Ethical and Professionalism Issues in Labor and Employment Law Cases

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SELECTED ETHICS AND PROFESSIONALISM ISSUES IN LABOR AND EMPLOYMENT LAW CASES

I. CONFLICTS OF INTEREST

The most common ethics issue that arises in modern labor and employment law practice is the problem of conflicts of interests. 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. Representing Opposing Sides in the Same Litigation

Representing opposing sides in the same litigation is per se impermissible.³ Moreover, in some jurisdictions, the conflict may not be waived even with client consent.⁴ The problem is likely to arise in a case in which the attorney represents multiple parties and at some point in the litigation facts develop indicating that one of the parties has a cause of action against another.

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² See ABA Model Rules of Professional Conduct, Rule 1.7 (2003) [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); ABA Model Code of Professional Responsibility, DR 5-105 [hereafter ABA Model Code] (absent informed consent a lawyer shall decline proffered employment or continue multiple employment if the exercise of her independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment or continuance of multiple employment, or if it would be likely to involve him in representing different interests). See also Karen Donovan, When Big Law Firms Trip Over Their Own Clients, N.Y. Times, Oct. 3, 2004, at BU-5 (noting the difficulties large, multi-state and multinational law firms face with multiple, shifting and possibly conflicting client relationships).

³ See Tex. Rule 1.06.

⁴ Id.
party. In such a situation, the attorney may have to withdraw from representing both clients.\(^5\) Note that the conflict issue does not depend on the relative quantity or quality of the lawyer’s representation of the opposing clients.\(^6\)

### B. Adverse Representation Against a Current Client

The adverse representation of a current client, \textit{i.e.}, representing and opposing the same client on separate matters, is per se improper, although potentially waivable.\(^7\) It is immaterial that the two representations involve completely distinct and unrelated claims.\(^8\) When a lawyer is

\(^5\) 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 after her husband was fatally injured in an explosion, 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 represent the corporate client on other matters, and later improperly terminated the corporate client; the court rejected the contention of the attorney and the firm that they dropped the corporate client because of the plaintiff’s extreme dependency on the attorney and the firm: “A firm may not drop a client like a hot potato, especially if it is in order to keep happy a far more lucrative client.”).

\(^6\) ABA MODEL RULES, Rule 1.7 cmt.6.

\(^7\) Id. See also Cinema 5 Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1386-87 (2d Cir. 1976); Harvey E. Morse, P.A. v. Clark, 890 So.2d 496 (Fla. Ct. App. 2004) (law firm that represented trustee of decedent's living trust in probate proceedings had a conflict of interest with assignee of intestate heirs, who was a current client of law firm in unrelated matters, and thus disqualification of law firm from representing trustee was warranted; assignee did not consent to law firm's representation of trustee, and law firm had duty in representing trustee to uphold the validity of the trust and to augment its assets, which was directly adverse to assignee's interest in seeking assets of the estate); Franklin v. Callum, 782 A.2d 884 (N.H. 2001) (partner of a former attorney for a multi-state solid waste management project was disqualified from representing a member of waste management district’s governing board in suit to examine legal bills under state’s right-to-know law; attorney had drafted cooperative agreement for district, and the partner’s representation of the member could require her to interpret the work); Sperr v. Gordon L. Seaman, Inc., 284 A.D.2d 449 (N.Y. App. Div. 2001) (disqualification of law firm was appropriate where firm represented a client in one personal injury case while simultaneously opposing relief sought by that same client in a separate personal injury case involving the same premises); Discotrade Ltd. v. Wyeth-Ayerst Int’l, Inc., 200 F. Supp. 2d 355, 360 (S.D.N.Y. 2002) (continued...)}
opposing a client on one matter while representing it in another, it not only appears improper, but poses the risk of impropriety. The prohibition encompasses all types of representation, not just litigation.

C. Simultaneous Representation of Potentially Adverse Clients

...(continued)

(law firm disqualified from representing plaintiff in fraud and breach of contract action because it simultaneously represented a close corporate affiliate of defendant; the “substantial relationship” test “has been expressly rejected with respect to conflicts among current clients, and we decline to entertain it here.”).

9 N.J. Ethics Op. No. 679 (July 10, 1995) (no per se ban on representing in personal injury matter an attorney-adversary in an unrelated contract case, where the attorney reasonably believes representation will not be adversely affected, both clients consent after full disclosure and consultation, and neither client is a public entity; however, it is necessary to consider whether, under all the circumstances, there is an appearance of impropriety in the perceptions of “ordinary knowledgeable citizens” arising from the representation).

10 See Glueck v. Jonathan Logan, Inc., 653 F.2d 746, 750 (2d Cir. 1981) (firm that was involved in the negotiation of a multi-employer collective bargaining agreement could not represent individual employee of corporate member of multi-employer group in breach of employment contract suit).
There is no per se prohibition against representing multiple parties in litigation. Rather, a determination of the propriety of such representation requires a case-by-case analysis. After full disclosure of the inherent risks of simultaneous representation, clients may consent to such representation. If, however, an actual conflict materializes, the attorney may be precluded from representing either side. Otherwise, the attorney would elect one client to the detriment of the

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11 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 of interests 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); Shaffer v. Farm Fresh, Inc., 966 F.2d 142, 146 (4th Cir. 1992) (law firm for a union that is attempting to become bargaining representative for employees may also represent employees in suit against employer); In re Oracle Corp. Securities Litigation, 2005 U.S. Dist. LEXIS 35723 (N.D. Cal. April 25, 2005) (Counsel may maintain representation of Oracle shareholders in a Delaware derivative action and plaintiffs in a securities fraud action against Oracle involving the same factual predicate, since playing this dual role is only a “surface duality” that represents a potential for conflict, and is not a conflict per se requiring disqualification); Ill. Ethics Op. No. 01-07 (2002) (two lawyers in same firm may continue to represent two governmental units at the same time where the agencies’ interests are potentially in conflict but there is no current direct adversity between the parties; depending on the foreseeability of future conflicts, the lawyers may have a duty to inform their clients of the limitations that would be placed on their representation of each unit should an actual conflict develop); Bottoms v. Stapleton, 706 N.W.2d 411 (Iowa 2005) (in action by minority owner against the majority owner and the company, the trial court erred in granting motion to disqualify counsel for the majority owner and the company, since the potential for conflict of interest between the company and its majority owner was insufficient to preclude joint representation of the two; only an actual conflict of interest would justify disqualification); Quality Developers, Inc. v. Thorman, 31 P.3d 296 (Kan. Ct. App. 2001) (law firm could represent both president of company and individual shareholder in corporate shareholder’s derivative action against president and estate of vice president; president’s and individual shareholder’s ownership positions, under theory that president was beneficial owner of shares but individual shareholder was nominal owner, were not directly adverse, alleged discrepancies between testimony of president and individual shareholder regarding this theory were not substantial, and there was no showing that law firm was a necessary witness to an issue that was adverse to his clients).


other.\textsuperscript{14}

In the context of labor and employment law, the appropriateness of multiple representation frequently arises 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 certain situations, the corporate employer, to avoid responsibility, must show that the employee in question was acting outside the scope of his official responsibilities. The employee, on the other hand, has an interest in establishing that he acted within the scope of his duties, especially where such a finding would entitle him to indemnity from the corporate employer. If, however, the corporation acknowledges that the employee was acting within the scope of his duties, no conflict exists and multiple representation is not inappropriate.\textsuperscript{15}

Conflict of interest issues may also arise where a government official is being sued in her official and individual capacities. The same concerns regarding simultaneous representation exists because in most cases the official’s “employer” (the governmental entity) controls the litigation regarding the “official” capacity and the official has a separate (and potentially conflicting) interest regarding her “personal” exposure in the litigation.\textsuperscript{16}

\textsuperscript{13}(...continued)

\textit{Ex parte AmSouth Bank, N.A.}, 589 So. 2d 715, 722 (Ala. 1991) (allowing law firm to retain one of two adverse clients because the firm did not cause the conflict, the work it did was not substantially related, and it dropped the client least likely to be adversely impacted).

\textsuperscript{14} \textit{See In re Conduct of Vaile}, 707 P.2d 52, 55 (Or. 1985); \textit{Marguiles v. Upchurch}, 696 P.2d 1195, 1204 (Utah 1985) (optional withdrawal from the client of attorney’s choice would not cure the conflict of interest).

\textsuperscript{15} \textit{See Glueck v. Jonathan Logan, Inc.}, 653 F.2d 746 (2d Cir. 1981) (disqualification of law firm representing employee in breach of employment contract case not warranted by firm’s representation of trade association of which a division of defendant corporation was a member, to negotiate multi-employer collective bargaining agreement with union); \textit{Galligan v. City of Schenectady}, 497 N.Y.S.2d 186, 188 (App. Div. 1986) (government employer that conceded defendant employees’ acts were in furtherance of official policy had no conflict with defendant employees). \textit{Cf. In re Shannon}, 876 P.2d 548 (Ariz. 1994) (attorney violates rule governing conflict of interest when he represents two defendants with conflicting interests in civil litigation and indicates to one that it is to “our” obvious advantage to keep the other as friendly as possible).

\textsuperscript{16} \textit{See Johnson v. Board of County Comm’rs for County of Fremont}, 85 F.3d 489 (10th (continued...)}
The situation may also arise in the context of joint representation of multiple plaintiffs. For example, if two employees are discharged for the same offense, it is possible that one plaintiff could claim that the other alone committed the offense for which they were discharged and that he was therefore discharged without cause. That is, to advance the claim of one plaintiff means that the lawyer would have to undermine or diminish the claim of the other.\textsuperscript{17}

Indemnification claims may also create a disqualifying conflict of interest between joint employer-employee defendants.\textsuperscript{18}

\textsuperscript{16}(...continued) Cir. 1996) (attorney violated Colorado ethics rules by representing sheriff in official capacity only without informed consent of sheriff as an individual); Wasserman v. Black, 910 S.W.2d 564 (Tex. Ct. App. 1995) (attorney disqualified from continued representation of city officials sued by former city employees, after one defendant brought cross-claim against city and mayor seeking declaration of rights to indemnification for legal expenses by city, and alleging wrongful discharge, intentional infliction of emotional distress, and defamation). \textit{Compare Rodick v. City of Schenectady}, 1 F.3d 1341, 1350 (2d Cir. 1993) (not improper for single lawyer to represent police officers and city in malicious prosecution action, even though city’s only liability arose under doctrine of respondeat superior; although city might have defended by claiming that officers were not acting within the scope of their official duties, in this case both city and officers argued that officers were acting in their official capacities, and lawyer advanced all possible defenses available to officers).

\textsuperscript{17} \textit{See} Cal. Formal Ethics Op. No. 1999-153 (1999) (attorney may represent both the corporation and a shareholder of the corporation against another shareholder of the corporation “so long as the corporation and [the represented shareholder] do not have opposing interests . . . which the attorney would have a duty to advance simultaneously for each”); D.C. Ethics Op. No. 248 (1997) (prospective waiver involving attorney representation of joint plaintiffs denied same position in discrimination case); D.C. Ethics Op. No. 301 (2000) (lawyer representing plaintiffs in a class action lawsuit is not precluded from representing a member of the class who wishes to bring a tort action involving related subject matter against the same defendant); N.C. Ethics Op. No. 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). \textit{Cf. N.C. State Bar v. Whitted}, 347 S.E.2d 60 (N.C. Ct. App. 1986) (improper to undertake representation of two wrongful death claimants in obtaining settlement from limited fund; any apportionment would benefit one client to the other’s detriment).

\textsuperscript{18} \textit{See} Wasserman v. Black, 910 S.W.2d 564 (Tex. Ct. App. 1995) (attorney prevented (continued...)}
The District of Columbia Bar Legal Ethics Committee in Ethics Opinion No. 140 (1984), adopted the following test for determining the propriety of joint representation of potentially adverse interests; the test is based on ABA Standing Committee on Ethics and Professional Responsibility, Informal Ethics Opinion 1441 (1979). It consists of the following:

1. The co-parties agree to a single comprehensive statement of facts describing the occurrence.

2. The attorney reviews the statement of facts from the perspective of each of the parties and determines that it does not support a claim by one against the other.

3. 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.

4. The attorney advises each party as to the possible theories of recovery or defense which may be foregoing through this joint representation based on the disclosed facts.

5. Each party agrees to forego any claim or defense against the other based on the facts known by each at the time.

6. 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.

\(^{18}\) (continued)

from continued representation of city officials sued by former city employees, after one defendant brought cross claim against city and mayor seeking declaration of rights to indemnification for legal expenses by city, and alleging wrongful discharge, where complaint by co-defendant not waived. Cf. City of Huntington Beach v. Petersen Law Firm, 95 Cal. App. 4th 562 (2002) (professional conduct rule requiring that attorney representing multiple parties with potentially conflicting interests obtain written consent to joint representation did not require city to provide separate counsel for police officers who were co-defendants in civil rights action against city, where officers could have waived potential conflict and agreed to joint representation, or declined joint representation and obtained their own counsel). Compare Madison County v. Hopkins, 857 So. 2d 43 (Miss. 2003) (no conflict of interest resulted when lawyers representing county and sheriff in his official capacity in federal suit by sheriff’s department employees under FLSA 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).
(7) The attorney outlines potential pitfalls in multiple representation, and advises each party of the opportunity to seek the opinion of independent counsel as to the advisability of the proposed multiple representation; and, each either consults separate counsel or advises that no separate consideration is desired.

(8) 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.

(9) Each party agrees that the attorney may represent both in the litigation.19

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19 D.C. Ethics Op. No. 140 (1984). See also ABA Formal Ethics Op. No. 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. No. 248 (1997) (involving attorney representation of joint plaintiffs denied same position in discrimination case); Elonex I.P. Holdings, Ltd. v. Apple Computer, Inc., 142 F. Supp. 2d 579 (D. Del. 2001) (defendant in patent infringement case waived its objection to adverse representation of plaintiff by counsel that also represented defendant in unrelated patent dispute; a prospective waiver should identify the potential opposing party, the nature of the likely subject matter in dispute, and permit the client to appreciate the potential effect of the waiver); Worldspan, L.P. v. SABRE Group Holdings, Inc., 5 F. Supp. 2d 1356, 1360 (N.D. Ga. 1998) (advance waiver ineffective because it did not identify party as a client in the engagement letter and subsequent disclosure; “[A]ny document intended to grant standing consent for the lawyer to litigate against his own client must identify that possibility, if not in plain language, at least by irresistible inference including specific parties, the circumstances under which such adverse representation would be undertaken, and all relevant like information.”); Miss. Ethics Op. No. 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 subsequent to the commencement of the representation); The Tax Authority, 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; however, the court applied the decision prospectively and the agreement in the particular case would be honored); N.Y. State Ethics Op. No. 778 (2004) (Lawyer representing insurance company may not represent two (continued...)

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In addition, the lawyer should address in advance and, where possible, in writing, the

19(...continued)
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; “[s]uch disclosure should explain the potential advantage
to both clients of presenting a unified defense to the plaintiff employee’s action and the
offsetting disadvantage to the owner of the owner’s consequent inability to assert
indemnification rights as a cross-claim in the same action,” and explain any other potential
consequences including: (1) the lawyer’s obligation, absent each client’s agreement, to disclose
to one client any confidences and secrets communicated to the lawyer by the other client, (2)
circumstances which might require the lawyer to withdraw from the representation entirely or,
with appropriate consent, to continue to represent only one of the clients, and (3) possible
consequences at trial, such as the number of peremptory challenges granted to defendants);
future conflicts if (a) the law 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 decision whether to consent and (b) a disinterested lawyer would believe that
the law firm can competently represent the interests of all affected clients. “Blanket” or “open-
ended” advance waivers, and advance waivers that permit the law firm to act adversely to the
client on matters substantially related to the law 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 (c) ensure that client confidences and secrets be
permitted to undertake representation of corporation and one or more of its constituents provided
that: (1) corporate counsel concludes that in the view of a disinterested lawyer, the
representation would serve the interests of both the corporation and the constituent, and (2) both
clients give knowledgeable and informed consent, after full disclosure, of the potential conflicts
that might arise; even if the lawyer concludes that the requirements are met at the outset of the
representation, the lawyer must be mindful of any changes in circumstances over the course of
the representation to ensure that the disinterested lawyer test continues to be met at all times;
finally, the lawyer should consider structuring the relationships with both clients by adopting
measures to minimize the adverse effect of an actual conflict, should one develop. These may
include prospective waivers that would permit lawyer to continue representing the corporation in
the event the lawyer must withdraw from the multiple representation, contractual limitations on
the scope of the representation, explicit agreements as to the scope of the attorney-client
privilege and the permissible use of any privileged information obtained in the course of the
representations, and/or the use of co-counsel or shadow counsel to assist in the representation of
law does not require that every possible consequence of a conflict be disclosed for a consent to
be valid.”).
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 informed consent to the arrangement.\textsuperscript{20} The mere fact of joint representation, without more, does not provide a basis for implied authorization to disclose one client’s confidences to another.\textsuperscript{21} 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 in order to keep that client reasonably informed, to satisfy her duty to the non-disclosing client the lawyer should seek consent of the disclosing client to share the information or ask the client to disclose the information directly to the other client. If the lawyer cannot achieve disclosure, a conflict of interest is created that requires withdrawal.\textsuperscript{22}


\textsuperscript{21} Id.; D.C. Ethics Op. No. 290 (1999); Fla. Formal Ethics Op. No. 92-5 (1992); N.Y. City Ethics Op. No. 1999-07 (1999) (attorney who jointly represented two defendants who subsequently became adversaries should not provide documents or disclose information to one of the clients which could reveal sensitive and confidential personal matters about the other client unless and until (1) the attorney has the informed consent for such disclosure from both clients or (2) such disclosure is required by the disciplinary rules, the applicable law, or an order of a court of competent jurisdiction). Contra Frontline Communications Int’l, Inc. v. Sprint Communications Co., 232 F. Supp. 2d 281, 288 (S.D.N.Y. 2002) (“When an attorney represents an employer and an employee jointly, the employee cannot reasonably expect the attorney to keep any information from the employer.”); Kempner v. Oppenheimer & Co., 662 F. Supp. 1271, 1277 (S.D.N.Y. 1987).

\textsuperscript{22} D.C. Ethics Op. No. 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; “Because a conflict of interest arises between the interests of the alien employee in protecting the confidence that she lied in connection with the INS filing and the interest of the Employer in knowing that the work visa was fraudulently obtained, the lawyer must withdraw from representing both clients unless the retainer agreement permits the firm to continue one of the parties.”). Cf. D.C. Ethics Op. No. 327 (2005) (Where one client has given consent to the disclosure of confidential information by the lawyer to another client, the lawyer may reveal the confidence or secret. 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 (continued...)
What if one of the parties that has granted an otherwise valid prospective waiver changes his mind? The problem with a change of heart is that the other client(s) involved, and the lawyer, may have acted in good faith reliance upon the waiver. This is particularly likely if some time has passed between the signing of the waiver and its revocation. “The short answer is that while nothing can prevent a waiving client from later changing its mind, such an action might not compel a lawyer to withdraw from representing the other affected client.” Absent an agreement addressing the issue, the consequences largely depend on whether another party (i.e., another client or the lawyer) has detrimentally relied on the waiver. Ordinarily, if there has been detrimental reliance by another waiving client or the lawyer, the lawyer should continue to represent the other client. Absent such reliance, the parties should normally be restored to the status quo ante. For this reason, it is recommended that the consequences of a change of heart should be addressed in the written conflict waiver document.

Some authorities provide that the attorney must withdraw from the representation of all

\[\text{22}(...\text{continued})\]

affect that client's interests); N.Y.City Ethics Op. No. 2005-02 (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 the dual representation. The critical question is whether the representation of either client would be impaired. In particular, the lawyer has a conflict if the lawyer cannot avoid using the embargoed information in the representation of the second client or the possession of the embargoed information might reasonably affect the lawyer's independent professional judgment in the representation of that client. Whether that is the case depends on the facts and circumstances, including in particular the materiality of the information to the second representation and whether the information can be effectively separated from the work on the second representation. Whether the conflict can be waived depends on whether the lawyer can disclose sufficient information to the affected client to obtain informed consent and whether a disinterested lawyer would believe that the lawyer's professional judgment would not in fact be affected by possession of the information. If the lawyer is required to withdraw from the representation, the lawyer may not reveal the information giving rise to the conflict).


\[\text{24} \text{Id. Accord Unified Sewerage Agency v. Jelco, Inc., } 646 \text{ F.2d 1339, 1346 n.6 (9th Cir. 1981);} \text{ Fisons v. Atochem N. Amer., Inc., } 1990 \text{ WL 180551 (S.D.N.Y 1990).}\]

clients when an actual conflict arises. Others hold that the occurrence of an actual conflict, standing alone, does not require withdrawal. Rather, the issue should be analyzed under the conflict of interest rules that apply to “former clients.”

D. Prospective Waiver of Conflicts of Interests

A number of jurisdictions have held that an attorney may obtain a prospective waiver of potential conflicts that may arise in the course of 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 in the event the firm withdraws from representing the employee. Such agreements are not prohibited, provided that the lawyer can jointly represent the corporation and the employee competently and both the corporation and the employee give their informed consent. This is also true where the lawyer is asked to represent

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26 ABA MODEL RULES, 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); Civil Serv. Comm’n v. Superior Court, 163 Cal. App. 3d 70 (1984). Compare N.Y.City Ethics Op. No. 2005-05 (2005) (When, in the course of continuing representation of multiple clients, a conflict arises through no fault of the lawyer that was not reasonably foreseeable at the outset of the representation, does not involve the exposure of material confidential information, and that cannot be resolved by the consent of the clients, a lawyer is not invariably required to withdraw from representing a client in the matter in which the conflict has arisen. In deciding from which representation to withdraw, the overarching factor should be which client will suffer the most prejudice as a consequence of withdrawal. In addition, the attorney should consider the origin of the clients, the effect of withdrawal on the lawyer’s vigor of representation for the remaining client, and other similar factors).

27 Fla. Ethics Op. 87-1 (1987). See Ex parte AmSouth Bank, N.A., 589 So. 2d 715, 722 (Ala. 1991) (allowing law firm to maintain one client because the firm did not cause the conflict, the work it did was not substantially related, and it dropped the client least likely to be adversely impacted; otherwise, the attorney could elect one client to the detriment of the other, which does not really remove the taint of impropriety).

28 See Reich v. Muth, 34 F.3d 240, 245 (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); Visa U.S.A., Inc. v. First Data Corp., 241 F. Supp. 2d 1100 (N.D. Cal. 2003) (letter in (continued...
which First Data waived future unrelated disputes, including litigation, between Visa and First Data was effective and thus motion to disqualify denied where the letter was clear, consent knowing, and First Data was a sophisticated client; Zador Corp. v. Kwan, 31 Cal. App. 4th 1285 (1995) (if attorney received informed waiver of future conflicts, attorney may withdraw from its representation of one of the clients and continue to represent the other even if otherwise confidential information would be used against the former client); Cal. Formal Ethics Op. No. 1999-153 (1999) (lawyer may represent both the corporation and one of its shareholders who is also corporate president and CEO; to extent a potential conflict of interest exists, the lawyer must obtain the written consent of both the corporation and the shareholder before commencing representation); Cal. Formal Ethics Op. No. 1989-115 (1989); Griva v. Davison, 637 A.2d 830 (D.C. Ct. App. 1993) (attorney may represent both partnership and one of its partners, when such representation would be likely to involve differing interests only if each consents to representation after full disclosure of possible effect of representation on attorney’s exercise of professional judgment); Rymal v. Baergen, 686 N.W.2d 241 (Mich. Ct. App. 2004) (first employer’s counsel was not disqualified, on basis of conflict of interest, from continuing to represent employer in matters against employee’s supervisor and second employer that was a company started by employee and supervisor, following settlement of employee’s claims against first employer in suit alleging sexual harassment and retaliation; there was a lack of evidence showing conflict of interest or improper use of confidential information, and supervisor expressly consented to counsel’s participation if conflict was discovered; “While we recognize that consent was given before a conflict of interest was revealed, the written agreement anticipated the possibility of such a conflict, and [the supervisor] agreed that if a conflict arose, counsel could maintain representation of [employer].”); Pine Island Farmers Coop. v. Erstad & Riemer, P.A., 649 N.W.2d 444 (Minn. 2002) (Liability insurer brought malpractice action against law firm, arguing that law firm represented both insured and insurer in prior action brought by claimant. Law firm argued that its sole client was the insured and not the insurer. The Minnesota Supreme Court held that in the absence of a conflict of interest between the insured and the insurer, the insurer can become a co-client of the law firm defending the insured. However, the record did not contain any evidence that the law firm or any other attorney consulted with the insured regarding the possibility of dual representation or that the insured consented to dual representation after being informed of the risks. Therefore, the law firm was entitled to summary judgment dismissing the insurer’s malpractice action against it); N.Y. County Ethics Op. No. 724 (1998) (lawyer can seek advance waiver with respect to future conflicts of interests; validity of the waiver will depend on the adequacy of disclosure given the client under the circumstances, taking into account the sophistication and capacity of the person or entity giving consent); Softel, Inc. v. Dragon Med. & Scientific Communications Ltd., 1995 U.S. Dist. LEXIS 2088 (S.D.N.Y. Feb. 22, 1995) (attorney may represent potentially adverse defendants and their insurer where explicit consent obtained); In re Youngblood, 895 S.W.2d 322 (Tenn. 1995) (in absence of actual or probable conflict, in-house attorney employees of

(continued...)
both governmental as well as private clients.\textsuperscript{29}

The Model Rules contemplate that a lawyer in appropriate circumstances may obtain effective informed consent of a client to future conflicts of interest. General and open-ended consent is more likely to be effective when given by a client that is an experienced user of legal services, particularly if, for example, the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation.\textsuperscript{30}

\textsuperscript{28}(...continued)
insurance company may represent individual insureds in legal matters arising under insurance company’s policy); \textit{In re Cerberus Capital Management, 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); \textit{City of Dallas v. Redbird Dev. Corp.}, 143 S.W.3d 375 (Tex. Ct. App. 2004) (trial court properly denied a motion to disqualify the lessee’s counsel after counsel withdrew from representing the alleged alter ego of lessee, where counsel continued to represent the lessee with both clients’ agreement and since the alleged alter ego was no longer a party to the suit after severance of the action, there was no existing dispute between the lessee and the alter ego at the time of the withdrawal). \textit{Cf. In re Egger}, 98 P.3d 477 (Wash. 2004) (attorney’s negotiating loan transaction and making efforts to secure payment by borrowers to their creditor, who was client of attorney’s firm, at the same time he represented lender, absent evidence that he ever discussed potential conflict with lender or obtained written waiver, together with associate’s memo to attorney alerting him to potential conflict which arose from dual representation of both lender and individual who would benefit from loan, established that attorney violated professional conduct rule requiring attorney to disclose, and to obtain written consent to, potential conflict of interest).

\textsuperscript{29} \textit{See} ABA Formal Ethics Op. No. 97-405 (1997) (a lawyer who is engaged to represent a government entity, whether on a full-time or part-time basis, may not agree simultaneously to represent a private party against her own 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, as long as the two governmental entities are not considered the same client, and as long as informed consent is obtained).

\textsuperscript{30} ABA Formal Ethics Op. No. 05-436 (2005). (New Comment [22] to Model Rule 1.7, amended February 2002, permits a lawyer to obtain effective informed consent to a wider range of future conflicts than would have been possible under the Model Rules prior to their amendment.)

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Similarly, the District of Columbia Bar Legal Ethics Committee in Ethics Opinion No. 309 (2001) held that the less specific the circumstances considered by the client and the less sophisticated the client, the less likely an advance waiver will be valid. It further noted that an advance waiver given by a client having independent counsel (in-house or outside) available to review such actions is presumptively valid, however, even if general in character. The opinion also noted that regardless of whether reviewed by independent counsel, an advance waiver of conflicts will not be valid where the two matters are substantially related to one another. Although the committee stated that the rules do not require that waivers be in writing, it recommended that for the protection of lawyers as well as clients that advance waivers be written.

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 consent does not impair the effectiveness of the consent.

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31 D.C. Ethics Op. No. 309. Accord: ABA MODEL RULES, 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].”).


33 A sample of text for an “Advance Waiver of Conflicts of Interest” is set forth as an Appendix to the opinion. Id. at 15.

34 See Klemm v. Superior Court, 75 Cal. App. 3d 893 (1977) (court upheld written consents that were “knowing and informed and given after full disclosure,” even though they were obtained long after joint representation was undertaken). But see Anderson v. Nassau County Dep’t of Corrections, 376 F. Supp.2d 294 (E.D. N.Y. 2005) (Firm disqualified from representing plaintiff employee in Title VII action where employee was named as a defendant in a second lawsuit in which the firm was representing the plaintiff. Although in the second action the plaintiff agreed to withdraw claims against the employee, the withdrawal of ostensibly valid claims against an alleged viable defendant in order to maintain chosen counsel was inconsistent with the mandates of the code of professional conduct. Moreover, the “Waiver of Conflict of Interest” document signed by plaintiff was not effective since it was not signed until after the representation commenced. Finally, not only did the firm fail to take measures to separate the two respective case files, but the same attorney filed documents in both cases. Accordingly, the firm did not meet its burden to establish there was no actual or apparent conflict of interest in its continued representation of the employee.)
Even where both potentially adverse clients consent to representation, a court may nevertheless order disqualification.35 Conversely, some courts have rejected disqualification where prejudice is not shown, even where the attorney failed to fully inform the clients of the risks of joint representation.36

E. Taking Opposing Stances on an Issue–Positional Conflicts

Frequently, in representing multiple clients, attorneys must argue opposing sides on the same legal issue, thus potentially creating a conflict of interest. Conflict occurs when advocacy of a legal issue on behalf of one client could adversely affect a client in a second matter through precedential effect.

Although neither the Code nor the Model Rules prohibit most positional conflicts, both include provisions that could encompass some of the matters. If any representation would involve misuse of client confidences, it falls under the prohibition of Canon 4 of the Code and Rule 1.6 of the Model Rules. In addition, if accepting representation would compromise a lawyer’s “independent professional judgment,” it is impermissible under DR 5-105, while if there is a substantial risk it would be “materially limited” by the lawyer’s responsibilities to another client or a former client, it is impermissible under Model Rule 1.7. The Comment to that Rule explains:

Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact

35 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 one month after plaintiff’s discharge, raising issue of successor liability among co-defendants; “[T]his Court is not convinced that ‘it is obvious that [the attorney] can adequately represent the interest of each’ client.”). Compare Jaggers v. Shake, 37 S.W.3d 737 (Ky. 2001) (counsel’s representation of two plaintiffs in their legal malpractice action against their former attorneys and his simultaneous representative, in a completely unrelated legal malpractice action, of a potential defense witness was too attenuated to create an appearance of impropriety, and thus, counsel’s disqualification was not required for that reason).

36 Frontline Communications Int’l, Inc. v. Sprint Communications Co., 232 F. Supp. 2d 281 (S.D.N.Y. 2002) (even if counsel violated its ethical obligations to employee by not informing 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, counsel’s conduct did not prejudice employee’s defense of third party action and thus disqualification of counsel was not required).
that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, 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; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. 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.37

In contrast, the District of Columbia Bar Legal Ethics Committee in Ethics Opinion No. 265 (1996) held that when a lawyer in a firm is asked to represent an entity that takes positions on matters of law in a subject area in which the lawyer or her firm practices regularly on behalf of other clients, the lawyer may not, without the informed consent of all affected parties, accept simultaneous representation of both clients where such representation creates a substantial risk that representation of one client will adversely affect the representation of the other. Similar to the ABA Model Rules comments, the District of Columbia Bar opinion states that in determining the existence of a positional conflict, the lawyer must consider five factors: (1) the relationship between the two forums in which the two representations will occur; (2) the centrality in each matter of the legal issue as to which the lawyers will be asked to advocate; (3) the directness of the adversity between the positions on the legal issue of the two clients; (4) the extent to which the clients may be in a race to obtain the first ruling on a question of law which is not settled; and (5) whether a reasonable observer would conclude that the lawyer would be likely to hesitate

37 ABA MODEL RULES, Rule 1.7, cmt. 24. See also ABA Formal Ethics Op. No. 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. Formal Ethics Op. No. 1989-108 (1989) (determining that a lawyer may take opposite positions on the same legal issue in representing two separate clients before the same court); D.C. Ethics Op. No. 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).
in either of her representations or be less aggressive on one client’s behalf because of the other representation.38

F. Imputed Disqualification

Imputed disqualification arises when one lawyer in a law firm cannot represent a client for whatever reason. For reasons of confidentiality and loyalty, the ethical rules impute this prohibition to the attorneys associated with such attorney. The presumption is that one attorney in a law firm has access to confidential information about firm clients represented by other firm attorneys.39

1. Lawyer Changing Firms

An interesting problem arises when a lawyer joins a new law firm which represents parties adverse or interests adverse to his former firm’s clients and the lawyer potentially had access to adverse party confidences at his former firm or company. ABA Model Rule 1.10(b)

See ABA MODEL RULES, Rule 1.10; ABA Model Code, DR 5-105(d). See generally N.Y. City Ethics Op. No. 2003-3 (2004) (under DR 5-105(e) of the New York Code of Professional Responsibility, all law firms must keep records and must have policies and systems in place to check for conflicts of interest to the extent necessary to render effective assistance to the lawyers in the firm in avoiding imputed conflicts under DR 5-105(d) based on current or prior engagements; what records the firm must keep, and what policies and systems the firm must implement, depends on a number of factors, including (a) the size of the firm, (b) where the firm practices, and (c) the nature of the firm’s practice).
at a previous firm he does not imputedly disqualify his new firm.\textsuperscript{40} If, however, the attorney is in possession of actual confidences of his former clients, disqualification of both the attorney and his new firm is necessary.\textsuperscript{41}

\textsuperscript{40} See Silver Chrysler Plymouth v. Chrysler Motors Corp., 518 F.2d 751, 757 (2d Cir. 1975) (en banc), overruled on other grounds, Armstrong v. McAlpin, 625 F.2d 433 (2d Cir. 1980). See also Eberle Design, Inc. v. Reno A & E, 354 F. Supp.2d 1093 (D. Ariz. 2005) (Attorney who was joining law firm representing defendant in dispute involving patent rights had not previously played a substantial role in representation of plaintiff, and thus, disqualification of defendant’s law firm was not warranted, where attorney had only recorded a total of 9.2 hours over a nine-day period drafting proposed voir dire questions for plaintiff, and he took no part in fact discovery, expert witness preparation or discovery, hearings, summary judgment briefing or argument, or preparation of proposed pretrial order, motions in limine or jury instructions; disqualification is not warranted under such circumstances provided the personally disqualified lawyer is screened from participation in the matter and receives no portion of the fees paid by defendant, and plaintiff is given written notice that will enable plaintiff to ascertain defendant’s compliance with Rule 1.10(d). The lawyer did not undertake a “substantial role” merely by obtaining confidential and sensitive client information); Edwards v. 360 Degrees Communications, 189 F.R.D. 433 (D. Nev. 1999) (a lawyer who had not personally worked on a matter at his former law firm will not be disqualified from later representing the opposing party in the case based on a conclusive presumption of shared confidences).

\textsuperscript{41} See Schloetter v. Railoc of Ind., Inc., 546 F.2d 706 (7th Cir. 1976). See also Pound v. Cameron, 135 Cal. App. 4th 70 (2005), review denied, 2006 Cal. LEXIS 3550 (March 15, 2006) (Firm representing one party must be disqualified when it associates as counsel an attorney who previously obtained confidential information from the opposing party, even in the absence of any evidence that confidential information was shared between the firm and the associated counsel. The close relationship between a corporation and its controlling shareholders and the absence of any evidence or inference that an attorney acted in a manner inconsistent with the intent to retain the confidentiality of his work product compelled the conclusion that the privilege was not waived.); Gaton v. Health Coalition, Inc., 745 So. 2d 510 (Fla. Dist. Ct. App. 1999) (law firm which hired attorney who formerly had acted as co-counsel for opposing party would be vicariously disqualified based upon conflict of interest, where opposing counsel had provided their former co-counsel with extensive background on case and strategies and thoughts regarding liability, damages and discovery, even though former co-counsel has no present recollection of confidential information which he had acquired); Solow v. W.R. Grace & Co., 632 N.E.2d 437 (Conn. App. Ct. 1994) (law firm, which was large and departmentalized, was not per se prohibited from representing plaintiff in a suit against a former client; irrebuttable presumption of shared confidences does not arise where attorney who was source of imputed disqualification had left the firm). Compare Brotherhood Mut. Ins. Co. v. National Presto Indus., Inc., 846 F. Supp. 57 (M.D. Fla. 1994) (counsel for insured in fire loss and subrogation claim joined law firm (continued...)}
2. Screening

To prevent the disqualification of entire law firms, screening may be a successful device in some states. A so-called “ethical fire wall” may “guard against the inadvertent use of confidential information.”\(^\text{42}\) Such screening devices are particularly effective where the law firm

\(^{41}\)(...continued)

with partner who previously represented insurer in same matter; both counsel and firm disqualified; *Kassis v. Teacher’s Ins. & Annuity Ass’n*, 93 N.Y.2d 611 (N.Y. App. Div. 1999) (disqualification of defendants’ law firm required where associate hired by defendants’ firm previously worked for firm representing owner, though defendants’ firm erected “Chinese wall” around the attorney, where attorney participated extensively in representation of owner during his prior employment and defendants made only conclusory statements that attorney did not acquire confidences during his prior employment) [Author’s note: like the California Court of Appeals in *Hendricksen v. Great American Savings & Loan*, 11 Cal. App. 4th 109 (1992), “[w]e prefer to use the term ‘ethical wall’ [or ‘ethical fire wall’] rather than the more common, and often criticized term, ‘Chinese Wall.’” See also *Peat, Marwick, Mitchell & Co. v. Superior Court*, 200 Cal. App. 3d 272, 293 (1988) (Low, J., concurring) (criticizing the apparently widespread use of the term “Chinese Walls” to describe ethical screening because the term has an “ethnic focus which many would consider a subtle form of linguistic discrimination”).]; *Vermont Ethics Op. No. 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.). *Compare Papyrus Tech. Corp. v. New York Stock Exch., Inc.*, 325 F. Supp. 2d 270 (S.D.N.Y. 2004) (client’s bald, conclusory allegations that attorney who worked for law firm representing it in patent infringement litigation received confidences or secrets during weekly meetings of law firm’s intellectual property group were insufficient to warrant disqualification of attorney or his subsequent law firm, which represented client’s opponent; attendees of the weekly meetings received continuing legal education credit, which under state law could not be earned in connection with pending case, and client failed to provide dates and times of the meetings or the names of those in attendance).

