conduct that violates [28 U.S.C.§ 530B.]" (Ethical Standards for attorneys for the Government).

[45] *See* ABA MODEL RULE 1.10; ABA Model Code, DR 5-105(d). *See* N.Y. Ethics Op. 1105 (2016) (absent informed, written consent, if the public defender's office in which the lawyer is a part-time public defender is prevented from representing a person, then neither the part-time defender nor any lawyer in the part-time defender's private law firm may represent the person.); N.Y.C. Ethics Op. 2003-3 (2004) (outlining minimum requirements for a law firm's conflicts-checking system).

lawyer or firm.[46]

1. Lawyer Changing Firms.

When a lawyer joins a law firm that represents parties adverse to his former firm's clients, imputed disqualification of the new firm usually depends on whether the attorney possesses client confidences. If the attorney does not possess confidences of his former clients, his new firm is not usually disqualified; however, if the lawyer possesses confidences of his former client, disqualification of the lawyer and his new firm may be necessary.[47] Note that both the departing lawyers and their law firms have an ethical duty to protect client interests when a lawyer leaves a law firm.[48] Similar client protection issues arise when law firm addresses succession planning and

[46] *See* D.C. Ethics Op. 326 (2004) (lawyer may ethically refer a person seeking representation to another lawyer, even if the representation would be adverse to the referring lawyer's existing client(s), but there are practical considerations that should be taken into account). N.Y.C. Ethics Op. 2016-1 (2016) (When an attorney is unable to represent a prospective client due to a conflict of interest with an existing client in a matter in which the attorney's firm is not representing the existing client, the attorney is ethically permitted to refer the prospective client to another attorney(s) who are competent in the field; in doing so, attorney should consider several ethical limitations, including the attorney's duty to act in good faith toward the prospective client, avoid conflicts of interest, maintain confidentiality, limit communications with unrepresented adverse parties and abide by the rules governing reciprocal referral agreements and fee sharing. Additionally, attorneys are not obligated to refer prospective clients to counsel and may choose, for professional or other reasons, not to make the referral.); Wis. Ethics Op. 23-04 (2023) (A lawyer who receives compensation in exchange for the referral of clients to an investment advisor has a conflict of interest and is involved in a business transaction with a client. Whether a lawyer can engage in such a transaction must be analyzed on a case-by-case basis.).

[47] *See In re ProEducation Int'l., Inc.*, 587 F.3d 296 (5th Cir. 2009) (Attorney was not disqualified from representing judgment creditor in bankruptcy case based on alleged conflict of interest arising from his former firm's representation of another creditor in the case, where attorney had never personally represented, or gained any actual knowledge of, other creditor during his employment with former firm.); Neb. Ethics Op. 15-01 (2015) (Attorney who leaves a law firm representing a client in a matter is not precluded from joining another law firm that is representing an adverse client in the same matter provided that the transitioning attorney obtained no confidential knowledge or information concerning the matter or client before his or her departure.); Tex. Ethics Op. 693 (2022) (without prior consent, lawyer may not represent a person adverse to a client of the lawyer's former firm if the lawyer "personally represented" the client while at the former firm; any conflict of interest in such a situation will be imputed to all other lawyers of the lawyer's current firm, but ethical screening may be ineffective except in situations involving move from government service or clerkship or the affected clients provide informed consent to the screen); Tex. Ethics Op. 598 (2010) (absent consent, law firm may not continue as counsel in litigation matter after hiring an associate who formerly represented an adverse party if a reasonable probability exists that representation would violate confidentiality obligations owed to the adverse party or if the current litigation is the same as or substantially related to the matter in which the associate represented the adverse party).

[48] *See* ABA Formal Ethics Op. 489 (2019) (addressing multiple ethics issues when lawyer departs a firm, including prohibition on restrictions on the departing lawyer's ability to represent clients and addressing confidentiality and other issues relating to orderly transition of client matters); Alaska Ethics Op. 2005-2 (2005) (addressing ethics considerations governing departing lawyer and law firm when a lawyer departs the firm); Cal. Ethics Op. 2020-201 (2020) (same); Colo. Ethics Op. 116 (2007) (Ethical Considerations in the Dissolution of a Law Firm or a Lawyer's Departure from a Law Firm"); Iowa Ethics Op. 17-01 (2017) ("When Lawyers Change Firms: Guidelines for Lawyers, Their Existing Law Firms, and Potential Future Law Firms"); Me. Ethics Op. 219 (2018) (opinion addressing various ethical issues and suggested best practices departing lawyer and the firm involved in lateral transfers by attorneys); Mo. Informal Ethics Op. 2020-04 (2020) (regarding notice obligations of firm and departing lawyer); N.Y. Ethics Op. 1221 (2021) (lawyer who has changed law firms may contact clients she represented for estate planning purposes at her previous firm, may inform or remind these former clients that she has joined a new firm, and may offer to review their estate planning); N.Y.C. Ethics Op. 2023-1 (2023) (A number of ethics rules govern a lawyer's and a law firm or law department's ethical obligations to each other and to clients when a lawyer departs from a law firm or law department. The guiding underlying ethical principles seek to protect the client's right to choice of counsel and a

retirement.[49] Ethics rules also prohibit firms from imposing unreasonable departure notice periods on departing lawyers, or imposing blanket prohibitions on the departing lawyer making or retaining copies of client files or information on matters in which the lawyer has personally represented the client.[50] Similarly, in-house counsel may not agree to a covenant not to compete

lawyer's right to change firms, and to ensure a smooth transition during which the client continues to be fully and competently represented. Opinion provides guidance as to how these rules and precepts impact the key events that arise during an attorney's departure, including the substance and timing of communications with clients, notice requirements, issues and obligations pertaining to the notice and transition period, and the transfer of files.); N.C. 2025 Formal Ethics Op. 1 (2025) (Opinion sets out the requirements of the notice that must be sent to affected clients when a lawyer leaves a law firm.); N.C. 2021 Formal Ethics Op. 6 (2022) (to comply with its ethical responsibilities, law firm must keep a departing lawyer's email account active and must place an ongoing auto-reply message on the email account which must include notice of the lawyer's departure and, if appropriate, provide new contact information for the departing lawyer if it is known or reasonably ascertainable by the law firm, and law firm must monitor the account to ensure clients are not adversely impacted by the lawyer's departure); Tenn. Ethics Op. 2023-F-169 (2023) (Departing lawyers and their law firms have an ethical duty to protect client interests when a lawyer leaves a law firm. The departure of a lawyer who represents a client or is responsible for the law firm's delivery of legal services currently on a matter is information that may affect the status of a client's matter and require the client to make a decision regarding the representation as set forth in RPC 1.4. A departing lawyer and the law firm have an ethical duty to inform the client of the lawyer's departure. Because a client has the right to select counsel of the client's choice, the fact that the lawyer is leaving and where the lawyer will ultimately practice is information that will aid the client in determining whether to stay with the law firm, leave with the lawyer or seek legal representation elsewhere. Notice should be given to the client by the departing lawyer, the law firm, or preferably, jointly by the law firm and the lawyer.); Wash. Ethics Op. 201801 (2018) (addressing various ethical issues and suggested best practices for departing lawyer and the firms involved in lateral transfers by attorneys); Wis. Ethics Op. EF-25-02 (2025) ("Ethical Responsibilities of the Departing Lawyer and the Firm."). *Cf.* Ky. Ethics Op. KBA E-443 (2017) (addressing various ethical issues and suggested best practices for exchange of client information for law firms contemplating a merger or in situations involving lawyer lateral moves); Ky. Ethics Op. K-424 (2005) (addressing lawyer departure from a law firm, including the lawyer and law firm obligation to communicate with current clients regarding the departure, communication with former client and "firm" clients regarding the departure, and disposition of files of current clients whom the departing lawyer is representing); Mass Ethics Op. 2017-1 (2017) (When lawyers change firms and clients move with them, new engagement letters should be executed with the new firms as to hourly matters, and must be executed as to contingent matters, even when no material terms change. A lawyer bears the burden of justifying as fair and reasonable to the client any material change in the terms of the engagement that occurs after a representation commences. As to clients who want the old firm to continue to represent them, that firm's actions must comply with ethical and, where applicable, court rules); Ohio Ethics Op. 2020-06 (2020) (discussing ethical obligations of law firm and lawyer leaving the firm to ensure that affected clients are informed of the lawyer's departure and client's right to counsel of its choice); Tex. Ethics Op. 700 (2024) a lawyer who has departed from a law firm must enter into a new legal services agreement with a client who terminates the lawyer's prior firm and follows the lawyer to a new practice.).

[49] *See* Cal. Ethics Op. 2024-209 (2024) (Lawyers have an ethical obligation to protect their clients' interests throughout the representation, including in the event they are unable to continue practicing law on a temporary or permanent basis. Therefore, attorneys must assess whether a succession plan is necessary to protect their client's interests and prevent the risk of harm or prejudice to clients that may otherwise occur when a lawyer is unable to practice law. Based on this evaluation, a lawyer may need to take reasonable measures to prepare for a disruption or termination of their legal practice, including undertaking formal succession planning.); Colo. Ethics Op. 147 (2024) (Expecting the Unexpected: Ethical Considerations in Succession Planning—discussing key ethical considerations in succession planning, such as file organization and retention, trust account management and recordkeeping, assisting attorney responsibilities, and creation of a comprehensive Agreement to Close Practice).

[50] *See* Tex. Ethics Op. 699 (2024) (lawyer may not attempt to impose or enforce an unreasonable minimum departure notice period upon a departing lawyer, reassign client matters to new attorneys (absent client direction or exigent circumstances required for the protection of the client's interest) in a way that prevents a departing lawyer from fulfilling ethical obligations owed the client before departure, or deny a departing lawyer access to firm resources necessary to continue to represent clients competently and efficiently during the pre-departure period. Similarly, with respect to client matters for which a departing lawyer is personally responsible, the lawyer must make reasonable

or other terms that restrict their legal employment after the employee's termination or which other otherwise interferes with the attorney's professional autonomy to practice law and clients' freedom to hire the attorney of their choice, although a confidentiality agreement that does not exceed the scope of Rule 1.6 is permitted[51]

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efforts to avoid materially jeopardizing or disadvantaging those client matters by the timing or manner of their voluntary departure. A law firm' employment agreement may not contain a blanket prohibition preventing departing lawyer from making and retaining copies of client files or information on matters in which the lawyer has personally represented the client. A departing lawyer must be allowed to retain sufficient former client information to avoid conflicts of interests involving the lawyer's new practice (or subsequent practices with future firms) and therefore be able to serve clients where no conflicts exists. If departing lawyer is responsible for a client's representation or currently plays a principal role in the firm's delivery of legal services to that client, the departing lawyer has a duty to ensure client is timely informed (a) that the lawyer is leaving the firm, (b) that the client has the ultimate right to decide who will continue the representation, and (c) whether there are any contractual or financial ramifications of the client's decision. Preferably the law firm and the lawyer will agree on a joint announcement. When the firm and the lawyer have provided a joint notification, or when the firm has made a timely, accurate, and adequate unilateral announcement regarding the lawyer's departure, the lawyer is not obligated to provide a redundant announcement. A lawyer must provide notice of departure to a client, notwithstanding contrary instructions from the law firm, if the lawyer knows the law firm has not provided timely, accurate, and adequate notice. There may be instances in which both the firm and the lawyer make separate announcements, consistent with the clients' best interests and any legal and ethical obligations that the firm and the lawyer may have to the clients and to each other. Finally, a lawyer may not participate in offering or making a partnership or employment agreement that restricts the lawyer's right to solicit clients after termination of the representation, except an agreement concerning benefits upon retirement.); Me. Ethics Op. 218 (non-competition agreement or similar restriction on the right to practice as a result of the termination of a lawyer's relationship with other lawyers or law firm is generally prohibited); N.Y.C. Ethics Op. 2025-3 (2025) (The implementation by law firms of partnership or employment financial terms, including but not limited to payments in the form of forgivable loans, bonuses, deferred compensation, withdrawal payments, deductions from capital or otherwise that are automatically forfeitable or forfeitable at the discretion of the firm, that have the effect, either by their express terms or in practice, of discouraging or deterring competition with the law firm by lawyers who leave the law firm, is impermissible under Rule 5.6(a) of the New York Rules of Professional Conduct.). *Cf.* D.C. Ethics Op. 391 (2025) (Lawyers and law firms that contemplate agreeing with a government to conditions that may limit or shape their law practices must examine whether such conduct will create issues under the Rules of Professional Conduct. This might include conflicts of interest for existing or new engagements adverse to that government, improper restrictions upon the lawyers' right to practice, or interference with the lawyers' professional independence. If a conflict is found to exist, obtaining a valid waiver may be difficult. Lawyers who represent the government in seeking, negotiating, or implementing such agreements also must consider their responsibilities under the Rules).

[51] *See* Ohio Ethics Op. 2020-01 (2020) (in-house lawyer may not agree to employment contract with a covenant not to compete that would restrict lawyer's right to practice after separation of employment); Nev. Ethics Op. 56 (2020) (employment or stock agreement (other than a retirement benefits agreement) with an in-house counsel that includes a covenant not to compete restricting legal employment after the attorney's termination, violates Rule 5.6 because it interferes with an attorney's professional autonomy to practice his or her profession and clients' freedom to hire the attorney of their choice. A confidentiality agreement may be part of an in-house counsel's employment or stock agreement so long as it does not exceed the scope of Rule 1.6 or restrict the attorney's right to practice law after termination); Ill. Ethics Op. 23-05 (2023) (Lawyers offering or making an employment agreement that restricts the right of an in-house lawyer to practice law after termination of employment, such as through a noncompete provision, do not comply with the Illinois Rules of Professional Conduct.); Mich. Ethics Op. RI-312 (20025) (A client has a right of access to, but not rights of ownership of, a lawyer's files. That right of access extends, at a minimum, to what is reasonably needed to protect the client's interests. A lawyer must provide such access on reasonable terms that depend on the form in which the files are maintained. If a lawyer has previously provided copies of or access to file materials which the client is entitled to receive, a lawyer may charge the reasonable cost of retrieval and duplication of those files if requested by the client. A lawyer must provide access to at least materials filed with a court or other tribunal, or published to or received from third parties. A lawyer may be required to provide access to work-in-process and other preliminary materials if the client reasonably needs the materials to protect the client's interests under the circumstances. If the client has not paid the lawyer, the lawyer may withhold preliminary materials except in situations

2. Ethical Screening to Avoid Imputed Disqualification.

In some states, firms may use an "ethical firewall"[52] to avoid imputed disqualification.[53] Screening may be effective if the law firm or organization is a large one,[54] but it may not be

where the client is unable to pay the lawyer and has critical need of the materials to protect the client's interests. Ordinarily, a lawyer need not grant access to internal files that relate to the lawyer's administration of the representation. Absent extraordinary circumstances, a lawyer should not provide access to file materials that must be kept confidential because of duties to third persons or as may be required by law. A lawyer may withhold materials prepared by outside professionals and vendors pending payment to which the client has agreed unless the client is unable to pay for the materials and has critical need of the materials to protect the client's interests. A lawyer must promptly return client property entrusted to the lawyer but may assert a retaining lien over such property as security for unpaid fees and costs. The lawyer may be required to grant access to client property over which the lawyer has asserted a retaining lien if the client is unable to pay the lawyer and has critical need to access the property to protect the client's interests.); N.J. Ethics Op. 708 (2006) (non-compete clause for in-house counsel violates Rule 5.6); S.C. Ethics Op. 2000-11 (2000) (non-compete for in-house lawyer would violate Rule 5.6, but corporations may rely on trade secrets law and the provisions of Rule 1.6, 1.7, and 1.9 to preclude certain other subsequent employment); Va. Ethics Op. 1615 (1995) (in-house non-compete agreement violates Rules 5.6); Va. Ethics Op. 246 (1974) (It is improper for an attorney to enter into an employment agreement with a law firm under which said attorney would be precluded from practicing in the same geographical area as the firm for a specified time after such attorney terminates his employment with the firm). *Compare* Wash. Ethics Op. 2100 (2005) (attorney may agree to non-compete that has a savings clause that the provision will be interpreted to comply with the ethics rules and expressly citing Rules 5.6, 1.6, and 1.9); Conn. Ethics Op. 02-05 (2002) (same). *Cf.* Tex. Op. 670 (2018) (lawyer leaving a law firm may, at his expense, make and retain copies of former clients' documents generated in matters in which the lawyer personally represented the clients; however, lawyer must comply with his obligation to maintain the confidentiality of such documents). *Compare* ABA Informal Op. 1301 (1975) (in-house counsel's covenant not to compete was not in technical violation of Rule 5.6(a), which only forbids restrictive covenants between lawyers); *DISH Network Corp. v. Shebar*, 2017 Colo. Dist. LEXIS 87 (Dist. Ct. Colo. May 9, 2017) (noncompete for in-house counsel enforceable).

[52] Author's note: like the court in *Hendricksen v. Great Am. Sav. & Loan*, 11 Cal. App. 4th 109 (1992), "[w]e prefer to use the term 'ethical wall' rather than the more common, and often criticized term, 'Chinese Wall.'"

[53] *See, e.g.*, *Cromley v. Bd. of Educ. 205*, 17 F.3d 1059 (7th Cir. 1994) (attorney did not breach ethics rules when he switched employment from law firm representing high school teacher in section 1983 action to law firm representing defendants in action; screening procedures to avoid disclosure of information were timely employed and fully implemented by defendants' law firm); ABA Formal Ethics Op. 97-409 (1997) (former government lawyer who is personally disqualified from representing a client in a matter may be screened to enable other lawyers in her new firm to undertake the representation); D.C. Ethics Op. 308 (2001) (lawyers who leave private practice to enter government service must be vigilant to protect the interests of their former clients while representing their new clients with diligence and zeal; while disqualification of a government lawyer from a matter due to work done for a prior client is not imputed to other lawyers in the government agency or entity, screening measures should be considered in appropriate cases); D.C. Ethics Op. 279 (1998) (screening of a disqualified lawyer can cure imputed disqualification of her law firm only where the disqualified lawyer (1) was not a lawyer when involved in the previous matter on behalf of the now-disqualified lawyer; (2) was a government employee when involved in the representation; or (3) acquired information regarding the now adverse party in connection with a prospective client who did not become a client; even where available, screen is effective only if established in a timely manner). *Cf.* Mo. Informal Ethics Op. 2020-05 (2020) (attorney negotiating for future employment may make limited disclosures sufficient to check for conflicts).

[54] *See, e.g., In re Del-Val Fin. Corp. Sec. Litig.*, 158 F.R.D. 270 (S.D. N.Y. 1994) (screening procedures prevented imputed disqualification where conflicted attorney joined a 400-lawyer firm and was involved in the prior representation only in a peripheral manner); *In re B.W.*, 2017 WL 4231847 (W.Va. Sept. 25, 2017) (court did not err in denying petitioners' motion to disqualify the prosecuting attorney's office from representing the department of health and human resources in action to place petitioners' grandchildren in permanent custody of foster parents, based on fact that an assistant prosecuting attorney that signed a certificate of service in the action previously represented the foster parents, where the signing of the certificate was a mistake and did not violate the court's prior order that he have no communication with anyone in the prosecuting office concerning the case, the office effectively and completely screened the assistant prosecuting attorney from any involvement in the matter).

effective for smaller firms (ten or less lawyers)[55] or where screening was not erected in a timely or effective manner.[56] Ethical screens may also be established in the context of obtaining client consent to waive actual or potential conflicts.[57] An effective screen should: (1) prohibit access by the disqualified lawyer to files of the adverse matter; (2) prohibit access by the lawyers working

[55] *See, e.g.*, *Van Jackson v. Check 'N Go of Ill., Inc.*, 114 F. Supp. 2d 731 (N.D. Ill. 2000) (law firm that hired attorney from firm representing plaintiffs was disqualified from representing defendants in same case, even if attorney was screened from access to existing files in which his former firm had represented plaintiffs; new firm had only four members, method of screening attorney from conflicts was not described, and attorney entered appearance in state court case on behalf of defendants in nearly identical action involving different plaintiffs); *Norfolk S. Ry. v. Reading Blue Mountain & N. R.R.*, 397 F. Supp. 2d 551 (M.D. Pa. 2005) (law firm representing plaintiff failed to establish that its ethical screen would be effective to avoid disqualification where defendant's counsel was hired by the law firm before trial; the absence of a time lapse between the counsel's representation of defendant and his employment with the firm, the fact that counsel's involvement with defendant and his involvement with the case was substantial, and the small size of the firm (10 lawyers) all weighed in favor of disqualification).

[56] *See, e.g.*, *HDMI Licensing Admin., Inc. v. Availink Inc*., 2024 WL 1745023 (N.D. Cal. April 22, 2024) (Neither an ethical wall implemented several months after the litigation commenced nor a statement that each of the firm's offices operate as "independent legal entities" satisfies Defendant's burden on this record. King & Wood has not shown that it implemented a timely screen or proper preventative measures, and therefore it has not met its burden to rebut the presumption against vicarious disqualification.); *Krutzfeld Ranch LLC v. Pinnacle Bank*, 272 P.3d 635 (Mont. 2012) (where lawyer retained by litigants for a limited purpose did not affirmatively end the representation before joining the law firm representing the clients' opponent, the litigants remained the lawyer's clients, thus requiring disqualification of his new firm. Because the conflict was a current, not former, client conflict, screening measures would not be effective to remedy the conflict); *Ryan's Express Transp. Servs., Inc. v. Amador Stage Lines,* 279 P.3d 166 (Nev. 2012) (When considering whether the implemented measures screening a disqualified attorney from the rest of his firm are adequate, courts are to be guided by the following nonexhaustive list of factors: (1) instructions given to ban the exchange of information between the disqualified attorney and other members of the firm; (2) restricted access to files and other information about the case; (3) the size of the law firm and its structural divisions; (4) the likelihood of contact between the quarantined lawyer and other members of the firm; and (5) the timing of the screening.); N.Y.C. Ethics Op. 2006-1 (2006) (factors affecting validity of ethical screen include size of law firm, proximity in which lawyers work and firm's control over access to the files); *Kala v. Aluminum Smelting & Ref. Co.*, 688 N.E.2d 258 (Ohio 1998) (appearance of impropriety created when attorney, who had represented his former client in wrongful termination action for two years, left firm and joined law firm that represented his client's former employer could not be cured through attempts to erect ethical wall and take other screening actions, and thus, attorney's new firm, was disqualified from continuing to represent employer; attorney had obtained continuance to file appellate brief for client only two weeks before joining new firm, and no screening methods could affect perception that client's attorney had abandoned him and joined firm representing adversary while case was pending); *Clinard v. Blackwood*, 46 S.W.3d 177 (Tenn. 2001) (screening procedures to prevent contact between defendants' former attorney and plaintiffs' attorneys rebutted presumption of shared confidences when former attorney joined firm; however, appearance of impropriety created when defendants' former attorney joined law firm that represented plaintiffs required disqualification despite screening procedures; permitting firm to represent the plaintiffs would suggest that judiciary favored considerations of attorney mobility over client confidentiality and that attorneys were free to disregard ethical considerations for sake of better employment opportunities); Vt. Ethics Op. 2005-1 (2005) (in the absence of consent of both parties, a law firm may not continue to represent a client in pending litigation if the law firm hires an attorney from a firm representing an opposing party in that litigation).

[57] *See* N.Y. Ethics Op. 723 (1999) (absent former client's consent, a lawyer changing firms may not undertake representation adverse to the former client if (1) moving lawyer personally "represented" the client or otherwise acquired relevant confidences or secrets of the client, and (2) moving lawyer would be undertaking representation in the same matter or in a matter that is substantially related to one in which the moving lawyer or the old firm previously represented the former client; absent client consent, if moving lawyer is disqualified under this rule, the moving lawyer's new law firm is also disqualified); N.Y. Ethics Op. 720 (1999) (when a lawyer is moving from one law firm to another, the new firm must request, and the moving lawyer may disclose, the names of clients represented and, depending on the size of the old firm, the names of all clients of the old firm for a reasonable time period, as long as such information is not protected as a confidence or secret of the clients of the old firm and the disclosing firm does not violate contractual or fiduciary duties of the moving lawyer to the old firm).

on the adverse matter to the files of the disqualified lawyer; (3) prohibit communications by the disqualified lawyer and firm lawyers concerning the adverse matter; and (4) provide written notice to all firm personnel and clients of the fact and elements of the screen.[58] The files should also be labeled to reflect the access prohibition.[59] Twenty-eight states permit ethical screening for non-governmental lawyers;[60] less than half of the states do not.[61]

Courts recognize that imputed disqualification in the public-sector context imposes different burdens on the affected public entities and lawyers, including the difficulty that public entities would have recruiting competent lawyers. Based on these considerations, some courts more readily accept screening procedures to avoid disqualification in cases involving attorneys and non-attorneys employed by public entities.[62] Some jurisdictions apply the same standard for public and

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[58] D.C. Ethics Op. 279 (1998).

[59] *Id*.

[60] *See, e.g.*, Ariz. R. Prof'l Conduct 1.10(d); Cal. R. Prof'l Conduct 1.10 (2018); Colo. R. Prof'l Conduct 1.10; Del. R. Prof'l Conduct 1.10(c); Ill. R. Prof'l Conduct 1.10; Ind. R. Prof'l Conduct 1.10(c); Ky. Supr. Ct. Rules 3.130(1.10); Md. R. Prof'l Conduct 1.10(c); Mass. R. Prof'l Conduct 1.10; Mich. R. Prof'l Conduct 1.10; Minn. R. Prof'l Conduct 1.10(b); Mont. R. Prof'l Conduct 1.10(c); Nev. R. Prof'l Conduct 1.10(e); Nev. Ethics Op. 39 (2008); N.J. R. Prof'l Conduct 1.10(c); N.C. R. Prof'l Conduct 1.10(c) (silent on whether lawyer can share in fees relating to the matter); N.D. R. Prof'l Conduct 1.10(b); Ohio R. Prof'l Conduct 1.10(d); Ore. R. Prof'l Conduct 1.10(c); Pa. R. Prof'l Conduct 1.10(b); R.I. R. Prof'l Conduct 1.10; S.C. R. Prof'l Conduct 1.10(e) (allowing screening in the case of a lawyer that represented clients of a public defender's office, legal services office or similar program serving indigent clients); Tenn. R. Prof'l Conduct Rule 1.10 at (c) & (d); Utah R. Prof'l Conduct 1.10(c); Wash. R. Prof'l Conduct 1.10(e); Wis. R. Prof'l Conduct for Attorneys, Rule 1.10(a). *Cf.* Ill. Ethics Op. 18-02 (2018) (screening is only available when a lawyer becomes associated with a firm; screening is not available to insulate existing members of a firm from each other's potential conflicts); *Disciplinary Bd. v. Johnson*, 728 N.W.2d 199 (Iowa 2007) (approving deployment of ethical walls as a means of overcoming imputed disqualification of associates of attorneys affected by a conflict of interest in certain circumstances).

[61] *See Richard B. v. State*, 71 P.3d 811 (Alaska 2003) (rejecting screening to prevent disqualification). Accord: *Burnett v. Morgan*, 794 S.W.2d 145 (Ark. 1990); *Lansing-Delaware Water Dist. v. Oak Lane Park, Inc.*, 808 P.2d 1369 (Kan. 1991); Mo. Informal Ethics Op. 2020-20 (2020); N.Y. Ethics Op. 1186 (2002). *Cf. Doe v. Perry Cmty. Sch. Dist.*, 650 N.W.2d 594 (Iowa 2002) (law firm's ethical wall, which was a screening mechanism using case management software to restrict disqualified attorney's access to documents, was insufficient to prevent imputed disqualification of entire firm, where disqualified attorney represented student and her parents in criminal sexual abuse case against middle school teacher and his firm subsequently represented school district and principal in defense of student's and parents' civil sexual abuse suit); *Lennartson v. Anoka-Hennepin Indep. Sch. Dist. 11*, 662 N.W.2d 125 (Minn. 2003) (law firm disqualified from representing district in discrimination claim brought by former employee, when law firm had hired an attorney from a second law firm that formerly represented employee in the same matter and attorney had conducted one of the depositions for employee and had reviewed her case file, despite fact that attorney did not communicate any client confidences to new firm, and new law firm erected an "ethical wall" and prohibited attorney from any contact with school district's attorney).

[62] *See, e.g.*, *Roberts v. Hutchins*, 572 So.2d 1231 (Ala. 1990) (screening not effective for attorneys in private practice but should apply only to government attorneys or other publicly employed attorneys); *In re Charlisse*, 55 Cal. 4th 145 (2008) (in deciding vicarious disqualification in the context of public law offices, courts have looked to whether the public law office has adequately protected, and will continue to adequately protect, the former client's confidences through timely, appropriate, and effective screening measures and safeguards); Cal. Ethics Op. 1993-128 (1993) (referring to the use of screening of former government lawyer in a private law firm); D.C. Ethics Op. 285 (1998) (lawyer who employs a non-attorney former government employee must screen that person from matters that are the same as, or substantially related to, matters on which the non-attorney assisted government lawyers in representing a government client; the rules also prohibit the lawyer from inducing the former government employee to reveal confidential or privilege information; however, rule does not apply to government employees who did not work with government lawyers but were otherwise exposed to confidential government information); KBA E-453 (2021) (absent the informed written consent of the appropriate government entity, a former government officer or employee, in

private sector conflicts.[63]

connection with a matter in which the lawyer substantially and personally participated, may not disclose information about the matter to third parties, or be a fact or expert witness in the matter); Mich. Ethics Op. RI-334 (2004) (county may establish a separate public defender office to represent defendants with interests adverse to the interests of defendants represented by the original county public defender office, provided that the two offices are completely independent, do not share client information, and have separate supervisory personnel); *In re Advisory Comm. on Prof'l Ethics Op. 705*, 926 A.2d 839 (N.J. 2007) (attorneys formerly employed by the state must comply with both the professional conduct rule prohibiting a former government attorney from representing a private client in matters in which the lawyer, as a public employee, recently or substantially participated, and the Conflicts of Interest Law prohibiting a former state employee from representing, by himself or through any partnership or entity in which he has an interest, any client other than the state in connection with a matter that the employee was substantially and directly involved with as a state employee; although statute prohibited attorney conduct that the RPC would permit, statute served a legitimate governmental purpose and did not improperly encroach on judicial interests.); N.Y. Ethics Op. 1158 (2018) (subject to provisions regarding protection of confidential information and personal conflicts of interest, and other rules identified in opinion, lawyer who has worked on regulatory drafting as in-house counsel for a tax authority may seek new employment in a position seeking to change the current tax code and may work in such a position after leaving the agency); N.Y. Ethics Op. 1148 (2018) (lawyer formerly employed by a county department to handle child support enforcement proceedings may, after termination of such employment, represent respondents in such proceedings, provided that the lawyer was not personally and substantially involved in, and possesses no confidential information acquired about, the same specific matter while a government employee); Ore. Ethics Op. 2005-120 (2007) (when lawyer leaves a governmental entity to go into private practice, or leaves private practice to work for a governmental entity, the lawyer may not work on matters on which the lawyer participated personally and substantially in his former position without the informed consent of all parties, confirmed in writing; the lawyer's disqualification is imputed to the other members of the firm, unless the lawyer is properly screened); W. Va. Ethics Op. L.E.O. 2018-02 (2018) (screening is available where a former prosecuting attorney takes a position as a supervisory attorney in a public defender office).

[63] *See, e.g.,* ABA Formal Ethics Op. 509 (2024) (Model Rule of Professional Conduct 1.11(c) provides that a lawyer who acquired confidential government information while serving as a government officer or employee is disqualified from representing a "private client" whose interests are adverse to prevent the confidential government information from being used to the material disadvantage of that person. This Rule applies to a lawyer who acquired confidential government information while the lawyer was employed by or an official of the government, regardless of whether the lawyer seeking to represent the private client has now left government employ or office or maintains a private law practice (e.g., a part-time practice) while still in government employ or office. The Rule applies to the representation of a "private client," which can be any client represented in the lawyer's private practice that is not legally entitled to use the confidential government information in question.); Ariz. Ethics Op. 04-04 (2004) (separate "conflicts unit" within a public defender's office may not be employed to address imputed conflicts involving former clients even if screening is employed; two current clients may give a written formal waiver of conflicts under certain circumstances, but if both clients do not give consent, the public defender's office would constitute one firm, such that referral of case to the conflicts unit would not resolve the ethical conflict); *United States v. Williams,* 68 F.4th 564 (9th Cir. 2023) (District court abused its discretion when it disqualified entire United States Attorney's Office from litigating defendants' misconduct motions against single assistant United States Attorney in criminal prosecution; there was no indication that any ethical issues extended beyond that one prosecutor, and district court did not make specific factual findings that show that Office's continued representation would result in clear legal or ethical violation.); *City & Cnty. of San Francisco v. Cobra Sols., Inc.*, 38 Cal. 4th 839 (Cal. 2006) (entire city attorney's office vicariously disqualified because city attorney was retained by defendant while in private practice and worked on a matter substantially related to the pending matter; given city attorney's supervisory and policy-making role in the office, it is impossible to screen out all of his responsibilities for setting office policy and reviewing the performance of his attorney staff); Conn. Ethics Op. 22-01 (2022) (provided that he did not gain confidential information that could be used to the Municipality's disadvantage in the current case, an attorney that previously worked for the Municipality for five months would not run afoul of Rule 1.11 if he were to participate in a case adverse to the Municipality if he did not personally and substantially work on the same matter as the current litigation while employed by the Municipality); R. I. Ethics Op. 2007-09 (2008) (former state labor relations administrator may represent state employee whose interests are adverse to the state as an employer, provided that the attorney did not participate personally and

3. Conflicts Involving Paralegals, Secretaries, and Other Non-Attorneys.

Disqualification issues also arise when non-attorneys (such as secretaries, paralegals, and clerks) move from one firm to another since they may also possess former client confidences in their work with the former firm. Most jurisdictions hold non-attorneys to the same imputed disqualification standards as attorneys,[64] while a few apply a more lenient standard, especially with

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substantially in the matter relating to the employee's termination while he was a state labor relations administrator); *Calhoun v. Commonwealth*, 492 S.W.3d 132 (Ky. 2016) (court's refusal to disqualify the entire Commonwealth's Attorney's Office from prosecuting charges against defendant, after his public defender withdrew from representation before trial and took a job as an assistant prosecutor in the Commonwealth's Attorney's Office, was not erroneous; there was no indication that the former public defender participated in defendant's prosecution, and defendant was not substantially prejudiced by former public defender's employment with the Commonwealth's Attorney's Office); N.Y. Ethics Op. 1257 (2023) (Former district attorney may not be employed by a public defender's office in the same county, and may not personally represent a public defendant client in a matter in which he was personally and substantially involved as district attorney or in which he is conflicted because he acquired "confidential government information" within the meaning of Rule 1.11(c). Conflict is not imputed to all lawyers in the public defender's office, and public defender may assign another attorney to the matter if appropriate measures are taken to effectively screen the former district attorney from the matter in accordance with Rule 1.11(b); S.C. Ethics Op. 07-02 (2007) (private practice lawyer's hiring of non-attorney employee of the Solicitor's Office to work concurrently as a secretary in his office on immigration matters while she continues full-time work for the Solicitor's Office entails a risk of potential violations of the confidentiality and conflict of interest provisions of the ethics rules; nevertheless, subject to strict screening, confidentiality, and supervision procedures, it is not prohibited by the rules); Vt. Ethics Op. 2006-7 (2006) (Lawyer may represent private clients in matters before lawyer's former governmental agency, provided that lawyer had not participated personally and substantially in such matters during government service, absent consent of the governmental agency; and provided that in the new representation lawyer would not use or reveal confidences of lawyer's former government client)*; Richard v. Bd. of Prof'l Resp., Wyoming State Bar*, 547 P.3d 309 (Wyo. 2024) (Conflicts stemming from special bar counsel's prior representation of attorney in prior disciplinary proceeding as well as from deputy bar counsel's prior representation of attorney during her reinstatement proceedings, which required their respective disqualifications, were imputed to bar counsel and Office of Bar Counsel; bar counsel unilaterally determined special bar counsel did not have a conflict and could continue with his representation, Office of Bar Counsel did not provide required notice to attorney, who never consented to special bar counsel's service, and Office of Bar Counsel also never sent attorney notice detailing procedures it employed to keep deputy bar counsel ethically screened despite fact she had essentially switched sides and had become equivalent of an attorney in a prosecutor's office. The only appropriate remedy for the numerous conflicts of interest that occurred in current disciplinary proceeding against attorney was for Supreme Court to remand the matter to the Review and Oversight Committee (ROC) with instructions to appoint a new, conflict-free special bar counsel and to prohibit the Office of Bar Counsel from turning over any of work product of original special bar counsel, who was disqualified due to conflict of interest arising from his prior representation of attorney in a prior disciplinary proceeding, as well as the work product of bar counsel, who drafted formal charge against attorney based on the work product of original special bar counsel, whose conflict was imputed to bar counsel).

[64] *See, e.g.*, Ala. Ethics Op. 2002-01 (2002) (a non-attorney employee who changes firms must be held to the same standards as a lawyer in determining whether a conflict of interest exists); Miss. Ethics Op. 258 (2011) (law firm need not be vicariously disqualified by a newly hired paralegal's conflicts from work at another firm if the hiring firm institutes timely and effective screening); *Brown v. Eighth Jud. Dist. Ct.*, 14 P.3d 1266 (Nev. 2000) (disqualification of plaintiff's counsel was not warranted by fact that defense counsel's secretary left defense counsel's firm to work for law firm with which plaintiff's counsel worked closely on case before firm's withdrawal from case; there was no evidence that plaintiff's counsel acquired disqualifying information, and defendant's physician would not have been prejudiced by counsel's continued representation of plaintiff); N.Y.C. Ethics Op. 2009-3 (2009) (where law school graduate works in law school legal clinic on matters substantially related to the firm's work on behalf of its clients, firm should take adequate measures to screen law school graduate upon commencement of employment); S.D. Ethics Op. 2004-1 (2004) (rules do not prohibit employment of a part-time legal secretary by one law firm while she remains employed by another firm, provided firm makes reasonable efforts to insure that the legal secretary's conduct is compatible with the lawyers' and the firm's professional obligations, which may include instructing non-attorneys about the lawyers' ethical duties, especially the duty to maintain confidences, supervising non-attorneys in a way that

respect to whether screening mechanisms can be employed to prevent disqualifications.[65] At least

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does not permit them to engage in the unauthorized practice of law, and when appropriate, screening non-attorneys from involvement in particular client matters); *In re Johnston*, 872 N.W.2d 300 (N.Dak. 2015) (attorney who hired paralegal who had previously worked for opposing counsel on the other side of a mater in litigation failed to effectively screen paralegal and instead assigned paralegal to work closely on the matter, and thus violated rule of professional conduct which required attorney to put measures in place to comply with his obligations regarding conflicts of interest); Tenn. Ethics Op. 2003-F-147 (2003) (imputed disqualification and screening provisions apply not only when lawyers switch firms, but when non-attorney personnel switch firms as well); *In re Turner*, 542 S.W.3d 553 (Tex. 2017) (law firm must be disqualified after it employed a paralegal who had previously worked for the opposing party's counsel, where the paralegal obtained confidential information about the matter while working at the opposing firm and shared that information with her current firm; firm did not rebut the shared-confidences presumption because it did not instruct her to from working on the matter until after learning of her conflict: The failure to provide general instructions to a new employee to refrain from working on any matters on which she worked in any previous employment "creates an unacceptable risk of disclosure, even if the hiring firm is unaware of the new employee's specific conflict."); Tex. Ethics Op. 644 (2016) (firm is not required to withdraw from representing a client who, before becoming a lawyer, was employed as a law clerk for the firm representing the opposing party in the lawsuit and in that capacity helped provide services to the opposing party with respect to the lawsuit, so long as the firm screens the new lawyer from any personal participation in the matter to prevent the new lawyer's communicating to others in the firm confidential information that the new lawyer and the firm have a legal duty to protect); Tex. Ethics Op. 650 (2015) (firm representing a party in a lawsuit that hires an employee who is not a lawyer, paralegal or secretary but who was previously employed by the firm that represents the opposing party in the lawsuit will be required to withdraw from the representation if the employee in question had in the prior employment worked on the lawsuit or otherwise had access to information concerning the prior employer's representation of the opposing party in the lawsuit and the hiring firm fails to take effective steps, which normally would include screening the newly hired employee, to prevent the employee from disclosing or using in the hiring law firm confidential information related to the lawsuit. In all other circumstances, the hiring firm will not be required to withdraw from the representation unless, regardless of the hiring firm's attempts to prevent improper disclosure or use of any confidential information relating to the lawsuit acquired by the employee in the prior firm, the employee actually discloses or uses such confidential information in the hiring firm.); *In re Guar. Ins. Serv., Inc.*, 343 S.W.3d 130 (Tex. 2011) (firm effectively screened paralegal who had previously worked for opposing counsel on one of the firm's cases while at prior law firm so as to rebut the presumption of shared confidences, even though new firm's screening process did not reveal the conflict).

[65] *See, e.g.*, ABA Informal Ethics Op. 88-1526 (1988) (screening adequate to avoid imputed disqualification of firm that hired paralegal who worked on litigation matters for an opposing firm; rule applies equally to all non-attorney personnel in a firm who have access to material information relating to the representation of clients and also to agents who technically may be independent contractors, such as investigators); Md. Ethics Op. 2008-08 (2008) (same); *Herron v. Jones*, 637 S.W.2d 569 (Ark. 1982) (disqualification standards should be different as between attorney and secretary job-switching); D.C. Ethics Op. 227 (1988) (imputed disqualification can be avoided by screening paralegal who moved from one law firm to another firm that was handling a matter "substantially related" to the one on which the paralegal had worked at the former firm); Fla. Ethics Op. 86-5 (1986) (lawyer must admonish employee who has accepted job with opposing firm not to disclose client information; the new firm must consent to request or permit revelation of information; and former firm has duty to advise client of employee's move if he had a close working relationship with the client); *Hodge v. Ufra-Sexton, LP*, 758 S.E.2d 314 (Ga. 2014) (nonlawyer's conflict of interest could be remedied by implementing proper screening measures, and thus, a nonlawyer's conflict of interest stemming from work at a prior firm was not automatically imputed to new firm so as to disqualify new firm); *Foster v. Traul*, 175 P.3d 186 (Idaho 2007) (trial court did not abuse its discretion in medical malpractice action in denying patient's motion to disqualify defendants' attorneys because their newly hired associate was a former law clerk who worked on the court's prior summary judgment decision in the case; associate was properly screened from participation in the case.); Ill. Ethics Op. 16-05 (2016) (law firm may continue to represent city in municipal matters even though a paralegal employed by the firm is a member of the city council and the council has authority over the work and whether the firm's bills get paid); *Zimmerman v. Mahaska Bottling Co.*, 19 P.3d 784 (Kan. 2001) (secretary acquired material and confidential information regarding personal injury suit while working for plaintiff's lawyers, and thus defendants' firm, for which secretary began working after leaving plaintiff's firm, was disqualified from continuing to represent defendants; although secretary may not have been aware of importance of facts learned, plaintiff's files were not kept in secretary's office, and secretary was not assigned to partner working on suit, she testified that she was present when

one jurisdiction has concluded that unadmitted summer clerks, law student interns and law graduates cannot create the same kind of disabling conflicts when hired by a law firm or legal organization.[66]

G. Conflicts Involving Acceptance of Fees from Sources Other than the Client.

Corporate employers may offer to pay or reimburse attorneys' fees for the individually sued manager. Absent informed consent from the manager, such an arrangement is improper.[67] Similar

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plaintiff's attorneys discussed suit; disqualification may be avoided if non-attorney employee has not acquired material and confidential information regarding the litigation or, if client waives disqualification and approves use of ethical screening device); *Leibowitz v. Eighth Jud. Dist. Ct.*, 78 P.3d 515 (Nev. 2003) (screening of non-attorney employee may allow hiring law firm to avoid imputed attorney disqualification based on the employee's acquisition, in the former employment, of confidences of the adversary of the hiring law firm's client); Miss. Ethics Op. 258 (2011) (law firm that employs a non-lawyer who formerly was employed by another firm may continue representing clients whose interests conflict with the interests of clients of the former employer on whose matters the non-lawyer worked so long as the non-lawyer is screened to protect confidential information, the non-lawyer is instructed that no information relating to the representation of the clients of the former employer shall be revealed by the non-lawyer to any person in the current firm, the non-lawyer is not allowed to work on any matter in which he/she worked for the prior employer or regarding which the non-lawyer has information relating to the representation of the client of the former employer and the current firm takes all necessary steps to ensure that the non-lawyer takes no action and performs no work in relation to matters on which the non-lawyer worked in the prior employment unless a written consent is obtained by the client of the former employer); N.J. Ethics Op. 665 (1992) (screening applied to paralegal); N.Y. Ethics Op. 905 (2012) (A law firm that hires a lawyer who acquired confidential information while acting as a paralegal or legal assistant has an obligation to make reasonable efforts to ensure that the lawyer does not reveal the confidential information. If the lawyer acquired confidential information in a matter while working as a paralegal or legal assistant, the lawyer ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that the firm has a duty to protect.); N.C. Ethics Op. RPC 176 (1994) (screening needed even if the paralegal's involvement in the case was negligible); *Green v. Toledo Hosp.*, 764 N.E.2d 979 (Ohio 2002) (trial court warranted in denying motion to disqualify opposing counsel, though movant claimed that the counsel employed a secretary who had been once employed by the movant's attorney in the medical negligence action, given that the presumption of disclosed confidences had been rebutted, and thus, any evidence that the secretary had contact with or knowledge of confidential information at her former employer's firm was also rebutted; court noted that presumption can be rebutted with evidence that the new firm erected and followed adequate and timely screens to rebut evidence of exposure to confidential information); *Hayes v. Cent. States Orthopedic Specialists, Inc.*, 51 P.3d 562 (Okla. 2002) (before being disqualified for having hired a non-attorney employee from its opponent, the hiring firm should be given the opportunity to prove that the non-attorney has not revealed client confidences to the new employer and has been effectively counseled and screened from doing so); S.C. Ethics Op. 93-29 (1993) (screening applied to secretary; however, firm had no duty to notify client). *Cf.* Ohio Ethics Op. 2016-4 (2016) (if a legal intern engages in simultaneous or future employment as a law firm clerk, any conflicts arising from practice as a legal intern are imputed to lawyers of the firm; some conflicts may be waived with client consent but matters in which the intern had substantial responsibility cannot; such conflicts are not imputed to the interns or supervising attorneys in a legal clinic, though screening methods should be used to prevent improper exchange of confidential information).

[66] *See* N.Y.C. Ethics Op. 2024-6 (2024) (Because unadmitted law students and law graduates are not lawyers the imputed conflicts rules do not apply when those individuals are hired by a law firm or legal organization. As such, a conflict check for imputed conflicts is not required. However, the firms must still protect confidential information that may have been obtained by these individuals as a result of prior employment. Although screening is not a cure to imputed conflicts under Rule 1.10, screening may be an effective method to avoid improper use or disclosure of confidential information by unadmitted law students and recent law graduated.).

[67] *See* ABA MODEL RULE 1.8(f) (absent informed consent and no interference with the lawyer's independent judgment or the client-lawyer relationship or privileges, a lawyer shall not accept compensation for representing a client other than the client); ABA MODEL CODE, DR 5-107 (except with the consent of his client after full disclosure, a lawyer shall not accept compensation or anything of value for his legal services from one other than his client); Mich. Ethics Op. RI-293 (1997) (lawyer cannot enter into agreement to have fees paid by a third party if circumstances

conflict issues arise involving litigation funding and similar third-party arrangements.[68]

H. Conflicts Involving Insurance.

If an employer maintains insurance coverage for labor and employment law claims, insurers often will provide defense costs (and sometimes retain counsel to represent the insured) under a reservation of rights. Such cases raise the potential conflicts between the interests of the insurer and the insured.[69] In general, the rules of professional conduct, and not the insurance contract, govern the ethical obligations of a lawyer retained by the insurer to defend its insured.[70] When

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lead the lawyer to believe that there would be any interference with the lawyer's independence of professional judgment, nor can the agreement be made if any of its terms lead the lawyer to believe that the representation would be adversely affected, regardless of the consent of the client); N.Y. Ethics Op. 667 (1994) (attorney may accept a referral fee from a mortgage broker for referring client to broker, provided client consents to arrangement after full disclosure, all proceeds credited to client if client requests it, the aggregate attorneys' fees are not excessive, and the attorney exercises independent professional judgment on behalf of client).

[68] *See, e.g.*, Cal. Ethics Op. 2020-204 (2020) (discussing ethics obligations when a lawyer represents a client whose cases is being funded by a third-party litigation funder, including the obligation to maintain independent professional judgment and ensure client confidentiality; lawyer should obtain client's informed consent to disclose information to the funder and ensure that disclosures do not effect a waiver of attorney-client privilege, which may include having the funder sign a non-disclosure agreement and appropriate labeling of shared materials as confidential, among other measures); N.Y. Ethics Op. 1063 (2015) (when a lawyer accepts payment of legal fees from a third party, the third party payor is not a client merely by virtue of paying the fee); N.Y.C. Ethics Op. 2024-2 (2024) (opinion addresses the most common ethical issues involving litigation funding arrangements); N.Y.C. Ethics Op. 2011-2 (2011) (it is not unethical per se for a lawyer to represent a client who enters into a non-recourse litigation financing arrangement with a third party lender, but the lawyer must be cognizant of the ethical issues that may arise—such as potential compromise of confidentiality and waiver of attorney-client privilege, and potential impact on the lawyer's exercise of independent judgment – and advise clients accordingly); Nev. Ethics Op. 51 (2014) (discussion of multiple ethical issues arising when fees are paid by an unknown/anonymous third party on behalf of a client); W. Va. Ethics Op. L.E.O. 2016-01 (2016) (Lawyer or law firm may obtain a loan from a third party lender to advance litigation costs in a contingent fee matter and the costs can be deducted from the client's portion of the settlement or judgment, provided that client is fully advised in writing of the arrangement, the loan is not secured with the client's settlement or judgment, the terms are reasonable, and the client provides informed consent.). Cf. Colo. Ethics Op. 150 (2025) (addressing ethical issues that arise when a crowdfunding platform is used to raise funds for attorney's fees and costs including both when a client initiates the fundraiser and when a lawyer initiates the fundraiser); N.H. Ethics Op. 2021-22/02 (representing a client in a matter funded in whole or in part through donation-based crowd funding is not unethical per se, but attorneys are cautioned to exercise substantial caution when doing so given ethical considerations); Tex. Ethics Op. 695 (2022) (A lawyer employed by a nonprofit agency that provides legal services to low-income clients may not allow a funding organization or its monitor to review a client's confidential information unless the client provides effective consent after consultation or another exception to the lawyer's duty of confidentiality applies. A blanket consent obtained during the intake process is unlikely to be effective.).

[69] *See* Alaska Ethics Op. 2006-3 (2006) (a lawyer may not disclose confidences and secrets of an insured client to an outside contractor that is not the insurer without the informed consent of the insured client). *Compare Mount Vernon Fire Ins. Co. v. VisionAid, Inc.*, 875 F.3d 716 (1st Cir. 2017) (presence of an embezzlement counterclaim—which insured employer neither has to prosecute nor pay for—does not generate a conflict of interest entitling employer to separate counsel to defend against employee's age discrimination lawsuit at insurer's expense).

[70] *See* ABA Formal Ethics Op. 05-435 (2004) (unless the liability insurer is a party to the action brought by the lawyer's plaintiff-client, or unless under the particular circumstances of the case, the lawyer's taking testimony or discovery from the liability insurer presents a disqualifying adversity, representation of the plaintiff is not directly adverse and therefore does not present a concurrent conflict of interest to the lawyer's representation of the insurer in another action; however, a concurrent conflict may arise if there is a significant risk the representation of the individual plaintiff will be materially limited by the lawyer's responsibilities to the insurer, as for example, when it would be to the advantage of the plaintiff for the lawyer to reveal or use information relating to the representation of the insurer; if the lawyer concludes there is a concurrent conflict of interest, she may seek the informed consent of each affected

lawyers defend an insured under an insurance policy that permits the insurer to control the defense and settle within policy limits, they should communicate these limitations on the representation to the insured early in the representation.[71] If the lawyer knows that the insured objects to a

client, confirmed in writing, to waive the conflict if she reasonably believes she will be able to provide competent and diligent representation); *Cont'l Cas. Co. v. Pullman, Comley, Bradley & Reeves*, 929 F.2d 103 (2d Cir. 1991) (in insurance context, attorney owes allegiance, not to the insurer which retained him, but to the insured); *CHI of Alaska, Inc. v. Emp'rs' Reins. Corp.*, 844 P.2d 1113 (Alaska 1993) (appointed defense counsel owes "an absolute duty of fidelity to the insured over the interests of the insurer"); Alaska Ethics Op. 89-3 (1989) (when the attorney retained by the insurance company to represent an insured is informed by the insured that the insured does not want the attorney to represent him, the attorney has an ethical obligation to withdraw from such representation. The attorney also has a concurrent obligation to recommend that the insured seek legal counsel with regard to whether the insured's discharge decision may have ramifications under the insurance policy.); Conn. Ethics Op. 97-37 (1997) (lawyer may abide by his client's wishes not to assert certain claims even though insurer that is paying fees has directed the lawyer to contravene the client's instructions); *Franco v. Reinhardt*, 539 P.3d 934 (Haw. 2023) (Attorney retained by insurer to defend insured after Intermediate Court of Appeals vacated trial court's declaratory judgment that insurer owed no duty to defend or indemnify insured in wrongful death suit was not disqualified from representing insured on remand, and from filing motion for relief from judgment that was entered in wrongful death case while appeal from declaratory judgment was pending, without insured's express consent, absent any evidence that insured expressly rejected representation by retained counsel.); *Hartford Cas. Ins. Co. v. Halliburton Co.*, 826 So.2d 1206 (Miss. 2001) (no attorney-client relationship existed between insurer and attorney for oil company and attorney was therefore not disqualified from representing oil company in indemnity action, although attorney had represented individual who was insured by insurer and insurer had paid attorney's bill for representing insured, where insurer never independently hired attorney, individual hired attorney before an admission of coverage by insurer, and insured never gave insurer a choice about who he was going to hire as his attorney); Mont. Ethics Op. 040809 (2004) (an attorney retained by an insurer to defend its insured is required to obtain written informed consent from the insured client, and required at the outset of the representation to explain the scope of the representation, the rate of the attorney's fee to the insurer for representing the insured, and to inform the insured client that the insured has no responsibility for paying the retained attorneys' fees and expenses); N.Y. Ethics Op. 1154 (2018) (Attorney assigned by an insurer to represent an insured owes a duty of loyalty to the insured, and may not restrict or limit communications to the insured concerning the representation, notwithstanding attorney's concern that insured may use information adversely to financial interests of insurer); *APIE v. Garcia*, 876 S.W.2d 842 (Tex. 1994) ("client" of insurance defense counsel is the insured, not the insurer that hires the attorney and pays for his services). *Cf.* Ga. FAO 05-11 (2005) (attorney may not simultaneously represent an insured client in a case and the insured's insurance company in an unrelated matter and consent is not available to cure the conflict; if the insured of the insurance company is the true client in the unrelated matter, then there is no simultaneous representation of directly adverse interests, but the attorney may have a personal interest conflict in that the attorney has a financial interest in maintaining a good business relationship with the insurance company, though this conflict may be consented to by the insured client); Tex. Ethics Op. 669 (2018) (if an insured fails to communicate with lawyer retained to defend the insured, then the lawyer may withdraw from the representation; in that event, lawyer must protect the insured's confidential information and may not, without insured's consent, disclose to the insurance company the reason for the withdrawal. In moving to withdraw, the lawyer should avoid disclosing to the court or to the insurance company the specific reason for withdrawal. The lawyer instead should provide only a general explanation that professional considerations require withdrawal, although there are circumstances in which a court may require additional information).

[71] *See* Alaska Ethics Op. 2008-2 (2008) (where a lawyer represents an insured party whose claim is subrogated to a third-party insurer, subrogated insurer's right to receive proceeds from the insured plaintiff's recovery in a lawsuit does not make the insurer a "client" of the lawyer under the ethics rule); Alaska Ethics Op. 90-2 (1990) (When an attorney hired by the insurer to represent the insured is instructed by the insurer to make an offer of judgment and the insured instructs the attorney not to make the offer of judgment, the attorney is ethically obligated to honor those instructions); Ariz. Ethics Op. 94-03 (1994) (counsel appointed by insurer to defend an insured represents only the insured and not the insurer); Cal. Ethics Op. 1995-139 (1995) (same); Fla. Bar R. 4-1.7(e) (upon undertaking representation of an insured client at expense of insurer, lawyer has duty to ascertain whether lawyer will be representing both the insurer and the insured as clients, or only the insured, and to inform both the insured and the insurer regarding the scope of representation); Fla. Ethics Op. 02-7 (2002) (an attorney hired by an insurer to defend an insured in an employment discrimination claim must provide a copy of the insured's statement of client's rights

settlement, he may not settle the claim at the insurer's direction without giving the insured an opportunity to reject the insurer's defense and assume responsibility for its own defense at its own expense.[72] However, so-called "monitoring" counsel, hired by the insurer to oversee the work of the lawyers representing the insured, have no duties to the insured.[73]

Ethics opinions uniformly hold that a lawyer must not permit compliance with insurance case handling "guidelines" (such as limits on the number of depositions, whether to hire an expert in the case, whether particular depositions may be videotaped, and what legal research may be conducted) that impair materially the lawyer's independent professional judgment or are contrary to the best interests of the insured.[74] Similarly, although a lawyer's flat-fee arrangement with an insurance company is not *per se* unethical, the lawyer should ensure that such arrangements do not

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only if there is an element of personal injury involved in the claim; the attorney should make similar disclosure to the insured even if there is not an element of personal injury, but may choose the method of disclosure); Fla. Ethics Op. 97-1 (1997) (primary duty of an attorney hired by insurer is to the insured); Haw. Ethics Ops. 36 and 37 (1999) (same); Ill. Ethics Op. 98-08 (1999) (lawyer designated by insurer to defend an insured party represents and has the same professional obligations that would exist had the lawyer been personally retained by the insured; disagreement between the lawyer and the insured as to defense strategy may require the lawyer to withdraw); Ind. Ethics Ops. 98-4 and 98-3 (1998) (same); Ky. Ethics Op. KBA E-410 (2001) (when an insurer provides the defense to an insured, the attorney represents the insured but not the insurer); Me. Ethics Op. 164 (1998); Miss. Ethics Op. 246 (1999); *In re Rules of Prof'l Conduct and Insurer Imposed Billing Rules and Procedures*, 2 P.3d 806 (Mont. 2000) (insurer billing and practice guidelines, such as requiring that defense counsel seek prior approval for certain tasks, interferes with the defense counsel's exercise of independent judgment and may not be agreed to; court cautioned that its ruling was not a "blank check" to defense counsel to escalate litigation costs nor that defense counsel need not ever consult with insurers or that they cannot be held accountable for their work); R.I. Ethics Op. 99-18 (1999); Vt. Ethics Op. 98-7 (1998); Va. Ethics Op. 598 (1985) (although paid by the insurer, lawyer must represent insured with undivided loyalty); Wis. Ethics Op. E-99-1 (lawyers cannot accept limits on the defense of claims that are so onerous that they would prevent lawyers from satisfying their ethical obligations to their clients); N.C. 2019 Formal Ethics Op. 2 (2019) (lawyer may not agree to ERISA plan terms that usurp client's authority as to the representation).

[72] *See* authorities cited at note 68, *supra*.

[73] *See Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft*, 69 Cal. App. 4th 223 (1999) (corporate parent was not "client" of law firm serving as "monitoring counsel" for parent's insurance underwriters as to claims against parent, for purpose of determining whether firm had conflict of interest in representing water district as to district's negligent engineering claims against corporate subsidiary).

[74] *See* ABA Formal Ethics Op. Ethics 01-421 (2001); Colo. Ethics Op. 107 (1999); Fla. Ethics Op. 97-1 (1997); Neb. Ethics Op. 00-1 (2000); Ohio Ethics Op. 2000-3 (2000); Ore. Ethics Op. 2002-166 (2005); Tex. Ethics Op. 533 (2000); Utah Ethics Op. 02-03 (2002); W.Va. Ethics L.E.I. 2005-01 (2005). *See also* Ky. Ethics Op. KBA E-416 (2001) (lawyer may not agree to abide by insurer-prescribed handling guidelines unless: (i) the lawyer determines that the guidelines will not interfere with the lawyer's independent judgment and other duties owed the insured under the rules of professional; (ii) the lawyer discloses the guidelines' existence to the insured and provides a practical explanation of their import, at the outset of the representation and as may become necessary in specific situations thereafter, and the insured consents after consultation to any guideline that materially limits the representation; and (iii) the lawyer performs all duties imposed by the rules, regardless of compensation under the guidelines, so long as the representation continues); Mass. Ethics Op. 2000-4 (2000) (lawyer retained by insurer to defend its insured must make independent determination as to whether aspects of insurer's litigation guidelines which mandate use of paralegals for certain tasks are ethically permissible); Mont. Ethics Op. 900517 (2010) (independent counsel retained by insurer to represent insured may not comply with insurer's billing practices and procedures that may interfere with his independent of professional judgment or with the client-lawyer relationship, but counsel may comply with those of the insurer's requests for information which merely serve to keep the insurer apprised of the general status of the litigation and with billing procedures that merely serve to keep the insurer informed as to what service s it pays for); Tenn. Ethics Op. 2000-F-145 (2000) (absent insured's informed consent, attorney may not accept conditions imposed by insurer which control the scope and conditions of trial strategy, including the decision of whether or not to appeal a judgment, whether or not to demand a jury, and whether or not to participate in mediation).

impair the lawyer's ability to exercise independent judgment on behalf of the client.[75] Similarly, insurance carriers typically request that attorneys hired to represent the insured provide billing and other information concerning the insured client's case either to the insurance company or to an outside auditor. The majority of ethics committees that have considered the issue have held that a lawyer may not release an insured client's confidential information to the insurer or an outside auditing firm hired by the insurer without appropriate disclosure and client consent.[76] Several states caution that such consent cannot be implied from the insurance contract.[77] Even with consent, the attorney should make sure that no confidential information revealed by the client is in the billing statement.[78]

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[75] *See* Fla. Ethics Op. 98-2 (1988) (flat fee arrangement with insurer to defend all of the insurer's third-party insurance defense work permitted unless the lawyer concludes that her independent professional judgment will be affected by the arrangement); Conn. Ethics Op. 97-20 (1997) (flat-fee arrangement with insurer permissible; lawyer's obligations to client remain); Mich. Ethics Op. RI-343 (2008) (lawyer may contract with an insurer to represent its insured on a fixed fee basis, so long as the arrangement does not adversely affect the lawyer's independent professional judgment and the lawyer represents the insured with competence and diligence; however, the lawyer may not agree with the insurer that it will not disclose to the insured information about the fee arrangements); N.Y. Ethics Op. 1202 (2020) (lawyer may charge fixed fee for a matter as long as it is not excessive and lawyer specifies the services that are included in the fee); Ohio Ethics Op. 1997-7 (1997) (flat-fee arrangement with insurer permissible if agreement is reasonable and adequate, not excessive or so inadequate that it compromises professional judgment; representation must be competent and zealous); Ore. Ethics Op. 1991-98 (1991) (flat-fee arrangement with insurer permissible, provided lawyer fulfills ethical duties to insured); Tex. Ethics Op. 542 (2002) (fixed-fee arrangements permissible; even with such an arrangement, it is the lawyer's responsibility to professionally and ethically render representation to the insured); Utah Ethics Op. 02-03 (2002) (although a flat-fee arrangement with an insurer is not per se unethical, such arrangements are unethical if they induce the lawyer to improperly curtail services for the client or perform them in a way contrary to the client's interests).

[76] *See, e.g.*, ABA Formal Ethics Op. 01-421 (2001) (a lawyer may disclose the insured's confidential information, including detailed work descriptions and legal bills, to the insurer if the lawyer reasonably believes that doing so will advance the interests of the insured; however, the lawyer may not disclose the insured's information to a third-party auditor hired by the insurer without the informed consent of the insured; if the lawyer reasonably believes disclosure of the insured's information to the insurer will adversely affect a material interest of the insured, the lawyer must not disclose such information without the informed consent of the insured); N.H. Ethics Op. 2018-19/2 (2019) (unethical for a lawyer hired to defend an insured to release billing information to third-party auditors hired by the insurer) (withdrawing N.H. Ethics Op. 1993/94-15 and modifying N.H. Ethics Op. 2001-01/05). Accord*:* Ala. Ethics Op. 98-02 (1998); Alaska Ethics Op. 2006-3 (2006); Ariz. Ethics Op. 99-08 (1999); Colo. Ethics Op. 107 (1999); Conn. Ethics Op. 107 (1999); D.C. Ethics Op. 290 (1999); Fla. Ethics Op. 99-2 (1999); Haw. Ethics Op. 36 (1999); Idaho Ethics Op. 136 (2000); Ind. Ethics Op. 98-4 (1998); Iowa Ethics Op. 99-01 (1999); Ky. Ethics Op. KBA E-409 (1999); Me. Ethics Op. 164 (1998); Md. Ethics Op. 99-7 (1998); Mass. Ethics Op. 2000-4 (2000); Miss. Ethics Op. 246 (1999); Neb. Ethics Op. 00-1 (2000); N.H. Ethics Op. 2000-01/5 (2000); N.M. Ethics Op. 2000-02 (2000); N.Y. Ethics Op. 716 (1999); 1998 N.C. Ethics Op. 10 (1998); Ohio Ethics Op. 2000-2 (2000); Okla. Ethics Op. 314 (2000); Ore. Ethics Op. 2005-157 (2005); Pa. Ethics Op. 2001-200 (2001); S.C. Ethics Op. 02-01 (2002); S.C. Ethics Op. 97-22 (1997); S.D. Ethics Op. 99-2 (1999); Tenn. Ethics Op. 99-F-143 (1999), *as clarified*, 99-F-143(a) (1999); Tex. Ethics Op. 552 (2004); Tex. Ethics Op. 532 (2000); Utah Ethics Op. 98-03 (1998); Vt. Ethics Op. 98-7 (1998); Va. Ethics Op. 1723 (1999);); Wash. Ethics Op. 201802 (2018); Wash. Ethics Op. 195 (1999); W. Va. Ethics Op. L.E.O. 99-02 (1999); Wis. Ethics Op. E-99-1 (1999). *See also* Ky. Ethics Op. KBA E-410 (2001) (attorney defending an insured whose defense is provided by the insured under a reservation of rights may communicate with the insurer regarding the litigation status and analysis of liability if the attorney protects the rights and confidences of the client insured and discloses no information disadvantageous to the client without particularized consent); *In re Rules of Prof'l Conduct and Insurer Imposed Billing Rules and Procedures*, 2 P.3d 806 (Mont. 2000) (counsel cannot ethically submit their bills to a third-party auditing service without waiving the attorney-client privilege).

[77] Haw. Ethics Op. 36; Ky. Ethics Op. KBA E-410 (2001); R.I. Ethics Op. 99-17 (1999); Tenn. Ethics Op. 99-F-143 (1999) *as clarified*, 99-F-142(a) (1999); Utah Ethics Op. 98-03 (1998); W.Va. Ethics Op. LEI 99-02 (1999).

[78] *See* D.C. Ethics Op. 223 (1991) (lawyer working for legal services agency that receives federal grant funding must

Absent an actual conflict, an insurance company staff attorney or a "captive" law firm (i.e., a firm that usually works exclusively for the insurance company) may ethically represent the insured if the attorney reasonably believes that he/she can adequately represent the insured's interests, the insured gives informed consent after full disclosure, the attorney honors confidentiality owed the insured, and the attorney is not assisting the insurer in conduct constituting the unlicensed practice of law.[79] A few jurisdictions have prohibited insurer staff counsel from representing the insured due to this divided loyalty problem.[80]

I. Conflicts Regarding Former Clients.

Absent prior informed consent, a lawyer is disqualified if he formerly represented an adverse party in a matter "substantially related" to current representation.[81] The scope of a substantially

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refuse request of federal entity that monitors contract compliance to see confidential documents); Pa. Ethics Op. 91-170 (1991) (court-appointed criminal defense lawyer asked to submit itemized bills for hourly work to the court administrator for approval may disclose only the general nature of the tasks performed and the time involved); Utah Ethics Op. 98-03 (1998) (before lawyer hired by insurer to defend insured may submit billing statements to an outside audit service, the lawyer should not include confidential information revealed by the client in the billing statement).

[79] *See* ABA Formal Ethics Op. 03-430 (2003) (insurance staff counsel may represent both their employer and their employer's insured in a civil lawsuit resulting from an event defined in the insurance policy so long as staff counsel informs all insureds whom they represent that they are employees of the insurer, and exercise independent professional judgment in advising or otherwise representing the insureds); Iowa Ethics Op. 19-01 (2019) (follows ABA formal Ethics Op. 03-430); Tex. Ethics Op. 687 (2020) (insurance company staff lawyer employed to defend insured may comply with insurer's guidelines only if staff lawyer's affiliation with insurer is fully disclosed to client, the guidelines do not interfere with the lawyer's independent judgment, and the guidelines are reasonable in scope and character; if staff attorney believes that insurer's staffing support materially comprises attorney's ability to represent client, lawyer should try to persuade insurer to increase staffing and, if conflict cannot be cured, lawyer must withdraw); Tex. Ethics Op. 696 (2023) (Texas Disciplinary Rules of Professional Conduct do not prohibit staff counsel employed by an insurance company from representing insured clients merely because the insurance company considers the results of performance surveys in deciding the lawyer's compensation or continued employment. Lawyers may not allow performance surveys to interfere with their exercise of independent professional judgment and the rendering of candid advise during the representation of a client.); Tex. Ethics Op. 668 (2017) (regardless of the fact that staff attorney's employer is the client's insurance company, attorney has duty of loyalty to his client, must exercise independent judgment on behalf of his client, and must zealously represent his client. If staff attorney's representation becomes adversely limited by his interests or the interests of the insurer, he must not continue the representation without informed consent from each affected or potentially affected client. If staff attorney cannot exercise independent judgment on behalf of his client, he must withdraw from representation). Accord: Ala. Ethics Op. 2007-01 (2007); Alaska Ethics Op. 99-3 (1999); Cal. Ethics Op. 1987-91; Fla. Ethics Ops. 97-1, 86-6, and 81-5; Ill. Ethics Op. 89-17; Mich. Ethics Op. CI-1146; N.Y. Ethics Op. 1102 (2016); Ohio Ethics Op. 1995-14 (1995(; Okla. Ethics Op. 309; Pa. Ethics Op. 96-196 (1996); Va. Ethics Op. 598 (1985); *Unauthorized Practice of Law Comm. v. Am. Home Assurance Co.*, 261 S.W.3d 24 (Tex. 2008) (insurers' use of lawyer-employees does not constitute unauthorized practice of law; staff attorneys must fully disclose employment status and potential conflicts to insureds). *Cf.* N.Y. Ethics Op. 987 (2014) (absent informed consent from the insured, staff counsel may not permit review of the confidential information in the client's file by insurer's non-attorney employees).

[80] *See, e.g.*, *Brown v. Kelton*, 380 So.3d 361 (Ark. 2011) (liability insurer may not use in-house counsel to represent an insured in court); *Am. Ins. Ass'n v. Ky. Bar Ass'n*, 917 S.W.2d 568 (Ky. 1996) (insurer staff counsel incapable of providing undivided loyalty to insured).

[81] *See* ABA MODEL RULE 1.9(a) and (c); Tex. DRPC 1.09(a)(3); N.M. R. Prof'l Conduct 16-109. *See also Atmosphere Hosp. Mgmt. Servs., LLC v. Royal Realties, LLC*, 28 F. Supp. 3d 692 (E.D. Mich. 2014) (counsel's prior representation of hotel owner in negotiating labor relations involving two unions and negotiating management contract with management services company was "substantially related" to other management services company's subsequent lawsuit against owner for breach of contract, which required disqualification of counsel from representation of other management services company in subsequent matter, since there was substantial risk that confidential information as would normally or typically have been obtained by counsel in prior representation of management services company

related "matter" for purposes of this Rule depends on the facts of a particular situation or transaction.[82] When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited.[83] On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client with respect to a wholly distinct problem of that type even though

would materially advance other management services company's position in subsequent case); *Persichette v. Owners Ins. Co.*, 462 P.3d 581 (Colo. 2020) (In bad faith action brought by insured against his underinsured motorist (UIM) insurer, in which insurer sought to disqualify insured's co-counsel and his law firm on the basis they had previously represented insurer in substantially related matters, allowing law firm and its attorney to remain as insured's co-counsel would have seriously threatened the integrity and fairness of the proceedings, and thus, the district court should have granted insurer's motion to disqualify; given law firm's prior representation of insurer, law firm's representation of insured was likely to obtain an advantage for him and a disadvantage for the insurer); Ark. Ethics Op. 2006-1 (2006) (firm's position as outside counsel for a city on employment issues bars any member of the firm from appearing before an integral part of the city and seeking relief for a private client; any attempt by the city to waive the conflict would appear to be invalid); Conn. Ethics Op. 25-2 (2025) (outlining duties to former clients); Ill. Ethics Op. 22-01 (2022) (lawyer who previously represented a medical group in defending against medical malpractice claims may not subsequently represent a client in asserting a medical malpractice claim against a physician who is a member of the medical group if the matters are the same or substantially related unless the former client gives informed consent; even if there is no conflict, the lawyer should not reveal confidential information relating to the presentation except as otherwise permitted under Rule 1.9(c)); Md. Ethics Op. 2015-01 (2015)(outlining attorneys' duties to former clients); N.Y. Ethics Op. 1103 (2016) (An attorney who previously represented Corporation A may represent Corporation B in litigation with Corporation X that is unrelated to the attorney's prior representation of Corporation A, notwithstanding that Corporations A and B are competitors in the same industry and that it is in Corporation A's economic interest for Corporation B to lose the litigation with Corporation X. Corporation A's threat to sue Corporation B in a matter unrelated to the attorney's prior representation of Corporation A similarly does not bar the attorney from representing Corporation B in the threatened litigation); N.Y. Ethics Op. 1008 (2014) (a law firm may not oppose a current client in any matter, related or unrelated, absent the current client's informed consent; a law firm may represent a former client in any matter that is not substantially related to the firm's legal work for that former client. Even if the entity is no longer a client, a law firm has a continuing duty to protect confidential information of that entity); Tex. Ethics Op. 626 (2013) (Lawyer who formerly represented corporation in circumstances where the lawyer came to possess confidential information of the client corporation relating to the former client's competitive position in its market is not permitted to make a significant investment in a new business that the lawyer knows will compete with the former client's business at a time when the confidential information concerning the former client remains relevant to the former client's current business.). *Cf.* Cal. Ethics Op. 1998-152 (1998) (attorney representing a new client in a matter adverse to a former client of the attorney's law firm should first obtain the former client's informed written consent if the attorney knows or reasonably should know that another lawyer in the firm obtained material confidential information during the representation of the former client).

[82] *See, e.g., Worley v. Moore*, 807 S.E.2d 133 (N.C. 2017) (In assessing whether two matters are "substantially related for purposes of disqualification rule, trial court should consider, among other things, the initial engagement letter and the scope of representation and any limits on confidentiality, the factual background leading to the past representation, the amount of time spent with the attorney, the subject matter of the two representations, and all of the facts and circumstances of the current litigation, particularly as compared to the past representation). *See generally* Pa. Ethics Op. 2012-100 (2012) (discusses general considerations in determining whether matters are "substantially related" within the meaning of Rule 1.9(a) regarding former client conflicts).

[83] *See* ABA Formal Ethics Op. 497 (2021) ("Material adverseness" under Rule 1.9(a) and Rule 1.18(c) exists where a lawyer is negotiating or litigating against a former or prospective client or attacking the work done for the former client on behalf of a current client in the same or substantially related matter. It also exists in many but not all instances when a lawyer is cross-examining a former or prospective client. "Material adverseness" may exist when the former client is not a party or a witness in the current matter if the former client can identify some specific material, legal, financial, or other identifiable concrete detriment that would be caused by the current representation. However, neither generalized financial harm nor a claimed detriment that is not accompanied by demonstrable and material harm or risk of such harm to the former or prospective client's interests suffice).

the subsequent representation involved a position adverse to the prior client.[84] However,

[84] *Hempstead Video, Inc. v. Vill. of Valley Stream*, 409 F.3d 127 (2d Cir. 2005) (magistrate judge correctly ruled that defendant's counsel was not disqualified because of its association with an "of counsel" attorney who represented plaintiff adult video company and its principals on unrelated matters; counsel's relationship was too attenuated and too remote from the matter in question to attribute potential conflict to the firm, since attorney became "of counsel" for the limited purpose of providing transitional services for several selected clients and continued representing all his other clients, including defendant, in his independent capacity); *Wega v. Ctr. for Disability Rights, Inc.,* 395 F. App'x 782 (2d Cir. 2010) (Disqualification of former employer's lead counsel was not warranted in former employee's ADA action; there was only limited contact between employee and counsel during course of representation of employer in unrelated legal matter, and there was no reason to conclude that counsel was capable of providing testimony that might be especially useful to support or rebut employee's allegations of disability, much less that he ought to be called to do so); D.C. Ethics Op. 315 (2002) (lawyer may represent a client in private practice in the same matter on which the lawyer worked while a government employee where the lawyer's participation was limited to drafting status reports and participating in discussions regarding the timing of ongoing rulemaking proceedings; because his participation in the prior matter did not involve him in the merits of the litigation and consisted of no more than official responsibility or participation on administrative and peripheral issues, he did not participate "substantially" in the prior litigation); *Heringer v. Haskell*, 536 N.W.2d 362 (N.D. 1995) (similar considerations under state rules); *Ex Parte Utils. Bd.,* 274 So.3d 229 (Ala. 2018) (trial court abused its discretion in disqualifying utility board's retained counsel, based on the fact that one of the firm's attorneys, who briefly represented utility board in the matter, served as chair the Alabama Environmental Management Commission, where there was no evidence that former chair, in his capacity as a utility board commissioner, "personally and substantially" participated in a matter connected with his brief representation of UBT; even if his disqualification could be justified, his minimal participation in defending the utility board and his resignation from the firm militate against imputing any potential disqualification of the former attorney to the firm); D.C. Ethics Op. 275 (1998) (law firm which is contacted by a potential class action plaintiff and which receives confidential or secret information from the potential client may not, after the law firm and the potential client fail to agree on the terms of the engagement, seek to identify another client to represent in the same or substantially related matter unless the attorneys who received the confidential information from the first potential client can be screened from the subsequent representation or the first potential client consents to the subsequent representation); *Jacob N. Printing Co v. Mosley*, 779 N.W.2d 596 (Neb. 2010) (lawyer's representation of employer against former employee was not "substantially related" to lawyer's earlier representation of former employee against third party, even though both cases involved unfair competition, and thus disqualification of lawyer was not required, where prior case dealt with former employee's alleged breach of a noncompete agreement, while the case at hand contended that former employee engaged in the conversion of employer's client lists, the two cases did not involve the same type of evidence, the only witness in common appeared to be former employee himself, lawyer expressly denied that he was aware of any trade secrets, trial strategies, negotiation strategies, legal theories or business practices of former employee, and three years elapsed between the end of lawyer's representation of former employee and the commencement of the litigation in case at hand.); N.Y.C. Ethics Op. 2001-2 (2001) (law firm may represent a client whose interests in a corporate transaction are adverse to those of a current client in a separate matter, and may represent multiple clients in a single matter, with disclosure and informed consent, so long as a disinterested lawyer would believe that the law firm can competently represent the interests of each); *Bd. of Cnty. Comm'rs v. Ass'n of Cnty. Comm'rs of Oklahoma Self-Insured Grp*., 485 P.3d 234 (Okla. 2021) (Attorney, who represented board of county commissioners in action brought against county commissioners self-insured group, did not gain knowledge of material or confidential information which would have jeopardized integrity of judicial process during prior representation of self-insured group in separate matter, and thus disqualification of attorney and law firm where he had worked on basis of conflict of interest was not required, even though prior action and instant action both involved breach of contract and bad faith allegations; attorney testified that he never met with group in prior matter, except for one lunch meeting with partner, obtained confidential information or had personal recollection of any, met with group's employees, or participated in settlement conferences or depositions); Tex. Ethics Op. 578 (2007) (law firm may represent municipality against another municipality that was a former client without prior consent of the former client if the matter does not involve questioning the validity of the law firm's services or work product for the former client, the proposed representation does not involve a matter that is the same or substantially related to the matter for which the firm represented the former client, and there exists no reasonable probability that the proposed representation would cause the law firm to violate the confidentiality obligations owed to the former client; if any lawyer in the law firm could not represent the municipality client in the proposed matter because of prior representation of a former client while the lawyer was in

disqualification does not depend on the quantity or quality of the former representation.[85] Substantial relationship may be presumed where there is a reasonable probability that confidences were disclosed which could be used against the client in later adverse representation.[86] Although

private law practice, the entire law firm would be prohibited from undertaking the representation; representation would be prohibited without regard to the law firm's attempt to screen from the current representation all lawyers who could not themselves represent the current client in the proposed matter because of their prior representation of the adverse party). *See* ABA Formal Ethics Op. 471 (2015) (Upon the termination of a representation, a lawyer is required to take steps to the extent reasonably practicable to protect a client's interest, and such steps include surrendering to the former client papers and property to which the former client is entitled such as materials provided to the lawyer, legal documents filed or executed, and such other papers and properties identified in this opinion. When the lawyer's representation of the client in a matter is terminated before the matter is completed, protection of the former client's interest may require that certain materials the lawyer generated for the lawyer's own purpose be provided to the client.); R.I. Ethics Op. 2023-8 (2023) (A client's file has long been recognized as the property of the client which he or she is entitled to receive. Where attorney has already transmitted the electronic portion of the case file to the new attorney. To perfect his termination of representation of the former client, the inquiring attorney should transfer the remaining, paper portion of the case file to the new attorney forthwith.). Accord: Ariz. Ethics Op. 15-02 (2015); Wash. Ethics Op. 202401 (2024).

[85] *See*, *e.g.*, *Lane v. Sarfati*, 676 So.2d 475 (Fla. App. 1996) (attorney who provided manager with standard form contract disqualified from representing manager's clients in suit involving interpretation of form even though addendum was from a form book and attorney did not provide any advice other than that manager should use form).

[86] *See United States v. Prevezon Holdings Ltd.*, 839 F.3d 227 (2d Cir. 2016) (investment advisory firm was entitled to mandamus relief disqualifying counsel for Cyprus-based business accused by United States in civil forfeiture action of having received proceeds of scheme that defrauded Russian treasury by forging corporate documents of portfolio companies controlled by firm, where firm had previously hired counsel to help gather evidence to defend it in criminal proceedings in Russia in connection with scheme, counsel had reviewed non-public documents from firm related to Russian treasury fraud, firm was not party to forfeiture proceeding, business's trial strategy called for it to demonstrate that firm's principal and his agents engaged in series of misrepresentations to execute fraud, appeal after final judgment would provide no useful remedy if confidences revealed provided grist for Russian authorities pursuing firm and its principal, case implicated significant and novel question of law regarding rights of nonparty clients, and allowing counsel to represent business would create potential for harm to future government investigations.); *Reid v. Costco Wholesale Corp.*, 2023 WL 3432168 (C.D. Cal. April 20, 2023)(law firm disqualified from representing plaintiff in personal injury action where a lawyer at firm represented defendant in 21 personal injury actions over 3 years and was privy to defendant's pre-litigation strategies, case handling and internal documents, and firm did not carry its burden that it established an effective ethical screening measures to prevent sharing of confidences.); *In re Mitcham*, 133 S.W.3d 274 (Tex. 2004) (confidentiality agreement between law firm that represented asbestos plaintiffs in suits against defendant, under which plaintiffs' law firm and associate attorney, who previously worked for defendant's law firm as a legal assistant before she was hired by plaintiffs' law firm, agreed not to share information regarding facts surrounding defendant's use of asbestos, operated to disqualify plaintiffs' law firm from representing asbestos plaintiffs against defendant even after associate attorney left its employ; law firm could not give plaintiffs representation to which they were entitled without violating agreement); *Nat'l Med. Enters., Inc. v. Godbey*, 924 S.W.2d 123 (Tex. 1996) (attorney for one defendant who owed no duty of confidentiality to a co-defendant was nevertheless bound by such a duty when he signed a joint defense agreement; because of this voluntary confidentiality agreement, any attorneys with whom he was associated during that representation were disqualified as well). *See also* Ala. Ethics Op. 2000-03 (2000) (former city attorney may not represent party adverse to city while also representing city officials sued in their official capacities in unrelated matters, without consent of city); Cal. Ethics Op. 1998-152 (1998) (Lawyer A in firm consulted by client over period of weeks about merits of lawsuit that client intends to bring against certain parties and, after consultation, ends relationship and retains another lawyer to prosecute suit; another lawyer in the same firm as Lawyer A (Lawyer B) should not accept representation of defendants in client's lawsuit without client's informed consent if that lawyer knows or through exercise of reasonable diligence could learn about first lawyer's representation of client in connection with the lawsuit); N.Y. Ethics Op. 922 (2012) (Lawyer may represent prospective client in litigation that could involve impleading former clients if current litigation is not substantially related to the matters on which the lawyer represented those former clients. However, in the impleader action, lawyer may not be able to reveal or use certain information relating to the former clients.); N.Y. Ethics Op. 871 (2011) (attorney may not oppose a former client in a different matter without former client's informed consent if

some courts have denied disqualification where there is no evidence that confidential information was accessed or shared,[87] the substantial relationship between the two representations alone may be sufficient to disqualify the attorney.[88]

1. Former Employer Representatives as Plaintiffs.

A law firm engaged to represent a corporate or organizational entity is presumed to represent the entity only and not the individual employees that communicate with the firm in the course of carrying out their job duties.[89] Some courts and ethics opinions have held that an attorney-client

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a reasonable lawyer would perceive a substantial risk that the attorney would normally have learned confidential information during the prior representation that could be used against the former client in the present matter); N.C. 2003 Formal Ethics Op. 14 (2004) (if current representation requires cross-examination of a former client using confidential information gained in prior representation, then lawyer has a disqualifying conflict of interest); *In re L.H.*, 182 A.3d 612 (Vt. 2018) (attorney's representation of the State, in abuse and neglect case, after initially representing the children gave rise to a disqualifying conflict of interest; the parties in an abuse and neglect proceeding had separate interests and positions as to the proper placement of the children, the requirements of the case plan, and the frequency of parent-child contact, and attorney's prosecution of the State's termination of parental rights petition after her representation of the children undermined the integrity of the process). *Cf.* D.C. Ethics Op. 349 (2009) (joint defense agreements do not create "former client" conflicts because the members of the joint defense group do not become the lawyer's clients by virtue of the agreement; but lawyer who participates in the group may acquire contractual or fiduciary obligations to the members of the group who were not the lawyer's clients).

[87] *See Living Cross Ambulance Serv., Inc. v. New Mexico Pub. Regul. Comm'n.*, 338 P.3d 1258 (N.M. 2014) (once a substantial relationship between the former representation and the current proceedings is found, there is an irrebuttable presumption that the former client revealed facts requiring attorney's disqualification); N.J. Ethics Op. 686 (1998) (neither former associate at plaintiffs' firm that represents medical providers in assigned claims against insurers in PIP arbitrations nor any firm for which he may work may represent insurers against his former clients in cases involving assigned PIP claims, but they may represent insurers against any clients of the attorney's former firm in matters in which he was not involved, assuming he did not acquire any confidential information about these clients of his former firm whom the attorney did not represent). *Cf.* Tex. Ethics Op. 607 (2011) (rules permit disclosure of client information by a lateral candidate when the lawyer believes it is necessary to do so to comply with a court order, the rules of disciplinary conduct, or other law; disclosure of information for conflicts checking purposes permitted by the rules); Cal. Ethics Op. 2016-195 (2016) (Lawyer may not disclose his client's secrets, which include not only confidential information communicated between the client and the lawyer, but also publicly available information that the lawyer obtained during the professional relationship which the client has requested to keep secret or the disclosure of which is likely to be embarrassing or detrimental to the client. Even after the termination of the attorney-client relationship, lawyer may not disclose potentially embarrassing or detrimental information about the former client if that information was acquired by virtue of the lawyer's prior representation); N.Y. Ethics Op. 1085 (2016) (when a firm is aware of parties adverse to a prospective client but has only incomplete information for those parties, it may be necessary for the firm's conflict check to go beyond checking its written records of engagements, by consulting its lawyers who may have represented those adverse parties).

[88] *See In re Am. Airlines,* 972 F.2d 605 (5th Cir. 1992) (firm that formerly gave legal advice to an adverse party in a substantially related matter must be disqualified whether or not firm has gained confidences). *Compare State ex rel. Verizon W. Va., Inc. v. Matish,* 740 S.E.2d 84 (W.Va. 2013) (Law firm representing former employees in their wrongful-termination actions against former employer after its representation of other former employees in prior wrongful-termination actions against same former employer, did not have disqualifying conflict of interest; there was no material limitation upon law firm's representation of its current clients resulting either from law firm's loyalty to its former clients or its obligations arising from such representation.)

[89] *See Cole v. Ruidoso Mun. Sch. Dist.*, 43 F.3d 1373 (10th Cir. 1994); *United States v. Holmes*, 2021 WL 2711230 (N.D. Cal. July 1, 2021) (magistrate judge did not commit clear error in finding that outside law firm did not jointly represent Theranos and defendant, its former CEO, where former CEO could not establish that it was clear that when she approached law firm, she was seeking legal advice in her individual rather than representative capacity, or that the communications were confidential, and did not concern matters within the company or the general affairs of the company); *United States v. Int'l Bhd. of Teamsters,* 119 F.3d 210 (2d Cir. 1997) (attorney-client privilege did not

relationship may be implied based on the employee's subjective belief coupled with an objectively reasonable basis for that belief, such as where the lawyer was not sufficiently clear to the employee concerning whom the lawyer represented and the employee disclosed personal confidential information to the lawyer in response.[90] In such a situation, the attorney may owe fiduciary and

protect communications that union president candidate's campaign manager had with campaign's law firm about campaign contribution violations, where communications concerned only matters relevant to the campaign and manager never sought advice in his individual capacity from the firm). *Cf.* S.C. Ethics Op. 99-08 (1999) (lawyer who represents client in action against manager and employer where manager was material witness for employer may represent manager in action against employer; lawyer must obtain client's consent if representation is in a related case and is materially adverse to client); Vt. Ethics Op. 2000-07 (2000) (attorney who formerly represented corporation in litigation may subsequently handle an unrelated matter adverse to the president of that corporation if no confidential information is used to the disadvantage of the corporation).

[90] *See, e.g.*, *Home Care Indus. v. Murray*, 154 F. Supp. 2d 861 (D. N.J. 2001) (disqualifying law firm serving as corporate counsel from representing corporation in suit against former CEO after finding that firm shared an implied attorney-client relationship with CEO before his employment ended, where CEO had sought firm's assistance to defend him against claims by former employees of corporation, firm failed to inform CEO that it represented corporation, not CEO, firm had access to CEO's files, thoughts, and strategies regarding employees' claims, and firm fostered environment in which CEO felt he could confide in firm, and corporation's suit against CEO shared common core of facts with employees' claims against CEO); *Advanced Mfg. Techns., Inc. v. Motorola*, 2002 WL 1446953 (D. Ariz. 2002) (de facto relationship established where employee testified at deposition that he was represented by corporate counsel and counsel failed to disagree); *Montgomery Acad. v. Kohn*, 82 F. Supp.2d 312 (D. N.J. 1999) (affirming magistrate judge's disqualification counsel for academy in suit against former director where parties' interests were materially adverse because an implied attorney-client relationship existed between counsel and former director where 1) counsel and former director met several times to discuss potential losses in the academy's pension plan based on former director's investments and possible liability for director; (2) counsel and former director discussed the possibility of counsel representing both the academy and the former director; and (3) former director and counsel generated a "to do" list regarding director's personal investments, personal insurance policy, and documents they needed to review relating to pension plan investments); *Simons v. Royer Cooper Cohen Braunfeld, L.L.C.*, 587 F. Supp.3d 209 (E.D. Pa. 2022) (business owner adequately alleged implied attorney-client relationship between himself and law firm that was outside counsel for LLC that had been retained by owner's business partner to represent partner individually and adversely to owner in negotiations to amend put-call agreement governing disposal of shares in their LLC, for purpose of legal malpractice claim by owner against firm; owner may have objectively reasonable grounds to believe that firm represented him, as he alleged he had previously requested advise from the firm on personal matters and firm provided advise in those matters); *Rosenbaum v. White*, 692 F.3d 593 (7th Cir. 2012) (Under Indiana law, an attorney-client relationship need not be express; it may be implied by the conduct of the parties, but there must be evidence of a consensual relationship, existing only after both the attorney and client have consented to its formation.); *Bistline v. Parker*, 918 F.3d 849 (10th Cir. 2019) (former church members plausibly pled existence of implied attorney-client relationships with church's law firm and its partner by alleging that they were repeatedly solicited for money to pay legal fees, that they were led to believe that lawyers were protected their interests, that they were directed to firm if personal legal matters arose, that firm actually represented some church members, that they were completely sequestrated within church, that church leaders explained fee solicitation as payment for individual as well as collective representation, that they received weekly legal updates front of entire congregation by person affiliated with firm, that they were told that successful representation of church as a whole would in turn protect them individually, and that firm and attorney held themselves out to government officials and public-at-large as representing individual rights of individual church members.); *NuStar Farms v. Zylstra*, 880 N.W.2d 478 (Iowa 2016) (an attorney-client relationship may be either express, such as when representation is based on a written agreement, or implied by the conduct of the parties.); *Disciplinary Bd. v. Allen*, 900 N.W.2d 240 (N.D. 2017) (existence of attorney-client relationship does not depend on an express contract or payment of fees, and may be implied from the parties' conduct); *Commonwealth v. Spanier*, 132 A.3d 481 (Pa. Super. 2016) (Attorney-client relationship existed between university president and university's general counsel before and during president's grand jury testimony, thereby giving rise to attorney-client privilege, even though president knew that attorney was general counsel for university; attorney did not adequately explain to president that her representation of him was solely as an agent of university, president was not aware that attorney was not appearing with him to protect his interests and therefore unable to provide advice concerning whether he should answer potentially incriminating questions or invoke his right

other duties to his/her "client" in such a situation.[91] Where the surrounding circumstances do not support the employee's subjective belief, courts have not implied an attorney-client relationship,[92]

against self-incrimination, and president's meetings with attorney relative to president's own subpoena did not pertain to a subpoena for university. The general counsel appeared before the grand jury with each of three administrators; although she indicated to the grand jury's supervising judge she represented the university, she also appeared with and sat next to each administrator during his testimony, and each stated on the record that Baldwin was his personal lawyer when they testified before the grand jury and she remained in the courtroom and next to each of the three witnesses for the entirety of their testimony); *Commonwealth v. Schultz*, 133 A.3d 294 (Pa. Super. 2016) (same holding as *Spanier* with respect to university vice president); *Commonwealth v. Curley*, 131 A.3d 994 (Pa. Super. 2006) (same holding as *Spanier* with respect to university athletic director); R.I. Ethics Op. 2012-03 (2012) (where company's in-house attorney's predecessor entered an appearance before Human Rights Commission to represent company and one of its managers, in-house attorney may not reveal his notes of discussions with the manager to outside counsel representing the company in the matter without the manager's consent; the manager had good reason to believe that at the time of the meeting with the attorney, the attorney was his attorney for the claim). *Cf.* N.Y.C. Ethics Op. 2016-2 (2016) (attorney may represent a non-party witness at a deposition in a proceeding where that attorney also represents a party, subject to the following limitations: (i) such representation may not exceed a limited scope representation under Rule 1.2(c), if so, the attorney must ensure that any limitations on the scope of representation are reasonable under the circumstances and obtain informed consent from the witness-client; (ii) attorney must evaluate whether the witness-client creates a conflict of interest with the party-client—if so, the attorney must determine whether the conflict is waivable and secure written conflict waivers before proceeding, and must continue to monitor the representation to ensure that appropriate steps are taken if a conflict of interest arises later in the proceeding; (iii) the attorney must explain that both clients in a joint representation are entitled to receive information that is material to the representation—thus, if one of the joint clients discloses confidential information that is material to the other joint client, the lawyer is obligated to share that information with the other, unless an exception applies or the clients agree to a different arrangement; and (iv) when communicating with deposition witness about the prospective representation, the attorney must comply with the ethical rules regarding solicitation of clients); *Cohen v. Jaffe Raitt Heuer and Weiss, P.C.*, 790 F. App'x 440 (6th Cir. 2019) (Jury's determination in legal malpractice case against law firm that devised corporate structure which resulted in clients' company incurring pension liability from distressed corporation they acquired after seeking firm's advice that firm had attorney-client relationship with clients' company, was supported by sufficient evidence including clients' testimony that they intended firm to represent both themselves and their company, client's email to firm requesting legal advice "to be sure that we aren't personally liable or put our other assets/companies at risk" from ERISA common control group liability due to corporation's underfunded pension plan, ERISA expert's testimony that he would have believed his client was group of companies had he received such an email, firm's work on ERISA liability that required analyzing other companies, and attorney's admission that he owed duty of care to clients and their other companies.).

[91] *See, e.g.*, *Off. of Disciplinary Counsel v. Baldwin*, 225 A.3d 817 (Pa. 2020) (affirming public reprimand sanctions against former university general counsel; counsel violated disciplinary rules by representing three university officials by accompanying them to testify before the grand jury, and then testifying to the grand jury about them, which contributed to criminal charges against her clients, and ultimately caused the charges to be quashed, which prejudiced the administration of justice; attorney was "personal counsel" to the officials for disciplinary purposes because officials reasonably believed attorney was representing them personally and individually and attorney would not have been permitted to accompany officials into grand jury proceedings unless she was their personal counsel); *Off. of Disciplinary Counsel v. Fina*, 225 A.3d 568 (Pa. 2020) (affirming suspension of prosecutor from practice of law for one year where prosecutor subpoenaed testimony of two senior university administrators and the general counsel before grand jury without prior judicial approval; he mislead the supervising judge, causing the judge to believe that such resolution was unnecessary because he had undertook to refrain from inquiry into areas of potential privilege, and then reneged on those assurances, and acted improperly in turning general counsel into state's witness).

[92] *See, e.g.*, *Legacy Villas at La Quinta Homeowners Ass'n v. Centex Homes*, 626 F. App'x 679 (9th Cir. 2015) (reversing order disqualifying law firm from representing plaintiff homeowner association against Centex based on law firm advice letter sent to two homeowner association board members who were also Centex employees; although one of the Centex employees testified she believed the firm to be providing advice in her capacity as a Centex employee, that belief was unreasonable given that the letter provided advice to the individuals in their capacities as homeowner association board members, the contact was limited in nature and quantity, and there was no evidence that the Centex employees divulged confidential information to the firm or paid the firm for their services); *Belliveau v.*

Barco, Inc., 987 F.3d 122 (5th Cir. 2021) (Intellectual-property licensor's vague and conclusory declaration, in which he asserted that in-house counsel for sole shareholder of licensee-corporation communicated their agreement to act as his personal attorneys in licensing his intellectual property, and that they agreed to act at his direction on matters related to his intellectual property, and which conflicted with his deposition testimony that he did not discuss past sublicenses with in-house counsel, was insufficient to raise genuine issue of material fact regarding whether licensor had attorney-client relationship with in-house counsel establishing formal fiduciary relationship between licensor and shareholder, so as to preclude summary judgment on licensor's claims for breach of fiduciary duty and fraud by nondisclosure under Texas law.); *Int'l Strategies Grp. v. Greenberg Traurig, LLP*, 482 F.3d 1 (1st Cir. 2007) (express attorney-client relationship did not exist between investor in corporation and corporation's attorney absent evidence of a retainer agreement or other contract for legal services or evidence of billing or remittances for such services; the investor's asking the corporation's attorney about potential civil claims by corporation to recover funds was quite different from investor's seeking legal advice from attorney regarding its own potential claims, and thus was not sufficient to establish an implied attorney-client relationship; even assuming that investor relied on the corporation's attorney to provide direct legal services, such reliance was unreasonable and would not give rise to an implied attorney-client relationship; attorney had told investor on several occasions that he represented attorney alone, investor made several statements which indicated its understanding of this arrangement, investor chose to forebear in bringing its own legal action, hoping instead that attorney's negotiations on behalf of corporation would succeed, resulting in an eventual financial benefit to the investor, and investor was aware of its ability to bring suit against the corporation, reminding attorney and corporation of this fact on several occasions); *Wise v. Biowish Tech.., Inc.*, 2019 WL 192876 (D. Del. Jan. 11, 2019) (stockholder's claims against company's outside counsel based on a purported attorney-client relationship between stockholder and outside counsel were dismissed; stockholder did not have a reasonable belief that the company's outside counsel represented him personally where the conversation in question was initiated by outside counsel and the company's CEO, and not by stockholder, and the presence of the company's CEO in the conversation would have destroyed any purported privilege); *H-D Transp. v. Pogue*, 374 P.3d 591 (Idaho 2016) (It was unreasonable for first partner to believe that he and partnership had attorney-client relationship with attorney, who was hired by second partner, as element of first partner's and partnership's claims for professional negligence, breach of fiduciary duty, and unreasonable restraint of trade under Competition Act; even though first partner and partnership shared private financial information with attorney, there was no express agreement with attorney, there was hostility and conflict in relationship between partners before attorney entered picture, and partnership law required attorney's access to partnership's records); *Morin v. Maine Educ. Ass'n*, 993 A.2d 1097 (Me. 2010) (law firm hired by employer to investigate an employee's bias allegations is not disqualified from representing employer in employee's lawsuit even though lawyer who conducted the investigation allegedly received confidential information from the employee when he interviewed her); *In re Paul W. Abbott Co.*, 767 N.W.2d 14 (Minn. 2009) (No attorney-client relationship which would privilege their communications existed between attorney for insurer of corporation and alleged corporate officer, the widow of its former president, in either her individual capacity or as an officer, director, or employee of corporation, while insurer was acting to restore involuntarily dissolved corporation so it could seek a certificate of voluntary dissolution from Secretary of State and receive benefit of statutory bar on claims against dissolved corporations; when asked at deposition if she believed she was vice president and secretary, widow said "no," and replied the same when asked if attorney was her or the corporation's attorney.); *Pettis v. Simrall*, 354 So.3d 295 (Miss. 2023) (an attorney's representation of a general partnership does not create an implied attorney-client relationship between the attorney and the individual members of the general partnership); N.Y. Ethics Op. 1063 (2015) (when a lawyer accepts payment of legal fees from a third party, the third party payor is not a client merely by virtue of paying the fee); *Fogarty v. Palumbo*, 163 A.3d 526 (R.H. 2017) (Mere allegations by potential purchasers of property that one of the eventual purchasers was their attorney could not establish that purchaser was their attorney, in alleged fiduciary attorney-client relationship case; evidence showed that at all times purchaser was acting as a purchaser of the property rather than as an attorney for potential purchaser); S.C. Ethics Op. 15-01 (2015) (payment of fees does not create an attorney-client relationship). *Cf.* S.C. Ethics Op. 22-03 (2022) (in the absence of an attorney-client relationship with either the institution or the president, lawyer has no duty to provide legal advice to the president, and is prohibited from using or disclosing information concerning potential institutional violations that he heard about at a meeting with the president and a retiring employee unless it has become generally known or the institution provides informed consent); Utah Ethics Op. 18-03 (2018) (if there is no attorney-client relationship between attorney who testified as an expert witness and the party who engaged that attorney to testify, and the testifying attorney did not obtain confidential information regarding the party that engaged the witness, the subsequent representation of the adverse party in an appeal of the same case by a member of the testifying attorney's firm would not create a conflict of interest).

particularly where the lawyer advises the corporate employee in writing that the firm represents only the corporate entity and expressly disclaims representation of the employee.[93] The need to

[93] *See, e.g.,* ABA Formal Ethics Op. 514 (2025) (When an organization's lawyer provides advice to the organization about proposed conduct that may have legal implications for individual constituents, the constituents through whom the lawyer conveys advice may misperceive the lawyer's role and mistakenly believe they can rely personally on the lawyer's advice. Therefore, Rules 4.1, 4.3, and 1.13(f) require an organization's lawyer to take reasonable measures to avoid or dispel constituents' misunderstandings about the lawyer's role. An organization's lawyer may want to instruct or remind an organization's constituents about the lawyer's role early and often during the relationship, not only at times when constituents might rely to their detriment on a misunderstanding of the lawyer's role. Educating an organization's constituents who may receive the lawyer's advice in the future will lay the groundwork for later situations where lawyers may be advising the organization on matters with legal implications for the organization's constituents.); *In re Grand Jury Subpoena*, 415 F.3d 333 (4th Cir. 2005) (when company began an internal review of certain business transactions, its inside and outside counsel interviewed three former employees; later, the SEC began to investigate the same matter and a grand jury was investigation was initiated; the three employees became targets of the grand jury investigation and one of them was later indicted; when the grand jury issued a subpoena for documents relating to the interviews, the company voluntarily waived its privilege; the employees moved to quash, claiming that the lawyers investigating the business transactions individually represented each of them as well as the company and, therefore, the interviews were individually privileged; the Fourth Circuit disagreed, ruling that no individual attorney-client privilege attached to the employees' communication with the company's attorneys; before the interviews, attorneys told the employees that the lawyers represented the company and that the company could waive the privilege if it so chose; the lawyers also told the employees that the lawyers "could" represent them; the lawyers did not say that they "did" represent them; thus, the employees could not have reasonably believed that the investigating attorneys represented them personally during that period); *United States v. Ruehle*, 583 F.3d 600 (9th Cir. 2009) (Statements made by chief financial officer (CFO) of corporation to corporation's attorneys who were conducting internal investigation regarding propriety of corporation's stock option granting practices were not made in confidence, but were instead made for purpose of disclosure to outside auditors, and thus CFO's statements were not protected by attorney-client privilege; CFO admitted he understood the fruits of attorneys' inquiries would be disclosed to accounting firm in order to convince independent auditors of the integrity of corporation's financial statements or to take appropriate accounting measures to rectify any misleading reports and CFO was charged with primary responsibility for corporation's financial affairs.); *United States v. Merida*, 828 F.3d 1203 (10th Cir. 2016) (Choctaw Nation of Oklahoma, rather than defendant, held attorney-client privilege as to transcript of defendant's interview with Nation's attorneys, and thus, defendant could not assert privilege in prosecution for conspiracy to commit theft or bribery of programs receiving federal funds, theft by an employee or officer of a tribal government receiving federal funds, conspiracy to commit money laundering, and tax fraud; attorneys represented Nation, who waived privilege by providing transcript to government, and there was no evidence that attorneys represented defendant on an individual basis); D.C. Ethics Op. 328 (2005) (an attorney representing a constituent of an organization personally should make clear at the outset of the representation when he or she does not represent the organization as an entity; the attorney should ensure that the client, as well as non-client constituents of the organization with whom the lawyer may interact, understand the attorney's role; further, in view of the pervasive nature of confidential information of the organization to which such an attorney is likely to be exposed, in determining whether it is permissible to subsequently undertake matters that are adverse to the organization, the attorney must consider whether the organization is a "de facto client" for purposes of assessing potential conflicts of interest; the analysis is similar to that where an attorney represents a subsidiary or other affiliate of the organization; ideally, the attorney should expressly address these issues with the client at the outset of the representation and incorporate the understanding in the retainer agreement); *eShares, Inc. v. Talton*, 2025 WL 936921 (S.D. N.Y. March 27, 2025) (Communications by Talton, former Chief Technology Officer for Carta, with investigation team for Carta do not fall under the attorney client privilege because Talton was not firm's client, was not acting in his official capacity as a representative of Carta when speaking with the firm; indeed, taking Talton's allegations as true, investigation by firm was for Carta and against Talton in his individual capacity, for the retaliatory purpose of terminating Talton.); *Pierce v. Peters*, 2025 WL 3238262 (D. Ore. Nov. 19, 2025) (defendant doctor for correctional institution did not have standing to assert attorney-client privilege over ODC investigation conducted by its retained attorney where ODC undertook investigation to justify its termination of doctor, doctor was aware of ODC's and its lawyer's adversarial posture toward him and lawyer informed him that she could not keep their conversations confidential); *Nylen v. Nylen*, 873 N.W.2d 76 (S.Dak. 2015) (circuit court's findings that attorney told client that she could not represent client and that client could no longer reasonably believe that she

clarify whom the lawyer represents is also important in third party payor arrangements.[94]

2. Former Employer Counsel Bringing Claims on Behalf of Plaintiffs.

Disqualification issues may arise where an attorney that defended an employer with respect to an employment claim may leave to join an "employee-side" firm and seek to assist in representing a different employee alleging similar claims against that employer. The attorney and the firm may be disqualified under such circumstances.[95] But disqualification may not be

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was attorney's client such that the attorney-client privilege did not extend beyond the day of that conversation were not against a clear preponderance of the evidence, where client admitted during her deposition that she understood that attorney could not represent her, she had no attorney-client relationship with attorney, and that she contacted attorney as a friend.); *State ex rel. Blackhawk Enters., Inc. v. Bloom*, 633 S.E.2d 278 (W.Va. 2006) (attorney-client relationship never existed between attorney and corporation or majority stockholder, even though attorney drafted corporation's bylaws and other legal documents, and thus corporation and majority stockholder were not entitled to order disqualifying attorney and his law firm from representing minority stockholders in underlying civil action seeking dissolution of corporation; attorney was employed by minority stockholders to protect their sole interests throughout numerous transactions, and attorney expressly advised majority stockholder that he was not representing him in any way and advised him to obtain his own legal counsel). *Cf.* Alaska Ethics Op. 2020-1 (2020) (discussing the ethical issues that arise when agreeing to represent an individual non-party witness at a deposition in which the lawyer also represents a named party). *Cf.* ABA Formal Op. 518 (2025) A lawyer-mediator does not represent any party to a mediation. Under Rule 2.4, lawyer/mediators must explain their role to mediation parties who are not represented or who do not appear to understand the mediator's function and, where necessary, inform all parties of the difference between the role of a mediator and that of a lawyer representing a party. Based on the guidance in Comment [3], unless the parties are sophisticated consumers of mediation services, it is prudent for the lawyer-mediator not only to inform all parties that the lawyer-mediator does not represent them but also to afford them an opportunity to discuss what this means. In addition to other rules governing the duties of a mediator, the Model Rules require the lawyer-mediator to avoid communications that are dishonest, fraudulent, deceitful, or misrepresentative in violation of Rule 8.4(c)).