\(^{42}\) See, e.g., *Cheng v. GAF Corp.*, 631 F.2d 1052, 1057 (2d Cir. 1980), vacated on jurisdictional grounds, 450 U.S. 903 (1981). *See also Carbo Ceramics, Inc. v. Norton-Alcoa Proppants*, 155 F.R.D. 158 (N.D. Tex. 1994) (existence of ethical fire wall rebutted presumption of shared confidences); *Cromley v. Board of Educ.* 205, 17 F.3d 1059 (7th Cir. 1994) (attorney did not breach ethics rules when he switched from employment with law firm representing high school teacher in section 1983 action to employment with law firm representing defendants in that action; screening procedures to avoid disclosure of information were timely employed and fully implemented by defendants’ law firm); *La Salle Nat’l Bank v. County of Lake*, 703 F.2d 252, 257 (7th Cir. 1983) (ethical screens may be used to rebut presumption of shared

(continued...)
or organization is a large one.43 Even where ethical fire walls are recognized, they may not be effective in the case of smaller law firms or organizations44 or where screening was not erected

42(...continued)
confidences); Schiessel v. Stephens, 717 F.2d 417, 421 (7th Cir. 1983) (same); ABA Formal Ethics Op. No. 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. No. 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 (including volunteer service in certain District of Columbia offices) when involved in the related 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); D.C. Ethics Op. No. 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); Papyrus Technology Corp. v. New York Stock Exch., Inc., 325 F. Supp. 2d 270 (S.D.N.Y. 2004) (law firm that represented patentee in infringement case timely screened attorney who had previously worked for law firm that represented alleged infringer, making its disqualification unnecessary, where it established appropriate screening mechanisms on day it received actual notice that alleged infringer’s confidences or secrets may have been disclosed to attorney through email sent to prior firm’s intellectual property group, of which attorney was a member).

43 See, e.g., In re Del-Val Fin. Corp. Sec. Litig., 158 F.R.D. 270, 274-75 (S.D.N.Y. 1994) (imputed disqualification rebutted by screening procedures where conflicted attorney joined a 400-lawyer firm and was involved in the prior representation only in a peripheral manner) Solow v. W.R. Grace & Co., 610 N.Y.S.2d 128, 130, 133-34 (App. Div. 1994) (imputed disqualification rebutted because the conflicted attorneys transferred to a 350-plus attorney firm, their involvement in the prior representation had been negligible, and the principle attorneys responsible for the matter left the firm before the current representation).

44 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); (continued...)
in a timely or effective manner.\textsuperscript{45}

\textsuperscript{44}(...continued)

\textit{Mitchell v. Metropolitan Life Ins. Co.}, 2002 WL 441194 (S.D.N.Y. Mar. 21, 2002) (screening devices do not suffice to avoid disqualification where lawyer had extensive exposure to relevant confidential information in the course of her former representation of the defendant and, although she was not personally involved representing the plaintiff in this action, she worked in a 12-lawyer New York office of a relatively small firm and she works in close proximity to attorneys responsible for the action and regularly interacts with at least one of them); \textit{Crudele v. New York City Police Dep’t}, 2001 WL 1033539 (S.D.N.Y. Sept. 7, 2001) (disqualification required in lawsuit challenging police department’s sick leave policies because lead attorney assigned by city’s legal department to defend cases joined law firm representing plaintiffs; screening methods inadequate in context of a small law firm of only 15 lawyers); \textit{Marshall v. State of N.Y.}, 452 F. Supp. 103 (N.D.N.Y. 1997) (disqualifying firm of 15 attorneys despite screening); \textit{Hernandez v. Paoli}, 679 N.Y.S.2d 389 (App. Div. 1998) (fact that attorney for plaintiff, who was solo practitioner, had during course of litigation hired associate who was leaving employment with law firm with 25 attorneys which represented defendant, which firm was opposing counsel to plaintiff in other pending cases at the time associate was hired, warranted disqualification of plaintiff’s attorney; although it did not appear that associate had worked on the case at bar with defendant’s law firm, firm’s informal setting, including discussions among attorneys and fully accessible file room, justified disqualification); \textit{Fleigelman v. Eli Lilly & Co.}, 679 N.Y.S.2d 613 (App. Div. 1998) (twelve-attorney law firm representing plaintiffs, where defendant’s former attorney of seven years’ duration was still employed, failed to sustain its burden of demonstrating that it adopted safeguards adequate to assure against likelihood that defendant’s confidences would be divulged, thus warranting disqualification of firm).

\textsuperscript{45} See, e.g., \textit{Analytica, Inc. v. NPD Research, Inc.}, 703 F.2d 1263, 1267 (7th Cir. 1983) (rejecting ethical fire walls where “the law firm itself changed sides,” as opposed to situations where the lawyer has come from another firm or government service); \textit{I-Enterprise Co. v. Draper Fisher Jurvetson Management Co.}, 2005 WL 757389 (N.D. Cal. April 4, 2005) (even if the presence of an ethical wall could, in theory, preclude disqualification in a situation in which a non-government counsel moves from firm to firm, plaintiff did not promptly erect an ethical wall to screen the new lawyer from plaintiff’s litigation counsel in this action); \textit{Concat LP v. Unilever, PLC}, 350 F. Supp.2d 796 (N.D. Cal. 2004) (“Ethical wall,” erected by law firm to separate attorney working on estate planning for one of the controlling persons of plaintiff bringing patent suit from other attorneys representing patent suit defendant, was insufficient under California law to preclude disqualification of firm from representing defendant, for breach of duty of loyalty to plaintiff caused by the firm’s concurrent adverse representations.); N.Y. City Ethics Op. No. 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); \textit{Reilly v. \textsuperscript{(continued...)}}}
Computer Associates Long-Term Disability Plan, 423 F. Supp.2d 5 (E.D. N.Y. 2006) (disqualification of plaintiff’s law firm based on law firm’s hiring of attorney who had worked on behalf of defendants in various matters denied where firm timely and effectively erected ethical screen); Miroglio, S.P.A. v. Morgan Fabrics Corp., 340 F. Supp. 2d 510 (S.D.N.Y. 2004) (law firm as well as individual lawyer disqualified where ethical screen would have been ineffective; the disqualified law firm partner had direct personal involvement in the present and former representation); Blue Planet Software v. Games Int’l, LLC, 331 F. Supp. 2d 273 (S.D.N.Y. 2004) (disqualification of plaintiff’s attorney in intellectual property dispute, on grounds that he had access to defendant’s confidential information in prior suit, necessitated disqualification of his entire firm; implementing screening procedures would be ineffective because attorney had been substantially involved in the firm’s work for plaintiff prior to his disqualification); Arifi v. De Transport Du Cocher, Inc., 290 F. Supp. 2d 344 (E.D.N.Y. 2003) (other attorneys in firm would be disqualified from representing trailer manufacturer based on firm attorney’s pre-suit representation of operator of tractor-trailer rig in lawsuit in which manufacturer and operator were co-defendants and cross-claimants, notwithstanding that firm attorney’s pre-suit representation of operator was short-lived and limited and that confidential accident investigation file sent to firm attorney by operator’s insurer was never reviewed, where ethical wall regarding matter had not been established between firm attorneys representing manufacturer and attorneys who had represented operator, giving rise to presumption that confidences were shared); 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 “Chinese 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); 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 prior to 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.); Clinard v. Blackwood, 46 S.W.3d 177 (Tenn. 2001) (attorney screening procedures to prevent contact between defendants’ former attorney and plaintiffs’ attorneys rebutted presumption of shared confidences when former attorney joined firm; procedures kept plaintiffs’ files from the former attorney and prohibited him from discussing the case with plaintiffs’ attorneys, his office was separated by at least three offices from plaintiffs’ attorneys, and the former attorney was a non-equity member and received no fees from the case; however, appearance of impropriety (continued...)
While ethical fire walls are most commonly used in situations of lateral movement by attorneys, they may also be established in the context of obtaining consents from clients to waive actual or potential conflicts.\textsuperscript{46} Note also that the ethical screen should prohibit (1) involvement in the matter by the individually disqualified lawyer, (2) discussion of the matter between the disqualified lawyer and any firm personnel involved in the representation, (3) access by the disqualified lawyer to any files (including electronically stored files) of the matter from which she is screened, and (4) access by the lawyers working on the matter to any of the files of the disqualified lawyer.\textsuperscript{47} In addition, there should be written notification to all personnel of the firm and to the clients of the fact and elements of the screen.\textsuperscript{48} In appropriate circumstances, such as where the disqualified lawyer works near those handling the matter, the file protection element

\textsuperscript{45}(...continued) 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); \textit{HealthNet, Inc. v. Health Net, Inc.}, 289 F. Supp. 2d 755 (S.D. W. Va. 2003) (law firm’s attempt to screen partner from firm’s representation of party in trademark dispute against partner’s former client were insufficient to prevent disqualification of entire firm; screening arrangements were not established until at least 5 months after firm undertook its representation of party).

\textsuperscript{46} \textit{See generally} N.Y. State Ethics Op. No. 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 from engaging in representation under this rule, the moving lawyer’s new law firm is also disqualified); N.Y. State Ethics Op. No. 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 period of time, as long as such information is not protected as a confidence or secret of the clients of the old firm and the disclosing does not violate any contractual or fiduciary duties of the moving lawyer to the old firm).


\textsuperscript{48} \textit{Id. See also} Kala v. Aluminum Smelting & Ref. Co., 688 N.E.2d 258 (Ohio 1998).
can include labeling files to reflect the access prohibition.49

The majority of states do not recognize ethical fire walls as a means of preventing disqualification for nongovernmental lawyers.50 In contrast, courts have recognized that


50 See Roberts v. Hutchins, 572 So. 2d 1231 (Ala. 1990) (“Chinese wall” could not provide an effective screening to attorneys in private practice but should apply only to government attorneys or other publicly employed attorneys); Richard B. v. State, 71 P.3d 811 (Alaska 2003) (screening not effective to prevent disqualification); Burnett v. Morgan, 794 S.W.2d 145 (Ark. 1990) (not recognizing ethical screening); Henriksen v. Great Am. Sav. & Loan, 11 Cal. App. 4th 109 (1992) (law firm may not use screening to rebut presumption created by imputed knowledge rule when a lawyer in the firm was previously involved in the same or substantially related matter); Cal. Formal Ethics Op. No. 1998-152 (1998) (same); Hitachi, Ltd. v. Tatung Co., 419 F. Supp.2d 1158 (N.D. Cal. 2006) (Disqualification of defendant’s firm warranted where associate at the firm formerly represented plaintiffs in substantially related matter. Although defendant’s firm instituted an ethical screen to prevent the sharing of confidential information, the established rule in California is that such screens do not prevent disqualification where an attorney moved from one private firm to another. Even if California permitted ethical screens to prevent disqualification in this situation, the law firm’s intellectual property department was small, and there was substantial contact between the associate and the law firm’s attorneys who were handling the case); Doe v. Perry Cmty. Sch. Dist., 650 N.W.2d 594 (Iowa 2002) (law firm’s “Chinese 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); Lansing-Delaware Water Dist. v. Oak Lane Park, Inc., 808 P.2d 1369 (Kan. 1991) (rejecting use of screening devices as a remedy for the “taint” of incoming attorney who has switched sides during ongoing litigation by moving from one firm to another); Parker v. Volkswagenwerk Aktiengesellschaft, 781 P.2d 1099 (Kan. 1989) (the rules “reject . . . any thought that the ‘taint’ of the incoming lawyer can be cured by screening him or her out of the affected client’s matter, or by erecting a ‘Chinese wall’ or by imposing a ‘cone of silence’”); Koch v. Koch Indus., Inc., 798 F. Supp. 1525 (D. Kan. 1992) (under Kansas law, screening devices cannot prevent imputed disqualification of law firm); Hampton v. Daybrook Fisheries, Inc., 2001 WL 1444933 (E.D. La. Nov. 14, 2001) (“The Fifth Circuit has never recognized the possibility of a ‘Chinese Wall’ to rebut [the] presumption [of shared confidences].”); Lennartson v. Anoka-(continued...)
50(...continued)

Hennepin Indep. Sch. Dist. 11, 662 N.W.2d 125 (Minn. 2003) (law firm disqualified from representing school district in sex 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 law firm, and new law firm erected an “ethical wall” and prohibited attorney from any contact with school district’s attorney); Ciaffone v. Eighth Judicial Dist. Court, 945 P.2d 950 (Nev. 1997) (screening solution not permitted for lawyers or paralegals), overruled in part, Leibowitz v. Eighth Judicial Dist. Court, 78 P.3d 515 (Nev. 2003) (allowing screening for non-lawyer personnel). Compare Forsyth v. County of Los Angeles, 223 F.3d 990, 997 (9th Cir. 2000) (Ninth Circuit interprets California imputed knowledge standards and finds an ethics screen is adequate to avoid vicarious disqualification in the particular facts before it: “We hold that the vicarious disqualification of a firm does not automatically follow the personal disqualification of a former settlement judge, where the settlement negotiations are substantially related (but not identical) to the current representation. Screening mechanisms that are both timely and effective, as the Yagman firm erected here, will rebut the presumption that the former judge disclosed confidences to other members of the firm.”).

Screening is clearly permitted for nongovernment lawyers in Arizona, Delaware, Illinois, Indiana, Maryland, Michigan, Minnesota, Montana, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina (for lawyers representing clients of a public defender office, legal services office or similar program serving indigent clients), Tennessee Utah, Washington, and Wisconsin and possibly in California and Louisiana. See, e.g., Ariz. Rules of Prof. Conduct Rule 1.10(d) (permits the new firm to avoid disqualification because of the migratory lawyer’s former representation of an adverse party where: (1) the matter does not involve a proceeding before a tribunal in which the personally disqualified lawyer had a substantial role, (2) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee from the matter, and (3) written notice is promptly given to any affected former client to enable it to ascertain whether there has been compliance with the provisions of the Rule). Accord: Del. Rules of Prof. Conduct 1.10(c); Ind. Rules of Prof. Conduct 1.10(c); Md. Rules of Prof. Conduct 1.10(c); Minn. Rules of Prof. Conduct 1.10(b); Mont. Rules of Prof. Conduct 1.10(c); Nev. Rules of Prof. Conduct 1.10(e); N.J. Rules of Prof. Conduct 1.10(c); N.C. Rules of Prof. Conduct 1.10(c) (silent on whether lawyer can share in fees relating to the matter); N. Dak. Rules of Prof. Conduct 1.10(b); Ohio Rules of Prof. Conduct 1.10(d); Oregon Rules of Prof. Conduct 1.10(c); Pa. Rules of Prof. Conduct 1.10(b); S.C. Rules of Prof. Conduct 1.10(e) (allowing screening in the case of a lawyer that represented clients of a public defenders’ office, legal services office or similar program serving indigent clients); Tennessee Rules of Professional Conduct Rule 1.10 at (c) & (d) (Screening approved provided that the lawyer switching firms was not “substantially involved” (continued...)}
vicarious disqualification in the public sector context imposes different burdens on the affected public entities, lawyers and clients, including the difficulty public law offices would have recruiting competent lawyers. In light of these considerations, courts have more readily accepted the use of screening procedures or ethical fire walls as an alternative to disqualification in cases involving public law offices.51

50(...continued)
in the matter in question.); Cavender v. US Xpress Enters., Inc., 191 F. Supp. 2d 962 (E.D. Tenn. 2002) (adequate screening measures were taken by law firm representing employer in employment discrimination case to rebut presumption that employee’s former counsel had shared confidences during imminent merger of firms, where members of employee’s former counsel’s firm were to be located in different building than attorneys working on case for employer, employer’s attorneys were to remove all file materials related to action from general filing system, and firm limited places where suit could be discussed, controlled access to material pertaining to case on firm’s computer network, limiting sharing of secretaries, and denied former counsel any share in fee from suit); Allied Sound, Inc. v. Neely, 58 S.W.3d 119 (Tenn. Ct. App. 2001) (in imputed disqualification situation, one method of rebutting the presumption of shared confidences is to show that adequate screening measures have been instituted to prevent the flow of confidential information from the attorney to other members of the firm); Utah Rules of Prof. Conduct 1.10(c); Wash. Rules of Prof. Conduct 1.10(e); Wis. Rules of Prof. Conduct SCR 20:1.10(a)(2).

51 See, e.g., Roberts v. Hutchins, 572 So. 2d 1231 (Ala. 1990) (“Chinese wall” could not provide an effective screening to attorneys in private practice but should apply only to government attorneys or other publicly employed attorneys); City of Santa Barbara v. Superior Court, 122 Cal. App. 4th 17 (2004) (disqualification of entire city attorney’s office was not required when attorney representing homeowners in action against city accepted a job at city attorney’s office; screening measures established by the city attorney were both timely and effective in protecting the homeowner’s confidences, and attorney was well aware of her ethical duties and the serious consequences of violating them); Chambers v. Superior Court, 121 Cal. App. 3d 893 (1981) (private law firm not disqualified from representing plaintiff in litigation against state’s department of transportation after firm hired a lawyer previously employed by the state to represent that department in other, similar lawsuits; when he was employed by the state, the lawyer had acquired no confidential information about the pending lawsuit and ethical screen was sufficient to prevent the lawyer from participating in the lawsuit); Chadwick v. Superior Court, 106 Cal. App. 3d 108 (1980) (lawyer moving from county public defender office to district attorney’s office did not result in disqualification of district attorney’s office from prosecuting lawyer’s former clients, since screening would be sufficient to protect their confidential communications); Castro v. Los Angeles County Bd. of Supervisors, 232 Cal. App. 3d 1432 (1991) (rigorous screening procedures would permit a single nonprofit public benefit corporation simultaneously to represent all parties at dependency proceedings); Cal. Formal (continued...)
3. Paralegals, Secretaries and Other Non-Lawyers

The issue of disqualification also arises when non-lawyers (such as secretaries, paralegals and clerks) move from one firm to another. These individuals may also possess client confidences obtained during work with the former firm. A growing number of jurisdictions are beginning to address this issue. Most jurisdictions that have addressed the issue tend to apply the same standards to non-lawyers as are applied to lawyers under the jurisdiction’s applicable disciplinary rules.52 A few jurisdictions have held that a different standard should apply to

51(...continued)
Ethics Op. No. 1993-128 (1993) (referring to the use of screening of former government lawyer in a private law firm); People v. Manzanares, 139 P.3d 655 (Colo. 2006) (endorses ethical screens for former defense lawyers who join prosecutor’s office); Mich. Ethics Op. No. RI-334 (May 7, 2004) (county may ethically establish a separate public defender office to provide representation to 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). Compare Ariz. Ethics Op. No. 04-04 (2004) (a 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); City & County of San Francisco v. Cobra Solutions, 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).

52 See, e.g., Ala. Ethics Op. No. 2002-01 (2002) (a non-lawyer employee who changes firms must be held to the same standards as a lawyer in determining whether a conflict of interest exists); Actel Corp. v. Quicklogic Corp., 1996 WL 297045 (N.D. Cal. May 29, 1996) (plaintiff’s law firm disqualified when it hired as an associate and assigned to case person who previously worked for defendant’s law firm as a summer associate and recorded two hours’ time reviewing the file and preparing a memorandum on the matter); In re Complex Asbestos Litig., 232 Cal. App. 3d 572 (1991) (applying lawyer disqualification rules to non-lawyer assistants); Kouliasis v. Rivers, 730 So. 2d 289 (Fla. Ct. App. 1999) (imputed disqualification applied to law firm representing plaintiffs in medical malpractice case, after law firm hired legal secretary who, at her previous employment at the law firm defending the doctor, had been primarily assigned to the case and had been privy to confidential information that was material to the case); Stewart v. Bee-Dee Neon & Signs, Inc., 751 So. 2d 196 (Fla. Ct. App. 2000) (disqualification of law firm (continued...)

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52(...continued) that hired paralegal of opposing firm was improper, where no evidence was presented that paralegal actually disclosed material confidential information to hiring firm, that paralegal would necessarily work on case, or that screening measures would be ineffective); City of Apopka v. All Corners, Inc., 701 So. 2d 641 (Fla. Ct. App. 1997) (disqualification of defendant’s counsel after legal secretary for plaintiff’s attorney moved to law firm representing defendant improper; defense counsel had effectively screened secretary from involvement in subsequent litigation, and defendant had not obtained confidential information or an unfair advantage over plaintiff); Esquire Care, Inc. v. Maguire, 532 So. 2d 740 (Fla. Ct. App. 1988) (fact that secretary for defendants’ attorney became employed by attorney for plaintiffs while litigation was ongoing did not require that plaintiffs’ law firm be disqualified absent showing that plaintiffs had obtained unfair advantage over defendants); Lackow v. Walter E. Heller & Co., Southeast, Inc., 466 So. 2d 1120 (Fla. Ct. App. 1985) (there should be no distinction between attorneys and clerical staff when it comes to the requirement that a law firm should preserve the confidences and secrets of the client); Kapco Mfg. Co. v. C&O Enters., Inc., 637 F. Supp. 1231 (N.D. Ill. 1985) (applying Seventh Circuit case law relating to imputed disqualification of lawyers to law firm secretary/office manager); Maine Ethics Op. No. 186 (2004) (A lawyer may generally use screening with respect to a non-lawyer assistant to avoid conflicts and avoid imputed disqualification); Owens v. First Family Fin. Serv., Inc., 379 F. Supp. 2d 840 (S.D. Miss. 2005) (disqualification of plaintiff’s counsel warranted by the fact that counsel hired a paralegal that previously worked for defendants’ counsel. While working for defendants’ counsel, paralegal was exposed to documents, strategy meetings and settlement information. Although she never worked on the current case while there, she was a supervisory paralegal over actions which involved the same lenders, identical claims alleging a widespread practice, nearly identical facts, and the same documents. Ethical walls are not recognized in the Fifth Circuit, and in any event, no such wall was erected until several months after the paralegal was hired. Even though paralegal no longer worked for plaintiffs’ counsel, she was presumed to have given confidential information to the firm.) Williams v. Trans World Airlines, 588 F. Supp. 1037, 1044 (W.D. Mo. 1984) (disqualification standard should not differ between attorneys and secretaries); Brown v. Eighth Judicial Dist. Court, 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 prior to 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 plaintiffs); Coles v. Arizona Charlie’s, 973 F. Supp. 971 (D. Nev. 1997) (plaintiff’s attorney in age discrimination case disqualified because she worked for defendant’s law firm as a law clerk and briefly as a lawyer during time defendant retained law firm to advise it on employment law policies and practices and to represent company in employment litigation); Glover Bottled Gas Corp. v. Circle M Beverage Barn, Inc., 129 A.D.2d 678 (N.Y. App. Div. 1987) (applying rules to paralegal in affirming disqualification of firm); S.D. Ethics Op. No. 2004-1 (2004) (rules do not (continued...
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 law firm’s professional obligations, which may include instructing non-lawyer about the lawyer’s ethical duties, especially the duty to maintain confidences, supervising non-lawyers in a way that does not permit them to engage in the unauthorized practice of law, and when appropriate, screening non-lawyers from involvement in particular client matters; Tenn. Ethics Op. No. 2003-F-147 (2003) (imputed disqualification and screening provisions apply not only when lawyers switch firms, but when non-lawyer personnel switch firms as well); In re Am. Home Prods. Corp., 985 S.W.2d 68 (Tex. 1998) (professional obligations apply when new employee had worked for opposing firm as free-lance consultant performing paralegal tasks; disqualification required because plaintiff failed to rebut presumption that legal assistant shared confidential information with new firm); Phoenix Founders, Inc. v. Marshall, 887 S.W.2d 831, 835 (Tex. 1994) (while presumption that a legal assistant obtained confidential information is not rebuttable, the presumption that the information was shared with the new employer is rebuttable); In re Bell Helicopter Textron, Inc., 87 S.W.3d 139 (Tex. Ct. App. 2002) (evidence failed to establish that counsel for plaintiffs in action against helicopter manufacturer effectively screened former employee of manufacturer, who counsel hired as expert consultant, and thus disqualification of counsel was required, even though former employee stated that she did not violate confidentiality agreement, divulge proprietary information, trade secrets, trial strategies, attorney-client privileged information, or work product, that she knew of no confidential information or trial tactics, that she never worked on issues relating to case, that she agreed with counsel not to disclose manufacturer’s information, and that she relied exclusively on general engineering and aviation knowledge, skill and experience, given that former employee had worked for manufacturer on litigation involving systems on same model aircraft as that at issue); Rubin v. Enns, 23 S.W.3d 382 (Tex. Ct. App. 2000) (defendants’ law firm took sufficient appropriate steps to ensure confidentiality after hiring legal assistant who previously worked for plaintiff’s counsel in that case and thus avoided disqualification, though assistant worked more than 170 hours on that case, where defendants’ firm instructed assistant and all other employees not to discuss case with or in presence of assistant, assistant and all other employees signed confidentiality agreement agreeing not to discuss case, and assistant was prevented from access to all files concerning that case); Arzate v. Hayes, 915 S.W.2d 616 (Tex. Ct. App. 1996) (paralegal that “switched sides” from plaintiff’s firm to defendant’s firm in ongoing litigation after having gained confidential information at first firm does not result in disqualification of defendant’s firm if there is a showing that the firm took reasonable precautions to guard against disclosure of confidential information, including preventing paralegal’s access to or work on matters which she/he worked during prior employment); Daines v. Alcatel, S.A., 194 F.R.D. 678 (E.D. Wash. 2000) (applying Washington state imputed disqualification rules to non-lawyer employees).

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prevent disqualifications.53

53 See, e.g., ABA Informal Ethics Op. No. 88-1526 (1988) (screening would be adequate to avoid imputed disqualification of firm that hired paralegal who worked on litigation matters for an opposing law firm; rule applies equally to all non-lawyer personnel in a law 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); Smart Indus. Corp. v. Superior Court, 876 P.2d 1176 (Ariz. Ct. App. 1994) (disqualification of lawyer not mandated when he hires a non-lawyer assistant from opposing counsel, even if the assistant possesses client confidences, if the lawyer sufficiently screens the assistant from the case, notwithstanding Arizona rule that such screening is inadequate in the case of lateral movement of lawyers); Herron v. Jones, 637 S.W.2d 569 (Ark. 1982) (standards for disqualification should be different as between attorney and secretary job-switching); Chicago Ethics Op. No. 93-5 (1993) (screening applied to secretary who moved from one law firm to another); D.C. Ethics Op. No. 285 (1998) (a lawyer who employs a non-lawyer former government employee must screen that person from matters that are the same as, or substantially related to, matters on which the non-lawyer assisted government lawyers in representing a government client; further, the rules prohibit the lawyer from inducing the former government employee to reveal information made confidential by statute or a well-established common law privilege; however, rule does not apply to government employees who did not work with government lawyers but was otherwise exposed to confidential government information); D.C. Ethics Op. No. 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. No. 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); Zimmerman v. Mahaska Bottling Co., 19 P.3d 784 (Kan. 2001) (legal secretary acquired material and confidential information regarding personal injury suit while working for plaintiff’s lawyers, and thus defendants’ firm, for which legal 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 plaintiff’s attorneys discussed suit; disqualification may be avoided if non-lawyer employee has not acquired material and confidential information regarding the litigation or, if client waives disqualification and approves use of screening device or “Chinese wall”); Kan. Ethics Op. No. 90-5 (1991) (law firm may continue to represent client if former firm and clients consent or it is proven that employee did not acquire confidential information at the former firm); Baker v. Coxe, 974 F. Supp. 73 (D. Mass. 1997) (assuming, without deciding, that state attorney’s work as law student for law firm representing plaintiffs in action against state agency rose to the level of prior representation, the entire Office of Attorney General would not be disqualified from (continued...)

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G. Accepting Fees from Other than the Client

In the context of employment litigation, corporate employers frequently request joint representation of the corporation and the individual supervisor or manager accused of responsibility for the alleged discrimination or wrongful discharge. Moreover, frequently the employer offers to pay for the attorney’s fees of the individual employee. Unless informed representing the defendants, so long as case was transferred to new assistant attorney generals in another division and “Chinese wall” erected between those attorneys and former law student; Mich. Ethics Op. No. RI-284 (1996) (screening is needed if secretary or other employee typed, filed, copied, proofread or possessed confidential information); Mich. Ethics Op. No. RI-115 (1992) (screening applied to secretary); Leibowitz v. Eighth Judicial Dist. Court, 78 P.3d 515 (Nev. 2003) (screening of non-lawyer 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); N.J. Ethics Op. No. 665 (1992) (screening applied to paralegal); N.Y. State Ethics Op. No. 774 (2004) (When a law firm hires a secretary, paralegal or other non-lawyer who has previously worked at another law firm, the law firm must adequately supervise the non-lawyer which may include instructing the non-lawyer not to disclose protected information acquired at the former firm and instructing lawyers not to exploit such information if proffered; the firm need not always check for conflicts, but should do so in circumstances where the non-lawyer may be expected to have acquired confidences or secrets of the opposing party. If the firm learns that the non-lawyer did acquire material information of an adversary of the firm’s client, the firm should adopt protective measures to guard against improper disclosure); N.C. Ethics Op. No. 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 legal 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 legal 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. Central States Orthopedic Specialists, Inc., 51 P.3d 562 (Okla. 2002) (before being disqualified for having hired a non-lawyer employee from its opponent, the hiring firm should be given the opportunity to prove that the non-lawyer has not revealed client confidences to the new employer and has been effectively counseled and screened from doing so; if such proof is made to the trial court’s satisfaction, the court should deny the motion to disqualify the non-lawyer’s new firm); S.C. Ethics Op. No. 93-29 (1993) (screening applied to secretary; however, firm had no duty to notify client). But see Koch v. Koch Indus., Inc., 798 F. Supp. 1525 (D. Kan. 1992) (under Kansas law, screening devices cannot prevent imputed disqualification of law firm).
See ABA MODEL RULES, 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 any thing of value for his legal services from one other than his client); Mich. Ethics Op. No. RI-293, 1997 WL 452262 (1997) (lawyer cannot enter into agreement to have fees paid by a third party if circumstances 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. State Ethics Op. No. 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 attorney’s fees are not excessive, and the attorney exercises independent professional judgment on behalf of client).

As a separate matter, there is an open question whether a lawyer defending a client in a case has an affirmative duty to determine whether the client has insurance coverage for it. Compare Darby & Darby, P.C. v. VSI Int’l, Inc., 739 N.E.2d 744 (N.Y. 2000) (law firm had no duty to clients to advise them that their general liability insurance policy might cover Florida litigation costs involving clients’ alleged patent and trademark infringement because neither New York nor Florida recognized duty of insurer to defend patent infringement claims under general liability policy’s advertising injury claim, and theory of such coverage remained undeveloped at time of firm’s representation) with Jordache Enters., Inc. v. Brobeck, Phleger & Harrison, 958 P.2d 1062 (Cal. 1998) (suggesting that a defense attorney may have a duty to inquire about insurance coverage).
See also ABA Formal Ethics Op. No. 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 client, confirmed in writing, to waive the conflict if she reasonably believes she will be able to provide competent and diligent representation.); Continental 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. Employers’ Reins. Corp., 844 P.2d 1113, 1116 (Alaska 1993) (appointed defense counsel owes “an absolute duty of fidelity to the insured over the interests of the insurer”); Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft, 69 Cal. App. 4th 223 (1999) (corporate parent was not “client” of law firm that served 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); Conn. Ethics Op. 97-37 (1997) (lawyer may abide by his client’s wishes not to assert certain claims even though insurance carrier that is paying fees has directed the lawyer to contravene the client’s instructions); Pine Island Farmers Coop. v. Erstad & Riemer, P.A., 649 N.W.2d 444 (Minn. 2002) (In the absence of a conflict of interest between the insured and the insurer, the insurer can become a co-client of the law firm defending the insured. However, the record did not contain any evidence that the law firm or any other attorney consulted with the insured regarding the possibility of dual representation or that the insured consented to dual representation after being informed of the risks; therefore, the law firm was entitled to dismissal of the insurer’s malpractice action against it.); Hartford Cas. Ins. Co. v. Halliburton Co., 826 So.2d 1206 (Miss. 2001) (no attorney-client relationship existed between insurance company 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 insurance company and insurance company had paid attorney’s bill for representing insured, where insurance company never independently hired attorney, individual hired attorney prior to admission of coverage by insurance company, and insured never gave insurance company a choice about who he was going to hire as his attorney); Mont. Ethics Op. No. 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 (continued...)

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Formal Ethics Opinion No. 96-403 imposes special requirements on lawyers defending an insured under an insurance policy that permits the insurer to control the defense and settle within policy limits in its sole discretion. The Opinion requires the lawyer to communicate to the insured the limitations that the policy places on her representation, “preferably early in the representation.” Once the lawyer has so informed the insured, he need not consult the insured again before settling at the direction of the insured. If the lawyer knows that the insured

56(...continued)

insured, and inform the insured client that the insured has no responsibility for paying the retained attorney’s fees and expenses); Employers Cas. Co. v. Tilley, 496 S.W.2d 552 (Tex. 1973) (insurance defense counsel owes an unqualified duty to insured); APIE v. Garcia, 876 S.W.2d 842, 844 n.6 (Tex. 1994) (the “client” of insurance defense counsel is the insured, not the insurance carrier who hires the attorney and pays for his services); Bradt v. West, 892 S.W.2d 56, 77 (Tex. Ct. App. 1994) (retention of defense counsel does not create an attorney-client relationship between the insurance carrier and defense counsel). Cf. State Farm Mut. Auto. Ins. Co. v. Federal Ins. Co., 72 Cal. App. 4th 1422 (1999) (“an attorney-client relationship is formed between an insurance company and counsel it hires to defend an insured,” the insurance company is a client with respect to its ability to assert the attorney-client privilege, and it has an independent right, as a client, to bring a legal malpractice action against counsel hired to defend its insured).

57 See Ariz. Ethics Op. No. 94-03 (1994) (counsel appointed by insurer to defend an insured represents only the insured and not the insurer); Cal. Formal Ethics Op. No. 1995-139 (1995) (same); Colo. Formal Ethics Op. No. 91 (1993) (same); Colo. Formal Ethics Op. No. 107 (1999) (“[a]ttorneys ethically may not adhere to billing guidelines that unreasonably restrict their ability to perform services that are in the best interest of their clients, the insureds.”); Amendments to Rules Regulating the Fla. Bar, SC01-1509 (Fla. April 25, 2002) (mandatory disclosure rule requiring lawyers to present policyholders with a “Statement of Insured Client’s Rights,” which explains the relationship between the lawyer, the policyholder and the insurance company); Amendments to Rules Regulating the Fla. Bar, 838 So. 2d 1140 (Fla. 2003) (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. No. 02-7 (2002) (an attorney hired by an insurance company to defend an insured in an employment discrimination claim must provide a copy of the insured’s statement of client’s rights 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. No. 97-1 (1997) (primary duty of an attorney hired by insurance company is to the insured); Haw. Formal Ethics Op. No. 37 (1999) (same); Haw. Formal Ethics Op. No. 36 (same); Ill. Ethics Op. No. 98-08 (1999) (lawyer designated by insurance company to defend an insured party represents and has the same professional

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objects to a settlement, however, 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.  

Similarly, in Formal Ethics Opinion No. 01-421 (2001), the ABA Standing Committee on Ethics and Professional Responsibility concluded that a lawyer must not permit compliance with “guidelines” and other directives of an insurance company relating to the lawyer’s services to impair materially the lawyer’s independent professional judgment in representing the insured.

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57(...continued)

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 Op. Nos. 98-4 and 98-3 (1998) (same); Ky. Ethics Op. No. KBA E-410 (2001) (when an insurer provides the defense to an insured, the attorney represents the insured but not the insurer); Ky. Ethics Op. No. KBA E-331 (1988); Me. Ethics Op. No. 164; Miss. Ethics Op. No. 246; 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 should not be seen as 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. No. 99-18 (1999); Vt. Bar Ass’n Op. No. 98-7; Va. Ethics Op. No. 598 (1985) (although paid by the insurer, lawyer must represent insured with undivided loyalty); Wis. Ethics Op. No. E-99-1 (lawyers cannot accept restrictions or limitations on the defense of claims that are so financially or otherwise onerous that they would prevent lawyers from satisfying their ethical obligations to their clients).