[94] *See In re State Grand Jury Investigation*, 983 A.2d 1097 (N.J. 2009) (Attorneys representing employees in grand jury investigation of employer were not required to be disqualified on grounds that the employees' corporate employer had chosen the attorneys and paid for employees' representation; even though employer offered only to pay for attorneys of its own choosing, employees certified that they were satisfied with the attorneys chosen by employer, retention letters between attorneys and employer explained that attorneys' had professional obligations only to employees, selected attorneys had no current relationship with employer at time they were selected, attorneys were required not to disclose to employer any information regarding the representation, and employer was required to continue paying attorneys except unless court granted leave to discontinue payment. A lawyer may represent a client but accept payment, directly or indirectly, from a third party provided each of six conditions is satisfied: (1) the client's informed consent is secured; (2) the third-party payer is prohibited from, in any way, directing, regulating or interfering with the lawyer's professional judgment in representing his client; (3) there cannot be any current attorney-client relationship between the lawyer and the third-party payer; (4) the lawyer is prohibited from communicating with the third-party payer concerning the substance of the representation; (5) the third-party payer shall process and pay all such invoices within the regular course of its business, consistent with manner, speed and frequency it pays its own counsel; and (6) once a third-party payer commits to pay for the representation of another, the third-party payer shall not be relieved of its continuing obligations to pay without prior written notice to the lawyer and the client.).

[95] *See Sorci v. Iowa Dist. Ct.*, 671 N.W.2d 482 (Iowa 2003) (former executive director of non-profit organization which provided legal representation to children had "substantial responsibility" within meaning of rule prohibiting attorney from accepting private employment in a matter in which attorney had substantial responsibility while a public employee, in cases in which director acted as counsel for State as an assistant county attorney, including but not limited to all cases where she communicated or provided legal advice to State Department of Human Services social workers, other prosecutors, or agents of State concerning subject matter of the case, and such conflict of interest could not be waived; however, district court should have rescinded imputed disqualification of nonprofit organization once director left organization); *Freiburger v. J-U-B Eng'rs, Inc.*, 111 P.3d 100 (Idaho 2005) (former employee's attorney did not obtain confidential information through representation of former employer that affected his ability to represent former

warranted where the lawyer possessed no confidential information relevant to the current representation or where the current and former representations are not substantially related.[96] These former client rules apply to determine disqualification when an in-house lawyer for a corporation leaves and seeks to represent clients adverse to his/her former employer.[97]

3. In-House Counsel Bringing Personal Claims Against the Employer.

Ethical issues arise when an in-house counsel brings employment claims, including wrongful termination or discrimination claims, against his/her employer. Because the in-house counsel has had access to client confidences of the employer, there is a tension between the counsel's duty of loyalty to the employer/client and the right to pursue legitimate claims against the employer. As a result, a few jurisdictions have barred—or limited—the claims that an in-house counsel can make against his/her employer/client based on the in-house counsel's ongoing fiduciary duties and

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employee in declaratory judgment action regarding covenant not to compete, and thus disqualification not required; information at issue was former employer's tendency to aggressively defend its legal rights, the possession of that information did not give former employee any advantage, and attorney had no discussions with former employer concerning its noncompete agreements, employment policies, or former employee's employment relationship). *Cf.* Ohio Ethics Op. 2024-01 (2024) (In most circumstances, a corporation's in-house lawyer should avoid providing legal representation to a corporation's customers on matters relating to issues which the corporation has previously provided general services.); N.Y. Ethics Op. 1287 (2025) (A New York lawyer may not ethically act as a relator in a qui tam action under the False Claims Act against a former client, where the information used to support the claim was obtained during the course of the prior representation, unless disclosure is necessary to prevent the commission of a crime).

[96] S*ee Moore v. Olson*, 351 P.3d 1066 (Alaska 2015) (court did not abuse its discretion by refusing to disqualify opposing counsel from arbitration confirmation and vacatur proceedings, as requested by former business partner asserting a conflict of interest, arguing that she was opposing counsel's former client, where former business partner's alleged participation in helicopter hangar lease negotiations with opposing counsel were not substantially related in any way to the legal dispute raised in her allegations that her former partner and his businesses had breached their settlement agreement relating to the helicopter businesses); *Plein v. USAA Cas. Ins. Co.*, 463 P.3d 728 (Wash. 2020) (Insurer's business customs and practices, including confidential claims handling materials and business relationships, thought processes of adjusters, business representatives, and in-house attorneys, and its business and litigation philosophies and strategies were general knowledge that was not disqualifying for law firm that previously had represented insurer in bad faith actions with regard to its subsequent representation of insureds in insurance bad faith action under rule of professional conduct governing duties to former clients, and where law firm's former representation of insurer was not substantially related to current representation of adverse client.). *Cf.* Tex. Ethics Op. 659 (2016) (lawyer may represent one insured client in settling a claim against that client and represent the client's insurance company in defending another insured's claim against the insurance company that arises out of the same incident because there is no conflict between the lawyer's two clients as their interests are not adverse).

[97] *See* ABA Formal Ethics Op. 99-415 (1999) (if a former in-house lawyer personally represented his former employer in a matter, neither he nor his new firm may undertake a representation adverse to his former employer in the same or substantially related matter absent the former employer's consent; even if the former in-house lawyer did not personally represent his former employer in a matter, but obtained protected information concerning that matter while it was being handled by others in his legal department, he will be disqualified and his disqualification will be imputed to his new firm); Ky. Ethics Op. KBA E-387 (1995) (same); Wis. Ethics Op. E-87-3 (no per se rule prohibiting former house counsel for a corporate employer from representing clients against the corporate employer/client in matters not pending prior to or at the time of his/her termination of employment; however confidences and secrets of a former corporate employer may not be disclosed or used to the corporation's disadvantage by the former house counsel, and disqualification may be required on a case-by-case basis) . *See also Dynamic 3D Geosolutions LLC, v. Schlumberger Ltd*., 837 F.3d 1280 (Fed. Cir. 2016) (affirming disqualification of plaintiff's law firm and dismissal of case without prejudice where plaintiff hired former in-house IP counsel for defendant whose work involved analysis of the patents at issue in the case, and after joining plaintiff's law firm was involved in the decision to bring the case and hiring the law firm for the case; in-house counsel's work at defendant was substantially related to the current case and plaintiff's law firm had become privy to confidences in-house lawyer brought from defendant).

obligation to maintain employer/client confidences.[98] However, most courts and ethics opinions have held that the ethical rules do not prohibit in-house counsel from suing his/her employer,[99] but

[98] *See, e.g.*, *United States v. Quest Diagnostics Inc.*, 734 F.3d 154 (2d Cir. 2013) (Former in-house counsel for clinical laboratory violated state professional conduct rule prohibiting use of confidential information of a former client to the disadvantage of that client when he filed and participated as relator in qui tam action against the laboratory and its parent company alleging violations of federal Anti-Kickback Statute; although attorney allowed to disclose confidential information he reasonably believed necessary to prevent former client from committing a crime, the confidential information counsel revealed as plaintiff in qui tam suit was greater than reasonably necessary to prevent any alleged ongoing fraudulent scheme stemming from laboratory's actions eight years earlier, and suit could have been brought based only on information co-relators had obtained as former executives of the laboratory.); *Douglas v. DynMcDermott Petrol. Operations Co.*, 144 F.3d 364 (5th Cir. 1998) (information regarding in-house attorney's investigation into employee's interoffice discrimination complaint and separate business matter she had handled was confidential and, under state law, attorney's disclosure of those matters to DOE in response to inquiries regarding employment practices of her employer constituted breach of her ethical duties of confidentiality and loyalty; employer, not DOE, was counsel's client and employer had not consented to any arrangement whereby DOE was to be treated as a client; such disclosure was not protected activity under Title VII); *Jones v. Flagship Int'l*, 793 F.2d 714 (5th Cir. 1986) (employer did not impermissibly retaliate for filing an EEOC complaint when it suspended employee, an attorney who was employer's manager of EEO programs, in view of evidence that employee had solicited others to file EEOC complaint and was seeking to be the vanguard of a class action and in view of the sensitive role which the employee played in such matters for the company); *Doe v. A Corp.*, 709 F.2d 1043 (5th Cir. 1983) (former in-house counsel could prosecute an action in his own behalf against his former employer with respect to ERISA claims, despite his having advised the employer corporation on matters relating to his lawsuit, but he was ethically barred from prosecuting such litigation either as an attorney for, or as the class representative of other employees); *Rand v. CF Indus., Inc.*, 42 F.3d 1139 (7th Cir. 1994) (employer's "decision to fire one of its attorneys must be given special deference"); *Kelly v. City of Albuquerque*, 542 F.3d 802 (10th Cir. 2008) (assistant city attorney's participation as defense attorney in an EEOC mediation qualifies as "participation" for purposes for purposes of Title VII retaliation claim)*; Ausman v. Arthur Andersen LLP*, 810 N.E.2d 566 (Ill. App. 2004) (affirmed dismissal of in-house counsel's claim that firm fired her in retaliation for several objections she had raised to ventures it had assembled for clients as possible violations of SEC regulations; lawyer actions for retaliatory discharge would chill the client-lawyer relationship and discourage executives from confiding in in-house counsel for fear that company secrets one day may be spilled in open court); *Balla v. Gambro, Inc.*, 584 N.E.2d 104 (Ill. 1991) (total ban on wrongful discharge cases that raise attorney-client concerns); *Kidwell v. Sybaritic*, 784 N.W.2d 220 (Minn. 2010) (in-house general counsel fired for notifying senior management of his concerns about possible corporate wrongdoing in violation of fiduciary obligations may not obtain relief under state whistleblower statute); N.C. 2000 Formal Ethics Op. 11 (2001) (lawyer who was formerly in-house legal counsel for a corporation must obtain the permission of the court before disclosing confidential information of the corporation to support a personal wrongful discharge claim). *Cf.* N.Y. Cnty. Ethics Op. 746 (2013) (lawyers who are acting as attorneys for clients may not ethically collect whistleblower bounties in exchange for disclosing confidential information about their clients under the whistleblower provisions of the Dodd-Frank Act because doing so generally gives rise to a conflict between the lawyers' interests and those of their clients.); Tex. Ethics Op. 601 (2010) (lawyer employed as assistant city attorney may not refuse to withdraw from legal representation of the city because the lawyer is protected from termination by civil service employment provisions).

[99] *See* ABA Formal Ethics Op. 01-424 (2001) (Model Rules do not prohibit a lawyer from suing her former clients and employer for retaliatory discharge, but the lawyer must take care not to disclose client information beyond that information the lawyer reasonably believes is necessary to establish her claim); *Siedel v. Putnam Invs*., *Inc.*, 147 F.3d 7 (1st Cir. 1998) (complaint filed by former in-house counsel that revealed privileged information must be kept under seal; although attorneys may reveal privileged information to defend themselves against charges of ineffective assistance or legal negligence, they cannot use privileged information offensively.); *Trzaska v. L'Oreal USA, Inc.*, 865 F.3d 155 (3d Cir. 2017) (in-house patent attorney claim that he was fired because he refused to participate in an illegal activity by filing frivolous or bad-faith patent applications that would violate the RPCs and his ethical obligations as a patent attorney stated a viable claim under state employment law); *Kachmar v. SunGard Data Sys.*, 109 F.3d 173 (3d Cir. 1997) (state ethics rules imposing general duty of confidentiality for information relating to representation of client did not preclude in-house counsel from bringing retaliatory discharge claim against her former employer); *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989 (9th Cir. 2009) (confidentiality concerns alone do not warrant dismissal of SOX whistleblower claims brought by two married former in-house counsel who alleged they were fired for reporting

suggest that in-house counsel and the courts should take care to preserve client confidences to the

fraud in the context of a corporate merger); *Wadler v. Bio-Rad Labs., Inc*., 212 F. Supp.3d 829 (N.D. Cal. 2016) (SOX whistleblower protections preempt California's ethical rules that allowed for more limited disclosures of privileged communications in connection with SOX retaliation claims than permitted under SEC regulations under SOX and, therefore, former general counsel may use otherwise privileged and confidential information as evidence in his lawsuit alleging that employer terminated him for reporting alleged FCPA violations.), *later proceedings,* 916 F.3d 1176 (9th Cir. 2019) ($8 million jury verdict affirmed in part on California public policy claim); *Gen. Dynamics v. Super. Ct.*, 7 Cal. 4th 1164 (1994) (action permitted if complaint based on in-house lawyer's adherence to obligations imposed by the Code of Professional Responsibility, but prohibited if pursuit of claim would result in disclosure of client confidences or secrets); *Fox Searchlight Pictures, Inc. v. Paladino*, 89 Cal. App. 4th 294 (2001) (attorneys representing former in-house counsel in wrongful termination action against corporation were not disqualified because of counsel's disclosing to them confidential or privileged information she acquired while counsel to corporation; former in-house counsel entitled to sue her employer for wrongful termination as long as she did not publicly disclose information employer was entitled to keep secret); *Schaefer v. Gen. Elec. Co.*, 102 Fair Empl. Prac. Cases (BNA) 1332 (D. Conn. 2008) (in-house counsel's ethical obligations do not bar her from serving as class representative against her employer in a Title VII disparate impact gender discrimination class action; striking the class allegations based on concerns that in-house counsel would betray client confidences would be premature, and the company's confidential information can be adequately protected by a protective order); *Lewis* v. *Nationwide Ins. Co.*, 19 Ind. Empl. R. Cases (BNA) 1470 (D. Conn. 2003) (Connecticut Supreme Court would recognize the public policy violation asserted by a former in-house counsel employed by insurance company to defend its insured against liability claims who alleged he was demoted, harassed, and eventually fired because he refused to permit the insurance company to interfere with his exercise of independent professional judgment on behalf of his client-insureds in violation of the rules of professional conduct); *Alexander v. Tandem Staffing Sols., Inc.*, 881 So.2d 607 (Fla. App. 2004) (former general counsel's disclosures to her attorney reasonably pertaining to the whistleblower claims were permissible and did not require disqualification of former general counsel's attorney); *Heckman v. Zurich Holding Co.*, 242 F.R.D. 606 (D. Kan. 2007) (under Kansas law, in-house attorneys may bring retaliatory discharge claims against their former employers/clients so long as they do not run afoul of their duty of confidentiality); *GTE Prods. Corp. v. Stewart*, 653 N.E.2d 161 (Mass. 1995) (action permitted if complaint based on in-house lawyer's adherence to obligations imposed by the Code of Professional Responsibility; action prohibited if pursuit would result in a disclosure of client confidences or secrets); *Burkhart v. Semitool, Inc.*, 5 P.3d 1031, 1041 (Mont. 2000) (Rule 1.6 contemplates revealing confidential client information by a former in-house lawyer pursuing a retaliatory discharge claim against her former employer); *Tartaglia v. USB PaineWebber Inc.*, 961 A.2d 1167 (N.J. 2008) (Attorney alleging retaliatory discharge claim based on public policy embodied in a professional conduct rule must show that the employer's behavior about which she complained actually violated the rule, because attorneys should be knowledgeable about the rules and because they have an independent obligation to report violations to appropriate authorities.); N.Y.C. Ethics Op. 1994-1 (1994) (former in-house attorney may sue former employer for alleged discrimination and participate in preparing a class action against the employer, provided the attorney does not reveal any confidences or secrets of the employer or serve as class representative or class counsel); *Wise v. Consol. Edison Co.*, 723 N.Y.S.2d 462 (2001) (action allowed if complaint based on in-house lawyer's adherence to obligations imposed by the professional responsibility rules, but prohibited if pursuit would result in a disclosure of client confidences or secrets); Or. Ethics Op. 2005-136 (2005) ("claim or defense" exception to Rule 1.6 permits disclosure to establish a wrongful discharge claim); *Karsetter v. King Cnty. Corrs. Guild*, 444P.3d 1185 (Wash. 2019) (contract and wrongful discharge suits are available to in-house attorneys provided these suits can be brought without violence to the integrity of the attorney-client relationship). *Cf. Attorney Grievance Comm'n v. Smith-Scott*, 469 A.3d 281 (Md. 2010) (Attorney violated professional conduct rule governing confidentiality of client information when she intentionally attached as exhibits confidential email communications exchanged with client in motion filed with bankruptcy court; attorney neither attempted to obtain client's permission to disclose communications, nor take any preventative measures to limit disclosure). *See also* N.Y.C. Ethics Op. 2022-1 (2022) (under certain circumstances, a subpoena may constitute "other law" that authorizes disclosure of confidential information under Rule 1.6. An attorney receiving a subpoena seeking confidential information must (i) communicate with current or former client whose information is requested, (ii) seek the client's consent to provide the requested information, and (iii) if consent is not given, assert reasonable and non-frivolous objections to the subpoena and provide only the information not subject to such objections).

greatest extent practicable in such situations.[100]

[100] *See, e.g., Hoffman v. Baltimore Police Dep't*, 379 F. Supp. 2d 778 (D. Md. 2005) (former in-house attorney may maintain personal claims against department and its officials, so long as the court uses equitable measures to balance the needed protection of confidential information against the in-house attorney's right to maintain the suit, and as long as the in-house attorney continues to exercise his professional judgment and utmost care in protecting any confidences of his employer that have not been waived); Cal. Ethics Op. 2012-183 (2012) (While a senior associate in a law firm has the right to consult with attorney concerning a potential wrongful discharge claim against her former firm, and in that consultation to reveal, as necessary, client confidential information, except in the narrowest of circumstances, attorney may not publicly disclose those client confidences to pursue senior associate's wrongful discharge claim.); *Fremont Reorganizing Corp. v. Faigan*, 198 Cal. App. 4th 1153 (2011) (former employer's allegations that day after he was fired former in-house counsel told authorities about the company's allegedly illegal conduct stated a claim against former in-house counsel for breach of fiduciary duty and confidentiality); *In re Koeck*, 178 A.3d 463 (D.C. 2018), *adopting* Report No. 14-BD-061 (Bd. of Prof'l Resp., Aug. 30, 2017) (in-house attorney violated Rule 1.6 when she disclosed client confidences and secrets (i) to a reporter, (ii) to the U.S. Attorney's Office, (iii) to Brazilian authorities, and to the (iv) to the SEC, for which a sixty day suspension was appropriate; her disclosures to the DOL in connection in her SOX retaliation claim did not violate Rule 1.6. In-house attorney's counsel was found to have violated Rule 8.4(a) by knowingly assisting in-house counsel's disclosures to the press, for which informal admonition was appropriate sanction); *In re White*, 11 A.3d 1226 (D.C. 2011) (Board on Professional Responsibility did not err in finding attorney violated professional conduct rules in connection with purported "whistleblower" complaint against her former employer and subsequent dealing with government entities; investigation demonstrated that attorney had manipulated and fabricated supporting documents and presented false testimony, and that complaint had been filed in apparent attempt to head off attorney's termination for performance reasons); *Tartaglia v. USB PaineWebber Inc.*, 961 A.2d 1167 (N.J. 2008) (Attorney alleging retaliatory discharge claim based on a public policy embodied in a rule of professional conduct must show that the employer's behavior about which she complained actually violated the rule, both because attorneys should be knowledgeable about the rules, and because they have an independent obligation to report violations to the appropriate authorities.); Phila. Ethics Op. 99-6 (1999) (former in-house counsel, in the course of pursuing a wrongful termination claim against his former employer and client, may use confidential privileged information provided the information is reasonably necessary to advance the claim, the claim is a reasonable one, the information is used only after the client has been forewarned that it might possibly be used in connection with advancing the claim, and the information is used in the most minimal way possible and in a way that is designed to preserve the confidentiality of the information to the extent reasonably possible); San Diego Cnty. Ethics Op. 2008-1 (2008) (discharged in-house lawyer who wishes to sue her former employer may always speak confidentially with her own counsel to evaluate possible claims, but in a lawsuit she may not reveal information, other than ordinary employment-related information, unless the disclosure is authorized by a protective order or by a specific exception to the duty of confidentiality or the attorney-client privilege); *Crews v. Buckman Labs. Int'l, Inc.*, 78 S.W.3d 852 (Tenn. 2002) (claim or defense exception to duty of confidentiality permits disclosure by former in-house counsel for insurer to establish wrongful discharge claim against insurer; in-house counsel could not disclose any confidential information relating to insureds without the consent of those clients, where former in-house counsel made no claim against the insureds they represented during their employment and were not called upon to defend themselves against claims by those insureds). *Cf. Willy v. Admin. Review Bd.*, 423 F.3d 483 (5th Cir. 2005) (breach of duty exception to the attorney-client privilege applied, and therefore the privilege did not mandate exclusion of draft report prepared by oil company's in-house counsel concluding that a company subsidiary was exposed to liability under several environmental statutes, in proceedings on the counsel's DOL claim that the company violated whistleblower provisions of those statutes by firing him in retaliation for his writing the report); *Hill v. Johnson*, 538 P.3d 204 (Or. 2023) (breach of duty exception to attorney-client privilege applies only to communications between the client and the attorney who are directly involved in the alleged breach); *Meadows v. Kindercare Learning Ctrs.*, 2004 WL 2203299 (D. Ore. Sept. 29, 2004) (Oregon courts would permit a wrongful discharge claim by a former in-house counsel if the complaint is based on in-house counsel's refusal to violate the ethics rules or where the in-house counsel alleges that she personally suffered a discriminatory job action; however, where the in-house counsel has alleged only that she was terminated for not agreeing to defendants' discriminatory company policies, she cannot maintain a retaliatory discharge claim because the alleged protected conduct is inconsistent with the requirements of her position); *Broadbent v. Williams*, 2025 WL 385101 (D. Utah Feb. 4, 2025) (defendant university failed to meet its burden to overcome the presumption that court records are open to the public and thus court denied its request for

J. Conflicts Arising From "Beauty Contests" and Other Pre-Retention Contacts.

Some corporate entities conduct "beauty contests" or other pre-retention discussions in which law firms give presentations as to why they should be selected for a matter. An attorney-client relationship may be formed in such situations.[101] Even if no attorney-client relationship is formed,

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injunction to prevent plaintiff former in-house counsel from disclosing client confidences in her discrimination lawsuit against university; court also found that some of the information at issue was either not privileged or the university waived the privilege); Cal. Ethics Op. 2012-183 (2012) (although an attorney may disclose client confidences to her own attorney to evaluate a potential wrongful discharge claim against her former firm, neither she nor her attorney may publicly disclose those confidences to pursue her own wrongful discharge claim against the firm; opinion does not address whether disclosure through other means, such as under seal or pursuant to a protective order, would be permissible); D.C. Ethics Op. 363 (2012) (in-house lawyer may not disclose or use her employer/client's confidences or secrets in support of the lawyer's claim against the employer/client for employment discrimination or retaliatory discharge unless expressly authorized by Rule 1.6. If the employer/client puts the lawyer's conduct in issue, however (e.g., by lodging an affirmative defense or counterclaim), the lawyer may disclose or use the employer's confidences or secrets insofar as reasonably necessary to respond to the employer/client's contention. An in-house lawyer is not prohibited from bringing such a claim against her employer/client merely because the employer/client may find it necessary or helpful to disclose its confidences or secrets in defending against the lawyer's claim); N.Y. Ethics Op. 858 (2011) (general counsel may ethically require staff attorneys to sign confidentiality agreements that arguably extends staff attorney confidentiality obligations, after their employment ends, to information not otherwise protected as confidential information under the Rules, if the agreement makes plain that such confidentiality obligations do not restrict the staff attorney's right to practice law after termination and do not expand the scope of the staff attorney's duty of confidentiality under the Rules); S.C. Ethics Op. 99-08 (1999) (lawyer's representation of manager in action against employer, where lawyer previously represented client in action against manager and employer in which manager was a material witness for employer, did not violate ethics rules where there are no facts indicating that representation of the manager will be directly adverse to client or that lawyer has a conflicting responsibility to the client or employer).

[101] *See, e.g*., ABA Formal Ethics Op. 90-358 (1990) (Model Rule 1.3 protects information imparted by a would-be client seeking to engage a lawyer's services); Cal. Ethics Op. 1984-84 (1984) (an attorney has a duty to maintain confidences reasonably entrusted in discussions preliminary to forming the attorney-client relationship); Me. Ethics Op. 62 (1985) (lawyer who had initial consultation with a prospective client owed duty of confidentiality); Mich. Ethics Op. RI-154 (1995) (attorney has duty to protect and preserve confidences discussed with a prospective client); Mo. Informal Ethics Op. 2024-06 (2024) (prospective client entitled to return of papers and properties provided to lawyer during initial consultation; prospective client not entitled to client file if representation is declined); *Keuffer v. O.F. Mossberg & Sons,* 373 P.3d 14 (Mont. 2016) (Trial court did not abuse its discretion in disqualifying out-of-state counsel and local counsel of rifle manufacturer for violation of rule of professional conduct in hunter's personal injury action against manufacturer; it was evident that out-of-state counsel knew that hunter had talked with attorney from specific law firm and learned that firm was not interested in taking hunter's case, and counsel's questioning of hunter's wife about hunter's consultation with firm prejudiced hunter and wife, as it led them to question merits of their case); N.Y. Ethics Op. 685 (1997) (lawyer may not disclose information received during initial consultation); Ohio Ethics Op. 19-15 (1991) (confidences and secrets of a person who consults with attorney regarding representation are protected); N.C. 2003 Formal Ethics Op. 8 (2003) ("representation" of a client for purposes of the conflict of interest rules includes not only services provided after formation of an attorney-client relationship, but also any initial consultation for the purpose of establishing an attorney-client relationship); Tex. Ethics Op. 691 (2021) (lawyer who consults with a prospective client with respect to a matter owes that person a duty of confidentiality under Rule 1.5 of the Tex. DRPC and may not use or reveal information communicated by the prospective client except in accordance with that Rule; a consultation with a prospective client may result in a disqualifying limitation under Rule 1.06(b)(2), and as a general rule, a lawyer should not represent a client with interests materially adverse to those of a former prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter); Vt. Ethics Op. 2000-10 (2000) (a lawyer who discloses a potential conflict of interest to a caller who sought to retain the lawyer and divulges the general nature of an employer-employee disagreement and potential litigation and the name of the employer, is not disqualified from representing the employer because the lawyer explained to the caller that a conflict existed and that caller would have to seek legal representation elsewhere; but the lawyer may not then inform the employer of the telephone call or its

the firm may have confidentiality duties arising from such pre-retention communications with prospective clients that may require disqualification.[102] In such situations, attorneys should warn

content); Tex. DRPC, Preamble, Cmt. 12 (confidentiality duties may precede attorney-client relationship).

[102] *See, e.g.*, ABA MODEL RULE 1.18(b) (lawyer may not use or reveal information learned in a consultation with a prospective client, even if no attorney-client relationship ensues, and lawyer may not represent someone with interests materially adverse to the prospective client in a matter if that party could be significantly harmed by information the lawyer received from the prospective client); ABA Formal Ethics Op. 510 (2024) (Under Rule 1.18 of the Model Rules, a lawyer who was consulted about a matter by a prospective client, but not retained, is disqualified from representing another client who is adverse to the prospective client in the same or a substantially related matter if the lawyer received from the prospective client "disqualifying information"—i.e., information that could be significantly harmful to the prospective client in the matter. But, if the lawyer "took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client," and the firm takes specified procedural precautions, then the lawyer's conflict of interest is not imputed to others in the lawyer's firm. The Opinion addresses the "reasonable measures" necessary to avoid the imputation of conflicts of interest under Rule 1.18. First, information that relates to "whether to represent the prospective client" includes information relating to (1) whether the lawyer may undertake or conduct the representation (e.g., whether a conflict of interest exists, whether the lawyer can conduct the work competently, whether the prospective client seeks assistance in a crime or fraud, and whether the client seeks to pursue a nonfrivolous goal), and (2) whether the engagement is one the lawyer is willing to accept. Second, to avoid imputation, even if information relates to "whether to represent the prospective client," the information sought must be "reasonably necessary" to make this determination. Third, to avoid exposure to disqualifying information that is not reasonably necessary to determine whether to undertake the representation, the lawyer must limit the information requested from the prospective client and should caution the prospective client at the outset of the initial consultation not to volunteer information pertaining to the matter beyond what the lawyer specifically requests.); ABA Formal Ethics Op. 492 (2020) (lawyer who receives information that could be significantly harmful from a prospective client and then represents a client in the same or substantially related matter where that client's interests are materially adverse to those of the prospective client violates Rule 1.18(c) unless the conflicts are waived by the prospective client. Whether the information is "significantly harmful" is a fact-specific inquiry and focuses on the potential harm in the new matter and will depend on, for example, the duration of the discussion, topics discussed, whether the lawyer reviewed the documents, and whether the information conveyed is known by other parties as well as the relationship between the information and the issues in the issues in the subsequent matter); Cal. R. Prof'l Conduct, Rule 1.18 (2018) (same); Cal. Ethics Op. 2021-205 (2021) (Lawyer may not use or disclose information received from a prospective client without the prospective client's informed written consent. This is true even if the information would be material to the representation of an existing client of the lawyer of the lawyer's firm. Interviewing lawyer who receives material confidential information from a prospective client is prohibited from accepting representation materially adverse to the prospective client on the same or a substantially related matter absent informed consent. Prohibition imputed to other members of firm unless interviewing lawyer took reasonable measures to obtain only information reasonably necessary to determine whether to represent the existing client and the firm promptly took screening and other reasonable measures under Rule 1.18(d)(2), including advising client to provide only identified information that the lawyer reasonably needs to decide whether to undertake the representation and limiting questioning of the client so as to elicit only such information); D.C. Ethics Op. 383 (2022) (absent informed consent, a lawyer generally may not disclose to a client or prospective client information about another client or prospective client that is a protected secret or confidence under Rule 1.6 or Rule 1.18. Such information often includes (i) the identity of another client or prospective client, and (ii) the nature of the other person's matter. Even requesting or agreeing to a commitment to make such disclosures, whether pursuant to an Outside Counsel Guideline or otherwise, may constitute a prohibited attempt or inducement to another to violate the Rules); Ill. Ethics Op. 12-05 (2012) (It would be improper for lawyer to represent a person adverse to a prospective client who had previously consulted with the lawyer in the same matter and disclosed significantly harmful information during the consultation absent both persons' informed consent); Ky. Ethics Op. KBA E-455 (2022) (A lawyer is prohibited from accepting a new matter if the lawyer receives information from a prospective client that could be significantly harmful to a prospective client in the new matter. In initial contact, the potential client should be advised not to disclose any factual information until after giving sufficient information to allow a conflicts check; Opinion includes a suggested Conflict Consultation Form.); Md. Ethics Op. 2019-05 (2019) (attorney disqualified from representing party adverse to prospective client where attorney received information that could be significantly harmful to the prospective client in the matter even though the attorney did not retain files or knowledge of a

the prospective client that no information the client considers confidential should be given because it will not be treated as confidential unless and until conflicts are cleared and the lawyer accepts the matter. The lawyer should also seek to obtain a written waiver of future conflicts based on participation in the contest if the law firm is not selected.[103] If the attorney receives confidential information, disqualification of the firm may be avoided by timely screens of the lawyer from the other firm members with respect to information received from the prospective client.[104] Disclosure of unsolicited information from a prospective client would not generally disqualify the firm, although the lawyer may be prohibited from using the information to benefit the lawyer's other clients.[105] Creation of confidentiality obligations will depend on the clarity of the firm's

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consultation with a prospective client); N.H. Ethics Op. 2019-20/02 (2020) (Lawyer is not authorized to reveal information from a prospective client to a current client, unless the prospective client gives the lawyer informed consent, confirmed in writing, to disclose the information; unless one of the exceptions to Rule 1.18 is satisfied, a lawyer may be required to withdraw from representing the current client with interests materially adverse to a prospective client if the information from the prospective client could be significantly harmful to the prospective client in the same or substantially similar matter. As a result, lawyers must be mindful of how they conduct the initial interviews with prospective clients to avoid conflicts that could be fatal to an existing client-lawyer relationship); N.J. Ethics Op. 695 (2004) (firm may represent corporate client after receiving unsolicited information from former employees who contacted the firm seeking representation in a lawsuit against the corporation; however, firm may not use or reveal the information received from the former employees). *Cf. Ulrich v. Gen. Motors LLC*, 2026 WL 183676 (S.D. N.Y. Jan. 23, 2026) (questionnaires from class counsel to prospective class members protected by the attorney-client privilege).

[103] *See* N.Y. Ethics Op. 1126 (2017) (lawyer may not disclose a prospective client's confidential information without the informed consent of the prospective client or some other exception to the confidentiality rules); N.Y.C. Ethics Op. 2013-1 (2013) (Even when no lawyer-client relationship exists, a lawyer who learns confidential information in a consultation with a prospective client may not use or reveal the information except to the extent permitted with confidential information of a former client, and the lawyer may not take on a materially adverse representation in the same or a substantially related matter when the information, if used in the matter, could be significantly harmful to the prospective client.); S.C. Ethics Op. 22-01 (2022) (lawyer has no ethical obligation to maintain the confidentiality of an unsolicited email message from an individual with whom the lawyer had no prior relationship; a person who communicates information unilaterally without any reasonable expectation that the lawyer is willing to discuss the possibility of forming an attorney-client relationship is not a "prospective client" to whom the lawyer owes a duty of confidentiality). *Cf.* D.C. Ethics Op. 374 (2018) (although lawyer must safeguard and return documents entrusted to the lawyer by a prospective client while evaluating whether to form a client-lawyer relationship, absent a legal obligation to do so, lawyer has no obligation to preserve or turn over to a prospective client information learned in or related to a prospective client consultation if client-lawyer-relationship does not exist).

[104] *See* ABA MODEL RULE 1.18(d)(2) (disqualification of firm may be avoided if attorney limited information from prospective client to that required to conduct a conflicts check and attorney effectively screened himself from other firm members regarding information received from the prospective client). Thirty-six states and the District of Columbia permit ethical screening to avoid disqualification of the firm in such situations. *See* Alaska R. Prof'l Conduct 1.18; Colo. R. Prof'l Conduct 1.18; Conn. R. Prof'l Conduct 1.18; Del. R. Prof'l Conduct 1.18; D.C. R. Prof'l Conduct 1.18; Fla. Bar Rule 4-1.18; Ill. R. Prof'l Conduct 1.18; Ind. R. Prof'l Conduct 1.18; Iowa Court Rule 32:1.18; Ky. Supr. Ct. Rule 3.130(1.18); La. R. Prof'l Conduct 1.18; Me. R. Prof'l Conduct 1.18; Md. R. Prof'l Conduct 1.18; Minn. R. Prof'l Conduct 1.18; Mo. R. Prof'l Conduct 1.18; Mont. R. Prof'l Conduct 1.18; Neb. R. Prof'l Conduct § 3.501.18; Nev. R. Prof'l Conduct 1.18; N.H. R. Prof'l Conduct 1.18; N.J. R. Prof'l Conduct 1.18; N.M. R. Prof'l Conduct 1.18; N.Y. R. Prof'l Conduct 1.18; N.C. R. Prof'l Conduct 1.18; Ohio R. Prof'l Conduct 1.18; 5 Okla. Stats. § Rule 1.18 (OSCN 2010) Appendix 3-A; Or. R. Prof'l Conduct 1.18; Pa. R. Prof'l Conduct 1.18; R.I. R. Prof'l Conduct 1.18; S.C. R. Prof'l Conduct 1.18(d); S.D. R. Prof'l Conduct 1.18; Utah R. Prof'l Conduct 1.18; Utah Ethics Op. 05-04 (2005); Vt. R. Prof'l Conduct 1.18; Wash. R. Prof'l Conduct 1.18; Wis. Supr. Ct. Rule 20:1.1.8; Wyo. R. Prof'l Conduct 1.18.

[105] *See* Fla. Ethics Op. 07-3 (2009) (A lawyer who receives information unilaterally from a person seeking legal services has no conflict of interest if already representing or is later asked to represent an adversary, and may use or disclose the information. If the lawyer agrees to consider representing the person or discussed the possibility of representation with the person, then the person is a "prospective client," and the lawyer does owe a duty of

confidentiality that may create a conflict of interest for the lawyer. Lawyers should post a statement on their websites that the lawyer does not intend to treat as confidential information sent to the lawyer via the website, and that such information could be used against the person by the lawyer in the future.); N. H. Ethics Op. 2009-2010/1 (2009) (when law firm's website invites public to send email to one of firm's lawyers, it is opening itself to potential obligations to prospective clients); N.Y.C. Ethics Op. 2001-1 (2001) (information provided by prospective client to a lawyer or law firm in email generated in response to Internet website maintained by the lawyer or firm would generally not disqualify the lawyer or firm from representing another present or future client in the same manner; where the web site does not adequately warn that information transmitted to the lawyer or firm will not be treated as confidential, the information should be held in confidence by the attorney receiving the communication and not disclosed or used for the benefit of the other client even though the attorney declines to represent the potential client); N.Y. Ethics Op. 960 (2013) (Lawyer may ethically represent a client seeking payment of fees tendered to a prior prospective client, who had earlier sought advice from the lawyer regarding the damage that was subsequently repaired by the client, unless the lawyer learned confidential information from the prospective client that would be significantly harmful to the prospective client). *See also* Ariz. Ethics Op. 02-04 (2002) (an attorney does not owe a duty of confidentiality to individuals who unilaterally send unsolicited email inquiries to the attorney; law firm websites, however, should include disclaimers, regarding whether or not email communications from prospective clients will be treated as confidential); Ariz. Ethics Op. 97-04 (1997) (lawyers should not answer specific questions or give fact-specific advice in chat rooms because they would be unable to screen for potential conflicts and would risk confidentiality problems); Colo. Ethics Op. 117 (2007) (Pro bono or legal services intake interview conducted by intake attorney or non-attorney intake specialist to screen for possible conflicts, to determine eligibility for services, and to identify his/her legal needs or objectives generally does not create an attorney-client relationship. The intake attorney or specialist should stress that no attorney-client relationship is created until the legal services or pro bono program determines the prospective client's eligibility for the program's services. If the initial inquiry suggests a conflict of interest, the intake specialist may still obtain limited information to determine eligibility for purposes of referral or possible representation, because obtaining such information does not create an attorney-client relationship); Haw. Ethics Op. 50 (2025) (attorneys volunteering at a self-help center must ensure that individuals are aware of the limited scope of service provided; if legal advice provided, an attorney-client relationship is formed and Rule 1.6 requires confidentiality for those communications; given the limited nature of relationship and impracticality of screening, Rule 6.5(a) modifies the conflicts of interest rules for such events—volunteer attorneys must decline a client at an event only if attorney knows representation involves a conflict with the current or former client of the attorney or the attorney's firm); *Sowders v. Lewis*, 241 S.W.3d 319 (Ky. 2007) (attorney-client privilege attached to any confidential communications between prospective co-counsel in medical malpractice action, and a medical expert that the prospective co-counsel consulted before deciding not to join plaintiffs' attorney as co-counsel.); Va. Ethics Op. 1832 (2007) (Where prospective client called lawyer's office and spoke only with the lawyer's secretary and provided the secretary with confidential details regarding her case, the lawyer may continue to represent an individual in a case against to the prospective client if the lawyer establishes an ethical screen between the secretary and the lawyer as to the prospective client as to the prospective client and the current client's case, instructs the secretary that she cannot reveal to the lawyer any confidential information obtained from the prospective client, and uses other staff persons in lieu of the secretary for any work relating to the representation of the current client. The lawyer should send a written communication to the prospective client or her lawyer that these measures have been taken); Wis. Ethics Op. EF-11-03 (2011) (the duties lawyer owes to prospective clients are not triggered by unsolicited email communication that lawyer receives "out of the blue from a stranger in search of counsel" so long as lawyer did not do or publish anything that would lead reasonable people to believe that they could share information with the lawyer without first meeting the lawyer and establishing a lawyer-client relationship; a lawyer who places ads or solicits email communications should use disclaimers or other similar methods to warn the individual in terms easily understood by laypersons that there is no lawyer-client relationship and that the communications are not confidential). *Cf.* Alaska Ethics Op. 2015-2 (2015) (Generally a lawyer does not have a responsibility to hold documents or property that a client has delivered unsolicited and that are not connected with the representation, but the lawyer should treat such items as abandoned property and exhaust reasonable efforts to locate the client, hold the funds for the requisite period of time, and then dispose of them); N.Y. Ethics Op. 1163 (2019) (A lawyer who represented a defendant who later defaulted in making payments under a settlement agreement, who cannot be now located by the lawyer, and who is facing a motion before a court based on the failure to make such payments, may inform the court that the lawyer no longer represents the defendant if the prior representation ended and the prior action before the court had ended. If the prior matter before the court had not been closed, the lawyer will have to seek permission from the court to withdraw from the representation, after using reasonable efforts to locate the client). *Cf.* Nev. Ethics Op. 60 (2023) (attorney cannot require a client or

disclaimers in its website or other communications with the potential client.[106] Similarly, responses

prospective client to sign an NDA as a condition for receiving legal advice; not only does an NDA violate professional rules and prejudice the client, it impedes the policies underlying the attorney-client privilege, which is held for the benefit of the client, not the attorney, and infringes upon a client's rights arising out of an attorney-client relationship.)

[106] ABA Formal Ethics Op. 10-457 (2010) (warnings on a firm's website can be used to avoid a misunderstanding by the website visitor that a client-lawyer relationship has been created, the visitor's information will be kept confidential, legal advice has been given, or that the lawyer will be prevented from representing an adverse party); Cal. Ethics Op. 2005-168 (2005) (disclaimer that "confidential relationship" would not be formed was not enough to waive confidentiality, because it confused not forming client-lawyer relationship with agreeing to keep communications confidential); D.C. Ethics Op. 316 (2002) (lawyers may take part in online chat rooms and similar communications with Internet users seeking legal information; to avoid creating an attorney-client relationship, lawyers should avoid giving specific legal advice); Ill. Ethics Op. 96-10 (1997) (lawyers participating in chat rooms or other online services that could involve offering personalized legal advice to anyone who happens to be connected to the service, should be mindful that the recipients of such advice are the lawyer's clients, with the benefits and burdens of that relationship); Iowa Ethics Op. 07-02 (2007) (where law firm's marketing materials suggest that the lawyer is available and expects to receive information regarding the matter from the prospective client in confidence, the lawyer cannot represent a party adverse to the prospective client if the lawyer receives confidential material from the prospective client; however, where all the lawyer did was publish his/her phone number in the marketing materials, no reasonable person would believe that he/she may send confidential information to the lawyer); Mass. Ethics Op. 2007-01 (2007) (absent an effective disclaimer, a lawyer who receives unsolicited information from a prospective client through an email link on a firm website must hold the information in confidence even if the lawyer declines the representation); Nev. Ethics Op. 32 (2005) (generally, an attorney-client relationship cannot be created as the result of the unilateral act of the prospective client, such as the sending of an unsolicited letter containing confidential information; however, an attorney who advertises or maintains a website may be deemed to have solicited the information from the prospective client, thereby creating a reasonable expectation on the part of the prospective client that the attorney desires to create an attorney-client relationship); N.H. Ethics Op. 2009-10/1 (2010) (firm that invited emails from the public on its website should set up procedures to minimize risk that emails will create a disqualifying conflict); N.J. Ethics Op. 712 (2008) (nonprofit trade association that sets up legal hotline staffed by attorneys to provide limited legal services to its members may not disclaim the formation of an attorney-client relationship, as it is likely such a relationship will arise in the course of the provision of services by attorneys staffing the hotline); N.M. Ethics Op. 2001-1 (2001) (appropriate disclaimers of attorney-client relationship should accompany any response to listserve message board, but any response that would suggest to a reasonable person that, despite disclaimer, relationship is being or has been established, would negate the disclaimer); N.Y. Ethics Op. 899 (2011) (lawyer may provide general answers (but not individual advice) in response to legal questions from laypersons on real-time or interactive social sites on the Internet, but the lawyer may not engage in "solicitation" absent compliance with Rule 7.3. If a person initiates a request on site to retain the lawyer, the lawyer may respond with a private written proposal outside the site so that persons who did not request the proposal may not see it); N.Y.C. Ethics Op. 2001-1 (2001) (if the web site does not adequately warn that information transmitted to the firm will not be treated as confidential, information should be held in confidence by the firm receiving the information and not disclosed to or used for the benefit of the other client even though the firm declines to represent the potential client); N.C. 2011 Formal Ethics Op. 8 (2011) (Use of live chat support services on a law firm's website is permitted, but the law firm must exercise precautions to ensure that visitors who participate in a live chat session are not misled to believe that they are conversing with a lawyer if such is not the case and that the nonlawyer agent does not give any legal advice. The firm should also be wary of creating an "inadvertent" lawyer-client relationship and should be mindful of its duties to prospective clients under Rule 1.18(c)); N.C. 2000 Formal Ethics Op. 3 (2000) (lawyers who do not want to create client-lawyer relationships on law firm message board should use specific disclaimers on any communications with inquirers, but substantive law will determine whether client-lawyer relationship is created); Ohio Ethics Op. 99-9 (1999) (attorneys who answer legal questions for a fee posed by visitors to firm's website, are subject to same constraints that govern other methods of delivering legal services, including requirements of conflict checks, competence, and confidentiality); Pa. Ethics Op. 2010-6 (2010) (Rule 7.3 does not categorically bar use of social media for solicitation purposes where the prospective clients to whom the lawyer's communication is directed have the readily exercisable ability to ignore the lawyer's overture); S.C. Ethics Op. 12-03 (2012) (Lawyer may participate in legal information websites that complies with communications and advertising rules, but only with a specific caution against inadvertently forming an attorney-client relationship by offering more than basic information of general

to legal questions posed in a public setting, such as legal seminars or radio call-in shows, do not establish an attorney-client relationship.[107] Initial contacts with a prospective client may also create disqualifying conflicts.[108] However, such contacts may not result in disqualification if the person was not genuinely seeking legal services from the lawyer, and instead attempting to disqualify the lawyer from engagement by an opponent ("taint shopping").[109]

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applicability.); S. Dak. Ethics Op. 2002-2 (2002) (firm website that invites viewers to send email through jump site creates expectation of confidentiality); Tenn. Ethics Op. 2017-F-162 (2017) (ombudsman attorney employed by State workers compensation department may give limited legal advice to pro se litigants concerning basic legal principles, standard of proof and the elements of the claims and defenses of the employer, without creating an attorney-client relationship); Tex. Ethics Op. 651 (2015) (law firm need not include disclaimers in its website, but if the website solicits communications from potential clients without an effective warning notice, the firm may be required to treat the sender's information as confidential); Vt. Ethics Op. 2000-10 (2000) (a lawyer who discloses a potential conflict of interest to a caller who sought to retain the lawyer and divulges the general nature of an employer-employee disagreement, potential litigation and the name of the employer, is not disqualified from representing the institutional client because the lawyer involved explained to the caller that a conflict existed and that the caller would have to seek legal representation elsewhere; the lawyer may not then inform the institutional client of the call or its content); Va. Ethics Op. 1842 (2008) (Lawyer does not owe confidentiality duty to a person who unilaterally emails confidential information to the firm at the lawyer's address posted to the firm's website or by leaving a voicemail using the firm's public listing in the telephone directory.). *Cf.* ABA Formal Ethics Op. 473 (2016) (Lawyer receiving subpoena or other process relating to the representation of a client should follow client's direction and assert reasonable objections to disclosure; if client cannot be located, the attorney must assert nonfrivolous objections on client's behalf.).

[107] *See* Cal. Ethics Op. 2003-161 (2003) (communication to an attorney may result in an obligation to preserve confidentiality if an attorney-client relationship is created by the contact or the attorney's words or actions induce a reasonable belief that the speaker is consulting the attorney in confidence in his professional capacity to retain the attorney or to obtain legal services); Cal. Ethics Op. 2003-164 (2003) (when a segment of the public is present, such as a radio call-in show, an attorney-client relationship will not be formed when an attorney answers specific legal questions posed by persons with whom the attorney has not previously established an attorney-client relationship; by taking care when answering specific legal questions in such a setting and by use of appropriate disclaimers, an attorney can ensure that the persons posing the questions do not have a reasonable expectation that an attorney-client relationship has been formed or that their communications are confidential); N.Y. Ethics Op. 833 (2009) (attorney not ethically required to respond to unsolicited letters from incarcerated persons seeking legal representation); R.I. Ethics Op. 2024-01 (2024) (attorney may help organize and/or moderate a penal on addressing housing needs where attorney participates as an interested private citizen, not as an attorney, and attorney would not introduce himself as an attorney, market his firm's services, provide legal advice or attempt to solicit clients from among panelists or attendees).

[108] *See Barton v. United States Dist. Ct.*, 410 F.3d 1104 (9th Cir. 2005) (disclaimer in law firm's questionnaire stating that questionnaire did not form an attorney-client relationship did not waive confidentiality; therefore, individuals who completed questionnaire were entitled to prevent disclosure of questionnaire; communications to prospective clients covered by attorney-client privilege regardless of whether lawyer was retained, the word confidentiality was not in the disclaimer or questionnaire and the text in disclaimer was confusing); *EEOC v. Peters' Bakery*, 125 Fair Empl. Prac. Cases (BNA) 1643 (N.D. Cal. 2014) (employer's counsel disqualified due to a conflict of interest arising from a telephone call he had with charging party when she was seeking legal advice regarding the action; he spoke directly with charging party concerning her claims and thus had a direct professional relationship with her before he switched sides); Wis. Ethics Op. EF-10-03 (2010) (When lawyer has received information from a prospective client that could be significantly harmful to the prospective client, the lawyer may not thereafter represent a client whose interests are adverse to the prospective client in the same or a substantially related matter. Lawyers may avoid such conflicts by limiting the information received and seek a prospective client's agreement that consultations will not result in disqualification). *Cf. Zaug v. Virginia State Bar ex rel. Fifth Dist.—Section III Comm.*, 737 S.E.2d 914 (Va. 2013) (Attorney did not violate ex parte communication rule when, after realizing that caller was a plaintiff in action in which his firm represented defendant, attorney did not hang up immediately, but listened a few seconds more to caller's emotional outburst before telling her that his firm could not help her and she needed to contact her own counsel).

[109] *See* Ill. Ethics Op. 12-18 (2012); Mont. Ethics Op. 010830 (2000); N.J. Ethics Op. 703 (2006); N.Y. Ethics Op. 923 (2012); Tex. Ethics Op. 676 (2018). *Cf.* N.Y. Jud. Law §498 (extends privilege to communications between prospective client and lawyer referral service).

II. LAWYER AS WITNESS ISSUES

Attorneys that conduct internal investigations or otherwise involved in employment disputes before actual litigation arises may face the potential of being later disqualified as a witness.[110] Note that the attorney-witness rule in most jurisdictions only requires the disqualification of the individual lawyer and not the lawyer's firm,[111] although a few courts have required disqualification of the firm as well.[112] Moreover, in most jurisdictions, the lawyer-witness rule only disqualifies the lawyer from acting as an advocate at trial; pretrial litigation activities—including writing briefs, planning, and trial strategy—are not barred.[113] Some courts, however, have disqualified

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[110] *See* ABA MODEL RULE 3.7 (a lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except, where the testimony relates to an uncontested issue or to the nature and value of legal services rendered in the case, or disqualification of the lawyer would work substantial hardship on the client); R.I. Ethics Op. 2025-10 (2025) (attorney may not serve as expert witness in same matters in which he represents clients as an advocate); Wis. Ethics Op. EF-25-01 (2025) (Lawyer may not testify as a fact witness at trial at which they also appear as an advocate for a client. Nor, if they are "likely to be a necessary witness" may the lawyer choose to forego testifying to continue in an advocacy role. A witness is necessary if their testimony is critical for the client's case and is unavailable from other sources. Because the rule protects the integrity of the justice system rather than only the interests of the parties, informed consent does not prevent disqualification of the lawyer or exclusion of their testimony). *See also Hambrick v. Union Twp.*, 81 F. Supp. 2d 876 (S.D. Ohio 2000) (attorney who investigated alleged sexual misconduct at police department disqualified from serving as counsel for victims of alleged misconduct in action against police department; there was good possibility that attorney would be called as witness and that his testimony might be detrimental, prejudicial or contrary to plaintiffs' claims); *Ayus v. Total Renal Care, Inc.*, 48 F. Supp. 2d 714 (S.D. Tex. 1999) (defendant attorney who wrote letters to plaintiff before plaintiff's discharge disqualified where the truth of the underlying facts stated in letter were squarely at issue; attorney's firm was not disqualified, nor is attorney precluded from participating in pretrial proceedings, with the exception of representing client at his own deposition).

[111] *See* ABA MODEL RULE 3.7(b); *Legacy Villas at La Quinta Homeowners Ass'n v. Centex Homes*, 626 F. App'x 679 (9th Cir. 2015) (lawyer-witness rule did not support disqualification of law firm from representing homeowner association against Centex since Centex only identified one of the firm's lawyers as a witness and the rule does not prohibit an attorney from testifying in a trial where an attorney from the same firm will testify); *Meyer v. Iowa Mold Tooling Co.*, 141 F. Supp. 2d 973 (N.D. Iowa 2001) (attorneys and firm representing employer in employee's discrimination case could not be disqualified based on employee's intent to call former member of firm as witness); R.I. Ethics Op. 2000-02 (2000) (attorney may not continue to represent agency if he/she will be a witness in the case; however, attorney may continue to represent agency in the matter where other lawyers for agency are witnesses, provided the lawyer is not otherwise precluded under conflict of interest rules); *Arrowood Indem. Co. v. Thompson*, 2024 WL 115509 (W.D. Wash. Jan. 10, 2024) (lawyer-witness rule disqualifies individual lawyer, but not his firm, from continuing as defendant's trial advocate unless firm otherwise disqualified on conflict-of-interest grounds).

[112] *See* Ohio Ethics Op. 2003-5 (2003) (it is improper for a law firm director or an assistant law director to act as an advocate in a trial in which another attorney in the law director's office will testify as a witness on behalf of the city unless permitted to do so under one of the exceptions in DR 5-101(B)(1) through (4), or under compelling and extraordinary circumstances recognized by a court); *Reed Elsevier, Inc. v. thelaw.net Corp.*, 197 F. Supp. 2d 1025 (S.D. Ohio 2002) (lawyer witness rule disqualifies entire law firm and all other lawyers in it). *Cf.* Ohio Ethics Op. 2020-05 (2020) (lawyer may act as advocate in a trial in which another lawyer in office will testify as a witness only when the testimony is permitted by common law, if disqualification of the advocate would work a substantial hardship on the city, or when the testimony relates to uncontested issues or the nature and value of legal services).

[113] *See, e.g.,* ABA Informal Ethics Op. 1525 (1989) (lawyer-witness may represent client in pretrial proceedings, provided client consents after consultation and lawyer believes representation will not be adversely affected by the lawyer's interest in the expected testimony); *Culebras Enters. Corp. v. Rivera-Rios*, 846 F.2d 94 (1st Cir. 1988) (lawyers performing substantial pretrial work did not violate advocate-witness rule because they did not plan to act as advocates at trial if called as witnesses); *Murray v. Metro. Life Ins. Co.*, 583 F.3d 173 (2d Cir. 2009) (Even if some portion of testimony of four lawyers with law firm representing insurer would be adverse to the insurer in policyholders' action challenging its demutualization, disqualification of law firm by imputation was not required under New York's witness-advocate rule; testifying lawyers would not be trying the case to the jury, and the insurer,

counsel at the pretrial stage,[114] and some jurisdictions hold that the rule does not apply unless the attorney is a necessary witness for his own client.[115]

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a sophisticated client with sophisticated in-house counsel, wished to keep the law firm as its trial counsel.); Mont. Ethics Op. 140519 (2017) (lawyer-witness rule does not disqualify lawyer-witness from participating in pretrial matters; disqualification is not automatically imputed to partners and associates of the disqualified lawyer-witness at trial)). *Accord: Petrilli v. Drechsel*, 94 F.3d 325, 329 (7th Cir. 1996); *Fognani v. Young*, 115 P.3d 1268 (Colo. 2005); D.C. Ethics Op. 228 (1992); *Nguyen v. Louisiana State Bd. of Cosmetology*, 2014 WL 6801797 (M.D. La. Dec. 2, 2014); *Smaland Beach Ass'n v. Genova*, 959 N.E.2d 955 (Mass. 2012); Mich. Ethics Op. RI-299 (1997); *Practice Mgmt. Sols., LLC v. Eighth Judicial Dist. Ct.*, 2016 WL 2757512 (Nev. May 10, 2016); N.C. 2011 Formal Ethics Op. 1 (2011); S.C. Ethics Op. 99-03 (1999); *Anderson v. Koch Oil Co.*, 929 S.W.2d 416 (Tex. 1996). *Compare* Ill. Ethics Op. 11-06 (2011) (lawyer disqualified from representing client at trial because he is likely to be a necessary witness must stop the representation once the trial commences); Ill. Ethics Op. 11-05 (2011) (same).

[114] *See Gen. Mills Supply Co. v. SCA Servs., Inc.* 697 F.2d 704, 716 (6th Cir. 1982).

[115] *See Horaist v. Doctor's Hosp. of Opelousas*, 255 F.3d 261 (5th Cir. 2001) (plaintiff's attorney not disqualified from representing plaintiff in employment discrimination action on ground that he could be called to testify as to nature of plaintiff's intimate relationship with attorney and the fact that she did not reveal her harassment to him at the time; attorney was not a necessary witness since his testimony was cumulative of information that was available from another source, and plaintiff had no interest in discrediting attorney's testimony because his testimony corroborated hers); *Macheca Transp. Co. v. Phila. Indem. Co.*, 463 F.3d 827 (8th Cir. 2006) (disqualifying attorney as insured's counsel was an abuse of discretion, where district court considered only whether attorney's testimony was relevant, without considering whether attorney was the only witness available to testify in support of insured's vexatious refusal to pay claim against all-risk insurer); *EEOC v. Bardon, Inc.*, 108 Fair Emp. Prac. Cases (BNA) 552 (D. Md. 2010) (attorney who conducted sexual harassment investigation for defendant corporation disqualified under the lawyer-witness rule from acting as an advocate at trial); *Helena Country Club v. Brocato*, 535 S.W.3d 272 (Ark. 2018) (trial court erred in disqualifying counsel for defendant based on lawyer-witness rule because even assuming his testimony would be prejudicial to plaintiff, plaintiff did not demonstrate that attorney's testimony was material or truly necessary to any of the issues being litigated or that the evidence sought to be admitted through the attorney was unobtainable elsewhere); *Weigel v. Farmers Ins. Co.*, 158 S.W.3d 147 (Ark. 2004) (attorney-witness rule applies in cases where the attorney will be called to testify as witness for the opposing party provided the attorney's testimony is material to the determination of the issues being litigated, the evidence is unobtainable elsewhere, and the testimony is or may be prejudicial to the testifying attorney's client); *Zurich Ins. Co. v. Knotts*, 52 S.W.3d 555 (Ky. 2001) (affidavit filed by accident victims' attorney in opposition to a motion for summary judgment in insurance bad faith claim; the limited and specialized use of an affidavit by an attorney, who does not testify at trial for his clients, provides an insufficient justification to allow opposing counsel to deprive a party of its right to counsel of its choice); *Smaland Beach Ass'n v. Genova*, 959 N.E.2d 955 (Mass. 2012) (court could not disqualify property owner's attorney as a necessary witness without determining whether information sought from attorney could be adduced through other means); *Pacheco v. Libby, O'Brien, Kingsley and Champion, LLC*, 315 A.3d 725 (Me. 2024)(affirming disqualification of attorney and his firm from continuing as counsel for plaintiff where attorney was likely to be a necessary witness for plaintiff where, among other things, attorney's action or inactions in the treatment and disclosure of plaintiff's psychotherapy records are central to the plaintiff's case and the attorney alone has this knowledge, making his testimony relevant, material and unobtainable from other sources; plaintiff's demand for jury trial created a greater risk of confusion because a jury may be required to distinguish between attorney's advocacy and his testimony); *In re Sanders*, 153 S.W.3d 54 (Tex. 2004) (disqualification of attorney under the lawyer-witness rule was not required where other evidence could establish nature and extent of the husband's obligation to the attorney). *Cf.* N.Y.C. Ethics Op. 2005-3 (2005) (no per se bar to prevent lawyer from voluntarily testifying about a former client, but if the testimony would involve revelation of a "confidence" or "secret," the lawyer should attempt to secure the former client's consent before agreeing to testify); Utah Ethics Op. 04-02 (2004) (if lawyer, under the facts of the case, is a "necessary witness" in the litigation, and disqualification would not work a substantial hardship on the client, she must withdraw before trial); N.C. 2011 Formal Ethics Op. 2011-1 (2011) (lawyer-litigant/witness not automatically disqualified from representing himself); *In re Keenan*, 501 S.W.3d 74 (Tex. 2016) (plaintiff's attorney should not be forced to withdraw under the lawyer-witness rule, where the trial court's rulings made the lawyer's knowledge the only way to present the factual support on a key issue in the case; mandamus issued to permit limited discovery of the contents of the documents at issue, which avoided the attorney disqualification issue).

III. THE ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege protects against disclosure of confidential communications between an attorney[116] and his/her client.[117] Because lawyers representing corporations and organizations owe their allegiance to the entity, and not to any of its officers, directors or employees,[118] it must be determined which individuals within the entity are included within the scope of the attorney-client privilege.

A. The Tests for Determining Corporate "Client Confidences."

Courts have developed two different approaches to determining which communications between a lawyer and members of a corporation or organizational party are protected from disclosure by the attorney-client privilege. Under the minority **"control group"** test, the privilege applies only to persons in a position to control or take substantial part in a decision about any action that the corporation could take upon advice of counsel.[119] In *Upjohn Co. v. United States*, 449 U.S. 383 (1981), the Supreme Court rejected the "control group" test and applied a balancing approach consistent with the **"subject matter"** test. Under the subject matter test, the corporate attorney-client privilege applies to an employee's communication if: (1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.[120] Although

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[116] Communications made to an individual in the reasonable, but mistaken, belief that the individual was a licensed attorney may also be protected. *See, e.g., Anwar v. Fairfield Greenwich Ltd.*, 982 F. Supp. 2d 260 (S.D. N.Y. 2013) (Magistrate judge's ruling that Dutch bank could not have reasonably believed its unlicensed, in-house attorney was in fact an attorney, as would provide an exception under United States law to rule that attorney-client privilege did not protect communications with non-attorneys, was not clearly erroneous or contrary to law, where in-house attorney was not, and never had been, licensed in any jurisdiction, and he neither held himself out to be a licensed attorney nor performed acts suggesting to bank that he was admitted to the Netherlands bar.). *See also Pentacon BV v. Vanderhaegen*, 2025 WL 2318647 (S.D. N.Y. Aug. 11, 2025) (communications between plaintiff's in-house counsel and plaintiffs are privileged under New York law even though in-house counsel relinquished her law license, as required by Belgian law in connection with transitioning to an in-house position); *Wultz v. Bank of China*, 979 F. Supp. 2d 479 (S.D. N.Y. 2013) (Chinese bank's in-house documents governed by U.S. privilege law, except that documents which were actually communications from and to licensed attorneys, were not privileged; because Chinese law did not require in-house counsel to be licensed, there can be no "reasonable mistake" as to whether an in-house counsel served as a licensed attorney) (U.S. privilege law applies to all communications that properly "touch base" with U.S., legal matters, even if those matters are unrelated to the present litigation, and that it may assert privilege with respect to internal investigation if it proceeded at the direction of counsel for the purpose of obtaining legal advice); *Gucci Am., Inc. v. Guess?, Inc.*, 2011 WL 9375 (S.D. N.Y. Jan. 3, 2011) (communications between corporation and its in-house counsel privileged even though at the time of the communications counsel was an "inactive" member of the California bar; attorney-client privilege attaches to confidential communications made to an individual in the genuine, but mistaken, belief that the individual is an attorney).

[117] *Upjohn Co. v. United States*, 449 U.S. 383, 395-96 (1981).

[118] ABA MODEL RULE 1.13; ABA Model Code EC 5-18.

[119] *See Consolidation Coal Co. v. Bucyrus-Erie Co*, 432 N.E.2d 250 (Ill. 1982). *See S. Capitol Bridgebuilders v. Lexington Ins. Co.*, 2022 WL 444098 (D.D.C. Feb. 14, 2022) (applying Illinois control group test); *King v. Broadband of Indiana, LLC*, 2024 WL 406637 (S.D. Ind. Feb. 2, 2024) (although under Illinois law, privilege extends to communications between an insured and its insurer, communication between insurer and insured's office manager not privileged because she was not shown to be within the insured's control group).

[120] *Upjohn Co.*, 449 U.S. at 395-96, *citing with approval Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 609 (8th

1977). *See Neece v. City of Chicopee*, 106 F.4th 83 (1st Cir. 2024) (advice by city's attorney to the mayor regarding recommendation on a settlement and communications among the city attorneys and city council members in executive session were privileged attorney-client communications); *Fletcher v. ABM Bldg. Value*, 775 F. App'x 8 (2d Cir. 2019) (District court did not abuse its discretion in denying Plaintiff's motion to depose the two non-lawyer members of ABM's Termination Review Committee (TRC) because TRC's discussions and communications were made to ABM counsel at the direction of Defendant's VP of HR, to secure legal advice from counsel and thus were clearly privileged); *In re Cnty. of Erie*, 473 F.3d 413 (2d Cir. 2007) (emails between assistant county attorney and county officials were protected from disclosure by the attorney-client privilege; each of the emails was sent for the predominant purpose of soliciting or rendering legal advice since they conveyed to the officials responsible for formulating, implementing and monitoring county's correctional policies, a lawyer's assessment of the Fourth Amendment requirements and provided guidance in crafting and implementing alternative policies for compliance); *In re Ford Motor Co.*, 110 F.3d 954, 964-65 (3d Cir. 1997) (minutes of meeting attended by top-level executives of automobile manufacturer, in which general counsel briefed attendees about a report he had drafted regarding vehicle that was subject of plaintiff's product liability claims, were protected by attorney-client privilege under either Pennsylvania or Michigan law, as ultimate decision at meeting was reached only after legal implications of doing so were discussed, and disclosure of documents would reveal legal advice secured by attendees); *In re Search Warrant Issued June 13, 2019*, 947 F.3d 159 (4th Cir. 2019) (Law firm demonstrated that it was likely to succeed on merits of its invocation of attorney-client privilege and attorney work-product doctrine, as factor for obtaining preliminary injunction enjoining inspection of privileged attorney-client materials by a filter team that received ex parte approval from magistrate judge and that was comprised of prosecutors and non-lawyer federal agents, in contrast to inspection by magistrate judge or special master, for materials that had been seized pursuant to search warrant issued by magistrate judge during criminal investigation of law firm's partner and a client represented by partner; magistrate judge's legal errors in approving of filter team and its protocols included assigning judicial functions to filter team in violation of constitutional separation of powers, giving such approval in ex parte proceedings before search and seizure, and failing to properly weigh foundational principles that protected attorney-client relationships); *Exxon Mobil Corp. v. Hill*, 751 F.3d 379 (5th Cir. 2014) (Under Louisiana law, memo that recorded the advice of oil company's in-house lawyer regarding how to respond to another company's request for certain test results during contract negotiations was protected by the attorney-client privilege; document was prepared during contract negotiations in which both sides were assisted by legal counsel, the negotiations involved several legal issues, including indemnity for downstream tort claims, storage and handling of nuclear residue, licensure, trade secrets, and other issues, and the manifest purpose of the memo was to deal with any legal liability that could stem from under-disclosure of data, hedged against any liability that could occur from any implied warranties during complex negotiations); *S. Fifth Towers, LLC v. Aspen Ins., UK*, 763 F. App'x 401 (6th Cir. 2019) (reports and e-mails prepared or received by insurer's adjusters, claims administrators, counsel, and fraud investigators were protected by attorney-client privilege, in action by insured for breach of policy when it declined to cover demolition and repair costs in connection with water damage from rainstorm, since each document included language indicating that it contained confidential communications with insurer's attorney regarding impending litigation by insured, and fact that documents were drafted before insurer formally denied insured's claim and before insured brought contract action did not suggest that documents had no legal purpose); *BKWSpokane, LLC v. FDIC*, 663 F. App'x 524 (9th Cir. 2016) (opinions, advice, and concurrences issued by FDIC's in-house counsel to those ultimately responsible for making determinations on behalf of FDIC were protected under the attorney-client privilege); *Sprague v. Thorn Ams., Inc.*, 129 F.3d 1355 (10th Cir. 1997) (legal memo allegedly addressing employer's disparate treatment of women prepared for higher management by in-house attorney acting within scope of employment protected by attorney-client privilege, even if communications do not contain confidential matters; plaintiff's affidavit by management employee referring to contents of memo did not waive privilege; power to waive privilege rests with corporation's management and is normally exercised by its officers and directors); *Reyes v. EPA*, 991 F. Supp. 2d 20 (D.D.C. 2014) (emails between agency counsel and agency staff were subject to attorney-client privilege, and thus withheld from disclosure under FOIA; emails pertained to an issue for which agency sought the legal advice of its lawyers, and emails were kept confidential as they were limited to those responsible for developing agency's position on the subject of the communications); *Howell v. Joffe*, 483 F. Supp. 2d 659 (N.D. Ill. 2007) (lawyer for defendant left voice mail message on answering machine of former parochial school student who had sued church and diocese for allege childhood sexual abuse, then incorrectly hung up phone and proceeded to speak with an employee of the defendant about the plaintiff; the communication was protected from disclosure under the attorney-client privilege, to the extent the message inadvertently memorialized prior confidential conversation between defense counsel and clergy; prior conversation involved, *inter alia*, comparison between former student and others who had made similar allegations.);

Upjohn and its progeny are only binding on federal courts,[121] many state courts have adopted some variant of the subject matter test.[122] Attorneys conducting employee interviews that are intended

Neighborhood Dev. Collaborative v. Murphy, 233 F.R.D. 436 (D. Md. 2005) (the "intermediary doctrine" protected the attorney-client privilege with respect to communications between the law firm representing defendant and financial advisor, as these privileged communications were made in confidence for the purpose of obtaining legal advice from the law firm); *Gifford v. Target Corp.*, 723 F. Supp. 2d 1110 (D. Minn. 2010)(E-mail sent by employer's senior manager to her supervisor with a courtesy copy to employer's in-house counsel and another employee, summarizing conversation between manager and outside counsel as to selection of store team leaders, was entitled to attorney-client privilege in employees' FLSA action against employer; manager, pursuant to her supervisors' discretion, included counsel on communication relating to matter affecting scope of manager's duties and requested thoughts of in-house counsel, and e-mail also described content of a previous privileged discussion manager had with outside counsel regarding legal analysis and strategy.). *See In re Recall of Olsen*, 579 P.3d 1097 (Wash. 2025) (the attorney-client privilege exception to the open meeting act is available when the relevant government actor (1) discusses with counsel (2) actual or potential litigation (3) where public knowledge of the discussion is likely to cause adverse legal or financial consequence.).

[121] Federal Rule of Evidence 501 provides that the "common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege," unless otherwise provided by the U.S. Constitution, a federal statute, or Supreme Court rule. Rule 501 further states that "in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision." Moreover, when the evidence that is the subject of an asserted privilege is relevant to federal claims raised in a federal action, courts usually hold that federal law governs the privilege. *See, e.g., In re EEOC*, 207 F. App'x 426, 431 (5th Cir. 2006) ("With respect to the attorney-client privilege, we note that because this case concerns the adjudication of federal rights, the federal common law of attorney-client privilege applies."); *First Fed. Sav. & Loan Ass'n of Pittsburgh v. Oppenheim, Appel, Dixon & Co.*, 110 F.R.D. 557, 560 (S.D.N.Y. 1986) ("When evidence that is the subject of an asserted privilege is relevant to both federal and state law claims, the courts have consistently held that federal law governs the privilege.").

[122] *See Samaritan Found. v. Goodfarb*, 862 P.2d 870 (Ariz. 1993) (rejecting control group test); *Fireman's Fund Ins. Co. v. Super. Ct.*, 196 Cal. App. 4th 1263 (2011) (Attorney-client privilege precluded insurer's attorney from being compelled to answer deposition questions as to (a) what she told a partner in her firm in order for him to write a personal check to a witness in an investigation of insured's property damage claims, (b) whether attorney explained to partner who the witness was before partner wrote the check, and (c) how another attorney at the firm drafted a witness's declaration without speaking to the witness, in an investigation of insured's property damage claims; the questions sought the other attorney's evaluation of the witnesses and legal opinions involved in the drafting of the declaration and are not discoverable, absent evidence that those legal opinions had been shared with anyone outside the firm.); *Lash v. Freedom of Info. Comm'n*, 14 A.3d 998 (Conn. 2011) (Communications between assistant town attorney and town's first selectman related to legal advice, as required to establish that the communications were exempt, pursuant to attorney-client privilege, from disclosure requirements of FOIA; communications discussed strategy concerning pending litigation arising from request to town board of estimate and taxation for geographical information system data, stated that attorney took action in response to a suggestion by one of the town official, reported the results of the action, and offered a strategic analysis of those results.); *Worley v. Cent. Fla. YMCA,* 228 So.3d 18 (Fla. 2017) (Question of whether attorney referred client to a particular physician for treatment following slip and fall was protected by attorney-client privilege; even though client's treatment by particular physician was underlying fact, answering whether attorney requested client see certain physician required client to disclose part of communication that was held between client and attorney); *Ford Motor Co. v. Hall-Edwards*, 997 So.2d 1148 (Fla. App. 2008), *review denied*, 14 So.3d 241 (Fla. 2009) (Corporate counsel database was a mechanism for manufacturer's inside and outside counsel to communicate among each other, exchanging thoughts, opinions, strategies, mental impressions, and advice regarding defense of lawsuits and claims solely for the purpose of, and in furtherance of, the rendition of legal services to manufacturer, and, thus, was confidential communication immune from discovery under attorney work product and attorney-client privileges, where opposing party did not challenge manufacturer's affidavits or testimony attesting to privileges); *Keefe v. Bernard*, 774 N.W.2d 663 (Iowa 2009) (rejecting "control group" test); *Lexington Pub. Library v. Clark*, 90 S.W.3d 53 (Ky. 2002) (definition of "representative of the client" in Rules of Evidence was intended to embody the principles enunciated in *Upjohn*); Mich. Ethics Op. RI-348 (2010) (lawyer may rely on nonlawyer assistant as an intermediary to gather information from client and then relay the lawyer's advice back to the client, provided lawyer takes steps to prevent the assistant from elaborating or adding to the lawyer's advice); *ATV Watch v. New Hampshire Dep't of Transp.*, 20 A.3d 919 (N.H. 2011) (Documents related to discussions

to be covered by the attorney-client privilege should consider having the employee read and sign

between attorney for Department of Transportation and attorney for Department of Resources and Economic Development were made for purposes of facilitating rendition of professional legal services to DOT, and thus, were privileged attorney-client communications, for purposes of petitioners' request to DOT for records relating to use of all-terrain vehicles on former railroad corridors converted to rail trails); *Ramirez v. Marsh*, 590 P.3d 768 (N.M. 2025) (immigrant law center's client files contained attorney-client privileged information that could not be disclosed); *State ex rel. Hogan Lovells U.S., L.L.P. v. Ohio Dep't of Rehab. and Corrs.*, 179 N.E.3d 1150 (Ohio 2021) (Document authored by chief counsel for the Department of Rehabilitation and Correction, identifying drugs and combinations of drugs that could be used in carrying out lethal injections and describing the drug protocols used by other states, was properly withheld under the attorney-client privilege in response to a request under the Public Records Act for records relating to the Department's supply of drugs for its use in lethal injections, where the document communicated information and advice to the Department concerning how the Department could carry out executions); *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 824 N.E.2d 990 (Ohio 2005) (communications by attorney-employees of State departments are subject to the attorney-client privilege.); *Crimson Trace Corp. v. Davis Wright Tremaine LLP*, 326 P.3d 1181 (Ore. 2014) (Communications between law firm's lawyers and in-house counsel or quality assurance committee, concerning how actual and potential conflicts of interests between the lawyers and a former client should be handled in regard to litigation by a competitor against former client and one of the lawyers, were between a client, i.e., the two lawyers, and the client's lawyers, and were shielded by the attorney-client privilege from disclosure in former client's legal malpractice action against firm.); *Gillard v. AIG Ins. Co.*, 15 A.3d 44 (Pa. 2011) (Attorney-client privilege operates in a two-way fashion to protect confidential client-to-attorney or attorney-to-client communications made for the purpose of obtaining or providing professional legal advice); *Tobaccoville USA, Inc. v. McMaster*, 692 S.E.2d 526 (S.C. 2010) (Attorney-client privilege applied to documents between Attorney General (AG) and National Association of Attorneys General concerning cigarette importer's status as tobacco product manufacturer under Master Settlement Agreement (MSA) on recovery of tobacco related health care costs, if the documents contained confidential communications pertaining to legal matters; although AG had not retained Association attorneys, AG was paid member and solicited Association attorneys for legal advice and consultation on matters relating to the tobacco litigation, the MSA, subsequent enforcement of the MSA, and tobacco regulation.); *Castillo v. Rex*, 715 S.W.3d 321 (Tenn. 2025) (Chief operating officer (COO) of hospital, a healthcare organization, waived hospital's privilege under quality improvement committee (QIC) statute with regard to statements made by COO and other hospital officers in meeting with patient's surviving wife concerning treatment given or not given to patient in hospital's emergency room, as necessary for such statements, which arose from QIC review, to be discoverable in wife's healthcare liability action against hospital, physicians, and others; COO voluntarily, intentionally, and explicitly disclosed statements to wife, such that they were no longer privileged or confidential, and COO had authority to waive privilege on hospital's behalf.); *In re E.I. DuPont de Nemours and Co.*, 136 S.W.3d 218 (Tex. 2004) (attorney-client privilege may apply to communications between attorneys and employees who are not executives or supervisors); *Moler v. CW Mgmt. Corp.*, 190 P.3d 1250 (Utah 2008) (For a person to qualify as a representative of the client, for purposes of attorney-client privilege, there is no requirement that the person must be retained to give legal advice or that the person's services must be essential to legal representation of the client; instead, the district court need only determine whether the individual was "one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client, or one specifically authorized to communicate with the lawyer concerning a legal matter"); *Hermanson v. Multicare Health Sys., Inc.* 475 P.3d 484 (Wash. 2020) (Corporate attorney-client privilege allowed hospital to have ex parte communications with non-party physician that treated patient, limited to facts of the alleged negligent event, after patient brought action against hospital for disclosing high blood alcohol level to police; even though physician was hospital's independent contractor, rather than employee, and even though physician and patient had physician-patient privilege, physician maintained principal-agent relationship with hospital and owed hospital duties of loyalty, obedience, and confidentiality, as physician performed work on behalf of hospital and had his own office inside hospital. Corporate attorney-client privilege allowed hospital to have ex parte communications with non-party nurses and social worker that treated patient, limited to facts of the alleged negligent event, after patient brought action against hospital for disclosing high blood alcohol level to police; even though patient had nurse-patient and social worker-client privilege, policies underlying such privileges were identical to physician-patient privilege, which also did not preclude ex parte communications between hospital and treating physician).

an *Upjohn* warning statement before starting the interview.[123]

Privileged communications can be found in engagement letters;[124] emails,[125] litigation hold notices,[126] billing records and invoices,[127] or preliminary drafts of documents containing attorney

[123] A sample statement would read as follows: "I am a lawyer and represent [the company]. This interview is for the purpose of giving legal advice to [the company] and for the purpose of investigating facts about issues raised in [describe proceeding or matter]. Anything you tell me may be disclosed to [the company] and or in connection with the [proceeding or matter]. Unless [the company] specifically authorizes it in writing, I do not represent you personally and I am not authorized to provide you with personal legal advice. This interview is covered by the attorney-client privilege. This means that the things I say to you during this meeting and the things you say to me during this meeting are considered confidential communications between [the company] and its attorneys. Unless specifically authorized by the [general counsel] of [the company], please do not disclose to others what is said during this meeting. You are not prohibited from discussing the fact that we had this meeting; however, you may not disclose the content of what you and I say during this meeting. [The company] will not retaliate against you because you tell me anything unfavorable to [the company] [you may also wish to add: this guaranty of no-retaliation, however, is of course not a grant of immunity of any violation of company policy you may have already committed, if any]. Also, I cannot promise to keep anything you tell me confidential or secret from [the company]. Finally, please let me know if opposing counsel seeks to contact you about this matter."

[124] *See State ex rel. Brinkman v. Bd .of Educ. of Toledo City Sch. Dist.*, 250 N.E.3d 5 (Ohio 2024) (Redacted portions of engagement letter from law firm to school district, related to district's lawsuit against State and Governor challenging certain provisions of budgetary bill creating Department of Education and Workforce, were protected by attorney-client privilege, and thus exempt from disclosure requirement under Public Records Act in response to public records request, where redacted text consisted of legal advice provided by an attorney to the district.).

[125] *See Clover Staffing, LLC v. Johnson Controls World Serv., Inc.*, 238 F.R.D. 576 (S.D. Tex. 2006) (emails from corporate official to other corporate officials were protected by the attorney-client privilege, notwithstanding that none of the officials were attorneys, where emails were sent at the suggestion of the corporate legal department to gather information that could be used by attorneys in negotiating with subcontractor to resolve contract issues; however, PowerPoint slides based on notes taken at the meeting to review the subcontract were not protected by the attorney-client privilege since the documents were created for a business purpose rather than to aid in possible future litigation.); *Pearce v. Coulee City*, 2012 WL 3643676 (E.D. Wash. Aug. 24, 2012) (in wrongful termination lawsuit, privilege applied to: (a) emails from defendant mayor transmitting memo written by him and addressed to the City's retained counsel containing detailed "synopsis" of events that preceded Plaintiff's termination, along with editorial comments by mayor concerning the City's reasons for terminating Plaintiff; and (b) email from mayor to the City Clerk asking for information concerning individuals on Defendants' witness list which was specifically requested by the City's retained counsel and relying the substance of a comment made by counsel concerning legal strategy); *Blumenthal v. Kimber Mfg., Inc.*, 826 A.2d 1088 (Conn. 2003) (firearms manufacturer and its president established that attorney-client privilege applied to insulate corporate email, concerning agreement by another firearm manufacturer with various government agencies and the firearm industry's reaction to it, from disclosure to state attorney general, who sought email in connection with antitrust investigation; counsel to whom email was sent was manufacturer's outside counsel, current employees or officials of manufacturer sent email to counsel, email related to legal advice sought by manufacturer from counsel, given that it could be inferred that manufacturer was anticipating threat of similar litigation, and email was intended to be confidential); *In re JDN Real Estate-McKinney L.P.*, 211 S.W.3d 907 (Tex. App.--Dallas 2006) (single email from CEO and President of city's economic development corporation was protected by the attorney-client privilege, in city's condemnation action to acquire property through eminent domain, as part of a string of emails that were privileged, even though the document itself did not reveal anything privileged, because it is part of the context and subject of the privileged string of emails).

[126] *See Greenberg v. Amazon.com*, 2025 WL 2639221 (W.D. Wash. Sept. 12, 2025) (although litigation hold notices are normally protected by the attorney-client privilege, disclosure of the hold notices may nevertheless be appropriate where there is reason for concern that evidence has been lost).

[127] *See, e.g., Griswold v. Homer City Council*, 428 P.3d 180 (Alaska 2018) (attorney-client privilege applied to portions of attorneys' invoices that revealed attorneys' mental impressions, conclusions, opinions, or legal theories); *Los Angeles Cnty. Bd. of Supervisors v. Super. Ct.*, 2 Cal. 5th 282 (Cal. 2016) (attorney-client privilege does not categorically shield everything in a billing invoice from disclosure; however, invoices for work in pending and active legal matters are so closely related to attorney-client communications that they implicate the heartland of the

legal advice in the form of notations or suggestions[128] (but some courts hold that such drafts are

privilege); *Hewes v. Langston*, 853 So.2d 1237 (Miss. 2003) (although a simple invoice ordinarily is not privileged, itemized legal bills necessarily reveal confidential information and thus fall within attorney-client privilege); *State ex rel. Wells v. Lakota Local Schs. Bd. of Educ.,* 247 N.E.3d 424 (Ohio 2024) (An invoice for a legal service provided to a public-office client is a public record, with the caveat that the narrative portion of the invoice describing the service is protected from disclosure by the attorney-client privilege.); *State ex. Rel. Ames v. Baker, Dublikar, Beck, Wiley & Mathews*, 227 N.E.3d 1159 (Ohio 2023) (narrative portion of an invoice describing the legal service provided is protected from disclosure by the attorney-client privilege). *Compare Dibella v. Hopkins*, 403 F.3d 102 (2d Cir. 2005) (attorney time records and billing statements are not privileged when they do not contain detailed accounts of the legal services rendered); *Bergano v. City of Virginia Beach*, 821 S.E.2d 319 (Va. 2018) (Entry in billing records of city's attorney for trial preparation and document review and trial attendance on a certain date regarding litigation against requester in federal court did not fall within attorney-client and work-product exceptions to disclosure under state public disclosure law); *Hampton Police Ass'n v. Town of Hampton*, 20 A.3d 994 (N.H. 2011) (Descriptive entries in billing invoices from town's outside counsel in underlying arbitration with police association providing only general descriptions of nature of work performed were not per se privileged).

[128] *See, e.g., In re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1037 (2d Cir. 1984) (attorney-client confidentiality surrounding drafts of documents is not waived when the client sends the final draft of a document to another party because the clients have an intention of confidentiality while sharing the drafts with attorneys, which reflects a request for legal advice and that intention is not diminished by the possibility that the final draft of a document may be distributed); *In re City of Dickinson*, 568 S.W.3d 642 (Tex. 2019) (email communications between insurer's counsel and insurer's corporate representative, as well as drafts of the representative's summary judgment affidavit exchanged between himself and counsel, were protected by attorney-client privilege, and thus even though the corporate representative had been designated as a testifying expert, insurer could not be compelled to produce the emails and draft affidavits to city, in city's action against insurer to recover amounts owed under commercial windstorm policy following a hurricane); *Loftin v. Bande*, 258 F.R.D. 31 (D.D.C. 2009) (Draft documents, for purposes of discovery request to former corporate counsel in investors' securities fraud action against corporation, were protected under attorney-client privilege to extent that documents concerned privileged conversations; notes of conversations involving government staff attorney, although allegedly containing attorney's thoughts and mental impressions, simply transcribed unprivileged conversation); *In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.*, 632 F. Supp. 2d 1370 (M.D. Ga. 2009) (Draft letters of intent between seller and manufacturer were protected under the attorney-client privilege where the drafts were prepared by an attorney and reflected legal advice, information contained in the drafts was not disseminated to any third party, and the drafts postdated final letter of intent already produced to patients.); *Dewitt v Walgreen Co*, 2012 WL 3837764 (D. Idaho Sept. 4, 2012) (Preliminary drafts of corporate document are often protected by attorney-client privilege because they may reflect not only client confidences, but also legal advice and opinions of attorneys, all of which is protected by the attorney-client privilege.); *Long v. Anderson Univ.*, 204 F.R.D. 129 (S.D. Ind. 2001) (magistrate judge) (attorney-client privilege applied to (1) electronic mail sent from Human Resources Director to Dean of Students regarding conversation she had with university's legal counsel and his legal advice, (2) summary report prepared by counsel and human resources director, and (3) draft response to former student athlete's civil rights complaint that was prepared by dean of students and sent to legal counsel, investigative conclusions and codes prepared by counsel, and letter to counsel by Human Resources Director regarding discovery requests); *Oracle USA, Inc. v. Rimini St., Inc.*, 2020 WL 5750850 (D. Nev. Sept. 25, 2020) (Draft instructions sent by developers to in-house counsel privileged because purpose was to have counsel review and ensure that instructions did not violate injunction or compliance issues); *Ideal Elec. Co. v. Flowserve Corp.*, 230 F.R.D. 603 (D. Nev. 2005) (draft affidavits prepared by employee's counsel to which the employee made changes were protected by the attorney-client privilege as well as the work product doctrine.); *Randleman v. Fid. Nat. Title Ins. Co.*, 251 F.R.D. 281 (N.D. Ohio 2008) (Even if privileged, title insurance company waived attorney-client privilege as to draft affidavits and counsel communications about drafts, where company's counsel discussed advice and documents with agents, brokers, and lenders, all third parties to the suit. However, the draft affidavits and counsel communications were opinion work product, and thus protected from discovery documents where plaintiffs did not show a substantial need to discover them, where plaintiffs had the ability to test the credibility of affiants through depositions to determine the extent to which an affiant endorsed or qualified the statements in the affidavits, and affiants swore to the final affidavits, not the preliminary drafts); *In re Premera Blue Cross Customer Data Sec. Breach Litig.*, 329 F.R.D. 656 (D. Ore. 2019) (Drafts of scripts of what to say to customers after they received data-breach notification that were prepared by outside counsel or at request of outside counsel were subject to protection under

not privileged, or that privilege was waived when the final document was published to third parties).[129]

B. Misconceptions About Application of the Privilege.

There are a few misconceptions that clients (and some lawyers) have about the power (and limits) of the attorney-client privilege in the corporate/governmental context:

1. Involving a lawyer in the communications does not automatically make the communication privileged. Even when a lawyer is involved in the communications, the privilege will not apply if: (i) the individual providing the advice is not an attorney or acting as such,[130]

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work-product doctrine, in action by members and employees of healthcare benefits servicer and provider alleging that their confidential information had been released through data security breach in provider's computer network and that provider unreasonably delayed in notifying affected individuals, since absent prospect of litigation, what provider said to customers who called after receiving notification of data breach might well have been in substantially different format. However, final versions of scripts were not so protected because the contents were disclosed to third parties. Documents containing edits by counsel were similarly protected by privilege.); *Apex Mun. Fund v. N-Group Sec.*, 841 F. Supp. 1423, 1428 (S.D. Tex. 1993) (preliminary drafts of documents and communications made between attorney and client during the drafting process are privileged; only those parts of attorney-client documents that ultimately appear in published documents are outside the privilege.); *Kobluk v. Univ. of Minn.*, 574 N.W.2d 436 (Minn. 1998) (a provost's preliminary draft of a letter denying tenure, the final version of which was meant to be published to a third party, forwarded to university counsel for review, is protected by the attorney-client privilege where tenure candidate was represented by counsel and the university assigned an attorney to the matter, and the provost sent the draft to counsel because he anticipated that the letter denying tenure would "becom[e] a legal document").

[129] *See, e.g., In re Grand Jury Proceedings,* 33 F.3d 342, 354-55 (4th Cir. 1994) (declining to hold that preliminary drafts of documents intended to be made public could be protected by the privilege); *United States v. Under Seal*, 748 F.2d 871, 877 (4th Cir. 1984) (drafts documents relating to the purchase of another business, a public transaction, and containing information that could reasonably be expected to be imparted to third parties were not protected by the privilege); *United States v. Lawless*, 709 F.2d 485, 487 (7th Cir. 1983) (no privilege when information is transmitted to an attorney with the intent that the information will be transmitted to a third party); *Al Otro Lado, Inc. v. Wolf*, 2020 WL 6449152 (S.D. Cal. Nov. 2, 2020) (draft guidance to government was not protected by attorney-client privilege where although attorney assisted by making edits, the actual document was not written by an attorney and nothing in document revealed redlines or other indications of advice from attorney to the agency; although attached to a privileged email; the draft was not independently privileged).

[130] *In re Grand Jury Subpoena (Mr. S.)*, 662 F.3d 65 (1st Cir. 2011) (Where an attorney acts merely as a scrivener—facilitating the consummation of a real estate transaction, passing title, and disbursing funds—the documents generated by those actions are typically not privileged.); *In re Grand Jury Subpoena*, 542 F. App'x 252 (4th Cir. 2013) (Certain e-mails sent by a government-employed lawyer were not protected by the attorney-client privilege, and thus, were required to be produced in response to grand jury subpoena, absent showing that the government-employed lawyer was acting as a lawyer or providing a legal opinion in those e-mail.); *United States v. Spencer*, 700 F.3d 317 (8th Cir. 2012) (Attorney-client privilege did not apply to communications between defendant, who was charged with wire fraud and other fraud-related offenses, and attorney who prepared his income tax returns; attorney provided no legal advice to defendant, but acted in his capacity as a certified public accountant (CPA) while assisting defendant with his taxes.); *Zetz v. Boston Sci. Corp*., 2022 WL 605356 (E.D. Cal. March 1, 2022) (evidence was insufficient to establish that plaintiff considered lawyer to be her attorney at the time of her initial meeting with him or that there communications were in confidence; therefore, her discussions with the lawyer during their initial meeting was not privileged); *Doe v. Maine School Admin. Dist.*, 2025 WL 2978801 (D. Maine Oct. 22, 2025) (parents' affidavit that provided only a conclusory description of their relationship with attorney was insufficient to show that the lawyer was parents' legally authorized personal representatives so as to bring communications within the attorney-client privilege); *SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props. L.L.C.*, 2003 WL 193071 (S.D. N.Y. Jan. 29, 2003) (notes taken by property insurer's employee and another insurer's adjuster at market and steering committee meetings were not protected by attorney-client privilege from disclosure in insurer's suit to recover under policies, even if attorneys took part in meetings, and insurers shared common legal interest, where meetings involved ordinary business, rather

which is a particular risk for in-house counsel wearing two "hats";[131] (ii) the communication was not made for the purpose of securing legal advice to the entity;[132](iii) in the corporate privilege

than legal, matters, and attorneys later asked all non-attorneys to step out so that lawyers could meet separately); *SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props. LLC*, 2002 WL 1455346 (S.D. N.Y. July 3, 2002) (communication between employees of mortgage holder on the World Trade Center and its insurance advisors in drafting documents after 9/11 to address investor concerns following WTC attack were not protected by attorney-client privilege because they constituted information-gathering in the normal course of business, and not in anticipation of litigation); *Sodexomagic, LLC v. Drexel Univ.*, 291 F. Supp. 3d 381 (E.D. Pa. 2018) (Communication in which lawyer or lawyer's non-lawyer subordinate was acting in the role of a scrivener, receiving edits from businesspeople and inputting those edits, was not protected by Pennsylvania's attorney-client privilege); *S. Bell Tel. & Tel. Co. v. Deason*, 632 So.2d 1377 (Fla. 1994) (internal audits conducted by telephone company at request of counsel in response to Commission investigation did not constitute protected "communication" because lawyer was making substantive business decisions in addition to rendering legal advice); *New York Civil Liberties Union v. New York State Off. of Court Admin.*, ___ N.E.3d ___, 2025 WL 2955709 (N.Y. Oct. 21, 2025) (Office of Court Administration failed to meet its burden of establishing an attorney-client relationship between its counsel's office and all Unified Court System judges and thus Office of Court Administration was not entitled to a blanket attorney-client privilege exception to production); *Honolulu Civil Beat Inc. v. Dep't of Attorney Gen.*, 463 P.3d 942 (Hawai'i 2020) (Department of Attorney General was not acting within lawyer-client relationship when it prepared report of investigation of Office of Auditor, and thus report was not excepted from public disclosure by either lawyer-client evidentiary privilege or professional conduct rule of confidentiality; even though investigation began after Department received information from a legislator, neither legislator nor legislature had subjective belief that they would be supplied with privileged and confidential document, they were not seeking advice regarding legal rights and liabilities, and contents of report served as summary of facts, rather than legal advice); *Lexington Pub. Library v. Clark*, 90 S.W.3d 53 (Ky. 2002) (privilege is inapplicable when the attorney acts merely as a business advisor).

[131] *See W. Sur. Co. v. United States*, 2018 WL 6788665 (D. Ariz. Dec. 26, 2018) (insurance company's reserve information is not privileged even though it was set solely by its in-house counsel in his capacity as legal counsel; company failed to demonstrate that is reserve information is anything but "business advice," which is not protected by privilege); *Wal-Mart Stores, Inc. v. Vidalakis*, 2007 WL 4591569 (W.D. Ark. Dec. 28, 2007) (motion to quash subpoena directed to general counsel denied because it appeared that some of her actions were clearly taken in her role as real estate manager rather than as counsel); *Baran v. Walsh Constr. Co.*, 2007 WL 54065 (N.D. Ill. Jan. 4, 2007) (emails between various officials of defendant construction company and its vice president in charge of insurance department were not protected by the attorney-client privilege, even though the vice president also worked in the legal department of the company, where the vice president was acting in his capacity as the head of the insurance department, not in his capacity as the company's legal counsel.); *Ictech-Bendeck v. Wast Connections Bayou, Inc*., 2024 WL 247063 (E.D. La. Jan. 23, 2024) (because in-house counsel has an increased level of participation in the day-to-day operations of the corporation, it is more difficult to define the scope of the privilege when a communication is made to in-house counsel); *In re Aenergy, S.A*., 451 F. Supp.3d 319 (S.D. N.Y. 2020) (In light of the two hats often worn by in-house lawyers, communications between a corporation's employees and its in-house counsel though subject to the attorney-client privilege must be scrutinized carefully to determine whether the predominant purpose of the communication was to convey business advice and information or, alternatively, to obtain or provide legal advice. Therefore, E-mail thread between former chief-executive officer (CEO) for electric company's Angola business and in-house counsel, which was then forwarded to a mix of business officers and corporate counsel, suggesting that allegedly forged letters be sent to Angolan government without CEO's commentary, was not protected by attorney-client privilege, and thus was subject to production in aid of foreign litigation in Angola, where nothing in text of counsel's e-mail suggested that he was providing legal advice.); *Coster v. Amazon.com, Inc*., 2025 WL 904465 (W.D. Wash. March 25, 2025) (even when an in-house attorney leads a discussion or takes an active role in a meeting, this does not necessarily make the entire communication privileged, where the primary purpose of communication concerns business operations rather than giving legal advice, even when the email chain contains statements like "confirming privilege and confidential" and "seeking legal advice.").

[132] *See, e.g.*, *Adams & Assocs. v. NLRB*, 871 F.3d 358 (5th Cir. 2017) (email and other communications that pertained principally to human resources or labor relations, and not to legal advice, were not privileged); *A Greyhound Lines, Inc. v. Viad Corp.*, 2016 WL 4703340 (D. Ariz. Sept. 8, 2016) (privilege did not apply to in-house counsel's handwritten notations on otherwise non-privileged documents kept in legal department files where the notations were never communicated to anyone); *In re Google, Inc.*, 462 F. App'x 975 (Fed. Cir. 2012) (email from in-house counsel

responding to a request from company management was not shown to be privileged where the email's discussion was directed at a negotiation strategy as opposed to a license negotiation as a component or legal strategy, the email did not evidence any sort of infringement or invalidity analysis and nothing in the content of the email indicated that the in-house counsel prepared it in anticipation of litigation or to further the provision of legal advice; the fact that the email contained the words "confidential" do not demonstrate entitlement to the privilege in light of the email' contents); *United States v. Leonard-Allen*, 739 F.3d 948 (7th Cir. 2013) (Attorney-client privilege did not protect client intake form on which defendant listed her co-defendant as the person who referred her to the bankruptcy lawyer, in defendant's prosecution for perjury for testifying before a grand jury that co-defendant had not referred her to her bankruptcy lawyer; defendant's disclosure of who referred her did not reflect either the lawyer's or defendant's thinking, and it was not instrumental to the substance of the bankruptcy advice that lawyer provided, and statement on form that defendant's reason for seeking representation was financial did not reveal otherwise confidential information about defendant's motives, as it was widely known that lawyer represented defendant for bankruptcy.); *Pham v. Talkdesk, Inc*., 2023 WL 3149270 (C.D. Cal. March 14, 2023) ("courts have declined to extend the protections of the attorney-client privilege" to documents produced as part of a due diligence investigation "where the purpose of [the] investigation was to obtain factual data for a business purpose."); *Garcia v. Cnty. of Stanislaus*, 2022 WL 4237960 (E.D. Cal. Sept. 14, 2022) (County did not establish that county claim investigation report was privileged; County described a broad (and conclusory) general practice with respect to creating investigation reports following submission of a government claim; it asserted no information specific to the report at issue and it does not provide any information that report was prepared in anticipation of imminent litigation, so as to distinguish the instant claims investigation report from one prepared in the normal course of business); *Neuder v. Battelle Pacific Nw. N. Lab.*, 194 F.R.D. 289 (D.D.C. 2000) (business purpose of employee review committee meeting to terminate employee predominated over the legal issues and thus presence of attorney did not render document or discussions at meet privileged); *Oehler v. Eclipse Senior Living, Inc.*, 2024 WL 4267213 (E.D. Ky. Sept. 23, 2024) (emails created as part of defendant's ongoing investigation into elder abuse allegations are business- and administrative-related communications outside the scope of the attorney-client privilege because defendant has not shown they were made for the primary purpose of facilitating legal advice); *United States v. Booz Allen Hamilton, Inc.*, 2022 WL 3921019 (D. Md. Aug. 31, 2022) (assuming an attorney-client relationship existed between the NSA and the DOJ, to the extent DOJ was simply exploring the factual background behind the Proposed Acquisition, its correspondence with the NSA may not be protected by attorney-client privilege since it was not made in order to obtain legal assistance); *Krause v. Integra Lifesciences Corp.*, 2026 WL 296505 (D. Minn. Feb. 4, 2026) (court declined to allow redaction portions of plaintiff former employee's complaint referring to her communications with defendant's chief legal officer because defendant did not establish that the primary purpose of the communications was legal advice); *The Authors Guild v. Nat'l Endowment for the Humanities*, 2026 WL 309491 (S.D. N.Y. Feb. 5, 2026) (communications between DOGE attorneys and NEH and GSA employees not privileged where it was not shown that DOGE attorneys were authorized to act as attorneys for NEH and GSA, but noting that DOJ lawyers can unilaterally assume an attorney client relationship with employees of separate agencies for purposes of asserting privilege in litigation); *Babygrande Global, Inc. v. Rodriguez*, 2025 WL 3706560 (S.D. N.Y. Dec. 22, 2025) (email sent by defendant's director of people and operations was never privileged because it was sent to the "wider team" with no attorney involved or sent to an attorney's agent for the purpose of obtaining legal advice); *Lively v. Wayfarer Studios LLC*, 2025 WL 2606904 (S.D. N.Y. Sept. 9, 2025) (attorney client privilege did not apply to communications between employee of company allegedly involved in a smear campaign against plaintiff and her lawyer father where the communications reflected a father offering helpful advice to his daughter; it did not establish that he was giving his daughter legal advice or had formed an attorney-client relationship with her); *Haider v. Geller & Co.,* 457 F. Supp.3d 424 (S.D. N.Y. 2020) (Portions of complaint for employment discrimination filed by former employee, who served as acting general counsel for employer, that employer sought to redact involving discriminatory comments made to employee, employee's allegations about her efforts to protest those comments, and employee's allegations about discriminatory actions against her did not fall within attorney-client privilege, and thus presumption of public access to those portions of complaint was not defeated on such basis; allegations could not be reasonably interpreted as efforts to communicate with employee in order to obtain legal advice from employee in her role as acting general counsel); *In re Aenergy, S.A*., 451 F. Supp.3d 319 (S.D. N.Y. 2020) (In connection with purchase of turbines by contractor from electric company, e-mail thread between lawyer for contractor, in-house counsel for electric company, electric company's chief-executive officer (CEO), and another employee of electric company, about a meeting at which Angola officials, who had entered into agreement with contractor to build power plants in Angola, raised issue of four additional turbines, was not protected by attorney-client privilege, and thus was subject to production in aid of foreign litigation in Angola, despite CEO's assertion that he copied in-house counsel in order to seek legal advice, since the e-mail

thread summarized past meetings, and CEO did not declare that he sent e-mail thread to obtain legal advice or that he ultimately received legal advice.); *Dorfman v. Cnty. Mut. Ins. Co.*, 2025 WL 2962470 (D. Or. Oct. 20, 2025) (court denies motion to quash deposition subpoena to plaintiff's son on attorney-client privilege grounds; plaintiff's communications with her son were not subject to the attorney-client privilege because some of the communications at issue were not made for the purpose of facilitating legal services, and son was not a member of the bar for a significant portion of the period covered by the subpoena); *Meyer v. Mittal*, 2023 WL 2889774 (D. Ore. April 11, 2023) (proposal document from law firm was not privileged because it was not a communication made for the purpose of seeking or receiving legal advice and contained no legal advice. The primary purpose of the proposal was to outline business advice that defendants sought and firm offered to provide relating to setting up a company to expand defendant's market. Even if the proposal were privileged, defendants waived the privilege by waiting many months after they were aware of the inadvertent disclosure to take action to address it); *In re Premera Blue Cross Customer Data Sec. Breach Litig.*, 329 F.R.D. 656 (D. Ore. 2019) (Timeline prepared by in-house counsel relating to remediation efforts by healthcare benefits servicer and provider following data security breach in its computer network was not subject to attorney-client privilege or work-product protection, since timeline would have been prepared substantially in same format even absent anticipated litigation or regulatory investigations); *In re Diisocyanates Antritrust Litig.*, 2024 WL 3412049 (W.D. Pa. March 28, 2024) (Dow's powerpoint presentation on antitrust issues was not privileged where the powerpoint slide deck itself did not communicate particularized legal inquiries or legal advice and, instead, instructs the audience to "consult counsel" or to "[e]ngage your supervisor, Dow Legal representatives or the Office of Ethics & Compliance if you have questions or need additional guidance," and where the presenter's notes contained in the slide deck expressly state that "[t]his training is to raise awareness of the principles and framework in which business decisions will be evaluated by antitrust regulators. It is not a substitute for specific legal guidance in any particular situation or geography."); *Exchange 12, LLC v. Palmer Twp.*, 2024 WL 2925971 (E.D. Pa. June 10, 2024) (while the contents of any discussions at the Meeting between the former Township Solicitor and his client, the Board of Supervisors, concerning a proposed amendment to a settlement with the Plaintiff in another matter are clearly protected by the attorney-client privilege, the alleged statement by the former Township Solicitor during the meeting regarding plaintiff to the effect of "why are we negotiating with a terrorist," is just as clearly not protected by the attorney-client privilege. Such a comment allegedly made by the former township solicitor has absolutely nothing to do with securing or offering legal advice regarding an opinion of law or providing legal services or assistance in a pending legal proceeding); *Guy v. Yusen Logistics (Ams.), Inc.*, 2019 WL 2465173 (W.D. Tenn. Apr. 11, 2019) (emails exchanged between outside counsel and client before and during lawyer's internal investigation of hostile environment complaint not privileged because the emails concerned business, not legal, advice); *Littlejohn v. Kaiser Found. Health Plan of Washington*, 2025 WL 3718664 (W.D. Wash. Dec. 23, 2025) (if defendant's outside counsel was the actual decisionmaker for plaintiff's accommodation request, the basis for her decision may not be covered by the attorney-client privilege); *Leonard v. McMenamins, Inc.,* 2023 WL 8447918 (W.D. Wash. Dec. 6, 2023) (cybersecurity consultant report prepared by attorney not privileged because the report did not provide legal advice; mere delegation of business functions to an attorney is insufficient to shield otherwise unprotected factual investigation from discovery); *Matter of 2021 Redistricting Cases*, 528 P.3d 40 (Alaska 2023) (matters discussed during an executive session are not automatically privileged merely because an attorney for the governing body is present for the discussions); *State ex rel. Brinkman v. Bd. of Educ. of Toledo City School Dist.*, 250 N.E.3d 5 (Ohio 2024) (Statement that school district was not relying on foundation "for any services other than legal services," which was redacted from page two of copy of foundation's engagement letter to district, regarding its lawsuit against State and Governor certain provisions of budgetary bill creating Department of Education and Workforce, that was provided in response to records request under Public Records Act, was not protected by attorney-client privilege, and thus not exempt from disclosure requirement; statement described the general purpose of the work performed, i.e., legal services, rather than the specific nature of the legal services to be provided, and statement was similar to preceding statement that the foundation was providing "only legal services" to district, which was not redacted.); *Burns v. State*, 907 S.E.2d 581 (Ga. 2024) (Trial court did not abuse its discretion in concluding that jail calls between defendant and attorney who represented him during bond proceedings were not protected by the attorney-client privilege, and thus that disclosure of calls during trial for aggravated assault and related crimes did not violate Sixth Amendment right to counsel; while attorney and defendant discussed trying to obtain a bond for defendant and when bond hearing would occur, exchange of information was not made for the purpose of giving or receiving legal advice, but rather, matters related to bond were essentially procedural scheduling matters about which attorney's advice was neither sought nor rendered, and remainder of conversations during calls largely pertained to personal issues, requests, and favors); *Frankfort Reg'l Med. Ctr. v. Sheperd*, 2016 WL 3376030 (Ky. June 16, 2016) (risk manager's notes documenting communications

context, the corporate employee was not making the communication at the direction of his corporate superior;[133] or (iv) the communication included corporate constituents or third parties who were not essential to securing legal advice to the corporation.[134]

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made to her by obstetricians and nursing staff during her investigation into alleged malpractice in connection with infant's alleged brain injury during delivery were not made to effectuate legal representation of hospital, and thus notes were not protected by the attorney-client privilege in parents' malpractice action, where risk manager began her investigation before the hospital's counsel contacted her, obstetricians and nurses were not aware of why risk manager was questioning them, and risk manager had a mixed motive in undertaking the interviews and used her notes, at least after the fact, for a business purpose); *S. Utah Wilderness All. v. Automated Geographic Reference Ctr.*, 200 P.3d 643 (Utah 2008) (Records maintained by Center regarding rights-of-way that State and county claimed they obtained under repealed federal statute that offered free rights-of-way across federal lands, were not protected by the attorney-client privilege; although the State and the county were involved in litigation with government regarding such rights-of-way, the Center was not a party to the litigation agreement between the Attorney General's office, the State and the county that created the attorney-client relationship, a state statute required the Center to create and maintain records on such rights-of-way for the benefit of State and federal agencies as well as private persons, and the records were not created for the purpose of providing or obtaining legal advice); *State ex re. Brison v. Webster*, 2020 WL 2614650 (W.Va. May 22, 2020) (An email from one lawyer to another, adverse, lawyer about a settlement agreement is not protected by the attorney-client privilege because there is no attorney-client relationship between them; no legal advice is contained in documents exchanged outside the attorney-client relationship; and the disclosure of documents or other information to adverse third parties destroys any privilege that might attach); *State ex. rel. State v. Burnside*, 757 S.E.2d 803 (W.Va. 2014) (Audio recording of conversation between confidential informant and defendant, an attorney, did not violate state Wiretapping Act since conversation was not privileged as an attorney-client conversation; informant was not seeking legal advice from defendant, but was only seeking to purchase cocaine from him, and informant, having agreed to wear a recording device, did not intend that the conversation be kept confidential).

[133] *See Cole v. Kansas City S. Ry. Co.*, 713 S.W.3d 180 (Mo. 2025) (Pretrial statements by brakeman to railroad's lawyers regarding accident not protected by attorney client privilege; brakeman did not have an attorney-client relationship with the railroad's lawyers, and railroad's attorney-client privilege did not extend to brakeman where brakeman did not communicate with the attorneys at the direction of her corporate superior; that brakeman testified she was "called in" to speak with the railroad's attorneys was insufficient to show that she did so at the direction of a corporate superior). *Compare Upjohn Co. v. United States*, 449 U.S. 383 (1981) (finding attorney-corporate client privilege shielded the employees' testimony because they communicated with corporate counsel at the direction of their corporate superior for purposes of attorney-client privilege where, unlike the circumstances here, the corporation's chairman requested in writing that the employees answer questions for an internal legal investigation).

[134] *See, e.g., United States ex rel Barko v. Halliburton Co.*, 74 F. Supp. 3d 183 (D.D.C. 2014) (finding that attorney-client privilege did not apply to (i) documents with attorneys merely as incidental recipients, (ii) documents that merely reflect that a consultation occurred, and (iii) litigation hold notices that were not intended to be kept confidential—they were sent to large groups such as "all KBR employees," and follow-up emails encouraged employees to share some of the litigation hold notices with other employees who may not have received or read the first notice, and no warning was given that these notices should not be discussed outside the company or with unauthorized persons); *Reed v. Baxter*, 134 F. 3d 351 (6th Cir. 1998) (two councilmen were not clients of city attorney with respect to meeting among city attorney, city manager and fire chief regarding EEOC charges of white firefighters and thus the contents of the meeting were not protected by privilege; the councilmen were present as elected officials investigating reasons for executive behavior and not as clients, since they played no part in the decision at issue); *London Luxury, LLC v. Walmart, Inc.*, 2024 WL 1025220 (W.D. Ark. March 8, 2024) (legal conclusions by company's in-house counsel not protected by attorney-client privilege where the assessment was shared widely within the company and with the CEO of plaintiff); *Maquet Cardiovascular LLC v. Abiomed, Inc.*, 2026 WL 381370 (D. Mass. Feb. 11, 2026) (inclusion of defendant's consultant on otherwise privileged emails waived privilege, even though consultant had entered into agreement not to disclose defendant's confidential information, where there was no evidence consultant was employed to assist attorneys in rendering legal advice); *Dahl v. Bain Cap. Partners, LLC*, 714 F. Supp. 2d 225 (D. Mass. 2010) (Email communications between counsel for leveraged buyout target and financial advisor, which was copied on or forwarded legal documents and communications about legal issues between target and its lawyers in order for advisor to provide "feedback" based on its financial expertise and industry experience, did not fall within the exception to rule

2. Labeling a document or communication "privileged" does not necessarily make it so. Although marking or labeling a document or communication as "privileged" is a factor courts consider, it is not dispositive; if the requirements of the privilege are not otherwise met, a document or communication will not be deemed privileged simply because it is marked "privileged."[135]

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waiving attorney-client privilege by disclosure of communications to third parties; advisor's role with respect to the emails was to provide business advice rather than legal advice, and there was no showing that advisor's review of legal documents and legal advice was necessary, or at least highly useful, in facilitating legal advice.); *Alta Partners, LLC v. Getty Images Holdings, Inc.*, 2023 WL 5717483 (S.D. N.Y. Sept. 5, 2023) (court rejects Getty's assertion of attorney-client privilege on behalf of its former CEO Klein, for communications from Klein's Getty email address with his personal attorney about compensation negotiations. Whether or not Klein had a reasonable expectation of privacy at the time of those communications, any potential attorney-client privilege was waived when Getty's counsel later collected and reviewed the communications during this litigation. Once the privilege is waived, it cannot magically be regained. Klein thus waived attorney-client privilege by allowing Getty's counsel to review his communications with his personal attorney about matters to which, at the time of the communications, he was adverse to Getty.); *Keefe v. Bernard*, 774 N.W.2d 663 (Iowa 2009) (Memo that attorney for clinic and doctor prepared after meeting with patient's treating orthopedic surgeon was not protected by clinic's attorney-client privilege, even though orthopedic surgeon was employee of clinic; memo reflected orthopedic surgeon's observations as witness or expert regarding doctors' treatment decisions based on his position as subsequent treating physician. If a corporate employee is interviewed by corporate counsel as a witness to the actions of others, the communication is not protected by the corporation's attorney-client privilege.); *State ex rel. Brison v. Webster*, 2020 WL 2614650 (W. Va. May 22, 2020) (Email from one lawyer to another, adverse, lawyer about a settlement agreement is not protected by the attorney-client privilege because there is no attorney-client relationship between them; no legal advice is contained in documents exchanged outside the attorney-client relationship; and the disclosure of documents or other information to adverse third parties destroys any privilege that might attach.).

[135] *U.S. v. Warburg Pincus*, LLC, 2022 WL 2128669 (D. Vt. June 14, 2022) (labeling of documents is only one possible precaution against disclosure in analyzing waiver; failure to label is not dispositive); *State v. Kosuda-Bigazzi*, 250 A.3d 617 (Conn. 2020) (Evidence that file labeled "INCIDENT 2017," which contained handwritten notes describing circumstances of victim's death, was in locked file cabinet next to file labeled "CRIMINAL DEFENSE ATTORNEY Oct. 2017," together with State's concession that contents of latter file were protected by attorney-client privilege, by itself, was insufficient to show that documents in "INCIDENT 2017" file were created for purposes of securing legal advice and were actually communicated to attorney, and thus were protected by attorney-client privilege, at hearing on defendant's motion to dismiss charges for murder and tampering with evidence on ground that police seizure and review of files constituted irreparable violation of privilege; rather, defendant had burden of establishing privilege with respect to each.); *Lluberes v. Uncommon Prods., LLC*, 663 F.3d 6 (1st Cir. 2011) (Attorney-client privilege would not protect communications between documentary filmmakers, attorney that they had retained to assist them in procuring insurance against potential "errors and omissions" in their film, and third party to whom attorney had referred filmmakers as someone qualified to act as fact-checker for their script, at least not to extent that communications consisted of annotated script prepared by factfinder, after verifying information in script with outside sources, with expectation that attorney would provide this annotated script to insurers to convince them to provide insurance for filmmakers' project, notwithstanding any declarative markings of confidentiality on such communications); *Robbins v. Off Lease Only, Inc.*, 2020 WL 4904196 (S.D. Fla. Aug. 20, 2020) (privilege did not protect notes and communications of in-house lawyer, who also served as company's chief human resources officer, related to an employee's termination; less protection is warranted when company officers have a mixed responsibility incorporating both business and legal aspects, and when their advice and communications are based on an on-going permanent business relationship rather than a specific request for legal advice; despite the label on the notes as "attorney work product-privileged," employer failed to meet its burden of showing communication was for the purpose of securing legal advice); *Lifewise Master Funding v. Telebank*, 206 F.R.D. 298 (D. Utah 2002) ("It is not necessary that a document be labeled as privileged in order for it to be subject to an Attorney/Client or work product privilege, if the document otherwise fits within such privilege. On the other hand, labeling a document as privileged does not meet the privilege claims' burden of establishing the privilege claim. The labeling may alert a recipient of the document of a possible privilege claim and thereby invoke ethical inquiry by the recipient to determine if the document was privileged."). *Cf. Bradbury v. City of Lewiston*, 533 P.3d 606 (Idaho 2023) (Research memoranda concerning potential illegality of city practices, which were prepared by city attorney and submitted to city manager, were

3. "Copying in" or otherwise including a lawyer in otherwise non-privileged corporate communications does not necessarily create privilege. Similarly, otherwise non-privileged communications do not attain privileged status solely because the lawyer is "copied in" on correspondence or memoranda,[136] nor can routine communications with an attorney be protected by a blanket assertion of privilege.[137]

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protected by attorney-client privilege, although city did not seek attorney's advice or prompt research and attorney apparently conducted research and prepared memoranda on her own initiative, where city was undoubtedly a client and attorney was its lawyer, attorney provided professional legal services to city in form of memoranda, and memoranda were conspicuously marked with stamp designating them "attorney-client privilege" and each discussed pertinent legal issues concerning city).

[136] *Zelaya v. Unicco Serv. Co.*, 682 F. Supp. 2d 28 (D.D.C. 2010) (Carbon copying emails to in-house counsel will not provide the basis for attaching the attorney-client privilege.); *Hathaway v. Jefferson Cnty.*, 2024 WL 4930574 (D. Idaho Dec. 2, 2024) (emails from County's HR Director which cc'd legal counsel were not privileged because they were not made for the purpose of securing legal advice); *Kleen Prods., LLC v. Int'l Paper*, 2014 WL 6475558 (N.D. Ill. Nov. 12, 2014) (rejecting privilege with respect to "numerous allegedly privileged emails [that]… contain nothing more than mundane chatter about routine business matters." "It is improper to infer as a blanket matter that any email asking for 'comments' that copies in-house counsel along with several other high level managers automatically is a request for legal review."); *Cardinal Square, LLC v. QBE Specialty Ins. Co.*, 2023 WL 8471849 (S.D. Ind. Dec. 7, 2023) (merely because a document is produced by an attorney, or the attorney is copied on an email, does not mean it is protected under the work product privilege); *Oehler v. Eclipse Senior Living, Inc.*, 2024 WL 4267213 (E.D. Ky. Sept. 23, 2024) (fact that defendant's counsel was cc'd on otherwise business emails does not alone support a finding of privilege); *N.H. Youth Movement v. Scanlan*, 2026 WL 122779 (D. N.H. Jan. 15, 2026) (defendants did not establish that emails on which their counsel was a recipient reflected legal advice or that the lawyer requested for used the information requested and thus could not establish that the emails were privileged); *Anderson v. Trs. of Dartmouth Coll.*, 2020 WL 5031910 (D. N.H. Aug. 25, 2020) (the presence of counsel's name on a communication or "copied in" does not render the communication privileged; the document must have been intended to be confidential and made for the purpose of giving or obtaining legal advice to be privileged); *SEC v. Leibowitz*, 2025 WL 3763814 (S.D. N.Y. Dec. 30, 2025) (email chain not privileged because although general counsel is copied on email, no one on the chain requested legal advice from the general counsel and the general counsel did not provide legal advice to anyone else in the chain); *NRD GP LLC v. Centiva Cap., LP*, 2025 WL 2782804 (S.D. N.Y. Sept. 30, 2025) ("the mere fact that an attorney is copied on the email does not transform its content into one that can satisfy the demands of the attorney-client privilege"); *Graves v. Deutsche Bank Sec., Inc.*, 2011 WL 6057554 (S.D.N.Y. Dec. 5, 2011)(plaintiff's handwritten notes were not privileged; although received by plaintiff's counsel the contents were not communicated to counsel and thus not essential to plaintiff's procurement of legal advice); *In re: Davol, Inc.*, 2021 WL 630826 (S.D. Ohio Feb. 18, 2021) (bcc'ing counsel on email did not convert it into a privileged document; the recipient line itself did not contain confidential information and party had no expectation of confidentiality because it copied opposing party on the email, vitiating any confidentiality); *United States ex rel Ellis v. CVS Health Corp.*, 2024 WL 3836669 (E.D. Pa. Aug. 15, 2024) (Attorney-client privilege did not extend to communications by a "cold chain" shipping consultant CVS hired where CVS's arrangement was to route the consultant's work through an outside law firm and which was, in many instances a fiction that even CVS employees openly acknowledged, and CVS personnel repeatedly coordinated directly with the consultant regarding clear matters of business development; attorney-client privilege does not shield documents merely because they were transferred to or routed through an attorney. Attorney-client privilege also did not extend to internal business discussions among non-attorneys at CVS, which implicate or referenced consultant's work.); *TIGI Linea Corp. v. Prof'l Prods. Grp., LLC*, 2020 WL 7773581 (E.D. Tex. Dec. 30, 2020) (merely cc'ing lawyer is insufficient to establish privilege); *Ex parte Willimon*, 299 So.3d 934 (Ala. 2020) (information bishop received from her attorney not automatically privileged; privilege extends only to confidential communications, not facts); *Zurich Am. Ins. Co. v. Super. Ct*., 155 Cal. App. 4th 1485 (2007) (otherwise routine, non-privileged communications between corporate officers or employees transacting the general business of the company do not attain privileged status solely because in-house or outside counsel is "copied in" on correspondence or memoranda and, in addition, a client may not shield facts, as opposed to communications, from discovery.).

[137] *United States v. Moore, Ingram, Johnson & Steele, LLP*, 2022 WL 3134374 (11th Cir. August 5, 2022) (the recipient of a summons properly should appear before the issuing agent and claim privileges on a question-by-question and document-by-document basis; district court correctly concluded that a categorical privilege log would be

4. Underlying facts or data included within an otherwise privileged communication are not necessarily protected from discovery. The attorney-client privilege protects disclosure of contents of communications themselves between an attorney and the attorney's client even if the communications contain otherwise relevant facts and data;[138] however, it does not protect against disclosure of the fact of an attorney-client communication,[139] or disclosure of the underlying facts by the person who has personal knowledge of those facts or disclosure of nonprivileged attachments, even though that person consulted an attorney or they were included in an otherwise

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inappropriate in this case); *In re LeFande*, 919 F.3d 554 (D.C. Cir. 2019) (Attorney's blanket assertion of attorney-client privilege was insufficient to establish that court violated the privilege by ordering him to appear for in-court deposition in connection with post-judgment discovery proceedings into whether he had aided his clients' transfer of assets to evade adverse judgment in underlying action; attorney made no showing that he could not have preserved any claims of privilege his clients may have had while also complying with the court's order, the correct process was for him to take the stand and assert the privilege and its basis in response to questions eliciting information he believed to be privileged, but he did not even attempt to defend his wholesale refusal by showing, for example, that plaintiff in underlying action sought only privileged information, nor could he have, as plaintiff's post-judgment discovery plainly swept more broadly.); *In re Grand Jury Subpoena (Mr. S.)*, 662 F.3d 65 (1st Cir. 2011) (Client's blanket assertion of attorney-client privilege in attempt to quash documents subpoenaed from client's attorney in grand jury proceeding was insufficient to show that the privilege attached to any particular item or items identified by the subpoena, particularly where documents sought were not confidential in nature.); *Kohan v. Lucid Group USA, Inc.*, 2025 WL 3675115 (N.D. Cal. Dec. 18, 2025) (blanket assertion of privilege not appropriate; identify of the client, amount of the fee, identification of payment by case file name, and the general purpose of the work performed are not usually protected from disclosure by the attorney-client privilege); *W. Express, Inc. v. Cathey*, 2025 WL 2098598 (W.D. Tenn. July 25, 2025) (blanket assertions of the attorney-client privilege or work product protection are ineffective).

[138] *See, e.g.*, *Jordan v. Terumo BCT, Inc.*, 550 P.3d 628 (Colo. 2024) (Communications from plaintiffs to their counsel conveying the relevant facts were indisputably for the purpose of obtaining legal advice and thus protected by the attorney-client privilege; although plaintiffs cannot refuse to provide the underlying facts and data that defendant seeks, absent a waiver, they cannot be compelled to provide their communications to their counsel. District court also erred in finding that plaintiffs waive the attorney-client privilege as to their underlying communications by sharing with their expert a spreadsheet containing the non-privileged, factual information that counsel had compiled from confidential communications with plaintiffs; nothing in the record suggests that the expert saw any of the communications sent from plaintiffs to their counsel).

[139] *Upjohn Co.*, 449 U.S. at 395-96. *See In re Grand Jury Proceedings*, 616 F.3d 1172 (10th Cir. 2010) (Questions which requested subpoenaed attorney to testify at grand jury regarding information he received from the government and then communicated to his client were not protected by attorney-client privilege; questions did not request information regarding privileged legal advice provided by the attorney to his client, nor would they tend, directly or indirectly, to require the attorney to reveal the substance of any legal confidence.); *Huffman v. United States Steel Corp.,* 2024 WL 4264211 (S.D. Ill. Sept. 23, 2024) (corporate deposition topic seeking information about the factual basis for defendant's answer and affirmative defenses does not invade the attorney-client privilege); *Advocare Int'l v. Smith*, 2022 WL 8622980 (E.D. Tex. Dec. 13, 2023) (questions about the underlying facts regarding defendant's knowledge of facts underlying the litigation not privileged merely because its counsel conducted an investigation and relayed his findings to them); *Ex Parte Alfa Mut. Ins. Co.*, 631 So.2d 858 (Ala. 1993) (attorney-client privilege did not bar deposition of corporation's general counsel regarding facts upon which he relied in authorizing corporation's outside counsel to threaten plaintiff and his attorney with sanctions); *Seybert v. Cominco Alaska Expl.*, 182 P.3d 1079 (Alaska 2008) (Attorney-client privilege and work product doctrine do not protect the existence and amount of loss reserves from discovery when they are relevant, absent some showing that the documents in question were prepared at the direction of an attorney); *Edwards v. Thomas*, 229 So.3d 277 (Fla. 2017) (external peer review reports did not contain communications between counsel and client, and therefore discovery of reports was not precluded by the attorney-client privilege); *State Farm Mut. Auto. Ins. Co. v. Edwards*, 670 S.W.3d 873 (Ky. 2023) (Trial court could order automobile liability insurer to answer interrogatory asking about automobile liability insurer's intent to rely on advice of counsel in evaluating accident victim's claim of bad faith and asking for identity of counsel and the advice given; parts of interrogatory about intent and counsel's identity did not seek content of communication protected by the attorney-client privilege or work-product doctrine, and because insurer did not respond to the initial question at all, Supreme Court had no way to know whether the interrogatory would actually violate privilege.).

privileged communication.[140]

5. Client identity is not generally privileged (but client identity and other client information may nevertheless be confidential). The identity of the client is not generally protected by the attorney-client privilege absent unusual circumstances, such as where disclosing the client's identity would necessarily disclose either the legal advice given or the confidential communications provided.[141] But client identity may be confidential information about the

[140] *See, e.g., Edwards v. Thomas*, 229 So.3d 277 (Fla. 2017) (external peer review reports did not contain communications between counsel and client, and therefore discovery of reports was not precluded by the attorney-client privilege); *United States v. Gonzalez*, 144 F.4th 396 (2nd Cir. 2025) (District court did not commit clear error in prosecution for conspiracy to distribute and to possess with intent to distribute controlled substance when it found that documents collected by Croatian police and personal papers found in defendants' luggage were not protected by attorney-client privilege, where defendants did not claim that they ever discussed content of those documents with their attorneys); *Cardinal Square, LLC v. QBE Specialty Ins. Co.*, 2023 WL 8471849 (S.D. Ind. Dec. 7, 2023) (attachments to an email do not become privileged merely virtue of the privileged email itself); *Reynolds v Wells,* 2016 WL 7330067 (Ky. Dec. 15, 2016) ((i) mere fact of representation is not privileged; (ii) public information does not become privileged simply from the act of an attorney commemorating it in a letter to a client); *United States ex rel. Long v. Janssen Biotech, Inc.*, 788 F. Supp.3d 167 (D. Mass. 2025) (An email sent to counsel seeking confidential legal advice is privileged, whether it contains an attached document or not; however, documents do not become privileged simply because they have been attached to an email sent to counsel. And absent special circumstances, the discoverability of an attached document must be analyzed independently from that of the email communication.); *Park W. Radiology v. CareCore Nat. LLC*, 675 F. Supp. 2d 314 (S.D.N.Y. 2009) (E-mail chain containing an e-mail forwarding a document for signature from an attorney followed by a mix of strictly ministerial communications relating to the signature and delivery of a declaration and social communications was not protected by the attorney-client privilege.); *Knight Specialty Ins. Co. v. Insa, Inc.*, 2025 WL 2101968 (M.D. Pa. July 25, 2025) (claim note not protected by the attorney-client privilege as it merely discussed the existence of an attorney-client relationship and the identity of the specific attorneys involved. In general, the facts of legal consultation or employment, client identities, attorney's fees, and the scope and nature of employment are not deemed privileged); *Boone v. Vanliner Ins. Co.*, 744 N.E.2d 154 (Ohio 2001) (documents containing communications between an insurer's claims employees about discussing an issue with an attorney did not contain attorney-client communications and were not protected by the attorney-client privilege.). *Cf. In re Grand Jury Investigation*, 22 N.E.3d 927 (Mass. 2015) (Attorney-client privilege protects against compelled production of a target's cellphone by his law firm, where phone was transferred from target to the firm to obtain legal advice; and that it contains in the information stored on its memory evidence of a crime under investigation by the grand jury).

[141] *SEC v. Covington & Burling, LLP*, 2023 WL 4706125 (D.D.C. July 24, 2023) (SEC's investigative demand to law firm for client names in investigation of cyberattack on law firm did not implicate attorney-client privilege; firm's disclosure of a client name "would tell the SEC nothing about what, if any, legal advice the client sought, or how the firm responded, with respect to the cyberattack. Only through guesswork and speculation could the SEC discern from the name of the client alone any communication's contents."); *Taylor Lohmeyer Law Firm P.L.L.C. v. U.S.*, 957 F.3d 505 (5th Cir. 2020) (information sought by IRS summons, including identities of law firm's clients, in connection with investigation of tax liability of those who allegedly used firm to create and maintain foreign bank accounts and foreign entities to conceal taxable income was not connected inextricably with a privileged communication, and, therefore, narrow exception to general rule that client identities are not protected by attorney-client privilege when revealing the identity of client would itself reveal a confidential communication did not apply, such that clients' identities were not shielded from disclosure under attorney-client privilege; IRS did not know substance of legal advice firm provided); *Watkinson v. Dep't of Corrs.*, 540 P.3d 254 (Alaska 2023) (identity of department of corrections official is not protected by the attorney-client privilege); *WyoLaw, LLC v. Off. of Attorney Gen.*, 486 P.3d 964 (Wyo. 2021) (Company, which described itself as law firm and which purportedly provided debt resolution services, failed to demonstrate that documents requested by Wyoming Attorney General pursuant to subpoena, which had been issued during investigation into potential violation of Wyoming Consumer Protection Act (WCPA), were protected by attorney-client privilege; in trial court, entity did not provide privilege log or identify in any manner documents or materials it claimed were protected by privilege, only client-related request for which there was no written waiver was one seeking list of client names with name of attorney that represented client, which was not subject to privilege, and

representation that cannot be disclosed unless the client gives informed consent. The disclosure of client identity and other client information is impliedly authorized as necessary to carry out the purposes of the representation, or where the lawyer's duty to protect the public and other interests outweigh the client's expectation of confidentiality.[142] Note that at least one ethics opinion has stated that lawyers must obtain a client's informed consent before posting even published judicial opinions involving their client on a firm website where the opinion contains information constituting confidential information under Rule 1.6.[143]

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request that sought documents related to debt settlement agreements entered on behalf of clients did not implicate attorney-client privilege). *Cf.* ABA Formal Ethics Op. 480 (2018) (lawyer may not reveal the identity of a current or former client or information relating to the representation of a current or former client in a blog or other social media post without the client's consent); Ky. Ethics Op. KBA E-447 (2019) (same); N.H. Ethics Op. 2019-20/01 (unless one of the exceptions in Rule 1.6 applies, Rule 1.6 prohibits the disclosure of the identity of a client).

[142] *See* Utah Ethics Op. 21-01 (2021). *See also In re Grand Jury Subpoena*, 204 F.3d 516 (4th Cir. 2000) (client identity privileged when the client has not authorized disclosure of confidential information and the compelled disclosure of his identity is tantamount to revealing his confidences); *In re Grand Jury Proceedings (Reyes-Requena)*, 926 F.2d 1423 (5th Cir. 1991) (if disclosure of client's identity will also reveal confidential purpose for which he consulted attorney, both confidential communication and client's identity are protected by attorney-client privilege); Ill. Ethics Op. 12-03 (2012) (client's identity is protected information that may not be disclosed to members of reciprocal referral business networking group without client's informed consent); Ill. Ethics Op. 97-1 (1977) (A lawyer may give the names of his clients to a bank as potential customers for banking services, but must first obtain consent of his clients to do so.); Mo. Informal Ethics Op. 2022-04 (2022) (use of a motion for summary judgment as a writing sample may require informed consent of the client; even if the motion is a matter of public record, it is nevertheless confidential information and cannot be disclosed unless the attorney can remove names, case numbers and other personally identifiable information such that the attorney does not reveal protected information that could reasonably lead to discovery of the client's information by a third person. If not, the attorney must obtain informed consent before using the motion as a writing sample; even if client gives informed consent, the attorney should consider whether redactions should be made to protect the client's interests. If the client does not provide informed consent, the attorney should not use the client's motion for summary judgment as a writing sample.); Nev. Ethics Op. 41 (2009) (lawyer may not reveal information relating to the representation of the client even if the information is generally known and not to the disadvantage of the client); N.Y. Ethics Op. 907 (2012) (lawyer may not disclose client's identity when making anonymous charitable donation on client's behalf); Wis. Ethics Op. ER-17-02 (2017) (attorney prohibited from disclosing client's identity unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out representation, or the disclosure falls within certain stated exceptions). *Cf.* N.Y. Ethics Op. 1282 (2025) (A New York lawyer working in another state for a non-profit organization that operates both an immigration legal clinic and a shelter for non-citizens may not share information gained during or relating to the legal clinic's representation with the shelter's nonlawyer staff unless (1) the information is not privileged and the disclosure would not be embarrassing or detrimental to the client; (2) the client gives informed consent to the disclosure; or (3) the disclosure advances the best interests of the client and is reasonable or customary under the circumstances.).

[143] Mass. Ethics Op. 2024-2 (2024) (A published judicial opinion can nevertheless contain confidential information protected by Rule 1.6 of the Rules of Professional Conduct. Therefore, before including a citation to such an opinion on a firm website, a lawyer must inquire whether the information is "generally known" within the meaning of Rule 1.6(a); if not, and if the information is embarrassing or detrimental to the client, the lawyer must obtain the client's informed consent before including a citation). *See also* ABA Formal Ethics Op. 511 (2024) (Rule 1.6 prohibits a lawyer from posting questions or comments relating to a representation to a listerv, even in hypothetical or abstract form, without the client's informed consent if there is a reasonable likelihood that the lawyer's questions or comments will disclose information relating to the representation that would allow a reader then or later to infer the identity of the lawyer's client or the situation involved. A lawyer may, however, participate in listserv discussions such as those related to legal news, recent decisions, or changes in the law, without a client's informed consent if the lawyer's contributions will not disclose, or reasonably be likely to lead to the disclosure of, information relating to the representation); N.Y. Ethics Op. 1268 (2024) (After termination of the representation, a lawyer may publish an article that discusses the legal issues in the representation, as long as the article does not reveal confidential information without the consent of the client. Confidential information does not include a lawyer's "legal knowledge or legal

6. "Dual-purpose" communications may not be privileged. There is an emerging split of authority where communications have dual purposes and include both legal and non-legal advice. Some courts have held that the privilege is not lost merely because relevant nonlegal business or practical considerations are included if one of the purposes of the communication include providing legal advice.[144] On the other hand, a few courts have held that the privilege is lost for

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research" or information that is "generally known" in the local community or in the trade, field or profession to which the information relates. But information is not generally known merely because it is available in court files); *Matter of Disciplinary Proceedings Against Merry*, 5 N.W.3d 285 (Wis. 2024) (Attorney's conduct in writing and publishing book regarding former client without client's consent, which revealed confidential information and caused client psychological harm, violated professional rules that prohibited lawyers who had formerly represented clients from using information related to representation to disadvantage of former client except when information had become generally known, or from revealing information related to representation, except as rules would permit or require.).

[144] *Slaughter v. McDonough*, 2022 WL 2817836 (D.D.C. July 19, 2022) (VA's Office of General Counsel (OGC) OGC served in a primarily legal capacity in providing legal advice to VA's Office of Accountability and Whistleblower Protection regarding the plaintiff's termination and thus communications were protected by the attorney-client privilege. Although the OGC's counsel's advice concerned a personnel decision—namely the drafting of the notice of proposed termination—these communications took place during the course of ongoing litigation related to the plaintiff's employment. Thus, the timing of the communications, combined with the descriptions of the attorney's involvement in the privilege log, indicate that the OGC was essentially providing a "legal sufficiency review" and legal advice regarding the implications of terminating the plaintiff's employment.); *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014) (defense contractor's internal investigation into whether the contractor had defrauded the United States government by inflating costs and accepting kickbacks while administering military contracts in wartime Iraq was protected by the attorney-client privilege, even if the investigation was undertaken as part of a mandatory compliance program, rather than for the sole purpose of obtaining legal advice, where a primary purpose of the investigation was to obtain or provide legal advice); *FTC v. Boehringer Ingelheim Pharm., Inc.*, 892 F.3d 1264 (D.C. Cir. 2018) (privilege covered general counsel's communications involving legal and business issues because a "one of the significant purposes of [her] communications was to obtain or provide legal advice."); *In re FirstEnergy Corp.*, 154 F.4th 431 (6th Cir. 2025) (district court erred in finding reports of internal investigation by corporation prompted by being implicated in a political bribery charge was not privileged; the corporation demonstrated that it sought and received legal advice from its attorneys throughout the investigation; the fact that it made business decisions based on the investigations did not alter this conclusion: " In the context of the legal threats that FirstEnergy faced—high-stakes criminal and civil allegations—it will be the rare company that will not also have business purposes for seeking essential legal advice."); *Alomari v. Ohio Pub. Safety*, 626 F. App'x 558 (6th Cir. 2015) (district court did not abuse its discretion in denying former Ohio Department of Public Safety (ODPS) employee's motion to compel discovery, in employment discrimination suit, of communications during meetings on ground they were protected by attorney-client privilege; employee's own deposition testimony indicated that he was aware lawyer was present at first meeting to gather information to advise ODPS on how to respond to media inquiries, an act with great legal ramifications, and primary purpose of second meeting was to provide ODPS with legal advice); *Motley v. Marathon Oil Co.*, 71 F.3d 1547 (10th Cir. 1995) (draft memo prepared by company's in-house counsel for implementation of reduction in force, and lists prepared at request of in-house counsel for use in advising company's restructuring oversight committee protected by the attorney-client privilege; the documents were prepared for the purpose of giving legal advice and were treated as confidential, the in-house counsel did not give business advice in the memo and lists, and the in-house counsel served as legal advisor to the committee); *Oasis Int'l Waters, Inc. v. United States,* 110 Fed. Cl. 87 (2013) (Passage in contracting officer's "Memorandum for Record" discussing government's reasoning for issuing modification to a government contract, in which contracting officer summarized advice provided by legal counsel, was protected by attorney-client privilege, even though the passage partly concerned financial and operational matters and not just legal advice; totality of the passage indicated that contracting officer requested legal advice regarding how to proceed with the contract with reference to counsel's knowledge and discretion in law. An attorney's focus during contract negotiations on achieving the most financially advantageous outcome for his or her client does not transform the attorney's communications into business advice that would not be protected by attorney-client privilege); *Estate of Serna v. Cnty. of San Diego*, 2024 WL 942368 (S.D. Cal. March 5, 2024) (attorney-client privilege did not apply to County's Critical Incident Review Board (CIRB) Reports and CIRB Spreadsheet; although the documents may have had a legal component, County did not establish that the primary purpose of the CIRB-related documents was seek or receive legal advice) (applying *In re Grand Jury*, 23 F.4th 1088, 1091 (9th Cir.

"dual-purpose" communications unless it can be shown that the "primary purpose" of the communication was to obtain legal advice.[145]

2021)); *Fields v. Am. Airlines, Inc.*, 2022 WL 2192933 (E.D. Pa. June 17, 2022) (plaintiff counsel's deposition questions to defendant's vice president on whether defendant's in-house counsel worked with him or others on last chance agreements for plaintiff appeared to seek privileged information; therefore, defense counsel was permitted to object and instruct his client not to answer the question); *McGowan v. Southern Methodist Univ.*, 2023 WL 2920848 (N.D. Tex. April 11, 2023) (Communications between law firms and universities for the purpose of legal guidance regarding Title IX obligations are protected by attorney client-privilege, and privilege also extends to reports generated by a law firm from the results of the audits.); *United States v. Microsoft Corp.*, 2020 WL 263577 (W.D. Wash. Jan. 17, 2020) (no work product protection for in-house counsel's emails with accounting firm that had both business and litigation purposes); *Skansgaard v. Bank of Am.*, 2013 WL 828210 (W.D. Wash. Mar. 6, 2013) (attorney-client privilege applied to business presentation prepared by defendant bank's in-house counsel and presented to the president of a bank division regarding both the business and legal bases and risks associated with the change to the bank's flood insurance placement methodology; although communications made by an attorney performing a dual role of providing legal advice as well as advising on business affairs poses a challenge in determining whether the communication was of a legal nature, review of the document reveals that counsel was assessing the legal risks of making the change and thus the document was subject to the privilege.); *Buckley, LLP v. Series 1 of Oxford Ins. Co., NC, LLC*, 876 S.E.2d 248 (N.C. 2022) (Business court ruling on motions by insured and insurer to compel email communications that insured law firm had with outside counsel hired to investigate sexual harassment allegations against firm's founding partner and that insurer had with general counsel regarding claim arising out of partner's departure properly recognized that the investigation by outside counsel had both business and legal purposes, conducted a detailed in camera review of each disputed document, and mandated disclosure of all communications that were unrelated to the rendition of legal services, while protecting communications that reflected a primary purpose of giving or receiving legal advice); *Harrington v. Freedom of Info. Comm'n,* 144 A.3d 405 (Conn. 2016) (privilege is not lost merely because relevant nonlegal considerations are expressly stated in a communication which also includes legal advice; however, it is not enough for an administrative agency invoking the privilege to show that a communication to legal counsel relayed information that might become relevant to the future rendering of legal advice; instead, the communication must also either explicitly or implicitly seek specific legal advice about that factual information); *In re Polaris, Inc.*, 967 N.W.2d 397 (Minn. 2021) (predominant purpose test governs whether document that contains both legal advice and business advice is protected by the attorney-client privilege); *Dubois v. Off. of the Attorney General*, 185 A.3d 734 (Me. 2018) (emails involved in planning for a strategy meeting between those in the Attorney General and other state agencies regarding potential litigation with a livestock company were covered by the work product privilege, and therefore encompassed by Freedom of Access Act exception from the definition of public record, where the e-mails revealed the purpose of the meeting and efforts made to accommodate the schedules of people who were to attend the meeting, which by itself points to the nature of issues and strategies that likely would be considered, and several e-mails explicitly discussed the Department of Agriculture, Conservation, and Forestry's investigative and legal options).

[145] *See Epic Games, Inc. v. Apple Inc.*, 161 F.4th 1162 (9th Cir. 2025) (the primary-purpose test applies to attorney-client privilege claims for dual-purpose communications); *Greer v. Cnty. of San Diego*, 127 F.4th 1216 (9th Cir. 2025) (Primary purpose of documents from county's critical incident review board (CIRB) concerning investigations of in-custody deaths at county jail was to obtain legal advice, and thus documents were protected by attorney-client privilege; chief legal advisor for county sheriff's department was required by policy to be part of CIRB, there was no contention that chief legal advisor was absent from any of the meetings memorialized in documents, in each instance, areas of potential liability for the inmate's death were discussed, investigations were necessary predicate to assessing liability for past events, and investigations were not separate from provision of legal advice on both liability for past events and avoidance of future liability.); *In re Grand Jury*, 13 F.4th 710 (9th Cir.), *amended op.*, 23 F.4th 1088 (9th Cir. 2021) (where communications implicate both legal and business concerns, such dual-purpose communications are not privileged unless it is shown that the primary purpose of the documents was to obtain legal advice rather than business advice)*, cert. granted*, 143 S.Ct. 80 (2022), *cert. dismissed as improvidently granted*, 143 S.Ct. 543 (2023); *Dunsmore v. San Diego Cnty. Sheriff's Dep't*, 2025 WL 2218766 (S.D. Cal. Aug. 5, 2025) (court grants motion to seal sections of county's expert declarations that reference the sheriff's Critical Incident Review Board (CIRB) reports because the attorney client privilege applied to the entirety of the CIRB report and information derived from it, following *Greer*); *Jordan v. U.S. Dep't of Labor*, 308 F. Supp. 3d 24 (D.D.C. 2018) (Email, which was not specifically

7. The attorney-client privilege may extend to communications solely between non-lawyers and with non-employees of the organization. The privilege may cover communications between non-lawyer employees of a party that discuss or transmit the lawyer's advice, even if the lawyer did not directly participate in the specific communication at issue,[146] as well communications with

addressed to corporation's in-house attorney, but on which sender copied the in-house attorney in order keep the attorney apprised of ongoing discussions, in order to allow him to have a complete understanding of the facts underlying any future claim, was not protected by attorney-client privilege, as required to withhold information under FOIA exemption in non-trade secret cases; primary purpose of email was not to obtain legal advice, email did not contain any factual information on which in-house attorney might rely to form a legal judgment, protection of the email would do little to promote purpose of attorney-client privilege, and email's topic and distribution list was nearly identical to that of different email that was not withheld on the basis of attorney-client privilege); *Ictech-Bendeck v. Wast Connections Bayou, Inc*., 2024 WL 247063 (E.D. La. Jan. 23, 2024) ("'When a corporation simultaneously sends communications to both lawyers and non-lawyers it usually cannot claim that the primary purpose of the communication was for legal advice or assistance because the communication served both business and legal purposes.'") (internal citations omitted); *Slocum v. Int'l Paper Co.*, 2021 WL 5861499 (E.D. La. June 28, 2021) (email from communications manager to lawyers and non-lawyer PR employees not privileged; when an employee "simultaneously sends communications to both lawyers and non-lawyers, it cannot claim that the primary purpose of the communication was for legal advice or assistance because the communications served both business and legal purposes"; moreover, the exchange was "consistent with the general practice of copying legal counsel on all communications which may, at some time, be of legal significance."); *Sky Angel U.S., LLC v. Discovery Commc'ns, LLC*, 28 F. Supp. 3d 465 (D. Md. 2014) (magistrate judge's determination that the primary purpose of a chain of emails regarding due-diligence review of a prospective contract partner's distribution methodology was to obtain legal advice, and thus the emails were protected under attorney-client privilege, was not clearly erroneous or contrary to law, even though the resulting due-diligence memo was distributed to both the in-house attorney and non-legal employees, where the attorney testified that he acted exclusively in a legal and not a business capacity as in-house attorney, and that he used memo in drafting a distribution agreement with the partner); *McLaren Health Care Corp. v. Gartner, Inc.*, 2025 WL 2524110 (E.D. Mich. Sept. 2, 2025) (email from company's vice president to its human resources team not privileged and may be produced in discovery because the predominant purpose of the email was business-related and not to seek legal advice); *Sodexomagic, LLC v. Drexel Univ.*, 291 F. Supp. 3d 381 (E.D. Pa. 2018) (E-mail sent to a large group of individuals, including lawyers, was not protected by Pennsylvania's attorney-client privilege, where it was clear that the e-mail communication was not for the primary purpose of seeking legal advice; document reflecting a scheduled appointment in which a lawyer was invited was not protected by attorney-client privilege; there was not a request for legal advice associated with the meeting request, even though the discussion at the meeting might have been privileged, and the e-mail chain continued without any provision of legal advice); *United States ex rel. Mitchell v. CIT Bank*, 2021 WL 4439516 (E.D. Tex. Sept. 28, 2021) (privilege did not extend to communications between CIT's attorneys and a consultant CIT retained to conduct an independent foreclosure review, because the communications were not made for the primary purpose of obtaining legal advice given that the consultant's Statement of Work contained several explicit disavowals of any attorney-client relationship, and stated that in performing its review it would not be for the purpose of rendering legal advice; therefore, CIT's disclosure of privileged documents to the consultant constituted a waiver of the privilege).

[146] *Shaffer v. Am. Med. Ass'n*, 662 F.3d 439 (7th Cir. 2011) (Memo prepared by employee's supervisor for the sole purpose of meeting with in-house counsel regarding the elimination of employee's position was protected by attorney-client privilege; memo was prepared in connection with the provision of legal services in that supervisor was told that, in preparation for the meeting with in-house counsel with respect to anticipated litigation regarding the elimination of employee's position, he should put in writing his recollection of his decision-making regarding elimination of employee's position); *Ryskamp v. Looney*, 2011 WL 3861437 (D. Colo. Sept. 1, 2011) (communications between law firm and its clients—a closed-end fund, its director and its managing advisor—were protected by attorney-client privilege despite inclusion of the fund management, the fund's compliance officer, interested directors and adviser portfolio managers and counsel in the communications; the individuals had a significant relationship to the matter at issue, the purpose of the communications was to gain or provide legal assistance, the subject matter was within the individuals' duties, and the communications were treated as confidential. Communications where the law firm was not a participant were nevertheless privileged where the communications were either directed by the firm or which discussed legal advice provided by the firm); *In re Testosterone Replacement Therapy Prods. Liab. Litig.*, 301 F. Supp. 3d 917 (N.D. Ill. 2018) (E-mail chain containing communication between plaintiff's in-house attorneys and

three non-attorney employees concerning work with outside counsel was protected by attorney-client privilege, in plaintiffs' civil RICO action against manufacturers of testosterone replacement therapy drugs, where attorneys requested information concerning their investigation relating to civil RICO claims, their request revealed their legal thinking, and one employee provided information in response to request. E-mails containing inquiry from plaintiff's in-house attorney to three non-attorney employees seeking information about account manager of manufacturer of testosterone replacement therapy drugs were protected by attorney-client privilege since e-mails revealed attorney's thinking, and aided attorney's investigation into role of account manager with respect to civil RICO claims. Two e-mail chains between two of plaintiff's non-attorney employees relaying statements and inquiry from plaintiff's in-house attorney were protected by attorney-client privilege since e-mail chains reflected in-house attorney's legal thinking and forward-looking strategy for civil RICO action, and they contained relevant response from one employee.); *Crabtree v. Experian Info. Sols., Inc.*, 2017 WL 4740662 (N.D. Ill. Oct. 20, 2017) (magistrate judge) (attorney-client privilege applies to investigation-related email between two non-attorney employees where the lawyer has "some relationship to the communication" and the email would reveal "the substance of a confidential attorney-client communication"); *Muldrow v. City of St. Louis*, 2019 WL 5597057 (E.D. Mo. Oct. 30, 2019) (where attorney represented City and individual supervisor in discrimination case, email from supervisor to another municipal employee under the direction of the attorney to obtain information for the attorney to prepare a response to the plaintiff's charge of discrimination was protected from disclosure by the attorney client privilege); *Carter v. Cornell Univ.*, 173 F.R.D. 92 (S.D. N.Y. 1997) (associate dean who conducted interviews of employees at request of outside counsel could not be deposed since he was a representative of outside counsel); *Clark v. Buffalo Wire Works* Co., 190 F.R.D. 93 (W.D. N.Y. 1999) (attorney-client privilege protected former employee's personal notes that he kept and turned over to counsel during a period in which he suspected that employer would terminate him because of his age, from discovery in subsequent age discrimination suit brought by other employees; employee did not waive privilege for such notes by testifying to the underlying facts regarding termination at deposition); *In re Petition of Novalpina Cap. Partners I GP S.A.R.L.*, 2025 WL 920667 (D. Ore. March 26, 2025) (emails concerning fund between certain limited partners and law firm privileged; although partners did not retain firm, they shared a common legal interest with the other limited partners in the fund such that the privilege may extend to cover these communications; certain emails may be protected by privilege even if no attorney was included on the communications, whether they are seeking or relaying confidential information on behalf of an attorney); *Valmarc Corp. v. Nike, Inc.,* 2024 WL 166101 (D. Ore. Jan. 16, 2024) (outside counsel's emails remained privileged even though they were forwarded between non-lawyer personnel of defendant; privilege extends to communication between nonlegal employees in which the employees discuss or transmit legal advice given by counsel, as well as an employee communication regarding her intent to seek legal advice about a particular issue); *McCall v. Procter & Gamble Co.*, 2019 WL 3997375 (S.D. Ohio Aug. 22, 2019) (communications shared by non-attorney employees may be privileged if they were made in order to relay information requested by attorneys, or to disseminate legal advice given by those attorneys so that the corporation's employees act appropriately); *Sodexomagic, LLC v. Drexel Univ.*, 291 F. Supp. 3d 381 (E.D. Pa. 2018) (document in which lawyer provided legal advice, which a non-lawyer forwarded to a second non-lawyer, while making clear that his response was based on lawyer's counsel, was protected by Pennsylvania's attorney client privilege; e-mail that quoted a prior privileged communication between client and lawyer, and the lawyer's response, was protected by the attorney-client privilege, as well, but only the privileged portion of the e-mail, rather than entire e-mail itself, could be redacted in the downstream communication when it was produced in response to discovery in breach of contract suit between food service provider and private university); *Moffatt v. Wazana Bros.*, 2014 Empl. Prac. Cases (BNA) 170,552 (E.D. Pa. 2014) (attorney-client privilege that attached to email from defendant's CFO and HR manager seeking legal advice from corporate counsel was not waived when the CFO relayed email to defendant's President and CEO since these recipients "needed to know" the contents of the communications to make informed decisions concerning the subject matter of the communication, the termination and severance of the plaintiff); *TIGI Linea Corp. v. Prof'l Prods. Grp., LLC*, 2020 WL 7773581 (E.D. Tex. Dec. 30, 2020) (privilege extends to nonlegal employees where the employees discuss or transmit legal advice given by counsel); *Perkins v. Gregg Cnty.*, 891 F. Supp. 361, 363-64 (E.D. Tex. 1995) (employee's taped "notes" his conversations with his former employers for the purpose of seeking legal advice and assistance protected by attorney-client privilege, even though attorney ultimately declined representation); *Ex parte CSX Transp., Inc.*, 374 So.3d 690 (Ala. 2022) (Evidence supported finding that files in employer's risk-management system (RMS) were prepared in anticipation of litigation, and thus were not discoverable under work-product doctrine unless employee showed substantial need for the materials to prepare his case and that he was unable without undue hardship to obtain the substantial equivalent of materials by other means; within three days of accident, employer was notified employee had obtained representation regarding his claims against employer for "any and all injuries and damages arising from his on-the-job injury,"

third party non-employees, such as translators or accountants, that are necessary to assist the lawyer in understanding the issue to render advice, or to individuals that are the "functional equivalent" of the company's employees.[147] However, at least one court has concluded that an

affidavit of employer's senior director of risk management indicated risk-management department (RMD) was part of employer's legal department, RMD investigated and evaluated claims in anticipation of litigation, the information generated by RMD was entered into RMS, and RMS included RMD personnel's mental impressions and opinions.); *Chaimov v. State by and through Oregon Dep't of Admin. Servs*., 520 P.3d 406 (Or. 2022) (Request forms prepared by state agencies seeking draft legislation from Office of Legislative Counsel, which were completed but not submitted, were covered by attorney-client privilege, and thus were exempt from disclosure pursuant to Public Records Act, even though requester argued such documents were never communicated to lawyer, such that they were not confidential communications between client and lawyer; rule governing attorney-client privilege did not require that communication be delivered to attorney, and instead protected confidential communications made for purpose of facilitating rendition of professional legal services, purpose of request forms, which were kept confidential, was to facilitate governor obtaining legal services associated with bill drafting, and forms were kept between governor, as client, and state agencies, as governor's representatives); *Oregon Health Scis. Univ. v. Haas*, 942 P.2d 261 (Or. 1997) (university department head's communication with faculty, at faculty meeting regarding internal report on discrimination in department triggered by lawsuit by female physician, did not waive the attorney-client privilege; the communication was confidential and made in furtherance of providing legal services to client and, even though no lawyer was present, statement was communication between "representatives of the client"). *Cf. Lively v. Wayfarer Studios LLC*, 2025 WL 2606904 (S.D. N.Y. Sept. 9, 2025) (internal corporate communications that did not include counsel were not privileged where they were not made for the purpose of obtaining or providing legal advice); *In re Silver*, 540 S.W.3d 530 (Tex. 2018) (patent agent's client may assert lawyer-client privilege event though the patent agent's work is not under a licensed attorney's direction); *Fireman's Fund Ins. Co. v. Super. Ct.*, 196 Cal. App. 4th 1263 (2011) (privilege covered lawyer's in-firm communications in furtherance of a client's interests even if the client is not present; thus, communications between lawyer, her partner, and investigator concerning lawyer's opinion about the value of a possible witness in pending litigation was privileged); *Zurich Am. Ins. Co. v. Super. Ct*., 155 Cal. App. 4th 1485 (2007) (in bad faith action by insured against insurer, the attorney-client privilege presumptively applied to communications among personnel who were not lawyers insofar as legal advice was discussed or contained in communications among insurer's employees to whom disclosure of legal advice or opinions was necessary to further purpose of legal consultation); *Canarelli v. Eighth Judicial Dist. Ct.*, 464 P.3d 114 (Nev. 2020) (Physical delivery of an individual's notes to attorney is not required for the notes to constitute "communications" that could be protected by attorney-client privilege; so long as the content of the notes was previously or is subsequently communicated between a client and attorney, the notes constitute communications subject to the attorney-client privilege).

[147] *See, e.g., United States v. Kovel*, 296 F.2d 918 (2d Cir. 1962) (attorney-client privilege extends to non-lawyers, such as accountants, where the client's communications to the non-lawyer is necessary to assist the lawyer in understanding the issues to enable the lawyer to provide legal advice and representation); *Dialysis Clinic, Inc. v. Medley*, 567 S.W.3d 314 (Tenn. 2019) (communications between a corporation's legal counsel and a third-party property manager hired by corporation to manage its properties were protected by the attorney client privilege; privilege applies to communications between an entity's counsel and a third-party non-employee if the employee is the functional equivalent of the entity's employee and the communications were made with the intention that they would be kept confidential; corporation hired property manager as its agent because of its experience in property management, which the company did not have in-house, and manager had primary responsibility for the day-to-day management of the properties at issue in the litigation); *Parneros v. Barnes & Noble, Inc*., 332 F.R.D. 482 (S.D. N.Y. 2019) ("Factual investigations conducted by an agent of the attorney [ ] clearly fall within the attorney-client rubric.'"); *Multiple Energy Techs., LLC v. Under Armour, Inc.*, 2024 WL 4784112 (W.D. Pa. Nov. 14, 2024) (attorney's emails on which his daughter was copied were privileged because the daughter, a medical doctor, acted as a sales consultant for plaintiff and the communications related to draft agreements on which the recipients were asked to weigh in on); *SIS, LLC v. Orion Grp. Holdings, Inc.*, 2023 WL 8703419 (S.D. Tex. Dec. 15, 2023) (email communications and a report exchanged between defendant's counsel and a former technology consultant retained by defendant during the period relevant to lawsuit are privileged because the consult qualifies as a "client representative under Texas Rules of Evidence and information was not disclosed outside of defendant); *Nat'l Prods., Inc. v. Innovative Intelligent Prods. LLC*, 2023 WL 6215296 (W.D. Wash. Sept. 25, 2023) (outside designer for defendant was the functional equivalent of an employee of the defendant and thus testimony concerning designer's discussions with defendant and its attorneys protected by the attorney client privilege; evidence showed that designer worked closely with defendant to develop its

individual's communications with an artificial intelligence (AI) chatbot using information obtained from his counsel are not protected by privilege where, among other things, counsel did not direct the communication and the individual consented to the platform's policies which stated that the information will be used to "train" the AI device and the platform reserved the right to share information with governmental authorities.[148]

8. Communications between separately represented clients may be privileged. The privilege can extend to communications between separately represented parties in a "joint defense" agreement,[149] or between parties having a "common interest" with respect to the controversy at issue,[150] but communications will not be protected if they do not concern an issue of "common

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designs and was defendant's primary designer). *Cf. United States v. Graf*, 610 F.3d 1148 (9th Cir. 2010) (Defendant, who was functional equivalent of employee of health insurance company, was not entitled to personal claim of attorney-client privilege to protect his communications with corporate counsel for company; although defendant was primary agent with whom corporate counsel communicated, counsel never informed defendant that he was their client, all matters discussed between defendant and counsel related to the company, the company paid all legal bills, and defendant admitted that he never requested that counsel represent him personally.). *Cf. Energy Policy Advocates v. Ellison*, 980 N.W.2d 146 (Minn. 2022) (The attorney-client privilege may apply to internal communications among attorneys in a public law agency, even if those communications do not involve a communication between one of the agency's attorneys and a client.).

[148] *United States v. Heppner*, ___ F. Supp.3d ___, 2026 WL 436479 (S.D. N.Y. Feb. 17, 2026) (defendant's exchanges with generative AI chatbot "Claude," in which he provided Claude with information he learned from counsel, and which he subsequently shared with counsel were not protected from government inspection by the attorney-client privilege or work product doctrine because: (i) "Claude" was not a lawyer, (ii) the communications with Claude were not confidential because the written policy to which Claude users consent provide that the platform collects both input and output data from users, that it uses the data to "train" Claude, and that it reserves the right to disclose the data to third parties, including governmental regulatory authorities, and (iii) defendant did not communicate with Claude for the purpose of obtaining legal advice as he did so not at the suggestion or direction of counsel, and Claude disclaims providing legal advice—when the government asked Claude whether he could give legal advice, it responded that "I'm not a lawyer and can't provide formal legal advice or recommendations" and recommended that the user "should consult with a qualified attorney who can properly assess your specific circumstances"—and defendant's later sharing of the information with his attorneys did not convert the communication to a privileged one.).

[149] *See, e.g.*, *United States v. Gonzalez*, 669 F.3d 974 (9th Cir. 2012) (Express oral or implied joint defense agreement (JDA) existed between married fraud defendants and their counsel, at least to a point, during defendants' criminal proceedings, such that joint defense privilege applied to communications made thereunder, where counsel for both defendants indicated that they met and discussed confidential information for purposes of trial preparation and strategy, with the understanding that such communications were privileged and confidential, notwithstanding that JDA might have ended once defendant-husband decided to pursue his own defense and blame defendant-wife for crime, thereby ending their common legal interests); *OXY Res. Cal. LLC v. Super. Ct.*, 115 Cal. App. 4th 874 (2004) (noting statutorily recognized "joint client" or "common interest" exception to attorney-client privilege, which applies where two or more clients have retained or consulted a lawyer on a matter of common interest in which event neither may claim the privilege in an action by one against the other; joint client or common interest doctrine is not an extension of the attorney-client privilege, but is more appropriately characterized as a nonwaiver doctrine); *Howard v. IOMAXIS, LLC*, 887 S.E.2d 853 (N.C. 2023) (Evidence supported trial court's determination that counsel was not acting as corporate counsel when giving legal advice on call that had been secretly recorded by LLC member pertaining to potential impact on litigation defense of signing amendment to limited liability company's (LLC) operating agreement and, instead, was acting as joint defense counsel for LLC and individual members, who were represented pursuant to express engagement letter stating that counsel jointly represented LLC members and LLC and that members could not pursue individual interests through common attorney, such that member held attorney-client privilege as to advice given on call, notwithstanding competing evidence that counsel had stated that LLC was the client and that amended operating agreement was in LLC's best interest; counsel had given member personal legal advice during call that was in his best interest in defending himself in lawsuit without limitation or qualification.).

[150] *See Schaeffler v. United States*, 806 F.3d 34 (2d Cir. 2015) (common-interest doctrine precluded IRS from

compelling disclosure of otherwise privileged documents that a borrower shared with its lender); *United States v. BDO Seidman, LLP*, 492 F.3d 806 (7th Cir. 2007) (common interest doctrine applied to sustain accounting firm's attorney-client privilege as to memo written by accounting firm's in-house attorney to its outside counsel, which was sent by accounting firm to a second law firm that did not represent it; because the accounting firm and the second law firm jointly serviced several common clients with respect to the tax products at issue, they and the accounting firm's law firm had a common interest in sustaining the viability of their tax advice, and thus the attorney-client privilege was not waived by transmittal of the memo to the second law firm); *Bennett v. CIT Bank, NA*, 432 F. Supp. 3d 1370 (N.D. Ala. 2020) (common interest privilege applied to emails between defendants CIT and Federal National Mortgage Association containing legal advice from their respective counsel concerning the parties' claims to the insurance proceeds, where both defendants shared a common legal interest in defending their rights to the insurance proceeds at issue in the case in response to plaintiff's counsel's request for an accounting and acknowledgement that she would pursue a balance due the estate); *BBAM Aircraft Mgmt., LP v. Babcock & Brown LLC*, 3716574 (D. Conn. Aug. 29, 2022) (common interest privilege existed between BBAM and its trademark licensee thus BBAM did not waive privilege by sharing the legal advice it received concerning the trademark at issue with the licensee; both BBAM and licensee have a common legal and commercial in protecting the trademark at issue); *AgroFresh Inc. v. Essentiv LLC*, 2019 WL 4917894 (D. Del. Oct. 4, 2019) (district court reversed magistrate's order granting motion to compel documents where defendants established that the common interest doctrine applied to their communications, based on letter of intent that created shared legal interests between the parties with respect to the communications at issue); *Animal Welfare Inst. v. NOAA*, 370 F. Supp. 3d 116 (D.D.C. 2019) (Draft memorandum created by NOAA general counsel in response to National Marine Fisheries Service's (NMFS) request for legal advice as to issue paper arguing that amendments to the Mammal Protection Act had not terminated requirement that agencies receive necropsy of certain orca whale was protected by attorney-client privilege; although agencies shared memorandum with Marine Mammal Commission (MMC) and Fish and Wildlife Service (FWS), all agencies shared common legal interest in proper administration of MMPA, with issue paper author even having regularly, separately met with MMC and FWS to discuss paper's arguments.); *Baylor v. Mitchell Rubenstein & Assocs.*, 130 F. Supp. 3d 326 (D.D.C. 2015) (attorney-client privilege barred production of communications between law firm and debt collection service that hired firm on behalf of creditor where service acted as creditor's agent for the purpose of obtaining legal advice from firm; fact that service, rather than creditor, hired law firm did not prevent finding of privilege); *In re Bank of New York Mellon Corp. Forex Transactions Litig.*, 66 F. Supp. 3d 406 (S.D. N.Y. 2014) (document containing a legal memo originally prepared for defendant bank but that Bank later forwarded to its third-party investment pension plan investment managers, aimed at securing compliance with the requirements of ERISA, was protected by the common interest doctrine and the attorney-client privilege); *Nester v. Textron, Inc.*, 2015 WL 1020673 (W.D. Tex. Mar. 9, 2015) (magistrate judge) (attorney-client privilege covers communications between parent company's in-house and management personnel of an indirect subsidiary; in-house counsel's affidavit established he was engaged to represent both entities during the investigation at issue); *McKesson HBOC, Inc. v. Super. Ct.*, 115 Cal. App. 4th 1229 (2004) (parties aligned on the same side in an investigation or litigation may, in some circumstances, share privileged documents without waiving the attorney-client privilege if cooperation is reasonably necessary for counsel to provide representation in the investigation or litigation); *Hanover Ins. Co. v. Rap & Jepsen Ins. Serv., Inc.*, 870 N.E.2d 1105 (Mass. 2007) (common interest privilege protected communications among defendants and their lawyers from discovery, and the privilege applies even in the absence of consent of the clients and the common interest agreement need not be in writing); *Energy Policy Advocates v. Ellison*, 980 N.W.2d 146 (Minn. 2022) (As a matter of first impression, Minnesota recognizes the common interest doctrine. The common-interest doctrine, which permits parties with the same legal interests to share documents without losing the protection of the attorney-client privilege or work-product doctrine, applies when (1) two or more parties, (2) represented by separate lawyers, (3) have a common legal interest (4) in a litigated or non-litigated matter, (5) the parties agree to exchange information concerning the matter, and (6) they make an otherwise privileged communication in furtherance of formulating a joint legal strategy.); *Cotter v. Eighth Judicial Dist. Ct.*, 416 P.3d 228 (Nev. 2018) (Former chief executive officer (CEO) and shareholders shared common interest in litigation against members of corporation's board of directors on similar issues concerning breaches of fiduciary duty, and thus, common interest rule allowed CEO's counsel to share work product through e-mails with shareholders' counsel without waiving the work-product privilege; actions brought by CEO and shareholders were consolidated, CEO and shareholders asserted derivative claims against members, and shareholders never filed claims against CEO); *O'Boyle v. Borough of Longport*, 94 A.3d 299 (N.J. 2014) (Private attorney, who represented former municipal officer and private residents in litigation previously filed by public records requester, shared common interest with municipality at time private attorney disclosed work-product documents to municipal attorney, such that, under common interest rule, documents were not government records subject to production in

interest."[151] Some states rules impose a "pending" litigation requirement, whereby no common

response to requester's Open Public Records Act request; municipal attorney and private attorney had common purpose to defend their public and private clients from pending and anticipated litigation filed by requester, who did not agree with manner in which elected and appointed municipal officials discharged their public duties, and private attorney's work product was disclosed in manner calculated to preserve its confidentiality); *In re JDN Real Estate-McKinney L.P.*, 211 S.W.3d 907 (Tex. App.—Dallas 2006) (city did not waive, by disclosure to its economic development corporation, the ability to assert the attorney-client privilege for documents inadvertently produced in condemnation action, where city and corporation were both represented by the same law firm and they shared a common interest); *Kititas Cnty. v. Allphin*, 416 P.3d 1232 (Wash. 2018) (County did not waive its work product protection by exchanging e-mails with Department of Ecology about litigation over county's notice of violation and abatement requiring hazardous waste facility to halt operations until it obtained necessary permits to store moderate risk waste; county and Department were required to work together to ensure that facility complied with both local and state regulations, they cooperated over period of several years, and they engaged in considerable sharing of work product showing intent to develop common litigation strategy.); *Herrick v. Jackson Hole Airport Bd.*, 452 P.3d 1276 (Wyo. 2019) (When attorney-client matters are made public or revealed to third persons, the element of confidentiality, as required for attorney-client privilege to apply, is wanting; however, an exception to this rule arises when clients share information on a matter of common interest.).

[151] *See Waymo LLC v. Uber Techs., Inc.*, 870 F.3d 1350 (Fed. Cir. 2017) (Founder of alleged infringer was not entitled to common interest privilege to protect information he provided to independent investigator that prepared report before company acquired alleged infringer, so district court's order permitting discovery of report did not constitute clear error, such that founder's right to writ of mandamus was clear and indisputable in patentee's patent infringement and trade secret action against company that acquired alleged infringer, in which founder alleged to have taken patentee's documents intervened; founder's communications with investigator were not subject to attorney-client privilege, nor did founder and company share a common interest, since founder was subject of investigation ordered by parties on opposite sides of proposed purchase transaction); *Janson v. Stamford Health, Inc.*, 312 F. Supp. 3d 289 (D. Conn. 2018) (Common interest rule did not apply to protect from disclosure, in anesthesiologist's wrongful termination action against hospital and anesthesiology clinic, legal advice exchanged between hospital and clinic in connection with clinic's decision to terminate anesthesiologist with hospital's approval, even though hospital and clinic had shared concern about potential litigation, where parties did not enter into written joint defense agreement, and there was no evidence that, at specific time or times, joint defense or strategy had been decided upon and undertaken by parties and their respective counsel.); *Fond du Lac Band of Lake Superior Chippewa v. Cummins*, 2025 WL 2251920 (D. Minn. Aug. 8, 2025) (Joint defense privilege did not apply because non-parties failed to establish that joint representation existed at time communications were made; common interest privilege did not apply because non-parties failed to establish a common legal, as opposed to common business or commercial interest existed between them); *Fond du Lac Band of Lake Superior Chippewa v. Cummins*, 2025 WL 26046 (D. Minn. Jan. 3, 2025) (joint client privilege did not protect communications where subsidiary failed to establish that communications between employees of parent company and subsidiary reflected a legal matter of common interest); *The Authors Guild v. Nat'l Endowment for the Humanities*, 2026 WL 309491 (S.D. N.Y. Feb. 5, 2026) (communications between officials of defendant agencies and DOGE officials where no attorney was present not protected under the common interest doctrine where there was no indication that the communications conveyed or reflected legal advice or made in furtherance of a common legal strategy); *Gray v. Paramount Glob.*, 2025 WL 2639902 (S.D. N.Y. Sept. 15, 2025) (communication between union member and union and its attorney not protected by attorney client privilege; even if the *Upjohn* doctrine arguably protects communications between unions or labor organizations and its members, such privilege, if any, would belong to the organization, rather than the member; no common interest where member did not identify an identical legal interest with the union); *Savel v. Metrohealth Sys.*, 2024 WL 3554961 (N.D. Ohio July 26, 2024) (disclosure of communication made by plaintiff's attorney via a Telegram group message to unrepresented members of the group was not protected by the common interest doctrine because it was not shown that the Telegram group members all shared a common legal interest, or that the Telegram message thread was protected by the attorney-client privilege); *Robert R. McCormick Found. v. Arthur J. Gallagher Risk Mgmt. Servs., Inc.*, 158 N.E.3d 219 (Ill. 2019) (the common interest privilege does not apply where there is no insured-insurer relationship between the two parties and the party claiming the privilege is bringing suit based on the defendant's negligence in failing to procure appropriate insurance as a broker); *Canarelli v. Eighth Judicial Dist. Ct.*, 464 P.3d 114 (Nev. 2020) (Notes made by trustee, preparing for and memorializing his phone call with his attorneys, were not exempted from attorney-client privilege by common-interest exception, supporting finding that notes were not subject to disclosure in beneficiary's

interest exists absent litigation.[152] The common interest privilege does not generally extend to sharing privileged communications between non-legal employees of separately represented parties.[153] Note that in litigation brought by the EEOC the privilege may in some circumstances extend to communications between the EEOC and aggrieved individuals on whose behalf the EEOC has brought suit.[154]

C. Waiver of the Privilege.

1. Corporate Authority to Waive/"Ownership" of the Privilege.

Corporate Authority to Waive. The power to waive the corporate or organizational attorney-client privilege "is normally exercised by its current officers and directors."[155] Thus, a "mere

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breach of fiduciary duty action against trustees, where attorneys were not retained or consulted in common with beneficiary, and communications during phone call were not relevant to matter of common interest but rather related to situation in which trustee was adverse to beneficiary); *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 57 N.E.3d 30 (N.Y. 2016) common interest exception did not extend to attorney-client communications between two banks when the entities were in the process of merging; common interest exception applies only where the communications between the parties share a common interest and the communication relates to litigation, either pending or anticipated); *State ex rel. Kaminski v. Evans*, 2016 WL 1411730 (W.Va. Apr. 7, 2016) (no attorney-client relationship existed between counsel for lessee and third parties regarding natural gas lease litigation communications between counsel and third parties were not privileged; there was no evidence that either counsel or third parties contemplated an attorney-client relationship, no one sought legal advice from counsel regarding the litigation other than lessee, and there was no evidence that any specific communications were considered to be confidential by counsel or third parties).

[152] *See Atl. Anesthesia, P.A. v. Lehrer*, 347 A.3d 1043 (N.H. 2025) (common interest privilege did not apply to communications between the physician defendants, defendant hospital and their lawyers prior to the date that litigation was pending, based on plain language of Rule 502(b), N.H. R. Evid); *In re XL Specialty Ins. Co.*, 373 S.W.3d 46 (Tex. 2012) (Texas has a pending litigation requirement and thus no commonality of interest exists absent litigation). *Compare United States v. BDO Seidman, LLP*, 492 F.3d 806 (7th Cir. 2007) (federal common interest privilege applies whether or not there is pending litigation).

[153] *See Roblox Corp. v. Wowee Grp.,* 2024 WL 170767 (N.D. Cal. Jan. 16, 2024) (attorney client privilege does not attach to communications between non-attorney employees of different parties); *Eritrean Ass'n of Greater Seattle v. Gebrekidan*, 2025 WL 2614106 (W.D. Wash. Sept. 10, 2025) (common interest privilege does not protect communications between a nonparty and named parties who are not attorneys and who communicate with the nonparty without an attorney present; the doctrine is "designed to allow attorneys for different clients pursuing a common legal strategy to communicate with each other.").

[154] *See, e.g.*, *EEOC v. Scottsdale Healthcare Hosps.*, 2023 WL 5206131 (D. Ariz. Aug. 14, 2023) (communications between EEOC attorneys and active aggrieved individuals and who affirmatively responded to the EEOC's solicitation letters to discuss their potential claims constitute attorney-client communications; however, the privilege did not cover the EEOC's solicitation letters that were not responded to, or those that were responded to but the response declined to take an affirmative action to evidence their intent to enter into an attorney-client relationship); *EEOC v. Swissport Fueling, Inc.*, 2012 WL 1648416 (D. Ariz. May 10, 2012) (individuals who signed Participation Agreements with the EEOC had an expectation of privacy in communications attorney representing their interests and evaluating their claims and thus such communications are privileged). *Cf. EEOC v. CRST Van Expedited, Inc.*, 257 F.R.D. 513 (N.D. Iowa 2008) (employer may contact all alleged aggrieved individuals with whom the EEOC does not have a consensual attorney-client relationship).

[155] *See Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348-49 (1985). *Cf. In re Grand Jury Subpoena*, 909 F.3d 26 (1st Cir. 2018) (unless applicable law provides otherwise, a state government may invoke the attorney-client privilege in civil litigation to protect confidential communications between government officials and government attorneys); *Wilson v. Preston*, 378 S.C. 348, 662 S.E.2d 580 (S.C. 2008) (County council member could not independently review county's attorney-client privileged documents; privilege belonged to county as the client, and council was authorized to release that information and had to waive privilege before individual council member could review privileged documents).

employee" cannot waive the corporation's privilege."[156] Similarly, former officers and directors do not have the authority to assert or waive the privilege.[157] Moreover, a defunct corporation cannot

[156] *Weintraub*, 471 U.S. at 348-49; *Sprague v. Thorn Ams., Inc.*, 129 F.3d 1355, 1371 (10th Cir. 1997). *See also Nat'l. Sec. Counselors v. CIA*, 969 F.3d 406 (D.C. Cir. 2020) (although attorney is given power to claim privilege, his betrayal of the client's secret is not treated as a waiver of the privilege); *Alexander v. FBI*, 198 F.R.D. 306 (D.D.C. 2000) (disclosure of privileged information in testimony before various legislative bodies and other third parties, by corporate employee which was not authorized by corporation's officers and directors, did not waive corporation's attorney-client privilege); *Wheeler v. George*, 39 So.3d 1061 (Ala. 2009) (Attorney's disclosures to non-client did not waive attorney-client privilege in the absence of a showing of client's consent to disclosure.); *State Comp. Ins. Fund v. Super. Ct.*, 91 Cal. App. 4th 1080 (2001) (insured employer did not have standing to waive attorney-client privilege between insurer and insurer's attorney regarding documents pertaining to insured employer; insurer retained lawyers to perform services and render advice to it, but that did not bestow "client" status on insured employer); *Sharp v. Trans Union L.L.C.*, 845 N.E.2d 719 (Ill. App.), *review denied*, 845 N.E.2d 719 (Ill. 2006) (in underwriters' action for declaratory judgment that certain lawsuits against insured were not covered by insurance policy, insured bargained away any privilege that applied to pre-policy documents when it agreed to a broad cooperation clause that required it to cooperate "in all investigations, including investigations regarding coverage," and to an exclusion which defined coverage in terms of what insured's counsel knew about existing and potential errors and omissions lawsuits, which in effect constituted an agreement to share the legal reasoning and analysis of its general counsel with the underwriters in a coverage investigation); *Attorney Grievance Comm'n of Md. v. Powers*, 164 A.3d 138 (Md. 2017) (attorney-client privilege belongs to the client; the attorney cannot waive the privilege on behalf of the client without the client's consent); *Kurstin v. Bromberg Rosenthal, LLP*, 24 A.3d 88 (Md. 2011) (Client's current attorney lacked standing to challenge discovery order that required him to reveal allegedly privileged information in dispute between client and previous attorney stemming from underlying divorce action; it was the client that held the attorney-client privilege, not the attorney). *Cf. Maplewood Partners, L.P. v. Indian Harbor Ins. Co.*, 295 F.R.D. 550 (S.D. Fla. 2013) (Corporate representatives of the insureds under financial and professional services indemnity policy did not have independent right to assert attorney-client privilege as to corporate communications with attorney in connection with three underlying actions; they did not obtain legal advice as to underlying actions in distinctly individual, rather than representative, capacity, and communications related to their duties with insured.); *Am. Zurich Ins. Co. v. Mont. Thirteenth Judicial Dist. Ct.*, 280 P.3d 240 (Mont. 2012) (Claims adjuster, employed by third-party adjuster that workers' compensation carrier contracted to provide services for claimant's workers' compensation claim, was authorized to waive insurer's privilege in regards to letter that insurer's attorney wrote regarding claimants case by sending a copy of the letter to the insured employer, where adjuster in accordance with state statute had absolute authority over management of the claim); N.Y. Ethics Op. 1239 (2022) (An attorney in receipt of a court order directing production of his hard drive containing the confidential information of clients who have not waived privilege or consented to disclosure, has the obligation to advise non-waiving clients of the existence of the court order. Absent the clients' informed consent to waiver of the attorney-client privilege and consent to disclosure, an attorney must consult with the non-waiving clients about the reasonable steps necessary to avoid or limit production of confidential information and undertake those steps before complying with the court order).

[157] *Weintraub*, 471 U.S. at 348-49. *See In re Grand Jury Subpoena,* 828 F.3d 1083 (9th Cir. 2016) (Any attorney-client privilege concerning communications between former governor of Oregon and state attorneys regarding potential conflicts-of-interest or ethics violations, during his term as governor, was held by state, not by former governor personally, since consultation concerning conflict-of-interest or ethics laws was consultation about former governor's official actions and obligations, notwithstanding any consideration during such consultations of possible personal sanctions against former governor for any noncompliance with such legal obligations, and former governor could have hired his own lawyer for consultation about his conflict-of-interest concerns.); *Larmanger v. Kaiser Found. Health Plan of the Nw.*, 585 F. App'x 578 (9th Cir. 2014) (district court did not abuse its discretion by denying former employee's motion to compel deposition from two attorneys representing Kaiser; she provided no authority to support her contention that she was entitled to waive Kaiser's privilege because she and Kaiser were joint clients, and as a former employee she was no longer a "representative" of Kaiser for privilege purposes); *Trauscht v. Willa Lafayette Assocs., Inc.*, 2025 WL 2806759 (D. Ariz. Oct. 2, 2025) (plaintiff's status as a former board member does not allow him to waive privilege with respect to privileged communications between the board and counsel); *United States v. Sanders*, 2019 WL 4125631 (E.D. Ky. Aug. 29, 2019) (once bankruptcy trustee is appointed for corporate entity, trustee, not current or former management, or the corporate debtor, controls the privilege and has authority to waive it, even as to pre-appointment communications); *United States v. Blumberg*, 2017 WL 1170851 (D. N.J. Mar. 27,

assert privilege.[158]

Ownership of the Privilege in Corporate Sale/Merger Transactions. In the context of a merger or acquisition, the corporate attorney client privilege and the right to assert/waive it passes to the surviving corporation.[159] However, the sale of assets, without more, does not transfer the

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2017) (former CEO did not have authority to waive company's privilege even though former CEO claimed he was not given Upjohn warnings); *SEC v. Leibowitz*, 2025 WL 3763814 (S.D. N.Y. Dec. 30, 2025) (Testimony of company's former general counsel to the SEC did not waive firm's attorney-client privilege where general counsel was no longer employed as general counsel and was, instead, its outside counsel, and there was no evidence that former general counsel was authorized by the company to waive privilege on the firm's behalf. Testimony of company's former board member to the SEC concerning her communications with the law firm engaged to investigate alleged transfers, conversations between defendant and the company's general counsel that the defendant reported to her, and as to the fact that the company consulted counsel in determining how to account for the transfers, did not waive the company's privilege; there was no evidence that former board member was authorized to waive privilege on the company's behalf and the disclosure of the fact of consultation does not waive privilege); *Clair v. Clair*, 982 N.E.2d 32 (Mass. 2013) (Executrix of estate of one of four brothers who owned roughly equal shares in closely-held companies did not, by stepping into that brother's shoes for purposes of administering estate, automatically assume his role as a director of the companies, and was therefore not entitled on that theory to access to companies' privileged communications with corporate counsel.); *Tucker v. Honda of S.C. Mfg.,* 582 S.E.2d 405 (S.C. 2003) (former executives cannot waive a corporation's attorney-client privilege); *Inter-Fluve v. Mont. Eighteenth Jud. Dist. Ct.*, 112 P.3d 258 (Mont. 2005) (confidentiality of the attorney-client privilege was not violated when a former director of a closely-held corporation, who had brought claims against the corporation, was allowed to discover communications between the corporation's counsel and other directors which occurred during his tenure as director; treatment of the directors as joint clients with the corporation was proper because all powers of the corporation were exercised through the board of directors); *Las Vegas Sands Corp. v. Eighth Jud. Dist. Ct.*, 331 P.3d 905 (Nev. 2014) (corporation's current management was the sole holder of its attorney-client privilege, and thus, attorney-client privilege statute did not allow for a judicially created "class of persons" exception to attorney-client privilege, and therefore former chief executive officer (CEO) of corporation, who was suing corporation for breach of employment agreement, was not permitted to use corporation's privileged documents for use in litigation; allowing a former fiduciary of a corporation to access and use privileged information after he or she became adverse to the corporation solely based on his or her former fiduciary role was entirely inconsistent with the purpose of the attorney-client privilege, and such a situation would have had a perverse chilling effect on candid communications between corporate managers and counsel); *Lane v. Sharp Packaging Sys., Inc.*, 640 N.W.2d 788 (Wis. 2002) (former director could not waive lawyer-client privilege on behalf of corporation, for purposes of subpoena he served on corporation in action he commenced following termination of his employment, even though lawyer-client documents sought by subpoena were created during director's tenure on the corporation's board; Wisconsin followed the entity rule, accordingly privilege belonged to the corporation, only corporation could waive privilege, and only current management could act on behalf of the corporation).

[158] *See In re Grand Jury Subpoenas dated January 11, 2023 and June 28, 2023*, 2025 WL 2673680 (S.D. N.Y. Sept. 18, 2025) (where government established corporation no longer functionally existed, no valid claim of privilege could be asserted on its behalf). *See also SEC v. Carrillo Huettel LLP*, 2015 WL 1610282, at *2 (S.D.N.Y. Apr. 8, 2015) (same) (collecting cases); *accord United States v. Roscoe*, 2011 WL 13143140, at *3 (N.D. Cal. Jan. 6, 2011) ("[a] corporation that is defunct cannot assert the attorney-client privilege"); *United States v. Cox*, No. 14 Cr. 0140 (MAP), 2015 WL 13741738, at *4 (M.D. Fla. Oct. 7, 2015) (same); *United States v. Cole*, 569 F. Supp. 3d 696, 701-02 (N.D. Ohio 2021) (same).

[159] *See Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 342, 349 (1985) ("[W]hen control of a corporation passes to new management, the authority to assert or waive the corporation's privilege passes as well."); *Orbit One Commc'ns., Inc. v. Numerex Corp.*, 255 F.R.D. 98 (S.D.N.Y. 2008) (magistrate judge) (predecessor corporation's executive did not waive attorney-client privilege under New York law for confidential communications concerning Requisition Agreement stored on his work computer, after title to computer passed to successor corporation in acquisition transaction, since executive had reasonable expectation of confidentiality in communications that were never accessible to successor corporation); *In re Optuminsight, Inc.*, 2017 WL 3096300 (Fed. Cir. July 20, 2017) (extending a predecessor company's privilege waiver to post-merger communications; because predecessor's intentional waiver during its voluntarily requested re-examination of a patent was part of an

privilege from seller to buyer.[160] Moreover, by transferring emails or other communications to the buyer in an asset sales, the seller is deemed to have voluntarily disclosed privileged info to a third party, and thus waiving the privilege as to those communications.[161]

2. Waiver In General.

The attorney-client privilege may be waived, or found not to exist, in the following contexts, among others: (1) disclosures of privileged information to the government[162] (however, some

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ongoing litigation strategy, its waiver is not comparable to disclosing opinion of counsel); *Martinez v. Butterball, LLC*, 2011 WL 4549101 (E.D. N.C. Sept. 29, 2011) (seller corporation's privileges with respect to its turkey business transferred to buyer upon buyer's assumption of control of the assets; therefore, the fact that seller corporation "left behind" privilege documents after the sale did not waive the privilege); *Staneff v. Onsite Health Diagnostics, LLC.*, 2025 WL 1908168 (N.D. Tex. July 10, 2025) (attorney-client relationship between the firm and OHD passed to Simons when his company bought OHD because Simons gained control of OHD); *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, 80 A.3d 155 (Del. Ch. 2013) (Privilege over absorbed corporation's communications with its counsel, including those relating to absorbed corporation's acquisition by surviving corporation, passed to surviving corporation under statute stating that following merger "all property, rights, privileges, powers and franchises, and all and every other interest shall be thereafter as effectually the property of the surviving or resulting corporation."); *McKesson Corp. v. Green*, 610 S.E.2d 54 (Ga. 2005) (surviving corporation waived attorney work product protection with respect to outside counsel's investigation of absorbed corporation's pre-merger accounting problems, when surviving corporation disclosed documents to the SEC; surviving corporation's confidentiality agreement with the SEC did not prevent waiver of the attorney work product protection); *Girl Scouts-W. Oklahoma, Inc. v. Barringer-Thomson*, 252 P.3d 844 (Okla. 2011) (following merger, surviving company was entitled to files of absorbed company's former attorney regarding attorney's pre-merger representation of absorbed company; merger agreement transferred all assets, properties and privileges to the surviving company, and ownership of absorbed company's assets, as well as its attorney-client privilege, transferred to surviving company by operation of law as a result of the merger). *Cf. Postorivo v. A.G. Paintball Holdings,* 2008 WL 343856 (Del. Ch. Feb. 7, 2008) (where seller and acquirer expressly carved out privileged documents relating to the merger transaction itself, privilege asserted by seller sustained); *Tekni-Plex, Inc. v. Meyner & Landis*, 89 N.Y.2d 123 (N.Y. 1996) (privileged communications regarding merger negotiations remained with the seller; seller's rights regarding disputes arising from the transaction remained independent from and adverse to the buyer).

[160] *See PTC Therapeutics, Inc. v. Acurex Biosciences Corp.*, 2025 WL 3295327 (N.D. Cal. Nov. 26, 2025), *motion for reconsideration denied*, 2026 WL 243692 (N.D. Cal. Jan. 29, 2026) (where BioElectron transferred its assets to Acurex in an asset sale, the attorney client privilege regarding representation of BioElectron by its outside patent attorney did not transfer to Acurex and, therefore, there was no basis to disqualify the patent attorney no basis to impute a conflict of interest to her firm); *Zenith Elecs. Corp. v. WH-TV Broad Corp.*, 2003 WL 21911066 (N.D. Ill. 2003) (sale of assets did not transfer the right to invoke the attorney-client privilege despite contract provision stating that privilege transferred with the sale); *Pilates, Inc. v. Georgetown Bodyworks Deep Muscle Massage Ctrs.*, 201 F.R.D. 261 (D.D.C. 2000) (magistrate judge) (assignee of trademarks had no right to assert attorney-client privilege where there was no transfer of control of the corporation); *In re Grand Jury Subpoenas 89-3 and 89-4*, 734 F. Supp. 1207 (E.D. Va.) (transfer of assets, without more, is insufficient to effect a transfer of the privileges; control of the entity possessing the privileges must also pass for the privileges to pass.), *aff'd in relevant part*, 902 F.2d 244 (4th Cir. 1990).

[161] *Jim Daws Trucking, LLC v. Daws, Inc.*, 2025 WL 3754412 (D. Neb. Dec. 29, 2025) (where emails containing attorney-client privileged communications were transferred from the defendant seller to the buyer in an asset sale, the privilege is waived as to those communications); *Lynx Servs., Ltd. v. Horstman*, 2016 WL 4565895 (N.D. Ohio Sept. 1, 2016) (by transferring email communications to the buyer in an asset sale, seller voluntarily disclosed privileged information to a third party, thus waiving the privilege as to those communications); *GOT I, LLC v. XRT*, Inc. 2017 WL 3113408 (N.D. Ga. Feb. 28, 2017) (same); *In re In-Store Advertising Sec. Litig.*, 163 F.R.D. 452 (S.D. N.Y. 1995) (same).

[162] *In re Pac. Pictures*, 679 F.3d 1121 (9th Cir. 2012) (client waived attorney-client privilege by producing privileged documents to Government in response to subpoena; court declined to adopt "selective waiver" exception "accepted by the Eighth Circuit but rejected by every other circuit to consider the issue since"); *In re Grand Jury (Attorney-*

courts have found no waiver, or only a limited waiver, if the privileged information is provided in response to a government agency's subpoena, compelled by court order, or pursuant to a confidentiality agreement with the government, based on promoting the strong public policy interest in encouraging disclosure and cooperation with law enforcement agencies);[163] (2)

Client Privilege), 527 F.3d 200 (D.C. Cir. 2008) (Even if psychiatrist under investigation for Medicaid fraud shared originals of patient records with his attorney for the purpose of obtaining legal advice, the attorney's sharing the records with the government in an attempt to exonerate his client destroyed whatever attorney-client privilege might have attached to them, given that the records were shown with the psychiatrist's approval); *United States v. MIT*, 129 F.3d 681 (1st Cir. 1997) (university forfeited attorney-client privilege and work product protection with respect to IRS summons by disclosing documents to Defense Contracting Audit Agency); *Westinghouse Elec. Corp. v. Republic of the Phil.*, 951 F.2d 1414, 1429 (3d Cir. 1991) (voluntary disclosures to government agencies investigating companies waived attorney-client privilege, despite argument that companies reasonably expected SEC and DOJ would maintain confidentiality of information disclosed to them); *In re King's Daughters Health Sys., Inc.*, 31 F.4th 520 (6th Cir. 2022) (Medical center's partial disclosure to government of expert's findings pertaining to investigation into medically unnecessary procedures performed by doctor was intentional, as required for the partial disclosure to waive center's attorney client privilege over related, undisclosed information sought by government in doctor's healthcare fraud prosecution; center sent information to government in letter in an effort to settle potential claims against it for payments the center collected from Medicare for doctor's unnecessary procedures); *In re Qwest Commc'ns Int'l Inc.*, 450 F.3d 1179 (10th Cir. 2006) (corporation defending securities class action had waived attorney-client privilege and protection of work-product doctrine for documents sought by plaintiffs, by previously voluntarily producing same documents to federal agencies in connection with their investigations into corporation's business practices; there was no showing that "selective waiver doctrine" advocated by corporation was necessary to assure companies' cooperation in government investigations, agreements between corporation and agencies purported to maintain privileges but did little to limit further government disclosure, and selective waiver would not promote purposes of privileges); *United States v. Bergonzi*, 216 F.R.D. 487 (N.D. Cal. 2003) (attorney-client privilege did not protect investigative report and related material created by law firm in course of internal investigation ordered by its corporate client into allegations of accounting irregularities and securities fraud, where before preparation of the documents company agreed to disclose them to the government, and terms of confidentiality agreements governing the disclosure gave the government discretion to disclose the documents in certain circumstances such as criminal prosecution); *United States v. Worman*, 2024 WL 3639220 (D. Idaho Aug. 1, 2024) (investigation by investigator hired by defendant to investigate the case was not protected by attorney-client privilege because investigation was made for the express purpose of providing information to the Government); *McKesson HBOC, Inc. v. Super. Ct.*, 115 Cal. App. 4th 1229 (2004) (corporate target of government investigation waived its attorney-client privilege as to audit committee report and interview memoranda, which had been prepared by attorneys retained by corporation to perform internal review of alleged securities fraud, and which corporation had shared with government, despite confidentiality agreements stating corporation's intent not to waive privilege, as such disclosure was unnecessary to accomplishment of purpose for which attorneys had been retained); *SEC v. Herrera*, 324 F.R.D. 258 (S.D. Fla. 2017) (law firm conducting internal corporate investigation into client's financial and business activities waived work product protection when it voluntarily gave the SEC oral summaries of the work product notes and memoranda its attorneys prepared about interviews of its client's executives and employees; waiver limited to only the witnesses whose interview notes and memoranda were orally provided); *Hoffman v. Baltimore Police Dep't*, 379 F. Supp. 2d 778 (D. Md. 2005) (in action against police department and its officials by a former in-house employment attorney alleging race discrimination, defendants waived whatever privilege may have applied to documents relating to legal advice the former in-house attorney gave to the defendants when defendants produced the documents to the EEOC in response to the former in-house attorney's discrimination charge); *United States v. Coburn*, 2022 WL 357217 (D. N.J. Feb. 1, 2022) (in FCPA criminal case against company's former CEO and CLO, company's disclosure of portions of a privileged internal investigation to the SEC and the DPK constituted a waiver with respect to the portions actually disclosed, but also to undisclosed documents such as interview memoranda, notes and summaries).

[163] *See In re Fluor Intercontinental, Inc.*, 803 F. App'x 697 (4th Cir. 2020) (Government contractor did not waive attorney-client privilege by providing summary of findings of internal investigation into employee's conduct to government; even if contractor's disclosure contained legal conclusions as to past events and recommendations for future conduct, which only a lawyer was qualified to make, contractor did not disclose protected communications by quoting or substantively summarizing them, but rather disclosure merely covered same topic as internal investigation or stated that it was made pursuant to advice of counsel, and disclosure did no more than describe contractor's general

disclosures to persons other than the client that are not demonstrated to have an interest in maintaining the confidentiality of the contents of the communications, such as accountants,[164]

conclusions about propriety of employee's conduct.); *In re Grand Jury 16-3817 (16-4)*, 740 F. App'x 243 (4th Cir. 2018) (disclosure by general counsel of corporation's subsidiary to the Government pursuant to a written confidentiality agreement with the Government did not waive privilege in proceedings by corporation to quash grand jury subpoena); *In re Ex Parte Application of financialright GmbH*, 2017 WL 2879696 (S.D. N.Y. June 23, 2017) (privilege with respect to investigative materials generated by outside counsel not waived where VW's lawyers disclosed privileged information to the DOJ under a Non-Disclosure Agreement); *United States v. Sadler*, 24 F.4th 515 (6th Cir. 2022) (Testimony of defendant's former attorney that he gave defendant witness list in case shortly before defendant made threatening phone calls to witness's mother and sent threatening messages to witness's sister was not protected by attorney-client privilege, in prosecution for witness tampering; attorney's testimony did not disclose content of any meetings or conversations with defendant beyond those facts that government relayed to attorney, information did not reveal, either directly or implicitly, legal advice or any client confidence, and attorney's testimony merely indicated when defendant received specific types of information from government, through his attorney, about case); *Diversified Indus., Inc v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977) (corporation that discloses internal investigation materials in response to government subpoena subject only to a "limited waiver" and documents not necessarily discoverable in a subsequent private civil proceeding); *Hanson v. USAID*, 372 F.3d 286 (4th Cir. 2004) (attorney's unilateral release of report he created after he was hired by project engineer to provide report regarding dispute arising from construction project funded by defendant government agency did not amount to waiver of the attorney work product exemption of the FOIA which applied to report; defendant did not authorize release of report, defendant did not authorize attorney to release report, and attorney could not waive defendant's rights without defendant's consent); *Melendres v. Sheridan*, 2025 WL 3647977 (D. Ariz. Dec. 16, 2025) (because the court has compelled the sheriff's office to hand over withheld otherwise privileged documents to office's independent investigator would not constitute a waiver of the privilege); *Bickler v. Senior Lifestyle Corp.*, 266 F.R.D. 379 (D. Ariz. 2010) (defendant home did not waive attorney-client privilege when it shared document with Arizona DHS that was created by defendant's executive director for its in-house counsel in connection with investigation into injuries suffered by two residents who were allegedly pushed to ground and injured by another resident; public policy of Arizona, as reflect in statutes requiring DHS to license, regulate, discipline health care institutions and to investigate allegations of improper conduct or poor patient care, favored full disclosure by home to DHS.); *Spears v. First Am. eAppraiseIT*, 75 F. Supp. 3d 208 (D.D.C. 2014) (government agency's disclosure of privileged information to Senate committee under seal pursuant to a subpoena did not waive attorney-client privilege); *In re Linerboard Antitrust Litig.*, 237 F.R.D. 373 (E.D. Pa. 2006) (in antitrust action brought against linerboard manufacturers, protection of in-house counsel's recollection of internal investigation interviews as opinion work product was not waived by manufacturer's submission of investigation report to FTC; fairness did not dictate disclosure of recollection, manufacturer did not put report at issue in litigation, and manufacturer did not preclude plaintiffs from inquiring about basis or accuracy of facts disclosed in report); *The Sustainable Journalism Found. v. Okla. ex rel. Bd. of Regents of the Univ. of Okla.*, ___ P.3d ___, 2026 WL 90211 (Okla. Jan. 13, 2026) (university did not waive attorney-client privilege with respect to internal investigation reports into misconduct by providing the reports to the state bureau of investigation, where disclosure was pursuant to a subpoena and the bureau and university executed a joint-interest agreement to protect the privilege; the bureau was not in an adversarial position to the university but, instead, shared a joint interest among governmental agencies in the investigation). *Compare Regents of Univ. of Cal. v. Super. Ct.*, 165 Cal. App. 4th 672 (2008) (Suppliers' disclosure of documents to government agencies under DOJ policy treating a corporation's willingness to waive the attorney-client and attorney work product privileges as an important consideration in determining whether it would indict the corporation did not waive suppliers' privilege as disclosed documents for purposes of later antitrust suit brought against suppliers; as a practical matter, DOJ policy coerced suppliers to disclose the privileged materials); *St. Luke Hosps., Inc. v. Kopowski*, 160 S.W.3d 771 (Ky. 2005) (attorney-client privilege may not be overcome by a showing the need of an opposing party to obtain the information contained in the communications).

[164] *United States v. El Paso Co.*, 682 F.2d 530, 540-41 (5th Cir. 1982) (revealing privileged documents to accountants for tax consultation waived the attorney-client privilege with respect to the information that was provided to the accountants);*United States v. SDI Future Health, Inc.*, 464 F. Supp. 2d 1027 (D. Nev. 2006) (corporate and individual defendants waived attorney-client privilege with respect to memoranda from their attorneys that were attached to letter sent by corporation's employee to its accountants).

outside auditors,[165] board and committee members,[166] and managers and third parties not essential to providing or obtaining legal advice[167] (however, involvement of accountants and other

[165] *See United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 684-86 (1st Cir. 1997) (privilege waived as to materials supplied to outside auditors despite the fact that the government required the submissions to the auditors as a condition to obtaining the work the institution was performing for the government); *Off. of Hawaiian Affairs v. Kondo*, 528 P.3d 243 (Hawai'i 2023) (Disclosure by Office of Hawaiian Affairs its Board of Trustees of confidential communications during state audit without court order would have waived attorney-client privilege for redacted communications; auditor could have disclosed or mentioned involuntarily-disclosed privileged communications in an audit report or otherwise). *Compare United States v. Deloitte LLP*, 610 F.3d 129 (D.C. Cir. 2010) (Corporation did not waive work-product protection by disclosing documents to independent auditor; auditor was not an adversary of corporation because in preparing the documents, which concerned the tax implications of partnerships owned by the corporation, the corporation anticipated a dispute with the IRS, not with the auditor, and the corporation had a reasonable expectation of confidentiality because the auditor had an obligation to refrain from disclosing confidential client information).