58 See authorities cited at note 55, supra

59 See also Fla. Ethics Op. 97-1 (1997) (primary duty of an attorney hired by an insurance company is to the insured; attorney representing insured could not follow the insurance carrier’s instructions regarding filing a motion for summary judgment where these instructions would be contrary to the best interests of the insured); Mass. Ethics Op. No. 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; irrespective of the insurer’s directives, lawyer may not delegate to a paralegal tasks that cannot be performed completely by a paralegal); Neb. Formal Ethics Op. No. 00-1 (2000) (following insurance company guidelines that encroach on the lawyer’s exercise of independent professional judgment violates the Code of Professional Responsibility); Ohio Ethics Op. No. 2000-3 (2000) (it is improper for an insurance defense attorney to abide by an (continued...)
Such considerations also apply to a lawyer’s fee arrangements with an insurance company. For example, although a lawyer’s flat-fee arrangement with an insurance company is not per se unethical, the lawyer should ensure that such fee arrangements do not impair the lawyer’s ability to exercise independent judgment on behalf of the client.\(^{60}\)

\(^{59}\) (...continued)

insurance company’s litigation management guidelines in the representation of an insured when the guidelines directly interfere with the professional judgment of the attorney); Or. Formal Ethics Op. No. 2002-166 (2005) (lawyer cannot agree to comply with insurance defense guidelines where the guidelines will restrict his/her ability to perform tasks that, in the lawyer’s professional judgment, are necessary to protect insured’s interests); Tenn. Formal Ethics Op. No. 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); Tenn. Formal Ethics Op. No. 88-F-113 (1988) (absent insurer’s informed consent attorney may not accept conditions imposed by insurance company controlling the scope and conditions of pretrial discovery); Tex. Ethics Op. No. 542 (2002) (a lawyer is free to enter into a fee arrangement with an insurance company wherein the lawyer is compensated on a fixed fee basis for defined stages of representation in liability defense cases, but it is nevertheless duty of lawyer to ethically provide all necessary services to client and fee arrangement may not provide that the lawyer is to pay the costs and expenses of such litigation); Tex. Ethics Op. No. 533 (Sept. 2000) (lawyer retained by an insurance company to defend its insured, may not comply with litigation/billing guidelines—such as limits on the depositions to be taken, whether certain motions may be filed, whether to hire an expert in the case, whether particular depositions may be videotaped, and what legal research may be conducted—and means of periodic reporting to the insured which place restrictions which interfere with the lawyer’s exercise of his/her professional judgment in rendering such legal services to the insured/client); Utah Bar Op. No. 02-03 (2002) (the lawyer must not permit compliance with guidelines and other directives of an insurer to impair materially the lawyer’s independent professional judgment in representing the insured. If compliance with the guidelines will be inconsistent with the lawyer’s professional obligations, and if the insurer is unwilling to modify the guidelines, the lawyer must not undertake the representation).

\(^{60}\) See Fla. Ethics Op. No. 98-2 (1988) (a lawyer may accept a set fee per case from an insurance company to defend all of the insurer’s third party insurance defense work unless the lawyer concludes that her independent professional judgment will be affected by the arrangement); Conn. Ethics Op. No. 97-20 (1997) (flat-fee arrangement with insurer permissible; lawyer’s obligations to client remain); Ohio Ethics Op. No. 97-7 (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); Or. Ethics Op. No. 1991-98 (1991) (flat-fee arrangement with insurer permissible provided lawyer

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Insurance carriers typically will request that attorneys hired to represent the insured provide billing and other information concerning the insured client’s case either to the insurance company directly or to an outside auditor. The majority of ethics committees that have considered the issue have held that an lawyer may not ethically release an insured client’s confidential information, including detailed work descriptions, to the insurer or an outside auditing firm hired by insurer without appropriate disclosure and client consent.61 Several states

60(...continued)
fulfills ethical duties to insured); Tex. Ethics Op. No. 542 (2002) (a lawyer is free to enter into a fixed fee arrangement; even with such an arrangement, it is the lawyer’s responsibility to professionally and ethically render representation to the insured); Utah Ethics Op. No. 02-03 (2002) (although a flat-fee arrangement with an insurance company is not per se unethical, such arrangements are unethical if they would induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client’s interests). Contra America Ins. Ass’n v. Kentucky Bar Ass’n, 917 S.W.2d 568 (Ky. 1996).

61 See, e.g., ABA Formal Ethics Op. No. 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); Ala. Ethics Op. No. 98-02 (1998) (disclosure of detailed billing information to a third party auditor could present such a high risk to confidentiality that the lawyer should not even ask the client for consent); Alaska Ethics Op. No. 2006-3 (2006) (Lawyer may not send confidential defense bills, at the request of a client’s insurer, to an outside contractor without the informed consent of the insured); Alaska Ethics Op. No. 99-1 (1999); Ariz. Formal Ethics Op. 99-08 (1999); Cincinnati Ethics Op. No. 98-99-02; Colo. Formal Ethics Op. No. 107 (1999) (the risks posed to the insured by the disclosure of privileged materials to a third-party auditor triggers the attorney’s duty to seek the client’s informed consent prior to disclosure); Conn. Formal Ethics Op. No. 107 (1999); Conn. Informal Ethics Op. No. 00-20 (2000); D.C. Ethics Op. No. 290 (1999) (a lawyer may release insured client’s confidential information, including detailed work descriptions, to insurer or an outside auditing firm hired by insurer only upon appropriate disclosure and client consent; client’s consent to disclosure of such information to insurer does not infer consent to disclosure to insurer’s auditing firm); Fla. Ethics Op. No. 99-2 (1999) (attorney hired by insurance company to represent insured may not provide information relating to representation to an outside auditor at request of insurance company without specific consent of insured); Ga. Proposed Ethics Advisory Op. No. 99-R2 (2000); Haw. Formal Ethics Op. No. 36 (1999) (insured consent required for disclosure of confidential information to insurance company auditors); Idaho Formal Ethics Op. No. 136 (2000); Ind. Ethics Op. No. 98-4 (1998) (continued...)
(same); Iowa Ethics Op. No. 99-01 (1999); Ky. Ethics Op. No. KBA E-410 (2001) (an 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); Ky. Ethics Op. No. KBA E-409 (1999) (attorney must obtain fully informed consent from the insured before forwarding legal billing information to the insurer if the attorney knows the insurer will send the billing information to an outside auditor); Ky. Ethics Op. No. KBA E-404 (1998) (same); La. Ethics Op. (unnumbered) (same); Me. Ethics Op. No. 164 (1998) (same); Md. Ethics Op. No. 99-7 (1998) (same); Mass. Ethics Op. No. 2000-4 (2000) (lawyer may not submit legal invoices containing confidential client information to an outside auditor without insured’s express informed consent); Mass. Ethics Op. No. 1997-T53 (1997) (same); Miss. Ethics Op. No. 246 (1999) (same); Mo. Informal Ethics Op. No. 980188 (1998); Mo. Informal Ethics Op. No. 980124 (1998) (same); In re Rules of Prof’l Conduct and Insurer Imposed Billing Rules and Procedures, 2 P.3d 806 (Mont. 2000) (defense counsel cannot ethically submit their bills to a third party auditing service without waiving the attorney-client privilege); Neb. Ethics Op. No. 00-1 (2000) (lawyer violates the Code of Professional Responsibility by submitting a bill to an insurance company for representing its insureds which are often submitted to an outside auditor for review or which the lawyer is directed to submit directly to the auditor if such bill contains detail or information that constitutes confidences or secrets of the client); N.H. Ethics Op. No. 2000-01/5 (2000) (an attorney may not ethically submit detailed billing statements to outside auditors without prior consultation and informed consent of the client and an attorney cannot comply with a request by or requirement of an insurance company to seek consent for, or recommend, disclosure of billing statements to a third party auditor unless a disinterested attorney, based on the circumstances of the case, could conclude that the benefits of disclosure to the client would outweigh any potential risks; such circumstances “would rarely if ever, exist”); N.M. Formal Ethics Op. No. 2000-02 (2000); N.Y. State Ethics Op. No. 716 (1999) (a lawyer representing an insured may not submit legal bills to an independent audit company employed by the insurance carrier without the consent of the insured after full disclosure); N.C. 1998 Formal Ethics Op. No. 10 (1998) (informed consent required for disclosure to auditing company; because attorney represents insurer as well as insured, consent must be obtained according to the guidelines of Rule 1.7); Ohio Ethics Op. No. 2000-2 (2000) (attorney may not submit detailed legal bills to an outside audit company hired by an insurer without first obtaining client consent after full disclosure, including the risk that providing such information may waive the attorney-client privilege); Okla. Ethics Op. No. 314 (2000) (attorney may not agree to representation of client with knowledge that insurer will submit attorney’s invoices to an outside auditor, unless client’s informed consent is secured; among other problems, seeking informed consent to the audit procedure places the attorney in an impermissible conflict between attorney’s duty to maintain client’s confidence; attorney may not therefore, agree to the representation without violating the (continued...)

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ethics rules); Okla. Ethics Op. No. 309 (1998); Or. Formal Ethics Op. No. 2005-157 (2005) (attorney may not submit client’s bills to a third party audit service at the request of client’s insurance carrier. If conflict exists between insurer and client, attorney may not ask client’s permission to send bills; if no conflict exists, attorney may ask client for permission to send bills, but information revealed should go no further than necessary); Pa. Formal Ethics Op. No. 2001-200 (2001); Pa. Informal Ethics Op. No. 97-119 (1997) (same); Pa. Formal Ethics Op. No. 96-196 (1997); United States v. Keystone Sanitation Co., 899 F. Supp. 206 (M.D. Pa. 1995) (attorney billing statements privileged if they reveal litigation strategy or nature of services performed); R.I. Ethics Op. No. 99-17 (1999); S.C. Ethics Op. No. 02-01 (2002) (law firm representing insureds on behalf of insurance company may not permit insurance company to submit legal bills to independent software provider to aid in payment of invoice; if provider examines bills even through a computer program with no human intervention, there is a breach of confidentiality regarding the insured); S.C. Ethics Op. No. 97-22 (1997) (“Upon receipt of informed consent from the insurer as well as the insured, a lawyer would not be ethically prohibited from submitting his bill directly to a third-party auditing firm, unless the lawyer believes that doing so would substantially affect the representation.”); S.D. Ethics Op. No. 99-2 (1999) (counsel needs client’s informed consent to submit detailed legal bills to outside auditing companies of insurer); Tenn. Formal Ethics Op. No. 99-F-143 (1999), as clarified, 99-F-143(a) (1999) (attorneys are not allowed to include confidential information in billing and file reviews by auditing firms; neither are they allowed to enter into any agreement to represent an insured whereby the insurance company has the power to direct the manner of the attorney’s representation through any sort of directive); Tex. Ethics Op. No. 552 (2004) (Lawyer who has been retained by an insurance company to defend its insured may not furnish to the insurance company’s third-party auditor the lawyer’s fee statements via electronic mail: “A lawyer’s fee statement or invoice is confidential information, which the lawyer must protect, notwithstanding the payment of the lawyer’s fees by the insured’s insurance company. The delivery of confidential information to a third party, by any means or media, without the informed consent of the insured client violates Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct.”); Tex. Ethics Op. No. 532 (Sept. 2000) (without first obtaining the informed consent of the insured, a lawyer cannot, at the request of the insurance company paying his fees for the representation, provide fee statements to a third-party auditor describing legal services rendered by the lawyer for the insured); Utah Ethics Op. No. 98-03 (1998) (a lawyer may submit billing statements to an insurance carrier’s outside auditors only with the informed consent of the client; if the consent is based on the insurance agreement, the lawyer should review the agreement with the client and renew the client’s consent before sending any billing statements); Vt. Ethics Op. 98-7 (1998) (lawyer retained by an insurance company to represent a policy holder may not provide billings containing confidential information to an outside auditor employed by the insurance company except with the client’s informed consent, given after full disclosure as to the type of information which may be found in billing records); Va. Ethics Op. No. 1723 (1999) (continued...)
caution that such consent cannot be implied from the insurance contract between the insured and the insurance company.\footnote{62}

Even with consent, the lawyer should be careful about what information is included. For example, the lawyer should make sure that no confidential information revealed by the client is in the billing statement.\footnote{63}

\footnote{61}(...continued)

would be ethically impermissible for attorney to submit detailed information regarding insured’s case to an auditing firm absent informed consent; moreover, pursuant to attorney’s duty of loyalty attorney should not recommend that client provide such consent if disclosure would in some way prejudice client); Wash. Formal Ethics Op. No. 195 (1999) (attorney may not disclose confidential information in billing report without client’s consent; attorney may not ethically comply with requirement of third party to seek or obtain client’s consent to disclose such information; finally, attorney may not agree to billing guidelines without client consent if compliance will violate any confidences of client); W. Va. Ethics Op. No. LEI 99-02 (1999); Wis. Ethics Op. No. E-99-1 (1999) (a lawyer should not submit a bill for services that contains confidential information to an outside audit firm at the request of the insurer without the consent of the insurer).


\footnote{63} \textit{See} Ala. Ethics Op. 98-02 (1998) (the lawyer “should err on the side of non-disclosure”); D.C. Ethics Op. No. 223 (1991) (lawyer working for legal services agency that receives federal grant funding must refuse request of federal entity that monitors contract compliance to see confidential documents); \textit{HCA Health Servs. of Fla., Inc. v. Hillman}, 870 So. 2d 104 (Fla. Dist. Ct. App. 2003) (in regard to discovery for purposes of attorney fee award, counsel’s billing records contain privileged, attorney-client information); Pa. Ethics Op. No. 91-170 (court-appointed criminal defense lawyer asked to submit itemized bills for hourly work to the court administrator for approval may only disclose the general nature of the tasks performed and the time involved); Utah Ethics Op. No. 98-03 (before lawyer hired by insurance company 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); Washington Informal Ethics Op. No. 2081 (2005) (A lawyer may not reveal confidential information in client files in order to verify work billed to the funding authority). On the issue of waiver of the

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In some cases, the insurance company may assign its “in-house” counsel, who are full-time salaried employees of the insurance company, to defend its insured. Or it may engage attorneys and pay them on a salaried basis, providing all expenses necessary for them to operate an office that appears to the public to be an independent law firm. To whom does the attorney in these “captive” situations owe the ethical duty? Absent an actual conflict, an insurance company in-house staff attorney and/or a member of a “captive” law firm may ethically undertake representation of the insured only if: (1) the attorney reasonably believes that he/she can adequately represent the insured’s interests; (2) the insured consents after full disclosure and consultation; (3) the attorney’s professional independence in representing the insured is assured; (4) the attorney honors the duty of confidentiality owed the insured; and (5) the attorney is not assisting the insurer in conduct constituting the unlicensed practice of law.64

63(...continued)

attorney-client privilege in the context of required disclosure to third party auditors and reviewers, see 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. Mass. Inst. of Tech., 129 F.3d 681, 684-86 (1st Cir. 1997) (attorney-client privilege waived as to materials supplied to outside auditors despite the fact that the federal government required the submissions to the auditors as a condition to obtaining the work the institution was performing on behalf of the government); and discussion at Section III. A.3., infra (“Waiver of the Privilege”). Cf. Dibella v. Hopkins, 403 F.3d 102 (2nd Cir.), cert. denied, 126 S. Ct. 428 (U.S. 2005) (Attorney time records and billing statements are not privileged when they do not contain detailed accounts of the legal services rendered); Montgomery County v. Microvote Corp., 175 F.3d 296 (3d Cir. 1999) (attorney’s written communications with county official and his law firm’s billing records were protected by attorney client privilege because they revealed the nature of the services rendered); 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); Fidelity & Deposit Co. v. McCullouch, 168 F.R.D. 516, 523 (E.D. Pa. 1996) (same); Brennan v. Western Nat’l Mut. Ins. Co., 199 F.R.D. 660 (D.S.D. 2001) (portion of insurer's bill for legal fees was not protected by attorney-client privilege in insured's bad faith action against workers' compensation insurer; information in bill did little more than show client identity, fee amounts, an account number, and the general purpose of the work performed; however, portions of billing statements which reveal the motive of the client in seeking representation, litigation strategy, or the specific nature of the services performed, such as researching particular areas of the law, fall within the attorney-client privilege and was entitled to be redacted by insurer before billing statement was produced.).

64 See ABA Formal Ethics Op. No. 03-430 (2003) (insurance staff counsel ethically may undertake representations of both their employer and their employer’s insured in a civil lawsuit resulting from an event defined in the insurance policy so long as the lawyers inform all insureds (continued...)

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I. Conflicts Regarding Former Clients

Since the duty of confidentiality does not end with the attorney-client relationship, a lawyer has an ongoing duty of loyalty to a former client, including an obligation not to use confidential information about the former client in subsequent representation of another client. Moreover, after termination of a client-lawyer relationship, a lawyer may not represent another client in a substantially related matter. Thus, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. As a general rule, absent prior informed consent, a lawyer is disqualified if he formerly represented an adverse party in a matter “substantially related” to current representation.\(^65\)

\(^{64}\) (continued)


\(^{65}\) ABA MODEL RULES, Rule 1.9(a) and (c). *See also* Tex. Disciplinary Rules of Conduct 1.09(a)(3); N.M. Rules of Prof’l Conduct 16-109. The ABA Model Code has no direct counterpart, but Canon 9 (attorney should avoid even the appearance of impropriety) and Canon 4 (addressing confidentiality) are sometimes cited in addressing the problem. *See also* ABA/BNA Lawyers’ Man. on Prof’l Conduct, sections 51:207-51:223 (setting forth questions to consider in analyzing conflicts involving former clients); D.C. Ethics Op. No. 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 (continued...
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 nor 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); *In re Congoleum Corp.*, 426 F.3d 675 (3rd Cir. 2005) (Bankruptcy judge should not have granted debtor’s application to retain law firm as special insurance counsel, where firm had acted as counsel for the debtor pre-petition in negotiating settlement arrangements with asbestos injury claimants represented by attorneys who were co-counsel with the firm in insurance matters for those same claimants. The firm did not receive effective conflict waivers from the claimants it represented and, therefore, acted in violation of the Rules of Professional Conduct.). See also *Ark. Ethics Op. No. 2006-1* (2006) (Firm’s position as outside counsel for a city on employment issues would bar 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 consent and waive the conflict would appear to be invalid under Arkansas case law); *Fox Searchlight Pictures, Inc. v. Paladino*, 89 Cal. App. 4th 294 (2001) (company failed to establish that attorneys handling its former in-house counsel’s wrongful termination case possessed relevant confidential material acquired from their prior representation of company, so as to disqualify attorneys from representing former in-house counsel; although attorneys were formerly associated with law firm that provided company advice on intellectual property issues, among other things, there was no showing that attorneys had, through their former employment acquired confidential or privileged information that was material and substantially related to the present litigation); *State Farm Mut. Auto. Ins. Co. v. Federal Ins. Co.*, 72 Cal. App. 4th 1422 (1999) (attorney-client relationship was formed between insurer and counsel it hired to represent insured for purpose of determining subsequent disqualification motion; representation of clients with adverse interests was simultaneous, even though relationship with second insurer ended before motion to disqualified was heard, where simultaneous representation existed for period of three months); *Kroll & Tract v. Paris & Paris*, 72 Cal. App. 4th 1537 (1999) (public policy barred law firm, which had been hired by insurer to provide defense for insured under a full reservation of rights, and which was sued for legal malpractice by insured after law firm took on full defense at trial and lost, from asserting cross-claim for comparative equitable indemnity against second law firm, which had begun defense as insured’s personal counsel, and remained in case as insured’s independent Cumis counsel following first law firm’s reservation of rights); *Franzoni v. Hart Schaffner & Marx*, 726 N.E.2d 719 (Ill. App. Ct. 2000) (trial court did not err in disqualifying plaintiff’s counsel and his law firm in employment discrimination action; plaintiff’s counsel was formerly general counsel of defendant’s parent company and his considerable involvement in employment-related matters exposed him to confidential policies and practices regarding issues raised in plaintiff’s complaint and thus the present and former representations were shown to be substantially related); *Hickman v. Burlington Bio-Medical Corp.*, 371 F. Supp. 2d 225 (E.D. N.Y. (continued...))
The scope of a substantially related “matter” for purposes of this Rule may depend on the facts of a particular situation or transaction. The lawyer’s involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. 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 the subsequent representation involved a position adverse to the prior client.

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2005) (Court denied corporation’s motion to disqualify attorney for employee in suit seeking to recover commissions from the corporation where the subject matter of the attorney’s representation of the employee in the suit against the corporation is not substantially related to the subject matter of the attorney’s prior representation of the corporation, which consisted of matters involving collections, a breach of sales contract and recover of insurance on a burglary claim.); Jordan v. Philadelphia Housing Auth., 337 F. Supp. 2d 666 (E.D. Pa. 2004) (prior false arrest action against housing authority was substantially related to terminated police officer’s action alleging housing authority gave excessive force as pretextual reason for terminating officer in retaliation for exercising his speech rights, where adequate representation in prior case would have required investigation into housing authority officials’ knowledge of officer discipline and training, and such information would be relevant and helpful in instant matter).

Cf. Amparano v. Asarco, Inc., 93 P.3d 1086 (Ariz. Ct. App. 2004) (prior representation of corporation by attorney representing plaintiffs in putative class action against corporation alleging tortious environmental pollution did not require disqualification; attorney’s prior representation, which centered on water-related federal permitting and compliance matters, was not “substantially related” to current representation, a tort-based lawsuit focused on toxicology and causation of damages arising from alleged unchecked toxic air emissions, any conflict was too remote to raise “appearance of impropriety,” and corporation delayed raising issue of disqualification for at least two years after it became aware of possible conflict); Cal. Formal Ethics Op. No. 1998-152 (1998) (where attorney representing a new client in a matter adverse to a former client of the attorney’s law firm, should—but is not required to—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”).


67 Hempstead Video, Inc. v. Village of Valley Stream, 409 F.3d 127 (2nd Cir. 2005) (Magistrate judge correctly ruled that defendant’s counsel was not disqualified by reason 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

(continued...)
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); 
counsel’s representation of separate entity related to defendant union on unrelated matters does
not require disqualification; nor does fact that attorney was general counsel of union 10 years
representation of plaintiff in discrimination and sexual harassment suit against employer did not
create conflict of interest with former client, whom attorney represented in a similar suit against
employer, and thus disqualification was not warranted, although employer argued that if former
client were called as a witness, he would be forced to violate confidentiality provisions of
settlement agreement; former client could properly be called as witness, attorney had no
incentive to elicit confidential information, disqualification would impose substantial hardship
(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); Bieter Co. v. Blomquist, 132
F.R.D. 220, 224 (D. Minn. 1990) (law firm which had formerly represented joint venture not
disqualified from representing opposing party in subsequent suit against two of venture’s
constituents); N.Y. City Ethics Op. No. 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); Hamrick v. Union Tp., 79 F. Supp. 871 (S.D. Ohio 1999) (when an individual
client consulted an attorney once or twice, discussing possible witnesses and strategies for a
possible sexual harassment claim, the lawyer’s firm was disqualified from handling a later
lawsuit against the individual in a substantially related matter, even though the lawyer did not
recall any specifics of the conversation); In re Roseland Oil & Gas, Inc., 68 S.W.3d 784 (Tex.
Ct. App. 2001) (attorney representing current clients in oil and gas lease litigation involving
former clients exposed former clients to serious risks, which warranted attorney’s
disqualification; attorney accused one former client of “fabrication,” potential criminal liability
of client was addressed in documents filed by attorney, and former clients bore the risk that
statements made in confidence to their former attorney would be used against them). Compare
Majestic Steel Serv. v. Disabato, 1999 WL 961465 (Oct. 21, 1999) (trial court did not abuse
discretion in disqualifying attorney from representing former employee in action involving
covenant not to compete where attorney represented employer as outside counsel on a variety of
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Note, however, that disqualification does not depend on the quantity or quality of the former representation.68

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.69

67(...)continued

matters, including advice concerning employee agreement which contained covenant not to compete similar to the one at issue).

68 See, e.g., Lane v. Sarfati, 676 So. 2d 475 (Fla. Dist. Ct. App. 1996) (attorney who provided theatrical manager with addendum to standard form contract she used in her business disqualified from representing manager’s clients in suit involving interpretation of form; it is irrelevant that addendum was lifted from a form book and that attorney did not provide manager with any advice other than that she should use form).

69 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); In re Epic Holdings, Inc., 985 S.W.2d 41 (Tex. 1998) (three lawyers in two firms representing plaintiffs must be disqualified under Rule 1.09(a) in pending action because former firm represented defendants in matters substantially related to the issues in the current lawsuit and that counsel is questioning the validity of the work the former firm did for defendants; firms disqualified under Rule 1.09(b), which prohibits all the lawyers in a firm from representing a client that any one of them could not represent because of Rule 1.09(a)); National 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); Henderson v. Floyd, 891 S.W.2d 252 (Tex. 1995) (associate moved from one law firm to another law firm and his new firm was disqualified because, while at former firm, associate had seen the files related to a suit and may have handled them, may have had involvement in the suit, and attended “file review” meetings at former firm in which suit was discussed; once matters shown to be substantially related, former client entitled to conclusive presumption that confidences and secrets were imparted to former attorney); Texaco, Inc. v. Garcia, 891 S.W.2d 255 (Tex. 1995) (continued...)
(attorney representing plaintiffs in environmental lawsuit disqualified where he previously represented Texaco while at another firm and while with his other firm had actively participated in defending Texaco in another environmental contamination lawsuit); In re Sharplin, 2006 WL 2167179 (Tex. Ct. App. August 3, 2006) (Disqualification of law firm representing plaintiff in action against former president of underground fuel tank testing company was warranted, where attorney, who worked at law firm representing plaintiff, had obtained confidential information from president in a previous case in which he represented company that concerned matters of fraud that were substantially related to the matters in plaintiff’s case.); Tex. Ethics Op. No. 527 (Oct. 1998) (law firm composed of former members of another law firm that represented and now represents one party to litigation may represent an opposing party in that litigation without violating Rule 1.09(a); although members of the new firm personally handled matters for the party in the former firm, none of those matters involved a dispute similar to the present lawsuit). See also Ala. Ethics Op. No. 00-03 (Oct. 18, 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); Adams v. Aerojet-General Corp., 86 Cal. App. 4th 1324 (2001) (firm-changing attorney that did not personally represent the former client is not automatically disqualified on the basis of imputed knowledge of confidential information, from a case involving his former client or firm; disqualification should not be ordered where there is no reasonable probability that the firm-switching attorney had access to confidential information while at his or her former firm that is related to the current representation); Cal. Ethics Op. No. 1998-152 (1998) (Lawyer A in firm consulted by client over period of weeks about merits of lawsuit 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); City of Waukegan v. Martinovich, 2005 U.S. Dist. LEXIS 34528 (N.D. Ill. Dec. 16, 2005) (In action by city against defendant landowner relating to contaminants on defendant’s property, attorney for defendant should be disqualified where she previously worked for the city on the same redevelopment project from which the current lawsuit arose, and she specifically worked with the property owners, including defendant, during the course of her representation of the city.); Smith & Nephew, Inc. v. Ethicon, Inc., 98 F. Supp. 2d 106 (D. Mass. 2000) (law firm disqualified from representing employer, which was asserting ownership interest in patents held by former employees, where attorney who had been hired by employees 15 years earlier to negotiate employment agreements, and who had drafted contractual provisions determinative of current dispute, was currently of counsel with firm); Ferguson v. DDP Pharmacy, Inc., 621 S.E.2d 323 (N.C. App. 2005) (Attorney entered appearance for pharmacy in action against pharmacy and several of its employees, in which plaintiff alleged that the employees had wrongfully identified him as the person who attempted to pick up a forged prescription for a controlled substance, (continued...
However, even if there are no shared confidences, the substantial relationship between the two representations is itself sufficient to disqualify the attorney.  

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resulting in criminal charges which were later dismissed. Earlier, plaintiff had consulted with a lawyer in the same firm as the lawyer representing the pharmacy, in connection with the criminal charges. Disqualification of the firm representing the pharmacy affirmed, since the information the plaintiff shared with the lawyer was confidential and related to the same matter for which the law firm later represented the pharmacy.); N.C. 2003 Formal Ethics Op. No. 14 (Oct. 21, 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); Vt. Ethics Op. No. 2001-03 (2001) (an attorney who represented retailer in the bankruptcy area from 1995-99 cannot represent individuals seeking Chapter 7 representation who owe money to the retailer, where the attorney has no consent for such representation from the retailer and the retailer has shared confidential information with the attorney); Pepper v. Little Switzerland Holdings, Inc., 2005 U.S. Dist. LEXIS 14453 (D. V.I. July 6, 2005) (In wrongful discharge and retaliation action, plaintiff counsel’s prior work for defendant employer—a short-term research project regarding the state of the law on overtime compensation for commissioned salespersons—was not related to the claims raised by the plaintiff in the present case, and there was no evidence that counsel had obtained information about the employer’s policies and practices as a result of that work. Therefore, disqualification of plaintiff’s counsel was not warranted.). But see Edwards v. 360 Degrees Communications, 189 F.R.D. 433 (D. Nev. 1999) (under Nevada law, an attorney who was not directly involved in his firm’s representation of client cannot be imputed with actual knowledge of confidential information once the attorney resigns from the firm); N.J. Ethics Op. No. 686 (Nov. 23, 1998) (neither former associate at plaintiffs’ personal injury firm that represents medical providers in assigned claims against insurance carriers against his former clients in cases involving assigned PIP claims, but they may represent insurance carriers 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. In re George, 28 S.W.3d 511 (Tex. 2000) (when counsel is disqualified due to prior representation of opposing party in substantially related matter, once successor counsel moves for access to the work product or the opposing party moves to restrict access, the trial court should order the disqualified attorney to produce an inventory of work product describing the type, subject matter and nature of the work; court should examine the inventory and, if necessary, inspect the work product in camera; if the court is still unsure, the presumption of confidentiality is not rebutted and the material cannot be turned over to successor counsel).

70 Trone v. Smith, 621 F.2d 994, 998 (9th Cir. 1980). See also In re Am. Airlines, Inc., 972 F.2d 605 (5th Cir. 1992) (firm which formerly gave legal advice to an adverse party in a (continued...)
1. Former Human Resources Managers or Employer Representatives as Plaintiffs

In the labor and employment context, the issue of disqualification may arise where the lawyer gives advice in the course of the firm’s representation of a corporate employer to managerial employees who later bring claims against the employer. For example, in Cole v. Ruidoso Municipal Schools, the plaintiff, a former principal suing a school district in a sex discrimination and Equal Pay Act case, claimed that the school’s law firm should be disqualified because as principal she had consulted with attorneys from the firm regarding dismissal of several district employees and other “sensitive personnel matters” and acted on their advice. The Tenth Circuit held that the district court properly refused to disqualify the firm, since plaintiff only consulted with the firm for the purpose of carrying out her duties as principal and thus the attorney-client relationship was not with her individually, but as an agent of the school district.
being sued for retaliation in violation of first amendment rights is not entitled to an order disqualifying counsel for the district and the other co-defendants or blanket waiver of the attorney-client privileged communications between her and such counsel in order to advance an advice of counsel defense; although superintendent was occasionally provided legal advice by the district’s counsel in matters concerning the plaintiff that are at issue in the litigation, all advice was given to the superintendent solely in the context of her role as superintendent and not concerning her personal liability and thus the privilege is exclusively vested in the district’s board and superintendent is not authorized to waive the privilege without the board’s consent); Polovy v. Duncan, 702 N.Y.S.2d 61 (App. Div. 2000) (prior relationship between former executive director of not-for-profit corporation and lawyer who negotiated director’s leave and resignation on behalf of corporation would not have led a reasonable person to have concluded that lawyer was her “personal attorney” such that lawyer’s conduct during negotiations created a conflict of interest; there was no retainer agreement between the director and the lawyer with respect to any prior matter in which the lawyer may have assisted the director and such assistance apparently was in furtherance of the corporation’s interests); Talvy v. American Red Cross in Greater N.Y., 205 A.D.2d 143 (N.Y. App. Div. 1994) (former personnel director of defendant not entitled to disqualify defendant’s lawyer involved in prior cases for defendant; even though personnel director was involved in prior litigation discussions and confidential communications, he had no reason to believe his communications with lawyer would be kept from his employer); April Broad., Inc. v. Smith, 1996 WL 137487 (S.D.N.Y. Mar. 27, 1996) (principal of close corporation did not establish personal attorney-client relationship with corporate counsel); Wayland v. Shore Lobster & Shrimp Corp., 537 F. Supp. 1220, 1223 (S.D.N.Y. 1982) (“[I]t is clear that the firm was representing the corporation and thus Wayland could not have reasonably believed or expected that any information given to the firm would be kept confidential from the other shareholders or from the corporation as an entity.”); Nilavar v. Mercy Health Sys., 143 F. Supp. 2d 909 (S.D. Ohio 2001) (motion to disqualify denied where plaintiff provided no evidence that he reasonably believed attorney and attorney’s firm represented him individually; rather, the evidence showed that the plaintiff believed his communications arose as a shareholder of the corporation attorney and the attorney’s firm represented, not as an individual); Clark Capital Mgmt. Group, Inc. v. Annuity Investors Life Ins. Co., 149 F. Supp. 2d 193 (E.D. Pa. 2001) (implied attorney client relationship did not arise between defendant and prospective co-counsel, by virtue of series of brief telephone conversations between defendant’s attorney and prospective co-counsel, and thus no conflict of interest arose from fact that prospective co-counsel’s firm later was retained by plaintiff in the same action; attorney initiated calls to inquire into prospective co-counsel’s interests and availability, and no offer to retain was made or accepted); Cf. S.C. Ethics Op. No. 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 may have to obtain client’s consent only if representation is in a related case and is materially adverse (continued...)
In circumstances where the employer’s attorney previously represented the employee individually, albeit jointly with his former employer in prior litigation, some courts have rejected disqualification, holding that the former employee could not reasonably have assumed that the attorney would withhold information from the employer.\(^\text{73}\)

Notwithstanding cases like *Cole*, some courts and ethics opinions have held that an attorney-client relationship may be implied by conduct, especially where the lawyer was not sufficiently clear to the individual corporate employee concerning who the lawyer represented and where the employee disclosed personal confidential information to the lawyer.\(^\text{74}\)

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\(^\text{73}\) *Allegaert v. Perot*, 565 F.2d 246, 250-51 (2d Cir. 1977). *See Guerilla Girls, Inc. v. Kaz*, 2004 WL 2238510 (S.D.N.Y. Oct. 4, 2004) (motion to disqualify granted where attorney for defendant and proposed defendant-intervenors, all of whom claim to be current or past members of Guerilla Girls, an unincorporated association, because of her prior representation of the plaintiffs and the Guerilla Girls; because an unincorporated association is not a legal entity separate from the person who compose it, representation of the Guerilla Girls as a group is tantamount to her representation of each of its members).

\(^\text{74}\) *See, e.g., Home Care Indus., Inc. v. Murray*, 154 F. Supp. 2d 861 (D.N.J. 2001) (law (continued...)

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firm was disqualified from representing corporation in lawsuit against corporation's former chief executive officer (CEO) under New Jersey Rules of Professional Conduct; firm and CEO had shared implied attorney-client relationship while CEO was employed by corporation, since 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); *IBM Corp. v. Levin*, 579 F.2d 271, 281 (3d Cir. 1978) (law firm that provided labor law advice to corporation for several years held to be in an ongoing attorney-client relationship with corporation for purposes of disqualification motion, even though firm provided legal services on a fee for services basis rather than under a retainer agreement and was not representing the corporation at the time of the motion); *Advanced Mfg. Techs. Inc. v. Motorola, Inc.*, 2002 WL 1446953 (D. Ariz. July 2, 2002) (implied attorney-client relationship was created between non-party retired employee of defendant and defendant’s counsel, because employee had voluntarily appeared at counsel’s office and communicated freely in preparation for deposition, and at deposition itself employee clearly stated that counsel represented him and counsel, by silence, acquiesced; protective order rather than disqualification appropriate because counsel may have been intentionally misled by employee that employee’s interests were not adverse to defendant’s, and counsel had been representing defendant for three years and thus balance of equities weighed against disqualification); *Goldberg v. Warner/Chappell Music, Inc.*, 125 Cal.App.4th 752 (2005) (Goldberg, a former in-house counsel at Warner/Chappell, filed a discrimination action against her former employer and moved to disqualify the law firm representing Warner/Chappell on the ground that a former member of the law firm had given informal advice to Goldberg concerning the terms of her employment contract with Warner. The court of appeals found that, despite the informality, an attorney-client relationship existed between Goldberg and the former member of the law firm. However, the court found that this informal attorney-client relationship did not warrant disqualification of law firm in present action, since the former member had left the firm three years prior to Goldberg bringing the lawsuit and had no opportunity to inadvertently pass on confidential information to others at the firm.); *Maturi v. McLaughlin Research Corp.*, 2001 WL 1669254 (D.N.H. Dec. 31, 2001) (plaintiffs moved to disqualify defendant’s law firm on ground that one of the plaintiffs met with the firm in search of legal representation; court held attorney-client relationship may be implied by the parties’ conduct and held that evidentiary hearing was required to decide whether plaintiff disclosed confidential information to the attorney); *Montgomery Acad. v. Kohn*, 50 F. Supp. 2d 344 (D.N.J. 1999) (attorney disqualified from representing academy in suit to recover from its former director in an investment made in a worthless Ponzi scheme, after director provided attorney with confidential information regarding her investment of the academy’s funds in the scheme; at the time of the disclosure, there was an implied attorney-client relationship between the attorney and the insurer); *Mays v. Dunaway*, 2005 Ohio App. LEXIS 1540 (Ohio Ct. (continued...)}
Conversely, where the lawyer makes clear the interests that the firm represents, the courts have not implied an attorney-client relationship.75

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App. April 1, 2005) (Although attorney never met or communicated with the seller, his representation of her interests in the zoning matter created a reasonable belief in the seller’s mind that he was her attorney, resulting in an implied attorney-client relationship); Vt. Ethics Op. No. 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 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. Under these facts, the lawyer may not then inform the institutional client of the telephone call or its content).