[166] *See Morgan v. City of Fed. Way*, 213 P.3d 596 (Wash. 2009) (Municipal judge waived any attorney-client privilege protecting e-mail that he sent to city attorney regarding investigation of municipal court employee's hostile work environment complaint, and thus e-mail could be disclosed pursuant to Public Records Act, since judge had forwarded the e-mail to a third party, a city council member; forwarding the e-mail to city council member did not implicate any common legal interest.). *Cf. Pittsburgh History and Landmarks Found. v. Ziegler*, 200 A.3d 58 (Pa. 2019) (in shareholder derivative litigation, court rejects *Garner* exception to privilege in which plaintiffs may obtain communications between the corporation and its counsel relating to the misconduct giving rise to the claims if they demonstrate good cause for disclosure of the communications); *TP Orthodontics, Inc. v. Kesling*, 15 N.E.3d 985 (Ind. 2014) (When corporation formed a special litigation committee to investigate shareholders' derivative claims brought against corporation's president, and then later requested dismissal of those claims based on the findings of the committee, the corporation did not implicitly waive attorney-client privilege with regard to its special litigation committee report by putting the committee's good faith at issue, and thus, the trial court abused its discretion in ordering disclosure of the full report; the corporate secretary, in an affidavit designated in support of corporation's motion to dismiss, asserted that the copy of the attached committee report had been redacted to prevent disclosure of attorney-client privileged information, and attorney-work product prepared in anticipation of litigation, and it was the shareholders who put the committee's good faith, or lack thereof, at issue by filing a derivative suit.).

[167] *See United States v. Sanmina Corp.*, 968 F.3d 1107 (9th Cir. 2020) (in IRS subpoena enforcement action company waived privilege with respect to in-house counsel memos by sharing them with outside counsel based on district court's finding the documents were provided for the non-legal valuation analysis and not for the purpose of securing legal advice); *Sweet v. City of Mesa*, 2022 WL 326406 (D. Ariz. Feb. 3, 2022) (plaintiff waived privilege with respect to email communications between herself and her attorneys by forwarding them to her mother; although her mother was involved in the preparation of her daughter's case, she was not an agent of the plaintiff as her services were not necessary to assist plaintiff's attorneys in providing legal advice); *Sea Salt, LLC v. Bellerose*, 2020 WL 2114922 (D. Me. May 4, 2020) (wholesaler waived privilege by sending his lawyer's email to the FBI in connection with its criminal investigation); *N.H. Youth Movement v. Scanlan*, 2026 WL 122779 (D. N.H. Jan. 15, 2026) (third-party vendors included on email chains were not indispensable to or facilitating an attorney-client communication and, therefore, even if the emails contained information protected by the privilege, defendants waived the privilege as to those documents.); *U.S. Bank Trust Co. v. Dish DBS Corp.*, 2025 WL 3211751 (S.D. N.Y. Nov. 17, 2025) (defendants waived attorney-client privilege by sending documents to individuals who attended defendant's board meetings, including three board overseers, senior employees of defendant, the board chair's adult children as there was no evidence that any of these individuals had a need to know the content of the communications to perform their jobs effectively; however, transmittal of documents to board chair's chief of staff did not waive privilege because he was necessary to facilitate communications from attorney to client); *Allianz Glob. Invs. GmbH v. Bank of Am. Corp.*, 609 F. Supp.3d 287 (S.D. N.Y. 2022) (Attorney-client privilege did not protect document that foreign exchange market participant provided to its personnel for use as aid in talking with third party clients and answering clients' questions, in market participant's action against banks for alleged Sherman Act violation; regardless of whether document itself was intended to be disclosed to third parties, contents were intended to be shared); *Fox v. Alfini*, 432 P.3d 596 (Colo. 2018) (Presence of parents of client, who was aged in her early 30s, at initial consultation with attorney was not reasonably necessary to the consultation, and thus presence of parents destroyed any attorney-client privilege that attached to recording of consultation, even though client had recently had a stroke, where, prior to consultation, client

professionals that "translate" technical and other data of the client to facilitate the attorney's ability to effectively represent the client are within the scope of the privilege);[168] (3) disclosures to

had made numerous assertions on social media indicating that symptoms from stroke had disappeared and that "it's as if nothing happened."); *Burke v. Regalado*, 935 F.3d 960 (10th Cir. 2019) (Sheriff waived attorney-client privilege to e-mail from government attorney addressing conditions at jail by disclosing e-mail to company that provided medical services to jail and by not otherwise making any effort to keep e-mail confidential, on supervisory and municipal liability claims in action alleging deliberate indifference under section 1983 after death of pretrial detainee in jail as result of lack of medical care); *Lexington Pub. Library v. Clark*, 90 S.W.3d 53 (Ky. 2002) (even if investigatory memo regarding supervisor's job performance was drafted with assistance of employer's attorney, and even if it was partially based on privileged information, any attorney-client privilege was waived when information was voluntarily disclosed to supervisor; supervisor was not a "representative of the client" because, as the target of the investigation and potential adverse litigant, he was not in a position to make communications "to effectuate legal representation for the client"); *Harris Mgmt., Inc. v. Coulombe*, 151 A.3d 7 (Me. 2016) (Business associate was not "representative of client" and limited liability companies (LLC) under client's control before being hired by LLC to be general manager of country club, and thus, communications between client, attorney, and business associate were not protected by attorney-client privilege, where business associate was not expressly hired by client or either LLC, was not member of either LLC, and did not direct any specific action on behalf of either LLC). *Cf. Greer v. Cnty. of San Diego*, 127 F.4th 1216 (9th Cir. 2025) (District court's finding that documents from county's critical incident review board (CIRB) concerning investigations of in-custody deaths at county jail were sent to someone other than chief legal advisor for county sheriff's department was clearly erroneous, when determining that county waived any attorney-client privilege with respect to documents; county identified chief legal advisor as only recipient of documents in privilege log, documents were maintained in confidential file system in legal affairs unit of sheriff's department, documents were not accessible or disseminated to anyone else, and disclosure of documents to State Auditor was required by law.); *Baylor v. Mitchell Rubenstein & Assocs.,* 857 F.3d 939 (D.C. Cir. 2017) (Magistrate's finding that company retained by creditor to obtain legal services for creditor regarding collecting student loans from consumer was an agent of creditor for purposes of attorney-client privilege under DC or Maryland law, was not clearly erroneous or contrary to law; law firm offered affidavit describing relationship between creditor and company, as well as two authorizations by creditor for company to obtain legal services for creditor); *Fletcher v. ABM Bldg. Value*, 2017 WL 1536059 (S.D. N.Y. Apr. 28, 2017) (attorney-client privilege precluded deposition of company's Termination Review Committee members, which included an in-house lawyer and two non-lawyers; participation was part of the information-gathering for legal review of the decision); Tex. Ethics Op. 572 (2006) (unless the client has instructed otherwise, a lawyer may deliver materials containing privileged information to an independent contractor, such as a copy service, hired by the lawyer in the furtherance of the lawyer's representation of the client if the lawyer reasonably expects that the confidential character of the information will be respected by the independent contractor).

[168] *See, e.g.*, *Berisha v. Lawson*, 973 F.3d 1304 (11th Cir. 2020) (author's communications with publisher's attorney who conducted pre-publication legal review of book's contents protected by attorney-client privilege; even though author was not publisher's employee, author's cooperation was essential to pre-publication legal review process and publishing contract made clear that author and publisher were engaged in joint effort to produced published book to their mutual satisfaction and for their mutual benefit); *DaRosa v. City of New Bedford*, 30 N.E.3d 790 (Mass. 2015) (Documents prepared for city solicitor by outside environmental consultant regarding soil contamination for use in litigation with property owners and others, did not fall within derivative attorney-client privilege applicable to a third-party that functions as a translator between the client and attorney; even if consultant's analysis was critical to solicitor's ability to effectively represent city because technical data would otherwise have been difficult to understand, consultant was "translating" public record technical data relating to the site, not confidential communications from the client under circumstances where his presence would otherwise waive privilege); N.Y. Ethics Op. 1053 (2015) (Courts have repeatedly held that the privilege is not waived by a lawyer's use of an agent to facilitate communication with a client. If use of a sign-language interpreter does not waive the privilege, and use of such an interpreter is necessary for effective communication between the lawyer and client, it is ethically required); *Calvin Klein Trademark Trust v. Washer*, 124 F. Supp. 2d 207 (S.D. N.Y. 2000) (including investment banking firm in discussions between corporation and its counsel as to what the corporation was legally required to disclose to prospective purchasers at various stages of negotiations did not waive the attorney-client privilege; the firm's roles involved rendering expert advice as to what a reasonable business person would consider "material," a mixed question of law and fact that a law firm would not be able to adequately resolve without the benefit of an investment banker's expert assessment).

insurance brokers, adjusters or representatives[169] (however, some communications with the insurer or its representatives may be deemed essential to the representation of the insured and thus within the privilege);[170] (4) "public" disclosures, such as communications to the media or in public forums

[169] *See, e.g.*, *Knaack v. Allied World Specialty Ins. Co.*, 2024 WL 3226737 (W.D. Wash. June 28, 2024) (the presumption is that there is no attorney-client privilege between the insured and insurer in the claims adjusting process; an insurer may overcome the presumption by showing that its attorney was not engaged in the quasi-fiduciary tasks of investigating and evaluating or processing the claim, but in providing insurer with counsel as to its own potential liability, such as whether or not coverage exists under the law); *Allstate Indem. Co. v. Lindquist*, 2022 WL 414171 (W.D. Wash. Feb. 9, 2022) (it is presumed that there is no attorney-client privilege relevant between the insured and the insurer in the claims adjusting process); *Am. Zurich Ins. Co. v. Mont. Thirteenth Judicial Dist. Ct.*, 280 P.3d 240 (Mont. 2012) (Letter that attorney retained by workers' compensation insurer wrote to his client insurer and that insurer's adjuster voluntarily disclosed to the insured employer, when workers' compensation claim was pending, was not privileged under the attorney-client privilege when the workers' compensation claimant subpoenaed the letter in claimant's unfair settlement practices action against insurer, as insurer was a Plan II insurer, in evaluating and settling claimant's claim insurer bore direct liability to claimant, employer's role during the adjustment process was similar to that of a witness, employer was not a co-litigant, employer was not solely aligned with insurer but shared interest with both the insurer and the claimant, and insurer's disclosure of the letter to employer was not necessary for insurer to obtain legal advice.); *In re XL Specialty Ins. Co.*, 373 S.W.3d 46 (Tex. 2012) (in a bad faith action brought by an injured employee against a workers' compensation insurer, the attorney-client privilege does not apply to communications between the insurer's lawyer and the employer during the underlying administrative proceedings).

[170] *See Atmel Corp. v. St. Paul Fire & Marine Ins. Co.*, 409 F. Supp. 2d 1180 (N.D. Cal. 2005) (insured did not waive attorney-client privilege as result of disclosure of its documents to its insurance broker, where broker was necessary to further insured's interests and disclosure to broker was reasonably necessary to provide information to insurers); *Bank of Am. v. Super. Ct.*, 212 Cal. App. 4th 1076 (2013) ("When an insurer retains counsel to defend its insured, a tripartite attorney-client relationship arises among the insurer, insured, and counsel. As a consequence, confidential communications between either the insurer or the insured and counsel are protected by the attorney-client privilege, and both the insurer and insured are holders of the privilege."); *Jentz v. Conagra Foods*, 2011 WL 5325669 (S.D. Ill. Nov. 3, 2011) (Illinois law recognizes that under circumstances where an insurer is obligated to defend an insured, the attorney-client privilege may properly be extended to include communications between an insurer and an insured as well; however, the insurer-insured privilege is to be narrowly construed); *Dansko Holdings, Inc. v. Benefit Trust Co*., 2017 WL 5593321 (E.D. Pa. Nov. 21, 2017) (Communications between an insured, an insurance carrier, and its broker, are privileged if the communications "are necessary to procure and/or provide the representation in a manner necessary to maintain the availability of coverage and/or effectuate strategy and tactics of counsel," even if the attorney neither authored nor received the communication at issue); *Edge v. Affiliated FM Ins. Co.*, 2022 WL 3054209 (W.D. Wash. August 2, 2022) (Under Washington law, in first-party insurance claims by insureds claiming bad faith in the handling and processing of claims, the attorney-client privilege is presumptively inapplicable. Nonetheless, an insurer may overcome the presumption of discoverability by showing its attorney was not engaged in the quasi-fiduciary tasks of investigation and evaluating or processing the claim, but instead in providing the insurer with counsel as to its own liability: for example, whether or not coverage exists under the law.); *Canyon Estates Condo. Ass'n v. Atain Specialty Ins. Co.*, 2020 WL 363379 (W.D. Wash. Jan. 22, 2020) (privilege did not extend to communication between insurer's counsel and insured where counsel was involved in both quasi-fiduciary and coverage or liability capacities); *Cedell v. Farmers Ins. Co.*, 295 P.3d 239 (Wash. 2013) (insurer's attorney performed quasi-fiduciary functions of investigating, evaluating, negotiating, and processing underlying claim, in addition to advising insurer as to law and strategy, so as to support presumptive waiver of attorney-client privilege by insurer and entitle insured to discovery of claims file in first-party bad faith claim filed by insured.); *Bronsink v. Allied Prop. & Cas. Ins.,* 2010 WL 786016 (W.D. Wash. Mar. 4, 2010) (in plaintiffs' action against insurer, although an attorney acting as a claims adjuster for insurer, and not as legal advisor, the insurer could still claim the privilege if that attorney was an agent necessary for the provision of legal advice, the record does not demonstrate that the withheld documents and communications by the adjuster was necessary for the provision of legal advice to the insurer); *Anastasi v. Fid. Nat'l Title Ins. Co.*, 366 P.3d 160 (Hawai'i 2016) (No presumption existed that materials prepared by title insurer's in-house attorney, who also worked as claims adjuster, were not work product because the attorney prepared them before final decision on claim; presumption did not fit squarely with work-product privilege because it focused, not on whether material was prepared in anticipation of litigation or for trial, but on whether material was prepared before or after a formal determination was made on a claim); *Draggin' Y Cattle Co. v. Addink*, 312 P.3d 451 (Mont. 2013)

such as websites or blogs;[171] (5) disclosures to nonessential third parties which may include social workers, family members and friends;[172] (6) disclosures by revealing privileged information

(where the insured communicates with the insurer for the express purpose of seeking legal advice with respect to a concrete claim, or for the purpose of aiding an insurer-provided attorney in preparing a specific legal case application of the attorney-client privilege is appropriate as an extension to those employed to assist the attorney. However, a statement from an insured to an insurer betraying neither interest in, nor pursuit of, legal counsel bears only the most attenuated nexus to the attorney-client relationship; if what is sought is not legal advice but insurance, no attorney-client privilege extending to the statement can or should exist.); *Dakota, Minnesota & E. R.R. v. Acuity*, 771 N.W.2d 623 (S. Dak. 2009) (Attorney-client privilege did not protect communications between attorney and insurer client regarding investigation and denial of insured's claim for uninsured motorist benefits, where insurer delegated its initial claims function to attorney and attorney exclusively conducted investigation into claim and solely made the initial determination to deny uninsured motorist benefits.); *In re Tetra Techs., Inc.*, 2010 WL 1335431 (S.D. Tex. Apr. 5, 2010) (communications between company's employees, its counsel and its insurance brokers is protected as attorney-client communications, as long as communications were made for the purpose of facilitating the rendition of legal services to the client); *State v. Recht*, 583 S.E.2d 80 (W.Va. 2003) (statements made by doctor to law firm representing him in medical malpractice action remained privileged in unfair settlement practices action by estate of deceased patient against doctor's medical malpractice insurer, even though such statements were repeated by law firm to the insurer). *Cf. Montpelier U.S. Ins. Co. v. Bloom*, 757 S.E.2d 788 (W. Va. 2014) (insurer's lawyer does not waive attorney–client privilege for his coverage opinion by sending a coverage denial letter directly to the insured).

[171] *See Banneker Ventures, LLC v. Graham*, 253 F. Supp. 3d 64 (D.D.C. 2017) (Washington Metropolitan Area Transit Authority waived attorney-client privilege with respect to interview memoranda used to compile report of law firm WMATA had retained to investigate its board of directors in connection with unsuccessful negotiations with developer regarding a project, with the exception of subjects in the memoranda not covered by the report; although originally intended to be an internal document, WMATA board decided to release the report to the public in its entirety, report disclosed counsel's legal and factual conclusions about the events during negotiations with developer and WMATA board's standards of conduct, which were the exact subject of the interviews conducted and summarized in the interview memoranda, and WMATA did not zealously protect information contained in the memoranda); *In re Chevron Corp.*, 650 F.3d 276 (3d Cir. 2011) (Attorney-client privilege never attached to attorney's comments, made during production of documentary, regarding Ecuadorian class action in which attorney represented plaintiffs against oil company, because comments were not made "in confidence" due to presence of film crew, and comments thus were not a selective disclosure of privileged communication that effected a broad subject-matter waiver of privilege for material in attorney's file regarding Ecuadorian action); *Lenz v. Universal Music Grp.*, 2010 WL 4789099 (N.D. Cal. Nov. 17, 2010) (plaintiff who sent emails, posted a blog, and engaged in Gmail chat sessions through which she disclosed information relating to her attorneys' litigation strategy waived the attorney-client privilege for related information); *In re Sveaas*, 249 F.R.D. 96 (S.D. N.Y. 2008) (Attorney-client privilege was waived with respect to emails and attachments which reflected legal advice by law firm which represented buyer of sculpture when they were disclosed to art broker, where broker did not function as buyer's exclusive agent, and her participation in transaction was not necessary to firm's furnishing of legal advice to buyer).

[172] *Maday v. Pub. Libraries of Saginaw*, 480 F.3d 815 (6th Cir. 2007) (by relating the substance of her conversations with her prior attorney to a social worker, plaintiff waived any attorney-client privilege that may have applied to such conversations); *Bower v. Weisman*, 669 F. Supp. 602 (S.D. N.Y. 1987) (defendant waived attorney-client privilege with respect to letter he had received from his attorney mentioning plaintiff which client left spread out on table in room in hotel suite in which plaintiff was directed to wait for him when he left for a business meeting; defendant's conduct with respect to letter demonstrated insufficient objective interest in confidentiality to warrant sustaining privilege.); *Lynch v. Hamrick*, 968 So.2d 11 (Ala. 2007) (communications attorney had with client in presence of the client's daughter were not privileged, and thus attorney could testify about those conversations during trial to set aside deed, drafted by the attorney, that transferred a parcel of property to the daughter; the daughter and the client did not have a common legal interest in the subject matter of the representation, and the daughter's presence was not necessary for the attorney to prepare the client's will or deed); *United States v. Stewart*, 287 F. Supp. 2d 461 (S.D. N.Y. 2003) (defendant waived attorney-client privilege when she forwarded a copy of an email she sent to her attorney, containing her account of the facts relating to her sale of stock, to her adult daughter; however, such disclosure did not waive work product protection in the email, since she intended to keep the email confidential, she believed her daughter would keep its contents strictly confidential, and there was no prejudice to the government in withholding the document); *Nylen v. Nylen*, 873 N.W.2d 76 (S.Dak. 2015) (mother waived attorney-client privilege to communications

during discovery[173] (but note that disclosure of the mere fact of a privileged communication or disclosure of the non-privileged portions of the communication does not necessarily waive

between mother and her South Dakota and California attorneys by sharing them with her friend in action in which mother's children sought a declaration that she had gifted them person property, although friend was an attorney, where mother and friend did not have an attorney-client relationship with regard to the declaratory action). *Cf. State v. Brunson*, 218 N.E.3d 765 (Ohio 2022) (Codefendant did not waive his attorney-client privilege by voluntarily revealing the substance of attorney-client communications in a nonprivileged context, even though codefendant testified in a nonprivileged context at a public hearing on defendant's motion to suppress, and his testimony was voluntarily given, for the purpose of determining whether codefendant waived the attorney-client privilege, thereby allowing defendant to cross-examine codefendant about a conversation between codefendant and his attorney that was inadvertently recorded by police and then distributed to all codefendants; codefendant's testimony did not reveal the substance of privileged attorney-client communications.).

[173] *See Goins v. Advanced Disposal Servs. Gulf Coast, LLC*, 333 So.3d 644 (Ala. 2021) (Conductor voluntarily disclosed that his attorney referred him to see orthopedic surgeon, and thus the information was not protected by attorney-client privilege, in conductor's action against garbage truck driver and owner following collision between train and truck at railroad intersection; both at his deposition and at trial on direct examination, conductor revealed that he had been referred to orthopedic surgeon as a result of his conversations with his counsel); *Lynch v. Hamrick*, 968 So.2d 11 (Ala. 2007) (client waived the attorney-client privilege in proceeding to set aside deed transferring parcel of property to the client's daughter, where the client's attorney, during cross-examination of the client's former attorney, elicited testimony from the former attorney concerning private conversations between the former attorney and the client, had the former attorney read from notes she took during each meeting with the client, and asked former attorney about her conclusions as to the client's competency); *Adler v. Wallace Comput. Servs., Inc.*, 202 F.R.D. 666 (N.D. Ga. 2001) (testimony of witness who served as vice president and general counsel for employer, disclosing statements made by other corporate representatives seeking advice from witnesses in his role as attorney, constituted waiver of attorney-client privilege in Title VII action; employer designated witness as representative of the corporation for discovery purposes, giving witness ability to waive the privilege); *Williams v. Sprint/United Mgmt. Co.*, 2007 WL 38397 (D. Kan. Jan. 5, 2007) (defendant's counsel intended to provide a redacted version of a document to plaintiffs' counsel, albeit based on counsel's admittedly uninformed belief that the remaining information in the document was not privileged and, therefore, defendant's disclosure was intentional and voluntary and constitutes a waiver of the privilege); *Thomas v. Euro RSCG Life*, 264 F.R.D. 120 (S.D. N.Y. 2010) (attorney-client privilege applied with respect to employee's notes, but such privilege was waived where she relied on notes in connection with her deposition testimony in the case; employee reviewed the notes approximately fifteen minutes before the deposition because she and attorney had many conversations which would have been difficult to recount, and as conversations were central part of the deposition, the notes likely had an impact on employee's testimony); *AHF Cmty. Dev., LLC v. City of Dallas*, 258 F.R.D. 143 (N.D. Tex. 2009) (City defendants voluntarily waived attorney-client privilege with respect to documents which were used as exhibits at one defendant's deposition and served as the basis of questioning; the deposition questions and exhibits provided sufficient notice of the possibility that privileged documents had been produced to opposing party and that information regarding privileged communications was being sought.); *Anderson v. Sch. Bd. of Gloucester Cnty.*, 2020 WL 4719091 (E.D. Va. Aug. 13, 2020) (plaintiff waived attorney-client privilege as to communication with her lawyer concerning her receipt of EEOC's right to sue letter and the timing of her lawsuit where she produced the communication in response to discovery; the disclosure also waived the privilege as to the subject matter of the disclosure and school district entitled to question plaintiff about those communications and the subject matter); *Skansgaard v. Bank of Am.*, 2013 WL 828210 (W.D. Wash. Mar. 6, 2013) (defendant bank waived attorney-client privilege with respect to email chain document that bank produced during deposition and was read into the record; in the course of the deposition, defendants' counsel affirmatively stated that there was no attorney-client privilege in regard to the email chain and it was not until approximately two-months later that defendants reversed position and claimed that the email chain document was subject to claw back under the attorney-client privilege.).

privilege);[174] (7) disclosures to third party litigation funders;[175] (8) disclosures to public relations

[174] *See, e.g. In re Fluor Intercontinental, Inc.*, 803 F. App'x 697 (4th Cir. 2020) (Government contractor did not waive attorney-client privilege by providing summary of findings of internal investigation into employee's conduct to government; even if contractor's disclosure contained legal conclusions as to past events and recommendations for future conduct, which only a lawyer was qualified to make, contractor did not disclose protected communications by quoting or substantively summarizing them, but rather disclosure merely covered same topic as internal investigation or stated that it was made pursuant to advice of counsel, and disclosure did no more than describe contractor's general conclusions about propriety of employee's conduct.); *Doe v. St. Joseph's Univ.*, 832 F. App'x 770 (3d Cir. 2020) (University did not waive privilege by allowing an administrator to testify about meeting with counsel that was essentially limited to stating the meeting's purpose and the conclusion reached (i.e., that university's then-current policies conformed to the new guidance)); *Murtha v. New York State Gaming Comm'n.*, 2020 WL 5504311 (S.D. N.Y. Sept. 9, 2020) (defendant did not waive privilege by producing non-privileged portions of emails containing privileged communications); *Owens v. Audubon Field Solutions, LLC*, 2026 WL 459255 (E.D. Pa. Feb. 18, 2026) (court granted defendant's motion to quash subpoena issued to its outside law firm where it called for material protected by the attorney client privilege; law firm was hired precisely because of defendant's history of involvement in wage litigation and in anticipation that it may be subject to further suits; defendant's 30(b)(6) witness did not waive privilege because although he discussed the facts surrounding defendant's pay practices, he did not testify as to the substance of his communications with his attorneys); *Prewitt v. Walgreens Co*., 2013 WL 6229154 (E.D. Pa. Dec. 2, 2013) (Defendant did not waive attorney-client privilege by deposition testimony of plaintiff's supervisor that merely revealed the existence, not the substance, of communication; the inadvertent disclosure of documents did not waive privilege because it remedied immediately, and had no intention to use an "advice of counsel" defense.); *United States v. Alexander*, 2026 WL 440712 (S.D. N.Y. Feb. 17, 2026) (victim's timeline document prepared in coordination with her counsel were protected by the attorney client privilege, and her de minimis on-the-record discussion of the timeline document, which did not provide details concerning its contents, was insufficient to waive privilege); *Troubadour Oil and Gas, LLC v. Rustad*, 981 N.W.2d 918 (N.D. 2022) (Putative vendor of oil and gas interest did not make a per se waiver of attorney-client privilege or work-product doctrine, as those applied to communications between putative vendor's attorney and putative vendor's representative for its receipt of attorney's legal services, by disclosing representative as putative vendor's testifying expert, in breach of contract action brought against putative vendor by putative purchaser); *Nationwide Mut. Ins. Co. v. Fleming*, 992 A.2d 65 (Pa. 2010) (insurer waived attorney-client privilege for memo containing in-house counsel's legal advice by previously disclosing two other documents on the same subject matter during discovery).

[175] *See In re Outlaw Labs., LP Litig.*, 2021 WL 5768123 (S.D. Cal. June 29, 2021) (emails with law firm retained solely as a third-party litigation funder were not privileged); *Finjan, Inc. v. SonicWall, Inc*., 2020 WL 4192285 (N.D. Cal. July 21, 2020) (declining to extend attorney-client privilege for communications shared with litigation funder); *Sanchez Ritchie v. Sempra Energy*, 2015 WL 12912316 (S.D. Cal. Apr. 6, 2015) (rejecting "common interest" privilege where non-party movant's role was that of a third-party financier of plaintiff's attorneys fees and costs); *Leader Techs., Inc. v. Facebook, Inc.*, 2010 WL 4788014 (D. Del. June 24, 2010) (documents shared by plaintiff corporation with third-party funding the underlying litigation waived attorney-client privilege); *Cohen v. Cohen*, 2015 WL 745712 (S.D.N.Y. Jan. 30, 2015) (communications between plaintiff and litigation funder not privileged despite the existence of an executed "joint interest" agreement because the two shared a common financial interest in the outcome of the litigation, not a shared legal strategy); *Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711 (N.D. Ill. 2014) (plaintiff waived attorney-client privilege over documents shared with prospective funders because plaintiff's purpose was to secure funding and not to obtain legal advice or litigation strategies); Wash. Ethics Op. 202402 (2024) (When a reporting lawyer reasonably believes that data requested by a funder could lead to discovery of confidential client information, Rule 1.6 requires the reporting lawyer to act competently to safeguard that information. The reporting lawyer should provide the requested data only consistent with a funding agreement between the funder and the reporting lawyer or funded legal aid organization that contains provisions reasonably likely to prevent the inadvertent or unauthorized disclose of, or unauthorized access to, information relating to the representation of a client. The funding agreement must prevent inadvertent or unauthorized disclosure of, or unauthorized access to information relating to the representation of the client.). *Compare Devon IT, Inc. v. IBM Corp.*, 2012 WL 4748160 (E.D. Pa. Sept. 27, 2012) (communications with funders and funding agreement drafts protected as work product and by the attorney privilege under the common interest exception); *Cont'l Circuits LLC v. Intel Corp.*, 435 F. Supp.3d 1014 (D. Ariz. 2020) (litigation funding agreements constitute work product); *Mondis Tech v. LG Elecs., Inc.*, 2011 WL 1714304 (E.D. Tex. May 4, 2011) (documents shared with *potential* funders were

and marketing specialists[176] (although communications with public relations specialist are privileged if they are essential to providing legal services);[177] (9) using privileged information to

privileged). *See* N.Y. Ethics Op. 1266 (2024) (attorney may not report a client's confidential information to a government agency that funds the representation of the client without the client's informed consent).

[176] *See, e.g.*, *Bousamra v. Excela Health*, 210 A.3d 967 (Pa. 2019) (defendant waived attorney client privilege when its general counsel forwarded email received from outside counsel to its public relations and crisis management consultant; sending the email to the consultant was not either indispensable to the lawyer giving legal advice or facilitate the lawyer's ability to give legal advice to the client; the email did not solicit advice or input from the consultant nor did the attorney send it); *Church & Dwight Co. v. SPD Swiss Precision Diagnostics*, 2014 WL 7238354 (S.D. N.Y. Dec. 19, 2014) (communication to company's outside marketing firm waived attorney-client privilege where it was not shown that the marketing firm enabled counsel to understand aspects of the client's own communications that could not otherwise be appreciated in the rendering of the legal advice); *Breuder v. Bd. of Trs. of Cmty. Coll. Dist. No. 502*, 2022 WL 279277 (N.D. Ill. Jan. 31, 2022) (Board did not demonstrate that its communications with a public relations consultant and the Board's attorneys were privileged; the Board provided insufficient evidence to establish that the consultant's involvement in the Board's communications with its attorneys was for the purpose of assisting the attorneys in rendering legal services); *LG Elecs. U.S.A., Inc. v. Whirlpool Corp.*, 661 F. Supp. 2d 958 (N.D. Ill. 2009), *mandamus denied*, 597 F.3d 858 (7th Cir. 2010) (attorney-client privilege did not extend to protect defendant's corporate communications with third party advertising agencies; outside agencies did not act as the functional equivalent of defendant's employees so as to constitute de facto employees since defendant did not allow its agencies the freedom to design advertisements without its internal marketing approval, and retained all rights in the agencies' work product.); *Burton v. R.J. Reynolds Tobacco Co.*, 200 F.R.D. 661 (D. Kan. 2001) (memoranda made in the course of rendering general business advice or for public relations purposes not protected by attorney-client privilege); *In re Flint Water Cases*, 2024 WL 2139318 (E.D. Mich. May 13, 2024) (proposal created by defendant's outside public relations firm for non-litigation purposes such as public relations and media strategy was not covered by the attorney-client privilege); *Lively v. Wayfarer Studios LLC*, 2025 WL 2606904 (S.D. N.Y. Sept. 9, 2025) (communications between clients and counsel that also included public relations experts not privileged where it was not shown that the public relations experts were part of implementing legal strategy or advice); *Lively v. The Skyline Agency, LLC*, 2025 WL 2532796 (S.D. N.Y. Sept. 3, 2025) (Signal message chat between defendant agency, its chief marketing officer, who was separately represented, and the public relations team were not privileged because the purpose was for coordinating a media strategy, not for giving or receiving legal advice; even if marketing director's message could be understood as a request for legal advice, the response made clear that she was not the client of the agency's lawyer); *Bloomingburg Jewish Educ. Ctr. v. Vill. of Bloomingburg*, 171 F. Supp. 3d 136 (S.D. N.Y. 2016) (Town failed to present district court with competent evidence to demonstrate applicability of attorney-client privilege or attorney work-product doctrine to communications with non-party public relations firm retained by town at behest of town's counsel in a related action; town provided only vague and highly generalized declaration of its counsel regarding usefulness of public relations firm's services, town did not submit a privilege log, town did not provide or offer to provide copies of any of documents or communications in dispute, and town did not even describe with any particularity exemplars of any documents or communications that might be in public relations firm's possession); *Ebin v. Kangadis Food Inc.*, 2013 WL 6085443 (S.D. N.Y. Nov. 12, 2013) (defendant waived attorney-client privilege by copying non-attorney public relations agents on the redacted emails); *Haugh v. Schroeder Inv. Mgmt. N. Am., Inc.*, 92 Fair Empl. Prac. Cases (BNA) 1043 (S.D. N.Y. 2003) (attorney-client privilege did not extend to public relations consultant engaged by plaintiff's former counsel; plaintiff failed to show that consultant performed anything other than standard public relations services and failed to show that communications were necessary so that counsel could provide legal advice); *In re Copper Mkt. Antitrust Litig.*, 200 F.R.D. 213 (S.D. N.Y. 2001) (certain communications between defendant and public relations consultant, hired by it, to assist it with the intense media scrutiny brought on by a government investigation and anticipated litigation privileged; the consultant was indistinguishable from a corporate employee, and acted on behalf of the defendant and assisted legal counsel in rendering advice); *Calvin Klein Trademark Trust v. Wachner*, 198 F.R.D. 53 (S.D. N.Y. 2000) (attorney-client privilege did not apply to documents and communications between plaintiffs' counsel and its third-party public relations firm where public relations firm had preexisting relationship with the plaintiffs and was "simply providing ordinary public relations advice" with respect to documents at issue).

[177] *See FTC v. GlaxoSmithKline*, 294 F.3d 141 (D.C. Cir. 2002) (drug manufacturer investigated by FTC established attorney-client privilege in FTC subpoena enforcement action, with respect to communications it shared with its public relations and government affairs consultants; its counsel worked with the consultants in the same manner as they did

refresh a witness's recollection;[178] (10) failing to timely and properly assert the attorney-client privilege;[179] (11) disclosures to consultants where they are not the "functional equivalent" of the

with full-time employees, and consultants acted as part of team with full-time employees regarding their assignments); *In re Flint Water Cases*, 2023 WL 8724924 (E.D. Mich. Dec. 18, 2023) (attorney client privilege applied to defendant counsel's communications with defendant's public relations consultants made for the purpose of assisting with litigation, specifically when that work was within the scope of developing themes for defendant's defense; however, communications for the purpose of public relations or media strategy are not privileged); *In re Grand Jury Subpoenas*, 265 F. Supp. 2d 321 (S.D. N.Y. 2003) (privilege extended to discussions with public relations firm hired by lawyers for grand jury target where investigation was "a high profile matter" and "a matter of intense press interest and extensive coverage for months").

[178] *See Smith v. Ergo Sols., LLC*, 2017 FEP Cases (BNA) 210,352 (D.D.C. 2017) (managing partner and co-defendant in sexual harassment case waived privilege with respect to internal report pursuant to company's investigation of sexual harassment claims brought against the managing partner by two other employee when he testified at deposition, without objection, to the report's specific recommendations; as part-owner and managing partner of the company, managing partner had the authority to waive the privilege on behalf of the company); *Las Vegas Dev. Assocs. v. Eighth Jud. Dist. Ct.*, 325 P.3d 1259 (Nev. 2014) (witness's reliance on allegedly-privileged, attorney-prepared documents to refresh his recollection before giving deposition testimony waived attorney-client privilege and work-product doctrine, allowing adverse party to demand production of documents, inspect them, cross-examine witness on contents, and admit documents into evidence for impeachment purposes); *Las Vegas Sands Corp. v. Eighth Judicial Dist. Ct.*, 319 P.3d 618 (Nev. 2014) (attorney's admission at sanctions hearing that he reviewed privileged documents to refresh his recollection before or while testifying waived privilege with respect to such documents). *Cf. In re Kellogg Brown & Root, Inc.*, 796 F.3d 137 (D.C. Cir. 2015) (defense contractor's internal investigation into whether contractor defrauded U.S. Government by inflating costs and accepting kickbacks while administering military contracts in Iraq protected by attorney-client privilege and work product; contractor did not impliedly waive privilege and work product protection when corporate representative reviewed the documents in preparation for his deposition, since relator noticed contractor's deposition on the subject of whether the investigation documents were privileged, giving the corporate representative no choice but to review the documents in preparation; and contractor's reference to the investigation in summary judgment papers did not result in an "at issue" waiver since it only referred to the fact of an investigation and did not refer to the contents of any privileged documents); *Tucci v. Gilead Scis., Inc.*, 2023 WL 3584699 (W.D. Pa. May 22, 2023) (investigative report concerning plaintiff's complaints about improper business conduct prepared by in-house counsel to provide advice to the company was privileged; however, the company cannot invoke a blanket privilege over the investigation file, and must produce responsive non-privileged documents from the file, or otherwise provide a log that identifies which specific documents are being withheld and the basis for withholding them); *Clampitt v. Am. Univ.*, 957 A.2d 23 (D.C. 2008) (Former employee suing university president following termination of employment was not entitled, under rule governing use of a writing to refresh memory, to compel discovery of document prepared by president's counsel and reviewed by president before his deposition, where there was no showing that document refreshed president's recollection.).

[179] *See United States v. Khalil*, 2024 WL 4948835 (E.D. Mich. Dec. 3, 2024) (party waived attorney client privilege with respect to documents produced by its lawyer in response to a grand jury subpoena where it was on notice that the attorney had revealed the information to the government but waited over 18 months to file a motion with the court regarding privilege); *Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, 970 A.2d 656 (Conn. 2009) (Roman Catholic diocese and clergymen sued by purported victims and families alleging sexual abuse of minors by clergymen waived any privileges in connection with documents previously protected by sealing orders, where diocese and clergymen did not assert alleged privileges at time of documents' initial disclosure via voluntary discovery process, despite claim that diocese and clergymen disclosed information with the understanding that it would be sealed.).

company's employees;[180] (12) disclosures to experts;[181] (13) disclosures to an adversary;[182] (14)

[180] *See, e.g.*, *In re Restatis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig.*, 352 F. Supp. 3d 207 (E.D. N.Y. 2019) (defendant corporation waived privilege with respect to documents shared with its independent consultants; corporation did not establish that the consultant's input was needed to explain concepts unfamiliar to company's employees; moreover, the company did not show that the consultants played such exceptional roles at corporation that they could be treated as anything other than typical part-time consultants; the company engaged them through routine consulting agreements and neither exercised any independent decision-making for the company); *Ayrton Cap. LLC v. Bitdeer Techs. Grp.*, 2025 WL 743761 (S.D. N.Y. March 7, 2025) (Defendant waived attorney client privilege where a third-party broker sourcing financing on defendant's behalf was included in communications and it was not shown that broker was functionally equivalent to an employee of defendant); *SEC v. Rayat*, 2023 WL 4420325 (S.D. N.Y. July 10, 2023) (company defendant's inclusion of co-defendant who was a consultant to company in its communications with its counsel were not protected by the attorney client privilege where it was not shown that consultant was the functional employee of the company where he was not vested with authority to make decisions on behalf of the company; "[a]t best, Defendants have shown that [consultant] was a helpful consultant to [company]. They have not shown that he was a de facto employee warranting application of the exception."); *Glob. Textile All., Inc. v. TDI Worldwide, LLC*, 847 S.E.2d 30 (N.C. 2020) (Consultant retained by single shareholder of corporation did not have duties for corporation, and thus could not have been corporation's agent under functional-equivalent test, even if such test were recognized under North Carolina law, when determining whether consultant's participation in correspondence between corporation and shareholder operated to waive attorney-client privilege, in corporation's action alleging misappropriation of trade secrets against former employees; consultant lacked any sort of agency relationship with corporation.); *Utah First Fed. Credit Union v. Univ. First Fed. Credit Union*, 2024 WL 3510989 (D. Utah July 22, 2024) (documents and communications involving defendant, defendant's law firm, and a branding agency hired by defendant to consult and assist with defendant's rebrand party are not privileged; by involving the third party in the communication, they are not confidential and thus defendant waived the privilege; defendant failed to show that the communication fit within the joint client exception and agency was not shown to be the functional equivalent of an employee since agency performed the function any bran ding consultant would be expected to perform, and defendant failed to show that it and agency had a common legal interest); *Puma SE v. Brooks Sports, Inc.*, 2024 WL 4476767 (W.D. Wash. Oct. 11, 2024) (communications between defendant's attorneys and its advertising agencies were not privileged because defendant did not establish that they were the functional equivalent of defendant's employees where, among other things, the agency did not communicate directly with defendant's in-house counsel but went through its in-house marketing department, and there was no evidence that the agencies had access to confidential information or independent interactions with defendant's business executives); *Digital Mentor, Inc. v. Ovivo USA, LLC*, 2020 WL 550746 (W.D. Wash. Feb. 4, 2020) (communications between plaintiff company's employees, its outside counsel and a third-party consultant was not privileged because consultant was not the functional equivalent of an employee of plaintiff; there was no proof to establish the consultant's duties with respect to interacting with company's lawyers or that he had specialized knowledge upon which the lawyers would rely to render legal advice to the company, and it appeared that the communications were business, not legal, related).

[181] *See In re Chevron Corp.*, 633 F.3d 153 (3d Cir. 2011) (plaintiffs in environmental damages action in Ecuador waived work product and attorney-client privilege protections to documents created by non-testifying environmental consultant by submitting documents to court-appointed damages expert, where there was no reason for submission of documents to expert other than for him to consider those documents to advance plaintiffs' hope that expert's final global damages assessment report would reflect materials and conclusions in the document). *Cf. Sonate Corp. v. Beyond Meat, Inc.*, 2025 WL 1490378 (D. Mass. May 23, 2025) (defendant did not waive attorney-client privilege with respect to emails identified by expert in report where emails were inadvertently produced to the expert).

[182] *See Wi-Lan, Inc. v. LG Elec., Inc.*, 684 F.3d 1364 (Fed. Cir. 2012) (Patent owner's pre-litigation disclosure of letter to competitor, that law firm had written to owner expressing its legal opinion regarding enforceability of patent, waived both owner's confidentiality in that letter with law firm that wrote it, as well as owner's attorney-client privilege, at least as to letter itself, where letter had been marked "CONFIDENTIAL" on every page and it was addressed from attorney to client and contained detailed legal opinions.); *Ghaemmagham v. Dignity Health*, 2025 WL 3703611 (D. Ariz. Dec. 22, 2025) (attorney waived privilege with respect to clients' identity where he voluntarily revealed their identities in his demand letter to defendant); *Sayegh v. Automatic Data Processing, Inc.*, 2025 WL 2337110 (D. Ariz. Aug. 13, 2025) (Plaintiff expressly waived the attorney-client privilege regarding his communications with his former counsel relating to discovery strategy by disclosing those communications with redactions to his opponent in support of a discovery dispute, but the scope of such waiver does not extend in a blanket

disclosures to potentially adverse parties;[183] (15) disclosures by government employers in response

fashion to the lodged materials or to the sealed hearing transcript. The redactions, although they affect *what* was disclosed and thereby affect the scope of the resulting waiver, do not alter the fact that a waiver occurred. Substantial portions of the communications that Plaintiff disclosed were unredacted, and these disclosures therefore constitute a waiver of the attorney-client privilege.); *Bauer v. Bonner Cnty., Idaho*, 2025 WL 2401996 (D. Idaho Aug. 19, 2025) (Defendants expressly waived their privilege by allowing deponents to testify about Defendants' attorney-client privileged communications during depositions under the parties' "bubble" agreement. Further, the Court agrees that if Defendants place otherwise privileged communications at issue to defend their conduct, then they impliedly waive that privilege. These waivers apply to the subject matter of the disclosed communications. Beyond determining that the waivers relate to the same subject matter, however, the Court is unable to determine the scope of Defendants' waivers based on the parties' arguments.); *Phoenix Ins. Co. v. Diamond Plastics Corp.*, 2020 WL 4261419 (W.D. Wash. July 24, 2020) (insurer waived privilege with respect to its coverage opinion when claims adjuster sent claims file to insured's defense counsel that contained the opinion; privileged material was mistakenly yet voluntarily disclosed by employees acting within the scope of their authority); *Hill v. Wallach*, 661 S.W.3d 786 (Mo. 2023) (Hospital patient who was allegedly injured when her bed malfunctioned while she was recovering from back surgery waived work product protection for settlement documents relating to a motor vehicle accident involving patient following the incident at hospital, and thus, the documents were discoverable by hospital in its effort to prove its affirmative defense of reduction in patient's negligence action, where patient disclosed the documents to an adversary, i.e., the insurance claims adjuster in the motor vehicle accident case, even though disclosure was made to a former adversary rather than a current adversary.); Pa. Ethics Op. 2020-100 (2020) (attorneys risk divulging client confidences and privileged information when they communicate with opposing counsel and include their clients on the same email; attorney recipients of such emails may be deemed to violate the no contact rule if the, in turn, reply to all or otherwise directly contact an adverse client without opposing counsel's express consent except in situations where it is objectively reasonable to infer consent from the circumstances). *Cf. Exotica Botanicals, Inc. v. E.I. Du Pont de Nemours & Co.*, 612 N.W.2d 801 (Iowa 2000) (although attorney who served as general counsel for company disclosed the general subject matter of requested documents in another case, such limited disclosure was not a waiver of the work product privilege); Va. Legal Ethics Op. 1787 (2003) (attorney may request a retained expert witness who has received information protected by the attorney work product doctrine to contact the attorney upon receipt of a request or subpoena for the information and obtain an agreement from the witness that he will keep the client information confidential, including not disclosing the information to opposing counsel). *Compare Baylor v. Mitchell Rubenstein & Assocs.*, 55 F. Supp. 3d 43 (D.D.C. 2015) (attorney-client privilege barred production of communications between law firm and debt collection service that hired firm on behalf of creditor, where the debt collection service acted as the creditor's agent for the purpose of obtaining legal advice from the law firm; the fact that the debt collection service, rather than the creditor, hired the law firm did not prevent a finding of privilege where all other aspects of the privilege were established); *Ctr. Partners, LTD v. Growth Head GP, LLC*, 981 N.E.2d 345 (Ill. 2012) (Former vice president and former chief executive officer of defendant company did not voluntarily waive attorney-client privilege in their depositions as to legal advice received from counsel and shared with third parties; the disclosures were not voluntary since at the time they disclosed the privileged communications, the trial court had already ruled that the defendants had waived attorney-client privilege for communications shared among defendants.); *In re Charges of Unprofessional Conduct in Panel File No. 41310*, 899 N.W.2d 821 (Minn. 2017) (when his client terminated him in connection with settlement negotiations with an insurance company, lawyer emailed adjuster to inform him of the termination, advised the adjuster that the client was not accepting the settlement offer, and adding that the lawyer had "advised him that he had already accepted it, there is no rescinding his acceptance"; this type of disclosure "harms the legal profession).

[183] *See Hartleib v. Weiser Law Firm, P.C.*, 861 Fed. App'x 714 (10th Cir. 2021) (plaintiff waived privilege in communications with law firm by voluntarily disclosing some of those communications in his objection to the settlement and his filings in parallel litigation; under Kansas law, partial waiver of a privileged communication constitutes waiver of the privilege as to the entire communication); *In re Grand Jury 2021 Subpoenas*, 87 F.4th 339 (4th Cir. 2023) (patient's widow voluntarily disclosed, as required for her waiver of attorney client privilege, her communications with defendant-attorney, which disclosure occurred during attorney ethics investigation of defendant, was not clearly erroneous, for purposes of disclosure of materials obtained pursuant to grand jury's subpoena duces tecum, at government's request after defendant's indictment for attempted extortion, directed to law firms that advised defendant when he represented widow in negotiations to settle medical malpractice claim against state university's hospital system; investigation during which widow provided interview to Bar Counsel implicated only defendant and

to public information requests;[184] (16) disclosures in court or other public filings;[185] (17)

widow was under no obligation to participate, and she acquiesced to interview in wake of Bar Counsel's petition for disciplinary or remedial action.); *Simmons v. Children's Hosp. of Pa.*, 89 Fair Empl. Prac. Cas. (BNA) 417 (E.D. Pa. 2002) (employer waived attorney-client privilege as to summary of investigation into employment discrimination claim by employee's coworker when its attorney intentionally sent summary to employee's counsel, without knowing whether he was representing employee, along with letter suggesting uncertainty as to whether counsel represented employee, where there is no evidence that employer or attorney made any effort to verify whether employee's counsel represented employee before sending letter, and there was little reason to include summary with letter, as document could have been identified in some other way; attorney's statements coupled with her apparent lack of diligence, indicates that she and employer did not take reasonable measures to preserve privilege); *Goldstein v. Colborne Acquisition Co.,* 873 F. Supp. 2d 932 (N.D. Ill. 2012) (Minority shareholders of debtor LLC waived attorney-client privilege as to e-mail correspondence with their individual attorney using debtor's e-mail system, in bankruptcy trustee's action alleging that UCC sale of debtor's assets was a fraudulent effort to avoid judgment in favor of creditor, and seeking to compel production of debtor's pre-sale e-mails, where their e-mails were deliberately disclosed, by sale, to purchaser of debtor's assets, debtor reserved right to disclose messages sent over its e-mail system, third parties had a right of access to the e-mails, because whatever employees wrote became debtor's property under the policy, and shareholders did not allege that they were unaware of the company policy); *In re Santa Fe Int'l Corp.*, 272 F.3d 705 (5th Cir. 2001) (defendant's senior counsel's memo, which was disclosed to its horizontal offshore drilling competitors before filing of antitrust class action against it, was not protected by "common legal interest" extension of the attorney-client privilege; disclosures were made either to facilitate future illegal price fixing, or in the sole interest of preventing future antitrust violations, and were not made in response to an anticipated or perceived threat of future antitrust litigation); *PSE Consulting Inc. v. Frank Mercede & Sons, Inc*, 838 A.2d 135 (Conn. 2004) (statements made in the presence of a third party are usually not privileged because there is then no reasonable expectation of privacy); *Am. Zurich Ins. Co. v. Mont. Thirteenth Judicial Dist. Ct.*, 280 P.3d 240 (Mont. 2012) (adjuster's disclosure to insured employer of letter that attorney retained by workers' compensation insurer wrote regarding claimant's workers' compensation claim waived work product doctrine, and thus claimant could subpoena letter from employer in unfair settlement practices action against insurer, as employer's overlapping relationship with both claimant and insurer made insurer's expectations of confidentiality during the claims adjustment process unreasonable; insurer was a Plan II insurer and bore direct liability to claimant, and the law expressly excluded employer from participation in and liability for the claim); *Phoenix Ins. Co. v. Diamond Plastics Corp.*, 2020 WL 4261419 (W.D. Wash. July 24, 2020) (insurer waived privilege with respect to its coverage opinion when claims adjuster sent claims file to insured's defense counsel that contained the opinion; privileged material was mistakenly yet voluntarily disclosed by employees acting within the scope of their authority). *Cf. Santella v. Grizzly Indus., Inc.*, 286 F.R.D. 478 (D. Or. 2012) (Subpoenaed entities waived any claim of attorney– client privilege in relation to portions of offering documents to prospective investors that explained their business strategy when they distributed documents to third–party prospective investors, absent evidence that subpoenaed entities' counsel also served as counsel for and represented investors' interests or that entities and investors were engaged in pursuit of common legal strategy or intended to facilitate representation of either party in making those communications.).

[184] *See Lightbourne v. McCollum,* 969 So.2d 326 (Fla. 2007) (state waived any attorney-client privilege that may have existed with respect to two memoranda in litigation brought by prisoner when it disclosed the memos to prisoner's attorney as part of a public records request response).

[185] *See T3 Enters., Inc. v. Safeguard Bus. Sys., Inc.*, 435 P.3d 518 (Idaho 2019) (Company waived attorney-client privilege as to emails between company and its in-house counsel where company stipulated to the admission of the emails at an evidentiary hearing that took place as part of an arbitration proceeding between the parties.); *State ex rel. Boddy v. Bd. of Edu. of Xenia Cmty. City Sch. Dist.*, ___ N.E.3d ___, 2026 WL 173372 (Ohio Jan. 22, 2026) (district waived privilege with respect to emails by submitting them as part of their evidence in mandamus action); *In re Powerhouse Licensing, LLC*, 441 F.3d 467 (6th Cir. 2006) (by including attorney-client communications in affidavit, counsel for defendants effectively waived the privilege); *United States v. Dakota*, 197 F.3d 821 (6th Cir. 1999) (Indian tribe's implicit consent to inspection of its documents, which defendants obtained by subpoena from tribal offices while those offices were occupied by an activist group, many of whom were not tribal officers, waived attorney-client privilege as to the documents, since the tribe did not object to the subpoena or the inspection of the documents); *Cruz v. Coach Stores, Inc.*, 196 F.R.D. 228 (S.D. N.Y. 2000) (fact that company allowed its agent to file executive summary prepared by investigative firm, following completion of its inquiry into charges of financial improprieties, racial discrimination and sexual harassment by company employees, as part of a successful motion to be dismissed

confidential discussions in public settings where no reasonable measures are taken to ensure the communications are not overheard[186] (but if reasonable measures are taken, waiver will not be found);[187] (18) failure to timely provide a proper privilege log;[188] (19) making a request for

from a closed related litigation alleging that agent withheld discovery in another Title VII action, precluded claim of attorney-client privilege or work product protection asserted in Title VII action in opposing motion for disclosure of underlying notes that summary purported to summarize). *Cf. Tomahawk Mfg., Inc. v. Spherical Indus., Inc.*, 2026 WL 207353 (D. Nev. Jan. 26, 2026) (defendants waived attorney client privilege as to email from its former counsel by forwarding the email to the court's courtroom deputy); *Brown v. Amazon.com Servs. LLC*, 2026 WL 458445 (W.D. N.C. Feb. 18, 2026) (Plaintiff waived the confidentiality of her communications with her counsel by presenting to the court numerous emails, audio recordings and transcripts in support of her opposition to defendant's motion to enforce settlement). *Compare Jordan v. U.S. Dep't of Labor*, 273 F. Supp. 3d 214 (D. D.C. 2017) (disclosure of allegedly privileged materials to the district court or other tribunal for the purposes of determining the merits of a claim of privilege does not waive the privilege); *Dickson v. Rucho*, 737 S.E.2d 362 (N.C. 2013) (Statute regarding redistricting communications did not waive the right of legislators to assert attorney-client privilege or work-product doctrine in litigation concerning redistricting of General Assembly or Congressional districts by providing that all drafting and information requests to legislative employees and documents prepared by legislative employees for legislators concerning redistricting were no longer confidential and became public records upon the act establishing the relevant district plan becoming law; statute did not mention attorney-client privilege or work-product doctrine, let alone explicitly waive common-law doctrine.).

[186] *See, e.g., Wright v. Parish*, 2021 WL 5232256 (6th Cir. May 3, 2021) [T]he element of confidentiality is lacking" when a "defendant fail[s] to take reasonable precautions to keep his remark confidential" and instead "[chooses] to communicate with counsel by speaking to the attorney in a manner than can be overheard by a third person."); *Suburban Sew 'N Sweep, Inc. v. Swiss-Bernina, Inc.*, 91 F.R.D. 254 (N.D. Ill. 1981) ("even inadvertent communication to third parties, such as bystanders or eavesdroppers, destroys [attorney-client privilege, at least where the eavesdropping is no surreptitious and the attorney and client have made little effort to insure that they are not overheard."); *Pursely v. City of Rockford*, 2020 WL 1433827 (N.D. Ill. March 24, 2020) (incarcerated clients who speak to their attorneys on a phone line that they knew or should have known was recorded waives privilege).

[187] *See, e.g., In re Sealed Case*, 737 F.2d 94 (D.C. Cir. 1984) (conversation on board airplane between corporation president and general counsel was privileged even though neither party whispered or made any attempt to safeguard the conversation because there was no evidence that the discussions were actually overheard); *McFarland v. Fivespice, LLC*, 2017 WL 1758053 (D. Ore. May 4, 2017) (café's lawyer's meeting with executive chef in a restaurant booth was protected by attorney-client privilege; although meeting occurred in a restaurant booth in a public area, there were not many people in the restaurant and the booth was ten feet away from any occupied tables and the lawyer and chef did not raise their voices); *Gibbs v. State*, 543 P.3d 1185 (Nev. 2024) (detainee did not waive attorney-client privilege by using another detainee's telephone access code and making a three-way call to connect to his defense investigator and thus district court erred in admitting the State's recording of the call; detainee's violation of the detention center's rules prohibiting using another inmate's telephone access code did not waive the privilege, and the fact that the call was routed through a three-way call is, alone, insufficient to establish waiver of the privilege absent a showing that the third party remained present during the conversation).

[188] *See United States v. Fluitt*, 99 F.4th 753 (5th Cir. 2024) (Magistrate Judge's determination that privilege logs for non-party laboratories and their non-party alleged operator failed to adequately substantiate their assertions of attorney-client privilege, was not an abuse of discretion, on criminal defendant's motion to compel Government's disclosure of allegedly privilege documents downloaded from laboratories' computers pursuant to search warrants for investigation of genetic testing services; logs did not provide descriptions for documents/emails to explain why each should be protected from disclosure, and they did not disclose roles of parties to communications (attorney, client, neither), nor did they describe nature of communications (legal or non-legal)); *EEOC v. BDO USA, LLP*, 876 F.3d 690 (5th Cir. 2017) (Employer's privilege log, submitted in response to EEOC subpoena for records relating to its investigation into alleged discrimination, did not prove its prima facie case of attorney-client privilege as to all log entries; "blanket" claims in a privilege log, generalized descriptions of a document and conclusory statements that a document is privileged is insufficient; log included entries that were vague and/or incomplete in that they failed to identify a sender, recipient, date, or provide a substantive description of the subject matter, entries that failed to distinguish between legal advice and business advice, and entries that failed to establish that the communications were made in confidence and that confidentiality was not breached, and log also included conclusory descriptions of "legal advice" in the context of communications with in-house counsel); *In re Boeing Co.*, 2021 WL 3233504 (5th Cir. July

29, 2021) (company not entitled to privilege protection for 19 documents where its privilege log description did not explain what kind of "legal advice" is in-house counsel gave; "bare conclusory labels" are insufficient to warrant mandamus relief); *Siler v. EPA*, 908 F.3d 1291 (Fed. Cir. 2018) (EPA's draft notices of proposed sanctions for alleged misconduct by special agent for EPA's criminal investigation division were not protected by attorney-client privilege in proceeding before MSPB concerning EPA's decision to remove agent from his position; EPA did not produce privilege log or provide documents' authors or recipients, and EPA claimed that it did not know who drafted the documents and speculated that they were drafted by someone in the human resources department.); *Greer v. Cnty. of San Diego*, 634 F. Supp.3d 911 (S.D. Cal. 2022) (County failed to establish that it did not waive, via dissemination to third parties, any privilege that may have applied to incident reports that were prepared by county sheriff's department pertaining to jail deaths that preceded inmate's seizure and fall from his bunk after prison employees allegedly failed to administer his medication, where privilege log submitted by county failed to identify, as required by district court, all individuals listed as receiving copy of document and their relationship to county.); *Janson v. Stamford Health, Inc.*, 312 F. Supp. 3d 289 (D. Conn. 2018) (Employer's privilege log failed to adequately explain basis for claiming that listed documents were protected by attorney-client or work product privileges, and thus employer was required to produce documents in former employee's wrongful termination lawsuit, where log did not indicate that employer was party to one set of communications or that attorney was party to another set of communications, log did not describe nature and content of communications, and some communications occurred well before employee was terminated); *GateGuard, Inc. v. Amazon.com Inc.*, 2024 WL 3952145 (S.D. N.Y. Aug. 27, 2024) (plaintiff waived its attorney-client privilege when it failed to provide a timely privilege log with respect to documents produced); *Kizer v. N. Am. Transp. Servs., LLC*, 2020 WL 6263733 (W.D. Okla. Oct. 23, 2020) (privilege log must contain specific facts establishing the elements of the privilege for each document); *Fresenius Med. Care Holdings, Inc. v. Hood*, 269 So.3d 36 (Miss. 2018) (Trial court did not abuse its discretion in applying the sanction of waiver and ordering manufacturer of dialysis fluid, which the state had accused of engaging in unfair and deceptive trade practices in violation of the Consumer Protection Act, to produce e-mails and attachments that were responsive to state's discovery requests and that were not separately identified on manufacturer's second amended privilege log; trial court applied the sanction after manufacturer had not complied with nor sought clarification of trial court's previous order that manufacturer list each individual privileged e-mail and attachment in an e-mail chain on its privilege log rather than use the family logging method, i.e., listing the most recent communication in a chain, and trial court had found that manufacturer had thwarted reasonable discovery in several ways); *Meade v. Gen. Motors*, 250 F. Supp. 3d 1387 (N.D. Ga. 2017) (Employer waived attorney-client privilege in employee's action by asserting an overly broad claim of attorney-client privilege and failing to produce a proper privilege log after twice being ordered by the court to do so; employer improperly asserted attorney-client privilege over several documents that contained purely factual information merely because in-house counsel was included in e-mail chain, and revised privilege log was wholly inadequate to allow employee or the court to evaluate the validity of the assertions). *Cf. Ex parte Alfa Ins. Corp*., 284 So.3d 891 (Ala. 2019) (Trial court exceeded its discretion when it denied insurer's motion for a protective order and ordered insurer to produce a coverage letter and other attorney-client communications for in camera inspection or for discovery in insureds' action against insurer for breach of contract, bad faith, and other claims; insurer filed a privilege log describing the privileged nature of the pertinent materials and the basis for withholding the materials, insureds did not argue that insurer had waived the attorney-client privilege, and insureds did not establish that the materials at issue might not have been attorney-client communications as asserted in the privilege log); *In re U.S. Dep't of Justice Subpoenas to ABC*, 263 F.R.D. 66 (D. Mass. 2009) (Television network did not waive privilege over documents subpoenaed by government during investigation of its business practices, even though network did not provide privilege log for six months; government had permitted late assertions at least thirty times without objection during investigation, network notified government that it would provide privilege log when government complied with network's request to return inadvertently produced privileged documents, and investigation involved millions of documents.). *Compare Attorney Gen. v. Facebook, Inc.*, 164 N.E.3d 873 (Mass. 2021) (Social networking company did not waive its attorney-client and work product objections to Attorney General's requests, contained within third civil investigative demand, that sought identities of applications and developers that company reviewed at various stages of internal investigation conducted by its law firm, other information associated with review of identified applications, and internal communications about those applications, despite contention it waived such objection by failing to move to modify or set aside demand; company worked with Attorney General and communicated its objections to demand, including its assertions of privilege, and company also complied with requests in demand it believed called for nonprivileged information.).

attorney's fees;[189] (20) where the lawyer is identified as a witness by his client on the subject matter of the advice;[190] or (21) affirmatively placing privileged communications "at issue" in the case[191]

[189] *See Tacke v. Energy W., Inc.*, 227 P.3d 601 (Mont. 2010) (attorney-client privilege and work-product doctrine did not preclude employee from producing attorneys' billing records, when she moved for attorney fees against employer; in-camera review of the billing records by the trial court, and the use of redaction when necessary, would have accommodated the need to demonstrate the reasonableness of the fees award while protecting the attorney-client privilege and the work-product doctrine.); *Dishman v. First Interstate Bank*, 362 P.3d 360 (Wyo. 2015) (attorney fee statements are not privileged simply because they pertain to the attorney-client relationship; party will need to make a particularized showing that the bills contain attorney-client communications; moreover, a plaintiff waives attorney-client privilege and work product protection with regard to complete, unredacted bills from its attorneys by seeking attorney fees as damages for breach of contract). *Compare Feld v. Fireman's Fund Ins. Co.*, 909 F.3d 1186 (D.C. Cir. 2018) (In dispute between insurer and insured regarding hourly rates for his selected counsel under DC law, insurer did not waive attorney-client privilege with regard to its communications with its counsel regarding alleged agreement with insured pertaining to hourly rates for reimbursable attorney fees incurred in defense of action, and thus insured was not entitled to compelled discovery of documents including those communications, though district court had concluded that insured waived both attorney-client privilege and work-product privilege by placing his communications with his selected counsel at issue; insured had been represented throughout all discussions with insurer by his counsel, who acted as his agent, but insurer's attorney did not communicate with insured's counsel until after rate agreement allegedly was formed.); *In re Nat'l Lloyds Ins. Co.*, 532 S.W.3d 794 (Tex. 2017)(Insurer and claims adjusters did not offensively use their attorney-billing records so as to waive the work-product privilege that precluded insured homeowners' request for them *en masse* as part of claim for attorney fees in action against insurer and adjusters for alleged underpayment of claims, where insurer and adjusters stipulated that they would not use their own billing records to contest the homeowners' attorney fees, insurer and adjusters did not seek to recover their own attorney fees from homeowners; although Court of Appeals indicated that insurer and adjusters could seek attorney fees in the future based on a settlement offer, the offer-of-settlement rule had a process for reopening discovery to ascertain reasonableness of requested costs).

[190] *See Mendes v. Kirshenbaum & Kirshenbaum Attorneys at Law, Inc.*, 309 A.3d 1176 (R.I. 2024) (although the practice of ghostwriting may increase self-represented litigants' access to justice, approval of the practice is limited to attorneys licensed in the state of Rhode Island).

[191] *See, e.g.*, *U.S. Fire Ins. Co. v. Asbestospray, Inc.*, 182 F.3d 201 (3d Cir. 1999) (a party may waive the attorney-client privilege by affirmatively placing the advice of counsel in issue); *Rhone-Poulenc Rorer, Inc. v. Home Indem. Co*., 32 F.3d 851 (3d Cir. 1994) (reliance on advice of counsel as an affirmative defense waives privilege); *In re Grand Jury Subpoena*, 341 F.3d 331 (4th Cir. 2003) (subject of grand jury investigation impliedly waived attorney-client privilege regarding question of whether attorney aided him in filing immigration form and whether attorney told him to answer "no" on the form when, in response to questioning by FBI agents as to why he answered "no" to question asking whether he had ever been convicted of a crime, subject responded that he answered no under the advice of an attorney, and identified that attorney by name); *United States ex rel. Drakeford v. Tuomey*, 792 F.3d 364 (4th Cir. 2015) (defendant waived attorney-client privilege with respect to its communications with counsel when it asserted the advice-of-counsel defense); *Nguyen v. Excel Corp.*, 197 F.3d 200 (5th Cir. 1999) (defendant in FLSA action waived attorney-client privilege by failing to assert the privilege when confidential information was sought during deposition of company executives and by selectively disclosing portions of the privileged communications to establish its good faith defense); *Seneca Ins. Co. v. W. Claims, Inc.*, 774 F.3d 1272 (10th Cir. 2014) (because insurer cited "advice of counsel" to justify settling with its insured in the underlying action, it could not shield that advice from its insurance adjuster in recoupment action by insurer against the adjuster); *Jahn v. GEICO*, 759 F. App'x 815 (11th Cir. 2018) (trustee put at issue Doyon's communications with her GEICO-provided attorney by introducing portions of Doyon's videotaped deposition at trial, in which Doyon testified that the attorney had repeatedly assured her that she would win her case, and after she lost, had failed to inform her of the judgment against her; therefore, GEICO was entitled to call the attorney to the stand and introduce emails between the attorney and Doyon to rebut Doyon's assertions); *Arizona ex rel. Goddard v. Frito-Lay, Inc.*, 273 F.R.D. 545 (D. Ariz. 2011) (state FEP agency waived all attorney-client and work product privilege that it may have had in the investigation of an employee's complaint and preparation of the reasonable cause determination when, in lieu of simply stating the agency's conclusion that reasonable cause existed that the employer had subjected the employee to a hostile environment and discriminated against her on the basis of race and sex, provided a public determination that reasonable cause existed under the signature of one of its lawyers, who signed the document as "Chief Counsel"); *London Luxury, LLC v. Walmart, Inc.*,

2024 WL 1025220 (W.D. Ark. March 8, 2024) (company waived privilege with respect to in-house counsel's review of the transaction where it asserted a defense that in fairness requires examination of protected communication); *Ameritas Life Ins. Corp. v. Wilmington Savings Fund Society*, 2025 WL 3022544 (D. Del. Oct. 29, 2025) (counterclaim for unjust enrichment for the return of premiums paid to an insurer on the basis of excusable ignorance as to whether there was an insurable interest waives attorney client privilege over communications on whether there was an insurable interest); *Tracinda Corp. v. Daimler Chrysler AG*, 362 F. Supp. 2d 487 (D. Del. 2005) (plaintiff in action challenging merger opened the door to testimony concerning advice given by attorney to corporation's board, permitting defendant to use attorney's testimony about that advice defensively to complete the record after they invoked the attorney-client privilege, where plaintiff's use of attorney's opinion when questioning two witnesses was incomplete and misleading because it did not include her reasons for her statement that the transaction did not invoke a change of control); *Savignac v. Jones Day*, 763 F. Supp.3d 17 (D.D.C. 2025) (Defendant law firm waived privilege over memorandum from the firm's HR Director (Dressing) to the firm's managing partner (McCartan) by placing the HR director's advice at issue in the litigation; Jones Day wanted the court and jury to infer that McCartan approved the eight-week period of presumptive, postpartum disability leave for the reasons that Dressing described in her declaration, but the only plausible way to reach that conclusion, however, is to infer that Dressing conveyed her views to the managing partner and the managing partner was convinced by her advice. "That poses a problem for Jones Day, however, because the record demonstrates that Dressing conveyed her views in the December 22, 1993 memorandum—and, as far as the Court can discern, in no other manner—yet Jones Day seeks to withhold that document from Plaintiffs. Ultimately, Jones Day seeks to put Dressing's views at issue to explain why McCartan approved the relevant policy while withholding the one contemporaneous document that not only reflects those views but that was conveyed to McCartan."); *Feld v. Fireman's Fund Ins. Co.*, 292 F.R.D. 129 (D.D.C. 2013) (insured put at issue, and thus waived the attorney-client privilege with respect to communications relating to his or his attorney's understanding of and actions regarding homeowner's insurer's position on hourly rates, or that otherwise bear on the parties' agreement or lack thereof, in insured's suit against insurer seeking to recover $2.4 million of the more than $4.5 million in legal fees and expenses incurred in underlying suit against insured; although insured need not rely on such communications to prove his claim, he essentially claimed that no communications demonstrating that he and/or his attorney agreed to insured's proposed rates ever took place, thereby making certain attorney-client communications integral to the outcome of his claims.); *Wood v. Neuman*, 979 A.2d 64 (D.C. 2009) (Where a party asserts as an essential element of his defense reliance upon the advice of counsel, the party waives the attorney-client privilege with respect to all communications, whether written or oral, to or from counsel concerning the transactions for which counsel's advice was sought.); *Maar v. Beall's, Inc.*, 237 F. Supp. 3d 1336 (S.D. Fla. 2017) (Employer impliedly waived any attorney-client privilege with respect to requested documents that supported its affirmative defenses by putting its state of mind at issue when it asserted affirmative good faith defense, in putative collective action by employees classified as area managers alleging that they were not paid overtime in violation of the FLSA, since employer did not merely negate employees' allegations of willful violations in its affirmative defenses, but introduced its subjective weighing of legality by stating that it "at all times acted in good faith and with reasonable grounds for believing its actions fully complied with the law); *Clarke v. White Pine Charter Sch., Inc*., 2022 WL 280455 (D. Idaho Jan. 31, 2022) (Defendants waived privilege with respect to their attorneys' advice concerning whether there was an open meeting violation with respect to the Board's approval of plaintiff's contract where Defendants relied upon the open meeting violation as a basis for asserting that the approval of his contract extension was not valid); *Xirum v. ICE*, 2025 WL 2687724 (S.D. Ind. Sept. 19, 2025) (ICE waived privilege over memorandum when it incorporated the memorandum into the department's policy and was considered by ICE's final decisionmaker and thus part of the administrative record); *Bahl v. New York Inst. of Tech.*, 2024 WL 3835141 (E.D. N.Y. Aug. 15, 2024) (where plaintiff called his attorney as a witness to testify about the substance of his conversations with plaintiff, it would be unfair to permit plaintiff to rely on the attorney-client privilege to prevent testimony about such conversations); *Lawson v. Paramount Global*, 2025 WL 3201763 (S.D. N.Y. Nov. 17, 2025) (privilege did not apply where defendants did not establish that attorney's involvement in communications were for the purpose of providing legal advice; even if privilege applied, defendants' assertion of affirmative defense that they acted in good faith in that their employment decisions were legitimate and non-discriminatory, that defendants acted without malice, and that defendants complied with established policies and procedures to prevent discriminatory and harassing behavior (the "*Kolstad* defense"), necessarily implicated privileged communications and thus defendants placed the communications at-issue and thus privilege was waived); *Floyd's of Leadville, Inc. v. Alexander Cap., L.P.*, 2024 WL 4566148 (S.D. N.Y. Oct. 24, 2024) (plaintiff implicitly waived attorney-client privilege by making various allegations the accuracy of which can only be determined through an examination of communications between plaintiff and its attorney, by alleging that plaintiff had no knowledge of and gave no approval authorization to its attorney to engage in certain actions); *Chevron*

Corp. v. Donziger, 2013 WL 6182744 (S.D. N.Y. Nov. 21, 2013) (Defendants waived the privilege with respect to minutes of a meeting of the "Assembly of the Affected" because defendants' assertion of the privilege was a result of defendants' putting in issue and arguing that Donziger's role had been altered because of a decision allegedly taken at the meeting; defendants have put the events that occurred at that meeting at issue by using them to bolster that claim; and assertion of the privilege to shield the redactions, if permitted, would deprive Chevron access to information necessary to assess the validity of the claim.); *Rubel v. Lowe's Home Ctrs., Inc.*, 580 F. Supp. 2d 626 (N.D. Ohio 2008) (In proceeding brought by defendant to enforce a settlement of a personal injury suit brought by plaintiff, testimony of plaintiff's former attorney about his communications with plaintiff concerning attorney's authority to settle plaintiff's claim is admissible because plaintiff waived the attorney-client privilege when he voluntarily testified in his affidavit and deposition that he neither agreed to settle his case with defendant nor authorized his attorney to do so; moreover, a communication from a client to his attorney conveying authority to the attorney to act on his behalf as his agent in entering into an agreement with the opposing party, is a communication which is intended to be communicated to the opposing party and, therefore, is not privileged.); *Bean v. Wyoming Seminary of the Susquehanna Annual Conference*, 2024 WL 1197521 (M.D. Pa. March 20, 2024) (defendant waived privilege with respect to documents generated by outside counsel's investigation where contents of investigation will be used by defendant to challenge plaintiff's case, establish defendant's legitimate nondiscriminatory reasons for termination and undercut plaintiff's opportunity to show that those reasons are fabricated); *United States ex rel. Berkeley v. Ocean State, LLC*, 2024 WL 3201393 (D. R.I. June 26, 2024) (Defendants impliedly waived the attorney-0cleint privilege by asserting that they had a good faith belief in applying for the PPP loan after consulting their attorneys who participated in the application process on some levels; to hold otherwise, in this case, on these facts, would be unfair to Plaintiff and to the ultimate trier of fact); *United States ex rel. Dorsa v. Miraca Life Scis.*, 2024 WL 4279496 (M.D. Tenn. Sept. 24, 2024) (defendant waived attorney-client privilege over documents relating to defendant's investigation and its termination of plaintiff where in its summary judgment motion defendant attempted to use its frequent consultations with counsel to cloak the investigation and termination in legitimacy in an effort to show that its decision to terminate plaintiff was not a pretext for retaliation, which it cannot do without waiving the privilege); *Univ. of Tenn. Rsch. Found. v. Caelum Biosciences, Inc.*, 2024 WL 4011957 (E.D. Tenn. Sept. 1, 2024) (defendant company may not introduce legal advice its former parent company received in connection with its due diligence efforts where defendant never disclosed the contents of the advice received during discovery on grounds of attorney client privilege; allowing this evidence at trial would permit defendant company to use the attorney-client privilege as a sword and shield); *Ex Parte Meadowbrook Ins. Grp., Inc.*, 987 So.2d 540 (Ala. 2007) (risk management company and employer failed to affirmatively state that they were not relying on attorney's advice regarding decision to terminate injured worker's temporary total disability benefits in defense of worker's compensation claim of tort of outrage regarding the underlying workers compensation claim, as required to protect the attorney's advice from disclosure in discovery under the attorney-client privilege); *People v.* Superior Court, 12 Cal.5th 348 (2021) (prosecutor impliedly waived work product protection in jury selection notes when he relied on juror rating system to explain peremptory strikes); *Liggett v. People*, 529 P.3d 113 (Colo. 2023) (by putting his mental condition at issue in trial, a defendant waives the attorney-client privilege with respect to observations of consulting psychiatrists retained by his attorney); *Clair v. Clair*, 982 N.E.2d 32 (Mass. 2013) (Closely-held companies, against which executrix of one shareholder's estate brought action challenging disposition of business assets remaining after sale of most of companies' assets, waived attorney-client privilege as to communications with corporate counsel about prospective purchase by that shareholder of life insurance policies that had been corporately owned, where companies counterclaimed that now-deceased shareholder had breached fiduciary duties to fellow shareholders by filing to fairly value the policies as of date of sale, or, alternatively, by failing to fully and fairly disclose to fellow shareholders the potential tax liability and consequences of the sale.); *CR-RSC Tower I, LLC v. RSC Tower I, LLC*, 56 A.3d 170 (Md. 2012) (Landlords, defendants in developer-tenants' action against landlords seeking lost profits for landlords' refusal to perform ground leases, waived attorney-client privilege with respect to communication with counsel concerning reason for their refusal to perform, by attempting to use attorney-client privilege as a sword and shield by claiming, in response to questioning seeking to elicit their reasons for taking certain actions, that they relied upon advice of counsel, and subsequently asserting attorney-client privilege as to substance of such advice.); *Travelers Prop. Cas. Co. v. 100 Renaissance, LLC*, 308 So.3d 847 (Miss. 2020) (where claims handler relied substantially, if not wholly, on in-house counsel to prepare insurance denial letter, the insurance company waived the attorney-client privilege and was required to produce written communications between its in-house counsel and its claims handler and to produce its in-house counsel for a deposition); *In re Marriage of Perry*, 293 P.3d 170 (Mont. 2013) (Wife, who was a former prospective client of husband's divorce counsel, waived any attorney-client privilege she had with respect to information she had provided to husband's counsel as a prospective client, as wife, by filing motion to disqualify counsel in divorce proceeding,

(but mere references to attorney advice or consultation in litigation will not necessarily result in an at-issue waiver where the communications relate to the denial of the claim rather than an affirmative defense and the substance of the communications are not disclosed),[192] or where an

claiming that privileged information she had given attorney over the telephone was being misused and that counsel should be disqualified, put her communications with counsel at issue); *Desclos v. S.N.H. Med. Ctr.*, 903 A.2d 952 (N.H. 2006) (when a party asserting the attorney-client privilege injects privileged material into the case such that the information is actually required for resolution of the issue, the privilege-holder must either waive the attorney-client privilege as to that information or be prevented from using the privileged information to establish the elements of the case); *Boone v. Vanliner Ins. Co.*, 744 N.E.2d 154 (Ohio 2001) (in action alleging bad faith denial of insurance coverage, insured was entitled to discover claims file materials containing attorney-client communications that are related to the issue of coverage that were created before the denial of coverage; if the trial court finds that the release of this information will inhibit the insurer's ability to defend on the underlying claim, it may issue a stay of the bad faith claim and related production of discovery pending the outcome of the underlying claim); *Bertelesen v. Allstate Ins. Co.*, 796 N.W.2d 685 (S.D. 2011) A client only waives the attorney-client privilege under the advice-of-counsel exception by expressly or impliedly injecting his attorney's advice into the case; the key factor is reliance of the client upon the advice of his attorney); *Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 163-64 (Tex. 1993) (waiver of attorney-client privilege by offensive use; party asserting privilege seeks affirmative relief and the privileged information is determinative of the claim).

[192] *See In re Grand Jury Proceedings*, 219 F.3d 175 (2d Cir. 2000) (grand jury testimony of company's founder, chairman and controlling shareholder, referring to advice of counsel as validating corporation's actions, did not necessarily waive attorney-client and work product privileges, where witness was compelled to testify, was not the corporation's legal representative, had no legal training, was not directly involved in preparing the corporation's defense, and where the corporation had formally notified the government of its intention to preserve the privileges and did not itself take any affirmative steps to inject privileged materials into the litigation; rather, district court should carefully weigh circumstances surrounding testimony, including whether witness's interest in exculpating his own conduct that may override his fidelity to the corporation, in deciding whether, in fairness, that testimony effected waiver); *Martinez v. Hellmich Law Grp.,* 681 F. App'x 323 (5th Cir. 2017) (Attorney's claims against law firm for tortious interference, conspiracy to interfere with a business relationship, and business disparagement arising out of law firm's communications with attorney's former clients allegedly made in an effort to get them to hire law firm to bring an action against attorney, were barred by attorney-client privilege under Texas law, where all three claims arose out of communications law firm was privileged to make); *Ross v. City of Memphis*, 423 F.3d 596 (6th Cir. 2005) (plaintiff police officer sued defendants, the city, a former police director and a police deputy, alleging employment discrimination; the director asserted qualified immunity based on legal advice received from the city's attorneys and the district court ordered the director to disclose the contents of that advice; on interlocutory appeal, the Sixth Circuit reversed, finding that the city could assert the attorney-client privilege and the director's assertion of the advice of counsel defense did not result in a waiver by the city; the city still bore the burden of establishing the existence of the privilege, and there was some chance that the director clearly indicated he had sought individual legal advice; the district court was encouraged to consider that issue on remand); *Berns v. Sentry Select Ins. Co.*, 766 F. App'x 515 (9th Cir. 2019) (Under California law, invocation of attorney-client privilege by insurer that issued commercial general liability insurance policy in insured's breach of contract and bad faith action regarding failure to defend and indemnify insured in wrongful-termination action did not constitute bad faith; no exception to privilege applied given that insurer did not raise advice-of-counsel defense or raise claim of attorney disparagement); *Rich v. Bank of Am.*, 666 F. App'x 635 (9th Cir. 2016) (no implied waiver of attorney-client privilege; although defendant disclosed the existence of such communications, it did not use their contents as a basis for any claims or defenses); *Knox v. Roper Pump Co.*, 957 F.3d 1237 (11th Cir. 2020) (Employer did not waive attorney-client privilege in former employee's Title VII action to prevent discovery of communications between company president and counsel, despite employee's contention that it was counsel, not president, who were true decision makers, where employer did not assert advice-of-counsel defense, president testified that he was decision maker, and it was president who presented employee with his options); *Walker v. AIU Ins. Co.*, 2024 WL 4364149 (D. Ariz. Oct. 1, 2024) (to waive the privilege, a party must do more than confer with counsel and act based on counsel's advice. Waiver of attorney-client privilege is implied only when a party affirmatively "asserts a claim or defense that is dependent upon the advice or consultation of counsel); *Garibaldi v. Everest Nat'l Ins. Co.*, 2020 WL 6161715 (D. Ariz. Oct. 21, 2020) (communications from insurer's in-house counsel with adjuster after claim denial privileged and was not waived under at-issue doctrine); *Evanston Ins. Co. v. Murphy*, 2020 WL 6048206 (D. Ariz. Oct. 13, 2020) (insurer did not impliedly waive privilege simply because it conferred

with counsel and took action incorporating counsel's advice); *Roblox Corp. v. Wowee Grp. Ltd*., 2024 WL 170767 (N.D. Cal. Jan. 16, 2024) (implied waiver of privilege does not occur simply because it is related to the issues in the litigation, where the party has not affirmatively put the communications at issue by affirmative defense or otherwise); *McKenzie v. United States Tennis Ass'n, Inc.*, 2023 WL 6463475 (M.D. Fla. Oct. 4, 2023) (deposition questions inquiring about the existence of a fee arrangement and the date and length of conversations plaintiff had with her attorney were not objectionable based on the attorney client privilege, where defense counsel did not ask for the contents of any fee arrangements or the contents of the conversations); *Gookins v. Cnty. Materials Corp,* 2020 WL 489567 (S.D. Ind. Jan. 30, 2020) (fact that defendant conducted a pre-suit investigation does not "put at issue" the privileged documents that were created during that litigation); *Reed v. Baltimore Life Ins. Co.*, 733 A.2d 1106 (Md. 1999) (in former employee's defamation action against employer, employer's counsel was not using the attorney-client privilege as a sword as well as a shield, where employer did not use advice of counsel as an element of defamation defense; fact that defendant's counsel signed answers to interrogatories as a corporate secretary also did not waive privilege); *City Boxing Club v. USA Boxing, Inc.*, 2025 WL 3771405 (D. Nev. Dec. 31, 2025) (insurance company did not put its coverage counsel's actions at issue when its expert opined that the insurer's investigation was reasonable in part because it retained counsel to assist the insurance adjusters); *Colon v. City of New York*, 2023 WL 6497650 (S.D. N.Y. Oct. 5, 2023) (individual defendant's statement at deposition that the "Law Department" recommended that he not transfer an employee did not waive privilege because he did not disclose the substance of the advice provided by the Law Department or his underlying communications with the Law Department); *Bley v. Indep. School Dist. No. 1-002 of Oklahoma City.*, 2022 WL 3330273 (W.D. Okla. May 9, 2023) (District did not waive privilege by putting the legal advice at issue; although former Superintendent and School Board President testified in deposition that they relied on legal advice in making certain employment decisions concerning plaintiff's employment and District included emails from its former legal counsel to plaintiff's counsel on its exhibit list; although the District communicated through legal counsel when responding to Plaintiff's accommodations request and some of the District's personnel testified that they relied on the advice of counsel in making employment decisions, the District has not attempted to justify its conduct on the basis of advice of counsel. In fact, the District has repeatedly and unequivocally stated that it does not intend to rely on advice of counsel to defend itself in this action); *Bouchard v. Eastman Chem. Resins, Inc.*, 2024 WL 640050 (W.D. Pa. Feb. 15, 2024) (mere fact that company executive consulted with in-house counsel prior to terminating plaintiff does not amount to placing in-house counsel's advice "at issue"; the factual information executive conveyed in that setting is protected by attorney-client privilege); *Krabach v. King Cnty.*, 2023 WL 3948240 (W.D. Wash. June 12, 2023) (County defendants did not implicitly waive attorney client privilege by asserting counterclaim or based on testimony of director that she made decision to remove signs after she was advised by legal counsel that the signs were illegal, where the defendants' counterclaim does not depend on the legal advice provided. Defendants did not explicitly waive attorney client privilege due to director's public statement that she "conferred at length" with the prosecutor's office concerning the illegality of the signs at issue; simply disclosing the fact of the communication, identity of the attorney, the subject discussed and the details of the meeting is insufficient to waive privilege.); *United States ex rel. Patzer v. Sikorsky Aircraft Corp.*, 730 F. Supp.3d 856 (E.D. Wis. 2024) (defendants' witnesses may testify about their good-faith belief in the legality of their conduct without waiving the attorney client privilege. Such testimony is not based on the advice of counsel, and defendants have not attempted to bolster their claim by disclosing or describing attorney-client communications. Instead of relying on the advice of counsel, the witnesses will claim that they derived their subjective beliefs about the legality of their conduct though their experience in the government-contracting industry.); *Ex Parte Dow Corning Alabama, Inc.*, 297 So.3d 373 (Ala. 2019) (company, by seeking indemnity from employer and employer's liability insurer, thereby placing the reasonableness and good faith of a personal injury settlement at issue, does not waive the attorney client privilege or work product protections generated with respect to the personal injury action); *Ex Parte Nationwide Mut. Ins. Co.*, 990 So.2d 355 (Ala. 2008) (Electronic communications between insurer and its counsel that occurred after insurer denied insured corporation's request for defense and indemnity were protected by the attorney-client privilege and work-product doctrine, such that insurer was not required to produce the communications in response to corporation's discovery request in its bad faith action against insurer); *Ex Parte State Farm Fire and Cas. Co.*, 794 So.2d 368 (Ala. 2001) (mere fact that plaintiffs claimed damages to compensate for attorney's fees they incurred in earlier action did not indicate a waiver of the attorney-client privilege); *Woodbury Knoll, LLC v. Shipman and Goodwin, LLP*, 48 A.3d 16 (Conn. 2012) (Although the reasonableness of the settlements reached in another case were directly at issue in a legal malpractice action brought by former clients, the direct communications between the former clients and their attorney's in the other case were not at issue, and thus, were not subject to the "at issue exception" to the attorney-client privilege, absent any showing that the reasonableness of the settlement in the other case was necessarily determined by the advice the settling clients received from counsel in that case.); *Genovese v. Provident Life and*

Accident Ins. Co., 74 So.3d 1064 (Fla. 2011) (attorney-client privileged communications are not discoverable in action by a first-party insured against insurer for bad faith; goal of privilege would be severely hampered if an insurer was aware that its communications with its attorney, which were not intended to be disclosed, could be revealed upon request of insured, and there is no exception to the privilege that allows discovery of privileged communications based on a showing of need and undue hardship); *Brandon v. W. Bend Mut. Ins. Co.*, 681 N.W.2d 633 (Iowa 2004) (insurer in suit by insured did not waive attorney-client privilege as a result of its in-house attorney verifying the answers to interrogatories and attorney and adjuster providing the information for the answers); *Yung v. Grant Thornton, LLP*, 563 S.W.3d 22 (Ky. 2018) (Former clients of accounting firm did not impliedly waive attorney-client privilege in action against accounting firm alleging fraud in the marketing and sale of a tax shelter, which purportedly would allow funds held by clients' Cayman Island-based companies to be distributed to shareholders in the U.S. without federal tax liability, even though clients also received legal advice from an outside law firm, which was a non-party in action; main issue was whether clients justifiably relied on accounting firm in making their decision to utilize shelter, clients did not affirmatively use privileged communications with outside law firm to defend themselves or attack accounting firm, and outside law firm did not opine on validity of accounting firm's opinion but simply opined that reliance on advice from accounting firm would protect clients in the event of an Internal Revenue Service (IRS) audit); *Livingston v. 18 Mile Point Drive, Ltd.*, 972 A.2d 1001 (N.H. 2009) (Client's reliance on his attorney's testimony concerning attorney's preparation for real estate closing, the closing itself, and attorney's actions on client's behalf did not constitute "at-issue" waiver of attorney-client privilege in action for specific performance of option contract; client did not inject privileged material into case); *Bennett v. ITT Hartford Grp., Inc.*, 846 A.2d 560 (N.H. 2004) (in insured's action alleging breach of covenant of good faith and fair dealing against homeowner insurer, at-issue waiver of attorney-client privilege did not apply to compel insurer to produce documents concerning communications between insured and insured's attorney during insured's action against manufacturer of dryer, which allegedly caused fire that destroyed insured's home; what was at issue was not those communications, but rather was whether loss insured claimed to have incurred because of insurer's investigation of dryer's role in causing fire prevented insurer from filing action against manufacturer at earlier time); *W. Horizons Living Ctrs. v. Feland*, 853 N.W.2d 36 (N.D. 2014) (Trial court's order compelling nursing home to comply with nursing staff provider's discovery requests, which provided a blanket authorization for disclosure of insurer's entire claims file and all communications during settlement negotiations in a resident's prior lawsuit against nursing home, for which nursing home was seeking indemnification from provider, was an abuse of discretion; court's order was too broad and on remand the court was required to examine the specific information requested for a determination of whether any of the requested information was protected by lawyer-client privilege or constituted protected communications during settlement negotiations.); *State ex re. Hicks v. Fraley*, 184 N.E.3d 13 (Ohio 2021) (County auditor did not waive any attorney-client privilege that attached to opinion letter from county prosecutor's office by raising an "advice of counsel" defense, in action based on private-citizen affidavit asserting auditor committed a crime by employing her stepson in auditor's office, and thus letter was not subject to disclosure under Public Records Act; auditor did not present any evidence at probable-cause hearing held on citizen's affidavit, rather, it was special prosecutor who submitted opinion letter as evidence for court's consideration, letter memorialized opinion of prosecutor's office regarding legal consequences for actions that auditor had already taken, and thus letter showed prosecutor's office had already determined that the acts of which citizen complained of did not constitute a crime); *In re Mt. Hawley Ins. Co.*, 829 S.E.2d 707 (S.C. 2019) (on certified question from U.S. Court of Appeals for the Fourth Circuit, in the context of a bad faith insurance claim, insured's denial of liability and/or asserting good faith in the answer does not, standing alone, place the privileged communications "at issue" in the case), *followed on remand*, *In re Mt. Hawley Ins. Co.*, 773 F. App'x 771 (4th Cir. 2019); *Voorhees Cattle Co. v. Dakota Feeding Co.*, 868 N.W.2d 399 (S.D. 2015) (Purchaser of feedlot by contract-for-deed did not expressly or impliedly place advice of counsel into issue by bringing counterclaim against vendor for fraud, and therefore purchaser did not waive attorney-client privilege**,** despite contention that purchaser placed in issue its knowledge of whether vendor's plans to bring feedlot into compliance with environmental regulations were adequate; purchaser did not attempt to prove its claim by disclosing or describing its attorney's communications); *Andrews v. Ridco, Inc.*, 863 N.W.2d 540 (S.D. 2015) (Circuit court's failure to determine whether workers' compensation insurer had interjected, by an affirmative act, privileged communications into underlying bad faith litigation, such as would invoke an implied waiver of attorney-client privilege to injured worker's claim file notes and 199 "other" claim file notes, constituted reversible error, where insurer had not expressly relied on the advice of counsel as an essential element of its defense); *State v. Madden*, 601 S.E.2d 25 (W.Va. 2004) (where the interests of an insured and the insurer are in conflict with regard to a claim for under-insured motorist coverage and the insurer is represented by counsel, the bringing of a related first-party bad faith action by the insured does not automatically result in a waiver of the insurer's attorney-client privilege concerning the under-insurance claim); *Va. Elec. & Power Co. v. Westmoreland-LG&E Partners*, 526

affirmative defense is asserted, but the privileged communication does not relate to it.[193]

S.E.2d 750 (Va. 2000) (power producer met its burden of producing evidence to show that draft letter prepared by CFO of power producer to memorialize conversation with employee of electric utility was attorney-client privileged and not subject to discovery by electric utility in contract dispute, even though letter was shared with officer and counsel of parent company which formed partnership comprising power producer, where author testified he intended to seek legal advice both on content and whether it should be sent, letter was never sent, and substance of letter constituted very matter for which legal advice was sought); *Floyd v. Amazon.com Inc.,* 2025 WL 732446 (W.D. Wash. March 7, 2025) (plaintiff did not waive privilege by filing motion for leave to amend complaint to add new plaintiffs based on counsel's representation that although plaintiff had not expressed an intent to withdraw as a named plaintiff, he had become "difficult to reach" and could be experiencing "some type of personal emergency"; plaintiff's communications (and lack thereof) were referenced generally in the motion, to explain why the motion was filed, but those communications and that motion were not directly connected to any claim in the amended complaint or any defense thereto).

[193] *In re Sanderson Farms, LLC*, 2025 WL 2025358 (5th Cir. July 15, 2025) (Sanderson did not waive the privilege when its employee responded to direct deposition questions concerning privileged communications); *In re Schlumberger Tech. Corp.*, 818 F. App'x 304 (5th Cir. 2020) (employer did not waive privilege by asserting defense of good faith reliance in FLSA case where it did not claim that counsel advised it that its decisions complied with the FLSA nor allude to advice of counsel; nor did employer waive privilege by allowing former human resources consultant to testify about employer's compliance reviews at deposition as a corporate representative); *In re Itron, Inc*., 883 F.3d 553 (5th Cir. 2018) (Under Mississippi law, complaint in acquiring company's action against corporate officers of acquired company for negligent misrepresentation after officers allegedly failed to disclose acquired company's agreement with a third company, which resulted in dispute between acquiring company and third company which ended in settlement, did not waive acquiring company's attorney-client privilege as to material from dispute with third company; although complaint sought as damages the amount of the settlement, complaint never specifically pled reliance on any legal advice and did not mention any attorneys, attorney-client communications, or attorney-client relationships); *Rock River Commc'n v. Universal Music Grp.* 745 F.3d 343 (9th Cir. 2013) (defendant who relies on the protection afforded by *Noerr-Pennington* does not give up the right to keep its communications with its lawyer confidential); *EEOC v. George Washington Univ.*, 2022 WL 3980991 (D.D.C. Sept. 1, 2022) (magistrate judge decision) (University did not waive attorney client privilege with respect to its internal investigation of claimant's discrimination claim by asserting affirmative defense to punitive damages based on evidence that the hiring decisions and compensation decisions at issue were made in good faith efforts to comply with the law since those decisions predate the internal investigation and was not dependent on it); *Miteva v. Third Point Mgmt. Co.*, 218 F.R.D. 397 (S.D. N.Y. 2003) (testimony of employer company's principal and sole owner in response to deposition question by employee's counsel, that termination letter did not specify any reason for employee's dismissal and was so worded on advice of counsel, did not waive the attorney-client privilege; employer had not affirmatively asserted advice of counsel defense in action and was not relying thereon; employer's limited acknowledgment of reliance on advice of counsel in employer's preparation of employee's termination letter was not sufficient to constitute disclosure of the full content of the advice or to serve as a basis for compelling that balance of communication be revealed); *Empire W. Title Agency, L.L.C. v. Talamante*, 323 P.3d 1148 (Ariz. 2014) (Purchaser's allegations that title agent breached the parties' contract by failing to comply with the terms of a Closing Instructions Letter (CIL), which instructed the agent to verify that the legal description of the property corresponded to a description that included an access easement, and that purchaser "reasonably believed" that the CIL's property description was included in all closing documents, did not waive purchaser's attorney-client privilege as to communications revealing whether purchaser knew the easement had been abandoned by quitclaim deed, even though purchaser's knowledge of the alleged title defect might be material to title agent's defense, since purchaser's allegations did not necessarily incorporate knowledge or advice obtained from counsel); *Rademacher v. Greschler*, 455 P.3d 769 (Colo. 2020) (Client who brought legal-malpractice action against attorney who represented her during appeal in civil action concerning promissory note neither asserted claim or defense that depended on her privileged communications with attorney who represented her in divorce proceedings, nor otherwise placed communications at issue, and thus client did not impliedly waive attorney-client privilege protecting communications, where client merely asserted legal malpractice claim, then contested civil attorney's statute of limitations defense, and although divorce attorney sent civil attorney letter expressing client's dissatisfaction with civil attorney's performance, nothing on face of letter indicated that client believed that she then had viable malpractice claim.); *State Farm and Fire Cas. Co. v. Griggs*, 419 P.3d 572 (Colo. 2018) (Insurer's submission of

When the U.S. Department of Justice executes a search warrant or subpoena and seizes potentially privileged files, it often forms a "taint" or "filter" team of prosecutors and agents who are screened from the investigation team who review the information to ensure that only non-privileged/protected information is passed on to the investigation team. Courts have increasingly cast doubt on the government's ability to use taint teams (as opposed to a special master or other judicially supervised person) as a means of shielding potentially privileged information from documents seized in a search warrant/subpoena.[194]

3. Waiver of Privilege Due to Inadvertent Disclosure.

The question of under what circumstances, if any, an inadvertent disclosure of privileged or confidential material constitutes a waiver of the attorney-client privilege has been approached by the courts in any one of three ways. Some courts follow the "never waived" approach, which holds that a disclosure that was merely negligent can never affect a waiver because, a fortiori, the holder of the privilege lacks a subjective intent to forego protection of the privilege.[195] A few courts apply

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former attorney's affidavit, in support of its opposition to injured motorist's request for sanctions, did not place privileged communications at issue, and therefore did not result in an implied waiver of the attorney-client privilege; the affidavit contained only facts and did not assert any claims or defenses, it did not refer to any advice that attorney gave to insurer, and the affidavit was not offered in support of any claim or defense that depended upon privileged information or attorney advice.); *Deutsche Bank AG v. Sebastian Holdings, Inc*., 294 A.3d 1 (Conn. 2023) (sole shareholder's testimony that transfers were made for estate planning purposes did not impliedly waive privilege with respect to his attorney's estate advice concerning the transfer, where he did not testified he made the transfers on advice of counsel for estate planning purposes and placed no reliance on any legal advice).

[194] *See Harbor Healthcare Sys., LP v. United States*, 5 F.4th 593 (5th Cir. 2021) (Health care provider lacked adequate remedy at law with respect to materials protected by attorney-client privilege, as factor weighing in favor of pre-indictment return of materials seized by United States, in searches of provider's offices and facilities after DOJ had shared with its prosecutors the allegations in qui tam actions under False Claims Act; it was not certain that there would ever be criminal charges which would present an opportunity for a suppression motion, and a suppression motion would not force government to return the materials); *In re Sealed Search Warrant*, 11 F.4th 1235 (11th Cir. 2021) (DOJ use of taint team to review seized materials did not violate privilege holder's rights); *In re Search Warrant Issued June 13, 2019*, 942 F.3d 159 (4th Cir. 2020) (Law firm demonstrated that it was likely to succeed on merits of its invocation of attorney-client privilege and work-product doctrine, as factor for obtaining preliminary injunction enjoining inspection of attorney-client materials by a filter team that received ex parte approval from magistrate judge and that was comprised of prosecutors and non-lawyer agents, in contrast to inspection by magistrate judge or special master, for materials that had been seized pursuant to search warrant issued by magistrate judge during criminal investigation of law firm's partner and a client represented by partner; magistrate judge's legal errors in approving filter team and its protocols included assigning judicial functions to filter team in violation of separation of powers, giving such approval in ex parte proceedings before search and seizure, and failing to properly weigh foundational principles that protected attorney-client relationships).

[195] *See Estabrook v. Admin. Review Bd.*, 814 F.3d 870 (5th Cir. 2020) (employer did not waive the attorney-client privilege in SOX administrative hearing where claimant's counsel asked a question that might elicit privileged information, employer's counsel objected and the ALJ overruled the objection; the resulting disclosure was compelled, not voluntary and thus no waiver); *Am. Nat'l Bank and Trust Co. v. Equitable Life Assur. Soc'y*, 406 F.3d 867 (7th Cir. 2005) ("involuntary disclosure of privileged information to [a litigation adversary] does not constitute a waiver of privilege."); *Gray v. Bicknell*, 86 F.3d 1472, 1483 (8th Cir. 1996) (waiver of privilege only accomplished through client's intentional and knowing relinquishment, not through mere inadvertent disclosure); Ark. R. Evid. 502 (recognizes "selective waiver"; no waiver for inadvertent disclosure, snap back available); *Dukes v. Wal-Mart Stores, Inc.*, 2013 WL 1282892 (N.D. Cal. Mar. 26, 2013) (magistrate judge) (Wal-Mart did not waive the attorney-client privilege with respect to confidential memo by its outside law firm addressing alleged gender disparities in pay and promotion that was leaked to media where the disclosures to the media were unauthorized and involuntary); *Howard v. Gray*, 291 F.R.D. 6 (D.D.C. 2013) (Exclusion of document containing handwritten notes of employer's general counsel that was allegedly inadvertently disclosed to employee recommending that employee be terminated was

a "strict accountability" rule, which finds a waiver of the privilege regardless of the privilege holder's intent to waive.[196] Most state courts have applied a balancing test,[197] in which the court considers (a) the proportion of documents inadvertently produced against the overall production;[198]

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mandatory in employee's action against employer under the ADA, where employee had the document in his possession but failed to disclose it during discovery, and admission of document would prejudice employer, since, to the extent that the document constituted waiver of attorney-client privilege employer would have been able to disclose other privileged documents, and conduct further relevant discovery.); *Jones v. Eagle-North Hills Shopping Centre,* 239 F.R.D. 684 (E.D. Okla. 2007) (plaintiff counsel's inadvertent disclosure to defense counsel of privileged email did not constitute waiver of the attorney-client privilege*);* Pa. Ethics Op. 2007-200 (2007) (inadvertent transmission of privileged materials should not constitute a waiver of the privilege, except in the case of carelessness or indifference); *In re Christus Spohn Hosp. Kleberg*, 222 S.W.3d 434 (Tex. 2007) (inadvertent nature of hospital's disclosure of documents to its expert preserved work product privilege and entitled hospital to recover the documents upon realizing its mistake, provided hospital's designated expert did not testify at trial; but if hospital continued to designate the expert, the documents could not be "snapped back"); *In re Ford Motor Co.*, 211 S.W.3d 295 (Tex. 2006) (mistake of Florida court clerk's office, in disclosing to the general public documents that had been produced during discovery in Florida pursuant to a stipulated confidentiality protective order in Florida products liability action against vehicle manufacturer, did not waive the confidentiality of the documents, for purpose of manufacturer's right to enforce the stipulated confidentiality order in Texas products liability action); *Harold Sampson Children's Trust v. Linda Gale Sampson 1979 Trust*, 679 N.W.2d 794 (Wis. 2004) (lawyer did not waive attorney-client privilege in connection with documents he produced pursuant to opposing parties' discovery request in civil litigation, though lawyer wrongly concluded documents were not privileged and produced them without consulting with his clients; although lawyer's disclosure was voluntary, not inadvertent, a client holds and controls the privilege and only the client can waive it). *Cf. Ardon v. City of Los Angeles*, 62 Cal. 4th 1176 (2016) (City's inadvertent disclosure of documents in response to Public Records Act request did not waive attorney-client and work product privileges covering the documents).

[196] *See Agility Pub. Warehousing Co. v. U.S. Dep't of Justice*, 110 F. Supp. 3d 215 (D.D.C. 2015) (the privilege can be waived even by inadvertent disclosures); *Paxton v. City of Dallas*, 509 S.W.3d 247 (Tex. 2017) (attorney-client privilege may be waived by inadvertent disclosure during litigation, if the disclosure is accompanied by conduct inconsistent with the privilege of confidentiality); *Walton v. Mid-Atlantic Spine Specialists, P.C.*, 694 S.E.2d 545 (W.Va. 2010) (Disclosure of physician's letter to his attorney was "inadvertent," not "involuntary," in medical malpractice action against physicians, and thus privilege was waived; there was no evidence suggesting that letter was knowingly produced by someone other than the holder of the privilege through criminal activity or bad faith, physicians did not argue that any criminal activity or bad faith was involved, and all of the evidence indicated that the physicians mistakenly produced the letter.). *Cf. Williams v. District of Columbia*, 806 F. Supp. 2d 44 (D.D.C. 2011) ("it used to be the case that virtually any disclosure of a communication protected by the attorney-client privilege, even if inadvertent, worked a waiver of the privilege"; Rule 502(b) partially abrogated this strict approach to waiver).

[197] *See Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec*, 529 F.3d 371 (7th Cir. 2008) (district court did not clearly err in finding that attorney-client privilege was not waived by defendant's disclosure of memo under balancing approach, even though the fact that the memo was filed with the court weighed in favor of waiver; the scope of discovery, given that 30 to 40 boxes were produced on the date memo was produced, and defense counsel's attempts to rectify the error immediately upon learning of the disclosure weighed against finding waiver; balancing test applied); *K.L. Grp. v. Case, Kay & Lynch*, 829 F.2d 909 (9th Cir. 1987) (inadvertent production of privileged letter, along with some 2,000 other documents during discovery, did not result in waiver of attorney-client privilege); *State ex rel. Allstate Ins. Co. v. Gaughan*, 508 S.E.2d 75, 95 (W. Va. 1998).

[198] *SEC v. Reyes*, 2007 WL 528718 (N.D. Cal. Feb. 13, 2007) (balance of factors supported finding that SEC did not waive privilege when it inadvertently sent a two-page document to the defendant's attorneys during discovery: (1) the SEC reviewed the materials both before and after their production to ensure that the disclosures did not contain confidential material ("[F]oolproof measures are not required; only reasonable measures are."), (2) very little time elapsed between the SEC's inadvertent disclosure and its effort to fix the problem, (3) the scope of the production (involving millions and documents and hundreds of thousands of physical pages) was enormous relative to the privileged information produced (two pages), and (4) there were no fairness considerations that required a finding of waiver); *Cobell v. Norton*, 213 F.R.D. 69 (D.D.C. 2003) (documents did not lose protection of attorney-client privilege despite monitor's inclusion of the documents as attachments to report, and their subsequent dissemination; government made efforts reasonably designed to preserve privilege, requesting that portions of report discussing the documents be stricken, and timely requesting a protective order); *Simon Prop., Grp. v. mySimon, Inc.*, 194 F.R.D. 644 (S.D. Ind.

and (b) the extent to which the disclosing party took reasonable precautions to prevent disclosure of the information.[199]

2000) (consider: (1) extent to which the neglect leading to inadvertent disclosure was excusable or inexcusable, (2) whether it is possible to provide effective relief from the inadvertent disclosure, and (3) whether there is any serious prospect of harm to the interests of the opponent or to the interests of justice if waiver is not found); *Maldonado v. New Jersey*, 225 F.R.D. 120 (D. N.J. 2004) (defendants in employment discrimination action did not waive attorney-client privilege with respect to letter written by two defendants to their then-attorney, and which inexplicably fell into plaintiff's hands, when defendants took reasonable precautions to safeguard letter and there was no indication that defendants or their attorney were responsible for letter's disclosure; only one disclosure occurred and way in which it occurred was unexplained; letter essentially was blueprint to defendants' thought processes and trial strategy, and it was not in the interests of justice to punish defendants via waiver in light of their reasonable precautions to prevent dissemination of letter); *HSH Nordbank AG New York Branch v. Swerdlow*, 259 F.R.D. 64 (S.D. N.Y. 2009) (Attorney-client privilege was not waived by carelessness, with respect to inadvertent production, during discovery in action to collect on loan guaranties, by administrative agent for five non-party lenders who participated in syndication of $192 million loan for a residential condominium development, of nine documents involving communications between counsel retained by administrative agent, and the lenders, relating to timing and conduct of litigation to collect on loan guaranties, in which litigation the lenders were not parties; agent reviewed millions of pages of documents, about 250,000 of which were eventually produced during discovery, agent promptly sought to recall the documents, and parties had executed a discovery protective order in which they had agreed that inadvertent production of a document subject to attorney-client privilege would not effect a waiver of the producing party's rights.); *FDIC v. Marine Midland Realty Credit Corp.*, 138 F.R.D. 479 (E.D. Va. 1991) (waiver of attorney-client privilege by inadvertent disclosure because sending lawyer had not taken adequate precautions to prevent disclosure); *Harp v. King*, 835 A.2d 953 (Conn. 2003) (Housing Finance Authority's employees did not waive attorney-client privilege by inadvertently disclosing legal strategies memo to developer of low and moderate income housing; Authority made reasonable efforts to preserve confidentiality of privileged material, only two memos were inadvertently disclosed while a large number of documents were produced; Authority did not delay upon learning that the legal strategies memo inadvertently had been made available, and applying the privilege did not prejudice the developer); *Goldsborough v. Eagle Crest Partners,* 838 P.2d 1069 (Or. 1992) (waiver by disclosure in response to discovery request; no evidence of mistake, inadvertence or lack of client authorization); *Myers v. City of Highland Vill.*, 212 F.R.D. 324 (E.D. Tex. 2003) (attorney-client privilege protecting some paragraphs of memo by city manager was not waived when the memo was inadvertently produced during discovery; while city did not establish that it took precautions to prevent the disclosure of the document, the city promptly requested that the document be returned after learning of its disclosure; it had produced approximately 1,500 pages, and the fairness factor weighed in favor of the city); *Gold Standard, Inc. v. Am. Barrick Res. Corp.*, 805 P.2d 164 (Utah 1990) (mining company waived work product privilege regarding memoranda by inadvertently providing documents to mining partner and by failing to file motion for protective order until more than one year after documents had been produced).

[199] *See Kovacs v. Hershey Co.*, 2006 WL 2781591 (D. Colo. Sept. 26, 2006) (attorney-client privilege waived when employer disclosed notes from its outside counsel and emails from its in-house counsel and thus plaintiffs may inquire into the "narrow subjects and precise words of the notes and email, which included: (1) whether the case involved a "group term program; (2) whether the OWBPA and its implementing regulations applied to the case and employer's exposure to an "age claim risk" if they did not; and (3) whether any adverse impact analyses were conducted by employer in connection with the retirement plan at issue); *Kyko Glob., Inc. v. Prithvi Info. Sols., Ltd.,* 2014 WL 2694236 (W.D. Wash. June 13, 2014) (no waiver of privilege where defendant's computer with hard drive containing privileged information was acquired by plaintiff at auction; defendant had reformatted hard drive and reasonably believed no one could access what had been stored there); *Comprehensive Neurosurgical, P.C. v. Valley Hosp.*, 312 A.3d 243 (N.J. 2024) (hospital did not waive privilege with respect to emails from its general counsel containing legal advice when it inadvertently disclosed the emails during the "whirlwind of what could realistically and fairly be described as an intense court-ordered expedited discovery; hospital took reasonable steps to prevent disclosure which in addition to executing a discovery agreement, included designating the emails with varying levels of confidentiality, and hospital's then-counsel acted carefully considering the expedited exchange of voluminous written discovery—where approximately 57,000 documents were exchanged in roughly two months).

4. Waiver Under Federal Rule of Evidence 502 and State "Snap Back" Rules.

Federal Rule of Evidence 502 embodies five principles regarding waiver of the attorney-client privilege and work product protection: (1) a subject matter waiver will be found only when the waiver of the attorney-client privilege or work product protection is intentional, the disclosed and undisclosed communications or information concern the same subject matter, and they "ought in fairness" be considered together (e.g., inadvertent disclosure would *never* result in a subject matter waiver);[200] (2) an inadvertent disclosure does not constitute a waiver if the holder of the privilege or work product protection took "reasonable steps" to prevent disclosure and promptly took reasonable steps to rectify the error;[201] (3) a disclosure in a state proceeding would not operate as

[200] *See, e.g., Ictech-Bendeck v. Waste Connections Bayou, Inc.*, 2024 WL 14955 (E.D. La. Jan. 12, 2024) (Defendants intentionally waived privilege with respect to Report by disclosing it to plaintiffs; waiver extends to those undisclosed documents pertaining to defense counsel's involvement in the preparation of the Report that will enable plaintiffs to qualify, explain, contextualize and otherwise cure the misimpression created by Defendants' communications with the media conveying the impression that the Report was prepared by a highly qualified and unbiased third party); *IME Watchdog, Inc. v. Gelardi*, 2025 WL 2439242 (E.D. N.Y. Aug. 25, 2025) (individual defendants waived their attorney-client privilege with respect to certain conversations with their lawyers with respect to the property sale by submitting an affidavit in which they stated that they kept their attorney fully informed at every step of the property sale); *Stolarik v. New York Times Co*., 2019 WL 4565070 (S.D. N.Y. Sept. 20, 2019) (where employer agreed to waive privilege with respect to communications from its in-house counsel recommending that employer not provide new work to plaintiff because his outside activities were damaging employer's relationship with its customers, it also waived privilege with respect to advice its outside counsel gave to its in-house counsel concerning the same issue); *In re Professional Fee Matters Concerning the Jackson Walker Firm*, 2024 WL 4903762 (D. Ore. Dec. Nov. 27, 2024) (law firm expressly waived privilege as to its engagement with former partner and thus waiver extended to all other communications on the same subject, including the underlying information). *Cf. Hill, Kertscher & Wharton, LLP v. Moody*, 839 S.E.2d 535 (Ga. 2020) (Implied waiver of attorney-client privilege extended to clients' communications with a non-party law firm, in client's legal malpractice action against another law firm; both law firms together represented the clients in the matters that were the subject of the malpractice complaint, as indicated by the non-party law firm's discovery responses, and, by suing defendant law firm, clients put at issue questions of proximate causation, reliance, and damages, all of which might have been affected by other attorneys who represented clients in the same matters underlying clients' malpractice complaint).

[201] *See Salmon v. Lang*, 57 F.4th 296 (1st Cir. 2022) (Public school officials, town, and local school committee did not waive all attorney-client communications and work product related to investigation of incident in school principal's office, after which teacher was escorted from the building by plain-clothes officer, when they disclosed six attorney-client privileged emails, which were attached to a redacted version of the investigation report, in response to teacher's discovery requests in connection with her suit against them; disclosure of the privileged materials was inadvertent, in that, upon discovering that the unredacted emails had been disclosed, defense counsel notified teacher's counsel of the "inadvertent disclosure" and requested that the unredacted materials be returned); *U.S. v. Warburg Pincus*, LLC, 2022 WL 2128669 (D. Vt. June 14, 2022) (Inadvertent disclosure of privileged information by Warburg's counsel to counsel at ModMed was not a waiver because Warburg's counsel took immediate steps to retrieve the email containing the documents and ModMed's counsel confirmed that he had deleted the documents without reading. ModMed's subsequent disclosure of the email to the government did not waive Warburg's privilege; ModMed was not a holder of the privilege and Warburg reasonably relied on the representations of ModMed's attorney that he had deleted the subject email without reading it.); *Ground Zero Ctr. for Non-Violent Action v. United States Dep't of Navy*, 860 F.3d 1244 (9th Cir. 2017) (when privileged information is turned over inadvertently to a party in the course of discovery, applicable privileges generally are not waived; the party who mistakenly received the information must "promptly return, sequester, or destroy" it once notified it is privileged). *Cf. Sherman v. Berkadia Com. Mortg. LLC*, 2018 WL 4300322 (E.D. Mo. Sept. 10, 2018) (where defendant disclosed one of two memoranda discussing results of outside counsel's internal investigation to HUD and where members of defendant's executive committee denied certain aspects of the memorandum in their deposition testimony, defendant made a limited waiver of attorney client privilege under the fairness doctrine and thus plaintiff would be allowed to disclose and use the "Background," "Concerns," and "Summary of Investigation" sections of the memorandum since they disclose facts

a waiver in a federal proceeding if the disclosure would not be a waiver if it had been made in a federal proceeding or is not a waiver under the law of the state in which the disclosure occurred; (4) if a federal court orders that the privilege is not waived by disclosure in connection with litigation pending before the court, the disclosure is also not a waiver in any other federal or state proceeding; and (5) an agreement on the effect of disclosure in a federal proceeding is only binding on the parties to the agreement, unless it is incorporated into a court order. Rule 502 applies in all cases in federal court and federal court-mandated arbitration proceedings, and in state court with respect to the consequences of disclosures previously made in a federal proceeding.[202] Some states

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discovered during interviews with defendant's employees, the contents of which was partially disclosed in defendant's memorandum to HUD); *Walker v. Charter Commc'ns, LLC*, 2020 WL 6636222 (D. Nev. Nov. 12, 2020) (court ordered plaintiff to delete privileged email inadvertently sent from employer's counsel to plaintiff's counsel where employer's counsel sent an email requesting that email be deleted hours after it was inadvertently sent). *Atkinson v. Veolia N. Am., LLC*, 2021 WL 411503 (E.D. N.C. Feb. 5, 2021) (plaintiff did not waive attorney based on statements made in deposition; where in response to defendant's questions, plaintiff became upset and mentioned that he had told his attorney everything about the incident, but he did not disclose details of the communications, and his counsel promptly objected to the line of questioning).

[202]*See Carmody v. Bd. of Trs. of the Univ. of Ill.*, 893 F.3d 397 (7th Cir. 2018) (Inadvertent disclosure of document that was protected by attorney-client privilege by associate state university counsel to former employee, an information technology manager, did not waive privilege in former employee's due process action against university's board of trustees and university officials regarding termination based on allegations of breach of network security; there was no indication of intent to waive privilege or produce document, defendants took reasonable steps to prevent disclosure, only one privileged document slipped through disclosure, and defendants took prompt and reasonable steps to rectify disclosure, while former employee or his lawyer surreptitiously photographed document, and stayed silent for a year before attaching it as an exhibit to summary judgment motion); *In re Bona Fide Conglomerate, Inc.*, 728 F. App'x 656 (9th Cir. 2018) (District court's finding, that excerpts of statements by central non-profit (CNA) agency's general counsel about her private conversations with CNA's executives and outside counsel were privileged and that the privilege was not waived, was not clearly erroneous, in breach of contract action brought by affiliate of federal government's AbilityOne program against CNA that was responsible for allocating work to AbilityOne affiliates, where general counsel informed affiliate's chief executive officer on recordings that excerpts were taken from that she was not authorized to disclose some of the information she was providing him and that CNA's board of directors had limited her role in certain matters, and when CNA learned of the existence of the recordings, it asserted the attorney-client privilege.); *Northrop Grumman Sys. Corp. v. United States*, 120 Fed. Cl. 436 (2015) (Postal Service's disclosure of documents to relator in qui tam proceeding, approximately one month after contractor notified DOJ regarding likelihood of inadvertent disclosure of those documents in contract proceeding, waived protection of work product doctrine or attorney-client privilege for documents, since USPS counsel claimed to have reviewed material and deleted all privileged information, so documents were not inadvertently disclosed to relator.); *CP Salmon Corp. v. Pritzker*, 238 F. Supp. 3d 1165 (D. Alaska 2017) (defendant federal agencies did not waive attorney-client privilege by disclosing legal advice protected by attorney-work product doctrine in action challenging agencies' cost recovery rule, where disclosure was inadvertent, agencies had taken reasonable steps to review, redact, and prevent disclosure of privileged materials, and agencies took prompt and reasonable steps to rectify the disclosure); *Orthopedic Hosp. v. DJO Glob., Inc.*, 2020 WL 5363307 (S.D. Cal. Sept. 8, 2020) (defendant waived its privilege under Rule 502 by inadvertently disclosing privileged letter where letter was discussed during video deposition for approximately four minutes without objection by defendant and did not raise issue of inadvertent disclosure until plaintiff argued that the disclosure operated as a subject matter waiver); *Kilopass Tech., Inc. v. Sidense Corp.*, 2012 WL 1534065 (N.D. Cal. May 1, 2012) (Inadvertent disclosure waived privilege under Rule 502(b) where plaintiff corporation produced 1,139 privileged documents in a batch of 55,000, or more than 1 in 50 and thus the high proportion of privileged documents evidences a failure on plaintiff's part to properly screen the documents; moreover, all three parties involved erred or otherwise did not execute their tasks with reasonable diligence: plaintiff failed to disclose to its current attorneys all of its prior attorneys, the third party vendor did not run the search terms against all production batches of documents, and plaintiff's attorney conducted "spot checking on various privilege search terms in various batches of documents," a process that allowed more than 1 in 50 privileged documents to escape their attention. In sum, these were not "reasonable steps to prevent disclosure."); *Educ. Assist. Found. for the Descendants of Hungarian Immigrants in the Performing Arts, Inc. v. United States*, 32 F. Supp. 3d 35 (D.D.C. 2014) (In action by foundation challenging IRS's

have adopted "snapback" rules for inadvertent disclosure of privileged information similar to Rule 502,[203] and, like Rule 502, have found a broad subject matter waiver of privilege in the case of intentional disclosures.[204]

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revocation of its tax-exempt status, even assuming that letter relied upon by IRS, from co-executor of will of individual whose charitable bequest funded foundation to attorney retained by co-executor and others in malpractice suit against will's drafter, would otherwise have been protected by the attorney-client privilege, that privilege was unintentionally waived by inadvertent disclosure of letter and failure of alleged privilege holders to take appropriate steps to promptly assert privilege and aggressively seek to recover letter; although foundation raised issue in its protest to proposed revocation and in motions filed in tax and district courts, these half-hearted, untimely, and intermittent efforts to assert privilege were insufficient, as co-executor took no action whatsoever to assert privilege until more than eight months after he learned of disclosure, and only demanded return of letter two years later.); *Alpert v. Riley*, 267 F.R.D. 202 (S.D. Tex. 2010) (Defendant attorney did not take reasonably prompt action to remedy inadvertent disclosure of information to third-party that attorney had stored on third-party's computer, weighing in favor of waiver of attorney-client privilege and work product protection, by waiting several years before taking action to retrieve directory from third-party or to protect it from dissemination after he reasonably should have known that network passwords had been compromised.); *Coster v. Amazon.com*, 2025 WL 1237370 (W.D. Wash. April 29, 2025) (a party's production of privileged documents was not inadvertent within the meaning of Rule 502(b) where it downgraded documents at issue during a comprehensive re-review of its privilege logs from "withheld" to "privilege redact" a year after it was withheld in full; when a party makes a strategic decision to redact a document rather than withholding it completely as privileged, it cannot later claim inadvertence to shield itself from the consequences of its own judgment call); *Pearce v. Coulee City*, 2012 WL 3643676 (E.D. Wash. Aug. 24, 2012) (Defendants did not waive privilege in certain emails where they disclosed the subject emails to Plaintiff inadvertently in discovery, Plaintiff did not contest the reasonableness of Defendants' approach to guarding against inadvertent disclosure in discovery (*i.e.,* having one attorney perform an initial privilege screening and a second attorney perform a privilege cross-check) and Defendants acted promptly to rectify the inadvertent disclosure after discovering it during an individual defendant's deposition).

[203] *See* Tex. R. Civ. P. 193.3 (specifying that a party who produces material or information without intending to waive a claim of privilege does not waive that privilege if, within 10 days or a shorter time ordered by the court after the producing party actually discovers that such production was made, the producing party amends the response, identifying the material or information produced and stating the privilege asserted. "If the producing party thus amends the response to assert a privilege, the requesting party must promptly return the specified material or information and any copies pending any ruling by the court denying the privilege). *See In re City of Dickenson*, 568 S.W.3d 642 (Tex. 2019) (Insurer which inadvertently disclosed to city, through electronic filing, 55 pages of emails between insurer's counsel and insurer's corporate representative, which were protected by attorney-client privilege, was entitled to recover those privileged materials under snap-back rule, in city's action against insurer to recover amounts owed under commercial windstorm policy following a hurricane, where insurer's attorneys contacted city's counsel the day after insurer responded to discovery request and sent letter requesting destruction of inadvertently disclosed emails, specifically describing the exhibit that contained the emails, and asserting the emails were protected by attorney-client privilege, and insurer also filed emergency motion with trial court that same day.).

[204] *See State ex re. Hicks v. Fraley*, 184 N.E.3d 13 (Ohio 2021) (County auditor's voluntary disclosure of opinion letter from county prosecutor's office to special prosecutor waived any attorney-client privilege that attached to the letter, in action based on private-citizen affidavit asserting auditor committed a crime by employing her stepson in auditor's office, and thus attorney-client privilege did not preclude disclosure of letter under the Public Records Act; auditor's disclosure qualified as a voluntary disclosure to a third party because the special prosecutor was not acting in place of county prosecutor, and thus did not have prior access to the letter, and while it was true that a county prosecutor is the legal adviser to all county officers, the special prosecutor did not step into that advisory role by virtue of his appointment); *Castille v. Fleming*, 992 A.2d 65 (Pa. 2010) (voluntary disclosure of privileged document waived the privilege as to other documents containing the same subject matter); *Miller v. Heimuller*, 2025 WL 573261 (D. Ore. Feb. 21, 2025) (although report prepared by District's legal counsel contained privileged communications, by disclosing the entirety of the report without any redaction of privileged material, Defendants intentionally waived attorney-client privilege over the subject matter of that report, which includes a second report, the related emails, and the discussion held during the District's board meeting. Defendants could have, but did not, redact the legal advice in that report when they provided a copy of that to plaintiff in discovery); *Fullerton v. Prudential Ins. Co.*, 194 F.R.D. 100 (S.D. N.Y. 2000) (by producing privileged documents concerning its investigation of employee's retaliation

Attorneys can minimize the risk that inadvertent disclosure will waive the privilege, such as stamping each page of confidential letters and similar communications "Confidential" and/or "Privileged," or using a "disclaimer" for the transmittal page of faxes or emails.[205]

5. Investigation Materials Prepared by Attorneys.

It is often the case that an employer will assign an in-house lawyer or an outside attorney to conduct an investigation. Waiver of the attorney-client privilege may be implicated in such cases.[206] Some courts have held that it is inconsistent to assert the attorney-client privilege,

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claims, employer waived its attorney-client privilege as to all other communications on the same subject); *Umpqua Bank v. First Am. Title Ins. Co.*, 2011 WL 4852229 (E.D. Cal. Oct. 12, 2011) (plaintiff waived privilege with respect to emails where it was on notice that the emails had been produced to defendant when it received letter from investigator in 2009; instead of objecting at that time, plaintiff proceeded to attach the letter to its complaint in the matter; although it did notify defendant that the e-mails were privileged during a witness's deposition in June 2011, but presented no evidence that it followed up with defendant's prior counsel to obtain the document. These actions suggest a failure to take reasonable steps to protect the communications as privileged.); *FTC v. Amazon.com, Inc.,* 2024 WL 3620467 (W.D. Wash. Aug. 1, 2024) (defendant's protection of multiple copies of a document with redactions and that contained attorney-client privileged information is evidence of an intentional production and thus defendant waived the privilege as to those documents). *Cf. Zeiter v. Walmart Inc.*, 2024 WL 1907385 (D. Nev. April; 29, 204) (fairness dictates allowing the plaintiffs to depose Walmart's in-house attorney where Walmart has waived its attorney-client privilege by relying on in-house attorney's declaration in support of its opposition to the plaintiffs' motion to strike Walmart's answer. In that declaration, in-house attorney stated that he "worked with Walmart to create responses" to interrogatories, that he "personally met with" the store's personnel manager, and they "interviewed all Walmart employees that were clocked in" on the day of the incident "who were still employed by Walmart at the time [Walmart was] answering the written discovery." He stated that this investigation "was the basis" for Walmart's discovery response that no Walmart employee remembered the incident. In-house counsel further stated that he and the personnel manager "did not contact any former employees."); *State of Washington v. Alderwood Surgical Ctr., LLC*, 2024 WL 1880446 (W.D. Wash. April 30, 2024) (defendants waived the attorney-client privilege over communications between its former in-house attorney and its employes disclosed in former employee's unemployment hearing, but that waiver did not invite a broad opening up of the waiver to subject matters similar to those discussed in the hearing, where the waiver was essentially invited by the administrative law judge, and the privilege was not used as a sword in that proceeding nor was there any indication that it would be used in the instant proceeding).

[205] An example would be similar to the following: "Notice: This communication is intended to be confidential to the person(s) to whom it is addressed. If you are not the intended recipient or the agent of the intended recipient or if you are unable to deliver this communication to the intended recipient, please do not read, copy, or use this communication or show it to any other person, but notify the sender immediately by telephone at ___."

[206] *See Vicnair v. Louisiana Dep't of Pub. Safety and Corr.*, 555 F. App'x 325 (5th Cir. 2014) (in Title VII action, email sent to employer's general counsel was covered by attorney-client privilege where it was between a confidential assistant to employer's deputy secretary and general counsel concerned a pending internal investigation); *Carmody v. Bd. of Trs. of the Univ. of Ill.*, 893 F.3d 397 (7th Cir. 2018) (Attorney-client communication containing legal advice and recommendations regarding investigation of conduct that led to termination of university's information technology manager based on allegations of breach of network security was protected by attorney-client privilege in former manager's due process case against university's board of trustees and officials); *Edwards v. Scripps Media, Inc.*, 2019 WL 2448654 (E.D. Mich. June 10, 2019) (attorney-client privilege applies to sexual harassment investigations, and when a company seeks advice on a matter that led to a subsequent business decision the legal advice does not become unprivileged business advice); *Brown v. Town of Front Royal*, 2022 WL 1321570 (W.D. Va. May 3, 2022) (Town waived its attorney-client privilege related to its investigation of plaintiff's hostile environment claims based largely on testimony that the Town hired investigator to investigate plaintiff's complaints and ensure the investigation was conducted lawfully, and that the Town apparently relied on the investigator (at least in part) to determine if complained-of behavior constituted sexual harassment or created a hostile work environment. Therefore, the Town's preventative and corrective actions may determine the Town's liability for a hostile work environment claim and the reasonableness of the Town's response to the harassment allegations was an element of plaintiff's hostile work environment claim); *State ex rel. Toledo Blade Co. v. Toledo-Lucas Cnty. Port Auth.*, 905 N.E.2d 1221 (Ohio

prohibiting discovery of the matter, while simultaneously seeking to introduce selected portions of the investigative file, as evidence at trial. Thus, some courts have held that a corporate employer has waived the attorney-client privilege when it contends in a sexual harassment case that its response to plaintiff's allegations were "reasonable" based on an investigation conducted by its outside counsel.[207] In contrast, where the investigative materials generated by the employer's

2009) (Investigative report prepared by port authority's outside counsel, in connection with allegations that authority's president had engaged in inappropriate relationship with a vendor to a consortium of which authority was a member, was related to rendition of legal services and was therefore excepted under attorney-client privilege from disclosure under the Public Records Act, though report did not make specific recommendation regarding president's employment; investigation required counsel to draw upon legal training and experience as well as knowledge of law governing port authority and its policies and personnel, and legal analysis was integrated throughout report.). *Cf. In re Premera Blue Cross Customer Data Sec. Breach Litig.*, 329 F.R.D. 656 (D. Ore. 2019) (Investigation by healthcare benefits servicer and its physical security provider was not subject to work-product protection, in action by members and employees of provider alleging that their confidential information had been released through data security breach in provider's computer network and provider unreasonably delayed in notifying affected individuals, since investigation was primarily business function, given that data breach was not committed through physical intrusion.); *Mega Mfg., Inc. v. Eighth Judicial Dist. Ct.*, 2014 WL 2527226 (Nev. May 30, 2014) (attorney–client privilege did not protect a post-accident investigative report by a manufacturer's engineer, even where the investigator sent the report to the manufacturer's outside counsel.); *Thompson v. C&H Sugar Co.*, 2014 WL 595911 (N.D. Cal. Feb. 14, 2014) (attorney–client privilege did not protect the HR Manager's memo regarding his internal investigation of hotline complaints, even though it was "ghostwritten" by the company's in-house lawyer; the memo qualified as attorney work product, but the plaintiff demonstrated substantial need for its production).

[207] *See Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1419 (11th Cir. 1994) ("Having gone beyond mere denial, affirmatively to assert its good faith [in an FLSA case], [the defendant] injected the issue of its knowledge of the law into the case and thereby waived the attorney-client privilege."); *Jackson v. Deen*, 2013 WL 3863889 (S.D. Ga. July 25, 2013) (Plaintiff may depose attorney for corporate defendants who investigated harassment complaints and formulated human resources procedures where it appears that defendants do not disavow any intention to rely on the attorney's testimony during their defense; plaintiff may inquire into attorney's actions relating to any investigation of discrimination complaints that were not conducted directly for or in anticipation of EEOC administrative action or litigation and is free to explore attorney's involvement in the formulation and implementation of employment policies for the corporate defendants. However, any information containing attorney's legal opinions formed in anticipation of EEOC administrative action or litigation is excluded from discovery.); *Harding v. Dana Transp., Inc.*, 914 F. Supp. 1084, 1096 (D. N.J. 1996) (employer waived attorney-client privilege by relying on its lawyer's investigation as affirmative defense to plaintiff's sexual harassment claims: "By asking [the attorney] to serve multiple duties, the defendants have fused the roles of internal investigator and legal advisor. Consequently, [the employer] cannot now argue that its own process is shielded from discovery")*; McGrath v. Nassau Health Care Corp.*, 204 F.R.D. 240 (E.D. N.Y. 2001) (in Title VII action in which employer asserted affirmative defense of appropriate remedial action, employer waived attorney-client and work product privileges, and thus, was required to produce attorney's report of investigation, her handwritten investigative notes and any part of reports that had been deleted or redacted); *Barbini v. First Niagara Bank*, 2019 WL 1922041 (S.D. N.Y. Apr. 29, 2019) (although records relating to advice related to internal harassment investigation were privileged, defendant waived privilege by functionally asserting *Faragher/Ellerth* defense by stating that it "undertook good faith efforts to prevent and remedy any alleged discrimination or retaliation" and that Plaintiffs failed to avail themselves of a particular remedy; manager's testimony that he relied on in-house counsel's advice and handled the two investigation matters separately and independently of each other indirectly asserts reliance on in-house counsel's advice); *Doe 1 v. Baylor Univ.*, 320 F.R.D. 430 (W.D. Tex. 2017) (although attorney client privilege applied to report prepared by outside law firm university retained to conduct an independent and external review of university's institutional responses to Title IX and related compliance issues, university waived that privilege by, among other things, intentionally releasing to the public the firm's "Findings of Fact" and "Recommendations"; waiver extended to all documents relating to the subject matter of the disclosed information); *Doe v. Baylor Univ.,* 335 F.R.D. 476 (W.D. Tex. 2020) (university waived work product objections over its outside lawyers' internal investigation materials where university admitted it would rely on the attorneys' investigation and factual findings in its defense of the sexual assault claims, resulting in an at-issue waiver, and the university's defense could not be separated from its law firm's work product; effectively the work product and university's defenses were one and the same); *Peterson v. Wallace Comput. Servs.*, 984 F. Supp. 821 (D. Vt. 1997)

attorney-investigator are reasonably segregated from the attorney's advice to the employer and other privileged communications, and the plaintiff is afforded full discovery regarding all aspects of the investigation, courts have generally held that the attorney-client privilege has not been waived unless a substantial portion of attorney-client communication has been disclosed to a third party.[208] In the context of criminal investigations, the courts have allowed an opposing party access

(attorney-client privilege and work product protection did not preclude disclosure of investigative notes and memoranda where employer asserted adequacy of investigation as defense); *State Farm Mut. Auto. Ins. Co. v. Lee*, 13 P.3d 1169, 1177 (Ariz. 2000) ("When a litigant seeks to establish its mental state by asserting that it acted after investigating the law and reaching a well-founded belief that the law permitted the action it took, then the extent of its investigation and the basis for its subjective evaluation are called into question. Thus, the advice received from counsel as part of its investigation and evaluation is not only relevant but, on an issue such as this, inextricably intertwined with the court's truth-seeking functions. A litigant cannot assert a defense based on the contention that it acted reasonably because of what it did to educate itself about the law, when its investigation and knowledge about the law included information obtained from its lawyer, and then use the privilege to preclude the other party from ascertaining what it actually learned or knew."); *Wellpoint Health Networks, Inc. v. Super. Ct.*, 59 Cal. App. 4th 110, 128 (1997) (if employer hopes to prevail by showing it investigated an employee's complaint and took actions appropriate to the findings of the investigation, then it will have put the adequacy of the investigation directly at issue and cannot stand on the attorney-client privilege; "The defendant cannot have it both ways."); *Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254, 259-60 (Del. 1995) (although a party cannot force insurer to waive attorney-client privilege merely by bringing bad faith action, where insurer makes factual assertions in defense of a claim which incorporate, expressly or implicitly, the advice and judgment of its counsel, it cannot deny an opposing party "an opportunity to uncover the foundation for those assertions in order to contradict them"); *Fenceroy v. Gelita USA, Inc.*, 908 N.W.2d 235 (Iowa 2018) (Former employer plainly relied on attorney's investigation into merits of African-American former employee's race-discrimination claim to support former employer's *Faragher-Ellerth* affirmative defense, which would have allowed former employer to escape vicarious liability for former employee's claim if former employer made certain showings, and thus former employer impliedly waived attorney-client privilege over investigation, where former employer expressly relied on investigation to support affirmative defense in its position statement before Iowa Civil Rights Commission, and in former employee's subsequent civil action, former employer raised affirmative defense in its answer and discussed investigation in its motion for summary judgment.). *See also Eletson Holdings, Inc. v. Levona Holdings, Ltd.*, 2025 WL 2294589 (S.D. N.Y. Aug. 8, 2025) (motion to quash subpoena for deposition of current trial counsel granted given the low relevance of the information requested and the risk of intrusion into the attorney-client privilege); *Peterzalek v. Iowa Dist. Court for Polk Cnty.*, 7 N.W.3d 37 (Iowa 2024) (parties to civil disputes may depose attorneys who have provided legal services to an opposing party where the party seeking the deposition has shown that (1) no other means exists to obtain the information than to depose opposing counsel; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case. However, the test does not apply to attorneys who have represented a client only in a completed case); *State of W. Va. ex rel. Stuphin v. Polin*, 914 S.E.2d 238 (W.Va. 2025) (depositions of opposing counsel engaged in active litigation should be rarely employed; when a party seeks to depose opposing trial counsel, that party must show all of the following: (1) that no other means exist to obtain the sought-after information than to depose opposing counsel; (2) that the information sought is relevant and non-privileged; and (3) that the information is crucial to the preparation of the case.); *Shelton v. Am. Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986) (same).

[208] *See, e.g., In re Fluor Intercontinental, Inc.*, 803 F. App'x 697 (4th Cir. 2020) (Government contractor did not waive attorney-client privilege by providing summary of findings of internal investigation into employee's conduct to government; even if contractor's disclosure contained legal conclusions as to past events and recommendations for future conduct, which only a lawyer was qualified to make, contractor did not disclose protected communications by quoting or substantively summarizing them, but rather disclosure merely covered same topic as internal investigation or stated that it was made pursuant to advice of counsel, and disclosure did no more than describe contractor's general conclusions about propriety of employee's conduct.); *Callahan v. HBSC Sec. (USA) Inc.*, 2025 WL 1404492 (S.D. N.Y. May 15, 2025) (Employer did not place privileged materials at issue by relying on the "results of the investigation" of plaintiff's trades which was overseen and carried out in part by its counsel; record revealed that employer produced responsive non-privileged documents relating to the investigation, including interview memoranda and its investigation report and plaintiff would be able to conduct depositions relating to the investigation and his termination, all of which is sufficient to allow plaintiff to mount a fair challenge to employer's decision making while also preserving employer's privilege.); *Smith-Bunge v. Wisconsin Cent., Ltd.,* 946 F.3d 420 (8th Cir. 2019) (District

court did not abuse its discretion in blocking deposition of railroad's counsel, in former railroad employee's retaliation action about her conversations with other railroad employees and whether former employee's employment record caused his termination; former employee could ask other employees directly about the information, and all information former employee sought from counsel was protected by the attorney-client privilege); *EEOC v. Lutheran Soc. Servs.*, 186 F.3d 959 (D.C. Cir. 1999) (refusing to enforce EEOC subpoena for sexual harassment investigation report prepared by counsel for Lutheran Social Services on attorney-client privilege grounds because attorneys conducted investigation in anticipation of litigation and there was no compelling need requiring disclosure); *Walker v. Cnty. of Contra Costa*, 227 F.R.D. 529 (N.D. Cal. 2005) (magistrate judge) (in race discrimination and retaliation case against defendants county and fire chief, investigation report by defendants' attorney as to the pre-litigation investigation into the employee's claims was discoverable because the language in the defendants' affirmative defense indicated that they intended to rely on the attorney's investigation and the county's human resources report, which waived the attorney-client privilege; however, the attorney's analysis of the adequacy of the investigation did not fall within the scope of the waiver since it was not relevant to the affirmative defense; defendants' reliance on the human resources report in their affirmative defense also waived any possible privilege, and there was no reason to believe the report contained any attorney's mental impressions or analysis); *Rauh v. Coyn*, 744 F. Supp. 1181 (D.D.C. 1990) ("The privilege was not waived merely because defendants' [sic] disclosed counsel's conclusion that the investigation could not determine the truth of Bottalico's allegations."); *Guster-Hines v. McDonald's USA, LLC*, 2024 WL 4476155 (N.D. Ill. Oct. 11, 2024) (investigation report by outside counsel hired to investigate the legal risks associated with the plaintiff's complaints of discrimination were protected from disclosure by the attorney-client privilege; the fact that the investigator memorialized one non-privileged aspect of her investigation for non-legal personnel does not preclude privilege from attaching to the rest of the investigation); *No Spill, LLC v. Scepter Canada, Inc.*, 2022 WL 2270237 (D. Kan. June 23, 2022) (Magistrate judge found plaintiff waived attorney client privilege where inventor of the patents in dispute who acted as a plaintiff's corporate representative stated in an email to a third party, "After inspection both I and my patent counsel believe your FMD design infringes our patents in many ways," permitting defendant to depose plaintiff's patent counsel. Magistrate judge found that inventor's email statement to a third party that "[m]y patent counsel advised me not to let it out of the bag quite yet. I'm going to send you a secrecy agreement. . .This is my concept and I need protection for it" did not waive privilege because inventor revealed only the general topic of conversation with the attorney and did not disclose the content or substance of the privileged communications); *Williams v. United States Envtl. Servs., LLC*, 2016 WL 617447 (M.D. La. Feb. 16, 2016) (finding no waiver of privilege since employer did not raise an affirmative defense that explicitly relied on the existence or absence of an investigation into plaintiff's allegations); *Waugh v. Pathmark Stores, Inc.*, 191 F.R.D. 427 (D. N.J. 2000) (magistrate judge) (fact that employer's in-house counsel attended meeting with employer's decision-makers, in which manager reported her factual findings from her investigation into employee's discrimination complaints, and reviewed documents relevant to employee's discrimination charges did not waive attorney-client privilege with respect to counsel's participation in employer's remediation efforts; counsel attended meeting and reviewed documents in his capacity as attorney for employer, counsel did not conduct investigation himself or act as decision-maker in employer's remediation efforts, and the employer declined to rely on counsel's advice to support its defense regarding reasonableness of its investigation or remedial measure); *Robinson v. Time Warner, Inc.*, 187 F.R.D. 144 (S.D. N.Y. 1999) (employer did not waive privilege with respect to its counsel's investigation into employee's allegations of discrimination by discussing investigation and counsel's findings in its response to employee's EEOC notice, where employer was merely rebutting employee's claim that counsel's findings were other than those told to employer's senior management and employer did not raise adequacy of investigation as a defense to employee's claims); *Angelone v. Xerox Corp.*, 2011 WL 4473534 (W.D. N.Y. Sept. 29, 2011) (assertion of *Faragher/Ellerth* defense waived privilege not only for investigation report itself, but for all documents, witness interviews, notes and memos created as part of and in furtherance of investigation; however, otherwise privileged documents created after investigation report issued, including those created after plaintiff filed EEOC charge, not subject to waiver); *N. Dakota v. United States*, 64 F. Supp. 3d 1314 (D. N.D. 2014) (a party's reference to attorney memorandums and disclosure of the ultimate conclusions did not constitute waiver of privilege); *Reitz v. City of Mt. Juliet,* 680 F. Supp. 2d 888 (M.D. Tenn. 2010) (By raising the *Faragher/Ellerth* defense, City defending sexual harassment claim waived the privilege with respect to discovery of memoranda written by outside counsel and her associate regarding interviews of City employees that were conducted in the course of the investigation of the claim, even though hostile environment claim has been dismissed; however, only the "fact" work product created by the lawyers - that is, the portions of the documents memorializing the information gathered by the investigators-is discoverable. Sections of the interview memoranda that reflect the lawyers' mental impressions, opinions, conclusions, judgments, or legal theories are not relevant to the plaintiff's remaining retaliation claim, nor will they lead to the discovery of relevant information as it

has no bearing on the issues of plaintiff's work performance, the discipline she faced before filing her internal complaint, or any other aspect of her current case.); *Ivy v. Outback Steakhouse, Inc.*, 2007 WL 1655115 (W.D. Wash. June 5, 2007) (in employment discrimination cases where the defendant asserts a defense of prompt investigation, courts have held that those defendants have waived attorney-client privilege with regards to the investigation; however, documents relating to the lawyer's intra-litigation analysis of that investigation are not necessarily waived, and that the distinction between documents related to pre-litigation investigation and a lawyer's intra-litigation analysis of that investigation must be made by the court on a document-by-document basis); *Scripps Health v. Super. Ct.*, 109 Cal. App. 4th 529 (2003) (confidential occurrence reports prepared by a hospital were protected by the attorney-client privilege where the reports were confidential reports prepared by hospital employees under its risk management plan and pursuant to the directive of its legal department and the reports were "primarily created for the purpose of attorney review, whether or not litigation is actually threatened at the time the report is made"); *Kaiser Found. Hosps. v. Super. Ct.*, 66 Cal. App. 4th 1217, 1229 (1998) (where a non-attorney has conducted an in-house investigation of employee complaints and the employee has been afforded full discovery of all aspects of that investigation with the exception of specified communications and documents protected by the attorney-client privilege and work product doctrine; no waiver of either the attorney-client privilege or work product doctrine has been established unless a substantial part of any particular communication has already been disclosed to third parties); *Sentinel Colorado v. Rodriguez*, 577 P.3d 48 (Colo. 2025) (general description of discussion of executive session in a city council agenda package that only detailed factual allegations of its stipulation with a council member did not waive the attorney client privilege); *The Sustainable Journalism Found. v. Okla. ex rel. Bd. of Regents of the Univ. of Okla.*, ___ P.3d ___, 2026 WL 90211 (Okla. Jan. 13, 2026) (reports by outside law firm of internal investigation into university's reporting of alumni donor data to external publications and allegations of possible sexual misconduct involving university's president were protected by the attorney-client privilege; they were created by attorneys for university's use during an investigation in anticipation of litigation and contained the thoughts, ideas and strategies of attorney retained to provide advice to the university on how to proceed in the various actions, and both matters were the subject of multi-county grand jury subpoenas and the sexual misconduct report resulted in civil litigation; the key question is whether the investigation or matter was pending at the time the reports were made; "nothing in the statutory language forfeits a valid attorney-client privilege merely because the underlying matter has concluded."); *Mortg. Guar. and Title Co. v. Cunha*, 745 A.2d 156 (R.I. 2000) (title insurer's claim for attorney's fees as element of damages in suit against lawyer for negligence and breach of contract in applying for policy did not impliedly waive the attorney-client privilege with respect to the insurer's communications with its attorneys for settling coverage claim; the insurer provided invoices from its attorney, and its communications with its attorneys were not relevant or integral to the negligence and contract claims); *Univ. of Texas Sys. v. Franklin Ctr. for Gov't and Pub. Integrity*, 675 S.W.3d 273 (Tex. 2023) (in determining whether documents underlying an internal investigation into allegations of undue influence in the university's admissions process are protected by the attorney-client privilege and thus exempt from disclosure under the Public Information Act, (i) the outside non-attorney investigator was engaged as a "lawyer's representative" in conducting the investigation as it was part of ongoing efforts by the university to ensure legal compliance and to enable the university's general counsel to provide a proper legal assessment on how to proceed; (2) the disputed documents fell within the attorney client privilege, as they were made between privileged persons and were for the purpose of facilitating the rendition of legal services to the University; (3) the university did not waive the privilege by disclosing some of the disputed documents to the investigator because the investigator acted in the capacity of a lawyer's representative; and (4) to the extent that the investigator's final report directly quoted from or otherwise disclosed "any significant part" of the disputed documents—which included interview notes and emails and similar communications—publication of the report on the university's website waived the university's attorney-client privilege as to those specific documents. *Cf. Chartraw v. City of Shawano*, 2017 FEP Cases (BNA) 407,496 (E.D. Wis. 2017) (employer did not waive privilege with respect to sexual harassment investigation documents where it did not raise a *Faragher/Ellerth* defense with respect to plaintiff's harassment claims to which the investigation documents were relevant); *S. Capitol Bridgebuilders v. Lexington Ins. Co.*, 2022 WL 444098 (D.D.C. Feb. 14, 2022) (Factual investigation materials attached to emails sent to attorneys are not protected by privilege because they were generated in the ordinary course of investigating the insured's claim); *Sheridan Newspapers, Inc. v. Bd. of Trs. of Sheridan Cnty. Sch. Dist. #2*, 350 P.3d 266 (Wyo. 2015) (Matters regarding proposed facility that school district board discussed during executive sessions were not privileged as attorney-client communications under the state Public Meetings Act, where minutes from those sessions did not reveal anything substantive about the content of the legal advice the district attorney provided to the board.); *Compton v. Safeway, Inc.*, 169 P.3d 135 (Colo. 2007) (recorded statements by two store employees who witnessed incident giving rise to lawsuit against store and made to store's risk management and loss control department during the ordinary course of the store's claim investigation were not protected by the attorney-

to the investigative reports prepared by non-attorney experts retained by the attorney–or the testimony of the expert–where the content of the report and the opinions and observations of the investigator are not so bound up with attorney-client communications that the confidential communications cannot be segregated from the investigator's observations or where the confidential communications are otherwise disclosed to nonessential parties.[209]

Was the investigator acting as an attorney? Some courts have held that the attorney-client

client privilege since there was no evidence that they were communicated in the course of obtaining counsel's advice or direction with respect to the store's rights or obligations); *Compudyne Corp. v. Shane*, 244 F.R.D. 282 (S.D. N.Y. 2007) (documents relating to corporation's investigation into private investment in public equity (PIPE) transaction protected by the attorney/client or work product privileges in action against defendant whose trading in corporation's stock allegedly caused shortfall in the PIPE because corporation's attorneys conducted investigation to prepare for filing the action). *Cf.* Am. Coll. of Trial Lawyers, Fed. Criminal Procedure Comm., "Recommended Practices for Companies and Their Counsel in Conducting Internal Investigations" (August 2020).

[209] *Compare State v. Riddle*, 8 P.3d 980 (Or. 2000) (attorney-client privilege did not prevent an expert whom defense had employed to investigate a factual problem from testifying for the other side as to the expert's thoughts and conclusions that were segregated from and not *based* on confidential communications; however, "[i]f an expert's opinion is so bound up with any such communication that the expert cannot, in the view of the trial court, segregate his or her opinion from some part of the confidential communication, then the expert should not be permitted to testify"), *with Holt v. McCastlain*, 182 S.W.3d 112 (Ark. 2004) (accident reconstruction report and observations of the accident reconstruction firm hired by law firm that in turn was employed by insurer to assist driver in his defense was subject to the attorney-client privilege held by driver and thus subpoena issued by district attorney to accident reconstruction firm and its employee for the firm's reports and the employee's observations must be quashed; driver made his confidential communications to lawyer, who in turn made them to accident reconstruction firm, believing they would not be disclosed and to assist the lawyer's legal representation, accident reconstruction firm took the information from the disclosures, went to the scene of the accident and made observations, then wrote a report that opined the expert's reconstruction of the accident and in such role accident reconstruction firm and its employee were attorney's representative, report was based on driver's confidential communications and accident reconstruction firm was never terminated by attorney). *See also Vasquez v. Whole Food Mrkt, Inc.*, 2021 WL 11432979 (D.D.C. Nov. 29, 2021) (defendant waived attorney client privilege when its spokesperson made statements to the media based on her communications with inhouse counsel; distinguishing *In re Fluor International*, the court found that spokesperson's statements to the media were not "general conclusions" regarding company's investigation that resulted in plaintiffs' terminations, but revealed the "protected communication" itself); *Ecolab, Inc. v. Ridley*, 2023 WL 11762788 (E.D. Tenn. Feb. 10, 2023) (distinguishing *In re Fluor Intercontinental Inc.* and finding waiver because defendant's own characterization of the information it claims to have voluntarily disclosed to Plaintiffs, showed defendant has done more than just describe general conclusions about plaintiff's conduct and defendant's investigations; defendant asserted, for example, that it "provided updates to Plaintiffs regarding the status of its ongoing investigation," engaged "in extensive pre-suit communications with Plaintiffs to address their concerns and respond to their questions," and "voluntarily disclosed to Plaintiffs detailed information regarding the nature, scope, and, ultimately, the outcome of [defendant's] investigation."). *See also Davis v. City of Seattle*, 2007 WL 4166154 (W.D. Wash. Nov. 20, 2007) (in sexual harassment case against a city-owned utility, plaintiff was entitled to depose investigator concerning the investigation she performed, the final letter report and supplemental report, and to ask her in deposition whether she changed her reports or did anything further as a result of meetings with the City Attorney's office to discuss her drafts, but plaintiff was not entitled to copies of the investigator's draft reports; the drafts at issue are not related to any contention by the utility that it took remedial action in light of plaintiff's discrimination complaints; to the contrary, some of the drafts concern accusations of wrongdoing on plaintiff's part, and the City has not asserted a defense based thereon that would result in a waiver of attorney-client privilege. Moreover, the sole purpose of the drafts was to convey information to the attorneys for the utility to aid them in providing sound advice.); *Harris v. Drake*, 99 P.3d 872 (Wash. 2004) (insurer properly claimed the work product protection, on behalf of insured, for report of, and opinions gained from, a medical examination of its insured conducted pursuant to the terms of personal injury protection in the insurance policy, where subrogation specialist of insurer indicated to parties that insurer would not allow expert who prepared report to testify against its insured in litigation between the insured and the tortfeasor, and there was no indication that subrogation specialist was not authorized to act on behalf of insurer).

privilege does not apply where the attorney was acting solely in the role of an investigator rather than as an attorney.[210] However, where the circumstances surrounding the client's retention of the lawyer show that the engagement was for the purpose of providing legal advice and the fact-finding by the attorney (and communications by and with the attorney's agents) related to the provision of legal services, courts have held that the attorney-client privilege applies to the communications contained in the report.[211]

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[210] *See Champine v. Boise Sch. Dist.*, 2026 WL 381777 (D. Idaho Feb. 11, 2026) (motion to compel testimony of defendant's in-house counsel regarding investigation he performed regarding alleged improprieties between district employees and plaintiff minor; in-house counsel was also a member of the district's executive team, dealing with day-to-day management of the district, and there was nothing in the record to suggest that counsel's investigations were for the purpose of providing legal advice rather than dealing with the day-to-day management of the district; no retention letter or scope of duties was provided; no mention of *Upjohn* warnings being given to people counsel communicated with during his investigations; no lawsuit or legal proceedings had begun; and no evidence that the persons counsel spoke to were aware that the information they provided was to enable the attorney to provide legal advice to the district.); *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337 (Tex. App.--Texarkana 1999) (attorney-client privilege does not apply where attorney was acting in any capacity other than that of an attorney, such as an investigator; trial court did not abuse its discretion in determining that an attorney hired by an insurer to conduct witness interviews was acting as an investigator and not as an attorney). *See also Diversified Indus., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977) (attorney's status as an investigator prevents communications from being protected by the attorney-client privilege); *7 Mile & Keystone, LLC v. Travelers Cas. Ins. Co. of Am.*, 2013 WL 12182278 (E.D. Mich. Jan. 15, 2013) (unredacted emails between defendant's lawyer and defendant's investigators before the denial of plaintiff's claim are not privileged where they reveal that lawyer was acting in the capacity of an investigator and not a lawyer); *Nat'l Farmers Union Prop. & Cas. Co. v. Dist. Ct.*, 718 P.2d 1044 (Colo. 1986) (interviews with employees concerning insurance claims investigation held not privileged, in part because there was no showing that persons interviewed by the attorneys were even informed that the attorneys were acting as counsel or told that the investigation was confidential); *Keefe v. Bernard*, 774 N.W.2d 663 (Iowa 2009) (Memo that attorney for doctor and clinic prepared after meeting with patient's treating orthopedic surgeon was not protected by orthopedic surgeon's personal attorney-client privilege; memo did not reflect legal advice sought by orthopedic surgeon, but instead demonstrated investigation by attorney into clinic's liability for doctor's actions.); *Morgan v. City of Fed. Way*, 213 P.3d 596 (Wash. 2009) (Attorney who prepared investigation report of municipal court employee's harassment complaint did not have an attorney-client relationship with municipal judge who was the subject of the complaint, and thus report was not protected, pursuant to attorney-client privilege, from disclosure under the Public Records Act; attorney had been hired as an independent investigator, and purpose of the investigation was not to give legal advice to judge, but to comply with city's antidiscrimination policy.). *Cf.* S.C. Ethics Op. 11-04 (2011) (investigator does not violate the no-contact rule by contacting individuals who investigator knows are represented by counsel, even if the investigator is also an attorney).

[211] *See, e.g., Jones Eagle LLC v. Ward*, 2026 WL 252903 (E.D. Ark. Jan. 30, 2026) (In evaluating whether an attorney-investigator is providing legal advice to trigger attorney-client privilege, courts have "emphasized the importance of the terms of engagement letter between the client and the investigator to determine the applicability of the privilege and whether legal advice was sought."); *United States ex rel. Barko v. Halliburton Co.*, 241 F. Supp. 3d 37 (D.D.C. 2017) (Reports from contractor's internal investigation, conducted under auspices of contractor's legal department, related to allegations that contractor's employees received kickbacks or bribes from subcontractor in exchange for a favorable contract awards or other contracting favors, could not be converted into admissible evidence and thus did not constitute evidence of kickbacks or bribes sufficient to raise genuine dispute of material fact as required to survive contractor's motion for summary judgment in relator's qui tam suit against government contractor and subcontractor; reports constituted inadmissible hearsay, and they were protected under attorney-client privilege); *In re Kellogg Brown & Root, Inc.*, 796 F.3d 137 (D.C. Cir. 2015) (defense contractor's internal investigation into whether contractor defrauded U.S. Government by inflating costs and accepting kickbacks while administering military contracts in Iraq protected by attorney-client privilege and work product; contractor did not impliedly waive privilege and work product protection when corporate representative reviewed the documents in preparation for his deposition, since relator noticed contractor's deposition on the subject of whether the investigation documents were privileged, giving the corporate representative no choice but to review the documents in preparation; and contractor's

reference to the investigation in summary judgment papers did not result in an "at issue" waiver since it only referred to the fact of an investigation and did not refer to the contents of any privileged documents); *T.E. v. S. Berwyn Sch. Dist. 100*, 600 F.3d 612 (7th Cir. 2010) (Attorneys were acting in capacity as attorneys for school board when they conducted investigation into teacher's sexual abuse of students, and thus attorney-client privilege applied to communications made and documents generated during investigation, although privilege was invoked to protect communications made by employees of governmental entity rather than private party; during confidential interviews with school-district employees, attorneys emphasized that law firm represented school board and not employee and that school board had control over whether conversations remained privileged, no third parties attended interviews, school board received report of firm's findings during executive session not open to public, and written executive summary was marked "Privileged and Confidential," "Attorney-Client Communication," and "Attorney Work Product," and affidavits submitted into record by attorneys and school board president emphasized that law firm had been hired to provide legal advice in context of facts it uncovered during internal investigation. Although board was responding to public distress about allegations, possible complicity of school principal, and urgent need to implement prospective protective measures, engagement letter between the law firm and the school district "spells out that the Board retained Sidley to provide legal services in connection with developing the School Board's response" to the abuse allegations.); *Collardey v. All. for Sustainable Energy, LLC*, 2019 WL 3778298 (D. Colo. Aug. 12, 2019) (the fact that attorney conducted investigation in her capacity as a third-party investigator did not render the attorney-client privilege inapplicable as long as the purpose of the interview was to assist company's counsel in providing legal advice; based on in camera review, magistrate found that investigator was hired by company to conduct an investigation under the direction of the defendant's legal counsel for the purpose of assisting legal counsel to provide legal advice around anticipated litigation); *In re Gen. Motors LLC Ignition Switch Litig.*, 80 F. Supp. 3d 521 (S.D. N.Y. 2015) (although manufacturer's publicly-issued report concerning its ignition switch recall investigation included results from witness interviews, manufacturer established that attorney-client privilege applied to portions of interview materials prepared by its outside counsel reflecting communications between current and former employees and agents and outside counsel in connection with the investigation). *See also In re Allen*, 106 F.3d 582, 600-05 (4th Cir. 1997) (attorney-client privilege protected communications between Attorney General's Office and attorney hired by it to investigate possible document mismanagement and confidentiality breaches and to prepare a written report of her findings); *Geller v. N. Shore Long Island Jewish Health Sys.*, 2011 WL 5507572 (E.D. N.Y. Nov. 9, 2011) (magistrate judge) (attorney-client privilege protected from discovery documents relating to internal investigation of plaintiff's harassment complaint conducted by employer's compliance officer that were generated after employer retained counsel; although investigator acted in the capacity of a compliance officer and not an attorney, at the point that employer retained counsel she acted as an agent of defense counsel and thus her interviews and any documents she created regarding those interviews were privileged; communications among non-attorneys in a corporation may be privileged if made at the direction of counsel, to gather information to aid counsel in providing legal services; the "sword-shield" exception did not apply because defense counsel affirmatively represented that defendants have no intention of using the investigation to avoid liability); *Grinnell Corp. v. ITT Corp.*, 222 F.R.D. 74 (S.D. N.Y. 2003) (documents and communications generated by attorney retained to investigate personal injury claims filed against company privileged where correspondence and documents clearly are of a legal character providing legal advice or services); *Doe v. Porter-Gaud Sch.*, 2026 WL 431351 (D.S.C. Feb. 16, 2026) (emails between school officials and its attorney as school navigated the aftermath of the incident between plaintiff and school employee, where school sought legal advice and investigative assistance from its attorney due to the sensitive nature of the situation as well as threats of litigation from plaintiff were protected by attorney-client privilege; the emails consist of communications between attorney and client that were aimed at providing legal and investigative services to the client, the court is satisfied that the privilege applies); *Suzlon Wind Energy Corp. v. Shippers Stevedoring Co.*, 662 F. Supp. 2d 623 (S.D. Tex. 2009) (Report prepared by in-house counsel for wind turbine distributor and transmitted to its board of directors was protected by the attorney-client privilege; report was prepared at the request of the company's highest officers and in-house counsel after a fire and the death of a company employee, the memo indicates that in-house counsel prepared the report in his capacity as a lawyer, not merely as an investigation, the memo itself, and the circumstances under which in-house counsel prepared it, show a desire for confidentiality, and there is no evidence that the memo was disclosed to others); *In re Int'l Sys. & Controls Corp. Sec. Litig.*, 91 F.R.D. 552 (S.D. Tex. 1981) (confidential communications made by attorneys "hired to investigate through the trained eyes of an attorney" privileged), *vacated on other grounds*, 693 F.2d 1235 (5th Cir. 1982); *In re LTV Sec. Litig.*, 89 F.R.D. 595 (N.D. Tex. 1981) (rejecting argument that attorney-client privilege should not apply when the attorneys involved performed in an investigative rather than strictly legal function); *Stewart v. City of Tacoma*, 2025 WL 660768 (W.D. Wash. Feb. 28, 2025) (discovery of materials from deputy city attorney's investigation of plaintiff's negligence claim against city protected

6. Waiver of the Privilege by Plaintiffs.

A plaintiff's reliance on his/her attorney's advice and actions to avoid limitations or other similar defenses may also waive the privilege.[212]

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by attorney-client privilege and work product doctrine; city's investigation was triggered by plaintiff's threat to sue if it did not pay him $400,000 and was plainly in anticipation of that potential litigation); *Broyles v. Convergent Outsourcing, Inc.*, 2017 WL 2256773 (W.D. Wash. May 23, 2017) (attorney-client privilege precluded deposition notice for company's litigation-support specialist where specialist was found to be an agent of the General Counsel and plaintiff could not prove that the information sought was either non-privileged or not obtainable elsewhere; specialist's affidavit denying liability did not waive privilege); *Ex Parte Schnitzer Steel Indus., Inc.*, 142 So.3d 488 (Ala. 2013) (anticipation of litigation was a significant factor in parent corporation's decision to have investigative report prepared regarding accident in which subsidiary's employee was injured as a result of workplace accident, and thus report was protected work product and its production could not be compelled during discovery in employee's personal injury action against parent corporation; there were concerns about potential litigation when preparer of initial report did her inspection of the accident, report was reviewed and revised by in-house counsel before it was finalized, and review of an accident report by in-house counsel did not occur in the ordinary course of business); *City of Petaluma v. Super. Ct.*, 248 Cal. App. 4th 1023 (2016) (Prelitigation factual investigation conducted by outside counsel retained by city into EEOC complaint filed by former employee, who worked for city as firefighter and paramedic, was protected by attorney-client privilege and work product doctrine in employee's suit against city under the FEHA for harassment, discrimination based on sex, and retaliation, even though counsel's role was limited to factual investigation and did not extend to providing legal advice; dominant purpose of counsel's representation was to provide professional legal services to city attorney so that he, in turn, was able to advise city on appropriate course of action.); *Costco Wholesale Corp. v. Super. Ct.*, 47 Cal. 4th 725 (2009) (Letter written to employer's corporate counsel by outside counsel who investigated wage classifications of certain employees was presumptively privileged, even if the opinion letter was not prepared in anticipation of litigation, where employer engaged the outside counsel to provide employer with legal advice. Even if the letter contained factual information from interviews with employees that could have been performed by a nonattorney, such memo was privileged since outside counsel was presented with a question requiring legal analysis and was asked to investigate the facts she needed to render a legal opinion.); *Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000) (attorney was retained by school district to conduct independent investigation in her capacity as attorney for purpose of providing legal services and advice, and thus attorney's entire report was protected by attorney-client privilege and excepted from disclosure to newspaper under Texas Public Information Act, even though attorney detailed her factual findings in discrete portion of report apart from her legal analysis and recommendations, where retention documents and witnesses demonstrated that district requested investigative report for primary purpose of obtaining legal advice); *Marshall v. Hall*, 943 S.W.2d 180 (Tex. App. – Houston [1st Dist.] 1997) (interview notes and summaries of the interview notes made during witness interviews by an employee of an attorney, acting as an agent for the attorney, are protected by the work-product privilege); *Gray v. Morgan Stanley DW Inc.*, 130 Wash. App. 1047 (2005) (in gender discrimination action, trial court did not err in denying employee's motion to compel the discovery of notes taken by employer's in-house counsel, where the notes sought were taken as part of the employer's investigation of alleged compliance violations and other issues raised by the employee). *Cf. EEOC v. Guess?, Inc.*, 176 F. Supp. 2d 416 (E.D. Pa. 2001) (employer failed to establish that its robbery investigation file was protected from disclosure under attorney-client privilege and work product doctrine, in response to EEOC subpoena issued in investigation of employer's alleged Title VII violations in terminating employee after asking racially motivated questions regarding robbery; employer asserted only that when employer's loss prevention department conducts investigation it produces report for legal department review and advice but did not specify what litigation employer was anticipating when it conducted robbery investigation).

[212] *See, e.g., Livingstone v. N. Belle Vernon Borough*, 91 F.3d 515 (3d Cir. 1996) (civil rights plaintiff who asserted that she relied upon advice of counsel in waiving right to sue had put her counsel's advice into issue, thereby waiving privilege); *Hemmah v. City of Red Wing*, 592 F. Supp. 2d 1134 (D. Minn. 2008) (by asserting that defendants failed to offer him a name-clearing hearing, plaintiff waived his attorney-client privilege with respect to communications from his lawyer informing him of defendants' willingness to provide the hearing); *3M Co. v. Engle*, 328 S.W.3d 184 (Ky. 2010) (Plaintiffs waived their attorney-client privilege by asserting their lawsuit was timely because they did not discover their legal claims until their attorneys told them of the possible nexus between the equipment and their illness); *EEOC v. Exel, Inc.*, 190 F. Supp. 2d 1179 (E.D. Mo. 2002) (in ADA action brought by EEOC on behalf of

D. Privilege Exceptions.

There are significant exceptions to the privilege. For example, disclosure of privileged communications is sometimes ordered under the "crime-fraud" exception,[213] although the

former employee, employee waived attorney-client privilege regarding his communications with his legal counsel and paralegal by voluntarily answering questions pertaining to communications and by directing defense counsel to question legal counsel directly regarding his injuries and ability to perform his former job duties); *Jackson Med. Clinic for Women, P.A. v. Moore*, 836 So.2d 767 (Miss. 2003) (mother in malpractice action waived attorney-client privilege when she used confidential communications with her attorney to toll statute of limitations, where mother specifically pled reliance on her attorney's advice as an element of her defense to clinic's motion for summary judgment on limitations issue and mother voluntarily testified about the communications with her attorney).

[213] *See, e.g., In re Grandy Jury Subpoenas v. Sealed Appellant 1*, 128 F.4th 127 (2nd Cir. 2025) (district court application of the crime-fraud exception to communications between former CEO of a public company and his lawyers regarding victims' allegations of sexual misconduct was not an abuse of discretion, where government had established probable cause to believe that the CEO used his lawyers' legal services to circumvent the Company's legal contracts control and created false books and records in violation of criminal statutes in order to conceal multiple allegations of sexual misconduct raised against him by two former Company employees. The settlement agreements resolving the claims were structured and negotiated to keep them hidden from the company—among other things, the agreements promised the two victims $7.5 million and $3 million, respectively, but it did not explicitly state that the Company would not be responsible for the payments and stated that in the event of a breach by the victims, "neither [the CEO] nor [the Company] shall have any obligation to make any payments," making the earlier lack of specificity more notable, and it provided that if one of the victims desired a letter of recommendation, the Company agreed to provide it. The evidence also showed that the CEO intentionally used the lawyer's legal services to circumvent the legal contracts control by, among other things, taking pains to ensure the agreements were not provided to the Company's legal department; he relied on external counsel to negotiate the agreements, without involving or even alerting the Company's own internal lawyers, and even though the agreements were made on behalf of the Company, neither the CEO nor the lawyer provided them to the Company for review or record-keeping; instead, both agreements were kept in the files of the lawyer's firm. When communicating with the lawyer about the agreements, the CEO also apparently relied almost exclusively on text messages, rather than his Company email, communications revealed that the lawyer specifically instructed the CEO to transmit the executed agreement via text instead of email for the express purpose of avoiding the Company gaining knowledge of it, and draft legal agreements for both victims were apparently exchanged this way as well.); *United States v. Gorski*, 807 F.3d 451 (1st Cir. 2015) (reasonable basis to believe that attorney-client communications were intended by defendant to facilitate or conceal criminal or fraudulent activity, as required to compel law firm to produce privileged documents under crime-fraud exception regarding fraud allegedly committed by defendant in operation of construction company; defendant allegedly misrepresented company's actual ownership and control to obtain government contracts, he retained law firm to restructure company to maintain supposed compliance with new regulations governing the contracts, and it was reasonable to infer that law firm was retained with intent of creating outward compliance with regulations so that defendant could continue his ongoing scheme); *In re Grand Jury Proceedings*, 802 F.3d 57 (1st Cir. 2015) (District court did not abuse its discretion in determining that salvor's communications with his attorneys fell within scope of crime-fraud exception to attorney-client privilege, in light of evidence that salvor was involved in scheme to defraud investors as to value of sunken vessel's cargo by falsifying documents and transmitting those falsified documents to potential investors and admiralty court, and that at least some communications between salvor and his attorneys with respect to admiralty proceeding were intended to facilitate that fraudulent scheme.); *In re Search Warrant dated Nov. 3, 2021*, 2024 WL 3507596 (2d Cir. July 23, 2024) (district court did not abuse its discretion in determining that documents communicating certain facts to Project Veritas's chief legal officer were not protected by the attorney-client privilege because they did not constitute an implicit request for legal advice regarding newsworthiness; the district court also did not err in finding that seven of the ten documents at issue were subject to the crime-fraud exception because they were created in furtherance of a conspiracy relating to Project Veritas's receipt of stolen property provided to it); *In re Grand Jury Subpoenas*, 628 F. App'x 13 (2d Cir. 2015) (in grand jury tax fraud investigation, the district court properly found probable cause to believe that company's owner was using his lawyers to further his fraudulent scheme and thus properly compelled company to produce communications with the attorneys; tax protest was based on a false, undocumented transaction and owner engaged in the protest as part of a strategy to further conceal that tax fraud and shirk his tax liabilities) *In re Grand Jury Subpoena*, 745 F.3d 681 (3d Cir. 2014) (district court did not err in finding

that there was reasonable basis to conclude that attorney's advice had been used by targets of grand jury investigation to fashion conduct in furtherance of their crime, and thus crime-fraud exception applied to attorney-client privilege with regard to unmemorialized verbal communications so that attorney could be compelled to testify before grand jury, where attorney provided information about types of conduct that violated the law, in addition to advice that he should not make payment, and then target stated that he was going to make payment anyway.); *In re Grand Jury Subpoena*, 642 F. App'x 223 (4th Cir. 2016) (District court did not clearly err in determining that government successfully made a prima facie showing that commodities traders who were being investigated by grand jury engaged in a criminal or fraudulent scheme of misusing information about impending trades for personal gain and intended to avoid detection and continue their scheme in communicating with their attorney, and thus district court did not abuse its discretion in denying attorney's and traders' motion to quash grand jury subpoena issued to attorney under crime-fraud exception to attorney-client privilege.); *Puri v. Khalsa*, 674 F. App'x 679 (9th Cir. 2017) (where plaintiffs alleged that defendant companies and their law firms conspired to exclude them from certain management positions and other fraudulent conduct, claim against law firm and one of its partners would not be dismissed where the complaint plausibly alleges that the services of the firm and partner were obtained to enable or aid in commission of a fraudulent plan against plaintiffs and, therefore, the crime-fraud exception applied); *In re Icenhower*, 755 F.3d 1130 (9th Cir. 2014) (Crime-fraud exception to attorney-client privilege applied to the extent that alleged contemnor consulted with his attorneys for purpose of furthering his obstruction of bankruptcy court's order; having invoked advice of counsel in support of his position that Mexican law made it impossible for him to comply with bankruptcy court's order and in support of his argument that, by contacting the Mexican Ministry of Foreign Affairs and by seeking an amparo, he had not engaged in conduct that was inconsistent with compliance with bankruptcy court's order, alleged contemnor implicitly waived attorney-client privilege with regard to communications on those subjects.); *In re Grand Jury Subpoena*, 2 F.4th 1339 (11th Cir. 2021) (crime-fraud exception applied to advice lawyer gave to candidate regarding the campaign's campaign expenditures and preparation and filing of disclosure forms; because the attorney's role in the campaign was to ensure compliance with Georgia law regarding filing financial disclosure forms and because the legal advice at issue was obtained after the personal expenditures were made and before the filing of the forms, the advice, "advance[d], or [at the very least] the client[] intend[ed] the advice to advance, the client's criminal or fraudulent conduct."); *JTR Enters. v. Columbian Emeralds*, 697 F. App'x 976 (11th Cir. 2017) (crime-fraud exception applied where numerous red flags should have alerted any reasonable attorney to "massive fraud of the court" by party, which authorized the district court to compelled discovery which would reveal existence of the fraud as well as efforts to conceal it); *Eastman v. Thompson*, 636 F. Supp.3d 1078 (C.D. Cal. 2022) (E-mails in which President's legal advisor and other attorneys suggested that—irrespective of merits—primary goal of filing certain lawsuits challenging vote counts was to delay or otherwise disrupt January 6, 2021 joint session of Congress to count electoral college votes fell within scope of crime-fraud exception to attorney-client privilege and work product doctrine. E-mails showing that President knowingly verified inaccurate voter fraud numbers in court filings were related to and in furtherance of conspiracy to defraud United States, and thus fell within scope of crime-fraud exception to attorney-client privilege and work product doctrine; Attorney General said that his investigators found no evidence of fraud on scale that would have changed election outcome, and e-mails showed that President knew that specific numbers of voter fraud were wrong but continued to tout those numbers, both in court and to public); *Chandler v. Phoenix Servs.*, 2020 WL 487503 (N.D. Tex. Jan. 30, 2020) (the crime-fraud exception in the sham litigation context); *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 180 F. Supp. 3d 273 (S.D. N.Y. 2016) (Under New York law, e-mails between general counsel and employees of petroleum company and company's subsidiary were discoverable under crime fraud exception to attorney-client privilege, in Pennsylvania's action against petroleum companies, alleging that companies' use of gasoline additive, methyl tertiary butyl ether (MTBE), contaminated or threatened to contaminate groundwater; e-mails involved legal advice about how best to protect attorney-client privilege when company restructured and spun-off subsidiary, which involved first stripping subsidiary of profitable assets, and subsidiary went into bankruptcy after it was sold, suggesting restructuring was intended to defraud creditors); *United States v. Wilson*, 2025 WL 26662 (D. Md. Jan. 3, 2025) (crime-fraud exception applied where attorney prepared an indemnity deed of trust and created two trusts that were used in the money laundering conspiracy alleged in the indictment); *Eletson Holdings Inc. v. Levona Holdings Ltd.*, 2025 WL 2688216 (S.D. N.Y. Sept. 19, 2025) (there is a reasonable basis to believe that certain of the documents contain communications that were intended to facilitate or to conceal fraudulent activity and thus fall within the crime-fraud exception; documents included communications regarding the drafting of an affidavit alleged to be false and misleading, responses to document production that were intended to be fraudulent and to conceal fraudulent conduct, a conversation among lawyers and client where testimony to be given and that is alleged to be false was discussed, communications regarding the recitation of facts alleged to be false, and documents concerning the concealment of fraudulent conduct after the conclusion of the arbitration.);

exception has been construed to be a narrow one.[214] Similarly, under the "fiduciary exception,"

People v. Radojcic, 998 N.E.2d 1212 (Ill. 2013) (Crime-fraud exception to attorney-client privilege applied such that defendant's former attorney could testify about former attorney's communications with defendant and acts that former attorney took in following defendant's instructions with respect to real estate transactions identified in indictment, in prosecution for financial institution fraud and other crimes related to a mortgage fraud scheme allegedly orchestrated by defendant; evidence indicated that defendant used his instructions to former attorney to further defendant's attempts to engage in fraudulent activity concerning sales of condominiums to straw purchasers and subsequent resales from straw purchasers to corporations controlled by defendant; A client may consult with his attorney about the legal implications of a proposed course of conduct, or how to defend against the legal consequences of past conduct, without triggering the crime-fraud exception; such good-faith consultations are protected by the privilege.); *Harris Mgmt., Inc. v. Coulombe*, 151 A.3d 7 (Me. 2016) (sufficient evidence supported finding that, when purchaser was communicating with his legal counsel, purchaser was engaged in or planning fraudulent activity that was expected and intended to induce management corporation's reliance on purchaser's statements that it would hire corporation to manage golf course and that purchaser intended to facilitate or conceal fraudulent activity through communications with his counsel, as required for crime-fraud exception to attorney-client privilege to apply). *Compare* ABA Formal Ethics Op. 491 (2020) (Rule 1.2(d) prohibits lawyer from advising or assisting a client in a transaction or other matter the lawyer "knows" is criminal or fraudulent; that knowledge can be inferred from the circumstances. If there is a high probability that a client seeks a lawyer's services for criminal or fraudulent activity, lawyer must inquire further to avoid advising or assisting such activity.); N.Y.C. Ethics Op. 2018-4 (2018) (When asked to represent a client in a transaction that a lawyer believes to be suspicious, the lawyer has an implicit duty under some circumstances to inquire into the client's conduct. If the lawyer believes that her client is entering into a transaction that is illegal or fraudulent, the lawyer ordinarily must attempt to inquire in order to provide competent representation to the client under Rule 1.1. Further, under Rule 1.2(d), which forbids knowingly assisting a client's illegal or fraudulent conduct, a lawyer has the requisite knowledge if the lawyer is aware of serious questions about the legality of the transaction and renders assistance without considering readily available facts that would have confirmed the wrongfulness of the transaction. Implicit in the rule, therefore, is the obligation to take reasonably available measures to ascertain whether the client's transaction is illegal or fraudulent. The lawyer's inquiry must be consistent with the confidentiality duty of Rule 1.6, which governs disclosures the lawyer may make to third parties during the inquiry, as well as with the duty to keep the client informed during the representation. If the lawyer concludes that the client's conduct is illegal or fraudulent, the lawyer must not further assist the wrongdoing and may undertake remedial measures to the extent permitted by the exceptions to the confidentiality rule.). *Cf* ABA Formal Op. 513 (2024) (guidance regarding the lawyer's duty to inquire into and assess the facts and circumstances of each representation to reduce the risk of counseling or assisting in a crime or fraud) .

[214] *See, e.g., Moore v. United States*, 342 A.3d 1222 (D.C. 2025) (Defendant's statements to appointed counsel just outside courtroom in contempt proceeding, in which defendant threatened to shoot assistant attorney general prosecuting the contempt claim, and later statements to counsel threatening to shoot assistant attorney general after defendant was placed on GPS monitoring, were not protected by the attorney client privilege.); *In re Grand Jury Subpoena*, 696 F. App'x 66 (3d Cir. 2017) (vague allegation that responses contain unspecified false statements fails to meet the "reasonably demanding" evidentiary standard applied to apply the crime-fraud exception); *In re Grand Jury Matter No. 3*, 847 F.3d 157 (3d Cir. 2017) (crime-fraud exception did not apply to lawyer's email concerning amending his tax returns where client merely forwarded his email to his accountant and said he wanted to "discuss" it'; there is no indication that he had ever decided to amend the returns and before the plan (in furtherance of a fraudulent business scheme) could proceed further the lawyer told the account to hold off. Thus, the client at most thought about using his lawyer's work product in furtherance of a fraud, but he never actually did so); *Lewis v. Crochet*, 105 F.4th 272 (5th Cir. 2024) (documents relating to law firm's Title IX investigation on behalf of Board were not discoverable under the crime-fraud exception because there was insufficient evidence to establish that the Board and the law firm criminally concealed public records in violation of Louisiana records law since the documents were not public records at the time of the concealment, there was no showing that the Board sought advice from the law firm for the purpose of furthering the crime of injuring a public record in violation of the records law, and there was no reasonable relationship between the privileged documents and the alleged prima facie violation of the records law); *In re Boeing Co.*, 2021 WL 3233504 (5th Cir. July 29, 2021) (crime-fraud exception did not apply to require production: a temporal nexus between the contested documents and the fraudulent activity alone is insufficient; once fraud is shown, it must be shown that all contemporaneous attorney-client communications could be construed as in furtherance of the alleged fraud); *Stone Surgical, LLC v. Stryker Corp.*, 858 F.3d 383 (6th Cir. 2017) (Former

employee failed to make prima facie showing that employer's internal e-mails, which allegedly discussed the existence of employee's non-compete agreement, fell within crime-fraud exception to attorney-client privilege, and thus district court did not abuse its discretion by excluding e-mails pursuant to attorney-client privilege; although employee alleged that employer tried to conceal fact that he did not have a non-compete agreement by filing complaint with a form copy of the agreement rather than his original agreement, there was no evidence that the agreement attached to the complaint was not his and that employer's statement that it was a "true and correct copy" was false, and employee could not rely on the e-mails themselves to prove the alleged fraud); *Automated Sols. Corp. v. Paragon Data Sys., Inc.*, 756 F.3d 504 (6th Cir. 2014) (The crime-fraud exception to attorney-client privilege did not apply to inadvertently disclosed e-mails between a software developer and its attorneys, despite contention that the e-mails demonstrated an intent to obstruct justice throughout the discovery process; the e-mails did not discuss violating a current order, nor did they seek advice regarding future illegal conduct, but rather appeared to discuss the ongoing discovery litigation process, a subject undoubtedly within the purview of the attorney-client relationship.); *Vidal-Martinez v. U.S. Dep't of Homeland Sec.*, 84 F.4th 743 (7th Cir. 2023) (District court did not clearly err in determining that communications between Immigration and Customs Enforcement (ICE) attorneys and county prosecutor to allow noncitizen's criminal prosecutions in county to go forward did not fall within scope of crime-fraud exception to attorney-client privilege, and thus were not protected from disclosure pursuant to FOIA exemption authorizing withholding of inter-agency or intra-agency memorandums or letters that would not be available by law to party other than agency; ICE did not engage in criminal conspiracy by coordinating with county to allow noncitizen's criminal prosecutions to go forward, and no evidence supported noncitizen's contention that federal government intentionally misled habeas court); *Shaffer v. Am. Med. Ass'n*, 662 F.3d 439 (7th Cir. 2011) (Crime-fraud exception did not remove attorney-client privilege protection from memo prepared by employee's supervisor for the sole purpose of meeting with in-house counsel regarding the elimination of employee's position; supervisor specifically told in-house counsel that he had prepared the memo in preparation for their meeting, and no attempt was made to hide that fact during the meeting or to anyone else thereafter, employer did not attempt to use the memo to support its termination decision, and there was no evidence that in-house counsel assisted supervisor in the commission of a fraud or gave any advice to him regarding the commission of a fraud.); *Drummond Co. v. Conrad & Scherer, LLP*, 885 F.3d 1324 (11th Cir. 2018) (Crime-fraud exception to attorney work-product protection could apply, in defamation action brought by company against which attorney/partner had filed alien tort cases, relating to letters that attorney/partner wrote to a foreign government and a foreign company while the alien tort cases were pending, to attorney work product from the alien tort cases, concerning allegations of fraud on the court, witness bribery, and suborning perjury, if the attorney/partner or law firm was engaged in the crime or fraud but the client was not); *Harris v. Hyundai Motor Mfg. Alabama, LLC*, 2021 WL 1536577 (M.D. Ala. April 19, 2021) ("the crime-fraud exception does not appear to apply to employment discrimination or ordinary torts); *Harris v. Sw. Power Pool, Inc.*, 2012 WL 645908 (E.D. Ark. Feb. 28, 2012) (information in plaintiff's possession regarding 2006 FLSA compliance audit, which the parties agree was an attorney-client privileged communication, was not subject to the crime-fraud exception; if the audit were to establish that, in 2006, employer was aware that plaintiff had been mis-classified yet took no corrective action, the information would certainly be relevant to establish that employer willfully violated the FLSA by continuing to treat plaintiff as nonexempt. Nevertheless, "[t]hat the [audit] may help *prove* that a fraud occurred does not mean that it was *used* in perpetrating the fraud."); *Eastman v. Thompson*, 630 F. Supp.3d 1078 (C.D. Cal. 2022) (Crime-fraud exception to attorney-client privilege and work product doctrine did not apply to e-mails to and from President's legal advisor discussing how electoral votes affected presidential campaign's "legal options," how litigation—if successful—might overturn election results, and how to frame cases for Supreme Court, even though e-mails also discussed how litigation served other goals, like providing support to state electors trying to decertify electoral votes or persuading public to question election's integrity; although those e-mails were sufficiently related to disrupting joint session of Congress to prevent it from counting electoral college votes, on balance, court could not conclusively determine that these e-mails furthered obstruction of January 6 proceedings); *Liberte v. Reid*, 2024 WL 22781 (E.D. N.Y. Jan. 2, 2024) (communications between NBCU in-house lawyers and NBCU employees, for the purpose of giving legal advice regarding social media posts by defendant NBCU media personality giving rise to the litigation, including a response to plaintiff's threat of litigation, was privileged; the crime-fraud exception did not apply because there was no evidence to support the conclusion that the communications or work product was intended to facilitate or conceal a scheme to spoliate evidence); *Alaska Interstate Constr., LLC v. Pac. Diversified Invs., Inc.,* 279 P.3d 1156 (Alaska 2012) (Former manager of LLC failed to make out a prima facie case against LLC for abuse of process based on LLC's reporting of manager's alleged criminal activity, and thus, superior court did not abuse its discretion by refusing to permit discovery of LLC's privileged communications under exception to attorney-client privilege for use of attorney's services to commit fraud; manager did not cite any evidence in the record supporting its assertion that LLC wrongfully reported

plaintiffs who are ERISA plan participants may be able to discover otherwise privileged communications between plan fiduciaries and their attorneys that relate to plan administration.[215]

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evidence of what it believed to be criminal activity); *In re 2015-2016 Jefferson Cnty. Grand Jury*, 410 P.3d 53 (Colo. 2018) (a party seeking to invoke the crime-fraud exception to the attorney-client privilege must make a threshold showing of facts adequate to support a good faith belief by a reasonable person that wrongful conduct sufficient to invoke the exception has occurred, and if this initial, minimal showing is made, the trial court may, at its discretion, order the production of documents for in camera review; second, to ultimately decide that a document in question should be stripped of privilege, a higher burden must be met, i.e., the party seeking to defeat the privilege must demonstrate probable cause to believe that a crime or fraud was being attempted or committed and the communication was made in furtherance of the crime or fraud); *Konchar v. Pins*, 989 N.W.2d 150 (Iowa 2023) (Trial court acted within its discretion in refusing to conduct in camera review of attorney-client emails as potentially discoverable under crime-fraud exception to attorney-client privilege, where plaintiff failed to make any initial showing that any privileged communications were made in furtherance of a crime or fraud by defendants, in defamation action arising from termination of plaintiff's employment as principal of Catholic school followed by publication of press release and an email to school and parish community about plaintiff); *Bd. of Overseers of Bar v. Warren*, 34 A.3d 1103 (Me. 2011) (Crime-fraud exception to the attorney-client privilege that existed between law firm and its former general counsel did not apply to defeat the privilege, which firm asserted protected from disclosure to Bar Counsel firm documents that Bar Counsel sought concerning former general counsel's investigation of firm's former partner for misconduct, as the firm was not planning or engaged in any fraudulent activity at the time it enlisted former general counsel's help in the investigation, and the firm did not intend to facilitate or conceal any fraudulent or criminal conduct in the communications with former general counsel); *Seibel v. Eighth Judicial Dist. Court*, 520 P.3d 350 (Nev. 2022) (A two-part test is used to determine whether the crime-fraud exception to the attorney-client privilege should apply, under which the party seeking to invoke the exception must prove by a preponderance of the evidence, first, that the client was engaged in or planning a criminal or fraudulent scheme when it sought the advice of counsel to further the scheme, and, second, that the attorney-client communications for which production is sought are sufficiently related to and were made in furtherance of the intended, or present, continuing illegality); *At. Anesthesia, P.A. v. Lehrer*, 347 A.3d 1043 (N.H. 2025)(crime fraud exception did not apply to breach of fiduciary duty or tortious interference claims; evidence suggested that defendant physicians engaged counsel to navigate a complicated legal landscape regarding physician contracts); *In re AEP Tex. Cent. Co.*, 128 S.W.3d 687 (Tex. App.—San Antonio 2003) (legal memo prepared by attorney, outlining potential claims between company and property owner that was involved in dispute, was protected by attorney-client and work product privileges, where attorney testified that memo contained his opinions and legal theories with regard to dispute, was prepared in anticipation of litigation, and then memo was transferred to counsel who represented company in the subsequent trespass action, such counsel testified that memo was not intentionally produced and he considered the document privileged, and no evidence supported claim that crime/fraud exception applied).

[215] *Solis v. Food Empl'rs Labor Relations Ass'n*, 644 F.3d 221 (4th Cir. 2011) (Fiduciary exception to attorney-client privilege that extended to communications between ERISA trustee and plan attorney regarding plan administration applied to DOL compliance investigation under ERISA just as it did in enforcement action, since Secretary's investigative role was directly related to her enforcement powers, interests that Secretary sought to protect in enforcement action did not differ from those protected in investigation, and potential for public disclosure in investigation context did not harm beneficiary interests any more than in enforcement context.); *Stephan v. Unum Life Ins. Co. of Am.*, 697 F.3d 917 (9th Cir. 2012) (Internal memo between ERISA plan administrator's claims analyst and its in-house counsel regarding whether to include beneficiary's bonus in his pre-disability earnings were discoverable under fiduciary exception to attorney-client privilege in beneficiary's action alleging breach of long-term disability insurance plan, since communications did not address any potential civil or criminal liability that administrator might face and there was no indication that they were prepared with such liability in mind.); *Harvey v. Standard Ins. Co.*, 275 F.R.D. 629 (N.D. Ala. 2011) (communications between attorney and an ERISA plan administrator that solely concern ERISA plan administration are an exception to the general shield of attorney-client privilege); *Allen v. Honeywell Ret. Earnings Plan*, 698 F. Supp. 2d 1197 (D. Ariz. 2010) (fiduciary exception applies to an attorney's advice to an ERISA trustee on matters of plan administration and where the advice does not implicate the trustee in any personal capacity; where the plan fiduciary retains counsel to defend itself against the plan beneficiaries the exception does not apply); *Sizemore v. Pacific Gas & Elec. Ret. Plan*, 952 F. Supp. 2d 894 (N.D. Cal. 2013) (Fiduciary exception to attorney-client privilege applied to two e-mails sent between employer and its counsel in relation to

E. Attorney-Client Privilege and Former Employees of the Organization.

Upjohn left open the question of whether communications between counsel and a company's former employees are included within the scope of the corporation's privilege.[216] Most courts extends the privilege to communications with former employees where the communication relates to the former employee's conduct and knowledge gained during employment and is relevant and necessary for the attorney to provide legal advice to the employer.[217] Some courts hold that the privilege that might otherwise apply may not protect communications on behalf of the corporation with corporate employees who later become adverse to the corporation.[218] This situation may also

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employee's seeking of pension benefits pursuant to ERISA under his employer's plan, where the e-mails were sent during the appeals process for employee's claims, and employer's interests were not yet adverse such that the exception no longer applied); *In re Estate of William K. McAleer*, 248 A.3d 416 (Pa. 2021) (when an ERISA fiduciary seeks legal advice in fulfillment of fiduciary responsibilities, plan beneficiaries are entitled to see an attorney's communications with the fiduciary, who serves as their representative); *Wal-Mart Stores, Inc. v. Indiana Elec. Workers Pension Trust Fund IBEW*, 95 A.3d 1264 (Del. 2014) (Production of documentary information protected by attorney-client privilege was warranted in shareholder's action seeking production of corporate records regarding bribery scandal involving Mexican subsidiary pursuant to the fiduciary exception to the attorney-client privilege; the privileged information was necessary and essential to shareholder's investigation into the corporation's handling of the scandal, and shareholder demonstrated good cause in that shareholder sought specific documents, the material did not risk the revelation of trade secrets, and the shareholder's allegations implicated criminal conduct). *Cf. Wachtel v. Health Net, Inc.*, 482 F.3d 225 (3d Cir. 2007) (Fiduciary exception to the attorney-client discovery privilege did not apply to ERISA fiduciary and its corporate parents in beneficiaries' suit to recover benefits and to redress alleged violations of fiduciary duties and failure to supply information to beneficiaries; beneficiaries were not the "real" clients obtaining legal representation from the fiduciary's counsel.).

[216] *Upjohn*, 499 U.S. at 395 n.3.

[217] *See, e.g.*, *In re Allen*, 106 F.3d 582 (4th Cir. 1997) (*Upjohn* analysis applies equally to former employees); *In re Coordinated Pretrial Proceedings in Petrol. Prods. Antitrust Litig.*, 658 F.2d 1355, 1361 n.7 (9th Cir. 1981) ("Former employees, as well as current employees, may possess the relevant information needed by corporate counsel to advise the client with respect to actual or potential difficulties, [and thus] the attorney-client privilege is served by the certainty that conversations between the attorney and client will remain privileged after the employee leaves."); *Peralta v. Cendant Corp.*, 190 F.R.D. 38 (D. Conn. 1999) (predeposition communications between former employee of defendant corporation–who was plaintiff's former immediate supervisor and allegedly the decision-maker with regard to plaintiff's discrimination claims–were protected by the attorney-client privilege insofar as their nature and purpose were to learn facts related to plaintiff's termination); *Cool v. BorgWarner Diversified Transmission Prods., Inc.*, 2003 WL 23009017 (S.D. Ind. Oct. 29, 2003) (where person with critical knowledge of the relevant facts is no longer employed by the corporation, and to represent his/her client effectively the corporation's counsel must seek information from the former employee, such communications are protected by the privilege); *Hanover Ins. Co. v. Plaquemines Par. Gov't*, 304 F.R.D. 494 (E.D. La. 2015) (conversations between former employees of corporation and corporate counsel before depositions in insurer's action to recover payments allegedly owed by parish to insured contractor for construction of community center were protected under attorney-client privilege; both former employees were employed with their respective former employers during the construction of the community center, not only did they both have knowledge of the construction project, but they were among the most important individuals associated with the project, and both spoke with corporate attorneys to enable attorneys to defend against litigation); *McGowan v. Southern Methodist Univ.*, 2023 WL 2920848 (N.D. Tex. April 11, 2023) (Attorney-client privilege protects conversations between corporate counsel and former employees (1) if the communication relates to knowledge obtained or conduct that occurred during the course of the former employee's employment; or (2) if the communication concerns conversations which were themselves privileged and which occurred during the employment relationship.); *Hairston v. Royal Bldg. Prods., Inc.*, 2019 WL 1546962 (W.D. Va. Apr. 9, 2019) (discussions between defense counsel and two former managerial employees of defendant in deposition preparation meetings protected by privilege; "it is settled law in this circuit that the attorney-client privilege held by a corporation extends to communications made by former employees to company counsel.").

[218] *See Amatuzio v. Gandalf Sys. Corp.*, 932 F. Supp. 113 (D. N.J. 1996) (communications with corporate employer's attorney made by, to, or in presence of non-attorney employee who later becomes adverse to employer not protected

arise in the case of post-termination communications with an unrepresented former employee for deposition by opposing counsel, and/or such attorney's communications during the deposition about her testimony in that deposition.[219] Some jurisdictions categorically refuse to extend the privilege to communications with former employees.[220] And at least two courts have held that the privilege can extend to communications with company employees before their employment began.[221]

by New Jersey ethics rules or attorney-client privilege if: litigation involves allegation by employee against corporation relating to duties owed by corporation to employee, and former employee was not responsible for managing litigation or making corporate decision that led to litigation to which the communications relate). *Compare Peralta v. Cendant Corp.*, 190 F.R.D. 38 (D. Conn. 1999) (any privileged information obtained by former employee during her employment with employer, including information conveyed by employer's counsel during that period, remained privileged upon termination of her employment).

[219] *See Peralta v. Cendant Corp.*, 190 F.R.D. 38, 41-42 (D. Conn. 1999) (no privilege applies to any communications between employer's counsel and a former employee whom counsel does not represent).

[220] *See Newman v. Highland Sch. Dist. No. 203*, 381 P.3d 1188 (Wash. 2016) (Attorney-client privilege did not extend to postemployment communications between corporate counsel for school district and former employees, and thus, school district was not entitled to a protective order to shield communications between counsel and former employees in connection with negligence action filed by parents and student-athlete against school district after student suffered a brain injury during a football game; former employees no longer owed duties of loyalty, obedience, and confidentiality to employer); *Infosys., Inc. v. Ceridian Corp.*, 197 F.R.D. 303 (E.D. Mich. 2000) ("[C]ounsel's communications with a former employee of the corporation generally should be treated no differently from communications with any other third-party fact witness."). *Compare Pallies v. Boeing Co.*, 2017 WL 3895614 (W.D. Wash. Sept. 6, 2017) (defendant should not be compelled to allow deposition questions about group deposition preparation meetings with defense witnesses that included current and former employees of defendant where there was an attorney client relationship between defense counsel and former and current employees and counsel signed declaration stating that she represented each employee/former employee to prepare them for deposition and thus the privilege extended to them to the extent necessary to give them legal advice); *Pike v. Cnty of San Bernadino*, 2019 WL 4390571 (C.D. Cal. Feb. 21, 2019) (no privilege for deposition preparation of non-defendant County employees where no indication that employees sought out legal advice of or sought to be represented by County's counsel).

[221] *See Vagnani v. Medlogix, LLC*, 2020 WL 5634349 (D. Mass. Sept. 21, 2020) (*Upjohn* extends to communications to corporate employees before their employment began if the other elements of privilege are otherwise satisfied); *Baxter Travenol Labs, Inc. v. Lemay*, 89 F.R.D. 410 (S.D. Ohio 1981) (same).

IV. EX PARTE COMMUNICATIONS.

In representing a client, a lawyer may not communicate about the subject matter of the representation with a party the lawyer knows is represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.[222] This rule is intended to preserve the integrity of the attorney-client relationship by protecting the party from the superior legal knowledge and skill of the opposing attorney. An attorney cannot circumvent this rule by communications indirectly through a non-attorney. Moreover, the represented person may not waive the prohibition by consenting to the contact or by initiating contact with the opposing lawyer.[223]

The rule covers not only parties to litigation, but any person who has retained counsel in a matter and whose interests are potentially distinct from those of the client on whose behalf the communicating lawyer is acting, including witnesses who have hired counsel in the matter.[224] However, in most jurisdictions, it must be shown that the attorney "knows"[225] that the corporation

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[222] ABA MODEL RULE 4.2; ABA MODE CODE DR 7-107 and EC 7-18. *See* S.C. Ethics Op. 24-01 (2024) (lawyer representing prospective buyer in real transaction cannot send letter to owner of the subject proper's address listed with the tax office in an attempt to put them on notice that a closing is taking place, when the purported seller is known to be represented by counsel, who does not consent to such contact). *Cf.* Cal. Ethics Op. 2011-181 (2011) (consent to ex parte contact may be implied by the facts and circumstances surrounding the communication with the represented party including: whether the communication is in the presence of the other attorney; prior course of conduct; the nature of the matter; how the communication is initiated and by whom; the formality of the communication; the extent to which the communication might interfere with the attorney-client relationship; whether a common interest or joint defense privilege exists between the parties; whether the other attorney has reasonable opportunity to counsel the party contemporaneously or immediately following the communication; and the instructions of the represented party's attorney); N.Y Ethics Op. 1125 (lawyer not required to communicate with an individual who is neither a client nor a party to a document drafted by the lawyer in the matter.); Neb. Ethics Op. 25-01 (2025) (When County employes its chief administrative officer (CAO) to represent the County in civil legal matters and an employee obtains advice on a matter from the CAO, the CAO's consent or declination of consent has no effect on the employee's communications with the County Attorney on the matter, as those communications are authorized by law).

[223] ABA Formal Ethics Op. 95-396 (1995); *Parker v. Pepsi-Cola Gen. Bottlers, Inc.*, 249 F. Supp. 2d 1006 (N.D. Ill. 2003). *See also* N.Y.C. Ethics Op. 2009-1 (2009) (The no-contact rule prohibits a lawyer from sending a letter or email directly to a represented person and simultaneously to her counsel, without first obtaining "prior consent" to the direct communication or unless otherwise authorized by law.).

[224] ABA Formal Ethics Op. 95-396 (1995). *Cf.* Tex. Ethics Op. 671 (2018) (lawyer may not anonymously contact an anonymous online individual to obtain jurisdictional or identifying information sufficient for obtaining a deposition of the individual in contemplation of a lawsuit).

[225] *See* ABA MODEL RULE 4.2, cmt. 7 (rule requires actual knowledge, which may be inferred from the circumstances; however, lawyer has no affirmative duty to inquire). *Accord*: ABA Formal Ethics Op. 472 (2015) (same); ABA Formal Ethics Op. 95-396 (1995) (same); Alaska Ethics Op. 2006-1 (2006); *Gaylard v. Homemakers of Montgomery, Inc.*, 675 So.2d 363 (Ala. 1996); *Koo v. Rubio's Rests., Inc.*, 109 Cal. App. 4th 719 (2003) (ex parte rules are a bar to contact only if the lawyer seeking contact actually knows of the representation); *Snider v. Super. Ct.*, 113 Cal. App. 4th 1187 (2003). *See also* Cal. Ethics Op. 1996-145 (1996) (if attorney does not have reason to know whether party represented attorney not required to inquire whether party represented; knowledge must be either actual or imputed based on objective standard); Fla. Ethics Op. 94-4 (1995) (opposing counsel may communicate with a pro se litigant concerning that litigation even though an attorney is representing the individual in a related matter; however, opposing counsel may not communicate with the individual about the subject matter of the attorney's representation without the attorney's consent); *In re Woodham*, 769 S.E.2d 353 (Ga. 2015) (Attorney's conduct in contacting developers without consent of their bond counsel to discuss settlement of intervention complaints in bond validation proceedings did not violate rule of professional conduct prohibiting attorney from contacting a represented party unless authorized to do so; attorney first attempted to make contact with developers' in-house counsel, attorney discontinued communications when he learned that developers had no such counsel, attorney declined to discuss anything of

or person is a "party represented by counsel"[226] in the matter at the time the contact is made.[227] Some courts have not been so limited in application of the rule.[228] The text of Rule 4.2 of the ABA Model Rules was amended to substitute the word "person" for "party" to negate the idea that the rule applies only in pending litigation.[229] The rule also requires that the subject matter of the representation be defined and reasonably specific, such that the contacting lawyer can be placed on notice of the subject matter. Thus, the fact that the corporation has an ongoing relationship with an outside law firm in which the firm represents the corporation in "all" legal matters that might

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substance with CEO without presence of lawyer for developers, and developers' litigation counsel represented CEO in further discussions, even though she did not enter an appearance in the underlying bond matter.); *Humco, Inc. v. Noble*, 31 S.W.3d 916 (Ky. 2000) (letter from hospital administrator to attorney for former employee responding to attorney's demand letter, which was copied to hospital's in-house counsel, did not clearly indicate that in-house counsel was representing hospital with regard to potential employment discrimination lawsuit and thus subsequent contact by former employee's attorney with current hospital employees did not violate ex parte contact rule: "Individuals often copy 'their attorney' on letters, but that fact alone does not establish that the attorney is representing the letter-writer, nor does this record reveal any such representation."); *K-Mart Corp. v. Helton*, 894 S.W.2d 630 (Ky. 1995) (although defendant a large national chain of retail stores, it did nothing to indicate to the plaintiff's counsel that its managerial employee was represented by counsel; employee, under orders from his supervisor, contacted the plaintiff to "smooth over" the situation and, after being told plaintiff was represented by counsel, voluntarily met with counsel and gave a statement concerning events at the store); *In re Users Sys. Servs., Inc.*, 22 S.W.3d 331(Tex. 1999) (attorney may speak with an opponent who states his attorney has been discharged; Rule 4.02 does not require attorney to contact a person's former attorney to confirm the person's statement that representation has been terminated before communicating with the person); *Featherstone v. Schaerrer*, 34 P.3d 194 (Utah 2001) (Utah ex parte communication rule requires actual knowledge, but allows a tribunal to infer knowledge from the circumstances).

[226] *Johnson v. Cadillac Plastic Grp.,* 930 F. Supp. 1437 (D. Colo. 1996) (corporation not a "party" at time employee's former attorney interviewed management employee since matter was at a pre-filing, informal investigatory stage and not clear at time of interview that litigation would in fact be commenced); *Jorgensen v. Taco Bell Corp.*, 50 Cal. App. 4th 1398 (1996) (former employee's counsel did not violate ex parte communications rule by retaining investigator to interview former employer's employees prior to filing suit); N.Y. Ethics Op. 785 (2005) (an attorney representing a plaintiff in a personal injury action may engage in settlement discussions with a non-attorney insurance company claims adjuster over the objection of the attorney assigned by the insurance company to represent the defendant-policyholder with respect to the claim, if: (1) the insurer is not represented by separate counsel with respect to the matter; and (2) the plaintiff's attorney does not deliberately elicit information protected from disclosure by the attorney-client privilege or work product doctrine). *Cf. In re Charges of Unprofessional Conduct in Panel File No. 41755*, 912 N.W.2d 224 (Minn. 2018) (Attorney had ongoing attorney-client relationship with his client in defamation action and acted in furtherance of that representation when speaking with client's co-defendant regarding settlement proposal, and thus, attorney was representing a client during the conversation with co-defendant, as required to find that attorney violated the no-contact rule by communicating with represented party; attorney had not filed notice of withdrawal with court, attorney had not completed his representation of client because there was no written settlement agreement submitted to the court, and attorney spoke with co-defendant, who was client's brother, at client's request).

[227] *See Univ. of Louisville v. Shake*, 5 S.W.3d 107 (Ky. 1999) (university failed to show it would be irreparably harmed by trial court's refusal to disqualify former university employee's attorney and his firm from employment discrimination case against university or to suppress any information obtained as a result of attorney's conversation with another former university employee at a party, and thus, university was not entitled to mandamus relief, given that former employee did not reveal any confidential or privileged information to attorney). *Compare* Ill. Ethics Op. 18-03 (2018) (Rule 4.2 does not bar lawyer from communicating with prospective client about a potential matter even though the prospective client is currently represented by another lawyer in connection with that same matter).

[228] *See Stahl v. Wal-Mart Stores, Inc.*, 47 F. Supp. 2d 783 (S.D. Miss. 1998) (under Mississippi law, proscriptions against ex parte communications have force even before actual litigation is commenced); *Miano v. AC&R Advert., Inc.*, 148 F.R.D. 68 (S.D. N.Y.), *adopted and approved*, 834 F. Supp. 632 (S.D. N.Y. 1993); *White v. Illinois Cent. R.R. Co.*, 162 F.R.D. 118 (S.D. Miss. 1995) (pre-suit interview of defendant's foreman by plaintiff's attorney's investigator without permission of defendant's attorney a violation of Rule 4.2 and hence improper).