75 See, e.g., Koo v. Rubio’s Restaurants, Inc., 109 Cal. App. 4th 719 (2003) (counsel’s declaration, during discovery dispute in manager’s class action suit against restaurant company, that firm represented both company and its managers, such that plaintiff-managers could not contact company’s managers ex parte, did not create an attorney-client relationship between firm and managers individually, but rather indicated firm represented managers in their capacity as managerial agents, and thus firm could not be disqualified for representing parties with adverse interests; firm did not agree to represent managers individually, and counsel’s unilateral action could not create attorney-client relationship); Fox v. Pollack, 181 Cal. App. 3d 954, 959 (1986) (attorney avoided formation of an attorney-client relationship by disclaiming relationship in advance of discussion; individuals’ states of mind, “unless reasonably induced by representations or conduct of respondent, are not sufficient to create the attorney-client relationship; they cannot establish it unilaterally”); SEC v. Save The World Air, Inc., 2005 U.S. Dist. LEXIS 8572 (S.D. N.Y. May 9, 2005) (No conflict of interest existed to require disqualification of law firm representing corporation in action by the SEC against the corporation and its chairman where the corporation has filed a cross-claim against the chairman. The record was barren of any evidence that the firm represented the chairman in his individual capacity or that the chairman reasonably believed it to be so; there was no showing that the chairman communicated with the firm on matters that did not concern the corporation or its general affairs, or that the chairman sought and received personal legal advice from the firm.). Compare In re Grand Jury Subpoena, 415 F.3d 333 (4th Cir. 2005), cert. denied sub nom., Under Seal v. United States, 126 S. Ct. 1114 (2006) (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 (continued...)
2. Former Outside Counsel for Employer Bringing Claim on Behalf of Plaintiffs

The disqualification issue also may arise where the outside counsel or law firm that previously represented the employer with respect to an employment claim brought by one employee seeks to later bring a claim on behalf of another employee against the same employer. Similarly, an individual attorney who assisted in the defense of an employer with respect to a wrongful discharge or discrimination claim when she was an associate of a “management-side” firm may leave that firm to join an “employee-side” firm and seek to assist the employee-side firm in its representation of a different employee alleging similar claims against that employer. The attorney (and the firm) may well be disqualified under such circumstances.76

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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. Prior to 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). Cf. D.C. Ethics Op. No. 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.); Ex parte Smith, ___ So. 2d ____, 2006 WL 1304943 (Ala. May 12, 2006) Outside directors of corporation that was in bankruptcy were free to form their own attorney-client relationship with law firm, to which corporation was not a party, regarding their individual personal rights and liabilities stemming from various matters relative to the corporation, and, thus, outside directors could assert attorney client privilege to prevent disclosure to corporation’s bankruptcy trustee of documents that contained attorney communications.)

76 See Sorci v. Iowa Dist. Court, 671 N.W.2d 482 (Iowa 2003) (former executive director of non-profit organization which provided legal representation to children had “substantial

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76(...continued)
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 non-profit organization once director left organization); 
Conley v. Chaffinich,431 F. Supp.2d 494 (D. Del. 2006) (In state police captain’s employment discrimination suit against operational commander, opposing counsel’s representation of commander violated professional conduct rule prohibiting counsel’s representation of client on a matter substantially related to his representation of former client where current client’s interests are materially adverse to the interests of the former client; opposing counsel’s prior work for captain was for the purpose of general legal advice and representation in state police disciplinary proceedings, and in defending commander on gender discrimination claim based on failure to promote captain, opposing counsel might have acquired information from captain in the earlier representation that was related to the subject matter of the discrimination lawsuit. However, employee waived her objection by not raising the disqualification issue until nine months after the potential conflict of interest should have been, and was, apparent to her and her counsel.); 
Walker v. Exxon Corp., No. H-94-2006 (S.D. Tex. Jan. 12, 1995) (attorney and her firm representing plaintiff in Title VII and wrongful discharge suit against employer disqualified because she previously represented employer as associate in similar claims brought by another employee; matters are substantially similar, and attorney obtained confidential information during former representation); 
Farris v. Fireman’s Fund Ins. Co., 119 Cal. App.4th 671 (2004) (Attorney and his law firm were disqualified from representing insured and others in lawsuit alleging bad faith and breach of insurance contract against insurer, on ground that attorney had formerly represented insurer and had access to confidential information material to the action; a substantial relationship existed between the subjects of the two representations, inasmuch as the attorney acted as a coverage attorney for insurer for 13 years, he actively participated in the representation provided to insurer with respect to coverage and bad faith cases, and coverage disputes were substantially related to bad faith actions because both turned on whether or not there was coverage under the terms of the policy. Entire law firm was subject to disqualification absent some showing that an ethical shield was created, and no such showing appeared on the record); 
ViChip Corp. v. Lee, 2004 U.S. Dist. LEXIS 24968 (N.D. Cal. Dec. 3, 2004) (Katzman and his former firm, Pillsbury Winthrop, represented ViChip during the time that Lee was its chief executive officer. In his capacity as ViChip’s counsel, Katzman filed all of ViChip’s incorporation papers, discussed corporate matters with Lee (in his capacity as ViChip’s CEO) and he was the administrative billing partner for the legal work performed by Pillsbury in preparing ViChip’s provisional patent application, although Katzman did no actual work on that (continued...)
application and billed little time on ViChip-related matters. After Lee was fired from ViChip, Katzman sent a letter to ViChip informing it that he and Pillsbury would no longer represent it. Some time after that, Katzman left Pillsbury and joined the Hopkins firm, which represented Lee in his action against ViChip. Katzman never sought ViChip’s consent before agreeing to represent Lee in the dispute. The district court disqualified Katzman and the firm, finding that “[s]ince the information about ViChip’s corporate structure was material to Katzman’s incorporation of the company, and ViChip’s corporate structure is also material to the evaluation and prosecution of the current dispute, there is a substantial relationship between the two matters.”; *Morrison Knudsen Corp. v. Hancock, Rothert & Bunshof, L.L.P.*, 69 Cal. App. 4th 223 (1999) (law firm’s representation of a corporation and its insurance underwriters in matters involving the corporation, which allowed the firm to acquire confidential information about the corporation, disqualifies it from representing a client in a related dispute with the corporation’s subsidiary); *Freiburger v. J-U-B Engineers, 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 employee in declaratory judgment action regarding covenant not to compete, so as to have required attorney’s disqualification; alleged confidential information was simply 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 non-compete agreements, employment policies, or former employee’s employment relationship); *Arctic Cat, Inc. v. Polaris Indus. Inc.*, 2004 WL 29441110 (D. Minn. Dec. 20, 2004) (Motion to disqualify lawyers for Arctic Cat in patent infringement action against Polaris denied, despite the fact that Arctic Cat’s present lawyers had previously done a variety of representations, including intellectual property work, for Polaris, including providing legal advice about responding to and designing around patents of their “arch enemy,” Arctic Cat, and almost 200 lawyers at the firm worked on various legal issues for Polaris and collected over $10 million in fees over the course of three years. There was no evidence that the lawyers “did any work for Polaris relating to the fender-storage technology at issue in the current litigation, or work on the . . .Accused Products or did any patent work on this technology.” Moreover, during its representation of Polaris, no one at the law firm accumulated any confidential, proprietary, or trade secret information bearing on the legal and factual issues relating to the present litigation; “any information the law firm did gain concerning Polaris’ operations was of a nature which could be generally known after the conduct of routine discovery.”); *Henry v. Delaware River Joint Toll Bridge Comm’n*, 2001 WL 1003224 (E.D. Pa. Aug. 24, 2001) (attorneys disqualified from representing plaintiff employees against commission where one of its attorneys while as an associate for a previous law firm represented bridge commission in employment relations matters and was publicly identified as commission’s labor counsel); *Panebianco v. First Unum Life Ins. Co.*, 2005 U.S. Dist. LEXIS 7314 (S.D. N.Y. April 27, 2005) (Disqualification of firm representing claimant against insurer required where firm hired an attorney that had represented insurer’s parent company in several cases, most of (continued...)
which related to entitlement to benefits under long-term disability policies. The attorney had regularly discussed trial and settlement strategy with the parent’s in-house counsel. Even though the attorney had since left the law firm, disqualification was required because the attorney had access to relevant privileged information during his prior representation and there was a substantial relationship between the issues in claimant’s complaint and the attorney’s prior representation against virtually identical allegations. Although the firm put in place screening procedures, it actively undermined those efforts by assigning the attorney to cases substantially related to his prior representation. Because the present case was filed while the attorney was at the firm and was continuing to actively participate in cases involving the parent company, the law firm had to be disqualified from representing the claimant.); Lott v. Morgan Stanley Dean Witter & Co. Long-Term Disability Plan, 2004 U.S. Dist. LEXIS 25682 (S.D. N.Y. Dec. 23, 2004) (Plaintiff sued defendant insurer, challenging her denial of her claim for long-term disability benefits based on the group disability policy issued by insurer to plaintiff’s employer. The insurer moved to disqualify the plaintiff’s attorney (Heck) and his law firm because of Heck’s prior representation of the insurer’s parent company. Before recently joining the firm, Heck was an associate and, later, a named partner in a firm where he “exclusively” represented “life and disability insurance companies in direct actions brought against them by policyholders seeking life and/or disability benefits,” and represented the insurer’s parent company in over 350 actions including one action where the insurer was the primary client and Heck was “lead counsel.” The court disqualified Heck and his firm. Heck’s former representation of the insurer and its parent company was substantially related to the present representation of the plaintiff because the plaintiff alleged a broad pattern of the insurer’s illicit conduct to inhibit claims and Heck had maintained an “advanced, highly developed understanding” of the insurer’s claim procedure while representing it in ERISA claims. Given Heck’s prior representation and his affiliation with the firm that did the bulk of the insurer’s legal work, he was more likely than not to have had access to privileged information in the course of his representation. Heck’s firm was also disqualified because neither it nor Heck had implemented screening procedures); Edwards v. Gould Paper Corp. Long Term Disability Plan, 352 F. Supp.2d 376 (E.D. N.Y. 2005) (Attorney’s prior representation of insurance company disqualified him and his current law firm from representing plan participant in action under ERISA to recover benefits under long term disability policy issued by company, where attorney’s representation of company lasted several years, during which time he gained intimate knowledge of company procedures and policies regarding payment and settlement of disability claims, action was commenced before he left firm that represented company, and current firm made no effort to implement screening procedures in case. [Note: The attorney in this case, Heck, was also disqualified on substantially similar grounds in Lott, supra.]); Ullrich v. Hearst Corp., 809 F. Supp. 229 (S.D.N.Y. 1992) (attorney who had represented corporate client on labor matters for over 20 years prohibited from representing former employees of corporation in retaliatory discharge, severance, and sex discrimination cases; by virtue of background attorney knew confidential information regarding (continued...)

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corporate toward acting in a retaliatory fashion, the general criteria on which performance levels of employees were judged, and corporate management’s assessment of general vulnerability on labor claims, which could be put to use in current litigation); *State ex rel. Cosenza v. Hill*, 607 S.E.2d 811 (W. Va. 2004) (The Jacobs filed a civil action against Bucklew in circuit court. At that time, Bucklew was represented by attorneys for Steptoe & Johnson. Wolf was associated with Steptoe at this time but alleged that he did not work on the Jacobs’ case or otherwise obtain any knowledge of the case from colleagues. Thereafter, Wolf terminated his employment with Steptoe and became associated with the Cosenza law firm two months later. The Jacobs discontinued their representation with their prior counsel and retained the Cosenza firm to represent them. While preparing the case for trial, Cosenza asked Wolf to assist him. In response to this addition to the Jacobs’ trial team, Bucklew moved to disqualify both Wolf and the Cosenza firm based upon Wolf’s prior employment with Steptoe at the time that the firm represented Bucklew in the Jacobs case. Disqualification was warranted; Wolf presumably obtained confidential information regarding his former firm’s representation of the defendant based on the size of the law firm in which the attorney previously worked (a six lawyer branch office); the close proximity of Wolf’s former office to those of the Steptoe & Johnson attorneys who directly work on Bucklew’s defense; and the spirit of collegiality associated with a law firm of that size (the parties conceded that it was common practice of the attorneys in that office to occasionally meet to discuss the cases on which they were working). Moreover, Wolf’s, Cosenza’s and the Cosenza law firm’s continued representation of the Jacobs against Bucklew raised the appearance of impropriety that supported disqualification, based on the above-described facts and the passage of a relatively short period of time between Wolf’s departure from the Steptoe firm and his new association with Cosenza and the Cosenza firm (Wolf joined the Cosenza law firm two months after leaving Steptoe and began working on the Jacobs’ case within a year following his arrival at Cosenza). See *EEOC v. Luby’s Inc.*, 347 F. Supp.2d 743 (D. Ariz. 2004) (EEOC filed action alleging that Luby’s had discriminated against employee on the basis of her disability. The employee, represented by lawyers from the Arizona Center for Disability Law (ACDL), intervened and moved to disqualify the attorney and her law firm from representing Luby’s in the case based on the attorney’s service on the ACDL board, which included service on the ACDL Legal Committee, which reviews litigation proposals. The court held that the attorney’s membership on the ACDL board did not create a conflict of interest warranting disqualification. Even though the attorney may have had general access regarding ACDL’s litigation strategies and likely settlement position prior to ACDL’s filing of the employee’s case, the attorney resigned from the board, the attorney had never represented the employee, the attorney acquired no confidential
3. Former In-House Counsel Bringing Claim on Behalf of Plaintiffs Against the Former Employer

The same former client disqualification issues arise when an in-house lawyer for a corporation or organization leaves and attempts to represent clients against his/her former employer. Some courts and ethics opinions considering this issue have applied the same former client rules to determine whether the former in-house attorney’s work for the employer

(...continued)

information about the employee or her claims while serving on the board (although she received an email containing such information, she deleted the email without reading it and notified ACDL that she should receive no such information), and Luby’s was aware of the attorney’s relationship with ACDL and agreed to retain her. The attorney’s membership on the board of a non-profit public-interest law firm did not create an attorney-client relationship between the attorney and individuals represented by the public-interest firm in litigation); Valdez v. Pabey, 2005 U.S. Dist. LEXIS 38311 (N.D. Ind. Dec. 27, 2005) (Law firm that had represented city for 27 years on a variety of matters including employment and hiring issues and was subsequently replaced after a change in city administration was not disqualified from representing plaintiff former employee in employment-related matter against the city and city officials; since the new city administration would have different policies and strategies than when the law firm represented it, it was unlikely that the firm would have learned anything confidential while representing the city that would be relevant to the current case). Accord: Ramos v. Pabey, 2005 U.S. Dist. LEXIS 38312 (N.D. Ind. Dec. 27, 2005); Briggs v. Aldi, Inc., 218 F. Supp. 2d 1260 (D. Kan. 2002) (attorney’s earlier representation of employer in defending sex discrimination and harassment suit filed by former assistant manager did not warrant disqualification from representing former employee in her race discrimination action against employer; two cases were not substantially related since the employees worked at different stores and made different claims, and different decision-makers, witnesses and documents were involved; similarly, attorney’s prior representation of employer in workers’ compensation and real estate matters did not warrant disqualification absent showing of relationship between factual contexts of cases); Raiola v. Union Bank of Switz., 230 F. Supp. 2d 355 (S.D.N.Y. 2002) (disqualification of employer’s counsel not required based on counsel’s representation of employee’s witness in a prior matter, where no evidence that counsel had access to privileged information relating to the prior representation of the witness, or that the information used to impeach witness was in any way privileged); Pa. Informal Ethics Op. No. 2006-06 (2006) (lawyer who previously provided advice and representation to university on employment matters may represent union in relation to matters between the union and the university, where the lawyer work for the university had been reduced seven years previously and phased out entirely five years previously, and there was a complete change in senior leadership whereby all of the persons the attorney dealt with were retired or otherwise moved into other positions, and the collective bargaining agreement with which the lawyer was familiar had been replaced by a successor agreement).
warranted disqualification.77

77 See ABA Formal Ethics Op. No. 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 averse 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); Franzoni v. Hart Schaffner & Marx, 726 N.E.2d 719 (Ill. App. Ct. 2000) (trial court did not err in disqualifying plaintiff’s counsel and his law firm in employment discrimination action; plaintiff’s counsel was formerly general counsel of defendant’s parent company and his considerable involvement in employment-related matters exposed him to confidential policies and practices regarding issues raised in plaintiff’s complaint and thus the present and former representations were shown to be substantially related). Babineaux v. Foster, 95 FEP Cases (BNA) 1264 (E.D. La. 2005) (Previous employment of employee’s counsel as assistant city attorney did not require disqualification in employee’s discrimination lawsuit against the city. Although the employee had filed a grievance while the attorney was employed with the city, the attorney’s cursory involvement in the grievance by being copied on two letters with respect to the grievance did not rise to the level of personal and substantial participation which would require disqualification, and the attorney possessed no confidential information that could be used to the material disadvantage of the city.); Franklin v. Clark, ___ F. Supp.2d ____, 2006 WL 2819820 (D. Md. Oct. 2, 2006) (plaintiff’s lawyer not disqualified in employment litigation against police department and its officials, despite his prior employment as an attorney in the city solicitor’s office where he worked on various employment matters for the police department, including EEOC cases and settlement negotiations, where the lawyer was fired from the solicitor’s office two months before the events giving rise to plaintiff’s termination, and he was not involved as a city solicitor in any of the incidents leading up to the plaintiff’s termination and the memorandum he drafted as a solicitor that relates to the current case no longer contains confidential information because the city waived confidentiality by disclosing the memorandum in discovery without objection); Jamaica Pub. Serv. Co. Ltd. v. AIU Ins. Co., 707 N.E.2d 414, (N.Y. App. Div. 1998) (although one of the attorneys representing plaintiff had previously been in-house counsel for a different company in defendant’s corporate family, ethical rules not violated since attorney’s work while in-house neither involved defendant nor touched on coverage disputes similar to those involved in the current lawsuit); Richards v. Lewis, 2005 U.S. Dist. LEXIS 23933 (D. V.I. Oct. 14, 2005) (Attorney’s prior representation of police department in employee’s unfair labor practice proceeding before the public relations board did not require her disqualification as employee’s counsel in a civil rights action against the department based on the same core facts; although counsel was unquestionably involved as the sole attorney representing the department against the employee in the unfair labor practice charge, her representation was limited, pro forma, and ultimately nominal, and there was no “investigative or (continued...)
4. **Former In-House Employer Attorney Bringing Personal Employment Claims Against the Former Employer**

Although not a former client issue, ethical issues arise when an in-house counsel chooses to litigate wrongful termination or other employment claims against his/her former employer. Because the former in-house counsel has had access to client confidences of the former employer, there is a tension between the attorney’s duty of loyalty to the former employer-client and the right to pursue legitimate claims against the former employer. Thus, most courts and ethics opinions have held that the ethical rules do not prohibit the former in-house counsel from suing his/her former employer, but they suggest that the former in-house counsel should take care to preserve client confidences to the greatest extent practicable in pursuing such claims.78

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77(...)continued

deliberative process” in which counsel participated to warrant her disqualification.). *Cf. Levin v. Raynor*, 2004 WL 2937831 (S.D. N.Y. Dec. 17, 2004) (Retired employees and their beneficiaries filed suit against several defendant unions under ERISA. Defendants moved to disqualify plaintiffs’ counsel based on the fact that one of the plaintiffs was, until his recent retirement, general counsel of one of the defendants and that his prior position made him both privy to and in actual receipt of confidential information. The court denied the motion since the former director never worked for defendants in a legal capacity and there was no evidence that the defendant’s privileged information had reached, or would reach, the plaintiffs’ lawyers and, therefore, the defendants have not been prejudiced.)

78 *See ABA Formal Ethics Op. No. 01-424 (2001) (Model Rules do not prohibit a lawyer from suing her former clients and employer for retaliatory discharge; in pursuing such a claim, however, the lawyer must take care not to disclose client information beyond that information the lawyer reasonable believes is necessary to establish her claim, relying on Model Rule 1.6); Kachmar v. SunGard Data Sys., 109 F.3d 173 (3d Cir. 1997) ("[I]t is difficult to see how statements made to [an in-house attorney] and other evidence offered in relation to her own employment and her own prospects in the company would implicate the attorney-client privilege. It is also questionable whether information that was generally observable by [plaintiff] as an employee of the company, such as her observations concerning the lack of women in [defendant’s offices] would implicate the privilege."); Fox Searchlight Pictures, Inc. v. Paladino, 89 Cal. App. 4th 294 (2001) (attorneys representing former in-house counsel in wrongful termination action against corporation was not disqualified by reason of counsel’s disclosing 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); General Dynamics v. Superior Court, 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); Lewis v. (continued...)
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 that in his last year with the company 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. “It would be surprising if the Supreme Court were to categorically reject [the Rules of Professional Conduct] as a source of public policy in the employment context, particularly when lawyers are increasingly employed full-time by corporations.”); Alexander v. Tandem Staffing Solutions, Inc., 881 So. 2d 607 (Fla. Dist. Ct. 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 in the whistleblower claim); Hoffman v. Baltimore Police Dep’t, 379 F. Supp.2d 778 (D. Md. 2005) (Former in-house attorney for police department may maintain wrongful discharge and discrimination 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); 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 of Montana Rules of Prof’l Conduct contemplates revealing confidential client information by a former in-house lawyer pursuing a retaliatory discharge claim against her former employer); Wise v. Consol. Edison Co., 723 N.Y.S.2d 462 (2001) (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); Meadows v. Kindercare Learning Centers, 2004 U.S. Dist. LEXIS 20450 (D. Ore. Sept. 29, 2004) (Oregon courts would permit an action for wrongful discharge by a former in-house counsel if the complaint is based on an in-house lawyer’s refusal to violate the Code of Professional Responsibility; once an in-house counsel’s employment has been terminated s/he generally is not barred from bringing a suit against the former employer for retaliatory discharge where the in-house counsel plaintiff alleges that she personally suffered a discriminatory job action. However, where, as here, the plaintiff has alleged only that she was terminated for not agreeing to defendants’ discriminatory company policies, she cannot maintain a claim for retaliatory discharge under Title VII and the Oregon discrimination laws because the alleged protected conduct is inconsistent with the requirements of the employee’s position. “‘[A]n employee does not receive special protection under Title VII simply because the employee handles discrimination complaints.’”); Or. Formal Ethics Op. No. 2005-136 (2005) (“claim or defense” exception to Rule 1.6 plainly permits “disclosure to (continued...)
However, a few jurisdictions have barred – or severely limited – the claims that can be made by a former in-house counsel against his/her former employer/client.79

78(...continued)
establish a wrongful discharge claim”); Philadelphia Ethics Op. No. 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); S.C. Ethics Op. No. 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; lawyer may have to obtain consent of client only if representation is in a related case and is materially adverse to client); Crews v. Buckman Labs. Int’l, Inc., 78 S.W.3d 852 (Tenn. 2002) (action permitted if complaint based on in-house lawyer’s adherence to obligations imposed by the Code of Professional Responsibility); Spratley v. State Farm Mut. Auto. Ins. Co., 78 P.3d 603 (Utah 2003) (attorney generally prohibited from using information relating to his prior representation of client “to the disadvantage of the former client,” but exception that allows disclosure of such information to the extent reasonably necessary “[t]o establish a claim or defense of the lawyer in a controversy between the lawyer and the client” permits disclosure by former in-house counsel for insurer to establish wrongful discharge claim against insurer; in-house counsel could not disclose any client confidential information relating to insurers 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. Administrative 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 Department of Labor claim that the company violated whistleblower provisions of several environmental statutes by firing him in retaliation for his writing the report); 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 for other employees).

79 See, e.g., Douglas v. DynMcDermott Petroleum Operations Co., 144 F.3d 364 (5th (continued...
(continued)
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 Louisiana law, attorney’s disclosure of those matters to Department of Energy in response to inquiries regarding employment practices of her employer constituted breach of her professional 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 disclosures 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); 
*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”); 
*Ausman v. Arthur Andersen LLP*, 810 N.E.2d 566 (Ill. Ct. App.), *leave to appeal denied*, 823 N.E.2d 962 (Ill. 2004) (In-house counsel alleged that firm fired her in retaliation for several objections she had raised to ventures it had assembled for clients as possible violations of Securities and Exchange Commission regulations. Court of Appeals affirmed dismissal of the claim, citing the Illinois Supreme Court decision in *Balla v. Gambro, Inc.*, 584 N.E.2d 104 (Ill. 1991), that 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); 
N.C. 2000 Formal Ethics Op. No. 11 (2001) (lawyer who was formerly in-house legal counsel for a corporation must obtain the permission of the court prior to disclosing confidential information of the corporation to support a personal claim for wrongful termination). 
*Cf. Perin v. Spurney*, 2005 Ohio App. LEXIS 6112 (Ohio App. Dec. 22, 2005), *appeal not allowed*, 847 N.E.2d 6 (Ohio 2006) (Employee filed wrongful termination action against her employer, Honda R & D Americas, Inc. (“Honda”) and various managers, alleging she was terminated because she complained that Honda was illegally shipping hazardous materials. During the action Honda subpoenaed the employee’s husband, who was an in-house counsel for Honda and also on Honda’s ethics committee and had provided legal advice to the employer regarding the issue of transportation of the hazardous materials. The employee’s attorney represented the husband for the purposes of the deposition and announced that the husband would assert the spousal privilege on behalf of the employee, and the attorney-client privilege on behalf of Honda. The court of appeals affirmed disqualification of the employee’s counsel; although there was no evidence that the husband actually gave Honda’s confidences to the employee’s counsel, the appearance of impropriety arose due to counsel representing and communicating with an in-house attorney for Honda while also representing the employee in a wrongful termination action against Honda, raising concerns that the in-house attorney revealed Honda’s secrets to the employee’s counsel and that Honda (continued...)

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5. Considerations in Analyzing Former Client Conflicts

The ABA/BNA Lawyer’s Manual on Professional Conduct has suggested the following seven questions which should be asked when one wishes to determine whether a lawyer’s representation of a client will impermissibly conflict with her representation of a former client:

1. Was there ever an attorney-client relationship between the lawyer and a party who might seek her disqualification?

2. Is the client truly a former client of the lawyer’s or is the relationship ongoing?

3. Are the interests of the current and former clients adverse?

4. Is there a substantial relationship between the two representations?

5. Has the former client consented to the current representation, or waived objections to it?

6. Is the presumption that the lawyer gained confidential information from the former client rebuttable in this jurisdiction?

7. If so, has the presumption been rebutted? 80

6. Conflicts Arising from Law Firm “Beauty Contests” Conducted by Prospective Client and Other Pre-Retention Communications

Some corporate entities conduct law firm “beauty contests” to select outside counsel for a matter. This consists of a competitive interviewing process by which a client with substantial legal work or a significant case invites a number of law firms or attorneys to give a presentation as to why they would provide the client with the best representation. Participation in a beauty contest raises a concern that an attorney-client relationship may be created with the prospective corporate client, especially if confidential information may be disclosed in preliminary communications.

79 (...)continued

experienced a breach of loyalty due to the employee’s counsel representing and communicating with both the in-house counsel and the employee.).

80 See ABA MODEL RULES, Rule 1.7 and cmts. 10-12; ABA/BNA Lawyers’ Manual on Prof'l Conduct, §§ 51:207-51:223. See also Heringer v. Haskell, 536 N.W.2d 362 (N.D. 1995) (similar considerations under state rules).
discussions that may form a part of the contest. For the most part, the courts will look to all the surrounding circumstances to determine whether an attorney-client relationship was formed during such initial consultation and client evaluation. Even if an attorney-client relationship is

81 See Kenneth D. Agran, The Treacherous Path to the Diamond-Studded Tiara: Ethical Dilemmas in Legal Beauty Contests, 9 Geo. J. Legal Ethics 1307 (Summer 1996) (excellent discussion of the ethical dilemmas posed by law firm participation in legal beauty contests, arguing for a rebuttable presumption in favor or disqualification of a participating firm from adverse representation against proposed client in the same or substantially similar litigation, and suggests prophylactic measures for avoiding conflicts based on participation in legal beauty contests) (exhaustive analysis of cases involving legal beauty contests).

82 See, e.g., ABA Formal Ethics Op. No. 90-358 (1990) (Model Rule 1.3 protects information imparted by a would-be client seeking to engage a lawyer’s services); B.F. Goodrich Co. v. Formosa Plastics Corp., 638 F. Supp. 1050 (S.D. Tex. 1986) (no attorney-client relationship created during one-day interview by corporation of law firm in beauty contest; firm did not receive confidential information during the interview that could be used to the detriment of the interviewing corporation); E.F. Hutton & Co. v. Brown, 305 F. Supp. 371 (S.D. Tex. 1969) (although initial consultation may not itself trigger an attorney-client relationship, it may impose an obligation of confidentiality with respect to the subject of the consultation); People ex rel. Dep’t of Corps. v. SpeeDee Oil Change Sys., Inc., 20 Cal. 4th 1135 (1999) (attorney-client relationship established by lawyer’s consultation with prospective client, even though actual retention of the lawyer did not result); Beery v. State Bar, 43 Cal. 3d 802, 811-12 (1987) (an implied attorney-client relationship may be inferred if the attorney renders legal advice); Cal. Formal Ethics Op. No. 1984-84 (an attorney has a duty to maintain confidences reasonably entrusted in discussions preliminary to forming the attorney-client relationship); Me. Ethics Op. No. 62 (1985) (lawyer who had initial consultation with a prospective client owed duty of confidentiality); Mich. Ethics Op. No. RI-154 (1995) (attorney has duty to protect and preserve confidences discussed with a prospective client); Hempstead Video, Inc. v. Incorporated Village of Valley Stream, 2004 WL 62560 (E.D.N.Y. Jan. 12, 2004) (under New York law, plaintiff’s single, unsolicited telephone call to attorney who later became partner at law firm representing defendants to discuss possibility that attorney would represent plaintiff in possible unrelated proceeding contemplated by plaintiff did not constitute representation to warrant disqualification, where no file was ever opened by attorney with respect to plaintiff, attorney was not retained by plaintiff, and attorney did not know of law firm’s representation of defendants at the time of conversation); Seely v. Seely, 129 A.D.2d 625 (N.Y. App. Div. 1987) (fiduciary relation between lawyer and client extends to initial consultation with prospective client); N.Y. Ethics Op. No. 685 (1997) (lawyer may not disclose information received during initial consultation); Ohio Ethics Op. No. 19-15 (1991) (confidences and secrets of a person who consults with attorney regarding representation are protected); N.C. 2003 Formal Ethics Op. No. 8 (2003) (“representation” of a client for purposes of the conflict of interest rules includes not (continued...)
not formed as a result of participation in the contest, the participating lawyer or law firm may have duties of confidentiality or loyalty arising from participation. In such a case, the

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82(...continued)

only services provided subsequent to the formation of an attorney-client relationship, but also any initial consultation for the purpose of establishing an attorney-client relationship; *Constand v. Cosby*, 232 F.R.D. 494 (E.D. Pa. 2006) (A lawyer need not actually have been hired for the privilege to apply. The key is whether there has been a professional consultation with an attorney, who acts or advises as such.); *Clark Capital Mgmt. Group, Inc. v. Annuity Investors Life Ins. Co.*, 149 F. Supp. 2d 193 (E.D. Pa. 2001) (implied attorney client relationship did not arise between defendant and prospective co-counsel, by virtue of series of brief telephone conversations between defendant’s attorney and prospective co-counsel, and thus no conflict of interest arose from fact that prospective co-counsel’s firm later was retained by plaintiff in the same action; attorney initiated calls to inquire into prospective co-counsel’s interests and availability, and no offer to retain was made or accepted); Vt. Ethics Op. No. 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 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; under these facts, the lawyer may not then inform the institutional client of the telephone call or its content). See also Tex. Disciplinary Rules of Prof’l Conduct, Preamble, Cmt. 12 (duties such as confidentiality may precede attorney-client relationship). Compare *Ausc ape Int’l v. National Geographic Soc’y*, 2002 WL 31250727 (S.D.N.Y. Oct. 8, 2002) (letters to prospective clients to encourage their involvement in class action, and proposed form of retainer agreement, were not communications between attorney and client and were not confidential, even though letters were sent in furtherance of interests of existing clients).

83 *See, e.g.*, ABA MODEL RULES, 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); *Banner v. City of Flint*, 99 Fed. Appx. 29 (6th Cir.), *cert. denied sub nom., Pabst v. City of Flint*, 543 U.S. 926 (2004) (potential client’s statements to attorney during initial consultation were protected by attorney-client privilege, even if client eventually decided not to engage attorney); L.A. County Ethics Op. No. 506 (2001) (attorney has duty to preserve confidential information obtained during initial consultations with a prospective client, where consultations do not result in retention of attorney; attorney has no duty to disclose the information to an existing client, even though it may be significant to the existing client, where the information is unrelated to the attorney’s representation); *Gilmore v. Goedecke Co.*, 954 F. Supp. 187 (E.D. Mo. 1996) (Law firm disqualified from representing employer in age (continued...)

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participating attorney and/or the law firm may well be disqualified from representing parties adverse to the contest holder.\textsuperscript{84} Attorneys and law firms that participate in such contests—or any other situations that precede formulation of an attorney-client relationship, such as preliminary meetings or telephone conversations—should set forth the ground rules with the contest organizer before the contest begins. Specifically, the lawyer should apprise the prospective client that no information the client considers confidential should be imparted, because it will not necessarily 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 of interests.

\textsuperscript{83}(...continued)
discrimination lawsuit where, before bringing suit, plaintiff employee had consulted with a member of the firm about the case, even though representation of plaintiff was declined and even if defendant, whom firm had represented in various matters over a period of 50 years, was regarded as existing client, since without consent of plaintiff, firm could not relay to defendant the nature of any information it had regarding plaintiff, and thus defendant could not make informed decisions as to whether to consent to representation despite material limitation due to firm’s responsibilities to plaintiff; \textit{Maturi v. McLaughlin Research Corp.}, 2001 WL 1669254 (D.N.H. Dec. 31, 2001) (plaintiffs moved to disqualify defendant’s law firm on ground that one of the plaintiffs met with the firm in search of legal representation; court held attorney-client relationship may be implied by the parties’ conduct and held that evidentiary hearing was required to decide whether plaintiff disclosed confidential information to the attorney); N.J. Ethics Op. No. 17 (1994) (fiduciary relationship extends to preliminary consultation with prospective client, even though actual employment does not result); \textit{B.F. Goodrich Co. v. Formosa Plastics Corp.}, 638 F. Supp. 1050 (S.D. Tex. 1986) (“The fact that the attorney-client relationship had not yet been established does not mean that the Arnold firm owed no duty whatever to Goodrich. . . . [A] lawyer must preserve the confidences and secrets of one who has ‘sought to employ him.’”); Vt. Ethics Op. No. 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 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; under these facts, the lawyer may not then inform the institutional client of the telephone call or its content).

\textsuperscript{84} \textit{ABA MODEL RULES}, 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 with respect to information from the prospective client).
based on participation in the contest in the event that the lawyer or law firm is not selected.85

85 Agran, supra note 80, at Appendix B (text of Sample Waiver Letter prepared by a law firm). See also N.Y. City Ethics Op. No. 2006-2 (2006) (A lawyer who participates in a “beauty contest” with a prospective client, but who ultimately is not retained by the prospective client, is not personally prohibited from later representing a client with materially adverse interests in a substantially related matter if the lawyer did not learn confidences or secrets of the prospective client during the beauty contest. If the lawyer learned confidences or secrets of the prospective client, the lawyer may nonetheless later represent a client with materially adverse interests in a substantially related matter: (a) if, before the beauty contest, the lawyer obtained the prospective client’s advance waiver of any conflict that might result from the prospective client sharing confidences or secrets; (b) without an advance waiver, unless the confidences or secrets could be significantly harmful to the prospective client; or (c) if it can be established that the prospective client revealed confidences or secrets with no intention of retaining the lawyer, but for the purposes of disqualifying the lawyer’s firm from later representing possibly adverse parties.). N.Y. City Ethics Op. No. 2001-01 (2001) (“Absent appropriate precautions by lawyers participating in these so-called ‘beauty contests,’ the communication of confidential information by a prospective client may preclude the law firm from accepting an engagement from another present or future client adverse to the prospective client in the matter even though the lawyer is not retained.”); Buys v. Theran, 639 N.E.2d 720 (Mass. 1994); Bridge Prods. v. Quantum Chem. Corp., 1990 WL 70857 (N.D. Ill. April 27, 1990) (disqualifying the law firm of Sidley & Austin from representing a party in litigation after the firm had participated in a beauty contest sponsored by another party to the same litigation, since confidential information was disclosed by the party with the reasonable belief that there was an attorney-client relationship; “Sidley did not have Bridge sign a conflicts waiver; this would have put Bridge on notice with respect to making confidential disclosures. Sidley did not even indicate whether Bridge would be billed for the meeting; such knowledge would also have made Bridge more wary of making indiscriminate disclosures. Thus, it is Sidley, and not Bridge, who must pay for this confusion by being deemed part of an implicitly professional relationship and all of the ethical responsibilities arising therefrom.”); In re Amendments to Rules of Prof. Conduct, Rule 407, SCACR, 2005 S.C. LEXIS 199 (S.C. 2005) (Rule 1.18 amended to state that although any lawyer who received confidential information from a prospective client is personally disqualified, imputed disqualification of the lawyer’s firm can be avoided if all disqualified lawyers are timely screened and written notice if promptly given to the prospective client.); Utah Ethics Op. No. 05-04 (2005) (In most circumstances, the obligation of confidentiality attaches when a prospective client consults with the attorney in contemplation of retaining the attorney, even if that attorney is not ultimately retained and never advises the prospective client. Absent consent, the attorney may not undertake representation of another party in the same or substantially related matter if the attorney acquired relevant confidential information from the prospective client. An attorney may avoid disqualification by strictly limiting the information acquired during the initial consultation or by explicit agreement and waiver prior to the initial consultation.). See also Utah (continued...)
Some ethics opinions have distinguished “beauty contest” situations from those where the communication of the particular confidential information from the prospective client was unsolicited, such as in response to an Internet website maintained by the firm, or an advertisement. In such cases, disclosure of the information would not disqualify the firm, although the lawyer may have a duty not to disclose or use the information for the benefit of the lawyer’s other clients. Similarly, responses to legal questions posed in a public or semi-public

85 (...continued)
Rules of Prof. Conduct 1.18 (2005) (liberalizes the rule to permit a firm to screen an individually disqualified attorney to avoid disqualification).