[229] *Penda Corp. v. STK, LLC*, 2004 WL 1628907 (E.D. Pa. July 16, 2004) (applies to pre-complaint contacts); *Stahl v. Wal-Mart Stores, Inc.*, 47 F. Supp. 2d 783 (S.D. Miss. 1998) (some states retain the pre-1995 reference to "party.").

arise, without more, does not trigger the rule with respect to any new matters because the contacting lawyer has no reason to know that the corporation has consulted the firm with respect to the new matter. A similar analysis applies to in-house general counsel, who represents the corporation for all purposes. Thus, the mere existence of a general counsel for the corporation, without any particular involvement in the matter at issue, is insufficient to render the corporation "represented" for purposes of the ex parte rules.[230] Finally, a lawyer does not avoid the rule by sending communications to a party and simultaneously copying the party's lawyer.[231]

A. Former Employees.

The majority of jurisdictions permit ex parte communications with unrepresented former employees of a represented corporate party.[232] A few jurisdictions prohibit ex parte contact with

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[230] *See Stahl v. Wal-Mart Stores, Inc.*, 47 F. Supp. 2d 783 (S.D. Miss. 1998); *Humco, Inc. v. Noble*, 31 S.W.3d 916, 919 (Ky. 2000); *K-Mart Corp. v. Helton*, 894 S.W.2d 630 (Ky. 1995); ABA Formal Ethics Op. 95-396 (1995); *Jorgensen v. Taco Bell Corp.*, 50 Cal. App. 4th 1398 (1996) (that counsel knew potential defendant had in-house counsel insufficient to trigger the no-contact rule); N.Y. Ethics Op. 768 (2003) (mere fact that a lawyer knows that a corporation has an in-house legal staff does not necessarily mean that a lawyer "knows" that a member of that staff is representing the corporation in that matter.); Wis. Ethics Op. E-07-01 (2007) (the mere fact that an organization has in-house counsel does not render the organization automatically represented with respect to all matters).

[231] Fla. Ethics Op. 76-21 (1977) (lawyer who suspects opposing counsel's lawyer is not receiving settlement offers and other vital information may not transmit such information directly to the adverse party); N.Y.C. Ethics Op. 2009-1 (2009) (The no-contact rule prohibits a lawyer from sending a letter or email directly to a represented person and simultaneously to her counsel, without first obtaining "prior consent" to the direct communication or unless otherwise authorized by law. Prior consent to the communication means actual consent, and preferably, though not necessarily, express consent; while consent may be inferred from the conduct or acquiescence of the represented person's lawyer, a lawyer communicating with a represented person without securing the other lawyer's express consent runs the risk of violating the no-contact rule if the other lawyer has not manifested consent to the communication.); N.C. 2012 Formal Ethics Op. 7 (2013) (lawyer must have express consent of a represented person's lawyer before copying the represented person on an email communication.); S.C. Ethics Op. 18-04 (2018) (absent consent of opposing counsel, lawyer may not communicate with lawyer's client about the subject of representation directly or by copying lawyer's client in an email sent in response to opposing lawyer's email on which his client was copied; the mere fact that a lawyer copies his own client on an email does not, without more, constitute implied consent to a "reply to all" responsive email); Ky. Ethics Op. KBA E-442 (2017) (same). *Cf. In re Wollrab*, 420 P.3d 960 (Colo. 2018) (attorney did not violate ex parte communication rule by communicating with client about option to purchase client's business property, including drafting of the option for client's signature in absence of counsel who was representing client in the transaction; counsel had implicitly consented to attorney and client's continued communications about the transaction by never limiting such communications and by failing to respond or object to attorney's actions when attorney e-mailed and faxed signed option agreement to him, despite knowing that attorney and client frequently spoke and worked together.). *Cf.* Md. Ethics Op. 2017-02 (2017) (general guidance on Rule 4.2).

[232] ABA MODEL RULE 4.2, cmt.7 (Consent of the organization's lawyer is not required for communications with a former constituent). *See also Sequa Corp. v. Lititech, Inc.*, 807 F. Supp. 653, 659-60 (D. Colo. 1992); *EEOC v. Dana Corp.*, 202 F. Supp. 2d 827 (N.D. Ind. 2002) (employer did not show any reason why ex parte communications by EEOC with former managerial employee would reveal confidential, classified or privileged information and thus, such communications did not violate ex parte communication rules); *Terra Int'l, Inc. v. Miss. Chem. Corp.*, 913 F. Supp. 1306 (N.D. Iowa 1996); *Aiken v. Bus. & Indus. Health Grp., Inc.*, 885 F. Supp. 1474 (D. Kan. 1995); *Jenkins v. Wal-Mart Stores, Inc.*, 956 F. Supp. 695 (W.D. La. 1997) (counsel may interview former employee of opposing party so long as they do not discuss information protected by the attorney-client privilege); *Collier v. Ram Partners, Inc.*, 159 F. Supp. 2d 889 (D. Md. 2001) (counsel for Title VII plaintiff did not violate professional conduct rule by obtaining affidavit from former plant manager without prior consent of employer or its counsel; employee in question had not been privy to confidential information that might be disclosed following unauthorized contact); *Frank v. L.L. Bean, Inc.*, 377 F. Supp. 2d 233 (D. Me. 2005) (in sexual harassment suit, plaintiff and her counsel did not violate ex parte communication rule by interviewing a former employee of employer who was plaintiff's former supervisor and who plaintiff alleges failed to take reasonable steps to address his supervisor's harassment of plaintiff; ex parte

communication rule does not bar contacts with unrepresented former employees of defendant employer); *Smith v. Kalamazoo Ophthalmology*, 322 F. Supp. 2d 883 (W.D. Mich. 2004) (plaintiff counsel's ex parte contacts with unrepresented former employees of defendant did not violate Michigan's ethical proscription against communications with person represented by counsel, since former employee had no agency relationship with defendant at the time and her interests were even adverse to defendant's; however, attorney may not inquire into areas subject to the attorney-client privilege or work product doctrine); *FleetBoston Robertson Stephens, Inc. v. Innovex, Inc.*, 172 F. Supp. 2d 1190 (D. Minn. 2001) (plaintiff's attorney did not violate ex parte contacts rule by contacting unrepresented former executive of corporate defendant, where attorney at no point solicited any privileged information and no privileged information was related); Mo. Informal Ethics Op. 2020-10 (2020) (former employees of a represented corporation may be contacted ex parte); *United States v. W.R. Grace*, 401 F. Supp. 2d 1065 (D. Mont. 2005) (the government does not violate ethical standards of the Court by initiating ex parte contact with former employees of defendant corporation); *Johnson v. Ohio Dep't of Youth Servs.*, 231 F. Supp. 2d 690 (N.D. Ohio 2002) (affidavit of disability retiree from department of youth services was not procured in violation of ex parte communication rules; affiant was not on leave of absence despite retained reinstatement rights, and even if affiant's continuing relationship with department was such that he could not be viewed as a current employee, ex parte contact with him was not prohibited insofar as he had no authority to bind department or settle litigable matter and his act or omission did not give rise thereto); *Goodeagle v. United States*, 2010 WL 3081520 (W.D. Okla. Aug. 6, 2010) (ex parte communication rule limited to employees who are currently employed by the represented organization); *Ex Parte Terminix Intern'l Co.*, 325 So.3d 800 (Ala. 2020) ((Law firm's use of former office manager for pest-control company as an investigator and consultant in relation to arbitration proceedings in which law firm represented condominium owners on their termite-damage claims against pest-control company did not violate rule of professional conduct prohibiting a lawyer from communicating directly with those known to be represented by counsel in a matter; as to organizations, rule only applied to current employees, former office manager initiated his communication had eventual relationship with law firm after termination of his employment with pest-control company, and former office manager had never been personally served in actions initiated by law firm while office manager was employed by pest-control company.); Ala. Ethics Op. 92-12 (1992) (may contact former employees of represented company unless contact is intended to deal with privilege matter); Alaska Ethics Op. 91-1 (1991) (former employees can no longer bind corporation, so ex parte communications do not violate rule against communications with adverse party); Ark. Ethics Op. 2004-01 (2004) (an attorney is permitted to communicate in regard to the subject matter of representation with former corporate employees without seeking or obtaining the consent of the corporate attorney); Cal. R. Prof'l Conduct Rule 4.2 (prohibition does not extend to former constitutes of represented private or governmental entity); D.C. Ethics Op. 287 (1999) (lawyer may contact unrepresented former employee of corporation without consent of the corporation's lawyer; before any substantive communication, the lawyer must disclose to former employee the lawyer's identity and fact that he/she represents interests adverse to the employee's former employer; during the communication, the lawyer cannot attempt to solicit privileged information of the corporation); Fla. Ethics Op. 88-14 (1988) (lawyer can contact former employees who have not maintained any ties to corporation); *H.B.A. Mgmt., Inc. v. Estate of Schwartz*, 693 So.2d 541 (Fla. 1997) (lawyer not prohibited from communicating ex parte with corporate adversary's former employees); Ga. FAO 20-1 (2022) (a lawyer may communicate with a former employee of an organization that is represented by counsel without obtaining that counsel's consent, provided that the lawyer fully discloses to the former employee, before initiating the communication, the following information: (1) the identity of the lawyer's client and the nature of that client's interest in relation to the organization (i.e., the former employer); and (2) the reason for the communication and the essence of the information sought); Ill. Ethics Op. 09-01 (2009) (consent of organization's lawyer not required for communications with former corporate constituents about the subject matter of representation; however, if the constituent has his/her own counsel, that counsel must give consent to the communication); *Humco, Inc. v. Noble*, 31 S.W.3d 916 (Ky. 2000) (former employee with no present relationship with the organizational party is not a "party" for purpose of ex parte communication rules); Ky. Ethics Op. KBA E-381 (1995) (ex parte communications with unrepresented former employees of the organizational party is not a violation of Rule 4.2); *Clark v. Beverly Health and Rehab. Servs., Inc.*, 797 N.E.2d 905 (Mass. 2003) ("no contact" rule neither prohibits, nor purports to regulate, private contacts between an adverse attorney and an organization's former employees); Mass. Ethics Op. 02-3 (2002) (as a general rule, the anti-contact prohibition of Rule 4.2 does not apply to former employees of a corporation; anti-contact rule would apply if former employee is represented by counsel for his former corporate employer, or where the former employee is so exposed to confidential information of the corporation that contact with the employee should only be made through corporate counsel); Miss. Ethics Op. 215 (1994) (in representing a client a lawyer may ethically communicate, ex parte, with an unrepresented individual that was formerly employed by a represented party; however, the attorney has an affirmative duty to clear up any misunderstanding by the unrepresented

former employees whose acts or omissions may be imputed to the corporation in the matter, or those who had access to corporate confidences.[233] Contact with former employees that are conducted to obtain the represented company's confidential information, or which entail high risk that such information will be disclosed are prohibited.[234]

party about the lawyer's role); N.M. Ethics Op. 2015-01 (2015) (lawyer may communicate directly with former constituents of an organization; only communication with current constituents is prohibited by the Rules); *Muriel Siebert & Co. v. Intuit Inc.*, 8 N.Y.3d 506, 868 N.E.2d 208, 836 N.Y.S.2d 527 (2007) (disqualification of defendant's attorneys was not warranted by their ex parte interview with plaintiff's former chief operating officer (COO), merely because COO was at one time privy to plaintiff's privileged and confidential information; so long as measures are taken to steer clear of privileged or confidential information, adversary counsel may conduct ex parte interviews of an opposing party's former employee); Ohio Ethics Op. 96-1 (1996) (attorney permitted ex parte communication with former employee of corporation so long as attorney notifies the former employee that (1) litigation was pending, (2) their participation in the interview was voluntary, (3) that their former employer was represented by counsel, (4) that such counsel could be contacted for further information, (5) that the employee may be represented by his or her own counsel, and (6) that the employee may not reveal any attorney-client communications); S.C. Ethics Op. 01-01 (2001) (attorney may contact former employees of corporation so long as former employee is not represented by counsel and attorney fully discloses the nature of the matter and the purpose of the contact; attorney must be careful not to elicit privileged or confidential information of corporation); R.I. Ethics Op. 2012-02 (attorney representing plaintiff in a lawsuit against a corporation may communicate ex parte with a former employee of the corporation without the consent of the opposing counsel); S.D. Ethics Op. 2022-07 (2022) (lawyer representing a client suing the client's former entity employer and a lawyer represents the entity, the lawyer may contact another former employee of the entity-employer about the lawsuit without the consent of the entity-employer's attorney; subject to exceptions such as the possibility that the former employee possesses privileged information or has obtained representation from the entity-employer's attorney); Tex. DRPC 4.02 (former employees of the corporation not within scope of ex parte communication prohibition, even if former employee was a manager or supervisor or a person whose act or omission is the basis for the claimed liability against the corporation); Utah Ethics Op. 15-04 (2015) (lawyer may contact former employee who had been within control group of an adverse party, but may not communicate about any matters covered by the attorney-client privilege. Lawyer may only communicate about former employee's observations that were not communicated to corporate counsel, and may not ask about any communication with corporate counsel or discuss any work product that resulted from those communications); Utah Ethics Op. 04-04 (2004) (lawyer's ex parte contact with former employees of a represented corporate defendant is not barred unless at the time of the contact the former employee has returned to the company's payroll or has been specifically retained for compensation by the organization to participate as principal decision maker for a particular matter); *Wright v. Grp. Health Hosp.*, 691 P.2d 564 (Wash. 1984) (no-communication rule is not to protect corporate party from revelation of prejudicial facts, but rather to preclude interviewing employees who have authority to bind the corporate party); Wis. Ethics Op. E-07-01 (2007) (consent of the organization's lawyer is not required for contact with a former constituent of the organization, regardless of the constituent's former position); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 162 (Proposed Official Draft 1998) (rule prohibits all contact with former employees who have communicated with corporation's counsel).

[233] *See, e.g.*, *Brown v. Oregon Dep't of Corr.*, 173 F.R.D. 265 (D. Or. 1997) (lawyer for plaintiff in discrimination suit against state agency barred by Rule 4.2 from conducting ex parte interviews of management-level employees and current employees whose conduct is at issue; lawyer may conduct ex parte interview of current non-management employees, those employees whose conduct is not at issue, and all former or transferred employees); Or. Ethics Op. 2005-152 (2005) (same); *Lang v. Super. Ct.*, 826 P.2d 1228, 1234-35 (Ariz. App. 1992) (attorney prohibited from contacting former employee of corporate party represented by counsel if: (a) the acts or omissions of the former employee gave rise to the underlying litigation; or (b) the former employee has an ongoing relationship with the employer in connection with the litigation); Ariz. Ethics Op. 00-05 (2000) (following *Lang*); *Zachair, Ltd. v. Driggs*, 965 F. Supp. 741 (D. Md. 1997) (Rule 4.2 applies to ex parte contacts with certain former employees of represented party), *aff'd*, 141 F.3d 1162 (4th Cir. 1998). *Cf. Collier v. Ram Partners, Inc.*, 159 F. Supp. 2d 889 (D. Md. 2001) (counsel for employee did not violate rules by obtaining affidavit from former plant manager ex parte; manager in question had not been privy to confidential information that might be disclosed following unauthorized contact).

[234] *Rentclub, Inc. v. Transamerica Rental Fin. Corp.*, 811 F. Supp. 651 (M.D. Fla. 1992), *aff'd*, 43 F.3d 1439 (11th Cir. 1995) (firm that hired former employee possessing privileged information as "trial consultant" was disqualified);

B. Current Employees.

A few jurisdictions impose a blanket prohibition on contact with current managerial employees of the organization.[235] However, the ABA and the majority of jurisdictions prohibit ex parte communications only with current employees that have managerial responsibility with the organization that relates to the subject matter of the representation, or employees whose act or omission in connection with the subject matter of the representation may make the organization or government entity vicariously liable for such act or omission.[236] Moreover, a "blanket" assertion

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Camden v. Maryland, 910 F. Supp. 1115 (D. Md. 1996) (ex parte rule covers former affirmative action specialist of defendant who had initially investigated plaintiff's claims); *G-I Holdings, Inc. v. Baron & Budd*, 199 F.R.D. 529 (S.D. N.Y. 2001) (risk of inadvertent disclosure of attorney-client privileged communications by former employees of defendant law firms who had been exposed to the communications, including a claims paralegal, word processor, and administrative assistant, supported protective order barring ex parte interviews of those employees by plaintiff's investigators; even if investigators directed to instruct employees they were not to reveal privileged materials, investigators and employees were lay people, and it was unrealistic to expect that even the best-intentioned lay person to safeguard attorney-client privilege); Alaska Ethics Op. 91-1 (1991) (attorney may not solicit privileged information); Ariz. Ethics Op. 00-05 (2000) (in interviewing a former employee of an adverse party, a lawyer must refrain from inquiring into any privileged communications the former employee may have had with employer's counsel during his or her employment); Ohio Ethics Op. 96-1 (1996) (attorney may contact former employee without notifying corporate counsel, but attorney must fully explain to former employee that he represents a client adverse to corporation and inform former employee not to divulge any corporate attorney-client communications; if former employee is represented by attorney or has asked corporation's attorney to represent him, consent of attorney must be obtained); R.I. Ethics Op. 2011-03 (2011) (lawyer representing plaintiff in a pending suit may not directly contact former employee of defendant corporation if she was represented by counsel when the lawyer deposed her); S.C. Ethics Op. 92-31 (1992) (plaintiff's attorney may not contact former employees where alleged negligence is the basis of the complaint against the corporation); Va. Ethics Op. 1749 (2001) (attorney may initiate ex parte contact with former employee of corporation, who had during the employee's employment communicated with the corporation's counsel regarding the pending litigation, so long as employee is not represented by his own counsel, and provided that the contacting attorney identify his role in the matter and refrain from asking the former employee to disclose the content of his communication with the corporation's attorney).

[235] *See Bobele v. Super. Ct.*, 199 Cal. App. 3d 708 (1998) (ex parte contact by counsel for former employees with defendant's current employees and former employees who are still members of employer's "control group" barred).

[236] ABA MODEL RULE 4.2, cmt. 7 (rule includes a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with that matter may be imputed to the organization for the purposes of civil or criminal liability, or any agent or employee of the organization who is represented in the matter by his or his own counsel). Accord: Ala. Ethics Op. 2002-03 (2002); Ark. Ethics Op. 2011-2 (2011); Ill. Ethics Op. 09-01 (2009); Tex. Ethics Op. 461 (1989); Utah Ethics Op. 15-02 (2015); Wis. Ethics Op. E-07-01 (2007). *See also NAACP v. Florida Dep't of Corr.*, 122 F. Supp. 2d 1335 (M.D. Fla. 2000) (court will allow ex parte interviews of defendant's rank and file–i.e., non "managerial" or "control group" employees–subject to safeguards against disclosure of privileged information); *Bussell v. Minix*, 926 F. Supp. 809 (N.D. Ind. 1996) (plaintiff's counsel may interview employees ex parte where statements would not bind defendant); *In re Shell Oil Refinery*, 143 F.R.D. 105 (E.D. La. 1992) (corporate employee not a "party" for Rule 4.2 purposes unless the employee has managerial responsibility, the employee's acts or omissions of the may be imputed to the corporation for liability purposes, or the employee's statements may constitute admissions on the part of the corporation); *Perry v. City of Pontiac*, 254 F.R.D. 309 (E.D. Mich. 2008) (Rank-and-file police officers were not persons represented by another lawyer, and thus discovery protective order preventing arrestees' counsel in Section 1983 excessive force lawsuit from interviewing officers about retaliation for complaints and reputation of a defendant police officer was not warranted; officers were not managerial-level employees or persons whose acts in connection with matter at issue might have been imputed to city, and interviews were unlikely to lead to statements that would have been admissions by city.); *Andrews v. Goodyear Tire & Rubber* Co., 191 F.R.D. 59 (D. N.J. 2000) (attorney for plaintiff in employment discrimination suit did not violate rules of professional conduct governing ex parte contacts when he contacted managerial employee of defendant employer, where attorney determined through questioning of employee that he was not in employer's

litigation control group or otherwise represented by counsel, and attorney identified himself as attorney for plaintiffs); *Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc.*, 144 F. Supp. 2d 1147 (D. S.D. 2001) (counsel prohibited from ex parte contact with current (1) management employees of organization, (2) those whose acts or omissions may be imputed to the organization for liability purposes, (3) those responsible for implementing the advice of the organization's attorneys, (4) any member of organization whose own interests are directly at stake in the representation, and (5) information from employees that may constitute an admission against the organization); *Cole v. Appalachian Power Co.*, 903 F. Supp. 975 (S.D. W. Va. 1995) (counsel prohibited from ex parte contact with current (1) management employees of organization, (2) those whose acts or omissions may be imputed to the organization for liability purposes, (3) those responsible for implementing the advice of the organization's attorneys, (4) any member of organization whose own interests are directly at stake in the representation, and (5) information from employees that may constitute an admission against the organization); Cal. R. Prof'l Conduct Rule 4.2 (2018) (rule prohibits communications with a current officer, director, partner or managing agent of the organization, or current employee, member, agent or other constituent if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for the purposes of criminal or civil liability); *Snider v. Super. Ct.*, 113 Cal. App. 4th 1187 (2003) (ex parte communication rule extends only to "managing agents," which is defined as employees of an organization that exercise substantial discretionary authority over significant aspects of a corporation's business; under test a sales manager and a director for production of an events and design company were not managing agents and thus not represented parties of the company and thus contact with them by attorney for former employee of company did not violate the ex parte communication rule); Ky. Ethics Op. KBA E-382 (contact with present managerial employees prohibited); *Shoney's, Inc. v. Lewis*, 875 S.W.2d 514, 515 (Ky. 1994); *Messing, Rudavsky & Weliky, P.C. v. Presidents and Fellows of Harvard Coll.*, 764 N.E.2d 825 (Mass. 2002) (law firm representing campus police sergeant was not prohibited from making ex parte contacts with two lieutenants, two patrol officers, and a dispatcher employed by the university, in sergeant's sex discrimination and retaliation action against university; the two employees were not involved in directing the litigation or authorizing the university to make binding admissions, they were mere witnesses to events rather than active participants, and the supervisory authority the two lieutenants exercised over the sergeant was not a subject of the litigation); Mass. R. Prof'l Conduct, Comm. 4 to Rule 4.2 (2002) (in the case of an organization, the rule prohibits communications only with those agents or employees who exercise managerial responsibility in the matter, who are alleged to have committed the wrongful acts at issue in the litigation, or who have authority on behalf of the organization to make decisions about the course of the litigation; if the agent or employee is represented by his or her own counsel in the matter, consent by that counsel to a communication will be sufficient); *Palmer v. Pioneer Inn Assocs.,* 59 P.3d 1237 (Nev. 2002) (Nevada no-contact rule applies only to those employees who have legal authority to bind the corporation in an evidentiary sense, i.e., those employees who have "speaking authority" for the corporation (rejecting broader rule set forth in ABA comment and following Washington state rule); *Palmer v. Pioneer Inn Assocs.,* 338 F.3d 981 (9th Cir. 2003) (under Nevada's ex parte communication rules, waitress job applicant's attorney in Title VII termination action against restaurant corporation was not barred from ex parte communications with executive chef concerning whether applicant had been actually hired and then dismissed rather than not hired, since chef did not have managing authority sufficient to give him right to speak for and bind corporation; there was no showing that chef had been authorized to make statements concerning other employees' hiring decisions, and no evidence that chef had played any part in hire in question, and chef's testimony stemmed from his role as percipient witness rather than from privileged attorney-client communications); Tex. R. Prof'l Conduct 4.02; *Featherstone v. Schaerrer*, 34 P.3d 194 (Utah 2001) (Utah ex parte communications rule extends to person having managerial responsibility and to anyone who may legally bind the organization with respect to the matter in question); Vt. Ethics Op. 2007-01 (2007) (A lawyer who is representing a terminated employee in litigation against the company that formerly employed him may not communicate with a manager within the "control group" of the company on an employment-based matter, even if the subject matter on which the communication is anticipated does not include the manager's direct scope of responsibility.); Vt. Ethics Op. 2006-7 (2006) (Lawyer may represent private clients in matters before lawyer's former governmental agency, provided that lawyer had not participated personally and substantially in such matters during government service, absent consent of the governmental agency; and provided that in the new representation lawyer would not use or reveal confidences of lawyer's former government client.); Va. Ethics Op. 1890 (2020) (ex parte rule prohibits communications only with persons in the organization's control group or directors, officers or others who may be regarded as an alter ego of the organization; rule's prohibition does not apply former employees or agents, even former members of the control group); *Wright v. Grp. Health Corp.*, 691 P.2d 564, 569 (Wash. 1984) (only organizational employees who have the legal authority to bind the organization "in a legal evidentiary sense, i.e., those employees who have 'speaking authority' for the" organization, are off-limits to attorneys seeking unapproved ex

by counsel that the law firm represents all of the organization's managers and employees is generally insufficient to expand the scope of prohibited contacts.[237] Contact with a non-managerial employee may also be prohibited if the employee possesses or has access to confidential information of the represented organization.[238] In some jurisdictions, a lawyer is free to contact the in-house counsel of a represented corporation without the consent of opposing counsel.[239] In

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parte communications). *Cf.* Alaska Ethics Op. 2011-1 (2011) (lawyer adverse to a represented organization or corporation may not communicate with an employee or agent who has authority to bind it unless the other lawyer agrees or the communication is authorized by law; Alaska interprets this prohibition narrowly and does not extend it to all employees with managerial responsibilities or all employees whose acts or omissions are imputed to the organization); *Eagle v. Hurley Med. Ctr.*, 292 F.R.D. 466 (E.D. Mich. 2013) (Pharmacist, a bargaining unit employee, was not a "managerial employee," and thus could be interviewed by plaintiff's attorney outside the presence of pharmacy's counsel for purposes of obtaining information to support former pharmacy technician's employment claims against employer; pharmacist was a member of the nurses' union, not the supervisor's union, the only supervision she exercised over technician was supervising the dispensing of medications, and as a rank-and-file employee, her statements could not be imputed to employer as admissions.).

[237] *See, e.g.*, *Davis v. Creditors Interchange Receivable Mgmt. LLC*, 585 F. Supp. 2d 968 (N.D. Ohio 2008) (Plaintiff's attorneys entitled to contact debt collection agency's current employees who were not represented by counsel, unless the employee is a "management employee" or "'speak[s] for' or bind[s] the corporation" or the employee's opinions "from the basis of management decisions" or "act or omission in connection with the controversy may be imputed to or be an admission of the corporation." The plaintiff's attorneys may also contact unrepresented former employees of the opposing party *ex parte* with the former employee's consent. The plaintiff's attorneys must, however, "inform the former employee not to divulge any communications that the former employee may have had with corporate or other counsel," and the attorney must explain that she represents an interest adverse to the corporation.); Ohio Ethics Op. 2005-3 (2005) (despite assertion of blanket representation by counsel of the corporation and all of its current and former employees, counsel representing an interest adverse to the corporation may without the consent of corporate counsel contact (1) all current employees of the corporation, except those who supervise, direct, or regularly consult with the corporation's lawyer concerning the matter, or whose acts or omission in connection with the matter may be imputed to the corporation for the purposes of civil or criminal liability, and (2) all former employees (unless the former employees are represented by their own counsel and then consent of such counsel is required), where counsel explains that he represents a client adverse to the corporation and informs the former employee not to divulge any communications that the former employee may have had with corporate or other counsel with respect to the matter); Utah Ethics Op. 04-06 (2004) (if corporate counsel has actually formed an attorney-client relationship with present and former corporate employee-witnesses, and has properly obtained informed consent to joint representation, then corporate counsel may preclude opposing counsel from interviewing them; however, in the absence of an attorney-client relationship, it is improper for corporate counsel to block opposing counsel's access to other current corporate constituents by asserting an attorney-client relationship, unless these individuals were control group members, their acts could be imputed to the organization or their statements would bind the corporation with respect to the matter; similarly, it is improper to block opposing counsel's access to any former employee in the absence of a current fully formed and proper attorney-client relationship); Wis. Ethics Op. E-07-01 (2007) (a lawyer representing an organization may not assert a blanket representation of all constituents and may request, but not require, that current constituents refrain from giving information to a lawyer representing a client adverse to the organization). *See* Md. Ethics Op. 2017-02 (2017) (general guidance on ex parte communication issues).

[238] *See Coburn v. DaimlerChrysler Serv. N. Am.*, 289 F. Supp. 2d 960 (N.D. Ill. 2003) (plaintiff in putative class action against finance company failed to rebut presumption that class member, who worked as administrative assistant to the company's assistant general counsel, provided or was likely to provide plaintiff's counsel with confidential information, warranted disqualification; class member had personal incentive to transmit confidential information, information counsel requested from class member and information counsel prohibited her from discussing were closely related, and class member, who was not a lawyer, was not qualified to determine confidentiality).

[239] *See* ABA Formal Ethics Op. 06-443 (2006) (lawyer may contact in-house counsel for represented organization without violating Rule 4.2, unless in-house lawyer was engaged in providing only business advice in the matter in question, the in-house lawyer is an individual party represented by counsel in the matter, or where the lawyer has been instructed not to contact in-house counsel); D.C. Ethics Op. 331 (2005) (a lawyer may generally communicate with in-house counsel of a represented party about the subject of the representation without obtaining the prior consent of the entity's outside counsel retained to represent it in the matter); N.Y.C. Ethics Op. 2007-1 (2007) (no-contact rule

2002, the ABA amended Comment 7 to Model Rule 4.2 to remove the prohibition on communications with anyone "whose statements may constitute an admission on behalf of the organization" because that prohibition was "broad and potentially open-ended" and "had been read to prohibit communications with anyone whose testimony would be admissible against the organization as an exception to the hearsay rule."[240] Finally, where the contacted former employee is subject to a confidentiality agreement, Rule 4.4 (restricting methods of obtaining evidence from third parties and unwarranted intrusions into privileged relationships) does not necessarily expand the duties created by Rule 4.2.[241]

C. Putative Class Members.

In general, lawyers may contact putative class members pre-certification because they are not considered "represented" by class counsel until the class is certified, conditionally or otherwise.[242]

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does not prohibit a lawyer from communicating with an in-house counsel of a party known to be represented in that matter, so long as the lawyer seeking to make that communication has a reasonable, good faith belief based on objective indicia that such an individual is serving as a lawyer for the entity); Utah Ethics Op. 15-02 (2015)(Contact with in-house counsel regarding a matter where company retained outside counsel is not improper if the lawyer seeking to make that contact has a reasonable, good-faith belief based on objective indicia that such an individual is serving as a lawyer for the entity. If the in-house lawyer is a member of the control group, or wears more than one hat, i.e., is also a corporate manager or officer who may be a primary decision maker, or is the "chief legal officer" of the company, both as the lawyer for the company in the matter at hand and in some other or duel capacity, opposing counsel must obtain consent from outside counsel to make direct contact.); Wis. Ethics Op. E-07-01 (2007) (a lawyer does not violate the ex parte communication rules by contacting in-house counsel for an organization that is represented by outside counsel in the matter; retention of outside counsel does not normally transform counsel for an organization into a represented constituent and contact with a lawyer does not raise the same policy concerns as contact with a lay person).

[240] Annotated ABA Model R. Prof'l Conduct 4.2 (5th Ed. 2003). Arizona, Arkansas, Delaware, Florida, Idaho, Indiana, Iowa, Minnesota, Montana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Virginia, Washington, and Wyoming have revised their versions of Rule 4.2 to substitute "person" for "party."

[241] *See, e.g. Nestor v. Posner-Gerstenhaber*, 857 So.2d 953 (Fla. App. 2003) (ex parte interviews with former employees of a company represented by counsel are allowed regardless of the existence of contractual confidentiality agreement, and ex parte interviews with current employees may be allowed as well); Md. Ethics Op. 2007-03 (2007) (permitting ex parte contact provided lawyer complies with Rule 4.4(b) regarding disclosure of information protected from disclosure by statute or evidentiary privilege); Pa. Ethics Op. 2024-300 (2024) (Lawyer does not violate Rule 4.4 by eliciting factual information from a third-party former employee witness and has no obligation to inquire as to whether a binding confidentiality agreement exists. If third-party former employee witness is subject to a confidentiality agreement, lawyer should provide an opportunity for the witness to obtain independent legal advice as to the applicability and enforceability of the agreement. If the third-party former employee witness is represented by counsel, the lawyer may rely on that attorney's grant of permission to proceed with the interview even if the former employee is a party to a confidentiality agreement.).

[242] ABA Formal Ethics Op. 07-445 (2007) (before a class action has been certified the Rules do not generally prohibit counsel for either plaintiff or defendant from communicating with persons who may in the future become members of the class; with respect to such contacts, Rule 4.3 does not limit factual inquiries but requires both sides to refrain from giving legal advice other than advice to engage counsel, if warranted; if, on the other hand, plaintiffs' counsel's goal is to seek to represent the putative class member directly as a named party to the action or otherwise, the provisions of Rule 7.3, which governs lawyers' direct contact with prospective clients, applies; the fact that an action has been filed as a class action does not affect the policies underlying Rule 7.3 that prohibit the types of contact with prospective clients that have serious potential for overreaching and other abuse; however, Rule 7.3's restrictions do not apply to contacting potential class members as witnesses, so long as those contacts are appropriate and comport with the Model Rules). *See also Parks v. Eastwood Ins. Serv., Inc.*, 235 F. Supp. 2d 1082 (C.D. Cal. 2002) (in FLSA class action, employer may communicate with prospective plaintiff employees who have not yet "opted in," unless

However, once the class is certified and/or the court has ordered notice to the putative class, ex parte contact with putative class members is improper.[243] Even if the class has not yet been certified, there are circumstances where contact with putative class members may present issues. For example, contacts with putative class members may be deemed improper if the lawyer communicates false or misleading information to such putative class members.[244]

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the communication undermines or contradicts the court's own notice to prospective plaintiffs); *EEOC v. Dana Corp.*, 202 F. Supp. 2d 827 (N.D. Ind. 2002) (to extent individual potential class members had not established attorney-client privilege with EEOC, employer could conduct ex parte interviews with these individuals without violating ex parte communication rules); *Saucedo v. NW Mgmt. and Realty Serv.*, 2013 WL 163425 (E.D. Wash. Jan. 15, 2013) (unless and until class is certified, employer's employees, with exception of the named class representatives, are not represented parties within the meaning of the rule); *Kay Co. v. Equitable Prod. Co.*, 246 F.R.D. 260 (S.D. W.Va. 2007) (defendants' communication with putative class members before certification did not violate ex parte communication rule; before certification, putative class members had no lawyer-client relationship with plaintiff's counsel); *Parris v. Super. Ct.*, 109 Cal. App. 4th 285 (2003) (generally disapproving judicial restrictions on precertification contacts with potential class members based on freedom of speech concerns; however, protective orders may be allowed in appropriate circumstances); Conn. Ethics Op. 11-09 (2011) (attorney representing defendant in putative class action may contact putative class members ex parte before certification); Mich. Ethics Op. RI-219 (1994) (in-house counsel for defendant organization in class action suit may answer communications initiated by non-represented class members not otherwise known to be represented by counsel who have contacted the in-house counsel during the class "opt out" notice period to inquire about the nature of the class action and how the case affects them; if in-house counsel for a potential class plaintiff contacts in-house counsel for defendant, future contact with the potential class plaintiff by defense counsel should be through the in-house counsel). *Cf. Wilmuth v. Amazon.com Inc.*, 2025 WL 3039344 (W.D. Wash. Oct. 31, 2025) (pre-certification communications between plaintiffs and putative class members and collective members were not privileged).

[243] *See Lowery v. Circuit City Stores, Inc.,* 158 F.3d 742 (4th Cir. 1998) (district court did not preclude employer from establishing a defense when it limited ex parte communication between employer and its African-American employee class members), *vacated on other grounds*, 527 U.S. 1031 (1999); *Mullen v. Butler*, 91 F.4th 1243 (7th Cir. 2024) (District court did not commit clear error in finding that defendants' communications with putative class members during the opt out period warranted imposition of sanctions in lawsuit alleging youth volleyball business and its owners and operators concealed one owner's history of sexual abuse of underaged girls; evidence showed that one owner sent email to company employees stating that "[o]pt out is crucial," that company's vice president sent email to class members to provide his own take on implications of joining class or opting out, that defendants continued communicating with class members after being warned by court, and that their communications had significant coercive potential based on class members' business relationship with them.); *Resnick v. Am. Dental Ass'n*, 95 F.R.D. 372 (N.D. Ill. 1982) (district court prohibited employer's counsel from contacting members of a certified class); *Hernandez v. Vitamin Shoppe Indus., Inc*., 174 Cal. App. 4th 1441 (2009) (Conditional class certification for purposes of settlement, in action in which attorney represented a named plaintiff, triggered professional conduct rule generally prohibiting an attorney, while representing a client, from communicating directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, thereby precluding attorney from communicating with non-client class members after trial court had preliminarily approved the settlement, conditionally certified a class, and ordered claims administrator to send notice to class regarding proposed settlement, which communications involved letters urging non-clients to opt out and join another putative class action in which attorney was representing a named plaintiff and which involved the same wage and hour claims against employer.); N.Y.C. Ethics Op. 2004-01 (2004) (when a class has been certified, the class lawyer or the court must consent before a lawyer opposing the class may communicate directly with class members about the action); Pa. Ethics Op. 2009-1 (2009) (Rule 4.2 bars defense counsel in a state class action from contacting current or former employee class members regarding the subject matter of the lawsuit before a decision on certification (unless accomplished via deposition or other formal means of discovery with proper notice provided to the plaintiff's counsel).

[244] *See Richardson v. Interstate Hotels & Resorts, Inc*., 2018 WL 1258192 (N.D. Cal. Mar. 12, 2018) (court struck declarations of employees/putative class members submitted in support of defendant hotel's opposition to class certification motion in wage and hour case because hotel's counsel improperly represented the declarants during their depositions, creating a conflict of interest and tainting their declarations: at the outset of the case, hotel management directed the employees (who were putative class members) to sit for interviews during work hours by hotel counsel

D. Physicians and Other Agents of a Party.

The ex parte rule may extend to a party's agents, such as treating physicians,[245] consulting or testifying experts,[246] or accountants or other financial professionals.[247] Lawyer contacts with a

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and although each employee received a form disclosure explaining that counsel represented hotel and not the employee, the evidence established that at least some of the employees required interpreters, did not fully understand the disclosures, did not fully understand what a putative class was or how it might affect them (i.e., that they might recover money if they became part of a prevailing class), did not fully understand how their interviews might affect the litigation and did not feel free to decline the interviews or speak with plaintiffs' counsel instead; hotel counsel presented each employee with a declaration drawn from the interviews which highlighted points favorable to employer's case but omitting points favoring the putative class; they then proceeded to represent the declarants at their depositions without obtaining informed written consent beforehand. Under these circumstances, court struck the declarations and depositions and generally prohibited hotel from relying on them for any purpose other than optional completeness, and prohibited defense counsel from cross examining any putative class member they represented if they are called to trial or on summary judgment (some other firm without taint will have to do so), and possibly the jury will be informed as to the facts underlying hotel counsel's representation of the employees); *Vasquez v. Kraft Heinz Food Co.*, 2018 WL 4896072 (S.D. Cal. Oct. 8, 2018) (*Richardson v. Interstate Hotels* did not require disqualification of defense counsel, where counsel obtained putative class members' written consent before representing them at their depositions, unlike counsel in *Richardson*); *Romano v. SLS Residential Inc.*, 253 F.R.D. 292 (S.D.N.Y. 2008) (Defendant mental health facility improperly communicated with putative class members, abused the judicial process, and frustrated purposes of rule governing class actions in action brought by current and former resident-patients of facility alleging physical and mental abuse, where facility related false and misleading information directly to putative members and their families about the consequences of participating in lawsuit by telling them that their psychiatric records would be made public if they joined class, contacted other institutions involved in treating putative members in attempt to get institutions to sign opt outs on behalf of putative members, all of which created distress, misunderstanding, and fear among putative members.); *EEOC v. CRST Van Expedited, Inc.*, 257 F.R.D. 513 (N.D. Iowa 2008) (employer may contact all alleged aggrieved individuals with whom the EEOC does not have a consensual attorney-client relationship).

[245] *See, e.g.*, D.C. Ethics Op. 360 (2011) (under Rule 3.4(f) a lawyer may not request the client's treating physician to refrain from having ex parte communications with opposing counsel where legal impediments to such communications such as privacy laws and/or physician-patient privilege have been removed; the lawyer may, however, inform the physician that the physician has no obligation to speak with opposing counsel and that they physician may insist on the lawyer be present. The lawyer may also demand that the physician comply with all confidential obligations still in effect and may state his/her client's opinion as to the scope of the information that may be legally disclosed); Utah Ethics Op. 22-05 (2022) (withdrawing Op. 99-03 in light of court decisions prohibiting counsel contact with treating physician of represented party related to the merits or substance of the case). *Compare* ABA Formal Ethics Op. 93-378 (1993) (no ethics rule directly prohibits ex parte communication with the other side's witness in civil matter, but Rule 3.4(b) prohibits attorneys from counseling or assisting a witness to testify falsely); *Lovato v. Burlington N. & Santa Fe Ry. Co.*, 200 F.R.D. 448 (D. Colo. 2001) (defendant in personal injury suit would be allowed to conduct informal ex parte interviews with plaintiff's treating physicians), *modified on review*, 201 F.R.D. 509 (D. Colo. 2001) (inquiry of plaintiff's physicians will be limited to the taking of their depositions); *Youngs v. Peacehealth*, 316 P.3d 1035 (Wash. 2014) (attorney hired by corporation to investigate or litigate an alleged negligent event may engage in privileged ex parte communications with the corporation's physician-employee where the physician-employee has firsthand knowledge of the alleged negligent event giving rise to the litigation).

[246] *See, e.g.*, *Loudon v. Mhyre*, 756 P.2d 138 (Wash. 1998) (ex parte contact with opposing party's expert medical witness is prohibited by court rule; ex parte communication with a treating physician who testifies not as an expert but as a fact witness is prohibited as a matter of public policy). *Compare Cramer v. Sabine Transp. Co.*, 141 F. Supp. 2d 727 (S.D. Tex. 2001) (defendant's counsel would not be disqualified based upon ex parte contacts with seaman's expert witness). *Accord* Ala. Ethics Op. 2001-02 (2001) (it is generally permissible for an attorney to contact and communicate with an expert witness employed by the opposing party; however, if matter is pending in federal court or in any other jurisdiction which has adopted an expert discovery rule patterned after F.R.C.P. 26(b)(4)(A), an attorney who engages in such conduct could be in violation of ex parte communication rule).

[247] N.Y. Ethics Op. 735 (2001) (lawyer may communicate with an independent contractor of adverse corporate party, such as an accountant, unless lawyer knows independent contractor has retained counsel in the matter or the accountant

former client represented by a successor firm may also be prohibited.[248] If it is clear that the insured's counsel does not also represent the insurer, a plaintiff's counsel may contact the insurer directly without insurer's counsel's consent.[249]

E. Ex Parte Contact by an Investigator or other Agent of the Attorney.

The ex parte rule also applies to investigators hired by an attorney.[250] Thus, it is unethical for an attorney to use an undercover agent to befriend a party through subterfuge to discover important facts about the case.[251] Similarly, the attorney should discourage the client from hiring an

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is considered to be represented by the corporation's counsel in the matter either because it had the legal authority to bind the corporation or was implementing the advice of the corporation's counsel, or the acts or omissions of the accountant are binding upon or imputed to the corporation; in communicating with the unrepresented independent contractor the lawyer may not knowingly elicit information protected by the attorney-client privilege or the work product doctrine that the accountant has an obligation to keep confidential).

[248] N.Y.C. Ethics Op. 2011-1 (2011) (absent consent of successor counsel, lawyer may not contact a former client known to be represented by counsel to discuss matters within the scope of successor counsel's representation).

[249] N.Y. Ethics Op. 785 (2005) (attorney representing a plaintiff injured in an automobile accident may engage in direct settlement discussions with a non-attorney claims adjuster over the objection of the attorney assigned to represent the defendant-policyholder with respect to the claim, provided that (1) the insurer is not represented by separate counsel with respect to the matter, and (2) the plaintiff's attorney does not deliberately elicit information protected from disclosure in the action); N.Y.C. Ethics Op. 2005-4 (2005) (where an insurance company is a party to litigation, an opposing party's counsel may not communicate with an insurance adjuster in the absence of prior consent from the insurance company's lawyer; this prohibition applies notwithstanding that it is the non-attorney adjuster who initiates the communication, and notwithstanding the presumed sophistication of the adjuster; "prior consent" means actual, formal consent of counsel, whether conveyed orally or in writing; a lawyer risks violating the rule by relying on the adjuster's word that the insurance company's counsel consents or otherwise inferring consent from the circumstances.); Phila. Ethics Op. 98-2 (1998) (to avoid violating ex parte communication rules, the attorney should first ask defense counsel whether, in fact, he is representing the carrier; if defense counsel answers that he is representing the carrier, or if defense counsel refuses to answer the attorney's questions, the attorney may not contact the carrier, though he may wish to bring the issue to the court's attention for the purpose of advancing the prospects of settlement); Utah Ethics Op. 98-7 (1998) (contact with the insurer would be improper unless the plaintiff's lawyer has affirmatively determined that the insurer does not consider itself represented by counsel in the matter). *Cf. State Farm Mut. Auto. Ins. Co. v. Sanders*, 975 F. Supp. 2d 509 (E.D. Pa. 2013) (firm that represented 130 of physician's patients in personal injury lawsuits was not entitled to protective order preventing automobile insurer from directly contacting current and former clients in action against physician for insurance fraud; law firm's contingent fee agreements limited scope of representation of those clients to actions for personal injury, and therefore insurer could engage in ex parte communications with those clients regarding insurance fraud case).

[250] ABA Formal Ethics Op. 396 (1995). D.C. Ethics Op. 321 (2003) (lawyer for party may send investigator to interview an unrepresented party, so long as the investigator does not mislead party about the investigator's or the lawyer's role in the matter and that the investigator does not state or imply that unrepresented party must or should sign forms such as personal statements or releases of medical information; counsel should take reasonable steps to ensure that, where an investigator reasonably should know that the unrepresented person misunderstands the investigator's role, the investigator makes reasonable affirmative efforts to correct the misunderstanding); N.Y. Ethics Op. 828 (2009) (where agency investigators are acting under the supervision or control of its staff attorneys, attorneys are prohibited from directing or ordering agency's investigators to communicate with represented parties without obtaining prior consent; however, if the investigators are not acting under the supervision or control of the staff attorneys, prior consent would not be required for contact by the investigators and the attorneys would have no obligation to supervise the non-lawyer investigators). *Cf.* Wash. Ethics Op. 201502 (2015) (lawyer does not violate rule by hiring process server to accomplish personal service on represented opponent and contacting party to arrange a convenient time and place).

[251] *See Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc.*, 347 F.3d 693 (8th Cir. 2003) (trial court sanctions against defendant affirmed based on action of its defense counsel in hiring a private investigator to pose as a consumer, along with his wife or daughter, in visits to plaintiff's franchisees, for the purpose of making secret audio tape

investigator for such purposes.[252] Surveillance or investigation not involving communication with a represented party is not prohibited under this rule.[253] The rule also applies where a lawyer in one case is asked to pose questions of a represented deponent that were recommended by another lawyer, who represents the deponent's adversary in a different case.[254]

F. Client Communications with a Represented Party.

Represented parties may directly contact each other without violating the ex parte rules,[255] but if the party is also a lawyer, ex parte contacts may be prohibited.[256] Although some opinions have

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recordings of conversations in anticipation of trial; sanctions were the exclusion from trial of the recordings and any other evidence obtained as a result of the recordings).

[252] *See, e.g.*, *In re Burrows*, 629 P.2d 820 (Or. 1981).

[253] *See* N.C. 2003 Formal Ethics Op. 4 (2003) (visual observation is not a direct contact or communication with a represented person and does not violate Rule 4.2(a)).

[254] N.C. 2004 Formal Ethics Op. 4 (2004) (lawyer may ask questions of a deponent that were recommended by another lawyer, although the deponent is a defendant in the other lawyer's case, provided notice of the deposition is given to the deponent's lawyer).

[255] *See Snider v. Super. Ct.*, 113 Cal. App. 4th 1187 (2003) (ex parte communication rule not intended to prevent the parties themselves from communicating with respect to the subject matter of the representation); *EEOC v. McDonnell Douglas Corp.*, 948 F. Supp. 54, 55 (E.D. Mo. 1996) ("[T]here is nothing that prohibits one party to a litigation from making direct contact with another party to the same litigation."); *Isaacs v. Dartmouth Hitchcock Med. Ctr.*, 2012 WL 2752743 (D. N.H. July 9, 2012) (where pro se litigant was not a lawyer, ex parte communication rules do not prohibit his ex parte contact with defendant's managers). *See also* D.C. Ethics Op. 330 (2005) ("even if the lawyer has reason to know that the *pro se* litigant is receiving some behind-the-scenes legal help, opposing counsel acts reasonably in proceeding as if the opposing party is not represented, at least until informed otherwise."); Kan. Ethics Op. 09-01 (2009) ('[a]n attorney who receives pleadings or documents marked with the legend 'Prepared with Assistance of Counsel' has no duty to refrain from communicating directly with the *pro se* party, unless and until the attorney has reasonable notice that the *pro se* party is actually represented by another lawyer in the matter beyond the limited scope of the preparation of pleadings or documents, or the opposing counsel actually enters an appearance in the matter."); Nev. Ethics Op. 34 (2009) (pro se litigant assisted by a "ghost-lawyer" is considered "unrepresented" and thus opposing attorney must comply with Rule 4.3 governing communications with unrepresented persons); Tex. Ethics Op. 653 (2016) (lawyer who is a party in a matter but does not represent any other party in the matter may communicate directly with a represented adverse party without the consent of the party's lawyer, but will violate the Rules if the lawyer's communication with the adverse party involves dishonesty, fraud, deceit or misrepresentation).

[256] ABA Formal Ethics Op. 502 (Sept. 28, 2022) (a lawyer who is representing himself/herself in a matter may not communicate directly with a represented opposing party about the subject of the representation without the opposing lawyer's consent); Alaska Ethics Op. 2006-1 (2006) (Rule 4.2 applies where the lawyer is a pro se litigant; until the lawyer knows that an opposing counsel has been asked by the party to deal with the particular matter, the lawyer is not prohibited from dealing with representatives of the party); Colo. Ethics Op. 133 (2017) (absent a court order to the contrary, a lawyer who is representing himself/herself in a legal matter may not communicate about the matter directly with a represented party without the consent of the adverse party's lawyer; however, the lawyer/party may communicate directly with a represented adverse party when the lawyer/party himself or herself is represented by counsel); D.C. Ethics Op. 258 (lawyer who is party in a matter and proceeding pro se cannot communicate directly with another party known to be represented by counsel in the matter without first obtaining consent from the other party's lawyer.); Ill. Ethics Op. 23-04 (2023) (under Rule 4.2, a lawyer, even one who is acting pro se, is not permitted to have contact with a party who is represented in one aspect of a case and unrepresented in another aspect of the case, without the consent of that other party's lawyer, or the authorization of law or court order); *In re Steele*, 181 N.E.3d 976 (Ind. 2022) (Attorney violated rule of professional conduct prohibiting attorneys from communicating directly with opposing party about subject of the representation without consent of counsel for opposing party, notwithstanding that attorney did so while representing himself and not someone else in the underlying litigation, where attorney knew opposing counsel was representing opposing party with respect to attorney's demand and his subsequent lawsuit, he did not have either opposing counsel's consent or court authorization to talk with opposing party about this subject, yet attorney sent opposing party an email that thrice explicitly requested that he bypass opposing counsel, after two

held that contacts made by the client at the suggestion of his attorney violate the rules,[257] the majority of ethics opinions and rules permit the lawyer to advise a client to speak directly with a represented party, but the attorney is prohibited from indirectly communicating with the adverse party.[258] There is a fine line between "advising" the client that a communication can be made and "encouraging" the client to do so.[259] Some state ethics rules permit a lawyer to suggest that a client

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weeks of unsuccessful discussions with opposing counsel and the filing of a lawsuit). *Accord*: Haw. Ethics Op. 44 (2003); N.Y. Ethics Op. 879 (2011); *In re Lucas*, 789 N.W.2d 73 (N.D. 2010) (Attorney violated Rule 4.2 where attorney while representing himself in litigation against his condominium association sent letters to the association's board, to an officer, and to a board member while the association was represented by counsel, suggesting settlement and discussing other matters related to the litigation; suspension warranted); *In re Haley*, 126 P.3d 1262 (Wash. 2006) (Rule 4.2 prohibits a lawyer who is representing his own interests pro se from contacting another party whom he knows to be represented by counsel). *But see* N.J. Ethics Op. 746 (2024) (Rule 4.2 does not apply to lawyers who are proceeding pro se in legal matters, though other ethics rules apply to the conduct of such lawyers. Pro se lawyer-parties should always treat adverse parties with courtesy and consideration, not misrepresent facts or law, and refrain from overreaching, disrupting the represented person's client-lawyer relationship, or seeking to acquire uncounseled disclosures.); Tex. Ethics Op. 653 (2016) (lawyer who is party in a legal matter but who does not represent any other party in the matter may communicate concerning the matter directly with a represented party without consent of the adverse party's lawyer, but violates the rules if the communication involves dishonesty, fraud, deceit or misrepresentation.).

[257] *See* ABA MODEL RULE 4.2, cmt. 4 (lawyer may not violate rule by acting through another person); *In re Anonymous*, 819 N.E.2d 376 (Ind. 2004) (employer's attorney violated ex parte communications rule where attorney gave employer an affidavit that attorney wanted employee to sign in support of employer's proposed motion to sever employer's and employee's federal criminal trials; attorney was aware employer would speak directly to employee, who was represented by separate counsel, and even if employer was not acting as attorney's agent, attorney ratified employer's direct contact with employee and actively participated in events leading to employee signing affidavit, by failing to take steps to intervene when employer presented affidavit for employee's signature in attorney's presence, by failing to take steps to contact employee's counsel while attorney was waiting for employee to sign the affidavit, by taking control of affidavit once it was signed, and by filing affidavit with federal court); *Holdren v. Gen. Motors Corp.*, 13 F. Supp. 2d 1192 (D. Kan. 1998) (court issued protective order prohibiting plaintiff's counsel in age discrimination case from encouraging and facilitating the contacts of plaintiff, a current GM manager, with GM employees in violation of ex parte rules). *Cf.* N.Y. Ethics Op. 2011-1 (2011) (Absent consent of successor counsel, a lawyer may not contact a former client known to be represented by counsel to discuss matters within the scope of the successor counsel's representation).

[258] ABA MODEL RULE 4.2, cmt. 4 ("Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make."); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99(2) (2000) ("[The no-contact rule] does not prohibit the lawyer from assisting the client in otherwise proper communication by the lawyer's client with a represented nonclient."); ABA Formal Ethics Op. 11-461 (2011) ("[A] lawyer may give substantial assistance to a client regarding a substantive communication with a represented adversary. . .[which] could include, for example, the subjects or topics to be addressed, issues to be raised and strategies to be used. Such advice may be given regardless of who—the lawyer or the client—conceives of the idea or having the communication."); D.C. Ethics Op. 385 (2023) (A lawyer may encourage her client to communicate directly with a represented opposing party, without opposing counsel's knowledge or participation. A lawyer may also assist her client in preparing for such communications in several ways, but should not direct the communications or coach the client to seek confidential information, admissions, or binding agreements. A lawyer may not attend or observe party-to-party communications or assist his client during them. This is so, even though technology would easily allow a lawyer to do so undetected and would allow a client to seek real-time assistance during telephonic, virtual or remote meetings.); N.Y.C. Ethics Op. 2002-3 (2002) (where it is client's idea to communicate with a represented party, rule does not preclude the lawyer from advising the client concerning the substance of the communication; the lawyer may freely advise the client so long as the lawyer does not assist the client inappropriately to seek confidential information or invite the nonclient to take action without the advice of counsel or otherwise overreach the nonclient).

[259] *See* Or. Ethics Op. 2005-147 (2005) (rule allows lawyer to inform client that he/she is free to communicate directly with the adverse party; "[T]he lawyer [however] should exercise caution to avoid instructing the client to convey a particular message or fulfill an obligation of the lawyer. The client may not be used as a conduit or vehicle

communicate directly with a represented party and counsel the client with respect to those communications provided the lawyer gives reasonable advance notice to the represented party's counsel that such communications will be taking place.[260] However, "coaching" a client on communications may cross the line.[261] And copying a client on a communication with opposing counsel risks an ex parte contact in reply.[262]

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for relaying communications from the lawyer.").

[260] N.Y. Ethics Op. 846 (2010) (lawyer for insurer may not, without prior consent of claimant's counsel, send forms directly to a specific claimant where the lawyer knows the claimant is represented by counsel; however, if the lawyer gives reasonable advance notice to claimant's counsel, the lawyer may cause the insurer's employees to send the forms); N.Y. Ethics Code, DR 7-104; N.Y. Ethics Code, EC 7-18 (lawyer may advise his/her client to communicate directly with a represented person, including drafting papers for the client to present to the represented person, so long as the attorney gives "reasonable advance notice" that such communications will be taking place). *Compare* Mass. Ethics Op. 11-03 (2011) (it is not a violation of Rules 4.2 and 8.4(a) for a lawyer to advise her client to urge another person to release an attachment on the client's property, even though the other person is represented by counsel; the lawyer would, however, violate Rule 4.2 if she handed the other person a release of the attachment without first obtaining the permission of the other person's lawyer).

[261] *See* Utah Ethics Op. 22-06 (2022) (It is a violation of Rule 4.2, as well as Rules 4.1 and 8.4(c), for a lawyer to coach a client during the client's telephone conversation with a third-party, who the lawyer knows is represented by another lawyer, and the conversation relates to a dispute between the third-party and client).

[262] *See* ABA Formal Ethics Op. 503 (2022) (In the absence of special circumstances, lawyers who copy their clients on an electronic communication sent to counsel representing another person in a matter impliedly consent to receiving counsel's "reply all" to the communication. Thus, unless that result is intended, lawyers should not copy their clients on electronic communications to such counsel; instead, lawyers should separately forward these communications to their clients. Alternatively, lawyers may communicate in advance to receiving counsel that they do not consent to receiving counsel replying all, which would override the presumption of implied consent); Alaska Ethics Op. 2018-1 (2018) (lawyer who copies a client on email communications with opposing counsel risks waiver of attorney/client confidences. A lawyer who responds to an email where opposing counsel has "cc'd" the opposing counsel's client has a duty to inquire whether the client should be included in a reply. A lawyer may "bcc" the lawyer's own client on emails, however, the better practice is to forward the communication to the client to avoid inadvertent responsive communications by the client to opposing counsel); Colo. Ethics Op. 148 (2024) (Lawyer who includes his client in a group email or text to counsel for other parties discloses the client's contact information and also risk disclosure of potentially sensitive information relating to the representation if the client sends a reply that includes the other counsel, which can happen even if the sending lawyer has bcc'd the client. Therefore, lawyer should not include client in group emails or texts without the client's informed consent. Also, sending lawyer, by including the sending lawyer's client in a group email or text, has impliedly consented to the other counsel sending a reply that includes the sending lawyer's client. The sending lawyer can avoid these issues simply by using the two-email alternative. A lawyer who receives a group email or text that includes the sending lawyer's client may send a reply that includes the sending lawyer's client only if: (1) the reply is directed to the sending lawyer, not the sending lawyer's client; (2) the reply is limited to the topic addressed by the sending lawyer; and (3) the reply is sent within a reasonable period of time and not used as a pretext later to communicate with the sending lawyer's client. The receiving lawyer should make reasonable efforts in light of existing circumstances, which may include the substance or nature of the particular communication, not to include in a reply anyone to whom disclosure of information is not allowed by Rule 1.6, anyone who is represented by counsel in the matter whose counsel has not given consent for direct communication with that counsel's client, or anyone whose identity the receiving lawyer cannot determine. The receiving lawyer can avoid these concerns simply by sending a reply only to the sending lawyer and letting the sending lawyer decide to whom, if anyone, to forward the reply.); Ill. Ethics Op. 19-05 (2019) (unless consent to such contact has been obtained, it is a violation of Rule 4.2 for a lawyer to copy another lawyer's client on a reply email, even though the client was copied on the email to which the lawyer is replying, rejecting implied consent to represented parties based on opposing party "cc'ing" client); Neb. Ethics Op. 23-01 (2023) (lawyers may not CC their client on an email to opposing counsel unless the client has given informed consent to the disclosure of their email address. Lawyers may bcc their client on an email to opposing counsel, though the practice is not recommended; lawyers who CC their client on an email to opposing counsel have given implied consent for a receiving attorney to "reply all" in response to the communication); N.Y.C. Ethics Op. 2022-3 (2022) (attorney who cc's a client on email communications with other counsel has impliedly consented to

G. Law or Rule Exception.

Ex parte communications are permitted if they are authorized by law, including service of legal or contractual notices,[263] and requests for non-substantive information on purely administrative matters.[264]

1. Government Officials and Employees.

A lawyer representing a party in a matter adverse to the government may communicate with government officials who have authority to take or to recommend action in the matter, provided that the sole purpose of the lawyer's communication is to address a policy issue, including settling the controversy. In such a situation, the lawyer must give government counsel reasonable advance notice of his intent to communicate with such officials to afford government counsel an opportunity to consult with the officials on the advisability of their entertaining the communication. In situations where the right to petition has no apparent applicability, Rule 4.2

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other counsel replying all and thereby communicating directly with the attorney's client as authorized by Rule 4.2(a). Where the attorney bcc's their own client, who then replies all, however, the attorney has not impliedly consented, without more, to counsel's contacting the attorney's client). Accord: S. C. Ethics Op. 18-04 (2018); Ky. Ethics Op. KBA E-442 (2017); N.C. 2012 Formal Ethics Op. 7 (2013). *Cf.* Va. Ethics Op. 1897 (2022) (lawyer who receives an email from opposing counsel, with the opposing party copied does not violate Rule 4.2 if he replies all to the email, sending the response to both the sending lawyer and the client; a lawyer who includes their client in the "to" or "cc" field of an email has given implied consent to a reply-all response by opposing counsel); Wash. Ethics Op. 202201 (2022) (if a lawyer emails a second lawyer with a copy to the first lawyer's client, a "reply all" may be allowed if consent to include the first lawyer's client can be implied by the facts, but the prudent approach would be to seek express consent); N.J. Ethics Op. 739 (2021) (lawyers who include their clients in the "to" or "cc" line of a group email are deemed to have provided informed consent to a "reply all" response from opposing counsel that will be received by the client. If the sending lawyer does not want opposing counsel to reply to all, then the sending lawyer has the burden to take the extra step of separately forwarding the communication to the client or bcc-ing the client on the communication so that a reply does not directly reach the client).

[263] *See, e.g.,* Alaska Ethics Op. 2018-2 (2018) (attorney for a party to a contract may initiate notice to another party to that contract even if the other party is represented by counsel so long as the notice is contemplated by the pre-existing agreement of the parties. Such notice must not include argument or inquiries and must be strictly limited to the purposes the notice provisions of the agreement were intended to fulfill. However, professional courtesy suggests that, absent unusual circumstances, a copy of the notice should be sent to opposing counsel simultaneously with the sending of the notice to the designated non-client party); N.Y. Ethics Op. 894 (2011) (when authorized by statute, attorney may personally serve process on represented party and ask related questions, but may not go beyond service of process to communicate on the subject of the representation without the consent of such party's lawyer). *Cf.* Tex. Ethics Op. 613 (defense lawyer retained by insurer may not notify plaintiff himself, rather than plaintiff's attorney, when the settlement money has been transferred to the lawyer's account; the communication is not authorized by law notwithstanding that it is strongly encouraged by the Department of Insurance. But the lawyer need not discourage the insurer from notifying the plaintiff directly); Va. Ethics Op. 1752 (2001) (plaintiff's attorney may not contact multiple defendants represented by the same defense attorney to advise them by mail or at depositions of their right to separate counsel without the defense attorney's consent, even though opposing counsel refuses to acknowledge whether defendants have been advised of their right to separate counsel and objects to plaintiff's counsel advising the defendants in this regard); Va. Ethics Op. 521 (1983) (plaintiff's attorney may not directly contact opposing party without consent of that party's lawyer even though plaintiff's attorney believes opposing counsel is wrongfully withholding information from his client, an attorney).

[264] *See* D.C. Ethics Op. 295 (2000) (guardian ad litem in child abuse and neglect proceeding may communicate directly with a represented parent if the sole purpose is to obtain information about how to contact the child or to schedule a meeting with the child, because such communication would be administrative in nature and would not be about the subject of the representation).

prohibits communication without prior consent of government counsel.[265] In some jurisdictions the attorney may directly contact a government official about a matter involving the client, even though the agency was known to be represented by counsel, provided that the attorney informs the official that there is a pending dispute with the agency and that he is representing the client in the dispute.[266] Some jurisdictions apply the same ex parte communication rules applicable to private

[265] ABA Formal Ethics Op. 97-408 (1977). *See also* ABA MODEL RULE 4.2, cmt. 5 (communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government); ABA Formal Ethics Op. 95-396 (1995) (an example of "communications authorized by law" is the right of a party to a controversy with a government agency to speak with government officials about the matter – the right in question being the First Amendment right of petition); Nev. Ethics Op. 54 (2018) (an attorney does not violate Rule 4.2 by making public records requests to a state or local government agency or department when the attorney is actively involved in litigation against that agency or department, provided the attorney otherwise observes the restrictions placed on communications with represented parties); N.C. 2011 Formal Ethics Op. 15 (2011) (a lawyer may communicate with a government official for the purpose of identifying a custodian of public records and with the custodian of public records to make a request to examine public records related to the representation although the custodian is an adverse party, or an employee of an adverse party, whose lawyer does not consent to the communication); Va. Ethics Op. 1891 (2020) (communications "authorized by law" if made for purposes of addressing a policy issue, and the government official being addressed has the ability or authority to take action on the issue); Wash. Ethics Op. 2018-03 (2018) (if low-level government employees do not supervise, direct or regularly consult with the government lawyer concerning the matter, do not have the authority to obligate the government with respect to the matter, and are not individually represented by the government lawyer, the opposing lawyer may contact those employees directly).

[266] *See, e.g.*, Ala. Ethics Op. 2003-03 (2003) (attorney for State Board of Education may communicate directly with the members of County Board of Education to discuss settlement of pending lawsuit without obtaining the consent or approval of the attorney representing the County Board of Education); Alaska Ethics Op. 2017-2 (2017) (attorney representing a party in a suit against a governmental body may ethically contact a represented government decision-maker on behalf of a client to discuss a matter of government policy related to the lawsuit—such as conditions for settling the suit—but the attorney must give reasonable advance notice of the substance of the intended communication to the attorney representing the government official in the pending litigation; further the attorney's communication may not seek facts for use in the litigation and must be limited to matters of government policy on which the attorney reasonably believes the official has the authority to take or recommend action); D.C. Ethics Op. 340 (2007) (attorney representing client in dispute against a government agency may contact government officials, including those who have authority with respect to the dispute, without the consent of the government's attorney, so long as the attorney identifies himself and indicates that he represents a party adverse to the government; the attorney may not contact government officials concerning routine discovery matter, scheduling issues and the like, absent consent of government counsel); D.C. Ethics Op. 280 (1998) (attorney may communicate directly with government officials on a licensing board without first obtaining consent of the board's lawyer where the communication concerns the conclusion reached by the board in his client's case and about alleged improper conduct of governmental personnel, i.e., the board's counsel and staff; lawyer not required to give the board's lawyer advance notice of contact); Fla. Ethics Op. 09-1 (2010) (A lawyer may not communicate with officers, directors, or managers of State Agency, or State Agency employees who are directly involved in the matter, and other State Agency employees whose acts or omissions in connection with the matter can be imputed to State Agency about the subject matter of a specific controversy or matter on which a lawyer knows or has reason to know that a governmental lawyer is providing representation unless the agency's lawyer first consents to the communication.); Ill. Ethics Op. 13-09 (2013) (an attorney is not precluded from direct communications with a City decision maker as to underlying tax law policy issues, even when there is a pending tax case between the City and the attorney's client. Moreover, in such instance, prior notice to the City's attorney is not required by Rule 4.2. To the contrary, however, direct communications with the City decision maker as to the settlement or resolution of the pending matter cannot fairly be said to relate to policy issues, and are prohibited without first obtaining the consent of the City's lawyer. In such instance, the providing of prior notice to the City's attorney without obtaining the attorney's consent is insufficient to allow such direct communication with the City's representative.); Ky. Ethics Op. KBA E-332 (1988) (lawyer representing government department in litigation may not prevent private party's lawyer from contacting all employees of the department); Md. Ethics Op. 2018-05 (2018) (whether and to what extent a lawyer representing real estate developers may petition the Mayor, Planning Director, and/or Council member(s) of a City for assistance in working to obtain permits in a timely

sector parties.[267] Federal Government attorneys are subject to the rules of the state in which the attorney engages his or her duties.[268]

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fashion where an application had been previously denied); N.Y.C. Ethics Op. 1991-4 (1991) (lawyer for private party may communicate with governmental decision-maker at least in writing with copy to government counsel); N.C. Ethics Op. RPC 202 (1995) (lawyer did not violate ex parte rule by writing the town council requesting that the town drop its appeal of a decision granting a lawyer's client a sign variance despite the town council's objection to the communication, but required a copy of the letter to be sent simultaneously to counsel for the town); Or. Ethics Op. 2005-144 (2005) (attorney may contact a County employee to obtain copy of public records material to pending litigation without obtaining County attorney's consent where copying and dissemination of records part of County's day-to-day business; however, inquiries to employee about the meaning of the public documents may risk a violation of the rules); S.D. Ethics Op. 90-70 (1990) (lawyer representing party in litigation against municipality may write municipal official about the matter with notice and a copy of the communication to the City Attorney, but may not telephone or meet with officials without City Attorney's consent); Tex. Ethics Op. 604 (2011) (Ex parte rule does not apply to lawyer's contact with members of a state agency's board when the board is considering whether to act in a legislative capacity to adopt a regulation; after the regulation has been adopted, the lawyer is prohibited, with limited exceptions, from communicating privately with members of the board for purpose of influencing the board's decision on a permit application that the lawyer and the client are planning to file, and the lawyer is prohibiting from causing another, including the client, to communicate privately with the board for that purpose); Utah Ethics Op. 115R (1994) (lawyer representing client in matter against government agency may contact employees of agency orally or in writing outside government attorney's presence based on constitutional guarantee of unrestricted access to government, but where government is represented by counsel must disclose this to government employee being interviewed). *Cf.* Nev. Ethics Op. 61 (2025) (Nevada-licensed attorneys do not run afoul of Rule 4.2 when making public comments before a local governmental entity at or during a publicly-noticed meeting regarding pending litigation provided that it is not an opportunity for fact-finding nor a substitute for formal discovery during proceedings with the government entity.).

[267] *See, e.g.*, Alaska Ethics Op. 94-1 (1994) (Rule 4.2 bars lawyer for litigant against government agency from presenting the litigant's settlement position to the agency's managing board, absent specific authorization by law or consent of agency's counsel, even if the settlement offers on behalf of the litigant may not have been adequately communicated to the board); Conn. Ethics Op. 86-1 (1986) (lawyer in litigation against a government agency may communicate with a nonparty official of the agency on subject related to the litigation if official not in the position to bind agency, but must have government counsel's consent before a contact with an official who is a party); Ill. Ethics Op. 92-3 (1992) (defendant's lawyer may not send City officials correspondence with City Attorney about the matter); N.C. Ethics Op. RPC 132 (1993) (addresses a number of instances of permissible ex parte contact by a lawyer with City employees, but requires lawyer for private party generally to deal with government lawyer or obtain his consent to ex parte interview); Ohio Ethics Op. 2022-03 (2022) (lawyer prohibited from directly communicating with a current employee or official of the government (a) who supervises, directs, or regularly consults with the government's counsel concerning a matter, (b) who has authority to obligate the government with respect to the matter, or (c) whose act or omission in connection with the latter may be imputed to the government); *Brown v. Or. Dep't of Corr.*, 173 F.R.D. 265 (D. Or. 1997) (plaintiff's counsel in employment discrimination suit against state agency barred by Rule 4.2 from conducting informal ex parte interviews with the same employees whose alleged conduct formed the basis of the vicarious liability claim against the agency); S.D. Ethics Op. 92-15 (1993) (lawyer representing government employee in grievance matter may not write County Commissioners without County Attorney's consent); Tex. Ethics Op. 703 (2024) (If a lawyer for a governmental entity attends a meeting between a representative of the governmental entity and an individual known to be represented by a lawyer in the matter, and the individual's lawyer does not attend the meeting, the lawyer for the governmental entity may not communicate or cause or encourage another to communicate About the subject matter of the representation with the individual without the absent lawyer's consent.); Tex. Ethics Op. 474 (1991) (Rule 4.2 bars telephone contact by litigant's lawyer with city council criticizing city's settlement offer in suit against city); Wis. Ethics Op. E-95-1 (direct contact rule precludes a lawyer, in the course of representation, from making direct contact with covered government officials with respect to a matter when the lawyer knows the governmental entity is represented by counsel in the matter).

[268] *See* 28 U.S.C. § 530b(a); *United States v. Talao*, 222 F.3d 1133 (9th Cir. 2000) (when an employee/party of a defendant corporation initiates communications with an attorney for the government for the purpose of disclosing that corporate officers are attempting to suborn perjury and obstruct justice, ex parte communication rule does not bar discussions between the employee and the attorney.); Fla. Ethics Op. 90-4 (1990) (Rule 4.2 contains no exception for

2. FELA Actions.

Under the Federal Employers' Liability Act ("FELA"), common carriers may not prohibit their employees from voluntarily providing information regarding employee injuries.[269] Some courts have held that Section 10 authorizes ex parte contact with represented employees in FELA actions;[270] others have held that Section 10 does not authorize ex parte contact.[271]

H. Information Obtained Through an Opposing Party's Website.

Corporate websites are often a source of discoverable information. A lawyer does not violate the ex parte communication rules by collecting information from a "passive" website, even if its owner is represented.[272] Similarly, ordering products from a represented company's website does not violate the ex parte communication rule because the website provides no information in return other than what is available in the catalog.[273] If the website allows visitors to send messages and receive responses from the website or to participate in a "chat," there is the risk that the lawyer visiting the website might inadvertently communicate with the represented entity in violation of ex parte communication rules.[274]

I. Access to an Opposing Party's Use of Social Media.

A lawyer may use social media to obtain information on a represented party without consent of opposing counsel, so long as the lawyer does not "friend" the party or otherwise interact with the party in a way that would constitute an ex parte contact.[275] Similar rules exist for research on

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activities of DOJ attorneys); N.Y. Ethics Op. 768 (2003) (if a lawyer for a government agency knows that another lawyer represents the counter-party to a government contract in connection with that contract, then the government lawyer may attend meetings with non-attorney representatives of the counter-party, provided reasonable advance notice is given to opposing counsel; without consent of opposing counsel, the government lawyer may advise the lawyer's own client during the meeting, but may not communicate the government's position on the matter, respond to inquiries from the counter-party regarding agency filing requirements, nor otherwise negotiate with the counter-party); Tex. Ethics Op. 600 (2010) (lawyer for governmental agency is not permitted to communicate directly with a regulated person that is represented in the matter by counsel who has not consented to the communication, and is not permitted to cause or encourage such communications by other agency employees, and the agency lawyer is obligated to prevent such communications by employees whom the lawyer supervises).

[269] 42 U.S.C. § 60.

[270] *See Pratt v. Nat'l R.R. Passenger Corp*., 54 F. Supp. 2d 78 (D. Mass. 1999) (such contacts permitted despite state ethics rules to the contrary). Accord: *Shaffer v. Union Pac. R.R.*, 1996 WL 76157 (D. Or. Feb. 14, 1996); *Blasena v. Consol. Rail Corp.*, 898 F. Supp. 282 (D.N.J. 1995).

[271] *See Weibrecht v. S. Ill. Transfer, Inc.*, 241 F.3d 875 (7th Cir. 2001). Accord: *Hornick v. Am. Com. Barge Line*, 2008 WL 2168893 (W.D. Ky. May 23, 2008).

[272] *See* Or. Ethics Op. 2005-164 (2005) (lawyer may access the website of his represented opposing party even if the website contains information relevant to pending litigation, if the website is passive or if the communication from the lawyer is the equivalent of ordering products from a catalog; the issue is whether the communication has the character of a telephonic or face-to-face conversation); Or. Ethics Op. 2005-144 (2005) (government lawyer's consent not required to request public records from the governmental entity, but if the records clerk is asked to interpret the records or policies expressed in the records, the risk of improper ex parte communication is increased).

[273] *See* Or. Ethics Op. 2005-164 (2005); Or. Ethics Op. 2005-144 (2005) (government lawyer's consent not required to request public records from the governmental entity, but if the records clerk is asked to interpret the records or policies expressed in the records, the risk of improper ex parte communication is increased).

[274] Or. Ethics Op. 2005-164 (2005).

[275] N.Y.C. Ethics Op. 2010-2 (2010) (lawyer may not "friend" an individual under false pretenses to obtain evidence from a social networking website); Colo. Ethics Op. 127 (2015) (lawyer may obtain publicly available social media

juror social media use.[276] Lawyers should advise their clients about the risks associated with their use of social media, including advising them to change the privacy settings on their accounts to limit access by opposing parties.[277]

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information on a represented person without violating the ex parte communication rule); N.Y. Cnty. Ethics Op. 750 (lawyer prohibited from "adding" adverse party or witness on Snapchat because there is no means to disclose the lawyer's role in the pending adversarial proceeding prior to the Snapchat user acting on the request); Md. Ethics Op. 2014-05 (2014) (ethical guidelines relating to attorneys' use of social media); Me. Ethics Op. 217 (2017) (ethical guidelines for attorney access and use of social media). Accord: N.Y. Ethics Op. 843 (2010); Mass. Ethics Op. 2014-5 (2014); Pa. Ethics Op. 2009-02 (2009); San Diego Ethics Op. 2011-2 (2011); W. Va. Ethics Op. L.E.O. 2015-02 (2015). *See also* Or. Ethics Op. 2013-189 (2013) (Lawyer may access publicly available information on a social networking site and may access nonpublic information if the person is unrepresented in the matter and the lawyer makes no actual representation of disinterest. However, a lawyer may not advise or supervise the use of deception in obtaining access to nonpublic information unless the exceptions for lawful covert investigations of violations of civil or criminal law or constitutional rights under RPC 8.4(b) applies). *Cf. Lenz v. Universal Music Grp.*, 2010 WL 4789099 (N.D. Cal. Nov. 17, 2010) (plaintiff who sent emails, posted a blog, and engaged in Gmail chat sessions through which she disclosed information relating to her attorneys' litigation strategy waived the attorney-client privilege for related information); Tex. Ethics Op. 671 (2018) (lawyer may not, directly or through an agent, anonymously contact an alleged anonymous online defamer to obtain information sufficient for obtaining a deposition of defamer; to comply with the rules, attorneys and their agents must identify themselves and their role in the matter in question). *See generally* D.C. Ethics Op. 370 (Social Medial I: Marketing and Personal Use) and 371 (Social Media II: Use of Social Media in Providing Legal Services); N.Y. Bar Ass'n, "*Social Media Ethics Guidelines*" (2015) (guidelines concerning the ethical issues attendant to social media use including furnishing legal advice, communicating with clients, and ex parte communications); Pa. Ethics Op. 2014-300 (2014) ("Ethical Considerations for Attorneys Using Social Media"); W. Va. Ethics Op. L.E.O. 2015-02 (2015) (Discussing various ethics issues regarding use of social media and social networking by attorneys; among other things, (i) attorneys may advise clients about the content of their social media websites including removing or adding information, (ii) attorneys may connect with clients or former clients using social media; (iii) attorneys may not contact a represented person through a social media networking site; (iv) attorney may contact an unrepresented person using a social media networking site but may not use a pretextual basis for viewing information that would be otherwise private/unavailable to the public; (v) attorneys may use information on a website in client related matters; and (vi) attorneys may comment on reviews but should keep in mind confidentiality obligations).

[276] *See* ABA Formal Ethics Op. 466 (2014) (a lawyer may review a juror's/potential juror's Internet presence, which may include postings by the juror/potential juror in advance of and during trial, but a lawyer may not communicate directly or through another with a juror or potential juror). Accord: Ky. Ethics Op. KBA E-434 (2012); N.H. Ethics Op. 2019-20/03 (2020); N.Y.C. Ethics Op. 2012-2; N.Y.C. Ethics Op. 743 (2011); Tex. DRP 4.03 (2024). *Cf. Contour IP Holding, LLC v. GoPro*, No. 3:17-cv-04738 (N.D. Cal. Oct. 28, 2025) (law firm sanctioned $10,000 for violating court's standing order prohibiting LinkedIn research on prospective jurors since it is tantamount to improper contact because of the notifications it sends to users).

[277] *See* Fla. Ethics Op. 14-1 (2015) (lawyer may advise a client pre-litigation to change privacy settings on the client's social media pages so that they are not publicly accessible; provided there is no violation of the rules or law related to spoliation of evidence, lawyer may also advise client to remove information relevant to the foreseeable proceeding from social media pages so long as the social media information is preserved); N.H. Ethics Op. 2012-13-05 (2013) (although the ethics rules do not forbid use of social media to investigate a non-party witness, the lawyer must follow the same rules which would apply in other contexts, including the rules which impose duties of truthfulness, fairness, and respect for the rights of third parties, and must take care to understand the value and risks of using social media sites, as their ease of access is accompanied by a risk of unintended or misleading communications with witnesses; improper for lawyer to send a social media request without disclosing the lawyer's identity and role in pending litigation); N.Y.C. Ethics Op. 745 (2013) (attorneys may advise clients as to what they should/should not post on social media, what existing postings they may or may not remove, and the particular implications of social media posts); N.C. 2018 Formal Ethics Op. 5 (2019) (opinion reviews lawyer's professional responsibilities when seeking access to a person's profile, pages and posts on a social network to investigate a client's legal matter, including application of the ex parte communication rules, and rules prohibiting use of deception, dishonest or pretext to gain access to such information); N.C. 2014 Formal Ethics Op. 5 (2014) (lawyer must advise

J. Communicating With Unrepresented Parties.

A lawyer may not give an unrepresented individual party advice other than to seek counsel.[278] Lawyers may not circumvent this rule by using the client or a third party as a medium to give advice to the unrepresented party.[279] However, an attorney may suggest legal aid or other referral services approved by the bar.[280] The attorney must always clarify her role and interest in the dispute to unrepresented adverse parties.[281] Provided there is no overreaching or misrepresentation, the attorney may draft documents and submit them to the unrepresented party for signature.[282] When a person who known to have been represented by counsel declares that the representation has or will be terminated, the communicating lawyer should not proceed without reasonable assurance that the representation has in fact been terminated.[283]

K. Sanctions for Violating Ex Parte Communication Rules.

Violation of ex parte communication rules can result in exclusion of the evidence obtained,[284]

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a client about information on social media if information is relevant and material to the representation, and may advise a client to remove information on social media if not spoliation or otherwise illegal); Phila. Ethics Op. 2014-5 (2014) (lawyer may advise client to change the privacy settings on the client's Facebook page and may instruct client to make information on social media "private," but may not instruct or permit client to destroy/delete a relevant photo, link, text or other content, and must obtain a copy of such information to comply with a subpoena or document request).

[278] *See* ABA MODEL RULE 4.3, cmt. 2; ABA MODEL CODE DR 7-104. *See* Ky. Ethics Op. KBA E-450 (2020).

[279] N.Y. Ethics Op. 478 (1978). *Cf.* N.Y.C. Ethics Op. 2009-5 (2009) (A lawyer may ask unrepresented witnesses to refrain from voluntarily providing information to other parties to the dispute, but may not advise the witness to evade a subpoena or cause the witness to become unavailable. While lawyers generally are prohibited from giving legal advice to unrepresented parties, they may inform unrepresented witnesses that they have no obligation to voluntarily communicate with others regarding a matter in dispute and may suggest retaining counsel.)

[280] ABA Informal Ethics Op. 1194 (1974).

[281] *See* N.Y.C. Ethics Op. 2009-2 (2009) (lawyer may advise a self-represented person adverse to the lawyer's client to seek her own counsel and may state, where appropriate, identification of general legal issues that the self-represented person should address with a lawyer; undisputed statements of fact or law such as the position of the lawyer's client on a contested issue; and references to court-sponsored programs designed to assist a self-represented litigant. A lawyer may at any time explain or clarify the lawyer's role to the self-represented litigant and advise that person to obtain counsel and must volunteer this information if she knows or should know that a self-represented person misunderstands the lawyer's role in the matter.).

[282] *See* ABA MODEL RULE 4.3, ABA MODEL CODE DR 7-104; N.C. 2009 Formal Ethics Op. 12 (2010) (lawyer may prepare affidavit and confession of judgment for an unrepresented adverse party provided the lawyer explains who he represents and does not give the unrepresented party legal advice; however, the document cannot include a statement that the adverse party has consulted with his lawyer if he has not in fact done so).

[283] ABA Formal Ethics Op. 95-396; N.Y. Ethics Op. 959 (2013) (A lawyer who knows that an adverse party's lawyer has withdrawn from the representation or resigned from the bar may contact the adverse party to determine if he/she has retained new counsel or plans to represent himself or herself).

[284] *Bonaventura v. Bd. of Cnty. Comm'rs*, 131 Nev. 1255, 2015 WL 8187534 (Nev. Dec. 2, 2015) (in action by constable against Board of Commissioners, court did not abuse its discretion in striking affidavit of one commissioner, describing ordinance as a prearranged plan to get rid of constable, for violation of ex parte communication rule, based on testimony that constable, his counsel and paralegal went to see commissioner to obtain the commissioner's signature on a typed affidavit after they knew Board was represented by counsel); *Featherstone v. Schaerrer*, 34 P.3d 194 (Utah 2001) (attorney's unethical behavior in taping ex parte conversation with corporation's secretary-treasurer vitiated work product privilege with respect to tape recording and transcript (where attorney's unethical behavior allowed him to obtain transcript) and thus sanctions for attorney's failure to disclose it were proper).

disqualification of counsel,[285] or monetary sanctions.[286] However, courts are less likely to impose sanctions where the contact did not result in disclosure of an opposing party's confidential information or other prejudice to the opposing party.[287]

[285] *Weeks v. Indep. Sch. Dist. No. I-89*, 230 F.3d 1201 (10th Cir. 2000) (disqualification of plaintiff's attorney for ex parte communications with district's managerial employees was not an abuse of discretion); *Bedoya v. Aventura Limousine & Transp. Serv., Inc.*, 861 F. Supp. 2d 1346 (S.D. Fla. 2012) (Attorney for drivers in FLSA action against defendant violated ex parte communications rules by his ex parte statement to an officer of defendant company, in connection with court-ordered arbitration in another case, that attorney would never settle with FLSA defendants as long as they were represented by a particular attorney, and his ex parte contact with an independent contractor, who performed greeting work for defendant company, to review and sign affidavit in support of drivers' motion for conditional certification. Disqualification the only proper remedy given the egregiousness of the violation and the grave impact drivers' attorney's disparaging acts had on the attorney-client relationship between limousine company defendants and their attorney, the only proper remedy was disqualification of drivers' attorney; furthermore, in light of the small size of drivers' attorney's seven lawyer labor law practice, it was appropriate to also disqualify law firm from representation of drivers.); *Gifford v. Target Corp.*, 723 F. Supp. 2d 1110 (D. Minn. 2010) (Contacts by employees' counsel with employer's senior manager who had significant exposure to employer's privileged information warranted disqualification in FLSA action against employer, even though firm did not seek out manager and although firm cautioned manager not to divulge attorney-client information; counsel's repeated contacts with manager elicited privileged documents that were reviewed in at least a "perfunctory" fashion by counsel, instead of ceasing its review and immediately returning the documents to employer, counsel held documents for more than a month, at least two attorney-client communications were reviewed and evaluated by counsel, counsel interviewed manager regarding employees' putative collective action, a purpose completely separate from that for which she had approached and retained the firm, and counsel did not agree to represent employees until after its relationship with manager had begun and after privileged and confidential information had been disclosed).

[286] *Williams v. Lockheed Martin Corp.*, 990 F.3d 852 (5th Cir. 2021) (affirming sanctions against plaintiff's attorney for interviewing plaintiff's former supervisor by phone in violation of Rule 4.2); *Hill v. St. Louis Univ.,* 123 F.3d 1114 (8th Cir. 1997) (affirming sanctions against plaintiff for her counsel's ex parte communications with a department chair); *In re Maxwell*, 627 S.E.2d 16. (Ga. 2006) (suspension appropriate for attorney representing employer in sexual harassment case who held meetings with his client's employees that he knew were represented by counsel without obtaining their counsel's consent); *In re Williams-Bensaadat*, 181 So.3d 684 (La. 2015) (attorney sanctioned for communicating with a party known to be represented by counsel; her repeated denials compounded her misconduct).

[287] *See, e.g., Ridgeway Nursing & Rehab. Facility, LLC v. Lane*, 415 S.W.3d 635 (Ky. 2013) (Evidence that nursing and rehabilitation facility employees contacted by opposing counsel's investigator disclosed, at most, information regarding the employment status of facility employees was insufficient to warrant the issuance of a writ of mandamus disqualifying opposing counsel in the underlying wrongful death and negligence action).

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V. IN-HOUSE COUNSEL ETHICS ISSUES

In-house lawyers are also full-time employees of the corporation and thus are likely to encounter questions of professional independence not faced by outside counsel. In-house lawyers also often confront challenging issues regarding identifying the "client" among the various managers and other constituencies within the corporation. And unlike outside lawyers, in-house lawyers are more likely to assume multiple roles as business adviser and legal adviser, or both.

A. Identifying the Corporate/Organizational "Client."

Under ABA Model Rule 1.13, a lawyer employed or retained by an organization represents the organization, as distinct from its directors, officers, employees, or other constituents.[288] This rule is sometimes difficult to apply in practice. Sometimes requests may come from several sources, making identifying the authorized representative difficult. In advising a corporate entity, the lawyer should keep paramount the entity's interests and his professional judgment should not be influenced by the personal desires of any other person.[289] As a practical matter it may be difficult for the in-house lawyer to question the authority of a corporate constituent, especially if that constituent holds more power within the organization than the lawyer. Determining proper authority within the organization is especially important in those jurisdictions that recognize the "control group" test for purposes of the corporate attorney-client privilege, since only communications with persons in a position to control or take substantial part in a decision about any action that the corporation could take upon advice of counsel would fall within the privilege.[290] This issue also arises where the union hires an attorney to represent a member in a collective bargaining matter; in such cases, the union—and not the member—is the attorney's client.[291]

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[288] *See* Cal. Ethics Op. 2001-156 (2001) (attorney representing an entity generally has only one client, the entity itself); Colo. Ethics Op. 120 (2008) (A lawyer employed or retained by an organization represents the organization and owes a duty only to the organization itself. Although the organization acts through its authorized constituents such as directors, officers, agents and employees, the lawyer does not automatically represent these constituents merely because he represents the organization). *Cf.* D.C. Ethics Op. 382 (2021) (A lawyer may simultaneously serve as counsel and as a director for an entity as long as, while a lawyer-director, she takes every reasonable step to ensure that the client-entity appreciates the distinction between her duties as counsel and her duties as corporate director and declines any representation of the entity, or recuses herself from further representation of the entity, if a conflict is reasonably foreseeable or arises between two or more of: (1) the lawyer's duties to the entity as its counsel; (2) the lawyer's fiduciary duties to the entity as a director; and (3) the lawyer's personal self-interest inherent in simultaneously serving in both roles. The lawyer-director must engage in full and frank discussions with the entity-client of all material risks inherent in the lawyer serving in such a dual role and must obtain informed consent thereto.).

[289] ABA MODEL RULE 1.13.

[290] *See* Chapter 3.I., *supra* ("The Tests for Determining Corporate 'Client Confidences'").

[291] *See, e.g.*, *Peterson v. Kennedy*, 771 F.2d 1244, 1258 (9th Cir. 1985) (attorney handling a labor grievance on behalf of a union as part of the collective bargaining process has not entered into an attorney-client relationship in the ordinary sense with the particular union member who is asserting the underlying grievance.); *United States v. Int'l Bhd. of Teamsters,* 119 F.3d 210 (2d Cir. 1997) (attorney-client privilege did not protect communications that union president candidate's campaign manager had with campaign's law firm about campaign contribution violations, where communications concerned only matters relevant to the campaign and manager never sought advice in his individual capacity from the law firm); *Arnold v. Air Midwest, Inc.*, 100 F.3d 857, 862-63 (10th Cir. 1996) (where a union retains an attorney to represent it in a matter under the collective bargaining agreement, the union, not the member, is the attorney's client); *Brown v. Maine State Emp'rs. Ass'n*, 690 A.2d 956, 960 (Me. 1997) (member did not enter into an attorney-client relationship with union attorney during grievance procedure); *Friday Inv., LLC v. Bally Total Fitness of the Mid-Atlantic, Inc.*, 805 S.E.2d 664 (N.C. 2017) (tripartite attorney-client relationship exists between defendants

B. Corporate/Organizational "Miranda Warnings."

Executives, managers, directors, or other constituents often assume (incorrectly) that the in-house lawyer represents them personally. This confusion is likely to occur in the context of litigation against the corporation, since corporate managers and employees usually begin on the same "team" with the in-house lawyer and tend to feel that the lawyer represents "their" interests as well as the corporation (since in their minds these interests are identical). Internal investigations conducted by in-house attorneys present the same risk of confusion, with employees presuming that the in-house lawyer represents them personally. When the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing (such as directors, officers, members, shareholders, etc.), the lawyer must explain the identity of the client.[292] In the engagement letter, the lawyer/law firm should take care to

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and non-party that contractually agreed to indemnity defendants pursuant to an asset purchase agreement); *Raymond v. North Carolina Police Benevolent Ass'n*, 721 S.E.2d 923 (N.C. 2011) (when association hires counsel to represent a member, a tripartite attorney-client relationship exists among the association, the member and the attorney, enabling them to assert the privilege to shield their communications from discovery). *See also* N.Y. Ethics Op. 743 (2001) (union attorney representing member in arbitration proceeding must make clear to member that he/she is not the client and member's disclosures will not be kept confidential; thereafter, the attorney may share disclosures with union.).

[292] *See, e.g., United States v. Int'l Bhd. of Teamsters*, 119 F.3d 210 (2d Cir. 1997) (attorneys in all cases required to clarify exactly whom they represent, and to highlight potential conflicts of interests); Cal. Ethics Op. 2001-156 (2001) ("[A] city attorney must not mislead constituent sub-entities or officials who have no right to act independently of the governing body of the entity and who are seeking advice in their individual capacity into believing that they may communicate confidential information to the city attorney in such a way that it will not be used in the city's interest if that interest becomes adverse to the constituent or official."); Colo. Ethics Op. 120 (2008) (When the lawyer representing an organization knows or reasonably should know that the interests of the organization are adverse to those of the non-client constituents with whom the lawyer is dealing, the lawyer must clarify his/her role. In this circumstance, the lawyer should advise the constituent that the organization is the lawyer's client that a conflict of interest may exist between the organization and the constituent, that the lawyer does not and cannot represent the constituent, and that the constituent may wish to obtain independent counsel. The lawyer must inform the constituent that he/she cannot assert the attorney-client privilege with regard to communications between the constituent and the lawyer); D.C. Ethics Op. 305 (2001) (representation of a trade association does not, without more, create an attorney-client relationship with each member of the association; particular circumstances of a representation, however, may create an attorney-client relationship with one or more of the members); D.C. Ethics Op. 269 (1997) (a lawyer retained by a corporation to conduct an internal investigation represents the corporation only and not any of its constituents, such as officers or employees; corporate constituents have no right of confidentiality regarding communication with the lawyer, but the lawyer must advise them of his position as counsel for the corporation if there is any ambiguity as to his role); Miss. Ethics Op. 248 (2001) (attorney employed as in-house counsel by a mortgage broker should have a clear understanding of whom he represents, and should make sure that all parties involved in the real estate closing understand who is and who is not the attorney's client, and give the unrepresented parties an opportunity to obtain counsel; assuming that the attorney represents only one party, as he should, and that all other parties are made aware of that representation, there is no conflict with the other parties); *Goodrich v. Goodrich*, 960 A.2d 1275 (N.H. 2008) (Corporation under new ownership of former terminated employees, who obtained their shares from former shareholder after settling breach of contract, misrepresentation and quantum meruit action against corporation, gained control of attorney-client relationship with law firm that had represented corporation in the prior action, for purposes of determining whether law firm had a disqualifying conflict of interest that barred firm from representing corporation's former board of directors in employees' and corporation's breach of fiduciary duty action against the board; though corporation under new ownership no longer provided engineering and surveying services, it continued to own, manage and lease corporate office building, new ownership continued to operate corporation as a corporation in good standing, and corporation under new ownership continued to possess corporation's pre-existing rights and liabilities.); N.Y. Ethics Op. 978 (2013) (An attorney acting as general counsel to a closely held corporation represents the entity and not its directors/sole shareholders and must explain to the directors/shareholders that he does not represent them when he becomes aware that action to be taken on behalf of the entity may be divergent from their

identify accurately the corporate or organizational "client" since it will affect the scope (and waiver) of the attorney-client privilege and potential conflicts.[293]

Even in the absence of apparent adverse confidential interests, the in-house lawyer should give corporate "Miranda warnings," making clear that he/she is conducting the interview on behalf of the corporate or organizational entity and affirmatively stating that he/she does not represent the constituent.[294] This is especially important in situations where the employee has a potential claim against the corporation, or when the employee may have committed a wrong toward the corporation. An explanation of the lawyer's loyalty to the organization is often appropriate in connection with internal investigations. In disclaiming representation, the lawyer should explain the conflict of interest presented by the potential adversity, that the lawyer cannot represent the constituent, and that the employee's statements may not be kept in confidence with respect to the corporation and may not be privileged.[295] An in-house lawyer may also represent any of its

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personal interests.); *In re Conduct of Klemp*, 418 P.3d 733 (Or. 2018) (public reprimand warranted for attorney's breach of her duty to avoid improper communications with individuals; attorney's failure to correct misunderstanding about her role in representing individual prevented individual from making fully informed decision about seeking representation of her own, which might have averted subsequent expensive conflicts about control over her finances).

[293] *See* Alaska Ethics Op. 2012-3 (2012) (where the interests of the organization and its majority owners are adverse to the interests of minority owners, counsel for closely held organization must make a fact-based analysis to determine whether a conflict exists and, if it does, whether it can be waived. In general, representation of the organization does not imply representation of an individual owner or owners.); *O'Rear v. Diaz*, 2024 WL 3983363 (S.D. N.Y. Aug. 29, 2024) (defense counsel not disqualified for failing to give a plaintiff a proper *Upjohn* warning; portions of the warnings were conveyed and it should have been evident to plaintiff that the attorney represented the company and the contact was, at most, a technical violation of Rule 1.13 which would not affect or taint the litigation or a potential trial); *Estate of Paterno v. NCAA*, 168 A.3d 187 (Pa. Super. Ct. 2017) (university did not have standing to challenge production of investigative report prepared by external legal counsel where engagement letter stated that counsel was engaged as external legal counsel to the task force and, therefore, the university's task force, and not the university itself, was the client of the outside counsel); *Somers v. QVC, Inc.*, 2021 WL 3487315 (E.D. Pa. Aug. 9, 2021) (the mere fact that QVC and HSN were sister companies and had a shared services agreement did not automatically mean that the privilege would shield communications between QVC employees and a lawyer solely representing HSN in the absence of evidence that the two entities shared a legal interest in the communication at issue; however, where in-house counsel collaborates to ensure compliance with FTC regulations and shares that legal advice with employees from a sister company, the communications are protected).

[294] A suggested statement: "I am conducting this interview as the attorney representing [the company] in connection with an investigation of [describe nature of investigation/proceeding]. Anything you tell me may be disclosed to company management or as otherwise directed by [the company] in connection with that proceeding. Although what you say may be considered a confidential communication between the company and its attorneys, I do not represent you personally and thus cannot promise to keep anything you tell me from appropriate company officials." *See also* Cal. Ethics Op. 2001-156 (2001) (To avoid unintended formation of an attorney-client relationships with constituent officials, attorneys should comply with Rule 1.13(D), which requires the attorney not to mislead the official into believing that the attorney represents the official in his or her personal capacity when the attorney cannot do so.).

[295] *See, e.g., United States v. Stein*, 463 F. Supp. 2d 459 (S.D. N.Y. 2006) (Conversations between defendant, a partner in a large multinational accounting firm who was later indicted for accounting fraud, and both in-house counsel and outside counsel retained by the firm, which concerned an IRS investigation of the firm's tax shelter activities, were not protected by the attorney-client privilege, notwithstanding that the firm's partnership agreement stated that the firm's counsel acted on behalf of all partners except in a dispute between a partner and the firm, and that outside counsel had previously simultaneously represented the defendant and the firm in prior litigation; conversations did not focus on defendant's personal interests and liabilities alone, defendant was not deceived by the firm or its attorneys about the nature of her relationship with counsel, and in prior joint litigation defendant was a witness, not a party, in an employment lawsuit against the firm and such representation did not give rise to a reasonable expectation on her part that all communications with counsel, even a long time thereafter, were made in the context of an individual attorney-client relationship.); *New Destiny Treatment Ctr., Inc. v. Wheeler*, 950 N.E.2d 157 (Ohio 2011) (No attorney-

directors, officers, employees, or other constituents, provided the informed consent of the organization to dual representation is given by an official of the organization other than the individual who is to be represented, or by the shareholders.[296]

C. Governmental "Clients."

Unlike private clients, a governmental entity may have lawyers who have the legal authority to act independently of the entity. For example, a city's district attorney is often an elected official with the legal authority to take certain actions within his/her spheres independent of the executive officers of the city, such as the mayor or city council. The discretion of district attorneys regarding what cases to prosecute and how to deploy staff are not subject to control by the associated governmental entity and can only be attacked in court. Such truly independent sub-entities alter the "who is the client" rules in the governmental context.[297]

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client relationship existed between corporation and law firm and attorney who had represented dissenting member of board of trustees in underlying dispute over control of corporation, and thus corporation could not subsequently bring an action against attorney and firm for alleged negligence in assisting dissenting member, since dissenting member which had hired attorney and firm lacked authority to do so on corporation's behalf; although dissenting member had represented that attorney was corporation's attorney in underlying dispute, dissenting member had been relieved of his authority to control daily activities of corporation at time he hired attorney, and corporation took no action to ratify hiring of attorney, through a board resolution or otherwise.); *Kennedy v. Gulf Coast Cancer & Diagnostic Ctr. at Se., Inc*., 326 S.W.3d 352 (Tex. App.—Houston [1st Dist.] 2010) (Evidence supported finding that corporation alone held attorney-client privilege applicable to memo prepared by law firm at request of counsel, despite counsel's alleged subjective intent that law firm prepare the memo to benefit both corporation and its officers; memo expressly disclaimed any intent to advise corporation's owners, officers, or directors, and trial court determined that memo did not come within the joint client exception to the attorney-client privilege.). *Cf. In re Grand Jury Subpoenas*, 144 F.3d 653 (10th Cir. 1998) (corporate officers were able to assert a personal attorney-client privilege with respect to conversations with corporate counsel where they showed they approached counsel for purpose of seeking legal advice in their individual capacities rather than as representatives, and the conversations did not concern matters within the company or the general affairs of the company); *Bruzga's Case*, 27 A.3d 804 (N.H. 2011) (evidence that brother of attorney's incapacitated client sought and received advice from attorney on numerous occasions and that he relied upon such advice, supported the finding that the attorney formed an attorney-client relationship with the brother); *Disciplinary Bd. v. Netti*, 797 N.W.2d 591 (Iowa 2011) (attorney-client relationship presumed to exist between attorney and the person on whose behalf the attorney enters an appearance, but evidence that client did not consent to the appearance may rebut that presumption.).

[296] ABA MODEL RULE 1.7; Tex. DRPC 3.08 and cmt. 8. *See* Mo. Informal Ethics Op. 2021-05 (2021) (in dual representation of company and manager named in a lawsuit, the rules require that the company's consent be given by an appropriate official of the company other than the manager who is seeking individual representation). *Cf.* Ill. Ethics Op. 17-05 (2017) (in-house lawyer may provide legal services to multiple subsidiaries of the same corporate parent, but nevertheless must be mindful of the application of the Rule of Professional Conduct, particularly those addressing conflict of interest and confidentiality). *Cf. Univ. of Louisville v. Eckerle*, 580 S.W.3d 546 (Ky. 2019) (no attorney-client relationship existed between University and its regular outside attorney retained to represent department chair and dean with respect to faculty member grievance; the University was not a party to the grievance procedure, the attorney represented the chair and dean in the proceedings, the University was a neutral arbiter in the grievance proceedings, and no contract or other document supported a finding that attorney represented University in the matter).