86 See N.Y. City Ethics Op. No. 2001-01 (2001) (information provided by prospective client to a lawyer or law firm in email generated in response to Internet web site 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). See also Ariz. Ethics Op. No. 02-04 (2002) (an attorney does not owe a duty of confidentiality to individuals who unilaterally email inquiries to the attorney when the email is unsolicited; law firm websites, with attorney email addresses, however, should include disclaimers regarding whether or not email communications from prospective clients will be treated as confidential); Ariz. Ethics Op. No. 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); Cal. Ethics Op. No. 2005-168 (2005) (A lawyer who provides to web site visitors who are seeking legal advice a means for communicating with him, whether by email or some other form of electronic communication on his website, may effectively disclaim owing a duty of confidentiality to web site visitors only if the disclaimer is in sufficiently plain terms to defeat the visitor’s reasonable belief that the lawyer is consulting confidentiality with the visitor. Simply having a visitor agree that an “attorney-client relationship” or “confidential relationship” is not formed would not defeat a visitor’s reasonable understanding that the information submitted to the lawyer on the lawyer’s web site is subject to confidentiality. In this context, if the lawyer has received confidential information from the visitor that is relevant to a matter in which the lawyer represents a person with interests adverse to the visitor, acquisition of confidential information may result in the lawyer being disqualified from representing either.). Cf. Barton v. United States Dist. Court, 410 F.3d 1104 (9th Cir. 2005) (Law firm posted a questionnaire on its website to gather information from potential plaintiffs in a class action lawsuit, which required respondents to check a box acknowledging that the questionnaire did not constitute a request for legal advice and that the respondent was not forming an attorney-client relationship by submitting the information. In vacating the district court’s order compelling plaintiffs to produce the questionnaires, the Ninth (continued...)
Circuit held that the disclaimers did not act as a waiver of the privilege. Prospectives clients’ communications with a view to obtaining legal services were plainly covered by the privilege under California law, regardless of whether they have retained the lawyer and regardless of whether they ever retain the lawyer. The privilege does not apply where the lawyer has specifically stated that he would not represent the individual and in no way wanted to be involved in the dispute, “but the law firm did not do that in this case—it just made clear that it did not represent the submitter yet.” (emphasis in original); D.C. Ethics Op. No. 316 (2002) (lawyers may take part in on-line chat rooms and similar communications with Internet users seeking legal information; to avoid formation of attorney-client relationship, lawyers should avoid giving specific legal advice; if lawyer engages in communications of sufficient particularity and specificity to give rise to an attorney-client relationship under substantive law of the applicable jurisdiction, lawyer must comply with full array of D.C. ethics rules governing attorney-client relationships); Ill. Ethics Op. No. 96-10 (1997) (lawyers participating in chat rooms or other on-line 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); Nev. Formal Ethics Op. No. 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); Ohio Ethics Op. No. 99-9 (1999) (attorneys who answer legal questions for a fee posed by visitors to firm’s web site subject to same constraints that govern other methods of delivering legal services, including requirements of conflict checks, competence, and confidentiality); Vt. Ethics Op. No. 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 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; under these facts, the lawyer may not then inform the institutional client of the telephone call or its content).

See Cal. Ethics Op. No. 2003-161 (2003) (a person’s communication made to an attorney in a non-office setting may result in the attorney’s obligation to preserve confidentiality of the communication (1) if an attorney-client relationship is created by the contact, or (2) even if no attorney-client relationship is formed, the attorney’s words or actions induce in the speaker a reasonable belief that the speaker is consulting the attorney, in confidence, in his professional (continued...)
Also note that if the person disclosing information to the lawyer was not genuinely seeking legal services from the lawyer, but instead had the purpose of disqualifying the lawyer from being engaged by an opposing party—a practice referred to as “taint shopping”—then the information disclosed does not fall under the protections of the confidentiality or former client rules.88

7. Conflict of Interest Concerning Attorney’s Own Interests

Conflicts may also arise where the attorney’s personal interests diverge from that of the client.89 This issue arises most often in the context of settlement negotiations.90

87(...)continued)
capacity to retain the attorney or to obtain legal services or advice); Cal. Ethics Op. No. 2003-164 (2003) (normally, under circumstances when the public or 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, particularly questions outside the attorney’s area of expertise 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).


89 See Apple Computer, Inc. v. Superior Court, 126 Cal. App.4th 1253 (2005) (In class action in which named plaintiff was represented by law firm where he worked and by a second firm that served as co-counsel with his firm in other cases and had a close business connection with it, both firms were properly disqualified for conflict of interest; firms placed themselves in a position of divided loyalties arising from their own financial interest in recovering attorneys fees versus their obligation to the putative class to maximize recovery of monetary and other relief.); In re Obert, 89 P.3d 1173 (Ore. 2004) (lawyer who made a filing error did not have an obligation to obtain the client’s consent at the time the error was made, but once the lawyer determines the error was fatal, the notice and consent requirements would have been implicated); In re (continued...)
8. Referrals of Parties Potentially Adverse to Current Clients

It is generally consistent with the concept of the adversary system, and not prohibited by the rules of professional conduct, for a lawyer, if she chooses, to refer a person seeking representation to another lawyer, even if the representation would be adverse to the referring lawyer’s existing client. However, the lawyer must decide whether under the particular circumstances and in light of the practical considerations this is a wise thing to do. For example, some clients may not understand why their lawyer assisted an adversary to obtain counsel to sue them. Additionally, there is always the possibility that in discussions with the potential client, a lawyer might learn confidences or secrets that the person does not want revealed. If the lawyer does learn of those confidences or secrets and then realizes that the potential client is adverse to an existing client, she faces a dilemma: Under the rules, she may have an obligation to inform her existing client that someone intends to sue it. On the other hand, the potential client might not want to disclose to the lawyer’s existing client that she is contemplating a lawsuit.

“Presumably, most lawyers ascertain at the outset the name of the adverse party prior to discussing with a potential client a new matter. But if a lawyer neglects to do so of if the lawyer, particularly in a large firm, does not recognize at the outset that the adversary is a firm client, the lawyer may be seized with

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89 (...continued)

Knappener, 337 Ore. 15 (2004) (not every lawyer mistake triggers the notice and consent rules; rather, it must be shown that the lawyer’s error, and the pending or potential liability arising from that error, will or reasonably may affect the lawyer’s professional judgment). But see N.Y. Ethics Op. No. 789 (2005) (A law firm may form an attorney-client relationship with one or more of its own lawyers to receive advice on matters of professional responsibility concerning ongoing client representation(s), including on matters implicating the client(s)” interests, without creating an impermissible conflict between the law firm and the affected client(s). The law firm’s duty to disclose its conclusions will vary with the circumstances of the matter.).

90 See Fiandaca v. Cunningham, 827 F.2d 825 (1st Cir. 1987) (counsel for class of female inmates seeking improved facilities should have been disqualified when defendants offered to settle suit on advantageous terms which were contrary to the interests of a class of plaintiffs which counsel represented in a separate action); Keller v. Mobil Corp., 55 F.3d 94 (2d Cir. 1995) (in reversing dismissal of plaintiff’s case and sanction order against plaintiff’s counsel, Second Circuit 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. Formal 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).
confidential or secret information. Under those circumstances, the specific obligation under Rule 1.6 not to reveal those confidences and secrets trumps the more general Rule 1.4 obligation to keep clients informed.”91

II. LAWYER AS WITNESS

In the labor and employment law context it is common for the attorney to be asked to become involved in various employer-employee disputes before actual litigation arises or is contemplated. The most typical example arises in the context of sexual harassment claims. In interviewing the alleged harasser or harassee, the attorney should be wary of potential later disqualification as a witness.92 Plaintiffs’ attorneys may confront this issue when they conduct an investigation and receive information from management employees potentially useful at trial.93

91 D.C. Ethics Op. No. 326 (2004). See also N.J. Ethics Op. No. 695 (2004) (law firm may continue to represent corporate client after receiving unsolicited information from one of the corporation’s former employees who contacted the firm seeking representation in a lawsuit against the corporation; however, the firm is prohibited from using or revealing the information received from the prospective client).

92 See ABA MODEL RULES, 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 an value of legal services rendered in the case, or disqualification of the lawyer would work substantial hardship on the client). If a potential exists for the client to make a decision based upon the attorney’s investigation, the better practice is for the client, or someone else, to conduct the investigation. The attorney’s role should be limited to legal advice.

93 See Stewart v. Bank of Am., N.A., 203 F.R.D. 585 (M.D. Ga. 2001) (attorneys who were eyewitneses to and had personal knowledge of the foreclosure transaction and events subsequent thereto that were the subject matter of the litigation were disqualified from representing plaintiff under rule prohibiting attorneys from serving both in the capacity of advocate and witness, especially where disqualification would not work a hardship on plaintiff since litigation was in early stage prior to discovery); Hambrick v. Union Township, 81 F. Supp. 2d 876 (S.D. Ohio 2000) (attorney who investigated alleged sexual misconduct at police department was 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); Caplan v. Braverman, 876 F. Supp. 710 (E.D. Pa. 1995) (motion to disqualify due to conversation between management employee and plaintiff’s attorney concerning plaintiff’s departure from (continued...)
Note that, unlike the conflict of interest rules, the attorney-witness rule in most jurisdictions only requires the disqualification of the individual lawyer and not the lawyer’s firm, although a few courts have required disqualification of the firm as well. Moreover, the

93(...continued)
firm; motion denied with respect to attorney’s participation in pretrial and discovery matters; decision regarding trial disqualification delayed until completion of discovery to determine importance of testimony; Ayus v. Total Renal Care, Inc., 48 F. Supp. 2d 714 (S.D. Tex. 1999) (attorney-witness rule disqualified attorney for defendant, who wrote letters to plaintiff prior to plaintiff’s discharge, 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 discovery and pretrial proceedings, with the exception of representing client at his own deposition); Mt. Rushmore Broad., Inc. v. Statewide Collections, 42 P.3d 478 (Wyo. 2002) (likelihood of prejudice to creditor outweighed possible substantial hardship to debtor if debtor’s attorney was allowed to testify on its behalf, while also representing its interests as an advocate, in bench trial dispute over a dishonored check, where district court cited the importance of witness credibility in the case, had concerns about the attorney challenging the credibility of the creditor’s witnesses and, simultaneously, vouching for his own credibility, and noted that the attorney could have reasonably foreseen he would be a witness but, nevertheless, chose to proceed as an advocate).

94 See ABA MODEL RULES, Rule 3.7(b); Cardenas v. Benter Farms, 2001 WL 292576 (S.D. Ind. Feb. 7, 2001) (lawyer-witness rule inapplicable to trial testimony of former members of Legal Services Organization that representing plaintiffs where former members no longer represent the plaintiffs); Meyer v. Iowa Mold Tooling Co., 141 F. Supp. 2d 973 (N.D. Iowa 2001) (under Iowa law, attorneys and firm representing employer in employee’s disability discrimination case could not be disqualified based on employee’s intent to call as witness an attorney who was former member of firm); Cunningham v. Sams, 588 S.E.2d 484 (N.C. Ct. App. 2003) (although disqualification of attorney was proper as attorney was a material and necessary witness, attorney’s law firm should not have been disqualified from representing client at trial); R.I. Ethics Op. No. 2000-02 (Mar. 16, 2000) (attorney may not continue to represent agency if he/she will be a witness in the case; however, the attorney may continue to represent agency in the matter where other lawyers for agency are witnesses, provided the lawyer is not otherwise precluded from representation by reason of a conflict of interest); In re Acevedo, 956 S.W.2d 770 (Tex. Ct. App. 1997) (disqualification of a lawyer who may be a witness does not disqualify other attorneys in that attorney’s law firm, provided the client’s informed consent is obtained). Cf. Hagood v. Sommerville, 607 S.E.2d 707 (S.C. 2005) (Rule of professional conduct governing “lawyer as witness” did not prohibit individual employed full-time as a professional investigator and accident reconstruction expert by attorney for plaintiff from testifying in personal injury case handled by that attorney in which there existed no conflict of interest between the attorney and the plaintiff, or between the attorney’s employee and the plaintiff: “Jurors are not likely to be (continued...)
94 (continued) 
confused by a lawyer’s employee testifying as a witness for a client while the lawyer serves as 
The lawyer-witness rule, if applicable, only disqualifies the lawyer from acting as an advocate at 
trial; other matters, such as participating in pretrial activities, preparation of briefs and pleadings, 
and planning and trial strategy, are not generally barred in most jurisdictions.96 Some courts, 

95 See Ohio Ethics Op. No. 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) (when one lawyer is disqualified because he will testify as a witness, his 
entire law firm and all other lawyers in it must also be disqualified); Universal Athletic Sales Co. 

96 See, e.g., ABA Informal Ethics Op. No. 1525 (1989) (lawyer who expects to testify at 
trial 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); Petrilli v. Drechsel, 94 F.3d 325, 
329 (7th Cir. 1996) (lawyer-witness rule does not preclude in-house counsel from testifying in 
employee’s ERISA action since counsel’s role was solely that of a fact witness; although counsel 
involved in litigation, he did not act as advocate); Merrill Lynch Bus. Fin. Serv. Inc. v. Nudell, 
239 F. Supp. 2d 1170 (D. Colo. 2003) (attorney for lender, disqualified from representing lender 
at trial due to likelihood attorney would be called as witness, was not disqualified from 
representing lender in pre-trial matters); Fognani v. Young, 115 P.3d 1268 (Colo. 2005) (Courts 
have discretion to permit an attorney who is disqualified from acting as an advocate because he 
is likely to be called as a witness at trial to participate fully in pretrial litigation activities such as 
strategy sessions, pretrial hearings, mediation conferences, motion practice, and written 
discovery, so long as the client has consented to the representation and unless such participation 
would disclose attorney’s dual advocate/witness role to the jury.); Taylor v. Grogan, 900 P.2d 
60, 62 (Colo. 1995) (opposing counsel may be subpoenaed upon a showing that opposing 
counsel’s testimony will be actually adverse to his/her client, that the evidence sought to be 
elicited from the lawyer will likely be admissible at trial, and that there is a compelling need for 
the evidence that cannot be satisfied by some other source); D.C. Ethics Op. No. 228 (1992) 
(continued...)
(lawyer who is likely to be a necessary witness at trial ethically may assist counsel in both pre-trial matters and trial preparation and may continue to represent the party in most pretrial proceedings); Cerillo v. Highley, 797 So. 2d 1288 (Fla. Dist. Ct. App. 2001) (plaintiff’s counsel was not disqualified from participating in pretrial proceedings in civil battery action, even through there was possibility that counsel would be a witness at trial because he had witnessed the battery); Drago v. Davis, 1996 WL 479696 (N.D. Ill. Aug. 20, 1996) (defendant’s attorney and his law firm not disqualified as witnesses even though attorney had conversation with plaintiff concerning alleged harassment by defendant’s employee; no proof that testimony regarding the conversation would be disputed or that the testimony of defendant’s attorney would be prejudicial to his client); Jackson v. Adcock, 2004 WL 1661199 (E.D. La. July 22, 2004) (rule does not automatically require that lawyer be disqualified from pretrial activities); Mich. Ethics Op. No. RI-299 (1997) (lawyer no disqualified from representing client in pretrial matters even if lawyer might eventually be disqualified from acting as trial counsel); Mich. Ethics Op. No. RI-226 (Feb. 7, 1995) (lawyer who is going to be a necessary witness concerning a contested fact is not thereby prohibited from taking the case, from negotiating with parties, or from preparing trial strategy); DiMartino v. Eighth Judicial Dist. Court, 66 P.3d 945 (Nev. 2003) (rule does not preclude attorney from representing client in the pretrial stage); Main Events Prods. v. Lacy, 220 F. Supp. 2d 353 (D.N.J. 2002) (a lawyer who is likely to be a necessary witness in a case may represent the party in pretrial matters related to that case, even though he cannot be an advocate at trial); Adams v. Suozzi, 340 F. Supp. 2d 279 (E.D. N.Y. 2004), affirmed, 433 F.3d 175 (2nd Cir. 2005) (motion to disqualify denied where attorney is not appearing as a litigator in the case and, instead, the advocacy role is being performed by his partner and an associate of the law firm); United States v. Castellano, 610 F. Supp. 1151, 1167 (S.D.N.Y. 1985) (lawyer may fully participate in pretrial stage even though the lawyer will probably be called as a witness); Cunningham v. Sams, 588 S.E.2d 484 (N.C. Ct. App. 2003) (lawyer disqualified from representing client a trial because he was a material witness not prohibited from representing client in other capacities); S.C. Ethics Op. No. 99-03 (1999) (ethics rules do not prohibit lawyer from acting solely as witness at preliminary hearing); In re Bahn, 13 S.W.3d 865 (Tex. Ct. App. 2000) (fact that attorney’s testimony would go to essential fact of client’s case and could cause confusion that would keep jury from fairly evaluating case on the merits and thus disqualification of attorney from representing client at trial warranted; however, fact that attorney would testify at trial did not warrant disqualifying him from participation in retrial matters); Anderson v. Koch Oil Co., 929 S.W.2d 416, 422 (Tex. 1996) (attorney-witness rule only prohibits testifying attorney from acting as an advocate before a tribunal, not from engaging in pretrial, out-of-court matters such as preparing and signing pleadings, planning trial strategy, and pursuing settlement negotiations). Compare Ramey v. District No. 141, Int’l Ass’n of Machinists and Aerospace Workers, 378 F.3d 269 (2d Cir. 2004) (in airline mechanics’ RLA action against union for breach of duty of fair representation, trial court did not abuse its discretion in permitting testimony of attorney who previously represented mechanics, where...
however, have disqualified counsel at the pretrial stage.\textsuperscript{97}

Some jurisdictions hold that the rule does not apply if the lawyer is called as a witness by the opponent; disqualification is required only if the attorney is a necessary witness for his own client.\textsuperscript{98}

\textsuperscript{96}(...continued)

relationship between attorney and mechanics was of short duration and ended long before case came to trial and attorney’s testimony—that union was hostile to mechanics who associated with another union—went to heart of case; under advocate-witness rule, remedy where attorney is called to testify may be to disqualify the attorney in his representational capacity, not his testimonial capacity) and \textit{Brand v. 20th Century Ins. Co.}, 124 Cal. App.4th 594 (2004) (because defendant’s former attorney was personally involved in providing legal advice and services to defendant in matters substantially related to the instant litigation, he is barred from testifying as an expert witness against defendant).


\textsuperscript{98} \textit{See Macheca Transport Co. v. Philadelphia Indem. Co.}, _____ F.3d _____, 2006 WL 2707645 (8th Cir. Sept. 22, 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); \textit{FDIC v. U.S. Fire Ins. Co.}, 50 F.3d 1304 (5th Cir. 1995) (where attorney’s testimony may prejudice only his client, opposing party should have no say in whether attorney participates in litigation as both an advocate and a witness); \textit{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 (continued...)
...continued

another source, and plaintiff had no interest in discrediting attorney’s testimony because his testimony corroborated hers; McNair v. County of Maricopa, 2005 U.S. Dist. LEXIS 25585 (D. Ariz. Oct. 26, 2005) (“A party’s mere declaration of an intention to call opposing counsel as a witness is an insufficient basis for disqualification even if that counsel could give relevant testimony.” It must be shown “that the attorney will give evidence material to the determination of the issues being litigated and that the evidence is unobtainable elsewhere[].” (citations omitted)); Colyer v. Smith, 50 F. Supp. 2d 966 (C.D. Cal. 1999) (plaintiffs’ claim that defense counsel may be needed as fact witnesses did not warrant disqualification of defense counsel, absent showing that plaintiff needed testimony of opposing counsel or that it could not obtain desired information from other witnesses); AlliedSignal Recovery Trust v. AlliedSignal, Inc., 934 So.2d 675 (Fla. Ct. App. 2006) (Seller of business, which was defendant in fraud action brought by creditors’ trust of bankrupt buyer, failed to show that trust’s attorney, when called as seller’s witness, would give any testimony adverse to factual allegations of trust’s fraud complaint, as required to disqualify attorney from representing trust as “key witness” for seller.); Martinez v. Housing Auth. of DeKalb County, 590 S.E.2d 245 (Ga. Ct. App. 2003) (trial court refusal to disqualify attorney for housing authority, based on claim that attorney was material witness by having been personally involved in many communications and meetings regarding lease violations, was not abuse of discretion; attorney was not needed as a witness because other witnesses testified about events leading to eviction, and witnesses were fully available for cross-examination); Atkinson v. General Research of Elecs., Inc., 24 F. Supp. 2d 894 (N.D. Ill. 1998) (lawyer witness rule does not bar defendants’ lead counsel from testifying as witness for plaintiff and participating as advocate); Bogosian v. Board of Educ. of Community Unit Sch. Dist. 200, 95 F. Supp. 2d 874 (N.D. Ill. 2000) (teacher’s attorney would not be disqualified because of possibility that the attorney would testify to authenticity of attorney’s letter to school board that memorialized alleged oral agreement that items would be removed from teacher’s file upon his resignation; teacher sought to show that the resignation was contingent on board’s agreement with those terms, rather than to enforce the oral contract and, therefore, attorney’s testimony was not essential); 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 action for bad faith in insurance claims process; 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); United States v. Congi, 420 F.Supp.2d 124 (W.D. N.Y. 2005) (In criminal action against defendant officers and members of a union, the attorney and law firm representing one of the defendants should be disqualified. Shortly after the incident forming some of the counts of the indictment, the attorney interviewed several union members, some of whom were scheduled to be called by the government as witnesses against the defendant. Their testimony, and therefore their credibility, would be crucial to the jury’s determination of those counts of the indictment. If these witnesses were to testify at trial inconsistently with the statements they made to the attorney, the attorney would be the only
person in a position to impeach their credibility by testifying about their prior inconsistent statements. Therefore, the attorney was in the position of potentially being called as a witness at trial. Any waiver of the conflict by the defendant would have to be rejected because it would not eliminate the conflict as it related to the other parties, and because it was “severe” as it related to the defendant.; Daniel Gale Assoc., Inc. v. George, 8 A.D.3d 608, 779 N.Y.S.2d 573 (2004) (parties’ attorney and attorney’s law firm were not disqualified from representing parties, despite contention that attorney was potential witness, where opponent failed to show that attorney’s testimony was necessary to its case, or that attorney’s testimony would be prejudicial to his client); Hamrick v. Union Township, 81 F. Supp. 2d 876 (S.D. Ohio 2000) (attorney who investigated alleged sexual misconduct at police department was 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 plaintiff’s claims); In re Sanders, 153 S.W.3d 54 (Tex. 2004) (Assuming that evidence of husband’s barter arrangement with his attorney, that husband would perform carpentry work on attorney’s law offices to defray husband’s legal costs in divorce and child custody matter, was essential to the case because it would show that husband’s employment schedule would affect his ability to care for his minor child or pay child support, testimony from the attorney was not necessary, and thus disqualification of attorney under the lawyer-witness rule was not required; other sources, such as the husband’s testimony or the attorney’s billing records, could establish nature and extent of the husband’s obligation to the attorney.); In re Bahn, 13 S.W.3d 865 (Tex. Ct. App. 2000); Gilbert McClure Enters. v. Burnett, 735 S.W.2d 309, 311 (Tex. Ct. App. 1987) (disqualification not appropriate when opposing counsel merely announces his intention to call the attorney as a fact witness; there must be a genuine need for the attorney’s testimony that is material to the opponent’s client); Sutherland v. Jagdmann, 2005 U.S. Dist. LEXIS 25878 (E.D. Va. Oct. 31, 2005) (A party seeking to invoke the witness-advocate rule for disqualification purposes must establish that the proposed witness-advocate’s testimony is “strictly necessary,” not merely relevant and useful.). Compare 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); Cottonwood Estates, Inc. v. Paradise Builders, Inc., 624 P.2d 296 (Ariz. 1981) (same); Klupt v. Krongard, 728 A.2d 727 (Md. Ct. Spec. App. 1999) (same); LeaseAm. Corp. v. Stewart, 879 P.2d 184 (Kan. Ct. App. 1994) (same); Smithson v. United States Fidelity & Guar. Co., 411 S.E.2d 850 (W. Va. 1991); Bellino v. Simon, 1999 WL 1277535 (E.D. La. Dec. 28, 1999) (trial court disqualified lawyer who was likely to be a necessary witness–refusing plaintiff’s waiver of any conflict of interests–where a serious potential for conflict of interest existed should the attorney or his firm represent the plaintiffs); Corona v. Hotel and Allied Servs. Union Local 758, 2005 U.S. Dist. LEXIS 18545 (S.D. N.Y. Aug. 29, 2005) (In suit by union members against (continued...)
The National Labor Relations Board currently does not prohibit attorneys representing a party from testifying as witnesses in Board proceedings.99

III. ISSUES IN MATTERS INVOLVING CORPORATE/GOVERNMENTAL PARTIES

A. Attorney-Client Privilege

The attorney-client privilege protects disclosure of contents of communications between an attorney and the attorney’s client.100 Because lawyers representing corporations and organizations owe their fundamental allegiance to the entity, not to any of its officers, directors

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98(...continued)

union and their employer alleging breach of the collective bargaining agreement, union’s counsel was disqualified because he was a vital fact witness to the members’ claim that the union acted arbitrarily in failing to file a grievance on their behalf because he was present at the meeting discussing the potential grievance and generated a memorandum recommending that the union file such a grievance.) Cf. Waco Int’l, Inc. v. KHK Scaffolding Houston, Inc., 278 F.3d 523 (5th Cir. 2002) (though attorney may not testify as to purely legal matters, he or she may testify as to legal matters involving questions of fact, e.g., issues an attorney typically investigates in determining whether to pursue an ex parte seizure order); Cf. N.Y.C. Ethics Op. No. 2005-03 (2005) (There is no per se bar preventing lawyer from voluntarily testifying about a former client. However, 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. If in the course of testifying, the lawyer is asked a question for which the client’s consent has not been obtained, the lawyer should assert any applicable objection, including privilege, where applicable, that would enable the lawyer to avoid answering the question); Utah Ethics Op. No. 04-02 (2004) (lawyer must determine whether, under the facts of the case, she is a “necessary witness” in the litigation; if she is and disqualification would not work a substantial hardship on the client, she must withdraw prior to trial, different standard for withdrawal versus disqualification).


or employees, it must be determined which individuals within the entity are included within the scope of the attorney-client privilege.

1. 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: the “control group” test and the “subject matter” test.

“Control Group” Test. The “control group” test applies the privilege 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.

“Subject matter” Test. The United States Supreme Court explicitly rejected the “control group” test in Upjohn Co. v. United States, 449 U.S. 383 (1981). Although not endorsing any broad alternative rule, the Court’s ad hoc, case-by-case balancing approach was consistent with the subject matter test of Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 609 (8th Cir. 1977), which the Court cited with approval. Under the subject matter test of Diversified Industries, the attorney-client privilege is applicable 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.

101 ABA MODEL RULES, Rule 1.13; EC 5-18.


103 See 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, at which general counsel briefed attendees about 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 (continued...)

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so were discussed, and disclosure of documents would reveal legal advice secured by attendees; In re Avantel, S.A., 343 F.3d 311 (5th Cir. 2003) (“subject matter test,” rather than “control group test,” applied under Texas law to determine whether communications between corporation’s employees and its attorneys were protected from disclosure by attorney-client privilege, notwithstanding fact that communications were made before Texas adopted evidentiary rule that abandoned the control group test in favor of subject matter test; rule provided that it applied to all proceedings after effective date, and retroactive application of rule would not prejudice opposing party, which had no vested rights to documents); In re Grand Jury Subpoena, 886 F.2d 135 (6th Cir. 1989) (city council was client of city attorney with respect to closed condemnation hearings held pursuant to city code; therefore, district court erred in concluding that city council could not invoke attorney-client privilege to protect minutes of the meetings); Rehling v. City of Chicago, 207 F.3d 1009 (7th Cir. 2000) (district court did not clearly err in holding that general counsel to superintendent of police was acting in his legal rather than business capacity when advising ranking members of police department about disabled officer’s transfer, and that attorney-client privilege thus barred introduction of substance of conversation in officer’s ADA action; general counsel was not empowered to make business decision regarding officer’s transfer); Sprague v. Thorn Ams., Inc., 129 F.3d 1355 (10th Cir. 1997) (legal memorandum 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 memorandum did not waive privilege; power to waive privilege rests with corporation’s management and is normally exercised by its officers and directors); Gabriel v. Northern Trust Bank, 890 So.2d 517 (Fla. Ct. App. 2005) (Discovery request seeking documents that “relate to” specific allegations of the complaint improperly sought documents protected by the attorney-client privilege and work product doctrine; counsel’s determinations as to what documents were responsive to the request could indicate counsel’s litigation strategy.); Long v. Anderson Univ., 204 F.R.D. 129 (S.D. Ind. 2001) (attorney-client privilege applied to (1) electronic mail sent from university’s 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); Kyle v. Louisiana Pub. Serv. Comm’n, 878 So. 2d 650 (La. Ct. App. 2004) (public service commission was entitled to assert both the attorney client and deliberative process privilege during a legislative performance audit to prevent disclosure of certain emails between the commission and its counsel; communications at issue were between natural persons, an attorney and client, and executive branch officers of the state performing their lawful functions and duties); Ideal Elec. Co. v. Flowserve Corp., 230 F.R.D. 603 (D. Nev. 2005) (Draft affidavits (continued...)

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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); Carter v. Cornell Univ., 173 F.R.D. 92 (S.D.N.Y.) (associate dean who conducted interviews of employees at request of outside counsel could not be deposed since he was a representative of outside counsel); 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.); Rivera v. Kmart Corp., 190 F.R.D. 298, 303 (D.P.R. 2000) (documents authored by corporate official in charge of corporation’s insurance claims were protected by attorney-client privilege, where the information was needed by the corporation’s lawyers, and in-house counsel who received information from official was acting as an attorney when he received the documents; moreover, subjects discussed therein were consistent with giving subsequent legal advice); Brennan v. Western Nat. Mut. Ins. Co., 199 F.R.D. 660 (D.S.D. 2001) (handwritten note by employee of insurer which memorialized advice given by insurer’s attorney over telephone was covered by attorney-client privilege in insured’s bad faith action against workers’ compensation insurer); 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); In re Houseman, 66 S.W.3d 368 (Tex. Ct. App. 2001) (psychiatrist employed by attorney to assess client’s mental competency was “representative of the lawyer” and thus his testimony was barred by attorney-client privilege); In re Monsanto Co., 998 S.W.2d 917 (Tex. Ct. App. 1999) (applying amended section 503 in the context of documents generated by manufacturer’s attorneys in the course of providing legal services; attorney-client privilege protected copies of electronic mail and memoranda, facsimile cover pages, reports with handwritten notes, draft pages of legal documents, etc. constituting communications by and between counsel); In re Fontenot, 13 S.W.3d 111 (Tex. Ct. App. 2000) (documents submitted by physician to his liability insurance carrier–written narrative provided to attorney in another lawsuit and confidential claim questionnaire with same written narrative attached–after he received pre-suit notices of claim in medical malpractice case covered by the attorney-client privilege; physician’s contract of insurance expressly confers upon insurer right and duty to obtain and facilitate legal representation for physician in the event he is faced with a liability claim and it is undisputed that physician was communicating directly with his attorney when he copied the letter to the insurer and attached it to the questionnaire). Compare Reed v. Baxter, 134 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); Verschoth v. Time Warner, Inc., 85 Fair Empl. Prac. Cas. (BNA) 1528 (S.D.N.Y. 2001) (conversations between a freelance editor and a staff editor in which legal advice about the plaintiff was discussed was not protected by the attorney-client privilege because the freelance editor did not manage or supervise employees and was not (continued...)

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103(...continued)

responsible for effecting corporate policy regarding the legal advice given); 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.).

104 See In re Bieter Co., 16 F.3d 929 (8th Cir. 1994).

105 See Samaritan Found. v. Goodfarb, 862 P.2d 870 (Ariz. 1993) (rejecting control group test); Scripps Health v. Superior Court, 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”); Smith v. Laguna Sur Villas Cmty. Ass’n, 79 Cal. App. 4th 639 (2000) (condominium association, but not individual homeowners, held attorney-client privilege with respect to law firm retained for construction defect lawsuit against developer, and thus dissident homeowners who questioned the amount of law firm’s bills could not demand production of the law firm’s work product or legal bills); 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); Olson v. Accessory Controls & Equip. Corp., 735 A.2d 881 (Conn. App. Ct. 1999) (communications between employer’s attorney and attorney’s agent, namely environmental management company which was hired by attorney and employer to assist attorney in providing employer with legal advice regarding government order, fell within scope of attorney-client privilege); Southern Bell Tel. & Tel. Co. v. Deason, 632 So. 2d 1377 (Fla. 1994) (Upjohn test applied but internal audits conducted by telephone company at request of counsel in response to Commission investigation did not constitute protected “communication”); Progressive Am. v. Lanier, 800 So. 2d 689 (Fla. Dist. Ct. App. 2001) (in bad faith insurance action, attorney-client privilege protected computerized entries utilized by insurer’s claims representatives of conversations between insurer’s representatives, its in-house counsel, and defense counsel; communications to an from insurer’s attorneys and billing statements were also (continued...)
(continued)

privilege); *Hartford Fin. Serv. Group, Inc. v. Lake County Park & Recreation Bd.*, 717 N.E.2d 1232 (Ind. Ct. App. 1999) (in bad faith action against insurer, presuit communications between the insurer and its legal counsel regarding the loss claim at issue were protected by the attorney-client privilege, and thus were not subject to discovery); *Lexington Pub. Library v. Clark*, 90 S.W.3d 53 (Ky. 2002) (definition of “representative of the client” in Ky. rules of evidence was intended to embody the principles enunciated in *Upjohn*); *Neighborhood Development 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); *Kobluk v. University of Minn.*, 574 N.W.2d 436 (Minn. 1998) (a provost’s preliminary draft of a letter denying tenure, the final version of which is 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”); *Oregon Health Sciences 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”); *Safeguard Lighting Systems, Inc. v. North American Speciality Ins. Co.*, 2004 U.S. Dist. LEXIS 26136 (E.D. Pa. Dec. 30, 2004) (Documents generated by defendant’s outside claims adjusters, as well as those prepared by its outside counsel relating to the investigation and adjustment of plaintiff’s loss, were protected from discovery by the attorney-client privilege and work product doctrine; the adjuster was defendant’s agent and his communications with counsel were protected by the attorney-client privilege and there was no evidence that counsel was acting in a capacity other than as an attorney.); *SmithKline Beecham Corp. v. Teva Pharmaceuticals USA, Inc.*, 232 F.R.D. 467 (E.D. Pa. 2005) (Plaintiff did not waive the attorney-client privilege by revealing confidential communications to its consultants retained to assist it in obtaining facts and information needed to provide legal advice and assistance.); *Re AEP Tex. Central Co.*, 128 S.W.3d 687 (Tex. Ct. App. 2003) (legal memorandum 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 memorandum contained his opinions and legal theories with regard to dispute, attorney testified that memorandum was prepared in anticipation of litigation, memorandum was transferred to counsel who represented company in the subsequent trespass action, such counsel testified that memorandum was not intentionally produced and that he considered document privileged, and no evidence supported claim that crime/fraud exception applied). *Compare National Farmers Union Property & Cas. Co. v.*

(continued...)
2. Only Communications Protected

The attorney-client privilege only protects disclosure of contents of communications themselves between an attorney and the attorney’s client; it does not protect against disclosure of the underlying facts by the person who has personal knowledge of those facts, even though that person consulted an attorney.\(^\text{106}\)

\(^\text{105}(...\text{continued})\)

\textit{District Court}, 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); \textit{HPD Lab., Inc. v. Clorox Co.}, 202 F.R.D. 410 (D.N.J. 2001) (communications between defendant’s marketing department and paralegal did not come within attorney-client privilege; department approached paralegal for her own legal views, not for the purpose of obtaining legal advice from attorney, and she gave her advice independently, rather than as part of effort to assist attorney in formulating and rendering legal advice to client); \textit{Financial Techs. In’l, Inc. v. Smith}, 2000 WL 1855131 (S.D.N.Y. Dec. 19, 2000) (corporate communications with an unlicensed in-house attorney are not privileged if the corporation fails to verify its counsel’s status with the Bar). \textit{See also} Section 12-2234.B of the Arizona Statutes (communication between an attorney for a corporation, government agency, partnership, or other similar entity, and an employee, agent or member of the entity or employer is privileged if it concerns acts or omissions of or information obtained from the employee, agent or member if the communication is either: (1) For the purpose of providing legal advice to the entity or employer or to the employee, agent or member; or (2) For the purpose of obtaining information in order to provide legal advice to the entity or employer or to the employee, agent or member) (\textit{overruling} \textit{Samaritan Foundation v. Goodfarb}, 862 P.2d 870 (Ariz. 1993) (statements made by nurses and scrub technician to hospital counsel not within privilege since they were not seeking legal advice in confidence, the initial overture was made by others within the corporation, and they were mere witnesses to the incidents at issue since their conduct did not subject the corporation to potential liability).

\(^\text{106}\) \textit{Upjohn Co.}, 449 U.S. at 395-96. \textit{See also} \textit{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); \textit{Allen v. Chicago Transit Auth.}, 198 F.R.D. 495 (N.D. Ill. 2001) (employer did not show that document sent from employee’s discrimination complaint file, which was authored by a vice president of communications and sent to an equal employment opportunity coordinator, was protected from discovery by the attorney-client privilege, where document was neither authored nor reviewed by an attorney, and employer did not indicate when the matter was handed over to the employer’s legal department); \textit{Clark v.} (continued...)
3. Waiver of the Privilege

The attorney-client privilege may be expressly waived, or found not to exist, by:

(a) voluntary disclosure of the information or documents to a person other than the client who has no interest in maintaining the confidentiality of the contents of the writing, such as

(i) the government;\(^\text{107}\) or

\(^{106}\) (continued)

\(\text{Buffalo Wire Works Co., 190 F.R.D. 93 (W.D.N.Y. 1999)}\) (although former employee’s notes and handed over to counsel during period of possible age discrimination were protected by attorney-client privilege, facts underlying such notes were discoverable).

\(^{107}\) \(\text{United States v. MIT, 129 F.3d 681 (1st Cir. 1997)}\) (University forfeited attorney-client privilege and work product protection with respect to IRS summons by disclosing documents to Defense Contracting Audit Agency); \(\text{Westinghouse Elec. Corp. v. Republic of the Phil., 951 F.2d 1414, 1429 (3d Cir. 1991)}\) (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); \(\text{In re Qwest Communications Intern. Inc., 450 F.3d 1179 (10th Cir. 2006)}\) (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 waive would not promote purposes of privileges.); \(\text{United States v. Bergonzi, 216 F.R.D. 487 (N.D. Cal. 2003)}\) (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 prior to 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); \(\text{McKesson HBOC, Inc. v. Superior Court, 115 Cal. App. 4th 1229 (2004)}\) (corporation that was target of federal 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 (continued...
had been retained); \textit{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 Securities and Exchange Commission (SEC); surviving corporation’s confidentiality agreement with the SEC did not prevent waiver of the attorney work product protection); \textit{Hoffman v. Baltimore Police Dept.}, 379 F. Supp. 2d 778 (D. Md. 2005) (In action against police department and its officials by a former in-house employment attorney alleging termination based on race, although documents relating to legal advice the former in-house attorney gave to the defendants may have fallen within the scope of the attorney-client privilege, such privilege was waived when defendants produced the documents to the EEOC in response to the former in-house attorney’s discrimination charge.). \textit{But see Diversified Indus., Inc v. Meredith}, 572 F.2d 596, 611 (8th Cir. 1978) (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); \textit{Hanson v. United States Agency for Int’l Dev.}, 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). See ABA Task Force on the Attorney-Client Privilege–Recommendation 111 (Aug. 22, 2005) (Resolution supporting preservation of the attorney-client privilege, stating that the ABA opposes the routine practice by government officials of seeking a waiver of the attorney-client privilege or work product doctrine); \textit{In re Linerboard Antitrust Litigation}, ___ F.R.D. ___, 2006 WL 2556404 (E.D.Pa. Sept. 5, 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 Federal Trade Commission (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.)

\textit{Lexington Pub. Library v. Clark}, 90 S.W.3d 53 (Ky. 2002) (even if investigatory memorandum 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”); \textit{Fullerton v. Prudential Ins. Co.}, 194 F.R.D. 100 (S.D.N.Y. 2000) (continued...)
(b) disclosure by revealing privileged information

(i) during trial or deposition testimony;\textsuperscript{109}

\textsuperscript{108}(...continued)

(by producing privilege documents concerning its investigation of employee’s retaliation claims, employer waived its attorney-client privilege as to all other communications on the same subject); \textit{Simmons v. Children’s Hosp. of Penn.}, 89 Fair Empl. Pract. Cas. (BNA) 417 (E.D. Pa. 2002) (employer waived attorney-client privilege as to summary of investigation into employment discrimination claim of 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). \textit{Compare Laguna Beach County Water Dist. v. Superior Court}, 124 Cal. App.4th 1453 (2004) (In action against water district by homeowner, alleging defective construction of dam near her home, attorney’s written responses to inquiries by auditor for water district, relating to financial effect of pending or threatened litigation against water district, were protected by California’s attorney work product doctrine, and thus were not discoverable; the attorney expressly identified documents as “attorney work product communication,” and there was no evidence that the attorney knew or suspected that the auditor would disclose the communications or that the auditor in fact did so.); \textit{Wilstein v. San Tropai Condominium Master Ass’n}, 189 F.R.D. 371 (N.D. Ill. 1999) (mere fact that condominium association’s board may have voluntarily disclosed minutes of board meetings at which attorney’s legal advice to association was discussed, so as to waive association’s attorney-client privilege as to those communications, did not mean that there had been a waiver of privilege for all future board meetings); \textit{Wise v. Consol. Edison Co.}, 723 N.Y.S.2d 462 (App. Div. 2001) (fact that employee mailed to his attorney, after his termination, certain documents on which he had worked as an attorney, did not constitute knowing waiver of confidentiality, such as would allow their use in attorney’s wrongful discharge suit against employer; employer had previously warned attorney that commencement of legal action would violate his ethical duty to preserve confidences); \textit{Carver v. Township of Deerfield}, 742 N.E.2d 1182 (Ohio Ct. App. 2000) (deposition testimony on cross-examination of town trustee that there “probably” were meetings between counsel for township and the trustees regarding settlement proposal did not waive attorney-client privilege because cross-examination testimony is not considered “voluntary” for the purpose of waiver of the privilege).

\textsuperscript{109} \textit{Adler v. Wallace Computer 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 (continued...)}
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; Sperling v. City of Kennesaw Police Dep’t, 202 F.R.D. 325 (N.D. Ga. 2001) (plaintiff in employment discrimination action waived attorney client privilege with regard to narrative she prepared at her attorney’s request for purpose of responding to defendant’s interrogatories, by referring to the narrative during her deposition, by her attorney effectively disclosing most, if not all, of the narrative’s contents to defense counsel when he attached a modified version of it to plaintiff’s discovery responses, and plaintiff used it during her deposition to refresh her memory); Clark v. Buffalo Wire Works Co., 190 F.R.D. 93 (W.D. N.Y. 1999) (former employee who kept personal notes and handed them over to counsel during period of possible age discrimination did not waive attorney-client privilege for such notes by testifying at deposition). Compare Barone v. United Indus. Corp., 146 S.W.3d 25 (Mo. Ct. App. 2004) (member of top management of former employer, who was client of attorney, did not waive attorney-client privilege regarding discussion he had with attorney regarding release agreement between former employer and former employee, and thus, former employee was not entitled to conduct discovery on these matters; where manager testified that he had limited discussions with attorney regarding release agreement, manager did not attribute release payments to former employee to mistake made by attorney, rather, manager merely testified that payments were inadvertently made and thus did not testify as to the subject matter of his communication to attorney).

110 See In re Powerhouse Licensing, LLC, 441 F.3d 467 (6th Cir. 2006) (by including confidential attorney-client communications in affidavit, counsel for defendants effectively waived the attorney-client privilege); 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 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 to motion for disclosure of underlying notes that summary purported to summarize); Hollingsworth v. Time Warner Cable, 812 N.E.2d 976 (Ohio Ct. App. 2004) (employer who voluntarily divulged to former employee’s attorney at unemployment hearing and in response to a discovery request certain of employer’s communications with employer’s legal counsel waived any claim of privilege with respect to the communications).
(i) insurance brokers,111

(ii) public relations specialists,112 and

111 See, e.g., Sony Computer Entertainment Am., Inc. v. Great Am. Ins. Co., 229 F.R.D. 632 (N.D. Cal. 2005) (Attorney-client privilege was waived where the privileged communications between the client and the client’s lawyer took place in the presence of the client’s insurance broker, absent evidence that the presence of the broker was “reasonably necessary to accomplish the client’s purpose in consulting counsel.”); SR Int’l Bus. Ins. Co. v. World Trade Ctr. Props. LLC, 2002 WL 1334821 (S.D.N.Y. June 19, 2002) (attorney-client privilege did not shield post-9/11 communications between attorneys for leaseholder on the World Trade Center and employees of insurance broker that obtained insurance coverage for the WTC; although case law extends privilege to communications without outside agents whose role is the functional equivalent to that of a corporate employee, the conversations here were between the insurance broker, “a multi-national corporation with its own retained counsel and the lawyers for one of its many clients.” Common interest privilege was not established because no showing that leaseholder and broker shared an identical legal interest since broker was “not a party to this litigation and its legal position will be unaffected by the outcome of this case.”).

112 See, e.g., Haugh v. Schro. Inv. Mgmt. N. Am., Inc., 92 Fair Empl. Prac. Cas. (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); Calvin Klein Trademark Trust v. Wachner, 198 F.R.D. 53, 54 (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 so far as the documents . . . in question [were] concerned”). Compare In re Keeper of the Records v. United States, 348 F.3d 16 (1st Cir. 2003) (extrajudicial disclosure of attorney-client communications, not used thereafter by client to gain adversarial advantage in judicial proceedings, cannot work an implied waiver of all confidential communications on the same subject); Federal Trade Comm’n v. GlaxoSmithKline, 294 F.3d 141 (D.C. Cir. 2002) (drug manufacturer being investigated by FTC established attorney-client privilege in action to enforce FTC subpoena, with respect to communications it shared with its public relations and government affairs consultants; corporate counsel worked with the consultants in the same manner as they did with full-time employees, and consultants acted as part of team with full-time employees regarding their particular assignments); In re Grand Jury Subpoenas, 265 F. Supp. 2d 321 (S.D.N.Y. 2003) (attorney client privilege extended to discussions with public relations firm hired by lawyers for grand jury target where investigation was “a high profile matter” and had been “a matter of intense press interest and extensive coverage for months”).
(iii) others, such as an adversary;\(^{113}\) or

\(^{113}\) See Energy Capital Corp. v. United States, 45 Fed. R. Serv. 3d 1179 (Fed. Cl. 2000) (government contractor waived attorney-client privilege when it sent documents prepared by its attorneys to third party independent contractors, absent evidence that third party contractors were acting as agents of contractor); In re Santa Fe Int’l Corp., 272 F.3d 705 (5th Cir. 2001) (defendant’s senior counsel’s memorandum, which was disclosed to its horizontal offshore drilling competitors prior to the 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 price fixing in violation of the antitrust laws, 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); Morisky v. Public Serv. Elec. & Gas Co., 191 F.R.D. 419 (D.N.J. 2000) (in employees’ class action against employer alleging denial of overtime pay in violation of FLSA, questionnaires distributed by employees’ attorneys at public meeting to which employees were invited before lawsuit was filed were not protected by the attorney-client privilege; meeting was open to the general public rather than limited to employees, purpose of questionnaires was to solicit potential clients, and employees who completed questionnaires were not yet clients at the time); Dobbs v. Lamonts Apparel, Inc., 155 F.R.D. 650 (D. Alaska 1994) (same); Hudson v. General Dynamics Corp., 186 F.R.D. 271 (D. Conn. 1999) (questionnaires completed by employees prior to becoming clients are not protected under work product doctrine because they are simply witness statements with none of the elements of privilege); 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); In re Currency Conversion Fee Antitrust Litig., 2003 WL 22389169 (S.D.N.Y. Oct. 21, 2003) (credit card issuer waived attorney client privilege as to documents provided to outside company providing computer services since computer company’s role was “akin to that of an accountant or other ordinary third party specialist, disclosure to whom destroys the attorney-client privilege”); Calvin Klein Trademark Trust v. Washer, 124 F. Supp. 2d 207 (S.D.N.Y. 2000) (inclusion of an 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 which a responsible law firm would not be able to adequately resolve without the benefit of an investment banker’s expert assessment); Exotica Botanicals, Inc. v. E.I. Du Pont de Nemours & Co., 612 N.W.2d 801 (Iowa 2000) (although attorney who served as (continued...)}
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); *Lewis v. UNUM Corp. Severance Plan*, 203 F.R.D. 615 (D. Kan. 2001) (defendants waived attorney-client privilege when its in-house counsel sent otherwise privileged documents to plan administrator; the plan administrator is a fiduciary acting on behalf of the beneficiaries of the plan and is not acting in his capacity as a company representative); *Denney v. Jenkens & Gilchrist*, 362 F. Supp.2d 407 (S.D. N.Y. 2004), *reversed in part sub nom., Denney v. BDO Seidman, L.L.P.*, 412 F.3d 58 (2nd Cir. 2005) (BDO Seidman (“BDO”), an accounting firm, prepared a memorandum to its outside law firm regarding the effect of an IRS notice on the requirement that BDO maintain a list of taxpayers participating in certain tax shelter transactions. Some time thereafter, a BDO partner had discussions with a partner at Jenkens & Gilchrist (“Jenkens”) because she wanted Jenkens to reconsider the text of opinion letters that Jenkens had planned to send to those clients that Jenkens had advised regarding tax shelters who were also clients of DBO, to harmonize the text of the opinion letters with that of the DBO memo. As part of the back-up for his argument, the DBO partner faxed a copy of the DBO memo to the Jenkens partner. In connection with the settlement of a class action claim against it Jenkens produced documents, including the DBO memo, to plaintiffs’ counsel and to the IRS in the case. Plaintiffs’ counsel first attempted to use the memo in a similar case against DBO pending in a federal court in Pennsylvania; in that case, the district court agreed with DBO that the memo was privileged for the purpose of that case only. Plaintiffs then moved for a determination in the present action that the memo is not privileged. The court found that even assuming the memo was privileged, any privilege that may have attached to the memo had been waived by its disclosure to Jenkens. Jenkens did not have a “common interest” with DBO since the purpose of the disclosure was to attempt to persuade Jenkens to harmonize the language of its client letters with that of DBO’s rather than in furtherance of a joint defense. Moreover, even assuming that the disclosure of the memo was inadvertent, DBO made no effort to demand the memo’s return, or to inform Jenkens that the memo was confidential and that it was sent in error when it first learned that it had come into Jenkens’ possession; “DBO *still* did not demand its return three years later, even when it knew that Jenkens was producing the documents to the IRS and to plaintiffs.”); *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); Tex. Ethics Op. No. 572 (June 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.) *In re Cooper*, 47 S.W.3d 206 (Tex. Ct. App. 2001) (defendant in automobile
personal injury case did not waive his attorney-client privilege by assigning his rights to any cause of action against his insurer to plaintiff motorist, where assignment’s language did not provide for defendant to waive or assign any right to assert attorney-client privilege, it did not provide for voluntary disclosure or consent to disclosure of any significant part of matters protected by attorney-client privilege, nor did it provide for defendant to cooperate as to matters giving rise to claims against his insurers; 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). See Va. Legal Ethics Op. No. 1787 (Dec. 22, 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 United States v. BDO Seidman, L.L.P., 368 F.Supp.2d 858 (N.D. Ill. 2005) (Partner of accounting firm that offered consulting services about tax shelters did not waive any attorney-client privilege that attached to firm’s memorandum to outside counsel discussing effect of IRS notice on tax shelters, by faxing memorandum to shareholder of co-defendant firm, where both shared common interest in ensuring compliance with the new regulation issued by the IRS and making sure that they could properly defend against any potential IRS enforcement action.) Cf. McKesson HBOC, Inc. v. Superior Court, 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); OXY Resources Cal. LLC v. Superior Court, 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); 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); Ashkinazi v. Sapir, 2004 WL 1698446 (S.D.N.Y. July 28, 2004) (conversation over speakerphone between general counsel and president of defendant corporation privileged; they were in their respective offices and general counsel had his door closed, demonstrating a reasonable intent to keep the discussion confidential).
See 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); 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); Profit Mgmt. Dev., Inc. v. Jacobson, Brandvik & Anderson, Ltd., 721 N.E.2d 826 (Ill. App. Ct. 1999) (client-plaintiff in legal malpractice action waived the attorney-client privilege by giving his deposition testimony in which he referred to his current attorney’s comments about the effect any judgment would have in dispute with Client’s employee and by referring to the prior correspondence with attorney); Ritacca v. Abbott Labs., 203 F.R.D. 332 (N.D. Ill. 2001) (defendant waived the attorney-client privilege with respect to documents because it failed to assert the privilege in a timely and proper manner); Chao v. Local 951, United Food and Commercial Workers Intern. Union, 2006 WL 2380609 (N.D.Ohio Aug. 15, 2006) (union member who filed objections to results of union election waived attorney-client privilege where at his deposition, without a lawyer present, he admitted that the attorney helped him draft his objections, his attorney had advised him to allege in his complaint every possible election irregularity enumerated in the statute, even though, for many of the allegations, and admitted he had no actual knowledge of facts supporting such claims; that the attorney was not represented at his deposition when he made the statements constituting waiver is immaterial—he and the attorney discussed whether the attorney should attend the deposition and decided his presence was unnecessary. “Having taken that risk, they cannot now claim waiver was due only to a lack of legal counsel.”). Cf. Best Prods., Inc. v. Superior Court, 119 Cal. App. 4th 1181 (2004) (defendant who asserted the attorney-client and work product privileges in a timely manner, albeit in a boiler-plate fashion, did not thereby waive the privilege; there was no requirement that a privilege log be tendered at that point of the discovery proceedings, and only if defendant had failed to file a timely response to plaintiff’s demand could the court find a waiver of privileges); 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, mediation, and settlement, 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); In re Currency Conversion Fee Antitrust Litig., 2003 WL 22389169 (S.D.N.Y. Oct. 21, 2003) (attorney-client privilege shielded incident report summarizing in-house legal advice on and resolution of particular issue, even though subject matter of report had been publicly disclosed); Clark v. Buffalo Wire Works Co., 190 F.R.D. 93 (W.D.N.Y. 1999) (attorney-client privilege protected former employee’s personal...
The attorney-client privilege may also be waived impliedly by the following conduct: (1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party; (2) through her affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the

\(^{114}(...)\) continued

notes, which 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).

\(^{115}\) See, e.g., 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); United States Fire Ins. Co. v. Asbestospray, Inc., 182 F.3d 201, 212 (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); In re Grand Jury Proceedings, 78 F.3d 251 (6th Cir. 1996) (disclosure by president of laboratory to government investigators that its attorneys had approved certain portions of a marketing plan did not necessarily waive attorney-client privilege with respect to the attorneys’ legal opinion for the entire plan, but only as to the points referred to by the president and perhaps those points “inextricably linked” to those actually discussed); Garcia v. Zenith Elecs. Corp., 58 F.3d 1171, 1175 n.1 (7th Cir. 1995); Home Indem. Co. v. Lane Powell Moss & Miller, 43 F.3d 1322 (9th Cir. 1995) (no implied waiver; even if plaintiffs placed privileged matter in issue, denial of discovery into the privileged communications was neither manifestly unfair or prejudicial to defendant); Centuori v. Experian Info. Solutions, Inc., 347 F. Supp.2d 727 (D. Ariz. 2004) (In consumer’s actions against, inter alia, county public defender’s office, and public defender representing criminal defendant who sexually molested consumer’s (continued...)
daughter, alleging that defendants willfully violated Fair Credit Reporting Act by using his credit reports in an attempt to discredit him as a witness at a criminal trial, defendants could not claim, in response to consumer’s motion to compel, that information relating to why public defender obtain consumer’s credit reports was protected by attorney-client privilege, or work product privilege, where defendants failed to show how disclosures they previously made—during the underlying criminal trial and to the credit reporting agency in response to an audit inquiry from the agency—regarding their intended purpose for obtaining credit reports had not resulted in a waiver.); Genetech, Inc. v. Insmed Inc., 236 F.R.D. 466 (N.D. Cal. 2006) (In patent infringement action in which alleged infringers asserted defense of inequitable conduct based on alleged failure to disclose prior art, patentee’s inventor’s deposition testimony denying knowledge of prior art, and denying memory of what documents he had given patentee’s attorney, did not constitute implied waiver of patentee’s attorney-client privilege, so as to warrant in camera review or compelled production of documents concerning communications between inventor and attorney; testimony did not put any attorney-client communication in issue, and assertion of privilege did not prejudice alleged infringers since patentee did not plan to offer inventor’s testimony at trial.); Sedillos v. Board of Educ., 313 F. Supp. 2d 1091 (D. Colo. 2004) (school superintendent precluded from waiving attorney-client privilege to support his advice of counsel defense with respect to challenged personnel actions, and retaining privilege as to rest of attorney’s advice; partial retention of privilege was contrary to the rule that attorney-client privilege may not be used as a shield and a sword); Metropolitan Life Ins. Co. v. Aetna Cas. & Sur. Co., 249 Conn. 36, 52-54 (1999) (where a party puts the content of the lawyer’s advice or actions at issue by raising claims that make the work of the attorney “integral to the outcome of the legal claims of the action,” a waiver of confidentiality has occurred, since a party cannot simultaneously make the attorney’s actions or advice an issue and invoke a privilege against revealing them); 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); Shapo v. Tires ’N Tracks, Inc., 782 N.E.2d 813 (Ill. App. Ct. 2002) (core of litigation is premised on defendant’s complaint that its former attorneys were not authorized to settle case on its behalf; therefore, “defendant has placed the conduct of its former counsel at issue, and waiver is applicable to those earlier communications between it and its former counsel involving the settlement agreement.”); Engineered Prods. Co. v. Donaldson Co., 313 F. Supp. 2d 951 (N.D. Iowa 2004) (patent infringement plaintiff waived attorney-client privilege with respect to communications concerning laches and estoppel when its president voluntarily stated at deposition that attorney was source of his belief that plaintiff had sat on his rights; assertion of advice of counsel to rebut defendant’s laches and estoppel defenses also (continued...)
waived attorney-client privilege in communications on subject of laches and estoppel); EEOC v. Caesars Entertainment, Inc., ___F.R.D. ___, 2006 WL 2615350 (D. Nev. August 22, 2006) (Attorney-client privilege and work product doctrine did not preclude deposition questioning of employer’s corporate representative regarding factual bases for employer’s position statements in response to charges of employment discrimination filed with the EEOC by employees, and for its affirmative defenses in subsequent suit brought by the EEOC against employer.); Desclos v. Southern New Hampshire Medical Center, 903 A.2d 592 (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.); Sanofi-Synthelabo v. Apotex Inc., 363 F. Supp.2d 592 (S.D. N.Y. 2005) (Statements made in deposition by witness regarding why plaintiffs decided to cancel its original claims did not require forfeiture of the attorney-client privilege with respect to privileged communications about the decision to cancel. The witness’s statements were minimal, fleeting, and his words underscored his uncertainty. Plaintiffs did not assert facts to a decisionmaker, such as a judge or jury, while shielding other facts from the decisionmaker.); WeddingChannel.Com v. The Knot, Inc. 2004 WL 2984305 (S.D. N.Y. Dec. 23, 2004) (The deliberate injection of the advice of counsel into a case waives the attorney-client privilege as to communications and documents relating to the advice); Urban Box Office Network, Inc. v. Interfase Managers, L.P., 2005 U.S. Dist. LEXIS 14008 (S.D. N.Y. July 12, 2005) (Defendant’s prior invocation of the advice-of-counsel defense waived the privilege as to the documents relevant to the defense in that and subsequent litigation); Hulse v. Arrow Trucking Co., 587 S.E.2d 898 (N.C. Ct. App. 2003) (truck driver waived attorney-client privilege, in personal injury action relating to collision with motorist, as to handwritten interrogatory responses driver faxed to driver’s attorney, where driver testified at deposition that typed interrogatory response stating that motorist’s vehicle was traveling at 50 miles per hour “was not my answer,” and that “I wrote” in handwritten interrogatory response that motorist was traveling “above the speed limit” of “[f]ifty-five plus”; that testimony puts contents of handwritten interrogatory responses into evidence by identifying obvious differences between handwritten and typed responses, and the handwritten response provided the best evidence of truck driver’s intended response to the interrogatory); Public Serv. Co. v. Lyons, 10 P.3d 166 (N.M. Ct. App. 2000) (waiver of attorney-client privilege is recognized only where a party seeks to limit its liability by describing the advice given by the attorney and by asserting that he relied on that advice, or where direct use is anticipated because the holder of the privilege must use the materials at some point in order to prevail); A&E Prods. Group, L.P. v. Mainetti USA Inc., 2004 WL 895699 (S.D.N.Y. April 27, 2004) (since patentee testified at hearing that he relied on his attorneys to tell him what information was required to be stated in disclosure statement and since defendants’ inquiry at the hearing was stymied as to why certain language was used in the statement by the patentee, patentee forfeited attorney-client privilege by his testimony); EEOC v. Rekrem, Inc., 2002 WL (continued...
27776 (S.D.N.Y. Jan. 10, 2002) (where employer asserted advice of counsel defense to EEOC charge, attorney-client privilege waived with respect to files generated by defendant’s outside counsel regarding such advice); \textit{Gabriel Capital, L.P. v. Natwest Fin., Inc.}, 2001 WL 1132050 (S.D.N.Y. Sept. 21, 2001) (“[W]hen a party voluntarily asserts an advice-of-counsel defense, it is deemed to have waived the privilege with respect to the advice received.”); \textit{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 prior to 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); \textit{Moskovitz v. Mt. Sinai Med. Ctr.}, 635 N.E.2d 331, 349 (Ohio 1994) (certain attorney-client communications and work-product materials in an malpractice insurer’s claims file were not protected from discovery by the attorney-client privilege or work-product doctrine in a proceeding for prejudgment interest, where the issue was whether there was a lack of a good faith effort to settle by a party or the attorneys acting on his or her behalf; “The only privileged matters contained in the file are those that go directly to the theory of defense of the underlying case in which the decision or verdict has been rendered.”); \textit{Synthes Spine Co., L.P. v. Walden}, 232 F.R.D. 460 (E.D. Pa. 2005) (Rule 26(a)(2)(B) requires disclosure of all information, whether privileged or not, that a testifying expert generates, reviews, reflects upon, reads and/or uses in connection with the foundation of his opinions, even if the testifying expert ultimately rejects the information.); \textit{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); \textit{Ginsberg v. Fifth Court of Appeals}, 686 S.W.2d 105, 108 (Tex. 1985) (“A plaintiff cannot use one hand to seek affirmative relief in court and with the other lower an iron curtain of silence against otherwise pertinent and proper questions which may have a bearing upon his right to maintain his action.”); \textit{In re Ben E. Keith Co., Inc.}, 198 S.W.3d 844 (Tex. Ct. App. 2006) (Trial court did not abuse its discretion by finding that chile manufacturer did not waive attorney-client and work product privileges regarding file of manufacturer’s insurance adjuster in connection with manufacturer’s reasons for settling claims brought by consumers who suffered food poisoning after eating spoiled chile, and thus that chile distributor was not entitled to discover adjuster’s file and depose adjuster, in consumers’ action against manufacturer, distributor and salvage grocer in which defendants asserted cross-claims against each other; distributor did not point to any evidence supporting its assertions that adjuster and his file were the only sources for learning reasons why manufacturer settled, that adjustor had unique personal knowledge about the litigation and settlement decisions, or that manufacturer waived the privileges because it allowed its attorney to testify about its reasons for settlement.); \textit{Alford v. Bryant}, 137 S.W.3d 916 (Tex. Ct. App. 2004) (attempt by client in malpractice action against attorney to use mediation confidentiality privilege offensively to prevent attorney from (continued...)}
presenting testimony of mediator as to conversation that occurred between attorney client in mediator’s presence waived mediation confidentiality under alternative dispute resolution confidentiality statute); In re Tjia, 50 S.W.3d 614 (Tex. Ct. App. 2001) (use of attorney client privilege by lessors, as plaintiffs in breach of contract claim, to refuse lessee’s discovery request for letter written to lessors by their attorneys was offensive, where lessee asserted affirmative defense and counterclaim that lessors first breached contract by unreasonably withholding consent for sublease, lessors alleged that they relied solely on attorney’s advice in not approving sublease, and letter materially affected lessee’s ability to present its defense, as information could not be obtained elsewhere). Compare In re Pioneer Hi-Bred Int’l, Inc., 238 F.3d 1370 (Fed. Cir. 2001) (party does not forgo the attorney-client privilege with respect to merger negotiations by disclosing the existence of the merger, the negotiations between the parties concerning the merger, or the property rights of the respective parties; waiver occurs only when a party relies on or discloses advice of counsel or other privileged information in connection with the merger); 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.); Ex Parte State Farm Fire and Cas. Co., 794 So. 2d 368 (Ala. 2001) (mere fact that plaintiffs claimed damages to compensate for attorneys fees they incurred in earlier action did not indicate a waiver of the attorney-client privilege); Laguna Beach County Water District v. Superior Court, 124 Cal. App.4th 1453 (2004) (In action against water district by homeowner, alleging defective construction of dam near her home, water district’s assertion of affirmative defenses relating to lack of knowledge of alleged construction defects did not constitute waiver of attorney-client privilege as to letters from water district’s attorney to water agencies association, which provided defense for water district, and thus letters were not discoverable, where the letters dealt with water district’s post-construction investigation of pending claims, and had nothing to do with the affirmative defenses relating to the water district’s preconstruction knowledge of defects.); Travelers Ins. Cos. v. Superior Court, 143 Cal. App. 3d 436 (1983) (holding attorney-client privilege not waived by signing answers to interrogatories); Playboy Enters., Inc. v. Welles, 60 F. Supp. 2d 1050 (S.D. Cal. 1999) (granting access to defendant’s electronic mail to court-appointed computer expert will not result in waiver, even if attorney-client communications are discovered); Pfizer, Inc. v. Ranbaxy Labs., Ltd., 2004 WL 1376586 (D. Del. June 28, 2004) (fact that an applicant bases its notification on the opinions and advice of its attorneys is insufficient to constitute a waiver of the attorney-client privilege and/or work (continued...)
product immunity with respect to the underlying documents expressing that advice or opinion); Chomat v. Northern Ins. Co., 919 So.2d 535 (Fla. App. 2006) (A party’s simple allegation in a contribution action that a settlement was reasonable, made in compliance with statute, does not take the case out of the general rule that the mere bringing of an action cannot be said to have waived the attorney-client privilege.), review denied, ___ So.2d ___ (Fla. July 26, 2006); American Nat’l Bank and Trust Co. v. Emerald Investments Ltd. Partnership, 2005 U.S. Dist. LEXIS 14254 (N.D. Ill. July 14, 2005) (By denying that it acted in bad faith in breach of contract action defendant company did not waive attorney-client privilege concerning communications which may have been relevant to the issue of bad faith.); Hayes v. Burlington N. & Santa Fe R.R. Co., 752 N.E.2d 470 (Ill. App. Ct. 2001) (railroad’s use of release signed by switchman following train accident, in negligence action brought by surviving spouse of switchman, did not waive attorney client privilege as to FELA case summary and letter to railroad’s general counsel, even though evidence in document could have helped spouse rebut an affirmative defense issue raised by railroad); Brandon v. West 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); Four Rivers Gaming, Inc. v. Reliable Amusement Co., 737 So. 2d 938 (La. Ct. App. 1999) (testimony by owner’s attorney about sending contract termination letter did not waive privilege, since testimony only repeats what is evident from the letter, which was not privileged); Dixie Mill Supply Co. v. Continental Cas. Co., 168 F.R.D. 554 (E.D. La. 1996) (a litigant’s assertion that he acted in good faith does not, by itself, waive the attorney-client or work product privileges in a bad faith action by the insured); Bennett v. ITT Hartford Group, 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); 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 effect waiver of 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); Brennan v. Western Nat’l Mut. Ins. Co., 199 F.R.D. 660 (D.S.D. 2001) (an insurer’s assertion that it acted in good faith does not, by itself, waive the attorney-client or work-product privileges (continued...)

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privilege would have denied the opposing party access vital to her defense.\textsuperscript{116}

\textsuperscript{116}(...continued)

when defending a bad faith claim by an insured.); \textit{In re Carbo Ceramics, Inc.}, 81 S.W.3d 369 (Tex. Ct. App. 2002) (defendant did not waive its claim of attorney-client privilege by asserting that it intended to rely on advice of counsel defense in action for tortious interference with contractual relations, where defendant’s separate defense of justification did not constitute request for affirmative relief, and, by time court addressed issue of offensive use, defendant had changed its strategy and declared it would not assert advice of counsel defense); \textit{State v. Madden}, 601 S.E.2d 25 (W. Va. 2004) (where the interests of an insured and the insurance company are in conflict with regard to a claim for under-insured motorist coverage and the insurance company 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 insurance company’s attorney-client privilege concerning the under-insurance claim); \textit{Virginia Elec. & Power Co. v. Westmoreland - LG&E Partners}, 526 S.E.2d 750 (Va. 2000) (independent power producer met its burden of producing evidence to show that draft letter prepared by chief financial officer 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). \textit{See also} Section V., \textit{infra} (“Inadvertent Disclosure and Improper Acquisition of Privileged Documents and Information”).

\textsuperscript{116} Jurisdictions differ on whether the waiver extends beyond the specific information disclosed, such as to the entire conversation/document or the subject matter of the waived communication. \textit{Compare Chevron Corp. v. Pennzoil Co.}, 974 F.2d 1156 (9th Cir. 1992) (court refused to extend scope of a waiver of the attorney-client privilege beyond the few privileged documents actually discovered) and \textit{Sizemore v. City of Madras}, 2004 WL 1318883 (D. Or. June 10, 2004) (plaintiff is not entitled to any information beyond the privileged documents actually disclosed to the district attorney) \textit{with Beneficial Franchise Co. v. Bank One}, N.A., 205 F.R.D. 212 (N.D. Ill. 2001) (defendant in patent infringement action that indicated the opinions of its attorney formed the basis for its equitable estoppel defense waived the attorney-client and work product privileges as to all pre-filing information involving the same subject matter of the disclosed communications, as well as all documents, even those prepared after suit was commenced, casting doubt or contradicting those opinions, irrespective of whether the documents indicate on their face that they were conveyed to the client), \textit{Murray v. Gemplus Int’l. S.A.}, 217 F.R.D. 362 (E.D. Pa. 2003) (former employer’s disclosure of internal communications prepared by its in-house counsel, in response to employee’s discovery request in trade secret appropriation action which showed that counsel desired that previous employer’s assignment of employee’s intellectual property to former employer be “squeaky clean,” was not inadvertent but (continued...)

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Also, “the power to waive the corporate attorney-client privilege rests with the corporation’s management and is normally exercised by its current officers and directors.”\textsuperscript{117} Thus, “[a] mere employee cannot waive the corporation’s privilege.”\textsuperscript{118}

\textsuperscript{116}(...continued) rather intentional, thus former employer waived attorney-client privilege as to documents disclosed and is not entitled to return of the documents; former employer took no action until 11 weeks after it was informed of disclosure and one week after employee filed motion to compel, and former employer’s apparent motive for producing documents was to bolster its case, waiver extended beyond documents disclosed and subject matter of the negotiations, and gave employee right to inspect other documents to determine how former employer intended to make assignment “squeaky clean”; former employer intentionally and selectively disclosed documents in order to put a positive light on negotiations between former employer and previous employer) and \textit{In re Papst Licensing}, 2001 WL 1135265 (E.D. Pa. Sept. 24, 2001) (party waived attorney client privilege by submitting affidavit of its in-house counsel which revealed privileged communications, and waiver extended to communications relating to the same subject matter). \textit{Cf. St. Luke Hospitals, Inc. v. Kopowski}, 160 S.W.3d 771 (Ky. 2005) (“[W]hen a communication is protected by the attorney client privilege it may not be overcome by a showing of the need by an opposing party to obtain the information contained in the privileged communications.”).


\textsuperscript{118} \textit{Weintraub}, 471 U.S. at 348-49; \textit{Sprague v. Thorn Ams., Inc.}, 129 F.3d 1355, 1371 (10th Cir. 1997). See also \textit{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); \textit{In re Claus von Bulow}, 828 F.2d 94, 100-01 (2d Cir. 1987) (corporate employee cannot waive the corporation’s attorney-client privilege); \textit{United States v. Chen}, 99 F.3d 1495, 1502 (9th Cir. 1996), (same); \textit{In re Grand Jury Subpoenas}, 144 F.3d 653 (10th Cir. 1998), cert. denied sub nom., \textit{Anderson v. United States}, 525 U.S. 966 (1998) (“Any privilege resulting from communications between corporate officers and corporate attorneys concerning matters within the scope of the corporation’s affairs and the officer’s duties belongs to the corporation and not to the officer.”); \textit{Motley v. Marathon Oil Co.}, 71 F.3d 1547 (10th Cir. 1995) (“The mere fact that [defendant] designated a lawyer, pursuant to Fed. R. Civ. P. 30(b)(6), as its corporate representative at one deposition, is a wholly insufficient ground to hold that [it] waived its attorney-client privilege.”); \textit{Sharp v. Trans Union L.L.C.}, 845 N.E.2d (continued...)
(...continued)

719 (Ill. Ct. App. 2006) (In action brought by underwriters for declaratory judgement 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.); Rojicek v. River Trails Sch. Dist. 26, 2003 WL 1903987 (N.D. Ill. April 17, 2003) (former superintendent being sued for retaliation in violation of first amendment rights is not entitled to an order disqualifying counsel for the district and the other co-defendants or blanket waiver of the attorney-client privileged communications between her and such counsel in order to advance an advice of counsel defense; although superintendent was occasionally provided legal advice by the district’s counsel in matters concerning the plaintiff that are at issue in the litigation, all advice was given to the superintendent solely in the context of her role as superintendent and not concerning her personal liability and thus the privilege is exclusively vested in the district’s board and superintendent is not authorized to waive the privilege without the board’s consent); IMC Chems., Inc. v. Niro, Inc., 2000 WL 1466495 (D. Kan. July 19, 2000) (when one of plaintiff’s attorneys disclosed the privileged communications during his deposition regarding his and his client’s interpretation of the contract, the intent behind the contract, and the negotiations and drafting of the contract; “[T]he disclosures occurred without the consent of the client; such disclosures thus breached the attorney-client relationship. The disclosures did not, however, waive the attorney-client privilege.”; however, court found waiver by plaintiff’s failure to timely object following discovery of disclosure); Coffin v. Bowater, Inc., 2005 U.S. Dist. LEXIS 9395 (D. Me. May 13, 2005) (Corporation sold its wholly-owned subsidiary, a paper company, to the current owner. The paper company later filed for bankruptcy. Retired employees of the paper company sued the corporation, claiming the corporation was responsible for assuming the benefit obligations owed to them. The employees filed a motion to compel production of documents from the corporation relating to the paper company; the paper company’s trustee in bankruptcy purported to waive the attorney-client privilege of the paper company in the documents. The court found that the right to waive the privilege with respect to communications between the corporation’s legal representatives and the paper company rested with the managers of the current owner of the company and not with the bankruptcy trustee. As a result of the sale, the current owner assumed all of the paper company’s tangible and intangible rights, including all confidentiality obligations. The bankruptcy trustee had no right to waive the paper company’s privilege.); Lane v. Sharp Packaging Syst., 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 (continued...)
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. In such cases, waiver of the attorney-client privilege is implicated. The waiver issue arises when counsel for the employer seeks to introduce evidence at trial that he/she has developed in the course of investigation as the basis of the employer’s affirmative defense, as in sexual harassment cases, or otherwise in response to plaintiff’s claims.