[297] *See* Cal. Ethics Op. 2001-156 (2001) (The cases suggest that a court might be less rigorous in interpreting the scope of the conflicts of interest rules when applied to governmental attorneys than to other attorneys.); Colo. Ethics Op. 120 (2008) (It is improper for a lawyer representing an organization to assert that he/she has been engaged by the constituents since representation of organization does not automatically extend to individual constituents); N.Y.C. Ethics Op. 2004-03 (2004) (conflict of interest questions may be analyzed differently for government lawyers because of the legal framework within which they function; questions about the identity of the public client, and about whether particular decisions in the representation are entrusted to the government lawyer or to an agency representative, must

D. Responses to Unlawful Activity.

An in-house lawyer has a duty to take reasonable remedial action when he/she learns that an officer, employee or other person within the organization intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization.[298] Model Rule 1.13(b) requires counsel to proceed as reasonably necessary in the best interest of the organization, which may require reporting "up the ladder" to higher authorities within the organization and, if warranted by the circumstances, reporting to the highest authority that can act on behalf of the organization with respect to the issue.[299] Model Rule 1.13 also provides that the lawyer may "report out" where, despite the lawyer's efforts to report the violation up the organizational ladder, the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or a refusal to act that is clearly a violation of law and counsel reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, but the lawyer may disclose only to the extent that the lawyer reasonably believes necessary to prevent substantial injury to the organization.[300] However, this reporting out provision does not apply with respect to

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be determined by reference to the law establishing the government law department, and not exclusively by referring to disciplinary provisions; similarly, the questions of whether a government law department may represent multiple government agencies with differing interests, or even antagonistic positions, is in part a question of law, although ethical considerations suggest that, at the very least, it is advisable to avoid representing public agencies in disputes with each other; in dealing with individuals within the government, government lawyers must comply with DR-5-109, which generally governs representation of an entity; when the agency constituents are unrepresented and the government lawyer does not propose to represent them, the lawyer must clarify his or her role as set forth in opinion; in that event, the government lawyer will be limited in the extent to which he or she may provide advice to the individual.); Utah Ethics Op. 19-02 (2019) (Government clients are treated like organizational clients under Rule 1.13; however, lawyers representing government clients may have expanded duties under relevant law. Government clients should be identified at the outside of the representation. However, a lawyer may not ignore potential conflicts by virtue of a narrow definition of the governmental client).

[298] ABA MODEL RULE 1.13(b).

[299] *Id*. *See also* ABA MODEL RULE 1.13(e) (lawyer that reasonably believes he/she has been discharged because of the lawyer's actions under Rule 1.13(b) or (c) or withdraws under circumstances that require or permit withdrawal under either of those paragraphs, shall take reasonable measures to ensure that the organization's highest authority is informed of the lawyer's discharge or withdrawal); Ill. Ethics Op. 20-02 (2020) (Rule 1.13 of the RPC governs when and whether an in-house lawyer is required to report fraudulent conduct of the entities' employees, officers or other individuals to higher authorities within the organization or to others outside the organization. Even if such reporting is not required, an in-house lawyer may be permitted to disclose such information within the organization, subject to the lawyer's obligation to maintain client confidences); Mich. Ethics Op. RI-345 (2008) (Where the corporation's CEO has informed the corporation's litigation attorney that he intend to destroy documents that are subject to a discovery order and has asked the lawyer to return copies of the documents, the lawyer should first attempt to dissuade the CEO from engaging in the threatened misconduct. If the officer does not relent, the attorney should refer the matter to higher authority in the corporation and should decline to return copies of documents in his possession until the matter is resolved. The attorney is not required to withdraw merely because the officer suggests improper conduct.).

[300] ABA MODEL RULE 1.13(c). *See also* ABA MODEL RULE 1.6(b) (permitting disclosure where the lawyer's services have been used by the client to further a crime or fraud causing substantial injury to the financial interests or property of another); N.Y. R. Prof'l Conduct 3.3 (disclosure of client confidential information may be required to remedy the client's fraud on the tribunal); ABA Formal Ethics Op. 491 (2020) (lawyer has duty to inquire when the lawyer knows, or should know, that the client is seeking the lawyer's services in a transaction advising or assisting in criminal or fraudulent conduct); Tex. DRPC 1.05 (lawyer may reveal confidential information, *inter alia*, when the lawyer has reason to believe it is necessary (a) to comply with a court order, a Disciplinary Rule, or other law, (b) to prevent the client from committing a criminal or fraudulent act, or (c) to rectify the consequences of a client's criminal or

information relating to the lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.[301]

Section 307 of the Sarbanes-Oxley Act ("SOX") 15 U.S.C. § 7245, required the Securities and Exchange Commission ("SEC") to adopt rules governing "minimum professional standards" for attorneys practicing before the SEC and/or representing issuers. In response, the SEC issued final regulations implementing the attorney conduct rules which, among other things, requires covered attorneys (both in-house and outside counsel) who become aware of "credible evidence of an issuer's material violation" of securities law, breach of fiduciary duty, or any "similar violation" to report the evidence "up the ladder" within the issuer until an "appropriate response" is made.[302] If the attorney believes reporting to the company's CEO and/or chief legal officer (CLO) would be futile, the attorney may report to the company's audit committee, independent committee or board until the attorney receives an "appropriate response."[303] If, within a reasonable time, the reporting attorney does not believe that the CEO or CLO has provided an appropriate response, the attorney must report the evidence of a material violation to the company's audit committee, independent committee or board, depending on the internal structure of the company.[304] If, within a reasonable time, the reporting attorney still does not reasonably believe the company has made an appropriate response, the attorney must explain the reasons for this belief to the CEO, CLO and the directors to whom the attorney reported earlier.[305] During this process, the reporting attorney may disclose to the SEC confidential information related to his/her representation of the company, without the company's consent, to the extent necessary to 1) prevent the company from committing violations likely to cause substantial injury to the company or its investors; 2) prevent perjury or a fraud on the SEC; or 3) rectify the consequences of a material violation that caused substantial injury to the company or its investors.[306]

The SEC proposed, but did not adopt, a "noisy withdrawal" provision, requiring attorneys who do not receive an "appropriate response" to withdraw from representing (or working as an in-house attorney for) an issuer, notify the SEC of the withdrawal or disavow any tainted documents filed with the SEC. The SEC later proposed an alternative to the "noisy withdrawal" that would

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fraudulent act in the commission of which the lawyer's services had been used); NY. Ethics Op. 1045 (2015) (in-house counsel for corporation may submit to an interview with an agency that is investigating alleged wrongdoing by the client, if the lawyer does not disclose confidential information, but if the agency's investigation results in a proceeding and if the lawyer is likely to be a witness on a significant issue of fact, the lawyer may not also act as an advocate before the tribunal in such proceeding, absent an exception to the lawyer-witness rule) *Cf.* Colo. Ethics Op. 142 (2021) (lawyer does not have a duty to inquire about a client's request if the lawyer suspects that the client is seeking advice in a transaction that may be criminal or fraudulent but does not have actual knowledge or is willfully blind to the client's suspected criminal or fraudulent activity).

[301] ABA Model Rule 1.13(d). *Cf.* Wash. Ethics Op. 2229 (2012) (where attorney's client is involved in an ongoing financial scam that the lawyer believes would constitute a crime, and the attorney learned of the scam in the course of representation of the client but was not directly involved in the scam nor believes the client has used his legal services to further the scam, the attorney may disclose information about the scam to law enforcement, as long as the attorney only shares that information he reasonably believes necessary to accomplish the law enforcement purpose of the disclosure; in these circumstances attorney may be compelled to withdraw from representation).

[302] *See* 17 C.F.R. §§ 205.1 through 205.6(c).

[303] *See* 17 C.F.R. § 205.3(b)(4).

[304] *See* 17 C.F.R. § 205.3(b)(3).

[305] *See* 17 C.F.R. § 205.3(b)(9)).

[306] *See* 17 C.F.R. §§ 205.3(d)(2).

require attorney withdrawal, but would require an issuer, rather than an attorney, to publicly disclose the attorney's withdrawal or written notice that the attorney did not receive an appropriate response to a report of a material violation. The proposed rules would also permit an attorney, if an issuer has not complied with the disclosure requirement, to inform the SEC that the attorney has withdrawn from representing the issuer or provided the issuer with notice that the attorney has not received an appropriate response to a report of a material violation.[307] The SEC has yet to adopt either "noisy withdrawal" provision.[308] The SEC regulations purport to immunize attorneys who make disclosures required or authorized by the regulations from discipline for violating state confidentiality provisions or other state rules.[309] This portion of the rule has set up a conflict between the SEC and state bars with rules that conflict with the SEC's.[310]

[307] 68 Fed. R. 6324 (2003); SEC Press Release No. 2003-13 (Jan. 23, 2003).

[308] SEC Semi-Annual Regulatory Agenda, 72 Fed. R. 23615, 23640 (Apr. 30, 2007).

[309] 17 C.F.R. § 205.6(c)).

[310] *See* Wash. Interim Ethics Op. Re: The Effect of the SEC's Sarbanes-Oxley Regulations on Washington Attorney's Obligations Under the RPCs (2003) (To the extent that the SEC regulations authorize but not require revelation of client confidences and secrets under certain circumstances, a Washington lawyer should not reveal such confidences and secrets unless authorized to do so under the RPCs; a lawyer cannot defend against a RPC violation by claiming "good faith" compliance with the SEC regulations); Letter from SEC General Counsel Giovanni P. Prezioso Regarding Washington State Bar Ass'n. Proposed Op. on the Effect of the SEC's Attorney Conduct Rules (2003) (SEC rules preempt conflicting state rules and shields an attorney from discipline based on "good faith" compliance with SEC rules); Corporations Comm. of the Bus. Law Section, State Bar of Cal., In re "Public Statement by SEC Official: Letter dated July 23, 2003 Regarding Washington State Bar Ass'n's Proposed Op. on the Effect of the SEC's Attorney Conduct Rules" (Aug. 13, 2003). *See also* Corporations Comm. of the Bus. Law Section and Comm. on Prof'l Responsibility and Conduct, State Bar of Cal., "Ethics Alert: The New SEC Attorney Conduct Rules v. California's Duty of Confidentiality" (2003). *Cf.* N.C. 2005 Formal Ethics Op. 9 (2006) (lawyer for publicly traded company does not violate state ethics rules if lawyer "reports out" confidential information as permitted by SEC regulations even though such conduct would otherwise violate North Carolina ethics rules).

VI. INADVERTENT DISCLOSURE AND IMPROPER ACQUISITION OF CONFIDENTIAL/PRIVILEGED INFORMATION OF THE OPPOSING PARTY

A. Ethical Obligations of Recipient of Inadvertently Disclosed Documents.

Attorneys face ethical issues in connection with inadvertent receipt or disclosure of attorney-client communications or other confidential information from an adversary. Such disclosures may occur because of a document production, a misdirected facsimile or email transmission, a "switched envelope" mailing, or misunderstood distribution list instructions. In some cases, an employee of a corporate party may deliver to the attorney documents which are considered by the corporation to be its confidential or proprietary information or otherwise privileged. With its frequent use of facsimile and electronic mail and the increase in multiparty and document intensive cases, inadvertent disclosures more frequently occur, and today's beneficiary of such disclosures may likely become tomorrow's victim.

In Formal Opinion 05-437 (2005), the ABA held that a lawyer who receives a document from opposing parties or their lawyers and knows or reasonably should know that the document was inadvertently sent should promptly notify the sender to permit the sender to take protective measures.[311] As the Opinion explained, the Model Rules do not require the receiving lawyer to

[311] ABA Formal Ethics Op. 05-437 (2005). *See* Alaska Ethics Op. 2019-2 (2019) (The lawyer who receives confidential information in an inadvertent disclosure must promptly notify the opposing lawyer. The lawyer should either follow the instructions of the adversary's lawyer, or refrain from using the materials until a definitive resolution is obtained from a court); *Lund v. Myers*, 305 P.3d 374 (Ariz. 2013) (Following an inadvertent disclosure, any non-privileged documents may be used in the litigation and any documents determined to be privileged must be returned to the disclosing party or destroyed); Ariz. Ethics Op. 01-04 (2001) (where former employee gave her attorney copies of documents of the ex-employer that appear, on their face, to be subject to the attorney-client privilege or otherwise confidential and were provided to the former employee by an "ally" who is a current employee of the ex-employer that has access to confidential information, the lawyer should refrain from further examination of the documents or from making any use of them and, subject to client consent, notify the ex-employer's counsel of their receipt and abide by that counsel's instructions or seek a court ruling as to whether they may be kept or used; if client misconduct is involved in obtaining the documents, the client should be counseled about the possible legal consequences of her conduct and advised to discontinue it); Calif. Ethics Op. 2013-188 (2013) (If an attorney receives an unsolicited intentionally transmitted communication between opposing counsel and opposing counsel's client under circumstances reasonably suggesting that it is a confidential communication apparently sent without the consent of its owner or with court approval, the attorney may not ethically read the communication, even if she suspects the crime-fraud exception might vitiate the privilege. The attorney must notify opposing counsel as soon as possible that the attorney has possession of the communication, and the two attorneys should try to resolve the privilege issue or, if that fails, obtain the assistance of a court.); *Rico v. Mitsubishi Motors Corp.*, 42 Cal. 4th 807 (Cal. 2007) (an attorney who inadvertently receives plainly privileged documents under the attorney-client privilege, the work product privilege, or any other similar doctrine, must refrain from examining the documents any more than necessary to determine that they are privileged, and must immediately notify the sender that he is in possession of potentially privileged documents; disqualification of plaintiffs' attorney and experts proper remedy for attorney's use of documents summarizing dialogue among defense attorneys and defense experts relating to strength and weaknesses of defendants' technical evidence; document was plainly privileged, and plaintiffs' attorney surreptitiously copied document, concealed this fact from defense team, then disseminated document among plaintiffs' legal team, and made full use of document to impeach defense experts during depositions; such unethical conduct caused irreversible damage to defendants); Colo. Ethics Op. 108 (2000) (a lawyer who receives documents from an adverse party or an adverse party's lawyer that on their face appear to be privileged or confidential, has an ethical duty, upon recognizing their privileged or confidential nature, to notify the sending lawyer that he/she has the documents, unless the receiving lawyer knows that the adverse party has intentionally waived privilege and confidentiality. In addition, if the lawyer actually knows of the inadvertence of the disclosure before examining the documents, the receiving lawyer must not

examine the documents and must abide by the sending lawyer's instructions as to their disposition); D.C. Ethics Op. 318 (2002) (When counsel in an adversary proceeding receives a privileged document from a client or other person that may have been stolen or taken without authorization from an opposing party, receiving party required to refrain from reviewing and using document if: (1) its privileged status is readily apparent on its face, (2) receiving counsel knows that the document came from someone who was not authorized to disclose it, (3) receiving counsel does not have a reasonable basis to conclude that the opposing party waived the attorney-client privilege with respect to such document. Receiving counsel may violate Rule 8.4(c) by reviewing and using the document in an adversary proceeding under such circumstances and should either return the document to opposing counsel or make inquiry of opposing counsel about its status prior to determining what course of action to take.); D.C. Ethics Op. 256 (1995) (Where a lawyer has inadvertently included documents containing client secrets or confidences in material delivered to an adversary lawyer, and the receiving lawyer in good faith reviews the documents before the inadvertence of the disclosure is brought to that lawyer's attention, the receiving lawyer engages in no ethical violation by retaining and using those documents. Where, on the other hand, the receiving lawyer knows of the inadvertence of the disclosure before the documents are examined, Rule 1.15(a) requires the receiving lawyer to return the documents to the sending lawyer; the receiving lawyer also violates Rule 8.4(c) if the lawyer reads and/or uses the material.); Fla. Ethics Op. 07-01 (2007) (lawyer whose client has provided lawyer with documents that were wrongfully obtained by client may need to consult with a criminal defense attorney to determine if the client has committed a crime; the lawyer must advise the client that the materials cannot be retained, reviewed or used without informing the opposing party that the attorney and the clients have the documents; if the client refuses to consent to disclosure, the attorney must withdraw from the representation); Fla. Ethics Op. 93-3 (1994) (attorney who receives confidential documents of an adversary as a result of an inadvertent release is ethically obligated to promptly notify the sender of the attorney's receipt of the documents); Haw. Ethics Op. 39 (2001) (attorney who receives on an unauthorized basis materials of an adverse party that the attorney knows to be privileged or confidential should, upon recognizing the privileged or confidential nature of the materials, either refrain from reviewing such materials or review them only to the extent required to determine how appropriately to proceed; the attorney should then notify the adversary's lawyer that the attorney has such materials, and should either follow the instructions of the adversary's lawyer with respect to the disposition of the materials or refrain from using the materials until a definitive resolution of the proper disposition of the materials is obtained from the court); Me. Ethics Op. 146 (1994) (receiving lawyer has duty to notify sending lawyer of receipt of inadvertently disclosed privileged or confidential documents); Md. Ethics Op. 2000-04 (2000) (lawyer who receives privileged documents from opposing counsel in discovery and learns before examining them that they were inadvertently produced, must immediately return documents unopened and unreviewed; if the lawyer learns of the inadvertent production only after reviewing the documents, the lawyer must inform his/her client and opposing counsel and consider whether to return the documents or seek a ruling from the court; earlier ethics opinion distinguished); Miss. Ethics Op. 253 (2005) (an attorney in possession of an opposing party's attorney-client communications for which the attorney-client privilege has not been intentionally waived should advise opposing counsel of the fact of its disclosure; once the fact of disclosure is before both parties, they can then turn to the legal implications of the disclosure and a legal assessment of whether waiver has occurred; in some instances the parties may be able to agree regarding how to handle the disclosure. In other instances, it may be necessary to seek judicial resolution of the legal issues); Mo. Informal Ethics Op. 2019-01 (2019) (if attorney knows or should know that opposing party's information was inadvertently sent, the attorney is required to notify the sender; if attorney knows or should know that opposing party's information was wrongfully obtained, use of the information may violate Rule 4-4.4(a)); *Maldonado v. New Jersey*, 225 F.R.D. 120 (D. N.J. 2004) (retention and use of privileged letter by attorney in which defendants responded to unfavorable administrative determination of plaintiff's allegations, warranted disqualification of plaintiff's counsel in his subsequent employment discrimination action, in that plaintiff's counsel should have recognized privileged nature of letter that was signed by two named defendants, addressed to their attorney, and contained information relevant to the litigation; counsel did not inform defense attorneys that they possessed letter or attempt to return it and refused to return letter upon request, and counsel digested, to plaintiff's advantage, contents of letter, which was essentially a blueprint to merits of case and defenses, such that its disclosure substantially prejudiced defendants; simply returning letter and removing possibility of future impingement on privilege would not remove taint.); N.Y. Ethics Op. 2019-3 (2019) (lawyer who receives a document related to the representation of the lawyer's client, and who knows or reasonably should know that it was inadvertently sent, must promptly notify the sender. Although substantive law, procedural rules, judicial decisions, court orders, and/or agreements between the parties may impose additional obligations, Rule 4.4(b) does not in itself prohibit the receiving lawyer from using inadvertently sent information. If using the inadvertently sent information would reasonably be expected to advance the client's objectives and the law permits its use, then Rules 1.2(a) and 1.4 direct the lawyer to consult with the client about the

refrain from examining the materials or to abide by the instructions of the sending lawyer, and the Rule does not apply to intentionally transmitted documents.[312] Many state ethics rules are in

risks and benefits of using the information. The client's desire to use the information should be treated by the lawyer as controlling when the failure to do so would constitute a failure "to seek the objectives of the client through reasonably available means permitted by law and these Rules" under Rule 1.1(c), and/or would "prejudice the rights of the client" under Rule 1.2(e). This determination may depend on whether reasonably available alternative means exist for obtaining the information in admissible form from independent sources, and how much time and expense would be involved in those efforts. If the lawyer reasonably determines that Rules 1.1(c) and 1.2(e) do not require using the inadvertently sent information, then the lawyer may refrain from using it, provided that the lawyer's decision is consistent with the lawyer's duties to competently and diligently seek the client's objectives in the representation. If the potential significance of the information is unclear, or if other law governing the use of such information in the jurisdiction is uncertain, a lawyer may refrain from using the information even over the client's objection. Finally, if the lawyer and the client have a fundamental disagreement over whether to use the inadvertently disclosed information, the lawyer may be permitted or required to withdraw from the representation depending on the circumstances.); N.Y.C. Ethics Op. 2012-1 (2012) (a lawyer who receives a letter, fax, email or other communication that the lawyer knows or reasonably should know was transmitted by mistake must promptly notify the sender and follow any other applicable law); N.Y.C. Ethics Op. 730 (2002) (if a lawyer receives information containing confidences that apparently were not intended for the lawyer, the lawyer should refrain from reviewing the information, notify the sender and comply with the sender's instructions on return or disposal of the information); N.C. Ethics Op. RPC 252 (1997) (a lawyer in receipt of materials that appear on their face to be subject to the attorney-client privilege or otherwise confidential, which were inadvertently sent to the lawyer by the opposing party or opposing counsel, should refrain from examining the materials and return them to the sender); *Transp. Equip. Sales Corp. v. BMY Wheeled Vehicles*, 930 F. Supp. 1187 (N.D. Ohio 1996) (counsel receiving inadvertently disclosed privileged documents was required, as a matter of professional responsibility, to inform sending counsel of his receipt of the document and return it without using or disseminating it); Or. Ethics Op. 2011-187 (2011) (if a lawyer receiving document containing metadata knows or should have known it was inadvertently sent, the lawyer must notify the sender promptly; the rules do not require the lawyer to return the document unread or to comply with a request by the sender to return the document); Pa. Ethics Op. 2011-10 (2011) (attorney who is mistakenly copied on an email between opposing counsel and that lawyer's clients must, after notifying sender, consult with his own client in deciding whether and how to use critical information in the email); Tenn. Ethics Op. 2004-F-150 (2004); Va. Ethics Op. 1871 (2013) (lawyer inadvertently receiving privileged information during pre-trial discovery should promptly notify opposing lawyer and either sequestered or destroyed his copy pending judicial determination of whether he could use the document); Va. Ethics Op. 1702 (1997) (outside the discovery process, lawyer inadvertently receiving privileged information from another party obligated to return the information to the party's lawyer or otherwise follow the sending lawyer's instructions, even if those instructions are to destroy the document); *Richards v. Jain*, 168 F. Supp. 2d 1195 (W.D. Wash. 2001) (requirement to return privileged materials to the privilege holder even if no pending litigation). *Compare* Alaska Ethics Op. 2019-3 (2019) (Lawyer who receives confidential information in an intentional and authorized disclosure is not required to notify the opposing counsel); Tex. Ethics Op. 664 (2016) (disciplinary rules do not prescribe a specific course of conduct a lawyer must follow upon the unauthorized or inadvertent receipt of another party's confidential information outside the normal course of discovery. In a given situation a lawyer's failure to act upon receipt of such materials might violate rules dealing with criminal, fraudulent, dishonest, deceitful or misleading conduct, but whether such violation occurs will depend on the specific facts and circumstances, the applicable law, and the rules of the governing tribunal. In deciding on a course of action, lawyer should advise client of the possible responsive actions and potential consequences thereof). *Cf. Cahill v. Insider, Inc.*, 131 F.4th 933 (9th Cir. 2025) (court had inherent power to order news organization that intervened in putative class action gender discrimination and hostile workplace case to return or destroy sealed confidential documents inadvertently disclosed to it by plaintiffs' counsel.).

[312] ABA Formal Ethics Op. 05-437. *See* ABA MODEL RULE 4.4(b) ("A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." Comment 2 to the Rule states that "[w]hether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived." Similarly, the Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person); *Merits Incentives, LLC v. Eight Judicial Dist.*, 262 P. 3d 720 (Nev. 2011) (attorney who receives documents regarding a case from an anonymous source must promptly notify opposing counsel

accord.[313] In contrast, a few state bar opinions have held that the receiving lawyer has no obligation to disclose to an adverse party that she possesses the adverse party's privileged/confidential information and the receiving lawyer may use the materials.[314]

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or risk being in violation of ethical duties and of being disqualified as counsel; notification must adequately put opposing counsel on notice that the documents were not received in the normal course of discovery and describe, with particularity, the facts and circumstances that explain how the documents came into counsel's or his/her client's possession). *Cf*. N.Y. Ethics Op. 945 (2012) (A lawyer may not disclose that the client has been reading the opposing party's client-lawyer e-mails, although not communicating the e-mails or their contents to the lawyer, unless (1) the lawyer knows that the client is committing a crime or fraud and no other remedial measures will prevent harm to the opposing party, or (2) governing judicial decisions or other law require disclosure.); Iowa Ethics Op. 15-02 (2015) (where counsel obtains confidential or attorney-client privileged communications inadvertently disclosed, or obtained under some cover of right, counsel should stop reading or otherwise using the documents and immediately notify the lawyer whose communications have been intercepted and either return the documents to the lawyer or follow the lawyer's directions regarding same, or apply to the court for directions on continued use or possession. If counsel receives the documents wrongfully obtained by the client or someone acting on client's behalf, receiving counsel should advise client of the consequences of their conduct and of counsel's duties specified in the foregoing sentence. If client refuses to allow counsel to rectify the wrongful disclosure, counsel should conduct due diligence to determine if the crime-fraud exception mandates disclosure and if so return the documents to the lawyer involved or file same under seal with the court without explanation, and withdraw from further representation of client); Utah Ethics Op. 15-03 (2015) (an individual whose purpose in communicating with the lawyer is to defraud that attorney rather than to obtain legal services is not a client or prospective client entitled to confidentiality; therefore, it would not violate any ethical rules for an attorney to disclose relevant information about the individual to law enforcement).

[313] *See* Ariz. R. Prof'l Conduct 4.4(b); Ark. R. Prof'l Conduct 4.4(b); Conn. R. Prof'l Conduct 4.4(b); Del. R. Prof'l Conduct 4.4(b); D.C. R. Prof'l Conduct 4.4(b); Fla. R. Prof'l Conduct 4.4(b); Idaho R. Prof'l Conduct 4.4(b); Iowa R. Prof'l Conduct 32:4.4(b); La. R. Prof'l Conduct 4.4(b); Md. R. Prof'l Conduct 4.4(b); Me. R. Prof'l Conduct 4.4(b); Minn. R. Prof'l Conduct 4.4(b); Miss. R. Prof'l Conduct 4.4(b); Mo. R. Prof'l Conduct 4.4(b); Mont. R. Prof'l Conduct 4.4(b); Neb. R. Prof'l Conduct 4.4(b); Nev. R. Prof'l Conduct 4.4(b); N.C. R. Prof'l Conduct 4.4(b); N.D. R. Prof'l Conduct 4.4(b); Ohio R. Prof'l Conduct 4.4(b); Or. R. Prof'l Conduct 4.4(b); Pa. R. Prof'l Conduct 4.4(b); R.I. R. Prof'l Conduct 4.4(b); S.C. R. Prof'l Conduct 4.4(b); S.D. R. Prof'l Conduct 4.4(b); Utah R. Prof'l Conduct 4.4(b); Wash. R. Prof'l Conduct 4.4(b); Wis. R. Prof'l Conduct 4.4(b).

[314] *See* Ill. Ethics Op. 98-04 (1999); Ky. Ethics Op. KBA E-374 (1995); Me. Ethics Op. 146 (1984); Md. Ethics Op. 89-53 (1989), *distinguished in part by* Md. Ethics Op. 2000-04 (2000); Phila. Ethics Op. 94-3 (1994). *See also Aerojet-General Corp. v. Transp. Indem. Ins.*, 18 Cal. App. 4th 996 (1993) (attorney who represented insured could not be faulted for examining and using memo from insurers' counsel to insurers' parent corporation, that attorney received innocently, and attorney could not be sanctioned for failing timely to disclose his receipt of memo). *Cf.* Mass. Ethics Op. 1999-4 (1999) (where a lawyer mistakenly receives from opposing counsel a letter addressed to the opposing counsel's client containing important evidence of which he had previously been unaware and informs opposing counsel of what has occurred, has no obligation to return the letter; if the lawyer "concludes that it is in the client's best interest to do so, [he/she] must resist opposing counsel's demand for return of the letter and should urge the tribunal to reject the claim of attorney-client privilege"); Mich. Ethics Op. CI-970 (1983) (Lawyer who receives an internal private memo of the opposite party during litigation may use the document at trial for impeachment purposes in action "provided that the lawyer or client did not procure or participate in the removal of the document; document at issue was "an internal self-evaluating and critical report by the county's affirmative action officer"); N.Y.C. Ethics Op. 2003-4 (2004) (lawyer who receives a misdirected communication containing confidences or secrets should promptly notify the sender and refrain from further reading or listening to the communication, and should follow the sender's directions regarding destruction or return of the communication; however, if there is a legal dispute before a tribunal and the receiving attorney believes in good faith that the communication appropriately may be retained and used, the receiving attorney may submit the communication for in camera consideration by the tribunal as to its disposition; additionally, the receiving attorney is not prohibited from using the information to which the attorney was exposed before knowing or having reason to know the communication was inadvertently sent; however, it is essential that the receiving attorney promptly notify the sending attorney of the disclosure to give the sending attorney a reasonable opportunity to promptly take whatever steps he or she feels are necessary); Ohio Ethics Op. 93-11 (1993) (lawyer conducting public records search that obtains, through no wrongdoing, copy of attorney-client privileged

Of course, the lawyer must notify her own client that confidential information has been inadvertently transmitted to and read by opposing counsel.[315]

B. Improper Acquisition of Confidential Information (Self-Help).

Lawyers are precluded from inducing present or former employees of an opponent to reveal information the lawyer knows to be protected from disclosure by statute or a well-established common law privilege, or to otherwise improperly acquire such information.[316] Moreover, courts generally discourage a party's resort to self-help evidence-gathering outside the normal legal process. Where parties have improperly obtained confidential information to support their claim or have otherwise circumvented the discovery process, courts have issued remedial orders, including: (i) ordering return or destruction of the improperly obtained evidence;[317] (ii)

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memo, may ethically read it or reveal its contents to client; however, attorney has ethical obligation to notify source and return copy of memo on request); Phila. Ethics Op. 91-19 (1991) (without client consent, Rule 1.6(a) prohibits disclosure to opposing counsel that client had innocently taken a letter written by opposing counsel when it became mixed up with client's own papers).

[315] *See* Ill. Ethics Op. 98-04 (1999); Colo. Ethics Op. 113 (2005) (a lawyer should fully and promptly inform the client of all material developments, including those resulting from the lawyer's own errors.); Mo. Informal Ethics Op. 2022-07 (2022) (where attorney's administrative assistant sent confidential email intended for client to an incorrect email address, attorney must take remedial action to mitigate the consequences to the client and should disclose to client the breach of confidential information to the extent reasonably necessary such that client may make informed decisions regarding the representation). *Cf.* ABA Formal Ethics Op. 481 (2018) (lawyer must disclose "material" errors to current clients, primarily under Rule 1.4. Although Rule 1.4 does not apply to former clients, there may be other reasons a lawyer would want to tell the former client about a mistake. The opinion contains a helpful discussion of when a current client becomes a former client.).

[316] ABA Formal Ethics Op. 97-408 (1997) (gaining from a former government employee information that the lawyer knows is legally protected from disclosure for use in litigation may violate Model Rules 4.4, 8.4(c) and 8.4(d)); ABA Formal Ethics Op. 91-359 (1991) (attorney must be careful not to seek to induce a former employee to violate the attorney-client privilege; such an attempt would violate Rule 4.4); N.J. Ethics Op. 680 (1995) (if lawyer had surreptitiously copied confidential documents in possession of attorneys for adverse party, and items of evidence were involved, it would constitute a violation of Rule 4.4); N.Y. Ethics Op. 749 (2001) (lawyer may not ethically use available technology to surreptitiously examine and trace email and other electronic documents). *Compare* Or. Ethics Op. 2011-186 (2011) (lawyer who receives documents from a third party that may have been stolen or otherwise taken without authorization from the opposing party is not required to notify the opposing party of the receipt of the documents, if the circumstances in which the documents were obtained by the sender involve criminal conduct and its disclosure might link the client to a crime; and in such a case the lawyer may be prohibited from accepting "evidence of a crime" unless the lawyer makes the evidence available to the prosecution).

[317] *See In re IBP Confidential Bus. Documents Litig.*, 754 F.2d 787 (8th Cir. 1985). *See also Niswander v. Cincinnati Ins. Co.*, 529 F.3d 717, 717 (6th Cir. 2009) (employee who worked at home on her home computer and had access to confidential files which she copied and gave to her attorney in support of a pending class action lawsuit to which she had opted in had not engaged in protected activity to support Title VII retaliation claim); *Hellman v. Weisberg*, 2007 WL 4218973 (D. Ariz. Dec. 3, 2007) (Title VII does not protect an employee's unauthorized appropriation, copying, and dissemination of confidential documents without showing that disclosure was necessary to preserve documents); *EEOC v. George Washington Univ.*, 502 F. Supp.3d 62 (D.D.C. 2020) (in discrimination case against university, EEOC ordered to destroy internal emails between university's associate general counsel and assistant to its athletic director it received from former employee who filed equal pay claim against university because they were privileged; university's counsel alerted EEOC that the emails were privileged; the court did not sanction EEOC's attorneys but warned it to assiduously comply with the letter and spirit of the Federal Rules and that future breaches would result in sanctions); *Deering v. Lockheed Martin Corp.*, 2022 WL 3867893 (D. Minn. Aug. 30, 2022) (in-house attorney improperly gave confidential and attorney-client privileged documents to her attorney, who then provided those documents to the EEOC and thus provided a legitimate nondiscriminatory reason for termination; fact issue on whether employer "drew the foul" by not preventing, or at least cautioning in-house attorney against including the documents in her EEOC complaint); *Hill v. Hassan*, 2010 WL 419433 (W.D. Pa. Jan. 29, 2010) (magistrate judge) (Defendants

disqualifying the lawyer receiving the improperly obtained evidence;[318] (iii) dismissing the

ordered to return immediately and destroy copies of documents received from an anonymous source that the parties agree most likely came from one of Plaintiff's current or former employees and at least some of which were, on their face, covered by Plaintiffs' attorney-client privilege; the justifications underlying the protections afforded to inadvertent productions apply with even greater and stricter force in connection with advertent but unauthorized disclosures.); *Nesselrotte v. Allegheny Energy, Inc.*, 615 F. Supp. 2d 397 (W.D. Pa. 2009) (the manner in which employee, employed as an attorney, took employer's confidential documents violated her common law fiduciary duty of honesty, and in taking the documents for her own gain, she violated duty of fidelity to her client; many of the documents were not only marked "confidential" or "attorney-client privileged," but were also marked "confidential information" as that term was defined in a confidentiality agreement; and the employee enlisted the help of two of her subordinates to assist her in copying and taking the documents, told no one at the company what she had done, and had no permission to remove the document); *Pillsbury, Madison & Sutro v. Schectman*, 55 Cal. App. 4th 1279 (1997) (preliminary injunction requiring employees' attorney to turn over documents that were removed from employer law firm was not an abuse of discretion, since attorney established no applicable exception to general rule prohibiting self-help evidence gathering by employees for use in contemplated litigation against their soon-to-be employers, and trial court chose least sanction cognizable in circumstances by ordering return to status quo existing at time documents were taken). *Cf.* Fla. Ethics Op. 07-01 (2007) (A lawyer whose client has provided the lawyer with documents that were wrongfully obtained by the client may need to consult with a criminal defense lawyer to determine if the client has committed a crime. The lawyer must advise the client that the materials cannot be returned, reviewed, or used without informing the opposing party that the attorney and client have the documents at issue. If the client refuses to consent to disclosure, the attorney must withdraw from representation).

[318] *Mirch Law Firm, LLP v. Nakhleh*, 2022 WL 1689252 (9th Cir. May 26, 2022) (disqualification of plaintiffs' counsel in a RICO action affirmed where a law firm witness obtained privileged information from defendants during a prior lawsuit through an implied attorney-client relationship; defendants reasonably believed that the witness was acting as their attorney in connection with the prior lawsuit and that their communications were privileged); *Jackson v. Microsoft* Corp., 78 F. App'x 588 (9th Cir. 2003) (dismissal of employment discrimination action due to employee's theft of employer's proprietary information, fraudulent deposition testimony, and general deception throughout proceeding was not abuse of discretion, even though the court had not first warned employee of possibility of dismissal, where employee had received and reviewed privileged information, and employer would have been unfairly prejudiced if case had gone forward); *Lynn v. Gateway Unified Sch. Dist.*, 2011 WL 6260362 (E.D. Cal. Dec. 15, 2011) (former employee's lawyer and law firm disqualified in employee's discrimination lawsuit against school district where lawyer knowingly took possession of emails that employee illegally copied from the district's server, 11% of which contained privileged information, returned the emails to employee after state court finding that emails had been wrongfully obtained and it was unlawful for employee or lawyer to possess them, and violated his duty of loyalty and confidentiality by revealing employee's crime in declarations opposing motion to disqualify; because lawyer was member of small law firm and other members of firm participated in various aspects of the relevant litigation, all attorneys and employees of the firm were disqualified); *MMR/Wallace Power & Indus., Inc. v. Thames Assocs.*, 764 F. Supp. 712 (D. Conn. 1991) (attorney who received confidential and privileged information relating to trial strategy and tactics indirectly from a former employee of the adverse party and used it disqualified because of unfair advantage that resulted); *State ex rel. Rogers v. Bancorp Bank*, 307 A.3d 360 (Del. Super.), *affirmed*, 310 A.3d 428 (Del. 2023) (court disqualified counsel who used a copy of the opposing party's laptop files, which contained privileged information, without implementing remedial measures and without promptly notifying the opposing party); *McIntosh v. State Farm Fire & Cas. Co.*, 2008 WL 941640 (S.D. Miss. Apr. 4, 2008) (consortium of lawyers suing insurers disqualified where one of the lawyers paid two sisters who worked for a company that did claims work for the insurer $150,000 each for "consulting services" and the sisters turned over substantial amounts of the insurers' confidential information to the consortium; the wrongful obtaining of insurers' confidential information and the payment of fees to the sisters far greater than that allowed for witnesses warranted disqualification of the lawyers who knew of the sisters' actions as well as those who "should have known."); *McDermott Will & Emery, LLP v. Super. Ct.*, 10 Cal. App. 5th 1083 (2017) (law firm disqualified for refusing to return privileged email and using it offensively before obtaining a court order permitting such use); *Clark v. Super. Ct.*, 196 Cal. App. 4th 37 (2011) (law firm representing plaintiff against former employer properly disqualified for keeping, reviewing and using the company's attorney-client privileged documents that plaintiff had turned over to the firm, where firm retained the documents for over nine months, and the inevitable questions about the sources of firm's knowledge could undermine the public trust and confidence; trial court's finding that attorneys' review of employer's attorney-client privileged materials could

affect the outcome of the proceedings, in disqualifying the attorneys' law firm from representing employee in litigation against employer, was supported by substantial evidence, including evidence that employee used a privileged memo as the basis for a securities fraud claim, and that questions employee posed to employer's former chief executive officer might have derived from a privileged legal opinion from an outside law firm.); *Sanchez v. Maquet Getinge Grp.*, 2018 WL 2324679 (N.J. Super. Ct. App. Div. May 23, 2018) (court did not abuse discretion in disqualifying employee's counsel in whistleblower case where employee, a compliance officer for the employer, downloaded two executives' hard drives and collected a "burn file" that included privileged communications between himself and in-house counsel, marked "attorney-client privilege," in violation of his confidentiality agreement with the employer; employee's removal of the documents was intentional and he did not establish that the *Quinlan* factors protected such copying was met); *Maldonado v. New Jersey*, 225 F.R.D. 120 (D. N.J. 2004) (retention and use of privileged letter to attorney in which defendants responded to unfavorable administrative determination of plaintiff's allegations warranted disqualification of plaintiff's counsel in his subsequent employment discrimination action, in that plaintiff's counsel should have recognized privileged nature of letter that was signed by two named defendants, addressed to their attorney, and contained information relevant to the litigation; counsel did not inform defense attorneys that they possessed letter or attempt to return it and refused to return letter upon request; and counsel digested to plaintiff's advantage contents of letter, which was essentially a blueprint to merits of case and defenses, such that its disclosure substantially prejudiced defendants and simply returning letter and removing possibility of future impingement on privilege would not remove taint.); *Nw. Nat'l Ins. Co. v. Insco,* 2011 WL 5574953 (S.D. N.Y. Nov. 15, 2011) (law firm disqualified from further representation of defendant in a pending arbitration, where firm's inappropriate action in obtaining confidential emails between arbitration panel members constituting its deliberations and ignoring plaintiff's request to identify or produce them); *In re Mktg. Inv'rs Corp.*, 80 S.W.3d 44 (Tex. App.—Dallas 1998) (trial court abused its discretion in not ordering former president of defendant corporation to return certain documents taken from corporation following his firing and in not disqualifying his counsel who refused to return the documents; court rejected former president's argument that he had right to information as president since the attorney-client privilege belonged to the corporation, not to individual constituents, and only the corporation could waive that privilege; displaced managers may not assert or waive the attorney-client privilege over the wishes of current managers, even as to statements that the former might have made to counsel concerning matters within the scope of their corporate duties); *Richards v. Jain*, 168 F. Supp. 2d 1195 (W.D. Wash. 2001) (paralegals of law firm representing plaintiff in employment litigation received computer disks from plaintiff containing a copy of every email stored on plaintiff's hard drive, including attorney-client privileged information of the employer, in violation of nondisclosure agreement; paralegal's eleven month access to privileged materials without the firm disclosing such access to opposing counsel or ceasing review of the materials, warranted disqualification, since paralegals' conduct and knowledge was imputed to the firm).

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litigation;[319] or (iv) other sanctions.[320] Some courts have ruled that disqualification and other sanctions are not appropriate where there is no evidence that the improperly obtained confidential information was given to the attorney and the attorney has not engaged in misconduct in obtaining the information,[321] or where the impact of the information on the litigation is not deemed

[319] *See Mayorga v. Ronaldo*, 2022 WL 2093723 (D. Nev. June 10, 2022) (district court issued case-terminating sanctions based on counsel for plaintiff's procurement and use of the defendant's cyber-hacked attorney-client privileged documents to revive long-since-released claims; when plaintiff's counsel first began attaching the purloined documents to his client's filings, the court found that defendant had not waived privilege and struck them, counsel remained undeterred, and when the defense learned that he planned to use some of those documents in depositions and believed he had even more than he'd disclosed, they filed a motion for case-terminating sanctions; the procurement and continued use of these documents was bad faith, and simply disqualifying counsel will not cure the prejudice to defendant because the misappropriated documents and their confidential contents have been woven into the very fabric of plaintiff's claims); *Stephen Slesigner, Inc. v. Walt Disney Co.*, 155 Cal. App. 4th 736 (Cal. App. 2007) (plaintiff licensor hired an investigator to surreptitiously obtain defendant's documents; other than a purported admonition to obey the law, the plaintiff provided no direction or supervision for the investigator's activities; the investigator took thousands of pages belonging to defendant, including documents marked privileged and confidential, and obtained the documents by breaking into defendant's office buildings and secure trash receptacles and trespassing onto the secure facility of the company hired by defendant to destroy its confidential documents; the documents were passed on to plaintiff's attorneys and principals, who reviewed them but kept no records of the documents they received or of those they discarded; for seven years, plaintiff concealed the investigator's activities from defendant and the court, deleting the "confidential" markings from the documents to create the false impression that the documents were not confidential or the false impression that defendant had created both confidential and non-confidential sets of documents; the court of appeals affirmed sanctions of dismissal against the plaintiff); *Lipin v. Bender*, 644 N.E.2d 1300 (N.Y. 1994) (dismissal of sexual harassment and discrimination complaint was appropriate sanction for plaintiff's taking from counsel's table in discovery proceedings and use of privileged and confidential defense documents; neither suppression of documents nor suppression of information was realistic alternative, and disqualification of plaintiff's counsel would not have ameliorated prejudice).

[320] *In re Wisehart*, 721 N.Y.S.2d 356 (App. Div. 2001) (condoning use of opponent's documents that had been copied by client/employee, failing to advise court and opponent immediately of theft of documents, using those documents to try to extract settlement from adversary, making use of client's reckless accusations against judges, making scurrilous remarks to judge in motion hearing, and disregarding court's directive to make no use of documents in litigation and to secure all copies was conduct warranting two-year suspension from practice of law).

[321] *See, e.g. EEOC v. Bay Club Fairbanks Ranch, LLC*, 2020 WL 4201685 (S.D. Cal. July 21, 2020) (EEOC attorney should not be disqualified for performing a "quick review" of text messages received from former employee of country club in response to a deposition subpoena duces tecum that contained communications from the club's general counsel; texts were not "obviously privileged" and thus it was reasonable for attorney to review the document only so far as to determine their potential privilege status); *Neal v. Health Net, Inc.*, 100 Cal. App. 4th 831 (2002) (trial court erred when it disqualified counsel for Neal, a former human resources manager for defendant, based on his former representation of a former legal secretary in discrimination action against defendant's legal department; although legal secretary admitted accessing a confidential legal file containing information about Neal's lawsuit, there was no evidence that legal secretary provided any confidential information to attorney or that attorney acted improperly); *In re Meador*, 968 S.W.2d 346 (Tex. 1998) (trial court did not abuse discretion in refusing to disqualify attorney from representing employee in sexual harassment action based on receipt of privileged materials from defendant through no wrongdoing of his own, instead ordering return of the purloined documents and agreement not to use them in the litigation; trial court on disqualification motion should consider: (1) whether the attorney knew or should have known material was privileged, (2) promptness with which attorney notifies opponent as to possession of information, (3) extent to which attorney reviewed and digested information, (4) extent to which disclosure of information would prejudice opponent, (5) extent to which opposing party may be at fault for disclosure, and (6) extent to which nonmovant will suffer prejudice from disqualification); *Merits Incentives, LLC v. Eight Judicial Dist.*, 262 P. 3d 720 (Nev. 2011) (adopting six factor test of *In re Meador* to determine whether to disqualify an attorney who through no wrongdoing of his/her own received an opponent's privileged materials); *United States v. Stewart*, 294 F. Supp. 2d 490 (S.D. N.Y. 2003) (where prosecutor inadvertently read email sent by defendant to her lawyer and then forwarded to her daughter, which email was later found to be protected work product and unavailable to government in trial against defendant, such protection did not warrant disqualification of prosecutor from participating in cross-

significant.[322] And in some situations "self-help" might be deemed "protected activity," not misconduct.[323]

examination of defendant; email constituted factual work product, there was no allegation that prosecutor engaged in misconduct or other unethical behavior, and the proper remedy, prohibiting the prosecution from using the document at trial, already had been granted here; government's two-month delay in alerting defendant of inadvertent review of email did not warrant disqualification, where government took prompt steps to protect document and ascertain whether defendant would continue to assert privilege over it; delay was not inappropriate in light of the government's reaction and the ambiguities in the defendant's privilege logs; and the factual document was not so critical nor was the prosecutor's review of it so extensive, that disqualification was warranted)*; In re RSR Corp.*, 568 S.W.3d 663 (Tex. 2019)(In corporation's suit against competitor for contract breach and trade-secret theft, competitor waived disqualification of corporation's counsel, based on counsel's alleged receipt of competitor's privileged and confidential information, where competitor, of its own accord, changed its legal strategy in middle of proceedings, unequivocally abandoning multi-factor test for disqualification and fervently dissuading trial court from applying it).

[322] *See Bland v. Fiatallis N. Am., Inc.*, 29 Employee Benefit Cases (BNA) 2530 (N.D. Ill. 2003) (former employee's counsel would not be disqualified, and his complaint would not be dismissed, as sanctions for his attorney's unauthorized retention of documents, a majority of which were ultimately found privileged and subject to protective order; some of the documents had to be produced, and attorneys had not used the documents improperly since dispute began); *Nesselrotte v. Allegheny Energy, Inc*., 2008 WL 2890832 (W.D. Pa. July 23, 2008) (although plaintiff in wrongful termination action, a fired in-house counsel, copied and gave her lawyer hundreds of privileged and confidential information without her employer's consent, which the court ordered returned to the employer, disqualification of plaintiff's lawyer and other sanctions was not warranted; the documents were not significant enough to affect the course of the litigation and the conduct of plaintiff and her lawyer was not sufficiently aggravated to warrant sanctions); *In re Nitla S.A. de C.V.*, 92 S.W.3d 419 (Tex. 2002) (disqualification of plaintiff's counsel was neither a necessary nor appropriate remedy to counsel's having reviewed documents, subsequently deemed privileged by an appellate court, which counsel received directly from the trial court in a discovery hearing; where defendant failed to show that plaintiff's trial strategy significantly changed after reviewing the documents, but could only demonstrate that reviewing the documents might have enabled plaintiff's counsel to identify four new witnesses to depose, and that this additional testimony could potentially harm defendant).

[323] *See, e.g., Erhart v. Botfi Holding, Inc.*, 2017 FEP Cases (BNA) 44,813 (S.D. Cal. 2017) (although the company's significant interest in enforcing its confidentiality agreement and protecting its trade secrets were not outweighed by the "strong public policy in favor of whistleblowing and protecting whistleblowers from retaliation" and, therefore, the company's confidentiality agreement could not prevent plaintiff former employee from sharing the information with the SEC; although former employee admitted he emailed files containing confidential company information to his personal Gmail address, to his mother "for safekeeping," and used his girlfriend's computer at their home to access company information, a jury could decide that his actions were "reasonably necessary" to support his allegations of wrongdoing and thus his actions may be protected, and the jury should have the opportunity to determine whether including information former employee gleaned from the documents in his whistleblower retaliation lawsuit was appropriate because it was reasonably necessary to his suit); *Verdrager v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C.*, 50 N.E.3d 778 (Mass. 2016) (An employee's acts of self-help discovery from an employer in aid of a claim under the antidiscrimination statute may in certain circumstances constitute protected activity under the statute, but only if the employee's actions are reasonable in the totality of the circumstances.); *Quinlan v. Curtiss-Wright Corp.*, 8 A.3d 209 (N.J. 2010) (employee's taking, copying and dissemination of an employer's confidential documents can be a protected activity under New Jersey Law Against Discrimination (LAD); in determining whether the taking a dissemination of a document is protected activity the court should consider: (1) how the employee obtained the document; (2) what the employee did with the document; (3) the nature and content of the document at issue; (4) the circumstances of the disclosure and whether it was unduly disruptive to the employer; (5) the employee's expressed reason for copying the document as opposed to requesting it through discovery; and (6) how the court's decision impacts the public policy embodying LAD and the effect permitting or precluding the use of the documents will have on balancing the legitimate rights of both employers and employees). *Compare Netter v. Barnes*, 908 F.3d 932 (4th Cir. 2018) (County employee's unauthorized review and disclosure of confidential personnel files of other employees to support her racial and religious discrimination claims did not constitute "protected activity" under the opposition clause of Title VII's antiretaliation provision; employee's conduct in reviewing and disclosing the files was not reasonable); *Vaughn v. Epworth Villa*, 537 F.3d 1147 (10th Cir. 2008) (although employee's conduct in copying and

C. Secret Tape Recording of Parties, Counsel, and Witnesses.

It is unethical in some states for an attorney to record any person, including adverse parties, without consent,[324] although some of these states make an exception for recordings made at the request or with the consent of a law enforcement agency or where disclosure of the taping would impair pursuit of a societal good.[325] The ABA and many state courts have held that secret taping, in itself, does not violate any ethical rules, provided it is lawful in the locality in which it is undertaken and no affirmative misrepresentations are made as to whether the conversation in question is being recorded.[326] At least one ethics panel has held that although secret recording of

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providing to EEOC unredacted patient medical records was protected activity under Title VII, retaliation claim dismissed because such disclosures violated employer policy and no showing that similarly situated employees who violated confidentiality but were not involved in EEOC proceeding were treated differently); *State v. Saavedra*, 117 A.3d 1169 (N.J. 2015) (affirming trial court's refusal to quash indictment of board of education clerk for official misconduct and theft by taking of public documents even though employee claimed need for the documents in employment litigation; although *Quinlan* held that in certain circumstances taking an employer's documents for use in an employment discrimination claim may be protected activity under the state's anti-retaliation law, it "did not endorse self-help as an alternative to legal process in employment discrimination. Nor did *Quinlan* bar prosecutions arising from an employee's removal of documents from an employer's files for use in an employment case, or otherwise address any issue of criminal law." However, employee may assert that her intent to use the documents in support of her discrimination claim gives rise to a "claim of right" defense or other justification).

[324] Ariz. Ethics Op. 95-03 (1995); Colo. Ethics Op. 137 (2019) (lawyer may not secretly record a conversation to which he/she is a party); Colo. Ethics Op. 112 (2003) (same). *See also Nissan Motor Co. v. Nissan Comput. Corp.*, 180 F. Supp. 2d 1089 (C.D. Cal. 2002) (recording conversations between counsel in normal course of civil litigation, without consent, is violates state penal law and is inherently unethical). Accord: *Anderson v. Hale*, 202 F.R.D. 548, 556 (N.D. Ill. 2001); Va. Ethics Op. 1635 (1995); Wis. Ethics Op. E-95-5; N.Y.C. Ethics Op. 1995-10 (1995).

[325] *In re Attorney Gen.'s Pet.*, 417 S.E.2d 526, 527 (S.C. 1992). *See also* N.Y.C. Ethics Op. 2003-2 (2004) (lawyer may not, as a matter of routine, tape record conversations without disclosing that the conversation is being taped; a lawyer may, however, engage in undisclosed taping of a conversation if the lawyer has a reasonable basis for believing that the disclosure of the taping would impair pursuit of a generally accepted societal good, such as situations involving investigations of misconduct, such as threats against the lawyer or possible perjury of a witness), *modifying* N.Y.C. Ethics Ops. 80-95 and 95-10. *Cf. Comm. on Prof'l Ethics & Conduct of Iowa State Bar Ass'n v. Mollman*, 488 N.W.2d 168, 172 (Iowa 1992) (prosecutorial exception to rule prohibiting surreptitious recording of conversations by lawyers does not excuse conduct of private attorney who wore concealed microphone to record conversation with friend and former client to lure friend into trap by law enforcement to secure leniency in attorneys' own drug prosecution case).

[326] *See* ABA Formal Ethics Op. 01-422 (2001) (lawyer who records a conversation without the knowledge of the party or parties to the conversation does not necessarily violate the Model Rules; however, a lawyer may not record conversations in violation of the law in a jurisdiction that forbids such conduct without the consent of all parties, nor may the lawyer falsely represent that a conversation is not being recorded; it is inadvisable for a lawyer to record a client conversation without the knowledge of the client). Accord: Alaska Ethics Op. 2003-1 (2003); Ariz. Ethics Op. 00-04 (2000); Ariz. Ethics Op. 90-2 (1990); D.C. Ethics Op. 229 (1992); Haw. Ethics Op. 30 (1995) Idaho Ethics Op. 130 (1990); Kan. Ethics Op. 96-9 (1997); Ky. Ethics Op. KBA E-279 (1984); Me. Ethics Op. 168 (1999); Mich. Ethics Op. RI-309 (1998); Miss. Ethics Op. 203 (1992); Mo. Ethics Op. 123 (2006); Neb. Ethics Op. 06-07 (2006); N.Y.C. Ethics Op. 80-95 (1980); N.Y.C. Ethics Op. 696 (1993); Ohio Ethics Op. 2012-1 (2012); Okla. Ethics Op. 307 (1994); Or. Ethics Op. 2005-156 (2005); Tenn. Ethics Op. 81-F-14 (1986); Tex. Ethics Op. 575 (2006) (lawyer not prohibited from making an undisclosed recording of the lawyer's telephone conversations between a client or third party provided that: (1) recordings of conversations involving a client are made to further a legitimate purpose of the lawyer or the client, (2) confidential client information contained in any recording is appropriately protected by the lawyer, (3) the undisclosed recording does not constitute a serious criminal violation under the laws of any jurisdiction applicable to the telephone conversation recorded, and (4) the recording is not contrary to a representation made by the lawyer to any person); Utah Ethics Op. 96-04 (1996); Va. Ethics Op. 1814 (2011); Va. Ethics Op. 1738 (2000). *Cf.* S.C. Ethics Op. 91-14 (1991) (attorney may not advise client that client may legally tape record conversations without consent of other party). *But see* Colo. Ethics Op. 137 (2019) (although lawyer may not secretly record conversations to which he is a party, he may advise, direct or supervise others who do so as long as the secret recording is otherwise lawful).

opposing counsel and others are not generally prohibited by the disciplinary rules, recording of clients, judicial officers or court personnel without their knowledge is prohibited.[327]

Work product protection may be vitiated if the attorney clandestinely recorded the witness's statements or directed his client to do so,[328] or if the attorney encouraged or supported the secret recordings.[329] Most courts require production of secret recordings to the extent the contents are otherwise relevant.[330] At least one ethics opinion has concluded that an engagement letter may prohibit a client from making video or audio recordings of communications between the lawyer

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[327] *See* Wis. Ethics Op. EF-24-01 (2024) (Recording of clients, judicial officers or court personnel without their knowledge or consent is prohibited by the disciplinary rules but recording of opposing counsel or others, is not ordinarily prohibited by the disciplinary rules. While lawyers normally do not need to disclose the fact that a conversation with a nonclient is being recorded, disclosure and consent must occur before recording clients or court personnel.).

[328] *See Parrott v. Wilson*, 707 F.2d 1262 (11th Cir. 1983) (plaintiff's counsel clandestinely recorded telephone conversations he had with two witnesses to the circumstances surrounding the death of plaintiff's son; work product protection vitiated by attorney's secretive recording of conversation); *Bogan v. Nw. Mut. Life Ins. Co.*, 144 F.R.D. 51 (S.D. N.Y. 1992) (plaintiff's tape-recorded conversations with certain witnesses without consent discoverable); *Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc.*, 347 F.3d 693 (8th Cir. 2003) (sanctions affirmed based on defense counsel hiring of private investigator to pose as a consumer, along with his wife or daughter, in visits to plaintiff's franchisees for the purpose of making secret audio tape recordings of conversations in anticipation of trial; sanctions were the exclusion from trial of the recordings and other evidence obtained as a result of the recordings); *Smith v. WNA Carthage, L.L.C.*, 200 F.R.D. 576 (E.D. Tex. 2001) (employee's surreptitious recordings of conversations with other employees, made in anticipation of litigation against employer but before her retaining counsel, were not shielded by work product doctrine; employees' statements were admissible against employer as vicarious admissions and discoverable as a matter of right, recordings could create unfair prejudice in subjecting witnesses to surprise or blackmail, and it would be unfair to allow only one party to use tapes; tapes were not subject to delayed production after depositions of other employees for impeachment purposes).

[329] *See, e.g., Chapman & Cole v. Itel Container Int'l B.V.*, 865 F.2d 676, 686 (5th Cir. 1989) (failure to reveal clandestinely-recorded tape of conversation between defense counsel and witness waives work product protection as contravention of ABA MODEL RULES); *Roberts v. Americable Int'l, Inc*., 883 F. Supp. 499 (E.D. Cal. 1995) (individual defendant manager not entitled to suppression of tape recordings of conversations between plaintiff and himself and between plaintiff and other employees surreptitiously obtained by plaintiff for use in employment discrimination case, even though arguably tortuous under state law; however as a matter of fairness, manager entitled to review tape before his deposition is taken, even though plaintiff noticed manager's deposition before he presented the tape); *McWhorter v. Sheller*, 993 S.W.2d 781 (Tex. App.—Houston [14th Dist.] 1999) (tape recording of conference between the parties by attorney violated ethics standards, but sanctions not appropriate because insufficient record to establish intentional act of bad faith by attorney); *Haigh v. Matsushita Elec. Corp. of Am.*, 676 F. Supp. 1332 (E.D. Va. 1987) (plaintiff, acting on own initiative and absent directive from counsel, secretly tape-recorded conversations with 58 individuals; discovery ordered since attorney's act of reviewing the tapes and using them to prepare the complaint and discovery requests amounted to "active encouragement and affirmative support" for plaintiff's secret recordings). *Cf. Gonzalez v. Trinity Marine Grp.*, 117 F.3d 894 (5th Cir. 1997) (dismissing employment discrimination claim too severe a punishment for employee who secretly tape-recorded meeting, then tampered with the tape); Phila. Ethics Op. 2000-1 (2000) (may be unethical for lawyer to surreptitiously use voice-recognition software to analyze the veracity of the speech patterns of deponents and counsel at deposition without their consent; however, if lawyer comes into possession of lawfully-created tape recording without restrictions as to its use, the software may be used to analyze the speech patterns on the tape).

[330] *Byrd v. Reno*, 1998 WL 429767 (D.D.C. Mar. 18, 1998) (attorney held in contempt for failing to produce in discovery, in a Title VII action, audiotapes of telephone conversations with her supervisors and a co-worker secretly tape-recorded by plaintiff, a DOJ lawyer; the tapes were not protected as work product because plaintiff's unethical conduct in secretly taping the conversations vitiated the privilege); *Gratton v. Great Am. Commc'ns*, 178 F.3d 1373 (11th Cir. 1999) (trial court did not abuse discretion in dismissing action of individual who produced only two of four to six secretly recorded tapes of conversations with his supervisors and failed to comply with an order to explain this spoliation).

and client.[331]

D. Lawyer Participation in Deception by Undercover Investigators and Testers.

Undercover investigations have long been a part of evidence collection in employment cases. For example, employers sometimes use undercover agents posing as employees to investigate wrongdoing in the workplace. Similarly, civil rights organizations have used discrimination "testers" to determine whether an employer is discriminating in hiring and recruiting. Lawyers do not violate ethics rules by participating in undercover investigations and discrimination testing for evidence-gathering purposes where the undercover agents and testers make misrepresentations solely as to their identity and purpose, particularly investigations conducted by governmental bodies.[332] Ethical violations may be found if the misrepresentations of an undercover investigator

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[331] N.Y. Ethics Op. 1270 (2024) (lawyer's letter of engagement or retainer agreement may prohibit a client from making video recordings and audio recordings of communications between the lawyer and client, provided the letter of engagement or retainer agreement: (a) does not mislead the client regarding circumstances under which the lawyer may seek to withdraw from the representation; and (b) does not serve as irrevocable advance consent by the client to withdrawal by the lawyer if the client violates the prohibition.).

[332] *Apple Corps Ltd. v. Int'l Collectors Soc'y*, 15 F. Supp. 2d 456, 475-76 (D.N.J. 1998) (Rule "8.4(c) does not apply to misrepresentations solely as to identity of purpose and solely for evidence gathering purposes."); *Gidatex S.r.L. v. Campaniello Imps., Ltd.*, 82 F. Supp. 2d 119 (S.D. N.Y. 1999) (Use of private investigators posing as customers and secretly tape recording their conversations with low level employees who are not involved in any aspect of the litigation does not constitute an end-run around the attorney-client privilege; investigators were merely recording the normal business routine of the defendant's showroom and warehouse);Ala. Ethics Op. 2007-05 (2007) (lawyer may employ private investigators to pose as customers under the pretext of seeking services of the alleged infringers on the same basis or in the same manner as customers); Ala. Ethics Op. 1989-31 (1989) (same); Colo. Ethics Op. 137 (2019) (lawyer may supervise others who participate in lawful investigative activities involving dishonesty, fraud, deceit or misrepresentation; however, lawyer may not personally participate in activities involving dishonesty, fraud, deceit or misrepresentation regardless of the lawfulness of those activities); D.C. Ethics Op. 323 (2004) (lawyers employed by government agencies who act in a non-representational official capacity in a manner they reasonably believe to be authorized by law do not violate the anti-deceit rule if, in the course of their employment, they make misrepresentations that they are reasonably intended to further the conduct of their official duties); N.Y.C. Ethics Op. 737 (2007) (lawyer may ethically employ an investigator who "dissembles" to third parties during an investigation, provided: (1) the investigation involves either intellectual property (such as theft of trade secrets) or civil rights (such as housing discrimination); (2) the lawyer reasonably believes that violations are occurring; (3) there is no other reasonable way to establish the violations; (4) the dissemblance is expressly authorized by law; (5) the lawyer does not otherwise violate ethics rules; and (6) the investigator's conduct does not rise to the level of a fraud or crime.); Utah Ethics Op. 02-05 (2002) (a government lawyer who participates in a lawful covert governmental operation that entails conduct employing dishonesty, fraud, misrepresentation or deceit for the purpose of gathering relevant information does not, without more, violate ethics rules); Va. Ethics Op. 1765 (2003) (federal agency lawyer may use deceit and misrepresentation, such as use of alias and secret taping, in undercover work without violating Rule 8.4(c)). *But see In re Gatti*, 8 P.3d 966, 976 (Or. 2000) (lawyer reprimanded for falsely posing as a doctor during telephone calls to an insurance company he was preparing to sue); *In re Ositis*, 40 P.3d 500 (Or. 2002) (applying *Gatti* to lawyer's participation in misrepresentation or deceit by others). *See* Or. HB 3857 (2001) (authorizes prosecutors and other government lawyers to participate in covert activities that are conducted by public bodies and/or the federal government for the purpose of enforcing laws, even though the participation may require the use of deceit or misrepresentation); Or. RPC 8.4(b) (it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided lawyer's conduct is otherwise in compliance with the disciplinary rules. Lawyer may commence or supervise covert activity only when the lawyer in good faith believes there is a "reasonable possibility that unlawful activity has taken place, is taking place, or will take place in the foreseeable future."); Colo. RPC Rue 8.4(c) (same); Or. Ethics Op. 2005-173 (2005) (interpreting RPC 8.4(b) under hypothetical scenarios). *See also* N.Y. City Bar Ass'n, *Regulating Lawyers' Supervision of Undercover Investigations: Report* (2019) (proposing amendments to Rule 8.4(a) to permit a lawyer to give advice and supervision to otherwise lawful undercover investigations).

or discrimination tester go beyond identity and purpose and involve fraud or perjury or other misconduct.[333] Similarly, ethics committees and courts have held that the ethics rules are violated when a lawyer uses an investigator to contact a person known to be represented by counsel.[334]

[333] *Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc.*, 347 F.3d 693 (8th Cir. 2003) (sanctions against defendant affirmed where its defense counsel hired a private investigator to pose as a consumer, along with his wife or daughter, in visits to plaintiff's franchisees, for the purpose of making secret audio tape recordings of conversations in anticipation of trial; recordings and any other evidence obtained as a result of the recordings properly excluded); *Meyer v. Kalanik*, 212 F. Supp. 3d 437 (S.D. N.Y. 2016) (defendant Uber and its in-house counsel acted improperly in retaining and failing to properly supervise unlicensed private investigators hired to conduct "reputational due diligence" on plaintiff and his counsel in connection with an antitrust suit brought against Uber and its CEO; the investigation was aimed not at obtaining evidence relevant to the dispute but, instead, designed to "intimidate" plaintiff and his counsel, or to "prejudice the Court against them"; investigators conducted 28 acquaintances/colleagues of the plaintiff and his counsel and made inquiries into their family live, career prospects and living arrangements, routinely using materially false statements as to the reasons for the inquiries and secretly recording telephone conversations without their consent. Crime-fraud exception compelled disclosure of all documents relating to the investigation.).

[334] *See, e.g.*, *Curatola v. Am. Elec. Power*, 2008 WL 2120840 (S.D. Ohio May 19, 2008) (court excluded evidence obtained from a defense investigator's *ex parte* communication with plaintiff, prohibited defendants from hiring any other private investigators to investigate plaintiff or his family in connection with the matter, and ordering defendants to forward all video/audio recordings and other evidence obtained through the investigator's *ex parte* communications with to plaintiff and to produce the investigator for deposition at plaintiff's request).

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VII. ETHICS ISSUES INVOLVING TECHNOLOGY

A. Employee Confidential Communications Using Employer's Computer Resources.

Privilege waiver issues arise when an employer accesses confidential communications that an employee or former employee has stored or created using the employer's computer resources. Waiver depends on whether the employee had a reasonable expectation that the information on the employer's equipment would remain confidential. Where the employer provided effective notice to employees that it monitors use of its electronic equipment, including the content of emails that are created, read or stored using its computer equipment, the courts have found that the employee has no reasonable expectation of privacy with respect to such communications.[335] Some courts

[335] *See United States v. Finazzo*, 682 F. App'x 6 (2d Cir. 2017) (District court did not abuse its discretion in finding that defendant waived attorney-client privilege as to an e-mail sent from attorney to defendant's work e-mail, which listed as an asset his interest in company with which he had engaged in kickback scheme perpetrated at his employer's expense; employer's policies specifically stated that employees had no expectation of privacy when using work e-mail, and that employer could monitor, access, delete, or disclose e-mail.); *Farris v. Int'l Paper*, 95 Fed. R. Serv. 1297 (C.D. Cal. 2014) (emails sent by and to an attorney from a company computer not privileged in light of company policy stating that activities on its computers were not private and could be monitored by the employer; nevertheless, court excluded evidence of communications between and his attorney on relevance grounds); *Doe 1 v. George Washington Univ.*, 480 F. Supp.3d 224 (D.D.C. 2020) (plaintiffs suing university waived attorney client privilege when they communicated with their attorneys through their university-issued email accounts); *Alamar Ranch, LLC v. Cnty. of Boise*, 2009 WL 3669741 (D. Idaho Nov. 2, 2009) (Member of group waived the privilege for email messages she sent from her work computer to her attorney, where the employer put all employees on notice that their e-mails would become employer's property, be monitored, stored, accessed and disclosed by the employer, and should not be assumed to be confidential); *Sickles v. McDonough*, 2023 WL 7406161 (E.D. Mo. Nov. 9, 2023) (former VA employees' emails with his lawyer on the VA's email system not privileged where employer had a policy that restricted employees personal use of email system and provided that such emails were not privilege and subject to monitoring, and employee had notice of the policy); *Kaufman v. SunGard Inv. Sys*., 2006 WL 1307882 (D. N.J. May 10, 2006) (because plaintiffs received notice of defendant's email monitoring policy, plaintiffs waived any privilege claims by using defendant's email system to send and receive privileged communications); *In re Reserve Fund Sec. and Derivative Litig.,* 275 F.R.D. 154 (S.D.N.Y. 2011) (Vice president of money market fund had no reasonable expectation of privacy in email communications he sent to his wife using company email system, and thus communications were not protected by marital communications privilege in SEC enforcement action against the fund's advisors and principals, where company banned personal use of its email system, had reserved its right to access employee email, had warned employees that email sent over company's system might be subject to disclosure to regulators and courts, and vice president was aware of these policies; company's policy explicitly stated that employees "should limit their use of e-mail resources to official business," that company "reserves the right to access an employee's e-mail for a legitimate business reasons or in conjunction with an approved investigation," and that employees' email communications would be automatically saved and were subject to review.); *Pontikos v. Am. Med. Tech.,* 2021 WL 634999 (N.D. Ohio Feb. 18, 2021) (plaintiff waived attorney-client privilege when she used her company email to correspond with her counsel; plaintiff's intent to speak in confidence with her attorneys was not objectively reasonable, given that employer allowed only limited personal use of its email system, the policy stated that employer may monitor employees emails, employer's policy stated that it may disclose employee emails to third parties, and plaintiff received a copy of the policy); *United States v. Hamilton*, 778 F. Supp. 2d 651 (E.D. Va. 2011) (public school employee lacked objectively reasonable expectation of privacy, for Fourth Amendment purposes, in e-mails between him and his wife that were stored on his work computer, since, at time search warrant for his work computer was executed, he was on long-standing notice that contents of his computer were subject to inspection; although the e-mails were exchanged before defendant's employer's adoption of computer use policy, employer subsequently adopted computer use and privacy policy providing that all information created, sent, received, or stored in employer's computer system was subject to inspection and monitoring at any time as authorized by Superintendent or designee, and forms acknowledging policy were electronically signed in defendant's name on his computer); *PCF Ins. Servs. Of the West, LLC v. Fritts*, 2024 WL 3966735 (W.D. Wash. Aug. 28, 2024) (plaintiff waived the attorney

have held that the privilege applied to protect an employee's communication with her attorney using the employer's computer equipment where the employee used a third-party service and the employer's policy did not specifically address the use in question.[336] To avoid claims of

client privilege with respect to communications he had with his attorney that were stored on his company laptop where company policy gave it the right to access and monitor its technology and signed an acknowledgement of the policies); *Aventa Learning, Inc. v. K12, Inc.*, 830 F. Supp. 2d 1083 (W.D. Wash. 2012) (Under Washington law, materials that vice president of company had saved or stored on his company-issued laptop, including emails contained privileged communications and materials created before his employment, were not protected by the attorney-client privilege, since he had no reasonable expectation that the materials were confidential and would be kept confidential; laptop was not his property, and pursuant to company policy, company reserved right to access and disclose any file or stored communication on the device at any time, including web-based personal email accounts accessed through employer-issued computer or laptop); *Sims v. Lakeside Sch.*, 2007 WL 2745367 (W.D. Wash. Sept. 20, 2007) (plaintiff employee had no reasonable expectation of privacy in the contents of the laptop that was furnished by defendant school, including emails he sent and received on his school email account, since the school's employee manual was unequivocally clear that user accounts are the property of the school and that the school does not ensure the confidentiality of its employee email records; however, the court found that any web-based emails generated by plaintiff and any material he created to communicate with his attorney and his spouse are protected by the attorney-client and spousal communication privileges; notwithstanding the school's policy in its employee manual, "public policy dictates that such communications shall be protected to preserve the sanctity of communications made in confidence"); *Holmes v. Petrovich Dev. Co.*, 191 Cal. App. 4th 1047 (2011) (client did not have a reasonable expectation of privacy in her communication with her attorney using her employer's company email account and her employer's computer, and thus the communications were not covered by the attorney-client privilege in employee's subsequent lawsuit against her employer and supervisor, even though employee used a private password to use the computer and deleted the emails after they were sent, the employee had been warned that the account was to be used only for company business, and that the emails were not private, and that the company would randomly and periodically monitor its technology resources to ensure compliance with the policy, absent evidence that the employee knew for a fact that employer never actually monitored email); *In re Info. Mgmt. Servs., Inc.*, 81 A.3d 278 (Del. Ch. 2013) (attorney-client privilege did not extend to corporate executive's emails with her personal lawyer because he sent email through the company's email account; company maintained a policy that it may monitor employee emails, which nullified the executive's reasonable expectation of privacy); *Scott v. BethIsrael Med. Ctr.*, 847 N.Y.S.2d 436 (N.Y. Sup. 2007) (physician's emails with his attorney, using hospital's email system, were not made in confidence for purpose of the attorney-client privilege, where hospital's electronic communication policy, of which physician had actual and constructive notice, prohibited personal use of the hospital's email system and stated that the hospital reserved the right to monitor, access and disclose communications transmitted on hospital's email server at any time without prior notice); *Banks v. Mario Indus. of Va.,* 650 S.E.2d 687 (Va. 2007) (manager's pre-resignation memo to his attorney, written using company's computer and which was retrieved by company by a forensic computer expert, was not protected by the attorney-client privilege; pursuant to company's employee handbook, employees could use work computers for personal matters, but there was no expectation of privacy regarding such use).

[336] *United States v. Hudson*, 2013 WL 4768084 (D. Kan. Sept. 5, 2013) (employees do not waive the privilege in materials on their work computers simply because the employer can monitor their communications); *Fiber Materials Inc. v. Subilia*, 974 A.2d 918 (Me. 2009) (Supreme Judicial Court criticized company's attorneys for unilaterally examining and publicizing apparently privileged memo found on a company laptop used by its then president. Each page of memo was stamped with the legend "Attorney-Client Privilege/Confidential Work Product."); *Curto v. Med. Commc'ns.,* 2007 WL 1452106 (E.D. N.Y. May 15, 2007) (former employee had not waived her right to assert the attorney-client privilege and work product immunity concerning documents allegedly retrieved from employer-owned laptops used by the employee during her employment as a home office; employee took reasonable precaution to prevent inadvertent disclosure in that she sent the emails at issue through her personal AOL account which did not go through the company's servers and she attempted to delete the material before turning in the laptop, the volume of material was relatively limited, and the employee promptly requested return of the emails upon notification); *Gollersrud v. LPMC, LLC*, 541 P.3d 864 (Or. 2023) (Email messages on relator's former employers' servers containing communications between relators and their attorneys are privileged communications under the Oregon Evidence Code and relator's act of leaving employment and leaving those emails on the employer's email system does not constitute a disclosure of communications and a waiver of the privilege; employer did not establish that it had a policy concerning use of company equipment or monitoring of employee email, and no evidence that the employer in fact monitored

"reasonable expectation of privacy," employers should emphasize in their policies that employee use of third-party email services are also subject to monitoring.[337] Even if an employee's communications using the employer's computer equipment are privileged, employer's counsel may not have an obligation to notify the employee's counsel about the discovery of these communications, since the "inadvertent disclosure" rules do not necessarily apply.[338]

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emails). *Cf. Stengart v. Loving Care Agency, Inc.*, 990 A.2d 650 (N.J. 2010) (Emails exchanged by employee and her attorney through her personal, password-protected web-based email account were protected by the attorney-client privilege, even though emails were sent via employer's computer and a version of employer's handbook purported to transform private emails into company property. By using a personal email account and not saving the password, employee had a subjective expectation of privacy which was objectively reasonable in light of the ambiguous language of the employer's policy–which referred to company email accounts and did not warn employees that personal, web-based emails are stored on a hard drive and can be forensically retrieved and read, even while permitting "occasional personal use" of email–and the attorney-client privilege. Even with an unambiguous policy allowing employer to retrieve and read an employee's privileged communications if accessed on a personal, password protected email account would not be enforceable. Actions of employer's counsel in employment discrimination action by employee, in forensically retrieving and proceeding to read attorney-client e-mail communications sent by employee over employer's computer without alerting employee that employer's counsel was in possession of the e-mails and giving employee an opportunity to argue that the communications were privileged, were inconsistent with professional conduct rule relating to receipt of a document that a lawyer has reasonable cause to believe was inadvertently sent, even if employer's counsel had good-faith belief based on employer's policy that the e-mails were not protected by any privileged.); *Convertino v. U.S. Dep't of Justice*, 674 F. Supp. 2d 97 (D.D.C. 2009) (DOJ employee's expectation of privacy in e-mails sent to his personal attorney through his work e-mail account was reasonable, and thus protected from discovery by attorney-client privilege; DOJ maintained a policy that did not ban personal use of the company e-mail, and although the DOJ had access to personal e-mails sent through his account, employee was unaware that department would be regularly accessing and saving e-mails sent from his account.); *Pure Power Boot Camp v. Warrior Fitness Boot Camp*, 587 F. Supp. 2d 548 (S.D. N.Y. 2008) (Employer's access of employee's personal e-mails, which were stored and accessed directly from accounts maintained by outside electronic communication service provider, was unauthorized, and thus violated Stored Communications Act; employee, who did not store any of those communications on the employer's computers, servers, or systems and who did not send or receive such communications through the company e-mail system or computer, had a reasonable expectation of privacy in his personal e-mail accounts, which were protected by passwords, since nothing in employer's policy even suggested that if an employee simply viewed a single, personal e-mail from a third party e-mail provider, over employer's computers, then all of the his personal e-mails on whatever personal e-mail accounts he used, would be subject to inspection, and employee did not give implied consent to search his e-mails by leaving his login information stored on employer's computers); N.C. 2012 Formal Ethics Op. 5 (2012) (a lawyer representing an employer must evaluate whether email messages an employee sent to and received from the employee's lawyer using the employer's business email system are protected by the attorney-client privilege and, if so, decline to review or use the messages unless a court determines that the messages are not privileged.). *Compare Fazio v. Temp. Excellence, Inc.*, 2012 WL 300634 (N.J. Super. A.D. Feb. 2, 2012) (Employee had no reasonable expectation of privacy; in contrast to the employee in *Stengart,* plaintiff took no steps whatsoever to shield the e-mails from his employer; instead, he repeatedly sought legal advice about the negotiation for the purchase of TEI using his employer's own e-mail system on its own computer equipment and did not password-protect those communications.).

[337] *See Lazette v. Kulmatycki*, 949 F. Supp. 2d 748 (N.D. Ohio 2013) (That employer informed employee that her e-mail might be monitored on her employer-issued smartphone did not provide implied consent for supervisor to read all her personal e-mail over 18 months after employee returned smartphone upon leaving employer, as required for her Stored Communications Act claims against employer and supervisor). *Cf. BiTraceIT Corp. v. Dullen*, 2025 WL 3091826 (E.D. Pa. Nov. 5, 2025) (emails between plaintiff and her attorneys on defendant employer's computer were protected by attorney-client privilege where defendant failed to show that it had a policy banning personal or objectionable use of its email system, monitored plaintiff's emails and informed her of the policy and monitoring).

[338] *See, e.g.*, ABA Formal Ethics Op. 11-460 (2011) (When an employer's lawyer receives copies of an employee's private communications with counsel, which the employer located in the employee's business e-mail file or on the employee's workplace computer or other device, neither Rule 4.4(b) nor any other Rule requires the employer's lawyer to notify opposing counsel of the receipt of the communications. However, court decisions, civil procedure rules, or

B. Using Cellular Phones and Email for Confidential Communications.

Ethics opinions treat cellular and cordless phone communications no differently than communication by regular telephones,[339] but attorneys should warn clients about the risk of interception when using such phones before engaging in confidential communications.[340] Similarly, lawyers may use unencrypted email to communicate with clients unless unusual circumstances might require enhanced security measures.[341]

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other law may impose such a notification duty, which a lawyer may then be subject to discipline for violating. If the law governing potential disclosure is unclear, Rule 1.6(b)(6) allows the employer's lawyer to disclose that the employer has retrieved the employee's attorney-client e-mail communications to the extent the lawyer reasonably believes it is necessary to do so to comply with the relevant law. If no law can reasonably be read as establishing a notification obligation, however, then the decision whether to give notice must be made by the employer-client, and the employer's lawyer must explain the implications of disclosure, and the available alternatives, as necessary to enable the employer to make an informed decision). *Cf. Tse v. UBS Fin. Servs.,* 2005 WL 1473815 (S.D. N.Y. June 21, 2005) (disk belonging to plaintiff at her work station after her employment ended containing letter she had written to her attorney had not been inadvertently disclosed to defendant employer and, therefore, there was no waiver of the attorney-client privilege; the letter was stored out of sight, on a disk inside a folder in the plaintiff's work area; it was not printed out or stored in any way that made it easily accessible by, or even known to, a third party; a quick glance at the disk's label indicated it contained personal documents; it was not unreasonable for plaintiff to have assumed that the disk, so clearly identifiable as a personal belonging, would have been returned to her by her employer, and therefore, when it was not returned, to assume that the disk was not in her employer's possession and that no steps were required to seek its retrieval).

[339] *See, e.g.*, Ariz. Ethics Op. 95-11 (1995) (use of cordless phones to communicate with clients does not violate duty of confidentiality); Del. Ethics Op. 2001-02 (2001) (transmission of confidential information by way of email or mobile cell phone does not violate ethic rules, absent extraordinary circumstances such as circumstances in which the lawyer reasonably should anticipate the possibility that the communications could be intercepted and confidences disclosed, such as client's sharing an email account with others).

[340] *See* ABA Formal Ethics Op. 11-459 (2011) (lawyer sending or receiving substantive communications with a client via e-mail or other electronic means ordinarily must warn the client about the risk of sending or receiving electronic communications using a computer or other device, or e-mail account, where there is a significant risk that a third party may gain access); Iowa Ethics Op. 15-01 (lawyer sending or receiving client communications via email or other electronic means must ordinarily warn client of risk of interception including use of a computer or other device, or email account, to which a third party may gain access); N.Y.C. Ethics Op. 1994-11 (1994) (lawyers engaging in confidential conversations by cellular or cordless telephones or other communication devices readily capable of interception should consider steps sufficient to ensure security of conversations); N.C. Ethics Op. RPC 215 (1995) (same); Pa. Ethics Op. 2022-500 (2023) (If a lawyer stores information governed by Rule 1.6 on a smartphone, then the lawyer must take steps to prevent access to or disclose of the information. Consequently, a lawyer may not consent to share the information with a smartphone app unless the lawyer concludes that no human being will view that information, and that the information will not be sold or transferred to additional third parties, without the client's consent.). *Cf.* Cal. Evid. Code § 952 (attorney-client communications do not lose their privileged character simply because they were transmitted by facsimile, cellular or cordless telephone, or other electronic means).

[341] *See, e.g.,* ABA Formal Ethics Op. 477R (2017) (Lawyer may transmit information relating to the representation of a client over the internet without violating the Model Rules where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access. However, a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or where the nature of the information requires a higher degree of security); ABA Formal Ethics Op. 99-413 (1999) (lawyers do not violate ethics rules by sending clients information in unencrypted email, provided that they take reasonable precautions to guard against disclosure). Accord: Alaska Ethics Op. 98-2 (1998); Ariz. Ethics Op. 97-04 (1997); Colo. Ethics Op. 90 (1992); Del. Ethics Op. 2001-02 (2001); D.C. Ethics Op. 281 (1998); Fla. Ethics Op. 00-04 (2000); Haw. Ethics Op. 40 (2001); Iowa Ethics Op. 97-01 (1997); Me. Ethics Op. 195 (2008); Mass. Ethics Op. 00-01 (2000); Minn. Ethics Op. 19 (1999); N.Y. Ethics Op. 709 (1998); N.Y.C. Ethics Op. 1998-2 (1998); N.C. Ethics Op. RPC 215 (1995); N.D. Ethics Op. 97-09 (1997); Ohio Ethics Op. 99-9 (1999); Ohio Ethics Op. 99-2

C. Using Emerging Technology to Protect Client Information.

Ethics opinions also advise lawyers to take precautions to protect client confidentiality regarding electronic data stored in the firm's systems or via "cloud" storage and other similar methods.[342] The lawyer's ethical duty of competency includes the duty to be keep abreast of

(1999); Or. Ethics Op. 2011-184 (2011); S.C. Ethics Op. 97-08 (1997); Tenn. Ethics Op. 98-A-650(a) (1998); Tex. Ethics Op. 648 (2015); Utah Ethics Op. 00-01 (2000); Vt. Ethics Op. 97-5 (1997); Va. Ethics Op. 1791 (2003); Wash. Ethics Op. 2175 (2008). *See also* Pa. Ethics Op. 2022-400 (2022) (attorneys may use mail transmit information related to the representation of a client by complying with the following conditions: (i) attorney must consider the security risk associated with email and make reasonable efforts to prevent inadvertent or unauthorized disclosure or access to the information, (ii) after evaluation of the risks, consider whether encryption or other security should be used for specific emails, (iii) recognize that certain information, even encrypted, should never be sent by email including information for which the client has requested maximum security, (iv) consider whether to advise client regarding the risk and attorney must advise client of the risks when dealing with highly sensitive materials and items for which client has requested maximum security, (v) discuss with the client concerning whether to communicate by email and, if so, whether client desires any limitations on such use, (vi) consider whether under specific circumstances communication by email satisfies confidentiality obligations, and (vii) after considering risks, attorney may conclude that duty of competence requires encryption or secure file-sharing options by remail).

[342] Fla. Ethics Op. 12-3 (2013) (Lawyers may use cloud computing if they take reasonable precautions to ensure that confidentiality of client information is maintained, that the service provider maintains adequate security, and that the lawyer has adequate access to the information stored remotely.); Fla. Ethics Op. 21-2 (2021) (lawyer ethically may accept payments via a Web-based processing service such as PayPal, as long as reasonable steps are taken to protect against inadvertent or unwanted disclosure of information regarding the transaction and to safeguard funds of clients and third persons that are entrusted to the lawyer); Fla. Ethics Op. 10-2 (2010) (Lawyer who chooses to use devices that contain storage media such as printers, copiers, scanners, and facsimile machines must take reasonable steps to ensure that client confidentiality is maintained and that the device is sanitized before disposition); Ill. Ethics Op. 16-06 (2016) (lawyer may use cloud-based services in delivery of legal services, provided that lawyer takes reasonable measures to ensure that client information remains confidential and is protected from breaches, and that obligation does not end once the lawyer has selected a reputable provider); Iowa Ethics Op. 11-01 (2011) (lawyers may store client information on third party vendor servers rather than their own computers, as long as lawyer has unfettered access to the data and can reasonably verify that sound methods are being used to protect the information); Iowa Ethics Op. 14-01 (2014) (Opinion No. 11-01 requires only a due diligence process, not a specific result); Me. Ethics Op. 174 (2000) (attorneys may participate in commercial websites that give users access to legal services, provided that the attorneys evaluate the accuracy of the venture's advertising, comply with the applicable requirements relating to personal approval and storage of advertising, and do not promise the website operator that the attorney will withdraw from representation only if the client consents); Mass. Ethics Op. 12-03 (2012) (lawyer generally may store and synchronize electronic work files containing confidential client information across different platforms and devices using an Internet based storage solution so long as the lawyer takes reasonable efforts to ensure that the provider's terms of use and data privacy policies, practices and procedures are compatible with the lawyer's professional obligations, including the obligation to protect confidential client information); Mich. Ethics Op. RI-328 (2002) (law department in a governmental unit may use the services of a technical support department of the governmental unit without violating client confidentiality rules; the law department should clearly communicate the confidentiality rules to the technical support personnel); Miss. Ethics Op. 263 (2020) (lawyers may use cloud-based electronic data storage systems to store client confidential information, but lawyers must take reasonable precautions in using those systems); Mo. Informal Ethics Op. 2018-09 (2018) (same); Neb. Ethics Op. 19-01 (2019) (attorney may transmit client-related information using "cloud" storage if the lawyer has taken reasonable efforts to prevent inadvertent or unauthorized access to the information, maintains confidentiality of the information, and establishes reasonable safeguards to ensure the information is protected from loss, breaches, business interruptions and other risks related to the technology); N.Y. Ethics Op. 1020 (2014) (whether a lawyer to a party in a transaction may post and share documents using a "cloud" data storage tool depends on whether the particular technology employed provides reasonable protection to confidential client information and, if not, whether the lawyer obtains informed consent from the client after advising the client of the relevant risks); N.Y.C. Ethics Op. 2024-3 (2024) (In the event of a cybersecurity incident, lawyers have ethical obligations to take appropriate steps to protect clients' confidential information. While lawyers and law firms may have statutory and regulatory notification requirements to which they are subject, they also have an ethical

available technology and to ensure confidentiality when using technology to store client information;[343] and to safeguard client information contained in such electronic devices from

obligation under Rule 1.4 to promptly notify current clients in certain circumstances of the compromise of the confidentiality or availability of client information or if the law firm will likely be unable to meet material obligations to the client. There is no ethical prohibition against, or requirement to, pay a ransom to a cyber extortionist and lawyers and law firms may be not candid with respect to certain material facts when negotiating with cyber-extortionists in efforts to protect or regain access to client information and firm systems. Lawyers and law firms can only disclose client confidential information to law enforcement or in connection with a government investigation of a cybersecurity event if permitted by Rules 1.6, 1.9 or 1.18 and should be cognizant of potential risks to their clients of communicating with law enforcement or other government officials. Finally, conflicts of interests may require the lawyer or law firm not to advise a client in connection with the cybersecurity incident or to cease representing the client altogether in the event of a malpractice claim arising from the incident.); N.C. 2011 Formal Ethics Op. 6 (2012) (law firm may contract with software vendor to store and manager firm's client data provided that firm takes all reasonable steps to minimize the risk of inadvertent or unauthorized disclosure of client information and to protect such information from risk of loss); Ore. Ethics Op. 2016-191 (2016) (lawyer may maintain electronic-only client files provided appropriate steps to safeguard client property are taken); Pa. Ethics Op. 2024-100 (2024) (lawyers who retain third-party vendors to perform various functions must take reasonable efforts to ensure that the person's conduct is compatible with the lawyer's professional obligations including the requirement that the lawyer safeguard the client's confidential information consistent with Rule 1.6); Pa. Ethics Op. 2011-200 (2011) (attorneys required to take reasonable efforts to meet their obligations to ensure client confidentiality when using cloud computing, and confirm that any third-party service provider is likewise obligated); Tenn. Ethics Op. 2015-F-159 (2015) (lawyer may ethically allow confidential client information to be stored in the "cloud" if the lawyer takes reasonable care to ensure that all such information remains confidential and there are reasonable safeguards to ensure that information is protected from breaches and other risks); W. Va. Ethics Op. L.E.O. 2012-01 (2012) (use of electronic storage of client files is permissible, but attorney must ensure not only confidentiality of the data and its accessibility to the client, but also the integrity of the file). *Accord*: ABA Formal Ethics Op. 474R (2017); Ala. Ethics Op. 2010-02 (2010); Alaska Ethics Op. 2014-3 (2014); Ariz. Ethics Op. 05-04 (2005); Ariz. Ethics Op. 09-04 (2009); Cal. Ethics Op. 2012-184 (2012); Conn. Ethics Op. 13-07 (2013); Ky. Ethics Op. KBA E-437 (2014); Me. Ethics Op. 207 (2013); Me. Ethics Op. 194 (2008); N.H. Ethics Op. 2012-13/4 (2013); Nev. Ethics Op. 33 (2006); N.J. Ethics Op. 701 (2006); N.Y. Ethics Op. 842 (2010); N.D. Ethics Op. 99-03 (1999); Or. Ethics Op. 2011-188 (2011); Pa. Ethics Op. 2010-60 (2011); N.C. Ethics Op. RPC 215 (1995); Va. Ethics Op. 1818 (2005); Vt. Ethics Op. 2003-03 (2003); Wis. Ethics Op. EF-15-01 (2015). *See also City of Reno v. Reno Police Protective Ass'n*, 59 P.3d 1212 (Nev. 2002) (email transmissions subject the privilege if the other requirements are met). *Cf.* N.Y. CPLR 4548 (privilege is not6 lost for the "sole reason that it is communicated by electronic means or because persons necessary for the delivery or facilitation of such electronic communication may have access to the content of the communication"). *But see* Nev. Rev. Stat. § 597.970 ("A business shall not transfer any personal information of a customer through an electronic transmission other than a facsimile to a person outside of the secure system of the business unless the business uses encryption to ensure the security of the electronic transmission."). To date, forty states have amended their ethics rules to state that an attorney has an ethical duty to keep abreast of the benefits and risks associated with technology in delivering legal services to clients. (Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawai'i, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming).

[343] *See* ABA Formal Ethics Op. 482 (2018) (By proper advance preparation and planning and taking advantage of available technology during recovery efforts, lawyers can reduce their risk of violating ethics rules after a disaster; opinion outlines relevant rules in disaster situations, including the duty to safeguard client property and information); Cal. R. Prof'l Conduct 1.1 (lawyer's duty of competence includes "the duty to keep abreast of the changes in the law and its practice, including the benefits and risk associated with relevant technology."); Cal. Ethics Op. 2010-179 (2010) (Whether an attorney violates his/her duties of confidentiality and competence when using technology to transmit or store confidential client information will depend on the particular technology being used and surrounding circumstances. Before using a particular technology in the course of representing a client, an attorney must take appropriate steps to evaluate: 1) the level of security attendant to the use of that technology, including whether reasonable precautions may be taken when using the technology to increase the level of security; 2) the legal ramifications to a third party who intercepts, accesses or exceeds authorized use of the electronic information; 3) the

unauthorized access.[344] Lawyers also have an obligation to timely inform their clients of a data breach or theft of client funds or resources.[345]

D. "Virtual" Law Offices and Remote Work.

Ethics opinions have addressed ethical issues arising from maintaining "virtual" law offices and remote work arrangements, including the unauthorized practice of law.[346]

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degree of sensitivity of the information; 4) the possible impact on the client of an inadvertent disclosure of privileged or confidential information or work product; 5) the urgency of the situation; and 6) the client's instructions and circumstances, such as access by others to the client's devices and communications.); Mich. Ethics Op. RI-388 (2023) (Lawyer's obligation to safeguard digital property are the same as other property entrusted to the lawyer. Where the digital property is stored on a tangible medium, it is the tangible medium that must be safeguarded and not the underlying data. When the lawyer possesses the means to access the digital property, the obligation to safeguard the property extends only to the means of access.); N.Y. Ethics Op. 940 (2012) (lawyer may store confidential information on off-site backup tapes if lawyer takes reasonable care to ensure adequacy of systems to protect confidentiality.); La. Ethics Op. 19-RPCC-021 (2019) (lawyer must consider the benefits and risks associated with using technology in representing a client, and must use reasonable to ensure that client data is reasonably secure and accessible by the lawyer); Me. Ethics Op. 220 (2019) (same) Mich. Ethics Op. RI-381 (2020) (same); N.Y. Cnty. Ethics Op. 749 (2017) (same); Wash. RPC 1.1., cmt. 8 (lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.); Tex. DRPC 1.01, Cmt. 8 (same); Wis. RPC 20:1.1, Cmt. 8 (same). Accord: Colo. Ethics Op. 141 (2020); Ky. Ethics Op. KBA E-446 (2018); Mo. Informal Ethics Op. 2020-26 (2020). *Cf.* ABA Formal Ethics Op. 06-441 (2006) (the duty of competency also includes the duty to maintain an appropriate workload); Colo. Ethics Op. 146 (2022) (same).

[344] *See* N.Y.C. Ethics Op. 2017-5 (2017) (attorney has ethical obligations when crossing the U.S. border with confidential client information; lawyer must take reasonable steps to avoid disclosing information if a border agent seeks to search the attorney's electronic device, and lawyer may not disclose client's confidential information unless reasonably necessary to comply with a border agent's claim of lawful authority, including asserting privilege and otherwise avert/limit the disclosure of confidential information. If disclosure occurs during border search, lawyer must inform affected clients).

[345] *See* ABA Formal Ethics Op. 483 (2018) (when a data breach occurs involving, or having a substantial likelihood of involving, material client information, lawyers have a duty to notify clients of the breach in sufficient detail to keep clients "reasonably informed" and to the extent necessary to permit the client to make informed decisions regarding the representation, and to take other reasonable steps consistent with their obligation under the Rules); Cal. Ethics Op. 2020-203 (2020) (Lawyers who use electronic devices that contain confidential client information must assess the risk of keeping such data on electronic devices and computers, and take reasonable steps to secure their electronic systems to minimize the risk of unauthorized access. In the event of a breach, lawyers have an obligation to conduct a reasonable inquiry to determine the extent and consequences of the breach and to notify any client whose interests have a reasonable possibility of being negatively impacted by the breach); Ore. Ethics Op. 2023-202 (2023) (Lawyer has obligation to inform clients affected by theft of trust account funds by firm employee and should obtain a waiver from such clients to continue to represent them in the matters concerned. Lawyer may offer to either to write a check to the client to restore the funds or to pay those funds directly to the client.).

[346] *See* ABA Formal Ethics Op. 498 (2021) (the ABA Model Rules permit virtual practice, which is technologically enabled law practice beyond the traditional brick-and-mortar law firm. When practicing virtually, lawyers must particularly consider ethical duties regarding competence, diligence, and communication, especially when using technology. In compliance with the duty of confidentiality, lawyers must make reasonable efforts to prevent inadvertent or unauthorized disclosures of information relating to the representation and take reasonable precautions when transmitting such information. Additionally, the duty of supervision requires that lawyers make reasonable efforts to ensure compliance by subordinate lawyers and non-lawyer assistants with the Rules of Professional Conduct, specifically regarding virtual practice policies.); ABA Formal Ethics Op. 507 (July 12, 2023) (It is generally permissible for lawyers to participate in office sharing arrangements with other lawyers under the Model Rules. Office sharing lawyers should appreciate that such arrangements will require them to take appropriate measures to comply with their ethical duties concerning the confidentiality of information, conflicts of interest, supervision of non-lawyers,

and communications about their services. The nature and extent of any additional safeguards will necessarily depend on the circumstances); ABA Formal Ethics Op. 495 (2020) (Lawyers may remotely practice the law of the jurisdictions in which they are licensed while physically present in a jurisdiction in which they are not admitted if the local jurisdiction has not determined that the conduct is the unlicensed or unauthorized practice of law and if they do not hold themselves out as being licensed to practice in the local jurisdiction); Cal. Ethics Op. 2023-208 (2023) (remote practice does not alter a lawyer's ethical duties under the Rules of Professional Conduct and the State Bar Act; lawyers should implement reasonable measures, policies, and practices to ensure continued compliance with these rules in a remote working environment, with a particular focus on the duties of confidentiality, technology competence, communication, and supervision); Colo. Ethics Op. 149 (2024) ("Ethical Obligations for Lawyers Engaging in Virtual Practice") (addressing ethical issues and outlining best practices for attorneys practicing law in virtual and hybrid environments); Del. Ethics Op. 2021-1 (2021) (lawyers licensed in Delaware may ethically engage in the practice of Delaware law, for clients with Delaware matters, while physically present in another jurisdiction in which they are not admitted, unless a statute, rule, case law, or opinion of the local jurisdiction prohibits the conduct, provided that the lawyers do not hold themselves out as being licensed to practice in the local jurisdiction and may not advertise or otherwise hold themselves out as having an office in the local jurisdiction, or provide or offer to provide legal services for matters subject to the local jurisdiction, unless otherwise authorized); D.C. Comm. On Unauth. Practice of Law Op. 24-20 (2020) (non-member of D.C. bar may practice law from attorney's residence in the District of Columbia if attorney is practicing from home due to the COVID-19 pandemic, maintains a law office in a jurisdiction where the attorney is admitted to price, avoids using a District address in any business document or otherwise hold out as authorized to practice in the District, and does not regularly conduct in-person meetings with clients or third parties in the District); Fla. Ethics Op. FAO 2019-4 (2021) (it would not be the unlicensed practice of law for Florida domiciliary employed by a New Jersey law firm (having no place of business or office in Florida), to work remotely from his Florida home solely on matters that concern federal intellectual property rights (and not Florida law) and without having or creating a public presence or profile in Florida as an attorney); Ga. FAO 22-1 (2024) (lawyer not licensed in Georgia may provide legal services by remote means from Georgia while residing in Georgia where the legal services have no relation to Georgia other than the lawyer's physical location if (a) the lawyer does not hold out or otherwise repent that they are licensed in Georgia; (b) the lawyer takes reasonable steps to ensure that the lawyer's Georgia location is not generally known; and (c) the lawyer takes reasonable steps to correct any misunderstanding about the lawyer's licensure); Ill. Ethics Op. 25-01 (2025) (lawyer not licensed in Illinois may counsel an Illinois business on matters the lawyer is authorized by federal or other law or rule to provide in this jurisdiction; however, to the extent the non-Illinois lawyer seeks to advise an Illinois business on Illinois law, one of the exceptions to Rule 5.5(c) must apply); Ill. Ethics Op. 22-03 (2022) (There is no violation of the Rules of Professional Conduct for a lawyer to practice Illinois law from a geographic location outside the boundaries of state of Illinois. However, other geographic jurisdictions may have different perspectives. Illinois licensed lawyers should check the law and professional conduct rules of the geographic location in which the lawyer intends to practice Illinois law.); Mo. Informal Ethics Op. 2024-03 (2024) (lawyer licensed in another state but living in Missouri who plans to work for a law firm located in the other state from lawyer's home office in Missouri must seek admission in Missouri; Missouri prohibits lawyer from establishing an "office or other systematic and continuous presence in this jurisdiction for the practice of law" which includes the practice of law of another state from Missouri); Mo. Informal Ethics Op. 2024-02 (2024) (in-house counsel licensed in another state and working virtually from that state for a corporation that is located in Missouri must seek admission in Missouri); Mo. Informal Ethics Op. 2021-12 (2021) (outlining a number of ethical considerations in practicing from a virtual office including client communications and security of client information to include reasonable efforts to ensure against inadvertent or unauthorized disclosure or access to client information); Nev. Ethics Op. 59 (2022) (use of a "coworking" office space for the practice of an attorney admitted in Nevada but residing outside of Nevada constitutes maintaining an office in Nevada for purposes of SCR 42.1); Nev. Ethics Op. 57 (2020) work of an in-house attorney at a multi-jurisdictional corporation incorporated in a jurisdiction other than Nevada with the bulk of its operations outside the State, who is licensed to practice law elsewhere but not in Nevada, and who resides outside Nevada, falls within the exception to Nevada's unauthorized practice rules if the attorney does not establish a regular presence in the State or represent or imply that he/she is admitted to practice in the State); N.J. Ethics Op. 742 (2021) (non-New Jersey licensed lawyers who are associated with an out-of-state law firm, or are in-house for an out-of-state company, and how simply work remotely from their New Jersey homes but do not exhibit such outward physical manifestations of presence, are not considered to be engaging in the unauthorized practice of law in New Jersey); N.Y. Ethics Op. 1019 (2014) (law firm may give its lawyers remote access to client files, so that lawyers may work from home, as long as the firm determines that the particular technology used provides reasonable protection to the client's confidential information, or in the absence of such reasonable protection, if the law firm

obtains informed consent from the client, after informing the client of the risks.); N.Y. Cnty. Ethics Op. 754-2020 (2020) (discussing ethical obligations when lawyers work remotely); Or. Ethics Op. 2022-200 (2022) (following ABA Formal Ethics Op. 495; with respect to lawyer not licensed in Oregon but residing there, as long as the lawyer practices exclusively the law of jurisdictions in which the lawyer is licensed or otherwise authorized to practice law on behalf of non-Oregon residents, and lawyer does not hold themselves out as being authorized and available to handle matters in Oregon, lawyer is not engaged in the unauthorized practice of law in Oregon under RPC 5.5(a)-(b). Whether a lawyer licensed in Oregon and residing in another state but is not licensed there is engaged in unauthorized practice by continuing to represent Oregon clients remotely, is governed by the law of the other state); Pa. Ethics Op. 2021-100 (2021) (lawyer licensed in Pennsylvania may work remotely from another jurisdiction, even if the lawyer is not licensed in that jurisdiction, provided the lawyer takes appropriate steps (adopts ABA Formal Op. 495)); Pa. Ethics Op. 2020-300 (2020) ("Ethical Obligations for Lawyers Working Remotely") (outlining ethical issues and best practices for remote working attorneys); Phila. Ethics Op. 2021-100 (2021) (joint formal opinion with Pa. Ethics Op. 2021-100(2021)); S.F. Ethics Op. 2021-1 (2021) (for lawyer who is licensed to practice law in a jurisdiction other than California, but who is residing in California while remotely practicing law as authorized by the lawyer's out-of-state law license, the lawyer will not be in violation of California unauthorized practice statute and rules if the lawyer does not hold himself out as a licensed California lawyer, does not establish an office or other systematic or continuous presence for the practice of law in California, and does not represent a California person or entity but is merely physically present in California while using modern technology to remotely practice law in compliance with the rules of the jurisdiction where the lawyer is licensed); Tenn. Ethics Op. 2022-F-168 (2022) (lawyer domiciled outside of Tennessee, who is working remotely as full-time in-house counsel for an organization that has its principal place of business in Tennessee (and offices in other states), who is admitted to practice law only in a jurisdiction other than Tennessee and who is not registered as an in-house counsel in Tennessee is not engaging in the unauthorized practice of law because these circumstances alone do not establish a "systematic and continuous presence in Tennessee for the practice of law" as in-house counsel unless the lawyer is engaged in conduct that would evidence an indicia of a presence in Tennessee for the practice of law); Tex. DRPC 5.05 (Lawyer admitted to practice in another jurisdiction and not disbarred or suspended may provide legal services solely to the lawyer's employer or its affiliates, provided that this jurisdiction does not require pro hac admission. Lawyer not admitted to practice in this State, but who is authorized to practice in one or more jurisdiction may practice law from a temporary or permanent residence or other location in this State, provided that the lawyer (i) does not hold himself out as authorized to practice in this jurisdiction or as having an office for practice of law in this jurisdiction, (ii) does not solicit or accept Texas residents or citizens as clients the lawyer knows primarily requires advice on state or local law of Texas, except as permitted by Texas or federal law, and (iii) when the lawyer knows or reasonably should know that a person with whom the lawyer is dealing mistakenly believes that the lawyer is authorized to practice law in his jurisdiction, the lawyer should make diligent efforts to correct that misunderstanding); Utah Ethics Op. 22-01 (2022) (An in-house attorney for a Utah-based company is not required to obtain an in-house counsel license from the Utah State Bar if the attorney is not a resident of the State of Utah and does not maintain a systematic and continuous presence in the State of Utah for the practice of law); Va. Ethics Op. 1896 (2022) (a lawyer who is not licensed to practice in Virginia may work from a location in Virginia on a continuous basis so long as that practice is limited to exclusively federal law and/or the lawyer's licensing jurisdiction, regardless of the reason for being in Virginia; the lawyer must disclose that the lawyer is not licensed to practice in Virginia when disclosure is necessary to avoid the misleading implication that the lawyer is authorized to practice in Virginia); Wash. Ethics Op. 201601 (2016) (Ethical Practices of Virtual Law Offices); Wis. Ethics Op. EF-21-02 (2021) (addresses the ways in which the ethical responsibilities of lawyers and law firms are affected by working remotely). *Cf.* ABA Formal Ethics Op. 504 (2023) (Model Rule 8.5 provides that when a lawyer's conduct is in connection with a matter pending before a tribunal, the lawyer must comply with the ethics rules of the jurisdiction in which the tribunal sits, unless otherwise provided. For all other conduct, including conduct in anticipation of litigation not yet filed, a lawyer must comply with the ethics rules of the jurisdiction in which the lawyer's conduct occurs. However, if the predominant effect of the lawyer's conduct is in a different jurisdiction, then the lawyer must comply with the ethics rules of that jurisdiction.); Tex. DRPC 8.06 (The Texas rules of professional conduct apply to a matter pending before a tribunal in Texas. For any other conduct, the rules of the jurisdiction where the conduct occurred apply, except if the conduct had its predominate effect in a different jurisdiction, in which case the rules of that jurisdiction apply.). *Cf.* Ga. FA) 23-1 (2025) (lawyer closing a real estate transaction can satisfy their obligations under the rules of professional conduct by performing those responsibilities by use of video conference so long as the lawyer is in control of the closing process from beginning to end).