Some courts have held that it is inconsistent to both assert the attorney-client privilege, prohibiting discovery of the matter, while simultaneously seeking to introduce the investigation file, or even selected portions of the investigative file, as evidence at trial. Thus, corporate employers have been held to have 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 by outside counsel.  

privileged ownership belonged to the corporation, only corporation could waive privilege, and only current management could act on behalf of the corporation). Cf. State Comp. Ins. Fund v. Superior Court, 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); Inter-Fluve v. Montana Eighteenth Judicial Dist. Court, 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.)

 See State Farm Mut. Auto. Ins. Co. v. Lee, 13 P.3d 1169, 1177 (Ariz. 2000) (by asserting subjective evaluation and understanding of its personnel about state of the law on stacking coverage for underinsured and uninsured motorist claims, insurer affirmatively injected legal knowledge of its claims managers into insured’s bad faith action and put the extent and sources of this legal knowledge at issue, thereby waiving the attorney-client privilege as to communications between insurer and its counsel concerning propriety of insurer’s policy of denying stacking); 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 judgement of its counsel, it cannot deny an opposing party “an opportunity to uncover the foundation for those assertions in order to contradict them”); Rahn v. Junction City Foundry, Inc., 2000 WL 1679419 (D. Kan. Nov. 3, 2000) (defendant

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affirmatively acted in placing privileged information at issue by asserting the affirmative defense that it took prompt, effective remedial action when it became aware of sexual harassment complaint; *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.”); *Brownwell v. Roadway Package Sys., Inc.*, 185 F.R.D. 19 (N.D.N.Y. 1999) (employer waived attorney-client privilege and work product protection to prevent disclosure of statements during harassment investigation where employer raised adequacy of investigation as a defense); *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); *Woodson v. American Transit Ins. Co.*, 720 N.Y.S.2d 467 (App. Div. 2001) (insurer may not use attorney-client privilege or work product doctrine to shield from disclosure material relevant to the insured’s bad faith action); *Zurich Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 137 A.D.2d 401 (N.Y. App. Div. 1999) (same); *Brooms v. Regal Tube Co.*, 881 F.2d 412, 422 (7th Cir. 1989) (same), overruled in part on other grounds, *Saxton v. AT&T*, 10 F.3d 526 (7th Cir. 1993); *Jones v. Nationwide Ins. Co.*, 2000 WL 1231402 (M.D. Pa. July 20, 2000) (language in affirmative defense by insurer in bad faith action that it acted reasonably in accordance with the policy and state law waived the attorney-client privilege); *Cox v. Administrator 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.”); *Energy Capital Corp. v. United States*, 45 Fed. Cl. 481 (2000) (plaintiff waived attorney-client privilege and work product protection with regard to complete, unredacted bills from his attorneys by seeking attorney fees as damages for breach of contract); *In re ML-Lee Acquisition Fund II, L.P.*, 859 F. Supp. 765 (D. Del. 1994) (defendants waived right to assert attorney-client privilege by stating in deposition that they took or failed to take certain actions based on advice of counsel defense); *Rivera v. Kmart Corp.*, 190 F.R.D. 298 (D.P.R. 2000) (employer waived attorney-client privilege with regard to document pertaining to interview of store manager when it used such documents as a sword to support its position in a wrongful termination case that the employees were terminated for involvement in destruction of merchandise to be included in an insurance claim); *Peterson v. Wallace Computer Servs.*, 984 F. Supp. 821 (D. Vt. 1997) (attorney-client privilege and work product protection did not preclude disclosure of investigative notes and memoranda where employer asserted adequacy of investigation as defense). Cf. *Wellpoint Health Networks, Inc. v. Superior Court*, 59 Cal. App. 4th 110 (1997) (attorney-client privilege and work product doctrine may apply to attorney retained to investigate employee’s claims of discrimination and
As one court explained:

If defendant employer hopes to prevail by showing it investigated an employee’s complaint and it took action appropriate to the findings of an investigation, then it will have to put the adequacy of the investigation directly at issue, and cannot stand on the attorney-client privilege or the work product doctrine to preclude a thorough examination of its adequacy. The defendant cannot have it both ways. If it chooses his course, it does so with the understanding that the attorney-client

(...continued)

harassment; however, issue of whether employer waived privilege by raising defense of adequate investigation cannot be determined until defendant’s answer or discovery responses indicate the possibility of a defense based on thorough investigation and appropriate corrective response; Boling v. First Utility Dist., 1999 WL 917522 (E.D. Tenn. 1998) (employees’ communications with investigators and attorneys were privileged where employer did not intend to rely on adequacy of investigation as a defense; by the time that the communications had occurred, the prompt and remedial action upon which the employer was relying had already been taken); EEOC v. Lutheran Social Servs., 186 F.3d 959 (D.C. Cir. 1999) (refusing to enforce EEOC subpoena for report of sexual harassment investigation prepared by counsel for Lutheran Social Services on the grounds that it is protected by the attorney-client privilege because attorneys conducted investigation in anticipation of litigation and there was no compelling need requiring disclosure); McPeek v. Ashcroft, 202 F.R.D. 332 (D.D.C. 2001) (work product privilege applied to documents created by Department of Justice’s Equal Employment Opportunity Office following DOJ employee’s filing with EEO office administrative complaint of retaliation for lodging sexual harassment complaint against supervisor, since documents were prepared in anticipation of litigation, not in regular course of business); 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); 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); George v. Wausau Ins. Co., 2000 WL 1728511 (E.D. Pa. Nov. 21, 2000) (insurance company defending bad faith action did not waive attorney-client privilege by pleading as affirmative defense that it acted in a proper and reasonable manner in accordance with the provisions of the policy and with Pennsylvania law). 119
privilege and work product doctrine are thereby waived.\textsuperscript{120}

On the other hand, where the investigative materials are reasonably segregated from the attorney’s advice and other privilege communications and the plaintiff is afforded full discovery regarding all aspects of the investigation, courts have held that the attorney-client privilege has not been waived unless a substantial portion of attorney-client communication has been disclosed to third parties.\textsuperscript{121} In some contexts, such as criminal investigations, the courts have

\begin{footnote}

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.

\textsuperscript{121} \textit{Waugh v. Pathmark Stores, Inc.}, 191 F.R.D. 427 (D.N.J. 2000) (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 merely in his capacity as attorney for employer, counsel did not conduct investigation himself or act as decision-maker in employer’s remediation efforts, and her declined to rely on counsel’s advice to support its defense regarding reasonableness of its investigation or remedial measure); \textit{Walker v. County of Contra Costa}, 227 F.R.D. 529 (N.D. Cal. 2005) (In race discrimination and retaliation case against defendant county and fire chief, plaintiff employee, moved to compel production of an attorney’s investigation report on the merits of employees claims and a report prepared by the county’s human resources department. The magistrate judge ordered production of the attorney’s report as to the pre-litigation investigation into the employee’s claims because the language in the defendants’ affirmative defense indicated that they intended to rely on the attorney’s investigation and the 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 (continued...)

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allowed an opposing party access 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

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121(...continued)

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; Kaiser Found. Hosps. v. Superior Court, 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, then 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); In re Witham Mem’l Hosp., 706 N.E.2d 1087 (Ind. Ct. App. 1999) (attorney client privilege protected from disclosure a report and related communications prepared by investigator hired by hospital’s counsel to investigate allegations against hospital employees, hospital did not waive privilege by issuing press release concerning investigation or disseminating memos to its employees, where press release and memos did not include report or excerpts of report but rather summarized and commented on results of the investigation without revealing any of the information which supported those results); Pray v. New York City Ballet Co., 1998 WL 558796 (S.D.N.Y. Feb. 13, 1998) (where employer has raised “prompt investigation” defense but has given plaintiffs access to every aspect of its investigations, defendant has not waived attorney-client privilege with respect to the initial exchange of communication between counsel and defendant, including statements made by defendant to counsel concerning investigative leads or direction the investigations should take, and the advice of counsel given at the conclusion of the investigations); Mortgage Guar. and Title Co. v. Cunha, 745 A.2d 156 (R.I. 2000) (title insurer’s claim for attorneys 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). Cf. Robinson v. Time Warner, Inc., 187 F.R.D. 144 (S.D.N.Y. 1999) (employer did not waive attorney-client privilege or work product protection, with respect to content of counsel’s investigation into employee’s allegations of discrimination, by discussing investigation and counsel’s findings in its response to EEOC charge, 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 defense to employee’s claims).
investigator’s observations.\textsuperscript{122}

Note that some courts have held that the attorney-client privilege does not apply where the attorney was acting solely in the role of an investigator rather than as an attorney.\textsuperscript{123}

\textsuperscript{122} Compare \textit{State v. Riddle}, 8 P.3d 980 (Oregon 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 \textit{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”) \textit{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 in order 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). \textit{See 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).

\textsuperscript{123} \textit{See In re Tex. Farmers Ins. Exch.}, 990 S.W.2d 337 (Tex. Ct. App. 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 insurance company to conduct witness interviews was acting as an investigator and not as an attorney); \textit{Diversified Indus., Inc. v. Meredith}, 572 F.2d 596 (8th Cir. 1970) (en banc) (attorney’s status as an investigator prevents communications from being protected by the attorney-client privilege); \textit{Harper v. Auto-Owners Ins. Co.}, 138 F.R.D. 655, 671 (S.D. Ind. 1991) (“To the extent this attorney acted as a claims adjuster, claims process supervisor, or claim investigation monitor, and not as a legal advisor, the attorney-client privilege would not apply.”); \textit{St. Paul Reinsurance Co., v. Commercial Fin. Corp.}, 197 F.R.D. 620, 642 (N.D. Iowa 2000) (materials generated by or provided to attorney were not protected by (continued...)}
attorney-client privilege because attorney was acting in his capacity as a claims investigator or claims adjuster, not as an attorney, and such materials were generated in the ordinary course of insurer’s business of claims investigator); *Mission Nat’l Ins. Co. v. Lilly*, 112 F.R.D. 160, 163 (D. Minn. 1986) (rejecting application of the attorney-client privilege to materials generated by or provided to a law firm engaged in the non-legal business of acting as a claims investigator or claims adjuster); *Harpster v. Advanced Elastomer Systems, L.P.*, 2005 Ohio App. LEXIS 6220 (Ohio App. Dec. 28, 2005) (in personal injury action against AES for occupational injuries by plaintiffs—an AES employee and his spouse—attorney-client privilege did not shield from discovery documents related to AES’s investigation of accident where AES (1) assured plaintiffs that the investigation was being conducted by an “Exxon-Mobil employee,” and not legal counsel and/or under guidance of legal counsel, (2) discouraged and restricted plaintiffs’ counsel from involvement, and (3) threatened that the plaintiff employee would be discharged if he failed to cooperate. “AES acted in complete contravention of public policy when it first insisted that the investigation was conducted in the course of ordinary business and then, after the complaint was filed and AES had obtained information from [the plaintiff employee], completed changed its position and asserted that the disputed information was privileged.” The investigation materials were not protected by the attorney-client privilege merely because the information was later turned over to its General Counsel so that he could provide legal advice to AES and its officers and assist outside counsel in the defense of litigation, where there was no evidence that the investigation was conducted and/or directed by counsel, or that the materials contained communications between AES’s attorneys and their employees), *appeal not allowed*, 847 N.E.2d 1225 (Ohio 2006).

124 See, e.g., *Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. Ct. App. 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 through 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) (distinguishing *Texas Farmers Ins. Exch.*, *supra*); *In re Grand Jury Subpoena*, 599 F.2d 504, 510-11 (2d Cir. 1979) (investigation by law firm retained to investigate and provide legal advice based on that investigation “trigger[s] the attorney-client privilege”); *In re Int’l Sys. & Controls Corp. Sec. Litig.*, 91 F.R.D. 552, 557 (S.D. Tex. 1981) (confidential communications made by attorneys “hired to investigate through the trained eyes of (continued...)
124(...continued)
an attorney’’ privileged), vacated on other grounds, 693 F.2d 1235 (5th Cir. 1982); In re LTV
Sec. Litig., 89 F.R.D. 595, 600-01 (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); Archuleta v. City of Santa Fe, 2005 U.S. Dist. LEXIS 21924 (D. N.M.
Aug. 10, 2005) (Former police officer was demoted for failing to respond appropriately to a
missing child report. The city retained the attorney’s law firm to investigate allegations that the
former officer falsified health insurance documents. The attorney hired investigators to
investigate the allegations. The attorney prepared a report and recommendation for the city,
represented defendants at a pre-termination hearing, and was defendants’ co-counsel in the
present litigation by the former officer alleging retaliation regarding his demotion and
termination. The former officer issued a subpoena seeking the attorney’s deposition, primarily
seeking to learn whether defendants initiated the attorney’s investigation for retaliatory purposes.
The court determined that additional discovery was necessary to determine what information was
protected by the attorney-client privilege and the work product doctrine. Even if the attorney
was acting as an investigator and not as an attorney, the work product doctrine would protect the
information sought by the former officer. The work product doctrine applied to information
regarding how the attorney reached his opinion that the former officer violated regulations and
(where outside attorneys’s involvement in any fact finding or investigation of insurance claim
was clearly related to his rendition of legal services to insurer, attorney-client privilege protected
confidential communications between attorney, the lawyers assisting him, and his staff, and
insurer, its agents, and its employees); 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); In re Grand Jury Proceedings, 2001 WL
1167497 (S.D.N.Y. Oct. 3, 2001) (the results of internal corporate reviews, whether taken at the
direction of in-house counsel or outside counsel, may be protected from disclosure under the
attorney-client privilege and/or the work product doctrine); Robinson v. Time Warner, 187
F.R.D. 144 (S.D.N.Y. 1999) (attorney-client privilege and work product doctrine protected notes
of interviews conducted by outside counsel in internal investigation); United States v. Davis, 131
F.R.D. 391 (S.D.N.Y.), reconsideration granted in part, 131 F.R.D. 427 (S.D.N.Y. 1990); 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);
found that certain entries in insurer’s claims diary were protected by the attorney-client
privilege, where such entries were either requests to counsel for advice and opinions, or were
counsel’s reply to such requests); Marshall v. Hall, 943 S.W.2d 180 (Tex. Ct. App. 1997)
(interview notes and summaries of the interview notes made during witness interviews by an
(continued...
Proposed Rule 502 on waiver of attorney-client privilege and work product. On June 11, 2007, the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States approved proposed Evidence Rule 502 (Attorney-Client Privilege and Work Product; Limitations on Waiver). Proposed Rule 502 embodies the following basic principles regarding waiver of the attorney-client privilege and work product protection:

1. A subject matter waiver should be found only when the privilege or work product has been disclosed voluntarily, the disclosed and undisclosed communications or information concern the same subject matter, and they “ought in fairness” be considered together. In other words, inadvertent disclosure would never result in a subject matter waiver.

2. An inadvertent disclosure does not constitute a waiver if the holder of the privilege or work product protection took reasonable precautions to prevent disclosure and took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error.

3. A disclosure in a state proceeding would not operate as 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.

5. An agreement on the effect of disclosure in a federal proceeding is only binding on the

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 (Wash. App. 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).
6. The proposed rule would apply in all cases in federal court, including cases in which state law provides the rule of decision. It would also apply in state court with respect to the consequences of disclosures previously made in a federal proceeding.

The Committee decided not to propose a provision on selective waiver of the attorney-client privilege and work product protection, but prepared language for a draft statute on selective waiver to accompany a separate report to the Congress. If approved by the Judicial Conference in the fall, the proposed Rule will be submitted to Congress for action.

**Waiver of privilege by plaintiffs.** To the extent that a plaintiff is relying on his/her attorney’s advice and actions to avoid limitations or other similar defenses, such reliance may also waive the privilege.125

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125 *See Livingstone v. North Belle Vernon Borough.*, 91 F.3d 515 (3rd 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); *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 pleaded 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 regarding communications with her attorney); *Russell v. Curtin Matheson Scientific, Inc.*, 493 F. Supp. 456 (S.D. Tex. 1980) (plaintiff alleging in age discrimination case that argues he should not be barred by statute of limitations because he was unaware of his statutory rights waived attorney-client privilege with respect to communications with attorney during the charge filing period); *In re Imperial Corp. of Am. v. Shields*, 179 F.R.D. 286, 290 (S.D. Cal. 1998) (“[T]he party alleging reliance on his attorney’s investigation to discover certain causes of action and overcome statute of limitations bar, impliedly waived the attorney-client privilege and work-product protection that might apply regarding the investigations and its findings and conclusions”); *Lama v. Preskill*, 818 N.E.2d 443 (Ill. Ct. App. 2004), *appeal denied*, 829 N.E.2d 788 (Ill. 2005) (Plaintiff patient filed complaint in May 2001, alleging negligence by her doctor in a March 1999 surgery. She also alleged that she did not become aware of the negligence until June 1999. The doctor sought records from a meeting the patient’s husband had with an attorney four days after the surgery, while the patient was still hospitalized, asserting that the records would establish that the patient knew of her potential claim as of that meeting. The patient asserted that production of the records would violate the attorney-client privilege, but the court of appeals affirmed the trial court’s finding that the privilege was waived. The husband acted as the patient’s agent when he met with the attorney and, therefore, the patient could claim the privilege. However, she waived the privilege by voluntarily injecting the statute of limitations issue into the case by alleging in her complaint that the statute had been tolled because she did not discover her injury until June 1999.); *Pyramid Controls, Inc. v. Siemens Indus. Automations*, (continued...)
(...continued)

*Inc.*, 176 F.R.D. 269 (N.D. Ill. 1997) (defendants permitted to obtain documents and testimony from law firm that represented plaintiff during some of the period of time between June 14, 1995, the date of the alleged wrongful act, and May 14, 1996, one year prior to filing suit, on the issue of whether plaintiff knew or should have known about its possible cause of action prior to May 14, 1996, where the applicable statute of limitations is one year); *EEOC v. Exel, Inc.*, 190 F. Supp. 2d 1179 (E.D. Mo. 2002) (in ADA action brought by EEOC on behalf of 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); *American Standard, Inc. v. Bendix Corp.*, 80 F.R.D. 706, 708 (W.D. Mo. 1978) (discovery of what information attorney obtained, and nature and timing of his conclusions discoverable where plaintiff sought to avoid applicable statute of limitations by claiming that he relied on his attorney); *Murray v. Board of Educ.*, 199 F.R.D. 154 (S.D.N.Y. 2001) (by putting her medical condition “in issue” by claiming damages for emotional distress, plaintiff waived psychiatrist-patient privilege for psychiatrist’s notes that were relevant to the time and subject matter of the action; attorney-client privilege did not protect against disclosure of such unredacted notes where there was no indication that client met with psychiatrist at the direction of her attorney for purpose of attorney’s preparation for trial); *Bird v. Penn Cen. Co.*, 61 F.R.D. 43, 47 (E.D. Pa. 1973) (“Since . . . counsel served as investigators and advisors on the merits of the potential and actual claims . . . and therefore alone could ascertain the justification for a recission action, discovery of the relevant documents in their possession is essential to the defendant’s case.”); *Axler v. Scientific Ecology Group, Inc.*, 196 F.R.D. 210 (D. Mass. 2000) (defendants in security fraud action were entitled to discovery from plaintiffs’ counsel concerning what investigation they conducted, what information they received, and when they received it, where plaintiffs relied completely on their counsel to analyze publicly available information concerning defendants and to consult with experts); *In re Southwest Airlines Co.*, 155 S.W.3d 622 (Tex. Ct. App. 2004) (Plaintiffs waived the privilege by seeking to use the privilege to protect against the disclosure of information that was materially relevant to, and possibly validated, the statute of limitations defense asserted by Southwest: “[D]isclosure of the communication is the only means by which Southwest can obtain evidence regarding the plaintiffs’ affirmative defense to Southwest’s limitations defense because the communication contains the information on which the plaintiffs seek to rely to defeat limitations.”). *Cf. Darius v. City of Boston*, 433 Mass. 274, 741 N.E.2d 52 (Mass. 2001) (where a defendant asserts the statute of limitations as a defense and the plaintiff relies on the discovery rule to overcome that defense, the defendant may not, based solely on the plaintiff’s invocation of the discovery rule, automatically probe the plaintiff’s attorney-client relationship simply to determine whether the plaintiff may have revealed something to his/her attorneys that might be helpful to the defendant’s case). *Compare EEOC v. Continental Airlines, Inc.*, 395 F. Supp.2d 738 (N.D. Ill. 2005) (The fact that an EEOC investigator answered general deposition questions regarding the
4. **Attorney-Client Privilege and Former Employees of the Organization**

Although it established clear rules governing the attorney-client privilege with respect to current employees of a corporate organization, *Upjohn* left open the question of whether communications between counsel and former employees were included within the privilege.126 The majority of the lower courts that have addressed this issue have determined that the *Upjohn* rationale applies to former employees where the communication’s purpose is to give legal advice to the employer.127

125(...continued)

compilation of the EEOC investigative report on charging party’s discrimination claims and reviewed the report prior to his deposition did not waive the EEOC’s deliberative process privilege with respect to the report.).

126 *Upjohn*, 499 U.S. at 395 n.3.

127 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 Petroleum 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 in order to represent his or her client effectively the corporation’s counsel must seek information from the former employee, such communications are protected by the attorney-client privilege); *Amarin Plastics, Inc. v. Maryland Cup Corp.*, 116 F.R.D. 36 (D. Mass. 1987) (communication with former employees privileged when purpose of the communications was to give the former employer legal advice); *Surles v. Air France*, 2001 WL 815522 (S.D.N.Y. July 19, 2001) (communications between company counsel and former company employees protected by attorney client privilege if they are focused on exploring what the former employee knows as a result of his prior employment about the circumstances giving rise to the lawsuit), *aff’d*, 210 F. Supp. 2d 501 (S.D.N.Y. 2002); *Miramar Constr. Co. v. Home Depot, Inc.*, 167 F. Supp. 2d 182 (D.P.R. 2001) (attorney client privilege protected communications between construction company’s attorney and company’s former employee in charge of preparing estimates for (continued...)
Some courts have noted that the privilege may not protect communications on behalf of the corporation with corporate employees who later become adverse to the corporation.\(^{128}\) This situation may also present itself 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.\(^{129}\)

\(^{127}\)(...continued)

construction of store concerning preparation of claim negotiated between him and owner; however, privilege does not extend to former independent contractors for company); \textit{Wuchenich v. Shenandoah Mem’l Hosp.}, 2000 WL 1769577 (W.D. Va. Nov. 2, 2000) (same). \textit{But see Connolly Data Sys. v. Victor Techs., Inc.} 114 F.R.D. 89 (S.D. Cal. 1987) (no privilege applicable for former employees under California law); \textit{Clark Equip. Co. v. Lift Parts Mfg. Co.}, 1985 WL 2917 (N.D. Ill. Oct.1, 1985) (\textit{Upjohn} did not extend to former employees); \textit{Barrett Indus. Trucks, Inc. v. Old Republic Ins. Co.}, 129 F.R.D. 515 (N.D. Ill. 1990) (no privilege applicable); \textit{Infosys., Inc. v. Ceridian Corp.}, 197 F.R.D. 303, 306 (E.D. Mich. 2000) (“\textit{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.”). \textit{Cf. In re Learjet, Inc.}, 59 S.W.3d 842 (Tex. Ct. App. 2001) (aircraft manufacturer’s videotape, consisting of questions by manufacturer’s attorney to several employees about the procedures followed in building the aircraft, meeting the specification requirements, an explanation of the construction of the cooling system, and their impressions regarding the way the aircraft were cared for after delivery, were not covered by the attorney-client privilege; tapes were not made to facilitate the rendition of legal services but were instead made for the express purpose of presentation of factual information at a mediation proceeding in which witnesses involved were designated as testifying expert witnesses and thus were discoverable under rule requiring party to disclose expert’s mental impressions and opinions in connection with case, any methods used to derive them, and facts known by expert relating to or forming basis for opinions).

\(^{128}\) \textit{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 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). \textit{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).

\(^{129}\) \textit{See Peralta}, 190 F.R.D. at 41-42 (no privilege applies to any communications (continued...)}
5. Attorney Client Privileges and Client-Generated Documents

It is sometimes the case that an attorney will request that a client or prospective client record his or her recollections and thoughts about the circumstances of the case to assist the attorney’s analysis of the case. So long as the record was made for the purpose of seeking legal advice and assistance, the communications will be protected, even if the lawyer ultimately declines representation.130

6. Suggestions for Attorney Interviews of Management Employees

Attorneys conducting interviews of supervisory or management employees that are potentially subject to the attorney-client privilege under Upjohn should consider having the employee read and sign the following statement prior to commencement of the interview:

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 and [describe proceeding or matter]. Anything you tell me may be disclosed to the company and or in connection with the [proceeding or matter].

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 confidential. Please do not disclose to others what is said during this meeting. You are not prohibited from discussing the fact that we had this

129 (...continued)

between employer’s counsel and a former employee whom counsel does not represent, which bear on or otherwise potentially affect the witness’s testimony, consciously or unconsciously).

130 Perkins v. Gregg County, Tex., 891 F. Supp. 361, 363-64 (E.D. Tex. 1995) (employee’s verbal “notes” on tape of his conversations with his former employers were made for the purpose of seeking legal advice and assistance for them are protected by attorney-client privilege, even though attorney ultimately declined representation); In re Auclair, 961 F.2d 65 (5th Cir. 1992) (communication with attorney for purpose of securing legal advice protected even where attorney ultimately declines representation); Snyder v. Value Rent-A-Car, 736 So. 2d 780 (Fla. Dist. Ct. App. 1999) (in personal injury action, creation of a diary by victim’s spouse without her attorney directing her to do so did not prevent diary from containing work product).
meeting. Rather, you are prohibited from disclosing 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.
Signature_________________ Date:_____________________  

B. Ex Parte Communications With Organizational Employees

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.132 This rule is designed to preserve the integrity of the attorney-client relationship by protecting the party from the superior legal knowledge and skill of the opposing attorney.133 An attorney cannot circumvent this prohibition by delegating the task of communication to a non-lawyer. Moreover, the represented person may not waive the prohibition by consenting to the contact or by initiating contact with the opposing lawyer.134

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132 ABA MODEL RULES, Rule 4.2; ABA Mode Code, DR 7-107. See also EC 7-18.


The prohibition covers not only parties to a negotiation or formal 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. Such persons include potential defendants in civil litigation and witnesses who have hired counsel in the matter.\textsuperscript{135}

\textsuperscript{135} ABA Formal Ethics Op. No. 95-396 (1995). See also Ill. Ethics Op. No. 04-02 (2005) (Ex parte communication rules applies to non-litigation situations; where individual hired lawyer to negotiate an employment contract with a business entity, the entity’s general counsel may not contact the individual directly without consent of the lawyer.)
However, note that, as a threshold matter, it must be shown that the attorney “knows”\(^{136}\) that the

\(^{136}\) See ABA MODEL RULES, Rule 4.2, cmt. 7 (rule requires actual knowledge, which may be inferred from the circumstances; however, lawyer has no affirmative duty to inquire); ABA Ethics Op. No. 95-396 (1995) (requiring actual knowledge, which may be inferred from the circumstances); Gaylard v. Homemakers of Montgomery, Inc., 675 So. 2d 363 (Ala. 1996) (lawyer’s telephone conversation with employee of corporation that client was preparing to sue, in which lawyer persuaded employee to discuss details of client’s injury, did not violate ex parte rules where conversation took place before client filed suit and lawyer did not know whether corporation had retained counsel); Alaska Ethics Op. No. 2006-1 (2006) (“Knowing” for purposes of Rule 4.2 “denotes actual knowledge. . .that the entity is represented by counsel on a particular matter, which may be inferred from the circumstances.”); Alaska Ethics Op. No. 98-1 (1998) (unless plaintiff’s attorney has actual knowledge that the insurer is represented by counsel in the matter at issue, an attorney representing the plaintiff in personal injury litigation does not violate Rule 4.2 by contacting or communicating with claims representative or other agent of defendant’s insurer concerning the matter); Koo v. Rubio’s Restaurants, 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. Superior Court, 113 Cal. App. 4th 1187 (2003) (ex parte communication rule does not provide for constructive knowledge, but actual knowledge; however, in cases where an attorney has reason to believe an employee of a represented organization might be covered by the ex parte communication rule, that attorney would be well advised to either conduct discovery or communication with opposing counsel concerning the employee’s status before contacting employee since a failure to do so along with other facts may constitute circumstantial evidence that attorney had actual knowledge; once actual contact made, attorney should first ask questions that would establish employee’s status within an organization, whether the employee is represented by counsel, and whether the employee has spoken to the organization’s counsel concerning the matter at issue, before moving to substantive questions); Truitt v. Superior Court, 59 Cal. App. 4th 1183 (1997) (no improper ex parte communication occurred when investigator for employee’s law firm in FELA action contacted and obtained written statement from employee’s coworker since law firm had no actual knowledge that railroad was represented by counsel at time of contact; constructive knowledge or knowledge that railroad employs in-house counsel insufficient unless law firm knew in fact that in-house counsel represented person being interviewed when interview was being conducted); Jorgensen v. Taco Bell Corp., 50 Cal. App. 4th 1398 (1996) (action of former employee’s attorney retaining investigator to interview client’s former co-workers without former employer’s consent, seven months prior to filing sexual harassment action against former employer, did not violate ex parte communications rule); Cal. Ethics Op. No. 1996-145 (1996) (if attorney does not have reason to know whether party represented attorney not requested to inquire whether party represented; knowledge must be either actual or imputed based on objective standard); Fla. Ethics Op. No. 94-4 (1995) (opposing counsel may communicate with an individual who is litigating pro se concerning that litigation even though an attorney is representing the individual in a related (continued...))
matter; however, opposing counsel may not communicate with the individual about the subject matter of the attorney’s representation without the attorney’s consent); 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 was not violation of 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 in order 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 System 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). Compare In re News Am. Publ’g, Inc., 974 S.W.2d 97 (Tex. Ct. App. 1998) (mere statement to an attorney for plaintiff computer services company that one of the former officer/defendants had fired his attorney is insufficient to allow ex parte contact with the former officer/defendant, especially since that attorney had not yet received notice of the alleged termination and remained attorney of record).

137 Jorgensen v. Taco Bell Corp., 50 Cal. App. 4th 1398 (1996) (action of former employee’s attorney retaining investigator to interview client’s former co-workers without former employer’s consent, seven months prior to filing sexual harassment action against former employer, did not violate ex parte communications rule); Johnson v. Cadillac Plastic Group, Inc., 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); N.Y. Ethics Op. No. 785 (2005) (An attorney representing a plaintiff in a personal injury action may engage in settlement discussions with a non-lawyer 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, 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 by the attorney-client privilege or work

(continued...)
Some courts have not been so limited in application of the rule.\textsuperscript{139} Note that the text of Rule 4.2 of the Model Rules of Professional Responsibility was amended to substitute the word “person” for “party” to negate the idea that the rule applies only in pending litigation.\textsuperscript{140} However, many states still retain the pre-1995 reference to “party.”\textsuperscript{141}

According to the most recent ABA formal opinion on the subject, 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 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

\textsuperscript{137}(...continued) product doctrine.)

\textsuperscript{138} Cf. University 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).


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.142

1. Current v. Former Employees

a. Former employees.

Although neither Model Rule 4.2 nor the Model Code expressly addresses ex parte communications with former employees not individually represented by counsel, the ABA and numerous state bar and court decisions have held that an attorney may communicate ex parte with unrepresented former employees of a corporate party.143

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143 ABA MODEL RULES, Rule 4.2, cmt.7 (Consent of the organization’s lawyer is not required for communications with a former constituent); ABA Formal Op. No. 95-393 (1995); ABA Formal Op. No. 91-359 (1991); Alaska Ethics Op. No. 91-1 (1991) (former employees can no longer bind corporation, so ex parte communications do not violate rule against communications with adverse party); Alaska Ethics Op. No. 88-3 (1988) (same); Ark. Ethics Op. No. 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. Rules of Prof’l Conduct Rule 2-100, Discussion (citing Triple A Mach. Shop, Inc. v. State of Cal., 213 Cal. App. 3d 131 (1989) (Rules of Professional Conduct specify that the term “party” is “intended to apply only to persons employed at the time of the communication.”)); Continental Ins. Co. v. Superior Court, 32 Cal. App. 4th 94 (1995); Sequa Corp. v. Lititech, Inc., 807 F. Supp. 653, 659-60 (D. Colo. 1992); D.C. Ethics Op. No. 287 (1999) (lawyer may contact unrepresented former employee of corporation without consent of the corporation’s lawyer; prior to 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. No. 88-14 (1988) (lawyer can contact former employees who have not maintained any ties to corporation); H.B.A. Mgmt., Inc. v. Estate (continued...)
of Schwartz, 693 So. 2d 541 (Fla. 1997) (lawyer not prohibited from communicating ex parte with corporate adversary’s former employees); NAACP v. Florida Dep’t of Corr., 122 F. Supp. 2d 1335 (M.D. Fla. 2000) (interviews of former rank-and-file employees of defendant were not ethical violation, subject to safeguards against disclosure of privileged documents); Concerned Parents of Jordan Park v. Housing Auth. of St. Petersburg, 934 F. Supp. 406 (M.D. Fla. 1996); In re Domestic Air Transp. Antitrust Litig., 141 F.R.D. 556, 561-62 (N.D. Ga. 1992); Orlowski v. Dominick’s Finer Foods, Inc., 937 F. Supp. 723 (N.D. Ill. 1996); 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); P.T. Barnum’s Nightclub v. Duhamell, 766 N.E.2d 729 (Ind. Ct. App. 2002) (ex parte rule did not prohibit attorney representing patron in action against adult entertainment club from communicating with club’s former general manager); Terra Int’l, Inc. v. Miss. Chem. Corp., 913 F. Supp. 1306 (N.D. Iowa 1996); Cram v. Lamson & Sessions Co., 148 F.R.D. 259 (S.D. Iowa 1993); Aiken v. Business & Indus. Health Group, Inc., 885 F. Supp. 1474 (D. Kan. 1995); 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. No. E-381 (ex parte communications with unrepresented former employees of the organizational party is not a violation of Rule 4.2); 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., 86 Fair Empl. Prac. Cas. (BNA) 1008 (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); Davidson Supply Co. v. P.P.E., Inc., 986 F. Supp. 956 (D. Md. 1997) (Rule 4.2 did not apply to ex parte contacts with former employees of represented party); Frank v. L.L. Bean, Inc., 377 F. Supp. 2d 233 (D. Me.), motion for relief from sanctions order denied, 377 F. Supp. 2d 229 (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.); 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); Patriarca v. Ctr. for Living & Working, Inc., 778 N.E.2d 877 (Mass. 2002) (former employees were not within anti-contact rule where none of them were alleged to have committed wrongful acts at issue, there was no evidence that any of them had authority on behalf of corporation to make decisions about course of litigation, and there was no evidence that any of them were involved in...
supervising, planning, or directing events and practices that led to litigation); Mass. Ethics Op. No. 02-3 (June 26, 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); *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); *Olson v. Snap Prods., Inc.*, 183 F.R.D. 539 (D. Minn. 1998); Miss. Ethics Op. No. 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 party about the lawyer’s role); *Smith v. Kansas City S. Ry. Co.*, 87 S.W.3d 266 (Mo. Ct. App. 2002) (ex parte communications rule did not prohibit contact with former employees who were not expressly represented by their own counsel or counsel for organization; and even if rule applied to former managerial employees, defendant’s supervisor did not file within classification); *Calloway v. DST Sys., Inc.*, 83 Fair Empl. Prac. Cas. (BNA) 1608 (W.D. Mo. 2000); *United States ex rel. O’Keefe v. McDonnell Douglas Corp.*, 961 F. Supp. 1288 (E.D. Mo. 1997), aff’d, 132 F.3d 1252 (8th Cir. 1998); *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.); *Wallace v. Valentino’s of Lincoln, Inc.*, 2002 WL 31323811 (D. Neb. Oct. 17, 2002) (in Title VII case, plaintiff counsel’s interview of former manager of defendant not a violation of ex parte rules); *Curley v. Cumberland Farms, Inc.*, 134 F.R.D. 77, 83 (D.N.J. 1991)(same); *Lyondell-Citgo Refining v. Petroleos de Venezuela*, 2003 WL 22990099 (S.D.N.Y. Dec. 19, 2003) (attorney free to contact a former employee of corporation unless corporation carries its burden of identifying privileged information to which the former employee was privy); *Polycast Technology Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621, 628-29 (S.D.N.Y. 1990); *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 disciplinary rule prohibiting communication with represented party; 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 (continued...)
However, a few decisions have held that the rule prohibits ex parte communication with former employees whose acts or omission in connection with the matter may be imputed to the

(...continued)
insofar as he had no authority to bind department or settle litigable matter and his act or omission did not give rise thereto.; \textit{Davis v. Washington County Open Door Home}, 2000 WL 1457004 (S.D. Ohio Sept. 21, 2000) (contact with former employee of defendant permissible where attorney obtained employee’s consent to interview after explaining that he represented clients with interests adverse to the Open Door Home and other defendants, that the employee could terminate the interview at any time, that the employee could seek independent legal advice, and that the employee should not divulge any communications he may have had with defendants’ counsel); Ohio Ethics Op. No. 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. No. 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); \textit{Sherrod v. Furniture Ctr.}, 769 F. Supp. 1021, 1922 (W.D. Tenn. 1991); Tex. R. Prof'l Conduct, Rule 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. No. 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); \textit{Wright v. Group 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); \textit{Jones v. Rabonco, Ltd.}, 2006 WL 2401270 (W.D. Wash. Aug. 28, 2006) (Rule 4.2 does not apply to former employees). \textit{Restatement (Third) of the Law Governing Lawyers} § 162 (Proposed Official Draft 1998) (rule prohibits all contact with former corporate employees who have communicated with corporation’s counsel). \textit{Cf. Carnival Corp. v. Romero}, 710 So. 2d 690 (Fla. Ct. App. 1998) (in cruise passenger’s action against cruise line for sexual assault, disqualification of passenger’s counsel was not required based on counsel’s contacting two of cruise line’s former security officers and retaining one as expert, as officers were neither employed by cruise line at time of incident nor former high-ranking managerial employees, neither were shown to have access to confidential or privileged information, and officer would be used as expert only on his experience).
corporation, or who had access to corporate confidences. See, e.g., Brown v. Oregon Dep’t of Corr., 173 F.R.D. 265 (D. Or. 1997) (lawyer for plaintiff in racial 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. Formal Ethics Op. No. 2005-152 (2005) (same). See also Lang v. Superior Court, 826 P.2d 1228, 1234-35 (Ariz. Ct. 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. No. 2000-05 (2000) (following Lang); Rentclub, Inc. v. Transamerica Rental Fin. Corp., 811 F. Supp. 651 (M.D. Fla. 1992), aff’d, 43 F.3d 1439 (11th Cir. 1995); 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); Camden v. Maryland, 910 F. Supp. 1115 (D. Md. 1996) (same); Armsey v. Medshares Mgmt. Servs., Inc., 184 F.R.D. 569 (W.D. Va. 1998). Cf. Collier v. Ram Partners, Inc., 159 F. Supp. 2d 889 (D. Md. 2001) (counsel for employee in Title VII action did not violate Md. 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).