E. Examining "Metadata" That Reveal A Party's Confidential Information.

Lawyers sometimes transmit documents such as drafts of employment agreements, settlement agreements, and pretrial discovery by electronic mail. Such documents may contain "metadata" (data about the data) that the lawyer does not intend to send.[347] Some ethics opinions have held that it is unethical for the lawyer to examine metadata without consent of the sending lawyer.[348] However, most ethics opinions hold that lawyers may inspect metadata without contacting opposing counsel; lawyers concerned about disclosing confidential information in metadata should use "scrubbing" programs or other methods.[349] Opinions also state that lawyers have an obligation to use reasonable care when transmitting documents by email to prevent the disclosure of metadata containing client confidences or secrets.[350]

F. Artificial Intelligence and Law Practice.

Lawyers are increasingly using artificial intelligence ("AI") tools like ChatGPT to conduct

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[347] Metadata can include author(s)' names, the network server or disk where the document was saved, document revisions, hidden text, comments, prior edits/corrections, and time spent editing the document.

[348] *See* Ala. Ethics Op. 2007-02 (2007) (absent express authorization from a court, it is ethically impermissible for an attorney to mine metadata from an electronic document he or she inadvertently or improperly receives from another party). Accord: Ariz. Ethics Op. 07-03 (2007); D.C. Ethics Op. 341 (2007); Fla. Ethics Op. 06-2 (2006); Me. Ethics Op. 196 (2008); Minn. Ethics Op. 22 (2010); Miss. Ethics Op. 259 (2012); N.H. Ethics Op. 2008-2009/4 (2009); N.Y.C. Ethics Op. 738 (2008); N.Y. Ethics Op. 749 (2001); N.C. 2009 Formal Ethics Op. 1 (2010); Or. Ethics Op. 2011-187 (2011); Vt. Ethics Op. 2009-1 (2009). *Compare* Pa. Ethics Op. 2007-500 (2007) (final determination of how to address the inadvertent disclosure of metadata should be left to the individual attorney and his or her analysis of the applicable facts.); Cal. Ethics Op. 2015-193 (2015) (An attorney's ethical duty of competence related to litigation requires, at a minimum, a basic understanding of, and facility with, issues relating to e-discovery including the discovery of electronically stored information). *Cf.* Ill. Ethics Op. 18-01 (2018) (lawyer may not use tracking software in emails or other electronic communications with other lawyers or clients in the course of representing a client without first obtaining the informed consent of each recipient to the use of such software); Alaska Ethics Op. 2016-1 (2016) (use of tracking device that provides information about the use of documents, aside from their receipt and having been "read" by opposing counsel, is a violation of Rule 8.4).

[349] ABA Formal Ethics Op. 06-442 (2006). *Accord:* Vt. Ethics Op. 2009-1 (2009); Mo. Informal Advisory Op. 2021-13 (2021); Md. Ethics Op. 2007-09 (2006); Pa. Ethics Op. 2009-100 (2009). *See also* Wash. Informal Ethics Op. 2216 (2012) (lawyer may review readily accessible metadata that an opposing counsel inadvertently transmits in an electronic document, but the lawyer may not use forensic software to extract such metadata from a "scrubbed" document). *Cf.* Colo. Ethics Op. 119 (2008) (not unethical to search for meta data in an opponent's or third party's documents; receiving lawyer must notify sender if he has reason to believe that the document contains inadvertently transmitted information)*;* Tex. Ethics Op. 665 (2016) (Lawyer must avoid misleading or fraudulent use of information the lawyer may obtain from the metadata; absent specific rules, the lawyer should determine whether the possible course of action poses a material risk to the lawyer's client; if so, the lawyer should explain the risks and potential benefits to enable the client to make informed decisions).

[350] *See* Ariz. Ethics Op. EO-20-0008 (2022) (lawyer who authors and sends an electronic document to someone other than the client, or other privileged persons, is responsible for scrubbing the document of confidential metadata that may be contained within the electronic file. Receiving lawyer may ethically review the metadata in the document unless the lawyer knows or reasonably should know that the metadata was included inadvertently—in which case the receiving lawyer should notify opposing counsel and preserve the status quo for a reasonable period of time to permit the sender to take protective measures.); Tex. Ethics Op. 665 (2016) (lawyers must take reasonable measures to avoid the transmission of confidential metadata in electronic documents, including the use of reasonably available technical means to remove metadata before sending such documents to persons other than the lawyer's client.). *Accord*: Ala. Ethics Op. 2007-02 (2007); Ariz. Ethics Op. 07-03 (2007); Fla. Ethics Op. 06-2 (2006); Me. Ethics Op. 196 (2008); Mo. Informal Ethics Op. 2021-13 (2021); N.Y. Ethics Op. 782 (2004); N.Y. Ethics Op. 709 (1998); N.C. 2009 Formal Ethics Op. 1 (2010); Or. Ethics Op. 2011-187 (2011); Wis. Ethics Op. 12-01 (2012).

legal research and to aid in drafting briefs and memoranda. ABA Formal Opinion 512 (2024) addresses the use of AI in law practice,[351] and a number of states have also issued ethics opinions and guidance on the subject.[352] The ABA opinion advises that over-reliance on and improper use

[351] ABA Formal Op. 512 (2024) (lawyers using generative AI (GAI) tools have a duty of competence, including maintaining technological competence, which requires an understanding of the evolving nature of GAI. In using GAI tools, lawyers also have other relevant ethical duties, such as those relating to confidentiality, communication with a client, meritorious claims and contentions, candor toward the tribunal, supervisory responsibilities regarding others in the law office using technology and those outside the law office providing GAI services, and charging reasonable fees. With the ever-evolving use of technology by lawyers and courts, lawyers must be vigilant in complying with the Rules of Professional Conduct to ensure that lawyers are adhering to their ethical responsibilities and that clients are protected.). *See also* ABA Resolution 112 (2019) (urging courts and lawyers to address the emerging ethical and legal issues related to use of AI in the practice of law).

[352] *See, e.g.,* Alaska Ethics Op. 2025-1 (2025) (addressing the rules of professional conduct that should inform the use of generative AI in the practice of law); D.C. Ethics Op. 388 (2024) (Identifying ethics issues relating to use of generative AI; lawyers need to understand enough about how generative AI works, what it does, and its risks and limitations to become comfortable that the AI will be helpful and accurate for the task at hand, and that it will not breach client confidentiality. Lawyers should also be mindful of the implications generative AI creates for their duties of supervision; there duty of candor to the tribunal and their fairness obligations to opposing parties and counsel; the reasonableness of their fees; and their obligations with respect to the client file); Fla. Ethics Op. 24-1 (2024) (lawyers may use AI in the practice of law but must protect the confidentiality of client information, provide accurate and competent services, avoid improper billing practices, and comply with applicable restrictions on lawyer advertising. Lawyers should be mindful of the duty to maintain technological competence and educate themselves regarding the risks and benefits of new technology); Ky. Ethics Op. KBA E-457 (2024) (Opinion concludes that: (i) attorneys have ethical duty to keep abreast of the use of AI in the practice of law; (ii) attorneys have no duty to disclose the "rote" use of AI generated research on client matters unless the work is being outsourced to third parties, the client is being charged for the costs of AI, and/or the disclosure is required by court rules; (iii) if use of AI reduces the attorney's time and effort, the attorney must consider reducing the amount of fees charged; (iv) attorneys may charge client for expenses related to AI with appropriate confirmation in writing; (v) in using AI, attorneys has a continuing duty to safeguard confidential information; (vi) attorneys have ethical duty to review court rules and procedures as they relate to AI and to review all submissions using AI to ensure accuracy of contents of filings; and (vii) attorneys serving as partner or manager of law firm and/or supervising lawyers and nonlawyers at the firm has ethical responsibility of ensuring that policies and procedures regarding AI are in place and that training has taken place to assure compliance with the policies); Miss. Ethics Op. 267 (2024) (Lawyers may ethically use Generative AI, provided the lawyer has made appropriate safeguards to protect client information, is competent to use the technology, takes precautions to verify the accuracy of the tool's output, uses reasonable billing practices, and obtains the client's informed consent when appropriate); Mo. Informal Ethics Op. 2024-11 (Discussing the ethical issues lawyers should consider in developing a policy to use AI in the lawyer's practice including the duty of competence; duties regarding confidentiality of client information; the duty to make reasonable efforts to prevent inadvertent or unauthorized disclosure of or unauthorized access to information relating to the representation of the client; the lawyer's duty to protect and maintain independent professional judgment and not rely solely on content created by a generative AI platform or service; the lawyer's supervisory responsibilities to ensure other lawyers in the firm conform to the Rules; how use of generative AI may impact the reasonableness of fees; and how the use of generative AI may implicate the lawyer's duty of candor toward the tribunal.); N.Y.C. Ethics Op. 2025-6 (outlining ethical considerations when lawyers use AI tools to record, transcribe, and summarize conversations between attorneys and clients); N.Y.C. Ethics Op. 2024-5 (2024) (When using generative AI tools, a lawyer should take into account the duty of confidentiality, the obligation to avoid conflicts of interest, the duty of competence and diligence, the rules governing advertising and solicitation, the duty to comply with the law, the duty to supervise both lawyers and non-lawyers, the duty of subordinate attorneys, the duty to consult with clients, the duty of candor to tribunals, the prohibition on making non-meritorious claims and contentions, the limitations on what a lawyer may charge for fees and costs, and the prohibition on discrimination.); N.C. 2024 Formal Ethics Op. 1 (2024) (Discussing ethical issues in the use of AI in law practice including, *inter alia,* the duty to use AI competently, securely to protect client confidentiality, and with proper supervision when relying on or implementing AI's work production the provision of legal services; generally attorney has no duty to inform client that she is using an AI tool to complete ordinary tasks such as legal research or generic case management, but if the lawyer delegates substantive tasks in the representation to an AI tool, the lawyer's use of

of AI can implicate several ethics rules, including, among others, (i) the duty of competence with respect to the technology,[353] the duty to reasonably communicate with the client concerning the means by which the client's objectives are being accomplished,[354] (iii) the duty of confidentiality,[355] and (iv) responsibilities regarding nonlawyer assistance in the provision of legal services.[356]

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the tool is akin to outsourcing legal work to a nonlawyer, for which client's informed consent is required); Ore. Ethics Op. 2025-205 (2025) (Oregon lawyers may use AI and GAI tools in their legal practice, provided the lawyer follows guidelines set forth in the opinion to ensure the lawyer and the firm fulfil their duties regarding competency, communication, and confidentiality, and ensure that AI use meeting applicable rules, orders and other requirements of the court regarding such use); Pa. Ethics Op. 2024-200 (2024) (Artificial intelligence and generative AI tools, like any tool in a lawyer's arsenal, must be used with knowledge of their potential and an awareness of the risks and benefits the technology offers. They are to be used cautiously and in conjunction with a lawyer's careful review of the "work product" that those types of tools create. These tools do not replace personal reviews of cases, statutes, and other legislative materials. Additionally, although AI may offer increased productivity, it must be accomplished by utilizing tools to protect and safeguard confidential client information. With appropriate safeguards, lawyers can utilize AI in accordance with the Rules of Professional Conduct.); Texas Ethics Op. 705 (2025) (While there may be many ways that generative AI can assist in the practice of law and benefit lawyers and clients alike, Texas lawyers must always be aware of the ethical issues that may arise in the use of generative AI. Among many other issues, lawyers should acquire basic technological competence before using any generative AI tool, should always ensure that the tool does not imperil confidential client information, should always verify the accuracy of any responses received from a generative AI tool, and should not charge clients for the time "saved" by using a generative AI program.); Va. Ethics Op. 1901 (2025) (opinion discusses the ethical bounds and considerations when a lawyer is able to produce work dramatically more efficiently than in the past using generative AI.); Wash. Ethics Op. 202505 (2025) (providing general guidance on the ethical implications of using emerging artificial intelligence-enabled tools in law practice); W.Va. Ethics Op. L.E.O. 2024-01 (2024) (Discussing ethical issues surrounding use of AI in legal practice including duty of competence, duty of due diligence, duty to communicate, duty of confidentiality, duty to supervise, and duty of candor to the tribunal). *See also* ABA AI Task Force on Artificial Intelligence, "Year 2 Report on the Impact of AI on the Practice of Law" (2025)(erosion of skills for junior associates, deepfakes as evidence and lack of technical knowledge in law firms as challenges in the use of AI in practice); State Bar of Cal., "Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law" (2023) (outlining the various ethical issues in use of AI in practice including confidentiality, duty of competency among other considerations); Minn. State Bar, "Implications of Large Language Models (LLMs) on the Unauthorized Practice of Law (UPL) and Access to Justice (2024); N.J. Supreme Court, Preliminary Guidelines (2024) (AI guidelines for attorneys); N.Y.C. Bar Presidential Task Force on Artificial Intelligence and Digital Technologies, "Current Ethics Opinions and Reports Related to Generative Artificial Intelligence" (2025); Report and Recommendations of the N.Y. State Bar Assoc. Task Force on Artificial Intelligence (April 2024) (outlining the legal professional impact of AI, including the risk of waiving the attorney client privilege, and legislative and ethics rules recommendations for AI use); Taskforce for Responsible AI in the Law—Interim Report to the State Bar of Texas Board of Directors (2024) (includes a variety of recommendations being considered across different areas of legal practice, with a focus on the ethical and practical integration of AI. The proposals cover cybersecurity; education and legal practice; legislative, regulatory, and legal considerations; ethical and responsible use guidelines; access and equity; privacy and data protection; and AI summits and collaborative efforts); Va. State Bar, AI Guidance Update (2024).

[353] ABA Formal Op. 512, citing ABA MODEL RULE 1.1 cmt. 8 (lawyers "should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology."). *See also* Chapter 7.III (Use of Emerging Technology to Protect Client Information), *supra*.

[354] ABA Formal Op. 512, citing ABA MODEL RULE 1.4 (lawyers required to "reasonably consult with the client about the means by which the client's objectives are to be accomplished.").

[355] ABA Formal Op. 512, citing ABA MODEL RULE 1.6 (lawyer must "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."). *See also* Chapter 7.III (Use of Emerging Technology to Protect Client Information), *supra*.

[356] ABA Formal Op. 512, citing ABA MODEL RULES 5.1 and 5.3. *See* ABA Formal Ethics Op. 506 (2023) (regarding lawyer's responsibility to train and supervise a nonlawyer to assist with prospective client intake tasks including obtaining initial information about the matter, performing a conflict check, determining whether the assistance sought is in an area of law germane to the lawyer's practice, assisting with answering general questions about the fee

Large language model AI programs can sometimes produce what are known as AI-generated "legal hallucinations," that is, the programs generate plausibly-sounding fake citations and propositions of law from judicial opinions that purport to support the user's legal position, but which are, in fact, entirely fictitious, including falsely quoting real judges as authors of the fake opinions. Failure by attorneys to properly ensure against submission of court filings containing fake case citations and quotations (whether AI-hallucinated or not) has resulted in show cause orders and other warnings,[357] and monetary, CLE, and other sanctions under Rule 11 and the court's

agreement or process of representation, and obtaining the prospective client's signature on the fee agreement provided that the client is always offered the opportunity to communicate with the lawyer including to discuss the agreement and scope of representation); N.Y. Ethics Op. 1259 (2023) (Subject to various Rules regarding fee sharing, referral fees, solicitation, aiding the unauthorized practice of law, and supervision of nonlawyers, a lawyer may enter into a non-exclusive agreement with a paralegal who refers clients to the lawyer and completes forms for submission to judicial and non-judicial bodies.).

[357] *See McCarthy v. U.S. DEA*, 2025 WL 2028399 (3rd Cir. July 21, 2025) (petitioner ordered to show cause why he should not be sanctioned for citing inaccurate case summaries and non-existent decisions generated by AI); *Picon-Diaz v. Bondi*, 2026 WL 412348 (10th Cir. Feb 13, 2026) (petitioner's attorney warned about the use of AI and the responsibility to ensure citations are not fabrications but point to real cases that contain quotations attributed to them and arguably stand for the propositions for which they are cited); *Goldman v. Ariz. Bd. of Regents*, 2025 WL 3018812 (D. Ariz. Oct. 29, 2025) (court will require counsel for plaintiff to provide an explanation for the issues with the response he filed which cited cases that do not appear to exist. If counsel has or can locate the case he cited that the court cannot locate, he shall provide a copy of the case decision to the court and shall show cause why he should not be sanctioned under Rule 11); *Varsobia Home Care Servs., LLC v. Borrowing Fund, LLC*, 2026 WL 473119 (C.D. Cal. Feb. 19, 2026) (court suspected plaintiff prepared complaint with the assistance of AI, ordered counsel to file declaration disclosing use of AI and certifying that the filer, in the filer's independent legal judgment, has reviewed and verified the contents as accurate and in compliance with Rule 11); *Sunvilla Corp. v. Weiss*, 2025 WL 2684278 (C.D. Cal. Aug. 21, 2025) (plaintiff's counsel ordered to provide true and accurate copies of two cases containing the quotes cited in their brief and, if they cannot, to show cause why they should not be sanctioned for citing non-existent quotations); *Mirage v. Costco Wholesale Corp.*, 2025 WL 2201070 (C.D. Cal. July 31, 2025) (where plaintiff cited a case that apparently did not exist; to the extent he relied on AI, he violated standing order requiring disclosure and certification. Plaintiff admonished that any future citations to cases that do not appear to exist will result in a show cause order re why sanction should not be imposed); *Cruz v. United States*, 2025 WL 3641170 (C.D. Cal. Dec. 16, 2025) (plaintiff's counsel ordered to show cause why sanctions should not be imposed under Rule 11 for citing AI-hallucinated cases); *Martinez v. Dollar Tree Stores, Inc.*, 2025 WL 2176688 (C.D. Cal. July 31, 2025) (to the extent that plaintiff used AI to prepare motion that cited an apparently nonexistent case, plaintiff did not comply with court's standing order requiring disclosure and certification, and admonished plaintiff that future citation to nonexistent authority will result in the court setting an order to show cause re why sanctions should not be imposed); *Cummins v. Becerra*, 2026 WL 373336 (E.D. Cal. Feb. 10, 2026) (show cause order issued where attorney submitted brief with AI-hallucinated citations); *Gilbralter, LLC v. DMS Flowers, LLC*, 2025 WL 2689350 (E.D. Cal. Sept. 19, 2025) (because plaintiff's counsel showed candor in admitting to using sources, including AI, and that her inaccurate citation was an unintentional oversight and that she will implement safeguards going forward, counsel will not be sanctioned but admonished to use due case in using AI tools in preparing filings before the court); *Ekeocha v. U.S. Dep't of State*, 2025 WL 3228063 (D.D.C. Nov. 19, 2025) (warning plaintiff counsel concerning citation of nonexistent legal authorities and quotations, but declining to consider sanctions where court granted defendants'' motion to dismiss); *Smith v. Trump*, 2025 WL 2943723 (D.D.C. Oct. 16, 2025) (counsel for one of the individual defendants ordered to show cause why sanctions should be imposed for knowingly filing an opposition brief rife with fabricated citations and block quotations from the district court's rules); *N-Bar Trade, Inc. v. Amazon.com Servs. LLC*, 2025 WL 2986447 (D.D.C. Oct. 22, 2025) (plaintiff's counsel may have used AI to draft opposition, which contained quotes that do not actually appear in the cases to which they are attributed; if case returns to court from arbitration, counsel will be required to show cause why he should not be sanctioned for his use of nonexistent quotes); *Jones v. Dist. of Columbia Off. of Unified Commcns*, 2025 WL 2977585 (D.D.C. Oct. 22, 2025) (plaintiff's counsel cited to nonexistent quotations at several points in plaintiff's opposition brief; counsel is advised that further violations will not be tolerated and may result in sanctions and/or referral to a disciplinary committee); *Smith v. Athena Construction Grp. Inc.*, No. 1:18-cv-02080-APM (D.D.C. July 26, 2025) (counsel for plaintiff in FCA case ordered to show cause why the court

should not sanction and make a referral to relevant bar authorities for filing opposition to motion to continue that contained nine citations with false propositions of law and fabricated quotes, and one cited case did not exist and was supported by a fabricated quotation; attorney withdrew after admitting he used AI to file brief "riddled with citation errors); *United States v. Brewer*, 2025 WL 2636404 (M.D. Fla. Sept. 11, 2025) (defendant's counsel ordered to personally appear and show cause why sanctions should not be imposed for submitting motion with AI-generated fake cases, including but not limited to: fines; suspension from the Bar of the Middle District of Florida; referral to the Grievance Committee; referral to the Florida Bar; and/or any other applicable sanctions under the Court's inherent powers or other applicable authority); *Rollins v. Premier Motorcar Gallery, Inc.*, 2025 WL 2161428 (N.D. Fla. July 30, 2025) (court did not impose any sanction for plaintiff's continued citation to nonexistent cases, but cautioned plaintiff that "her reliance on AI technology to do her legal research absent attention to detail is a risky path forward all the same. She is on notice that continued citation to nonexistent law may result in dismissal of any future cases presented to this Court."); *Chenco Eng'g & Consulting GMBH v. Do-Fluoride New Materials*, 2025 WL 2430556 (D. Idaho August 22, 2025) (reminding counsel of their duties to according to the rules with respect to use of AI and their obligation to provide the Court with an accurate description of the law); *McPhaul v. Coll. Hills OPCO, LLC*, 2026 WL 35048 (D. Kan. Jan. 6, 2026) (plaintiff's counsel ordered to explain the false citation and quotations contained in his motion and to show cause why he should not be sanctioned pursuant to Rule 11(c)); *Woodward Harbor L.L.C. v. City of Mandeville*, 2026 WL 315061 (E.D. La. Feb. 5, 2026) (show cause order as a result of law firms' "astonishingly careless use of generative AI" in their response to motion to dismiss); *Mbow v. Mackert*, 2026 WL 221711 (D. Md. Jan. 28, 2026) (show cause order issued where plaintiff's counsel appeared to fictitious cases and misrepresented the holding of various cases); *Neal v. Frayer*, 2025 WL 3204710 (D. Md. Nov. 17, 2025) (court declines to issue sanctions where counsel implemented measures to ensure reliance on hallucinated cases does not recur, but warned that further violations will result in sanctions); *In re: Telexfree Sec. Litig.*, 2026 WL 412550 (D. Mass. Feb. 13, 2026) (attorney ordered to show cause why the court should not impose sanctions and/or refer the matter to the board of bar overseers where attorney on multiple occasions misrepresented the law to the court and such misrepresentations bore the clear hallmark of AI hallucinations); *Pauliah v. Univ. of Miss. Med. Ctr.*, 2025 WL 2988455 (S.D. Miss. Oct. 23, 2025) (hearing ordered where record showed plaintiff and his counsel may have used, when submitting the false statements and misrepresentations contained in Plaintiff's signed declaration; court retained jurisdiction for the purpose of determining what sanctions, if any, may be imposed.); *Chavez-DeRemer v. NAB, LLC*, 2025 WL 2308676 (D. Nev. Aug. 11, 2025) (warning parties that using generative AI tools may result in sanctions); *Gutierrez v. Lorenzo Food Grp., Inc*., 2025 WL 3258258 (D. N.J. Nov. 21, 2025) (ordered hearing to determine responsibility for submitting briefs with fabricated quotations and misleading citations); *Kertesz v. Colony Tire Corp.*, 2025 WL 2779094 (D. N.J. Sept. 30, 2025) (errors in plaintiff's amended briefs contained incorrect or made-up citations caused by attorney's use of AI tools; given attorney's self-disclosure and taking CLE on the topic, court does not impose sanctions but warned that if he relies on AI without proper oversight again, "the Court will not likely be so lenient."); *Oliver v. Dribusch*, 2025 WL 3251000 (N.D. N.Y. Nov. 21, 2025) (cautioning both parties that the use of "hallucinated" or fake case citations in legal submissions to a federal court is sanctionable conduct); *Burlingame v. Argo Private Client Grp., Ltd.*, 2025 WL 3653245 (S.D. N.Y. Dec. 17, 2025) (noting plaintiff's counsel's filings in opposition to motion to transfer reflect yet another instance of a lawyer relying on AI without checking the well-known problem of hallucinations; leaving what actions to take in response to these troubling circumstances to the transferee court); *Lin v. Noem*, 2025 WL 3013100 (S.D. N.Y. Oct. 28, 2025) (Plaintiff's opposition brief purported to cite three cases in support of her argument, in addition to attempting to distinguish two cases cited in defendants' moving brief, but for two of those supposed cases, however, the citations are not valid and plaintiff's counsel presents quotations that do not appear to exist, suggesting reliance on an AI tool; plaintiff's counsel directed to submit a letter explaining the citations and why sanctions should not be imposed for his apparent reliance on non-existent case law); *Flycatcher Corp. Ltd. v. Affable Ave. LLC*, 2025 WL 2030059 (S.D. N.Y. July 18, 2025) (where defendant's motion to dismiss with erroneous citations that were the result of AI hallucinations, court, court reserved decision on whether to sanction defense counsel and whether to strike the brief from the docket and allow him to file an amended brief, ordering him to appear at a conference to give him an opportunity to "prove [himself] worthy to carry the stylus once more in the service of justice and truth."); *J.G. v. NYC Dep't of Educ.*, 719 F. Supp.3d 293 (S.D. N.Y. 2024) (firm's use of ChatGPT as support for its aggressive fee bid is misbegotten and counsel "is well advised to excise references to ChatGPT from future fee applications."); *Safe Choice, LLC v. City of Cleveland*, 2025 WL 2958211 (N.D. Ohio Oct. 17, 2025) (plaintiff's attorney ordered to show cause why he should not be sanctioned under Rule 11 for citing fake cases in his opposition, by misrepresenting the legal significance of cases cited in the opposition, and by misrepresenting the legal of the same cases in the "final" brief presented to the court at the contempt hearing); *Hill v. Okla.*, 2025 WL 1840659 (W.D. Okla. July 3, 2025) (admonishing counsel for failure to comply with the court's AI

inherent powers,[358] and some courts have denied or limited pro hac status and other consequences

disclosure requirements and citing cases that were inaccurate, nonexistent and included direct quotations that could not be located), *later proceedings*, 2025 WL 3014223 (W.D. Okla. Oct. 28, 2025) (no further warnings or lenience on the issue of AI misuse); *Green Bldg. Initiative, Inc. v. Peacock*, 350 F.R.D. 289 (D. Ore. 2025) (plaintiff to show cause why sanctions should not be imposed under Rule 11(b) for plaintiff's citation of hallucinated cases.); *Russel Williams Home Servs. LLC v. Minleon Intern'l (USA) Ltd.*, 2025 WL 3651915 (M.D. Pa. Dec. 17, 2025) (attorneys for defendant ordered to show cause to explain the quality issues in their briefing, including fake quotations; "This behavior is unacceptable and counsel for Minleon will be ordered to answer for it."); *Axis Dynamics, Inc. v. Knox* Cnty., 2025 WL 2176505 (E.D. Tenn. July 31, 2025) (Court cannot say whether plaintiff's citation to nonexistent cases in briefing was due to lack or diligence, an irresponsible use of generative AI or an intentional attempt to mislead the court; plaintiff's counsel reminded that the rules of professional conduct and the federal rules of civil procedure prohibit misrepresenting the law to the court. Counsel placed on notice that further citations to fictitious authority or misrepresentation of actual authority will result in sanctions); *Holmes v. Univ. of Texas*, 2026 WL 297630 (W.D. Tex. Feb. 4, 2026) (show cause order for citing hallucinated cases in motion for reconsideration); *Ledoux v. Outliers, Inc.*, 2026 WL 291023 (W.D. Wash. Feb. 4, 2026) (plaintiff's counsel ordered to show cause why she should not be sanctioned under Rule 11 for filing several documents with inaccurate factual and legal citations which may have been generated by AI); *Michael Stapleton Assocs., Ltd.*, 2024 WL 3520170 (W.D. Va. July 24, 2024) (court ordered plaintiff's counsel to show cause why they should not be sanctioned and/or referred to their respective state bars for misconduct where objections to magistrate judge's order appeared to cite fictitious cases and made-up quotations); *Arajuo v. Wedelstadt*, 2025 WL 263529 (E.D. Wis. Jan. 22, 2025) (counsel warned that further filings with citations to nonexistent cases may result in sanctions); *North Henry's Lake Homeowners Ass'n v. Norton*, ___ P.3d ___, 2026 WL 31666 (Idaho Jan. 6, 2026)(although Homeowners' arguments in the case did not warrant an award of fees, court strongly caution counsel to ensure that citations used in briefing are *correct*. Failure to ensure an argument is supported with accurate citations to authority may warrant the imposition of sanctions, including an order to pay the other party's reasonable attorney's fees.).

[358] *See Amarsingh v. Frontier Airlines, Inc.*, 2026 WL 352016 (10th Cir. Feb. 9, 2026) (monetary and referral sanctions awarded against attorney representing herself for her misuse of AI in researching and drafting her appellate brief that contained seven fabricated case citations); *Fletcher v. Experian Info. Solutions, Inc.*, ___ F.4th ___, 2026 WL 456842 (5th Cir. Feb. 18, 2026) (monetary sanctions issued against appellant's counsel where she admittedly used AI to draft a substantial portion, if not all, of her reply brief that contained a number of AI-hallucinated citations and quotations and failed to verify the accuracy of the content created); *Park v. Kim*, 91 F.4th 610 (2nd Cir. 2024) (Attorney presented false statement of law to court by relying on generative AI tool to identify precedent that might support arguments in her brief without reading or otherwise confirming validity of a non-existent decision she cited; court of appeals referred attorney to grievance panel for further investigation, and directed attorney to furnish copy of decision to her client); *Johnson v. Dunn*, 2025 WL 2086116 (N.D. Ala. July 23, 2025) (three attorneys publicly reprimanded, disqualified from representing defendant in prisoner rights suit and referred to the bar and licensing authorities for fake citations to legal authorities in two motions that were AI hallucinations; no lesser sanction would serve the necessary deterrent purpose where the three lawyers were well-trained lawyers who work in a large, high functioning, well-regarded firm and benefited from repeated warnings and firm policies about the dangers of AI misuse, and access to gold-standard legal research databases, and they must have known that they would be deeply embarrassed in this kind of situation and that there would be harsh consequences with the court and their law firm. "And yet here we are." Court declined to sanction firm after finding that it had reasonable policies in place that, if followed, would have prevented the misconduct, and that the firm acted appropriately following the revelation that its attorneys had filed motions with bogus citations.); *United States v. McGee*, 806 F. Supp.3d 1264 (S.D. Ala. 2025) (where attorney intentionally used a program that supplied him legal argument, authorities, and citations, without making any effort to confirm that the information provided was accurate or even existed, court imposed inherent power sanctions of $5,000; ordering counsel to file a copy of the sanctions order in any case in which he has appeared and final judgment has not been rendered, in any case he appeared in the prior 12 months, and to any jurisdiction under which he is licensed to practice; ordering clerk to send a copy of order to the general counsel of the state bar for disposition with court's recommendation of public reprimand and sanctions; providing a copy to the Chief Judges for the Northern and Middle Districts of Alabama; referring matter to the Southern District's advisory panel to consider whether he should be removed from the CJA panel); *Dodge v. FirstService Residential Ariz.*, LLOC, 2025 WL 3653164 (D. Ariz. Dec. 17, 2025) (no further sanctioned ordered for use of AI-generated case law where after show cause order was issued plaintiff's counsel self-reported to state bar, openly and honestly admitted his improper use of AI, and the citation

deficient response brief did not prejudice plaintiff as the court found she could not prevail on the merits of the case and as a contingent fee case, attorney did not collect any fee, and public humiliation is a sufficient remedy under the facts of the case); *Hatfield v. Pirani*, 2025 WL 1950112 (W.D. Ark. July 16, 2025) (sanctions granted where defendant's attorney admitted to using AI to draft motions in limine that contained citations to nonexistent cases and quotation of nonexistent passages; court entered a separate order that attorney show cause why further sanctions should not be imposed, including monetary sanctions and referral to the Arkansas Judiciary's Office of Disciplinary Conduct); *Nguyen v. Savage Enters*., 2025 WL 679024 (E.D. Ark. March 3, 2025)(plaintiff sanctioned $1,000 for citing nonexistent authority in response to defendant's motion to dismiss, due in part to AI); *N.Z. v. Fenix Intern. Ltd.,* 2025 WL 3626155 (C.D. Cal. Dec. 12, 2025) (monetary and nonmonetary sanctions issued against attorneys for plaintiffs for AI misuse); *Tercero v. Sacramento Logistics, LLC*, 2025 WL 2605020 (E.D. Cal. Sept. 9, 2025) (plaintiff's counsel personally sanctioned $1,500, order to serve a copy of the order on his client and to the state bar, for submitting fake citations in motion for reconsideration; whether or not generated by AI, she repeatedly failed to offer any cogent explanation for the numerous citation deficiencies in Plaintiff's motion); *United States v. Hayes*, 763 F. Supp.3d 1054 (E.D. Cal. 2025) (levying $1,500 in sanctions against counsel personally for fictitious cases and quotations that the court suspected were produced using AI); *Support Community, Inc. v. MPH Intern. LLC*, 2025 WL 4110869 (N.D. Cal. Oct. 6, 2025) (court granted defendant counsel's motion to withdraw its motion for summary judgment that contained AI-hallucinated cases, defendant counsel ordered to refile the motion with all hallucinated cases excised but not allowed to replace them with new authority or argument, self-report to the state bar, and awarded attorney's fees to plaintiff for work done after the opposition was filed); *Coronavirus Reporter Corp. v. Apple Inc.*, 2025 WL 2162947 (N.D. Cal. July 30, 2025) (plaintiff's counsel sanctioned under Rule 11 for, among other things, using ChatGPT to generate documents and exhibits containing hallucinated citations); *Coomer v. Lindell*, 2025 WL 1865282 (D. Colo. July 7, 2025) (two lawyers for defendants sanctioned $3,000 each or submitting briefs that contained AI-generated errors including misquotes of cited cases, misrepresentation of principles of law associated with cited cases, misstatements regarding whether case law originated from binding authority, misattributions of case law to the district and citing cases that did not exist); *Davila v. Roblen, LLC*, 2026 WL 323134 (D. Conn. Feb. 6, 2026) (attorney ordered to complete CLE on responsible AI use and to share his knowledge with the legal community where he filed opposition to summary judgment containing multiple AI-generated citations); *Cojom v. Roblen, LLC*, 2025 WL 3205930 (D. Conn. Nov. 17, 2025) (plaintiff's counsel sanctioned for submitting pleading using AI-hallucinated citations); *The Doc App., Inc. v. Leafwell, Inc.*, 2025 WL 3288251 (M.D. Fla. Nov. 26, 2025) (award of attorney's fees, AI CLE requirements, and requirement to attach copy of order to any case in which counsel files or removes within 2 years, based on counsel's fake citations which may have been caused by his reckless use of AI), *on motion for reconsideration*, 2025 WL 3753997 (M.D. Fla. Dec. 29, 2025) (modifying sanctions to allow attorney to complete the CLE requirement remotely due to medical limitations that make travel to Florida difficult); *Dubinin v. Papazian*, 2025 WL 3248187 (S.D. Fla. Nov. 21, 2025) (order striking complaint, entering sanctions and referral to state bar and disciplinary committee where plaintiff's counsel cited nonexistent cases and quotations in a brief that appeared to be drafted by AI); *In re Neusom*, 2024 WL 1013974 (M.D. Fla. March 8, 2024) (attorney suspended from bar of the U.S. District Court for 1 year for inaccurate citations and completely fabricated authorities in his filings in a case, in which the lawyer used Westlaw and FastCase and may have used AI to draft the filings but was not able to check the excerpts and citations); *ByoPlanet Int'l, LLC v. Johansson*, 792 F.Supp.3d 1341 (S.D. Fla. 2025) (Despite being on notice that his use of AI resulted in hallucinated cases and citations, Plaintiff's counsel continued to make submissions to the Court using AI without checking the veracity of cases and citations and admitted he relied solely on a paralegal to draft filings to the court and did not adequately review the paralegal's work, warranting substantial sanctions: (i) dismissal four pending cases without prejudice and without leave to amend, (ii) plaintiff's counsel ordered to pay attorneys fees in the four cases for any time spent responding to any filing in which generative AI was used to develop hallucinated cases and fabricated quotations; (iii) if plaintiff's counsel files any case in the district within the next two years of the date of the order, he is required to include a copy of the sanction order to his complaint; and (iv) referral to state bar for appropriate discipline); *Crespo v. Tesla, Inc.*, No. 25-cv-80129, 2025 WL 1799411 (S.D. Fla. June 30, 2025), *aff'd*, No. 9:25-cv-80129, 2025 WL 2326039, at *2 (S.D. Fla. Aug. 12, 2025) ("The [c]ourt notes that had [p]laintiff engaged in a lack of candor regarding the fake citations, the sanctions considered in this case would be much more serious."); *Med. Buyers Grp., LLC v. Pence*, 2026 WL 149949 (M.D. Ga. Jan. 20, 2026) ($10,000 monetary sanctions awarded against plaintiff's counsel for citing nonexistent cases hallucinated by AI); *Med. Buyer's Grp., LLC v. Pence*, 2025 WL 3217751 (M.D. Ga. Nov. 18, 2025) (publicly admonishing plaintiff's counsel and awarding attorney's fees where counsel submitted hallucinated and false case citations to court without properly authenticating them); *Jackson v. Auto-Owners Ins. Co.*, 2025 WL 1932274 (M.D. Ga. July 14, 2025)(plaintiff's counsel and his firm sanctioned $1,000 and payment of defendant's reasonable attorneys fees and costs for citing non-

existent or "hallucinated" cases in plaintiff's response brief in support of denying defendant's motion to dismiss); *Ringer v. Bank of Am.*, ___ F.3d __, 2025 WL 3765431 (N.D. Ga. Dec. 30, 2025) (as sanction for submitting brief with multiple inaccurate citations, lawyer for defendant sanctioned $1,500, magistrate judge's order and recommendation naming lawyer and his firm ordered published, and required that a supervisor sign the lawyer's filings if he remained on the case; court was satisfied that the firm properly investigated the incident and was candid about the lawyer's errors); *Virgil v. Experian Information Solutions, Inc.*, 2026 WL 401066 (S.D. Ind. Feb. 12, 2026) (recommended sanctions of $10,000 against counsel for plaintiff's counsel for filing five briefs containing citations to non-existent cases, referral to chief judge for further discipline, and provide a copy of order to his client); *Davis v. Marion Cnty. Superior Ct. Juvenile Detention Ctr.*, 2025 WL 2502308 (S.D. Ind. Sept. 2, 2025) (recommended that attorney be sanctioned $7,500 and reference to the chief judge for further discipline for including two citations in his response to defendant's motion to compel that did not exist and were generated by AI); *Mid Central Operating Eng'gs Health and Welfare Fund v. HoosierVac LLC*, 2025 WL 1511211(S.D. Ind. May 28, 2025) (adopting magistrate judge's report and recommendation by reducing monetary sanctions from $15,000 to $6,000 personally against defendant's counsel for submitting to court and opposing counsel, on three separate occasions, briefs that contained citations to non-existent cases using generative AI; amount reduced due to counsel's subsequent efforts to educate himself and adhere to professional conduct moving forward); *Lafontant v. Coolidge-CLK St. Germane, LLC*, 2025 WL 2817583 (E.D. La. Oct. 3, 2025) (attorney personally sanctioned $1,000, required to take CLE on generative AI and referred to the disciplinary committee of the state bar for citing to fabricated, AI-generated case without confirming the accuracy or even the existence of the case); *Lee v. R&R Home Care, Inc.*, 2025 WL 2481375 (E.D. La. Aug. 28, 2025) (plaintiffs' counsel personally sanctioned $1,000 for filing a memorandum in opposition to a motion to dismiss without verifying the accuracy of a quotation and the citation of a case contained in the memorandum using AI); *Nora v. M & A Transp., Inc.*, 2025 WL 2337132 (E.D. La. Aug. 13, 2025) (plaintiff's counsel personally sanctioned $1,000 for filing motion to transfer that contained fabricated, AI-generated cases without verifying the accuracy or even the existence of the cases); *Kaufman v. Upton*, 2026 WL 156366 (D. Mass. Jan. 21, 2026) (attorney referred to board of bar oversees to impose discipline the board deems appropriate for attorney's citation of nonexistent citations, whether generated by AI or not); *Seither & Cherry Quad Cities, Inc. v. Oakland Automation, LLC*, 2025 WL 2105286 (E.D. Mich. July 28, 2025) (Rule 11 sanctions imposed on plaintiff's counsel based on briefs in response to summary judgment in two related cases that contained a series of AI-generated false and inaccurate citations; court found that the citations were not submitted in bad faith and thus inherent power sanctions were not appropriate; counsel ordered to pay defense counsel fees in responding to briefs); *Billups v. Louisville Mun. School Dist.*, 2025 WL 3691871 (N.D. Miss. Dec. 19, 2025) (sua sponte inherent power sanctions issued against plaintiff's three attorneys who submitted a memo that contained fabricated citations and misrepresentation of case holdings, all generated by AI; attorneys ordered to provide copy of sanctions order to the presiding judge in every pending state or federal case in which they have appeared, a copy of the order sent to the state bar, and all three attorneys disqualified and one ordered to withdraw from any case in which she appears as attorney of record before court); *Disability Rights Miss. v. Palmer Home for Children*, 2025 WL 3691874 (N.D. Miss. Dec. 19, 2025) (plaintiff's counsel sanctioned for citing three fabricated cases and six fake quotes; counsel ordered to pay $20,883.10 in attorney's fees and costs, attend CLE on AI, and a copy of the order provided to all judges and magistrate judges in the district and the state bar); *Gardner v. Combs*, 2025 WL 3632704 (D. N.J. Dec. 15, 2025) (monetary and nonmonetary sanction ordered against plaintiff's counsel for reliance on AI-hallucinated case law); *Gardner v. Comb*, 2025 WL 3632704 (D. N.J. Dec. 15, 2025) (plaintiff's counsel sanctioned for citing non-existence cases generated by AI, including monetary sanctions and order to self-report to bar authorities and serve his client with the opinion); *Lipe v. Alburquerque Public Schools*, 2025 WL 2695244 (D. N.M. Sept. 22, 2025) (plaintiff's counsel sanctioned $3,000 for violating Rule 11 by submitting a filing with the court without adequately reviewing it for accuracy, failing to verify its correctness, and citing authorities that do not exist); *Benjamin v. Costco Wholesale Corp.*, 779 F. Supp.3d 341 (E.D. N.Y. 2025) ($1,000 monetary sanction for citing hallucinated cases); *Ramirez v. Humala*, 2025 WL 1384161 (E.D. N.Y. May 13, 2025) (imposing $1,000 sanction against attorney and her firm for citing nonexistent authority in a filing to the Court); *Kaur v. Desso*, 2025 WL 1895859 (N.D. N.Y. July 9, 2015) ($1,000 monetary and CLE sanctions entered against plaintiff's counsel for using AI to draft a submission to the court that contained fabricated quotations from cited authorities); *Flycatcher Corp. Ltd. v. Affable Ave. LLC*, 2026 WL 306683 (S.D. N.Y. Feb. 5, 2026) (default judgment entered as a sanction where defense counsel "repeatedly and brazenly" violated Rule 11, despite multiple warnings from the court (2025 WL 2030059 (S.D. N.Y. July 18, 2025)) and fellow counsel, continued his AI misuse resulting in fake cases and erroneous citations, "exacerbated by his insouciant approach to cite-checking" and thus in bad faith); *In re Zimmer M/L Taper Hip Prosthesis*, 2025 WL 3650650 (S.D. N.Y. Dec. 16, 2025) (monetary and nonmonetary sanctions awarded against plaintiff's counsel for filing papers with AI-generated hallucinations and

inaccuracies); *J.D. v. New York City Dep't of Educ.*, 2024 WL 728626 (S.D. N.Y. Feb. 22, 2024) (firm's use of ChatGPT to support its aggressive fee attorneys fees requests is "utterly and unusually unpersuasive" and the Court "rejects out of hand its conclusions as to the appropriate billing rates); *Mata v. Avianca, Inc*., 678 F. Supp. 3d 443 (S.D. N.Y. 2023) (attorneys sanctioned for submitting brief written by ChatGPT that cited nonexistent judicial opinions with fake quotes and citations; lawyers abandoned their responsibility to check their work, and their actions rose to bad faith when they continued to stand by the fake opinions after judicial orders called their existence into question, making false and misleading statements to the court; attorneys ordered to write a letter to their client explaining what happened and including a copy of the order and the transcript of the sanctions hearing; attorneys ordered to send a similar letter to the real judges falsely cited as the authors of the fake opinions in the AI-generated brief; attorneys also sanctioned $5,000); *Dehghani v. Castro*, 782 F. Supp.3d 1051 (D.N.M.) (affirming magistrate judge's imposition of Rule 11 sanctions, including $1,500 monetary sanctions, mandatory CLE training, and order that attorney report sanction to disciplinary boards in three states); *McComb v. Best Buy,* 2024 WL 181857 (S.D. Ohio Jan. 17, 2024) (parties not allowed to use AI for any purpose, including preparing filings, before the court); *Mattox v. Product Innovations Research, LLC*, ___ F. Supp.3d ___, 2025 WL 3012828 (E.D. Okla. Oct. 22, 2025) (Monetary sanctions, referral to disciplinary body, and public remand awarded based on plaintiff's counsel violation of Rule 11 and the court's AI guidelines by submitting pleadings containing AI-generated fabricated case citations, erroneous citations, quotations of nonexistent law, and misstatements of law. The filings ranged from summary-judgment briefing, to motions in limine, and even a sanctions motion. The pattern was not inadvertent, and it was not harmless.); *Marti v. U.S. Pro Moving and Logistics, LLC*, 2026 WL 205532 (D. Ore. Jan. 27, 2026 (counsel admonished for violating Rule 11 by submitting an apparent AI-generated response to a motion to dismiss); *Lifetime Well LLC v. IBSpot.com Inc.*, 2026 WL 195644 (E.D. Pa. Jan. 26, 2026) (monetary and nonmonetary sanctions awarded against defendants' counsels for submitting motion with at least eight false case citation hallucinations generated by AI); *Bevins v. Colgate-Palmolive Co*., 2025 WL 1085695 (E.D. Pa. April 10, 2025) (Court sanctioned plaintiff's counsel for submitting briefs that cited case law that did not support his stated propositions and which, on their face, did not exist; the court directed that a copy of the sanctions order be forwarded to the Pennsylvania state bar and the district court bar, struck counsel's appearance in the case with prejudice, and required counsel to inform his client of the sanctions and the fact that if client wished to refile her case, she must find new counsel); *Bunce v. Visual Techn. Innovations, Inc.*, 2025 WL 662398 (E.D. Pa. Feb. 27, 2025) (imposing $2,500 sanction and ordering lawyer to complete one-hour CLE program related to AI and legal ethics for submitting fictitious cases created by generative AI); *Puerto Rico Soccer League NFP, Corp. v. Federación Puertoriqueña de Futbol,* 2025 WL 1080732 (D. P.R. April 10, 2025) (Rule 11 and inherent authority sanctions issued against Plaintiffs' attorneys for filing motions with incorrect reporter numbers, attributed to the wrong circuits or districts, or proposed incorrect party names), *order on application for attorneys fees*, 2025 WL 2709484 (D. P.R. Sept. 23, 2025) (awarding $24,492.10 in fees and costs as sanctions for filing four motions with multiple severely flawed citations errors; although plaintiff's counsel denied using AI, the sheer number of inaccurate or nonexistent citations suggest otherwise and, in any event, violations of Rule 11 and other rules occurred regardless of whether they were caused by a misuse of AI); *Gauthier v. Goodyear Tire & Rubber Co.*, 2024 WL 4882651 (E.D. Tex. Nov. 25, 2024) (monetary and other sanctions imposed against attorney who submitted a brief to the court that included cases generated by AI that referred to nonexistent cases and well as nonexistent quotations); *Wilson v. KIPP Texas, Inc.*, 2025 WL 3030444 (N.D. Tex. Oct. 29, 2025) (court sanctions plaintiff's counsel for his improper and undisclosed use of generative AI in preparing the summary judgment response and appendix that contained inaccurate and nonexistent authority, in violation of local rules and Rule 11, requiring him to confer with defendant's counsel regarding attorney's fees and costs related to defendant's motion for summary judgment, and attend two hours CLE regarding AI); *Elizondo v. City of Laredo*, 2025 WL 2071072 (S.D. Tex. July 23, 2025) (plaintiff's attorney assessed monetary sanctions of $2,500, three hours mandatory CLE including one hour on the use of AI in the legal context for submitting a response to the motion to dismiss in which his law clerk used AI tools, that contained wildly inaccurate citations and which misrepresented the legal holdings of the cited cases); *Black Oak Capital Boca, LLC v. Evans*, 2025 WL 3485757 (D. Utah Dec. 4, 2025) (rather than issuing monetary sanctions for included hallucinated cases in defendants' opposition to motion to dismiss second amended counterclaim and instead, ordered to read all of the cases and authority cited in the court's opinion and file a summary statement with the court certifying that he had done so); *Iovino v. Frier v. Hingiss*, 2023 WL 6046840 (E.D. Wis. Sept. 15, 2023) (to the extent briefing was prepared using AI, counsel is reminded that he remains responsible for any briefing he files, regardless of the tools employed); *Plumbers & Gasfitters Union Local No. 75 Health Fund v. Morris Plumbing, LLC,* 2024 WL 1675010 (E.D. Wis. April 18, 2024) (District court observed that Plaintiffs' reply cited a cases that none of the court's staff were able to locate and the citation went to a case of a different name, from a different year, and from a different circuit. "If this is, as the Court suspects, an instance of provision of falsified case

for AI misuse.[359] Some orders included referrals to state bar disciplinary authorities, subjecting the offending attorney to discipline as well.[360] To date, there are over **250** (and counting) court opinions responding to improper AI use.[361] Moreover, a number of courts have issued standing orders, rules, and other guidance on the subject.[362] Courts have also warned non-lawyer pro se

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authority derived from AI, Plaintiffs' counsel is on notice that any future instance of the presentation of nonexistent case authority will result in sanctions."); *Ark. Dep't of Hum. Servs. v. Ward*, 2026 WL 30410 (Ark. Feb. 5, 2026) (approving attorney ad litem's self-imposed sanctions—resigning as attorney ad litem and self-report to the Bar for violating Supreme Court's rules concerning use of AI); *People v. Cabrill*, 2023 WL 8111898 (Colo. Supreme Ct. Ofc. of the Presiding Disciplinary Judge, Nov. 22, 2023) (attorney suspended and fined for using sham case law citations produced by ChatGPT in a motion and lying to the judge that an intern produced the errors); *Kruse v. Karlen*, 692 S.W.3d 43 (Mo. Ct. App. 2024) (Dismissing employer's appeal in wage case and awarding $10,000 sanctions where employer filed appeals brief in which the overwhelming majority of the citations were not only inaccurate but entirely fictious; only two of the twenty-four case citations in the brief were genuine); *LaRoche v. Sterett*, 2025 WL 3174940 (Vt. Nov. 13, 2025) (appellant's attorney sanctioned for filing to make a reasonable inquiry into the accuracy of a legal contention contained in a brief he filed with the court using an "AI helper").

[359] *See Grant v. City of Long Beach,* 96 F.4th 1255 (9th Cir. 2024) (striking an appellant's brief and dismissing an appeal for materially misrepresenting or fabricating case citations); *Mavy v. Comm'r of Soc. Sec. Admin.,* 2026 WL 91483 (D. Ariz. Jan. 13, 2026) (affirming magistrate judge revoking plaintiff counsel's pro hac status and striking opening brief that contained "hallucinated" citations, but vacating Rule 11 violation because, although deficient, counsel's conduct was not tantamount to bad faith); *Lexos Media IP, LLC v. Overstock.com, Inc*., 2025 WL 3628119 (D. Kan. Dec. 15, 2025) (monetary and other sanctions, including revocation of pro hac vice admission and referral to disciplinary authorities, against attorneys for submitting briefs with AI-hallucinated citations); *Belenzon v. Paws Up Ranch, LLC*, No. CV 23-69-M-DWM (D. Mt. June 22, 2023) (pro hac vice status to out of state attorney granted on condition that attorney does his own work, and that use of AI drafting programs, such as Chat GPT, is prohibited); *Allah-El v. Columbia Univ.*, 2026 WL 412646 (S.D. N.Y. Feb. 13, 2026) (court denied plaintiff's counsel's application for pro hac admission, based on, among other things, counsel's failure to bring to the court's attention a prior order citing counsel filing requests for default judgment that were incomprehensible and contained numerous error including an entire conversation between counsel and ChatGPT); *Wadsworth v. Walmart Inc.*, 348 F.R.D. 489 (D. Wyo. 2025) (pro hac admission revoked and monetary sanctions awarded against attorneys for filing motions in limine that cited eight cases that did not exist, which attorneys admitted was "hallucinated" by AI).

[360] *See In re Zareh*, ___ N.Y.S.3d ___, 2026 WL 363103 (1st Dept., Feb. 10, 2026) (attorney disciplined in New York after filing brief in Texas federal court containing AI-generated citation errors).

[361] Based on the author's Westlaw searches through February 19, 2026. This number does not include (i) federal magistrate judge and state court of appeals decisions, (ii) cases involving pro se litigants; or (iii) improper use of AI by judges. Interestingly, when the author posed this question to ChatGPT on February 19, 2026, it provided a figure of 212 court cases involving AI-related sanctions or warnings since May 2023 and 169 in 2025 alone, inclusive of magistrate judge and state court of appeals decisions and cases involving pro se litigants. The author could not identify a basis for ChatGPT's apparent undercounting.

[362] *See* Hon. Gabriel A. Fuentes, "Standing Order for Civil Cases Before Magistrate Judge Fuentes," (N.D. Ill. 2023) (Rule 11 certifications are representations by filers "as living, breathing, thinking human beings that they themselves have read and analyzed all cited authorities to ensure that such authorities actually exist and that the filings comply with Rule 11(b)(2)."); Hon. Michael M. Baylson, "Standing Order re: Artificial Intelligence ('AI') in Cases Assigned to Judge Baylson" (E.D. Pa. June 6, 2023) (if any party has used AI in preparing any filing with the Court, party must, in a clear and plain factual statement, disclose that AI has been used in the preparation, and certify that each every citation to the law or the record in the paper has been verified as accurate); Hon. Brantley Starr, "Mandatory Certification Regarding Generative Artificial Intelligence" [Standing Order] (N.D. Tex. 2023) (attorneys appearing before Court must attest that "no portion of the filing was drafted by generative artificial intelligence," or if it was, that "it was checked for accuracy, using print reporters or traditional legal databases, by a human being."); Hon. Stephen A. Vaden, "Order on Artificial Intelligence"[Standing Order] (Ct. Int'l Trade June 8, 2023) (Any submission in a case assigned to Judge Vaden that contains text drafted with the assistance of a generative artificial intelligence program on the basis of natural language prompts, including but not limited to ChatGPT and Google Bard, must be accompanied by (1) a disclosure that identifies the program used and the specific portions of text that have been so drafted; and (2) a certification that the use of such program has not resulted in the disclosure of any confidential or business proprietary information of any unauthorized party). *Cf.* Hon. Michael Newman, "Standing Order Governing

litigants about the improper use of AI in litigation).[363] Judges' use of AI in preparing opinions has also drawn attention of courts of appeal.[364]

Similar ethics concerns exist when using AI-assisted deposition software[365] and technology-assisted review.[366]

Civil Cases at VI (S.D. Ohio Dec. 18, 2023) (no party may use AI in preparing of any filings submitted to the Court; ban not intended to cover information gathered from legal search engines, such as Westlaw or LexisNexis, or Internet search engines, such as Google or Bing); Ill. Supreme Court Policy on Artificial Intelligence (2025) (use of AI by litigants, attorneys, judges, judicial clerks, research attorneys, and court staff may be expected, and should not be discouraged, and is authorized provided it complies with legal and ethical standards; disclosure of AI use should not be required in a pleading); Local Rules of the Texas Business Court R. 10 (March 1, 2025) (AI is not prohibited, but the filing attorney or party is independently responsible for the accuracy of all filings and must comply with all legal and ethical duties); Virginia Bar Ass'n, "Model Artificial Intelligence Policy for Law Firms" (2024) (provides guidance to firms in developing AI policies for practice); Guidance on the Use of Artificial Intelligence-Based Tools in Practice Before the United States Patent and Trademark Office (April 11, 2024) (providing guidance to practitioners and the public of the important issues that patent and trademark professionals, innovators, and entrepreneurs must navigate while using AI in matters before the USPTO including, inter alia, confidentiality and the obligation to ensure that statements in AI-assisted documents are true and that there are no fictional case citations).

[363] *See, e.g., Dodds v. Bridges*, 2026 WL 380194 (10th Cir. Feb. 11, 2026) (warning pro se prisoner petitioner regarding use of AI-generated fake cases in his briefs); *Chumpitz-Morales v. Bondi*, 10th Cir. Feb. 11, 2026) (warning pro se petitioner seeking review of immigration order regarding use of misrepresented holdings of cases in her brief, which the court suspected were AI-generated hallucinations); *Jones v. Kankakee Cnty. Sheriff's Dep't*, ___ F.4th ___, 2026 WL 157661 (7th Cir. Jan. 21, 2026) (issuing observations and guidance for pro se use of AI); *Garces v. Hernandez*, 2025 WL 2401001 (5th Cir. Aug. 19, 2025) (The litigant-user of AI—even a pro se one like Garces—must verify the accuracy of AI-generated information, mindful that citing authorities that are fabricated by AI may violate appellate rules); *Brown v. Gat Dough Inc.*, 2025 WL 2663170 (N.D. Sept. 17, 2025) (pro se litigant warned against use of AI without carefully verifying all citations); *Sanders v. United States*, 176 Fed. Cl. 163, 169 (2025) (collecting cases where courts have sanctioned pro se litigants for failing to meet the requirements of Rule 11); *City of Dickinson v. Helgeson*, ___ N.W.3d ___, 2026 WL 392303 (N.D. Feb. 12, 2026) (pro se appellant sanctioned for filing brief with fake or nonexistent cases typically the result of AI hallucinations).

[364] *See La Union Del Pueblo Entero v. Abbott*, ___ F.4th ___, 2026 WL 391215 (5th Cir. 2026) (court of appeals noting district judge interview that he had used AI as an adjunct to his work on some aspects of the case and warning that AI should not be a substitute for legal judgment).

[365] *See Black v. City of San Diego*, 2025WL 1908072 (S.D. Cal. July 10, 2025) (affirming magistrate judge's order denying plaintiff's request for leave to conduct video depositions using AI transcription software where there were legitimate concerns with having many depositions taken and certified by an untested method that raises concerns in the handling of confidential information pursuant to the protective order).

[366] *See LaVeglia v. TD Bank*, 2020 WL 127745 (E.D. Pa. Jan. 10, 2020) (disapproving blind use of document review software to generate privilege logs; lawyer cannot substitute software-generated privilege logs for a lawyer's careful review and preparation). *Cf.* Mo. Informal Ethics Op. 2024-09 (2024) (lawyer may not rely on nonlawyer staff to perform redactions and e-filings, as lawyer is responsible for documents e-filed on behalf of lawyer at lawyer's direction per Rule 4-5.3).

VIII. ETHICS ISSUES INVOLVING SETTLEMENT

A. Conditioning Settlement on Waiver of Attorneys' Fees.

The Supreme Court held that a court may approve a class action settlement that waives statutory attorneys' fees as a condition of settlement.[367] Class counsel should explicitly address this fee-waiver issue in the retainer agreement.[368] However, ethics opinions have held that an attorney cannot ethically contract in advance with a client that the client may not accept or that the attorney may veto a particular offer in settlement of the case.[369]

B. Settlements Affecting the Interests of Multiple Clients.

A lawyer representing multiple clients must obtained the informed consent of each client to make or accept an offer of an aggregate settlement, which must include the total settlement amount or result, the amount and nature of each client's participation in the settlement, the fees and costs to be paid to the lawyer from the proceeds or by an opposing party, and the method by which costs are to be apportioned to each client.[370] Conflict issues also arise when proposed settlement terms

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[367] *Evans v. Jeff D.*, 475 U.S. 717, 727-28 (1986). *See also* Cal. Ethics Op. 2009-176 (2009) (Fee-waiver settlement offers are not ethically prohibited generally, and a lawyer does not violate any ethical obligation by recommending or conveying such offers.); *Ne. Ohio Coal. for the Homeless v. Secy. of Ohio*, 695 F.3d 563 (6th Cir. 2012) (prevailing plaintiff may waive statutory attorney fees as part of a negotiated settlement). Note that in some states it may be unethical for defense counsel to make such conditional offers. *Cf.* D.C. Ethics Op. 147 (1985) (it is unethical to condition settlement offer on waiver of statutory attorneys' fees); Me. Ethics Op. 17 (1991) (same); N.Y.C. Ethics Op. 80-94 (1981) (limiting its rationale to fee waivers in civil rights and civil liberties cases).

[368] *See* Alaska Ethics Op. 2017-1 (2017) (lump-sum settlement offers, inclusive of fees, are ethically permissible and counsel may advise the client of their intention to seek payment and address the possibility of lump-sum settlement offers within retainer agreements). Accord: Cal. Ethics Op. 1994-136 (1994); Utah Ethics Op. 98-05 (1998); Wash. Informal Ethics Op. 2102 (2005). *See generally* Conn. Ethics Op. 97-31 (1997) (discussion of ethical considerations in negotiating settlements when an attorney's fee award is sought).

[369] D.C. Ethics Op. 289 (1999); Utah Ethics Op. 98-05 (1998); Conn. Ethics Op. 97-31 (1997); N.D. Ethics Op. 93-09 (1993).

[370] *See* ABA Formal Ethics Op. 06-438 (2006) (in seeking to obtain the informed consent of multiple clients to make or accept an offer of an aggregate settlement or aggregate agreement of their claims, a lawyer must advise each client of the total amount or result of the settlement or agreement, the amount and nature of every client's participation in the settlement or agreement, the fees and costs to be paid to the lawyer from the proceeds or by an opposing party or parties, and the method by which the costs are to be apportioned to each client); D.C. Ethics Op. 386 (2023) (The representation of multiple clients creates unique issues concerning conflicts, confidentiality, and duties of loyalty, among others, of which lawyers need to be mindful. Representing multiple clients in settlement discussions touches upon all these issues and more. It is critical that lawyers fully inform their clients at the outset of the representation of the potential conflicts that can occur in the context of settlement discussions, and that they provide complete information to their clients about the nature of any settlement proposal, including the amounts they and other clients will receive and full details of the settlement, so that the clients can provide informed consent in writing, or interpose any objections they may have, to the terms of the settlement.); *Florida Bar v. Kane*, 202 So.3d 11 (Fla. 2016) (attorneys properly disbarred for settling claims for numerous clients against healthcare insurers under terms that gave attorneys complete discretion as to the specific amounts each client received without consultation/consent of the clients, and on which the attorneys received a disproportionate share of the settlement funds); *In re Ross*, 982 N.E.2d 295 (Ind. 2013) (lawyer publicly reprimanded for settling aggregated claims without disclosing to his 60 clients the terms of the settlement or the total amount paid by the company); *Tax Auth., Inc. v. Jackson Hewitt, Inc.*, 898 A.2d 512 (N.J. 2006) (engagement letter signed by 154 joint plaintiffs that provided advance consent that a majority could bind all to an aggregate settlement violates Rule 1.8; decision applied prospectively); N.Y.C. Ethics Op. 2020-3 (2020) (Lawyer should not settle one lawsuit that is dependent on, or where there is significant risk that it will impact, the terms of a settlement of another lawsuit being handled by the lawyer without obtaining written informed consent from each client

conflict with the interests of the lawyer's other clients;[371] terms benefitting the lawyer's interests

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or, in the case of certain aggregate settlements, court approval; lawyers should only attempt to use the "court approval" exception in circumstances where client consent is not feasible, such as class or derivative actions); N.Y.C. Ethics Op. 2009-6 (2009) (Absent court approval, a lawyer may not conclude an aggregate settlement on behalf of multiple, jointly represented clients absent the informed written consent of each settling client, or ask clients to waive their rights or bind themselves to an aggregate settlement approved by some, but not all, affected clients); N.C. Ethics Op. RPC 251 (1997) (lawyer may represent multiple claimants in a personal injury case, even though the available insurance proceeds are insufficient to compensate all claimants fully, provided each claimant, or his or her legal representative, gives informed consent to the representation, and the lawyer does not advocate against the interests of any client in the division of the insurance proceeds). *Cf.* Colo. Ethics Op. 134 (lawyer may ethically prepare an advance agreement for multiple jointly-represented clients providing that majority rule will govern future settlement decisions; before taking the representation, the lawyer must adequately disclose to the potential clients the risks and potential conflicts that might arise from such an agreement and from joint representation in the drafting of that agreement and must obtain the informed consent of each potential client); R.I. Ethics Op. 2022-02 (2022) (it is permissible under the Rules for attorney to enter into a fee agreement which states that the agreed-upon contingency fee percentage applies to the total of the damages award plus the court awarded attorney's fees).

[371] *See Johnson v. Nextel Commc'ns,* 660 F.3d 131 (2d Cir. 2011) (dismissal of putative class action lawsuit by approximately 587 employment discrimination claimants against their former law firm and their employer reversed because complaint stated claim against law firm for breach of fiduciary obligations to their former clients and against former employer for aiding and abetting such a breach, where law firm signed a pre-suit agreement with employer in which law firm received a total of $7.5 million and in exchange (a) the firm was required, within a short time frame, to persuade its clients *en masse* to abandon their legal and administrative proceedings against the employer, abandon their right to a jury trial and accept an expedited mediation/arbitration of their claims, (b) the firm would act as a "consultant" to employer for the next two years once their clients' claims were resolved, and (c) the firm was prevented from taking new claimants against the employer; the "inevitable purpose" of the agreement was to create "an irresistible incentive"—millions of dollars in payments to the law firm having no relation to services performed for, or recovered by, the claimants—for the law firm to engage in en masse solicitation of agreements from the 587 claimant clients, which was a violation of the firm's duty to advise and represent each client individually, a conflict "severely aggravated" by the sliding scale payment, which depended on how quickly each client's claims were resolved and by the $2 million consulting contract, which so burdened the opportunity for claimants to give informed consent that the agreement is not consentable); *Radcliffe v. Experian Info. Sol., Inc.*, 715 F.3d 1157 (9th Cir. 2013) (Conditional incentive awards in class action settlement caused class representatives' interests to diverge from class's interests and class counsel to engage in conflicted representation by continuing to represent settling class representatives and class at large, and thus district court abused its discretion in approving settlement and attorney fee award, where settlement agreement told class representatives that they would not receive incentive awards unless they supported settlement, and conditional incentive awards significantly exceeded in amount what absent class members could expect to get upon settlement approval); Ill. Ethics Op. 19-01 (2019) (fee agreement between lawyer and putative class representative under which they may be required to use part of their court-awarded fees in the class action case to compensate class representatives beyond the amount the court approves for that purpose creates a substantial risk that the lawyer is operating under a nonwaivable conflict of interest because it places the interests of the lawyer's client, the class representative, at odds with the interests of the absent class members to whom the lawyer owes fiduciary obligations). *Cf.* Md. Ethics Op. 2023-03 (2023) (an attorney may ethically act as their client's agent in seeking executed releases from potential future wrongful death beneficiaries; however attorneys should be cautious in pursuing such releases and should avoid acting in a representative capacity or providing legal advice to such potential beneficiaries while doing so.); *Williamson v. Edmonds*, 880 So.2d 310 (Miss. 2004) (joint client exception to attorney-client privilege allowed for disclosure of settlement information from attorney, who represented 31 clients jointly in litigation, to two former clients in action against attorney alleging breach of duty of care, breach of duty of loyalty, and breach of contract; clients were entitled to know the amount of the settlement, and the basis for the calculations, distributions, and accounting of the proceeds of the settlement); Ohio Ethics Op. 2010-6 (2010) (lawyer may not enter into a contingent fee agreement granting lawyer a power of attorney to take any action and execute all documents that the attorney deems necessary in the matter, including signing on the client's behalf a settlement agreement and release, or a settlement check; such a broad power of attorney improperly allocates all authority regarding the representation from the client to the lawyer and eliminates required communication by the lawyer to the client. Such practice is improper unless a lawyer can show that there are exigent reasons for a client to grant such authority to the lawyer.);

at the potential expense of their clients' interests may be particularly suspect.[372]

C. Settlements Limiting Attorney from Bringing Claims Against the Same Defendant.

ABA rules specifically prohibit settlements conditioned on agreeing to refrain from representing future claimants against the same defendant.[373]

Tex. Ethics Op. 698 (2023) (Lawyer-defendant who proposes or agrees to settle a legal malpractice case by assigning to a non-lawyer plaintiff a portion of contingent fees the lawyer may earn in unrelated matters is subject to disciplinary sanction for doing so if the lawyer knowingly "assists" or "induces" another lawyer to violate Rule 5.04(a). A lawyer has not "assisted" or "induced" another lawyer to violate Rule 5.04(a) if the second lawyer has not violated that Rule.).

[372] *See Keller v. Mobil Corp*., 55 F.3d 94 (2d Cir. 1995) (in reversing dismissal of case and sanction order against plaintiff's counsel, court expressed concern that plaintiff's counsel had a conflict of interest if she asked for withdrawal of district court's sanction order as a condition of plaintiff's settlement with defendant in employment discrimination case; case remanded to district court to consider ethical issue); Tenn. Ethics Op. 97-F-141 (1998) (requirement that a plaintiff's attorney become a party to a release might create a conflict of interest between the plaintiff's attorney and the plaintiff in violation of DR 5-101(A); therefore, such clauses are prohibited except in cases where the plaintiff's attorney releases a claim for attorneys' fees); *In re O'Meara' Case*, 54 A.3d 762 (N.H. 2012) (Attorney's conduct in allowing his interest in securing a $2 million fee to take precedence over his primary obligation to further clients' interests violated professional conduct rules; attorney threatened to sue clients for his contingency fee if they terminated his services, attorney revised original contingent fee agreement, without clients' knowledge or consent, to entitle him to $2 million fee, and attorney threatened to withdraw as counsel on morning of mediation to secure $2 million fee). *Cf.* Tex. Ethics Op. 675 (2018) (lawyer acting as mediator does not violate ethics rules by preparing and providing the parties a draft of a settlement agreement memorializing the terms of the parties' settlement reached during mediation, or by suggesting additional terms to include in the draft agreement).

[373] *See* ABA MODEL RULE 5.6; ABA MODEL CODE DR 2-108(B); ABA Formal Ethics Op. 95-394 (1995) (a lawyer may not offer, nor may opposing counsel accept, a settlement agreement which would obligate the latter to limit the representation of future claimants; rule applies to private and governmental parties); Accord: ABA Formal Ethics Op. 93-371 (1997); Alaska Ethics Op. 2000-2 (2000); Ariz. Ethics Op. 90-6 (1990); Cal. Ethics Op. 1988-104 (undated); Fla. Ethics Op. 04-2 (2005); Mich. Ethics Op. CI-1165 (1986); N.Y. Ethics Op. 1006 (2014); N.D. Ethics Op. 97-05 (1997); Tenn. Ethics Op. 97-F-141 (1998); Tex. Ethics Op. 505 (1994). *Cf. Florida Bar v. St. Louis*, 967 So.2d 108 (Fla. 2007) (lawyer entered into secret agreement with defendant corporation to settle multiple product liability cases involving the corporation's product by which the lawyer agreed not to bring future cases involving that product against the corporation and did not disclose the details of the arrangement with the court or disclose the arrangement to his clients; Court disbarred the lawyer and required disgorgement of the fees earned plus interest; lesser sanctions of reprimand, suspension and restitution were granted against the lawyer's partners, who were less involved in the details of the settlement.); Me. Ethics Op. 225 (2022) (A settlement agreement may not restrict a lawyer or firm from representing clients in lawsuits against the same party, using publicly available information to solicit new clients, or using publicly available information to promote an expertise on settling of a particular lawsuit.); *In re Gormally,* 57 A3d 1098 (N.J. 2012) (attorneys violated Rule 5.6(b) by agreeing to a limitation on future representations); Ohio Ethics Op. 2019-04 (2019) (A lawyer may not offer or agree to a direct or indirect restriction on the lawyer's right to practice as part of a proposed settlement agreement. A settlement provision that gives a lawyer significantly less discretion in the prosecution of future claims than a lawyer who is not subject to the agreement is an impermissible restriction on the lawyer's right to practice law. A lawyer may not offer or agree to a settlement agreement that requires a lawyer to affirm that that he or she does not represent any other individuals with similar claims against the defendant, prohibits the lawyer from the solicitation of clients with similar claims against the same defendant, or requires the lawyer keep confidential all information obtained during litigation.); Tenn. Ethics Op. 2016-F-161 (2016) (lawyer may not propose or agree to a settlement agreement that requires lawyer to turn over any work product materials as part of a settlement if that action will restrict his representation of other clients). *Cf.* N.Y.C. Ethics Op. 2025-4 (2025) (Lawyers always retain the discretion specifically given to them under the Rules, regardless of any contractual terms that could be read to deny a lawyer that discretion; lawyers should be aware of the risks of entering into agreements that they may not be ethically able to honor. Opinion recommends that lawyers, where appropriate, clarify in agreements that they should not be read to limit an attorney's ability to act in a manner otherwise consistent with the

D. Confidentiality and Non-disparagement Clauses.

Confidentiality clauses and general releases for parties in settlement agreements are often acceptable,[374] but they may not impose a limit an attorneys use in future matters for other clients.[375] Similarly, non-disparagement provisions can for parties are generally acceptable, but they may create conflict of interest issues,[376] and may improperly impose obligations on the lawyer

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Rules.); Tex. Ethics Op. 551 (2004) (lawyer formerly employed as a lawyer by a city can be required to comply with the city's ethics code that prohibits all former city employees from representing before the city for compensation any unrelated person for a period of two years after termination of employment with the city); W.Va. Ethics L.E.O. 2013-01 (2013) (settlement agreements requiring an attorney to agree to indemnify and hold harmless the opposing party from subrogation liens and/or third party claims violate the rules of professional conduct). *See* ABA Litigation Section, *Ethical Guidelines for Settlement Negotiations* (2002); Miss. Ethics Op. 266 (2022) (it is a violation of the Rules of Professional Conduct for an attorney to sign a release that in any way "approved" or "agreed to" terms that would obligate them unless they are a party to the matter. It is also a violation of the Rules for a lawyer to ask another lawyer to sign a release that would require them to "approve" or "agree to" any of the terms of the settlement.).

[374] *See* Conn. Ethics Op. 11-1 (2011) (a lawyer must communicate a settlement offer that includes a confidentiality provision regarding the terms of the settlement); D.C. Ethics Op. 289 (1999) (attorney cannot unilaterally require clients to waive right to agree to confidentiality provision in settlements); Fla. Ethics Op. 04-2 (2005) (confidentiality provisions and general releases of liability do not violate the rule against restriction on lawyer's future representations); L.A. Ethics Op. 512 (2014) (settlement agreement that is otherwise agreeable to the parties may contain a confidentiality clause that prohibits a lawyer from disclosing the fact and amount of the settlement to the lawyer's other current or future clients); N.C. 2003 Formal Ethics Op. 9 (2004) (lawyer may participate in a settlement agreement that contains a provision limiting or prohibiting disclosure of information obtained during the representation even though the provision will effectively limit the lawyer's ability to represent future claimants).

[375] *See.* ABA Formal Ethics Op. 00-417 (2000) (although a lawyer may participate in a settlement agreement that prohibits him from revealing information relating to the representation of his client, the lawyer may not participate or comply with a settlement agreement that would prevent him from using information gained during the representation in later representation against the opposing party, or a related party, subject to the limited restrictions on representations against former clients); Colo. Ethics Op. 92 (1992) (improper restrictions include conditioning settlement on agreement by claimant's counsel not to subpoena specified documents or persons in the court of representing non-settling claims, barring counsel from using certain expert witnesses in cases, imposing forum or venue restrictions in future cases brought by counsel, and prohibits his referral of potential clients to other control); Fla. Ethics Op. 04-02 (2004) (lawyer may agree as condition of settlement not to disclose information relating to the representation but may not agree that he will not use the information in the future); N.M. Ethics Op. 1985-5 (1985) (lawyer may turn over files to opposing counsel if client consents, but agreement to turn over entire work product is improper because it would inhibit her representation of future claims); N.C. 2023 Formal Ethics Op. 2 (confidentiality clause contained in settlement agreement that restricts a lawyer's ability to practice law violates Rule 5.6); S.C. Ethics Op. 16-02 (2016) (lawyer may accept confidentiality clause as part of a proposed settlement, provided they are otherwise permitted by the Rules of Procedure, as they do not restrict use of information gained in the course of representation but instead are limited to prohibition of disclosure of and publication of the settlement); *In re Mitcham*, 133 S.W.3d 274 (Tex. 2004) (confidentiality agreement between law firm representing asbestos plaintiffs in suits against defendant, under which plaintiffs' law firm and associate attorney, who previously worked for defendant's law firm as a legal assistant before she was hired by plaintiffs' law firm, agreed not to share information regarding facts surrounding defendant's use of asbestos, operated to disqualify plaintiffs' law firm from representing asbestos plaintiffs against defendant even after associate attorney left its employ; law firm could not give plaintiffs representation to which they were entitled without violating agreement).

[376] *See Johnson v. Hankook Tire Am. Corp.*, 449 F. App'x 329 (5th Cir. 2011) (sanctions affirmed against attorney who improperly retained confidential materials after settlement of a state court case, posted the information on his firm's website, and when a litigant in another action against the defendant subpoenaed the attorney for the materials, he informed the defendant of his intention to comply, and subsequently failed to obey court orders to return the document and made misrepresentations to the district court about the matter); Mo. Informal Ethics Op. 2020-07 (2020) (attorney must obtained client's informed consent to comply with protective order or settlement agreement requiring return or destruction of documents produced during discovery at conclusion of case); *Ex Parte Bland*, 667 S.E.2d 540 (S.C. 2008) (Attorneys' retention of confidential discovery materials from legal malpractice case materially breached

independent of those of the client.[377] If the information is not truly "confidential," such clauses may constitute an improper restriction on the lawyer's future representation.[378] Similarly, a lawyer

settlement agreement, which required all confidential discovery materials to either be returned to law firm or destroyed; when attorneys discovered they inadvertently possessed the materials, they attempted to use them in a separate case for leverage, and they made the discovery part of the record in the separate case. The trial court determination that the attorneys did not willfully violate protective order was an abuse of discretion; the attorneys both testified that after they discovered confidential discovery materials from legal malpractice case they both remembered that the materials were to be either destroyed or returned to law firm, and attorneys failed to destroy or return the materials and instead used them). *But* c*f. State ex rel. Verizon W. Va., Inc. v. Matish*, 740 S.E.2d 84 (W.Va. 2013) (Protective order or confidential settlement agreement may not preclude an attorney from representing a client in a later matter involving similar facts or parties based solely upon the attorney's obligations to maintain the confidentiality of information subject to such protective order or confidential settlement agreement.).

[377] *See* Ohio Ethics Op. 2019-04 (2019) (A lawyer may offer or agree to a narrowly drafted settlement provision to not publicly disparage the defendant if it permits the filing of additional civil complaints against the defendant, the advertising of the lawyer's previous experience with the defendant, and the consultation with prospective clients about the lawyer's experience with the defendant.); Tenn. Ethics Op. 2025-F-171 (2025) (It is improper for an attorney to propose or accept a provision in a settlement agreement that requires the attorney to become a party bound by a non-disparagement clause that prohibits the lawyer from future use of information learned during the case, which may shed a negative light on the defendants.); Tex. Ethics Op. 708 (2025) (Lawyer may not participate in offering or making a client settlement agreement whose terms would impose greater restrictions on the lawyer's right to practice law than those imposed by the law and Rules. For this reason, a lawyer may not participate in offering or making a client settlement agreement that commits a settling party's lawyer not to disparage the opposing party within the context of the lawyer's practice.); Utah Ethics Op. 25-01 (2025) (attorney may not offer or accept a non-disparagement clause in a settlement agreement that prevents the lawyer from making any negative communication about opposing party or attorney).

[378] *See, e.g.*, D.C. Ethics Op. 335 (2006) (a settlement may not compel counsel to keep confidential and not further disclose in promotional materials or on law firm websites public information about the case such as the name of the opponent, the allegations set forth in the complaint file, or the fact that the case has settled; however, settlement agreement may provide that the terms of the settlement and other non-public information may be kept confidential); Ind. Ethics Op. 1 of 2014 (2014) (To the extent a nondisparagement clause would be interpreted to apply to statements made in the course of the attorney's advocacy on behalf of a future client, or statements to clients or prospective clients to permit them to gauge the attorney's relevant experience, such a provision would violate Rule 5.6(b). The nondisparagement clause would also violate Rule 5.6(b) if it would prevent the attorney from voluntarily giving evidence to a party to litigation or a person seeking to investigate or assert a claim or defense, in the absence of a protective order or other valid confidentiality order that covers the evidence. A nondisparagement clause limited to an attorney's public statements made not in the context of legal advocacy for a client (e.g., advertising) does not violate the rule.); Md. Ethics Op. 2021-03 (2021) (it is not ethically proper for an attorney to sign a client's settlement agreement if the document broadly obligates the attorney to maintain confidentiality and non-disparagement such that it could act to restrict the attorney's right to practice. It would be permissible for the attorney to sign a client's settlement agreement containing a narrow requirement that the attorney maintain confidentiality over such things as the existence and terms of the settlement agreement, provided such information is not publicly available; likewise, it would be permissible for the attorney to sign a client's settlement agreement requiring non-disparagement unless the agreement directly or indirectly limits the lawyer's ability to represent vigorously new clients against the settling party); Me. Ethics Op. 225 (2022) (Settlement agreement may require that the terms of the settlement and other non-public information be kept confidential, but it may not require that "publicly available" information be confidential. A settlement agreement may not restrict a lawyer or firm from representing clients in lawsuits against the same party, using publicly available information to solicit new clients, or using publicly available information to promote an expertise on settling of a particular lawsuit.); Md. Ethics Op. 2016-07 (2016) (as part of settling a lawsuit, a defendant's lawyer may not propose and a plaintiff's lawyer may not agree to never discuss or disclose the underlying facts of a lawsuit which was already a matter of public record); N.H. Ethics Op. 2009-10/6 (2011) (settlement prohibiting attorney from disclosing publicly available information about client's case unethical if the secrecy promise would interfere with the lawyer's practice or future representations); N.Y. Ethics Op. 730 (2000) (settlement that prohibits lawyer from disclosing information that is not a confidence or secret is an improper restriction on the right to practice); N. D. Ethics Op. 97-105 (1997) (same); Ohio Ethics Op. 2023-13 (2023) (Settlement agreement prohibiting a lawyer's

cannot agree to indemnify/guarantee a client's settlement obligations,[379] nor may a lawyer

disclosure of a publicly accessible government record or information is an impermissible restriction on the lawyer's right to practice, and lawyer may not participate in the offer or acceptance of such a settlement agreement. However, due to the complexity of exemptions contained in state or federal law, not all requests to prohibit disclosure will be a violation of Rule 5.6(b). A lawyer is not required to abide by a client's decision to settle a matter if the settlement is conditioned on a restriction to practice and must withdraw from the representation.); Pa. Ethics Op. 2016-300 (2016) (confidentiality agreements and non-disparagement agreements are not per se ethically prohibited, although in some instances their use may be restricted or prohibited by substantive law. A lawyer may advertise that he/she has handled a certain type of matter, and a non-disparagement clause or confidentiality clause cannot preclude advertisement of areas of practice. Non-disparagement clauses and/or confidentiality clauses limited to an attorney's public statements regarding the specifics of a case, not made in the context of legal advocacy for another client, are permitted. However, provisions which either explicitly interfere with or are intended to interfere with the handling of future clients' cases are prohibited and it is improper to ask for and for a lawyer to agree to such provisions); S.C. Ethics Op. 10-4 (2010) (Lawyer's agreement to confidential settlement on behalf of his client that required that lawyer not identify or use the defendant's name for "commercial or commercially-related publicity purposes" and only identify generally that a "settlement was achieved against an industry" would not be ethical under current rules; lawyer advertising is a First Amendment right and the rules prohibit settlements that contain restrictions on the right to practice law); Tenn. Ethics Op. 2019-F-167 (2018) (It is improper for an attorney to propose or accept a provision in a settlement agreement, in a products liability case, that requires destruction of the subject vehicle alleged to be defective if that action will restrict the attorney's representation of other clients); Tenn. Ethics Op. 2018-F-166 (2018) (attorney may not propose or accept a settlement agreement provision prohibiting lawyer from future use of information learned during the representation or disclosure of information that is publicly available or that would be available through discovery in other cases as part of the settlement, if that action will restrict the attorney's representation of other clients); Tex. Ethics Op. 708 (2025) (A Texas lawyer may participate in offering or making a client settlement agreement that commits a settling party's lawyer not to reveal confidential information related to the matter for marketing purposes, provided the restriction applies only to confidential information that, under the Rules, a lawyer may not reveal without client consent.). *Cf.* Conn. Ethics Op. 19-02 (2019) (confidentiality agreement restricting parties' lawyers from disclosing information that is publicly available in court does not violate Rule 5.6(2)); N.C. 2019 Formal Ethics Op. 7 (2020) (lawyer may agree to an "attorney eyes only" restriction in protective order); Ethics Tenn. Ethics Op. 2019 F-167 (2019) (It is improper for an attorney to propose or accept a provision in a settlement agreement, in a products liability case, that requires destruction of the subject vehicle alleged to be defective if that action will restrict the attorney's representation of other clients.); S.F. Ethics Op. 2012-1 (2012) (counsel for employer accused of sexual orientation harassment may not demand a settlement provision that bars the plaintiffs' attorneys from boasting on their website or other advertisement that they have worked on that type of case against the employer or that they are experienced in that practice area). Note that settlement agreements with public entities, even with a confidentiality clause, may be subject to disclosure under public records acts. *See, e.g.*, *Rushton v. Dep't of Corr.*, 160 N.E.3d 929 (Ill. 2019) (settlement agreement was directly related to governmental function that medical provider performed for DOC and, thus, was public record under FOIA); *Libertarians for Transparent Government v. Cumberland City*, 269 A.3d 427 (N.J. 2022) (County's settlement agreement with former employee which contained date of separation and reasons therefor was government record subject to disclosure); *Tribune-Review Pub. Co. v. Westmoreland City Hous. Auth.*, 833 A.2d 112 (Pa. 2003) (confidential settlement agreement in possession of public entity's liability insurer was public record); Tex. Att'y Gen. Op. 658 (1998) (Open Records Act prohibits agency from entering into a settlement agreement containing a confidentiality clause).

[379] Alaska Ethics Op. 2014-4 (2014). *See* Ga. FAO 13-2 (2013) (lawyer may not agree, as a condition of settlement, to indemnify the opposing party from claims by third persons to the settlement funds); Ohio Ethics Op. 2011-01 (2011) (a plaintiff's lawyer may not personally agree, as a condition of settlement, to indemnify the opposing party from any and all claims by third persons to the settlement funds.); Texas Ethics Op. 694 (2022) (plaintiff's lawyer should not enter into an agreement that requires the lawyer to personally indemnify or hold harmless the defendant, the defendant's lawyer, or the defendant's insurer from any contractual or statutory reimbursement claims arising from the medical treatment made the basis of the suit. Likewise, a defendant's lawyer may not knowingly induce a plaintiff's lawyer to enter into such an agreement). *Accord*: Ariz. Ethics Op. 03-05 (2003); Me. Ethics Op. 204 (2011); Mo. Formal Ethics Op. 125 (2008); N.Y.C. Ethics Op. 2010-3 (2010); S.C. Ethics Op. 08-07 (2008); Ind. Ethics Op. 1 of 2005 (2005); N.Y. Ethics Op. 852 (2011); N.C. Ethics Op. RPC 228 (1996); N.M. Ethics Op. 2017-01 (2017); R.I. Ethics Op. 2022-01 (2022); Tenn. Ethics Op. Op. 2010-F-154 (2010); Va. Ethics Op. 1858 (2011); W. Va. Ethics Op.

participate in an agreement containing such provisions.[380]

E. Agreements Not to Report to Law Enforcement Authorities or State Bars.

A party may agree in settlement to refrain from bringing criminal charges based on the same claim if the agreement is not otherwise illegal and does not constitute or contemplate the fabrication, concealment or destruction of evidence, and the party does not agree to refrain from testifying in parallel proceedings.[381] However, the rules may prohibit a settlement agreement that commits a party or lawyer not to report a lawyer's conduct to state bar authorities.[382]

L.E.O. 2013-01 (2013); Wis. Ethics Op. E-87-11 (1987).

[380] *See* Va. Ethics Op. 1858 (2011); Ariz. Ethics Op. 03-05 (2003); Mo. Formal Ethics Op. 125 (2008); N.Y.C. Ethics Op. 2010-3 (2010); Wis. Ethics Op. E-87-11 (1987).

[381] ABA Formal Ethics Op. 363 (1992); Ill. Ethics Op. 20-03 (2020) (Lawyer's demand letter in an attempt to settle a civil claim may accurately set forth the relevant statute including the possibility of civil and criminal liability. However, a demand letter should not threaten criminal prosecution to gain an advantage in a civil matter and a lawyer should not state that criminal prosecution can be avoided by settling the claim). Accord: Ill. Ethics Op. 12-01 (2012); N.Y.C. Ethics Op. 1995-13; *Comm. on Legal Ethics v. Printz*, 416 S.E.2d 720 (W. Va. 1992); N.C. 2008 Formal Ethics Op. 15 (2009); N.C. 1998 Formal Ethics Op. 19 (1999). *Cf.* Mo. Informal Ethics Op. 2019-02 (2019) (where attorney has reason to believe evidence of plaintiff's criminal conduct during employment has been destroyed, an offer to forego reporting opposing counsel to the office of disciplinary counsel would violate the Rules if the attorney has a duty to report the conduct, or if the attorney lacked a well-founded basis for believing opposing counsel violated the Rules, or if threat is made to extract settlement concessions); Mo. Informal Ethics Op. 2019-02 (2019) (attorney's threat to refer the employment-related conduct of plaintiff for criminal prosecution violates Rule 4-8.4(d) unless attorney has actual intent to refer the matter for prosecution if the matter is not dismissed or settled; the conduct underlying the alleged criminal offense is related to the civil action and the use of the threat does not constitute a crime; attorney has a non-frivolous, good faith belief based in law and fact that the employment-related conduct of plaintiff was unlawful; and attorney's use of the threat would not lack a substantial purpose other than to embarrass, delay, or burden the Plaintiff or another person.); N.Y. Ethics Op. 1275 (2024) (lawyer admitted to practice in New York who principally practices before federal immigration courts in another state must comply with any reporting obligations in that state's Rules of Professional Conduct); N.Y.C. Ethics Op. 2017-3 (lawyer not prohibited from threatening non-criminal proceedings against an adverse party to obtain an advantage in a civil matter. However, such threats may violate criminal laws against extortion and, if so, they will likely violate Rules 8.4(b) and 3.4(a) (6). If such threats do not violate criminal law, they may violate Rule 8.4(d), which prohibits conduct prejudicial to the administration of justice; a violation of Rule 8.4(d) generally depends on whether the threat concerns matters extraneous to the dispute. Also, a threat made without a sufficient basis in fact and law or which included a false statement of fact or law would violate, *inter alia*, Rules 3.1 and 4.1). *Compare* Wis. Ethics Op. EF-21-01 (2021) (there is no prohibition in the Rules against threatening criminal prosecution to gain an advantage in a civil matter, but in doing so, the criminal matter must be related to the civil claim, the lawyer has a good faith belief that both the civil claim and the criminal charges are supported by the law and the facts, and the lawyer does not attempt to exert or suggest improper influence over the criminal process. Similarly, the Rules do not prohibit a settlement that includes an agreement to refrain from reporting the purported criminal conduct to the relevant authorities); *Chance v. Cook*, 50 F.4th 48 (11th Cir. 2022) (where attorneys defending employer in a sexual harassment suit by former employee were acting within the scope of their representation when they reported employee's workplace recordings to the state attorney for potential violation of Florida law, they could not be held liable under section 1985(2) for conspiring to intimate employee from testifying in her harassment case against the company); N.Y. Ethics Op. 1276 (2024) (a lawyer who knows that an unknown or unidentified person is creating fake social media accounts in order to scam the public has no duty under the Rules of Professional Conduct to take any action to combat the fake accounts). *But see* Mo. Informal Ethics Op. 2025-06 (2025) (It is prejudicial to the administration of justice to condition settlement of a civil matter upon the condition that criminal charges be dismissed against one of the parties).

[382] *See, e.g.*, Conn. Ethics Op. 15-01 (2015) (lawyer may not condition settlement in civil matter on agreement not to report professional misconduct); N.C. 2025 Formal Ethics Op. 2 (2025) (Opinion affirms prohibition on lawyers participating in a settlement agreement that includes a limitation on a party's or counsel's ability to report misconduct

F. Settlement-Related Misconduct.

Courts have sanctioned attorneys for settlement-related misconduct such as: (i) lack of candor to the mediator or other neutral;[383] (ii) bad faith participation in settlement conferences and negotiations;[384] (iii) bad faith delay in finalizing settlements;[385] (iii) impeding/delaying carrying out settlement terms;[386] (iv) bad faith proceedings to coerce a settlement;[387] and (v) other improper

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to the state bar and rules a lawyer serving as a mediator may not assist with or participate in a mediated settlement agreement that includes such a term.).

[383] *In re Member of State Bar (Fee)*, 898 P.2d 975 (Ariz. 1995) (failure to disclose to settlement judge separate agreement requiring client to pay attorney's fees in addition to those specified in agreement violates prohibition against false statement of material fact or law to tribunal and against dishonesty, fraud, deceit, or misrepresentation). *Cf. Brundage v. Estate of Carambio*, 951 A.2d 947 (N.J. 2008) (attorney's failure to disclose to appellate court that he represented another plaintiff in a palimony case that had been dismissed based on the absence of cohabitation and which was on appeal, although troublingly sharp, did not violate any ethical proscriptions and, therefore, setting aside settlement inappropriately punished plaintiff for conduct of her attorney); N.Y.C. Ethics Op. 2019-1 (2019) (in an ex parte proceeding, lawyer has duty to disclose to tribunal material facts, including adverse facts that will enable the tribunal to make an informed decision; it applies to proceedings in which, for practical or legal reasons, only one side has an opportunity to present its case as opposed to a situation where the opponent is absent by choice).

[384] *See Arneault v. O'Toole*, 718 F. App'x 148 (3d Cir. 2017) (plaintiffs' bad faith participation in settlement conference warranted inherent powers sanctions, based on finding that they attended the conference but refused to participate in negotiations, failed to communicate adequately and timely that their position was fixed prior to the conference); *U.S. Bank Nat'l Ass'n v. Manning*, 228 A.3d 726 (Me. 2020) (Trial court acted within its discretion in imposing sanctions on bank based on its conduct relating to judicial settlement conference; trial court found, and bank acknowledged, that bank failed to ensure that a person with "full authority" to settle attended the settlement conference.); *Davis v. Iowa Dist. Ct.*, 943 N.W.2d 58 (Iowa 2020) (District court's trial setting order directing "[a]ll parties with authority to settle" to attend pretrial settlement conference, was not too vague to alert plaintiff that he, as opposed to his attorney, needed to be personally present at conference, and thus his failure to appear at conference could support imposition of sanctions; there was no objectively reasonable meaning of phrase other than as a command addressed to the individual parties, and to extent there was any vagueness in order, it was incumbent on physician's attorney to seek clarification.). *Cf.* Cal. Ethics Op. 2019-198 (2019) (An attorney who has concluded that a client's claim lacks merit and cannot be pursued without violating ethics rules must withdraw from the representation. Before withdrawing attorney may take reasonable steps to avoid reasonably foreseeable prejudice to the client's rights, including settling the claim if attorney can do so consistent with the duty of truthfulness); Ariz. Ethics Op. EO-20-0001 (2020) (A client remains so until the lawyer's withdrawal is complete regardless of the reasons for and timing of the cessation of the lawyer-client relationship. Withdrawing lawyer must protect the client's interests despite any dispute between the lawyer and client and despite any wrongdoing of the client.).

[385] *See Knopf v. Elite Moving Sys.*, 677 F. App'x 252 (6th Cir 2017) (district court did not abuse its discretion in sanctioning lawyer under section 1927 for delaying settlement by repeatedly failing to answer emails and perform case follow-up, requiring defendant to incur fees in moving to compel settlement); *Farmer v. Banco Popular of N. Am.*, 791 F.3d 1246 (10th Cir. 2015) (affirming inherent authority sanctions against attorney for his extended delay in executing agreed-upon settlement agreement with bank, even though settlement agreement purportedly waived bank's right to seek or receive an award of fees; the court had indefeasible power to impose sanctions on a party for bad-faith misconduct such as that engaged in by attorney, and agreement could not bar this procedural fee-shifting.).

[386] *Airtran Airways v. Elem*, 767 F.3d 1192 (11th Cir. 2014) (Affirming award of attorney fees to ERISA plan sponsor after it prevailed in action to recover medical costs it spent on beneficiary's behalf after she and her attorney conspired to hide and disburse settlement funds she received after car accident, where attorney intentionally attempted to deceive plan administrator when he sent letter stating that $25,000 represented entire settlement amount, even though tortfeasor's insurer paid $475,000, and fee award would help deter others from cheating their benefit plan.).

[387] *Nath v. Texas Children's Hosp.*, 446 S.W.3d 355 (Tex. 2014) (trial court did not abuse its discretion in sanctioning physician for filing frivolous pleadings in action against hospital and medical school, where physician was attempting to use discovery to force damaging, irrelevant information regarding health of chief of medical school's plastic surgery division into the public domain to compel a more favorable settlement.); *Vines v. Welspun Pipes, Inc*., 2023 WL

conduct.[388] When a lawyer receives advance settlement authority, the lawyer has a continuing duty to communicate with the client concerning material developments and to keep the client reasonably informed about the status of the matter, including settlement offers. The lawyer should exercise caution in agreeing to a settlement within a previously authorized range if the assumptions underlying the client's delegation are no longer current.[389]

G. Duty of Candor and "Puffing" in Settlement Negotiations.

A lawyer may not make a false statement of material fact or omission of material information during negotiations,[390] but he/she may make subjective statements about the party's willingness to settle or its negotiation goals that can fairly be described as negotiation "puffing."[391] However, a lawyer may not reveal the limits of the lawyer's settlement authority without client consent.[392]

4685888 (E.D. Ark. July 21, 2023) (court sanctioned firm under Rule 11, barring it from practice in the district for two years, citing an 11-year pattern of inflated billing and excessive hourly rates; firm requested $96,000 in fees for an FLSA settlement, but awarded $500, and then repeatedly demanded unearned fees, needlessly drawing out the litigation, with meritless arguments, and continuing to request excessive fees is objectively unreasonable conduct.).

[388] *See* S.C. Ethics Op. 20-02 (2020) (Attorney may not contribute a portion of the attorney's fee directly to a settlement, but the attorney may inform the insurance company of his desire to reduce his fee in order to allow the insurance company to have more money to put toward the settlement, thus allowing for an outcome that benefits the client, and also is cost-effective for the attorney and the insurance company. Attorney must disclose his actions to both insurance company and to client, in order to satisfy Rules 1.4 and 5.4(c).).

[389] *See* N.Y.C. Ethics Op. 2022-2 (2022); Or. Ethics Op. 2019-195 (2019) (client cannot give a blanket delegation of all settlement authority to lawyer; however, with informed consent, client may give advance authority to agree to a settlement within pre-agreed parameters as long as that client places some outer limit on the lawyer's discretion and the client has sufficient information at the time to make an informed decision about providing such authorization).

[390] *Sheppard v. River Valley Fitness One, L.P.*, 428 F.3d 1 (1st Cir. 2005) (defense counsel's letter to plaintiff's counsel, in sexual harassment action, stating that separate plaintiff in related action had settled in favor of employer, which was defendant in both cases, and that related case had resulted in $50,000 judgment, but omitting fact that employer had agreed to accept $100 from other plaintiff in satisfaction of judgment, was a misrepresentation supporting monetary sanction against defense counsel for discovery misconduct); *Hubbard v. Plaza Bonita, LP*, 630 F. App'x 681 (9th Cir. 2015) (inherent power sanction affirmed where attorney for plaintiff in an ADA access claim failed to inform defendant his client had died before signing a settlement agreement promising prospective relief and by sending an agreement after his mother's death that purported to contain her signature when it was not in fact her signature, creating the impression that she was still alive); *Chavez v. New Mexico*, 397 F.3d 826 (10th Cir. 2005) *(*employer defendants were entitled to rescission of settlement agreement in Title VII case where employees' counsel withheld from employers' attorney the existence of a second, undisclosed suit, similar to the one the parties were attempting to settle; existence of a second, undisclosed suit was a material fact and, therefore, court properly refused to enforce the settlement agreement); *Fire Ins. Exch. v. Bell*, 643 N.E.2d 310 (Ind. 1994) (plaintiff could sue for fraud where defendant insurer's counsel misrepresented the limits of the applicable insurance policy). *Compare* ABA Formal Ethics Op. 94-387 (1994) (attorney has no duty to inform opposing party that the statute of limitations has run; to the contrary, it would be unethical to reveal such information without client's consent); ABA Formal Ethics Op. 95-397 (1995) (attorney cannot conceal his client's death during settlement negotiation); Va. Ethics Op. 1900 (2024) (The lawyer must disclose the client's death to opposing counsel or the opposing party if pro se before any further substantive communication. If the matter is before a court, the lawyer must disclose the client's death to the court no later than the next communication with, or appearance before, the court.). *Cf. Wong v. Luu,* 34 N.E.3d 35 (Mass. 2015) (attorney's conduct during settlement negotiations that results in the failure of those negotiations is not subject to sanctions under the judge's inherent powers where the judge is not participating in those negotiations).

[391] ABA Formal Ethics Op. 06-439 (2006); Cal. Ethics Op. 2015-194 (2015) (same).

[392] ABA Formal Ethics Op. 93-370 (1993) (information relating to the limits of the client's settlement authority and the terms a lawyer would recommend to his client is confidential, client information that cannot be disclosed absent client consent; a lawyer may not misrepresent facts in response to a judge's inquiry relating to his settlement authority even where it is inappropriate for a judge to make such an inquiry, and in such cases the appropriate response would

be to decline to answer).

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