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disclosed. Finally, if the former employee has retained counsel, the consent of his or her counsel is necessary.

b. Current Employees.

A few jurisdictions impose a blanket prohibition on contact with current managerial employees of the organization. However, the ABA and the majority of jurisdictions interpret

145 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); 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. No. 2000-05 (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. No. 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); S.C. Ethics Op. No. 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. No. 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).

146 See Bobele v. Superior Court, 199 Cal. App. 3d 708 (1998) (in sex and age discrimination case by former employees, plaintiffs’ ex parte contact with defendant’s current employees was barred); Lang v. Reedy Creek Improvement Dist., 888 F. Supp. 1143 (M.D. Fla. 1995). See also Public Serv. Elec. & Gas Co. v. Associated Elec. & Gas Ins. Servs. Ltd., 745 F.
the rule to prohibit communications 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 entity of government vicariously liable for such act or omission.\textsuperscript{147} Moreover, a

\begin{quote}
\textsuperscript{146}(...continued)
Supp. 1037 (D.N.J. 1990) (applying ex parte communication ban to all employees).
\end{quote}

\begin{quote}
\textsuperscript{147} ABA MODEL RULES, 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); Ala. Ethics Op. No. 2002-3 (2002) (contact permitted with employees of opposing party who are non-managerial, who are not responsible for the act for which opposing party could be liable, and who have no authority on behalf of the organization to make decisions about the course of the litigation); \textit{Paris v. Union Pacific R.R. Co.}, \textit{___ F. Supp.2d ___}, 2006 WL 2790420 (E.D. Ark. Sept. 28, 2006) (as now adopted in Arkansas, Comment 7 to Rule 4.2 does not interpret the rule to prohibit communications with a person whose statement may constitute an admission against the organization); \textit{In re Arkansas Bar Assn.}, No. 03-1049 (Ark. March 3, 2005) (adopting latest version of the ABA Model Rules, including revisions to Rule 4.2); Cal. Rules of Prof’l Conduct Rule 2-100(B) (defining “party” for purpose of rule as any officer, director or managing agent of party, or individual whose act or omission may bind or be imputed to organization or whose statement may be binding or imputed to organization); \textit{Snider v. Superior Court}, 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); \textit{Triple A Machine Shop, Inc. v. State}, 213 Cal. App. 3d 131, 140 (1989) (opposing counsel may initiate ex parte contacts with present employees, “so long as the communication does not involve the employee’s act or failure to act in connection with the matter that may bind the corporation, be imputed to it, or constitute an admission of the corporation for purposes of establishing liability”) \textit{Nestor v. Posner-Gerstenhaber}, 857 So. 2d 953 (Fla. Ct. 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); \textit{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); \textit{Bolt-by Monahan v. Johnson}, 128 (continued...)
F.R.D. 659 (N.D. Ill. 1989) (statements from lower level employees could be gathered by plaintiff’s attorney, but such statements could not be used as admissions under Fed. R. Evid. 801(d)(2)(D)); 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); Hammond v. Junction City, 167 F. Supp. 2d 1271 (D. Kan. 2001) (ex parte contact by plaintiff employee’s counsel and defendant city’s director of human relations violated Kansas Rules of Professional Conduct and warranted disqualification and award of attorneys fees and costs; discussion of director’s role in city’s document production and city’s shredding of documents concerned subject of representation, and director’s authority to make hiring decisions and investigations of discrimination complaints constituted managerial responsibilities; the fact that director was potential member of putative class did not except ex parte contact; there was no attorney client relationship between attorney and director until class certified, and it was only speculation that class would ever be certified), affirmed, 126 Fed. Appx. 886 (10th Cir. 2005) (imposition of sanctions affirmed); Ky. Ethics Op. No. E-382 (contact with present managerial employees prohibited); Chancellor v. Boeing Co., 678 F. Supp. 250 (D. Kan. 1988) (ex parte rule prohibited contact with “employees who may have been involved in the denial of promotions at issue in any way that their actions as agents may be imputed to defendant corporation for purposes of civil liability”); plaintiff’s attorney required to disclose names of persons contacted in violation of rules and produce notes and statements obtained from those contacts, and any evidence obtained thereby would be suppressed); Shoney’s, Inc. v. Lewis, 875 S.W.2d 514, 515 (Ky. 1994); 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); Messing, Rudavsky & Weliky, P.C. v. Presidents and Fellows of Harvard Coll., 764 N.E.2d 825 (Mass. 2002) (law firm representing sergeant employed by university’s police department 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. Rules of Prof’l Conduct, Comment 4 to Rule 4.2 (revised June 5, 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); Duckworth v. St. Louis Metropolitan Police Dept., 2005 U.S. Dist. LEXIS 26090 (E.D. Mo. Nov. 1, 2005) (In connection with employment discrimination action brought by three female police
147(...continued)

officers against various police entities and officials, plaintiffs’ ex parte contact with police sergeant without consent of defense counsel did not violate Rule 4.2; the sergeant’s acts or omissions could not subject defendants to liability in connection with the female officers’ claim of gender discrimination, since the officers complained of being assigned to the night shift based on their gender by persons of higher rank than the sergeant, and there was no showing that the sergeant had any authority to assign officers to certain shifts.; Calloway v. DST Sys., Inc., 83 Fair Empl. Prac. Cas. (BNA) 1608 (W.D. Mo. 2000) (Mo. Rule 4.2 does not prohibit ex parte communications with a litigation opponent’s employee—the former supervisor of the plaintiff in an employment discrimination case—when the supervisor’s statements cannot be imputed to the company); Porter v. Arco Metals Div. of Atlantic Richfield, 642 F. Supp. 1116 (D. Mont. 1986) (ex parte prohibition applied to present or former employees with managerial responsibilities concerning the matter in litigation); Palmer v. Pioneer Inn Assocs., Ltd., 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., Ltd., 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); Andrews v. Goodyear Tire & Rubber Co., 191 F.R. 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); Pa. Ethics Op. No. 2003-5 (2003) (in event that attorney engages in ex parte contact with anyone found to have authority to make a statement which could impute liability to the company, such conduct would result in a violation of R.P.C. 4.2); Penda Corp. v. STK, LLC, 2004 WL 1628907 (E.D. Pa. July 16, 2004) (contact by paralegal for plaintiff’s counsel with customer service manager for defendant violated Rule 4.2 because manager’s statements may constitute an admission on the part of defendant; court will preclude plaintiff from using any information obtained through the ex parte contact in the litigation); Lochead v. Amtrak, 1994 U.S. Dist. LEXIS 14473 (E.D. Pa. Oct. 13, 1994) (plaintiff’s ex parte contact with employee of corporate defendant did not violate Rule 4.2 of Pennsylvania’s Rules of Professional Conduct because employee had no significant managerial responsibility nor was in a position to bind the defendant by her acts, statements or admissions);
“blanket” assertion 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. Contact with a non-managerial employee may also be prohibited where the employee has possession of or access to confidential information of the represented organization.

The original Comment 7 to Model Rule 4.2 stated that the persons included within the no-contact rule included any person “whose statement may constitute an admission on behalf of the organization.” In 2002, the ABA amended Comment 7 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

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148 See, e.g., Ohio Ethics Op. No. 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 omissions 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. No. 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.).

149 See Coburn v. DaimlerChrysler Serv. N. Am., 289 F. Supp. 2d 960 (N.D. Ill. 2003) (plaintiff in proposed class action against finance company failed to rebut presumption that class member, who worked for company as administrative assistant to the company’s assistant general counsel, provided or was likely to provide plaintiff’s counsel with confidential information, warranted disqualification of counsel; 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).

150 ABA MODEL RULES, Rule 4.2, cmt. 7.
read to prohibit communications with anyone whose testimony would be admissible against the organization as an exception to the hearsay rule.\textsuperscript{151}

2. \textbf{Contact with Class Members by Counsel}

In the class action context, the prohibition on contact with a represented party has been held not to apply before certification because the potential class members are not yet “represented” by class counsel. However, counsel may be prohibited from contacting members of a class once it has been certified.\textsuperscript{152}

\textsuperscript{151} Annotated Model Rules of Professional Conduct 4.2 (5\textsuperscript{th} ed. 2003) (distinguishing \textit{Weeks v. Independent Sch. Dist. No. I-89}, 230 F.3d 1201 (10th Cir. 2000) as an example of an “overly broad” interpretation of Rule 4.2. \textit{Compare Weeks v. Independent Sch. Dist. No. I-89}, 230 F.3d 1201 (10th Cir. 2000) (in bus driver’s ADA and FLSA action against school district, both operations supervisor and bus driver’s immediate supervisor had “speaking authority” for the district for the purpose of ex parte communication rule and thus counsel was barred from engaging in ex parte communications with those employees with respect to subject matter of action).

\textsuperscript{152} \textit{Lowery v. Circuit City Stores, Inc.}, 77 Fair Empl. Prac. Cas. (BNA) 1319 (4th Cir. 1998) (district court did not preclude Circuit City from establishing a defense when it limited ex parte communication between Circuit City and its African-American employee class members), \textit{vacated on other grounds}, 527 U.S. 1031 (1999); \textit{Parris v. Superior Court}, 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); \textit{Parks v. Eastwood Ins. Serv., Inc.}, 235 F. Supp. 2d 1082 (C.D. Cal. 2002) (in FLSA class action for unpaid wages or overtime, defendant employer may communicate with prospective plaintiff employees who have not yet “opted in,” unless the communication undermines or contradicts the court’s own notice to prospective plaintiffs); \textit{Winfield v. St. Joe Paper Co.}, 20 Fair Empl. Prac. Cas. (BNA) 1093 (N.D. Fla. 1977); \textit{Resnick v. American Dental Ass’n}, 31 Fair Empl. Prac. Cas. (BNA) (N.D. Ill. 1982) (district court prohibited employer’s counsel from contacting members of a class certified under Rule 23, Fed. R. Civ. P.; DR 7-104 does not apply before certification because the potential class members are not yet “represented” by class counsel); \textit{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); \textit{Fulco v. Continental Cablevision, Inc.}, 789 F. Supp. 45, 47 (D. Mass. 1992); Mich. Ethics Op. No. RI-219 (1994) (in-house counsel for defendant organization in class action suit may answer communications initiated by non-representative 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 (continued...)
3. Contact with a Party’s Insurance Carrier

Where the defendant is covered by insurance, the plaintiff’s counsel may want to negotiate directly with the defendant’s insurance carrier, especially where defense counsel is unwilling to consider settlement. Several ethics committees have held that if it is clear that the defense counsel does not also represent the carrier, he may contact the carrier directly. However, if the defense counsel represents the carrier or if the matter is not clear, then direct contact is prohibited, absent consent.153

152 (...continued)
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); Tedesco v. Mishkin, 629 F. Supp. 1474, 1483 (S.D.N.Y. 1986); N.Y. City Ethics Op. No. 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); Dondore v. NGK Metals Corp., 2001 WL 516635 (E.D. Pa. May 16, 2001) (court prohibited defense counsel from contacting, ex parte, former management employees of defendant corporation who were part of putative class without prior court approval and under guidelines designed to ensure that such potential witnesses are making an intelligent and voluntary decision to speak with counsel, without any real or perceived pressure from a former employer’s lawyers); Fried v. SunGard Recovery Sys., 1995 U.S. Dist. LEXIS 2518 (E.D. Pa. Feb. 22, 1995). Cf. Hammond v. Junction City, 2002 WL 169370 (D. Kan. Jan. 23, 2002) (ex parte communication with employee–defendant city’s director of human relations—was not authorized by virtue of employee’s status as a potential class member, since the class had not yet been certified and it is possible the employee may opt out of class).

153 N.Y. Ethics Op. No. 785 (2005) (An attorney representing a plaintiff injured in an automobile accident may engage in direct settlement discussions with a non-lawyer 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, 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. No. 2005-04 (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-lawyer 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.); Philadelphia Ethics Op. No. 98-2 (1998) (to avoid violating ex parte communication rules, the attorney should first ask defense counsel whether, in fact, he is (continued...)
4. Communication with Others—Physicians, Experts and Independent Contractors

Ex parte communication issues have also arisen with respect to communications with individuals closely associated with a party, such as the plaintiff’s treating physician or a 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. No. 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); ABA Informal Ethics Op. No. 1149 (1970) (same); Heffner v. Jacobson, 469 A.2d 970 (N.J. Super. Ct. App. Div. 1983), aff’d, 498 A.2d 766 (N.J. 1985); Waller v. Kotzen, 567 F. Supp. 424 (E.D. Pa. 1983); In re Illuzzi, 616 A.2d 233 (Vt. 1992). See also Utah Ethics Op. No. 95-5 (1996) (“party to a matter” includes insurer).

party’s consulting or testifying experts,155 or a party’s independent contractors, such as accountants or other financial professionals.156

5. Ex Parte Communication by an Agent of the Attorney

As with clients, the *ex parte* communication rule also applies to investigators hired by an attorney.157 Thus, it is unethical for an attorney to employ an undercover agent to befriend a party through subterfuge to discover important facts about the case.158 Similarly, the attorney


156 N.Y. State Ethics Op. No. 735 (2001) (a lawyer in civil litigation may properly 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 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); United States v. Schwimmer, 892 F.2d 237 (2d Cir. 1989).


158 See ABA Informal Ethics Op. No. 663 (1975). See also Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc., 347 F.3d 693 (8th Cir. 2003) (trial court sanctions against defendant (continued...)

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should discourage the client from hiring an investigator for such purposes.\(^\text{159}\) Surveillance or investigation not involving communication with the client does not come within this prohibition.\(^\text{160}\)

Note that 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.\(^\text{161}\)

6. Client Communication with a Represented Party

\(^{158}\)\(^\text{(...continued)}\) 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 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).

\(^{159}\) ABA Informal Ethics Op. No. 663, supra note 159. See, e.g., Schantz v. Eyman, 418 F.2d 11, 13 (9th Cir. 1969) (the county attorney’s attempt, through the agency of a psychiatrist, to communicate directly with the defendant rather than through his counsel “was a gross violation of professional ethics”); In re Conduct of Burrows, 629 P.2d 820 (Or. 1981); In re Murray, 601 P.2d 780 (Or. 1979). L.A. County Ethics Op. 315 (1970) (attorney should discourage client from hiring an investigator for purpose of ex parte communications).

\(^{160}\) ABA Informal Ethics Op. No. 663 (1975). See also N.C. 2003 Formal Ethics Op. No. 4 (2003) (visual observation is not a direct contact or communication with a represented person and does not violate Rule 4.2(a)). Cf. Pa. Informal Ethics Op. No. 2001-10 (2001) (surveillance by an employer’s investigator involving communications with a workers compensation claimant does not violate ethical rules unless the employer’s attorney had actual prior knowledge of the investigator’s conduct or had reason to believe the conduct was occurring).

\(^{161}\) N.C. 2004 Formal Ethics Op. No. 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).
Contacts with a represented party initiated by the client of his own volition do not violate the ethics rules. See Alaska Ethics Op. No. 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); Snider v. Superior Court, 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.”). But see In re Haley, 126 P.3d 1262 (Wash. 2006) (Washington State’s 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). Accord: In re Segal, 509 N.E.2d 988 (Ill. 1987); Committee on Legal Ethics v. Simmons, 399 S.E.2d 894 (W.Va. 1990); Sandstrom v. Sandstrom, 880 P.2d 103 (Wyo. 1994); Runsvold v. Idaho State Bar, 925 P.2d 1118 (Idaho 1996); Vickery v. Comm’n for Lawyer Discipline, 5 S.W.3d 241 (Tex. App. 1999); In re Schaefer, 25 P.3d 191 (Nev. 2001). Compare: Pinsky v. Statewide Grievance Committee, 578 A.2d 1075 (Conn. 1990) (A represented lawyer-party did not violate ex parte communication rules when he directly contacted his landlord since he was not “representing a client.”).
suggestion of his attorney violate the ethics rules, the majority of ethics opinions and rules permit the lawyer to advise a client to speak directly to a represented party.

Under the Model Code, an attorney has a duty to try to dissuade his client from making ex parte contacts. The Model Rule and similar state rules suggest a contrary position. For

163 See ABA MODEL RULES, 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 attorney disciplinary rules prohibiting a lawyer from communicating with a represented party and prohibiting a lawyer from using methods to obtain evidence that violate a person's legal rights, 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. General 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).

164 ABA MODEL RULES, 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.”); N.Y. City Formal Ethics Op. No. 2002-3 (2002) (where the client conceives the idea to communicate with a represented party, DR 7-104 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).

165 See ABA Formal Ethics Op. No. 524 (1962) (a lawyer should use his best efforts to dissuade his client from communicating with another party without the consent of that party’s counsel).

166 ABA MODEL RULES, Rule 4.2, cmt. 4 (“Parties to a matter may communicate directly (continued...)”)
example, Rule 2-100 of the Cal. Rules of Professional Responsibility provides that “nothing in the rule prevents a member from advising the client that such communication can be made.” At the same time, the rule prohibits an attorney from indirectly communicating, without consent of counsel, with an adverse party. Accordingly, a fine line exists between “advising” the client that such communication is possible and “encouraging” the client to make such communications.167 On the other hand, some states have amended their ethics rules to permit a lawyer to suggest that a client 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.168

166(...continued)
with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make.”); San Francisco Informal Ethics Op. No. 1985-1 (1985) (an attorney does not have to discourage his or her client from directly negotiating with the opposing party); Los Angeles County Ethics Op. No. 375 (1978) (as long as an attorney does not use his client to indirectly communicate with the opposing party, an attorney has no obligation to dissuade his client from making contact); Carda v. E.H. Oftedal & Sons, Inc., 2005 WL 2121972 (D. S.D. Aug. 30, 2005) (Rule 4.2 allows parties to a matter to communicate directly with each other and does not prohibit lawyers from advising a client regarding a communication that the client is legally entitled to make.)

167 See Or. Formal Ethics Op. No. 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 for relaying communications from the lawyer.”).

168 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).
7. Law or Rule Exception

a. In General.

Ex parte communications are not prohibited if the communication is authorized by law. Some permitted communications include service of legal notices, offers of judgment and, in some jurisdictions, settlement offers. A court has held that defense counsel’s issuance of a subpoena for the deposition of a represented party plaintiff in one discrimination suit as a third party witness in a separate but related employment discrimination suit was not “authorized by law” to take the deposition without the presence of the witness’s attorney.

b. Government Officials and Employees.

Because private parties have certain inherent and constitutional rights to approach their government officials, they should not be restricted from seeking direct communication with those officials simply because the officials have employed an attorney to represent them. For example, in Formal Ethics Op. No. 97-408 (Aug. 2, 1997), the American Bar Association Ethics Committee interpreted Model Rule 4.2 as permitting a lawyer representing a private party in a controversy with the government to communicate about the matter 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 an opportunity for consultation between government counsel and the officials on the advisability of their entertaining the communication. In situations where the right to petition has no apparent applicability, either because of the position and authority of the official sought to be contacted or because of the purpose of the

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169 See ABA Informal Ethics Op. No. 426 (1961); ABA Informal Ethics Op. No. 985 (1967); ABA Informal Ethics Op. 1019 (1968). See also Va. Ethics Op. No. 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. No. 521 (1983) (plaintiff’s attorney may not directly contact opposing party without consent of that party’s lawyer even through plaintiff’s attorney believes opposing counsel is wrongfully withholding information from his client, an attorney).

170 Parker v. Pepsi-Cola Gen’l Bottlers, 249 F. Supp. 2d 1006 (N.D. Ill. 2003) (“[W]e do not believe that the ‘authorized-by-law’ exception creates a safe haven that allows contact with a represented party via a subpoena . . . .”).
proposed communication, Rule 4.2 prohibits communication without prior consent of government counsel.\textsuperscript{171}

Similarly, some jurisdictions have held that an attorney representing a private party may directly contact a government official about a matter involving the client, even though the government 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.\textsuperscript{172} Note that a number of jurisdictions apply the same ex parte communication rules

\textsuperscript{171} See also ABA MODEL RULES, 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. No. 95-396 (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); American Canoe Ass’n v. City of St. Albans, 18 F. Supp. 2d 620 (S.D. W. Va. 1998) (communication by plaintiff’s counsel with defendant City and City’s manager and employees not barred by Rule 4.2 because such contacts are “authorized by law;” however, plaintiff’s counsel must provide defendant with an inventory of any materials received from defendant government agencies and provide the information within court-set discovery deadlines).

\textsuperscript{172} See, e.g., Ala. Ethics Op. No. 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); D.C. Ethics Op. No. 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); Ky. Ethics Op. No. E-332 (1988) (lawyer representing government department in litigation may not prevent private party’s lawyer from contacting all employees of the department); Morrison v. Brandeis Univ., 125 F.R.D. 14 (D. Mass. 1989) (court allowed ex parte interviews with non-party employees of University that voted in favor of granting plaintiff tenure, based on plaintiff’s need to interview these favorable witnesses, provided plaintiff’s counsel clearly identified himself as plaintiff’s counsel and that counsel could not take statements from persons who refuse to talk or who requested their attorney); N.Y. City Ethics Op. No. 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. No. 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. Formal
applicable to private sector parties when government parties are involved.\textsuperscript{173}

\textsuperscript{172}(...continued)

Ethics Op. No. 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. No. 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); Utah Ethics Op. No. 115R (1994) (lawyer representing client in matter against government agency may contact employees of agency orally or in writing outside government attorney’s presence on basis of constitutional guarantee of unrestricted access to government, but where government is represented by counsel must disclose this to government employee being interviewed).

\textsuperscript{173} See, e.g., Alaska Ethics Op. No. 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. No. 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. No. 92-3 (1992) (defendant’s lawyer may not send City officials correspondence with City Attorney about the matter); N.C. Ethics Op. No. 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); Brown v. Oregon 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. No. 92-15 (1993) (lawyer representing government employee in grievance matter may not write County Commissioners without County Attorney’s consent); Tex. Ethics Op. No. 474 (1991) (Rule 4.2 bars telephone contact by litigant’s lawyer with city council criticizing city’s settlement offer in suit against city). Cf. Hammond v. Junction City, 2002 WL 169370 (D. Kan. Jan. 23, 2002) (ex parte communication with employee-defendant city’s director of human relations–was not authorized by virtue of employee’s status as government official since the purpose of the communication was not to address any policy issue over which the employee had authority to take or recommend action, and the attorney did not give government counsel reasonable advance notice of the intent to communicate with the official).

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c. FELA Actions.

Section 10 of the Federal Employers’ Liability Act (“FELA”) bars interference with employees of a common carrier from voluntarily providing information regarding employee injuries. There is a split of opinion among those courts that have considered the relationship between Section 10 and state ethics rules prohibiting ex parte communications. At least nine courts have held that ex parte contact with represented witnesses in cases brought under the FELA are appropriate despite ethical rules to the contrary. By contrast, at least ten courts have held that Section 10 does not authorize ex parte contact, reading Section 10 narrowly.

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174 42 U.S.C. § 60.


d. Communication About Administrative or Ministerial Matters.

Although Model Rule 4.2 states no exception for contact limited to purely administrative or ministerial questions, the rule has been interpreted to allow direct contact to obtain non-substantive information from an organization.177

e. Information Obtained Through Opponent’s Web Site

Some lawyers see an employer’s corporate web site as a potentially rich source of discoverable information. In most cases, a web site can generally be accessed by anyone having access to the Internet. The web site is posted with the knowledge and understanding that it is placed in the public domain. “Passive” web sites afford no method of direct interaction with the owner of the site. Viewing or downloading information posted on a passive site is the equivalent of reading a newspaper, magazine, or other document available for public consumption. Neither viewing nor following links involves any personal response to the visitor. A lawyer who reads information posted for general public consumption is thus not “communicating” with the represented owner of the web site for ex parte communication purposes.178 Note these issues apply equally to the “personal” web site of a plaintiff.

Some web sites allow the visitor to interact with the site. The interaction may consist of providing feedback about the site or ordering products. This kind of one-way communication from the visitor to the web site also does not constitute communicating “with a person” for the purpose of the ex parte communication rules. Rather, it is the equivalent of ordering products

177 See D.C. Ethics Op. No. 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). See also ABA MODEL CODE OF JUDICIAL CONDUCT, Canon 3B(7)(a) (1999) (permits ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits).

178 See Or. Formal Ethics Op. No. 2005-164 (2005) (lawyer may access the web site of his represented opposing party even if the web site contains information relevant to the litigation pending between the two clients, if the web site is passive or if the communication from the lawyer is the equivalent of ordering products from a catalog; “[The essence of the analysis] is whether the Internet-based communication has the character of a telephonic or face-to-face conversation. For the same reasons that conversing directly or indirectly with a represented person is forbidden by telephone or in person, it is also forbidden in any electronic format.”).
from a catalog by mailing the required information or by giving it over the telephone to a person who provides no information in return other than what is available in the catalog.179

A more interactive web site allows visitors to send messages and receive specific responses from the web site or to participate in a “chat room.” A visitor to a web site who sends a message with the expectation of receiving a personal response is communicating with the responder. The visitor may not be able to ascertain the identity of the responder, at least not before the response is received. In such cases, the lawyer visiting the web site of a represented person might inadvertently communicate with the represented person in violation of ex parte communication rules.180

8. Communication with Unrepresented Persons

a. Advice

In representing her client, a lawyer may not give an unrepresented individual any advice other than advice to seek counsel.181 The attorney is allowed to discuss the subject matter of the dispute, but may not imply that she is a disinterested person; at all times the lawyer must clarify the exact nature of her role and interest in the dispute. As long as there is no overreaching or misrepresentation, the attorney may draft documents and submit them to the unrepresented party for signature.182 Although an attorney should not suggest specific counsel, he or she may suggest

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179 See Or. Formal Ethics Op. No. 2005-164 (2005). See also Or. Formal Ethics Op. No. 2005-144 (2005) (prior consent of government’s lawyer not required to request and receive public records from the governmental entity; however, if the records clerk is asked to interpret the records or policies expressed in the records, the risk of violating the ex parte communication rules is increased). Note that some one-way communication can violate the ex parte communication rules, such as where a lawyer sends a letter or e-mail to a represented person without the opposing lawyer’s consent. Or. Formal Ethics Op. No. 2005-164 (2005); In re Complaint of Hedrick, 822 P.2d 1187 (Or. 1991).


181 See ABA MODEL RULES, Rule 4.3, cmt. 4; ABA MODEL CODE, DR 7-104.

legal aid or other bar referral services approved by the bar. An attorney may not circumvent this rule by using the client or some third party as a medium to give advice to the unrepresented party.

When the contact is initiated by a person who is known to have been represented by counsel but 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.

b. Interviews

Lawyers may interview an unrepresented party so long as the attorney’s role and potential conflicts of interests are made clear.

One area in which a labor lawyer must be especially careful is when he or she represents a company and interviews an employee with whom the company may have a conflict of interest, for example, an employee accused of discrimination by another employee who plans to bring

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186 See W.T. Grant Co. v. Haines, 531 F.2d 671, 675 (2d Cir. 1976) (interviewing corporate employees of corporate plaintiff); Jones v. Allstate Ins. Co., 45 P.3d 1068 (Wash. 2002) (insurance company’s claims adjuster’s conduct fell below standard of care of a practicing attorney when she did not disclose her conflict of interest, advised the claimants to sign a release of all claims, and did not either properly advise the claimants that there were legal consequences of signing the insurance company’s settlement check and release or refer them to independent counsel; although a non-lawyer, the adjuster’s actions constituted the practice of law and, therefore, the standard of care of a practicing attorney applied); In re Militia, 492 A.2d 380 (N.J. 1985).
suit. Also, if an attorney uses an investigator to conduct the interview, the investigator must reveal on whose behalf he is working.

9. Remedies for Violation of Ex Parte Communication Rules

The remedies for a violation of the ex parte communication rules can vary depending on the circumstances and can include sanctions or exclusion of the evidence obtained. In extreme cases where prejudice is shown, a violation can result in disqualification or

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189 Hill v. St. Louis Univ., 123 F.3d 1114 (8th Cir. 1997) (district court did not err in imposing $1,921.85 in attorneys fees as sanctions against plaintiff for her counsel’s ex parte communications with a department chair); In re Maxwell, 627 S.E.2d 16. (Ga. 2006) (six month suspension appropriate for attorney representing employer in sexual harassment case who held meetings with his client’s employees, including those he knew were represented by counsel, without obtaining the consent of their counsel).

190 D.C. Ethics Op. No. 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 and 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); Faison v. Thornton, 863 F. Supp. 2d 1204, 1218 (D. Nev. 1993) (ordering production of statements obtained during improper ex parte communications); Porter v. Fieldcrest Cannon, Inc., 514 S.E.2d 517 (N.C. Ct. App. 1999) (portions of deposition related to ex parte communication should be excluded); 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 and thus sanctions for attorney’s failure to disclose it were proper, where attorney’s unethical behavior allowed him to obtain transcript).

191 Weeks v. Independent Sch. Dist. No. I-89, 230 F.3d 1201 (10th Cir. 2000) (sanction of (continued...
disqualification of plaintiff’s attorney, for violation of ex parte communications with school district’s managerial employees, was not an abuse of discretion; *MMR/Wallace Power & Industrial, Inc. v. Thames Assoc.*, 764 F. Supp. 712, 724 (D. Conn. 1991) (defense counsel disqualified because he made unauthorized contact with former employees of plaintiff who had been member of litigation team; court applied three-part test: (1) did the employee have confidential information pertaining to plaintiff’s trial preparation and strategy?; (2) did he disclose it to defense counsel?; (3) if so, does counsel’s continued representation of defendant threaten to “taint” all further proceedings?); *Hammond v. Junction City*, 167 F. Supp. 2d 1271 (D. Kan. 2001) *affirmed*, 126 Fed. Appx. 886 (10th Cir. 2005) (imposition of sanctions affirmed) (violation of ex parte communication rules by plaintiff’s counsel in Title VII case warranted disqualification of plaintiff’s counsel, exclusion of evidence obtained through communications unless otherwise obtained through other means, and award of attorneys fees and costs to defendant); *Zachair, Ltd. v. Driggs*, 965 F. Supp. 741 (D. Md. 1997) (disqualifying counsel for, *inter alia*, violating Md. Rule 4.2 by engaging in ex parte contact with the former general counsel of a corporate defendant whom counsel knew or should have known possessed substantial privileged information), *aff’d* 141 F.3d 1162 (4th Cir. 1998); *Cordy v. Sherwin-Williams Co.*, 156 F.R.D. 575 (D.N.J. 1994) (defendant’s counsel and law firm disqualified because he retained expert first retained by plaintiffs for same case); *Jones v. Daily News Publ’g Co.*, 2001 WL 378846 (D.V.I. Mar. 16, 2001) (plaintiff’s lawyer disqualified because he represented Jones in employment discrimination action while simultaneously representing a second employee of the Daily News, Gross, where Jones was Gross’s supervisor and had direct involvement in the decision to terminate Gross; because Jones’ testimony goes to the heart of Gross’s suit, continued representation of Jones by Gross’s attorney violates Model Rule 4.2). *Compare La Jolla Cove Motel and Hotel Apartments, Inc. v. Superior Court*, 121 Cal. App. 4th 773 (2004) (Counsel’s ex parte contact with directors of a represented corporation is not barred because the directors’ separate counsel consented to the communication, although the corporation did not. Even if the contact violated the ex parte communication rules, the trial court was correct not to order disqualification of the offending counsel since there was no evidence that they obtained any confidential information that could give their clients an unfair advantage or impact upon the fairness of the trial or integrity of the judicial system); *Allstate Ins. Co. v. Bowne*, 817 So. 2d 994 (Fla. Dist. Ct. App. 2002) (in employment discrimination action former employee’s counsel not disqualified even though he spoke with management level employee of former employee’s wholly-owned subsidiary; counsel in good faith believed witness was employed by different entity, witness had not been in management position with former employer itself, counsel researched disciplinary rules, attempted to comply with rules and sought ethics advisory opinion, at beginning of statement, counsel asked witness if current employer was separate and distinct company, witness explained it was subsidiary, filings with Secretary of State indicated they were separate entities, counsel had no reason to believe that statements could constitute admissions and no evidence that confidences were revealed); *Muriel Siebert & (continued...)

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an order for new trial.192

**IV. SPECIAL ISSUES REGARDING IN-HOUSE COUNSEL**

In-house lawyers face unique ethical issues in labor and employment law matters. In-house lawyers are also full-time employees of the corporation and thus are likely to encounter difficult questions of professional independence not faced by outside counsel. Additionally, corporate counsel often confront challenging issues regarding identifying the “client” among the various managers, employees 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. The blending of managerial and legal duties makes issues of confidentiality more difficult as a practical matter.

**A. Identifying the Corporate/Organizational “Client”**

ABA Model Rule 1.13 provides that a lawyer employed or retained by an organization represents the organization, as distinct from its directors, officers, employees, shareholders or other constituents.193 This rule is easy to state, but sometimes difficult to apply in practice. A

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191(...continued)

*Co., Inc. v. Intuit Inc.*, 32 A.D.3d 284, 820 N.Y.S.2d 54 (N.Y. A.D. 1 Dept. 2006) (Disqualification of defendant’s counsel was not required to avoid “appearance of impropriety” that resulted from counsel’s ex parte interview with plaintiff’s former chief operating officer (COO); counsel specifically warned COO not to disclose privileged matter gained during his employment with plaintiff, and there was no evidence that defendants obtained any privileged material); *Smith v. Cleveland Clinic Found.*, 784 N.E.2d 158 (Ohio Ct. App. 2003) (disqualification of employee’s counsel from employee’s wrongful termination against employer, due to counsel’s contact with several of employer’s employees without informing employer, was improper, where the employer was not prejudiced by the conduct that formed the basis for the disqualification).

192 *Rowe v. Vaagen Bros. Lumber, Inc.*, 996 P.2d 1103 (Wash. App. 2000) (as a matter of law, ex parte contact with plaintiff’s expert medical witness by employer’s counsel required trial judge to grant a new trial on former employee’s common law tort action for retaliation, during which trial employer would be precluded from using testimony of employee’s medical experts with whom employer had ex parte contact).

193 *See* EC 5-18 (lawyer employed by corporation owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with (continued...)
corporate entity can only act through its duly authorized constituents. Sometimes authorized action can come from several sources and determining who is the authorized representative of the corporate entity is in some cases difficult. In advising the 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 or organization. As a practical matter it may be difficult for the in-house counsel to question the “authority” of a corporate constituent, especially if that constituent holds more effective power within the organization than the attorney. The issue of 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.

194 See authorities cited at note 195, supra.

195 See Section III.A.1., supra (‘The Tests for Determining Corporate ‘Client Confidences’”).


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B. Clarifying Who the In-House Lawyer Represents

In representing the corporation and dealing with its employees on a regular basis, it is sometimes the case that a corporate employee, director, or other constituent may presume erroneously that the corporation’s lawyer also represents the employee or constituent personally. This risk of confusion is more 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... 

(...continued)

tool that can assist in determining whether a city attorney faces a potential conflict of interest governed by Rule 3-310(C)(1) when asked to advise different bodies or officials within the city government regarding a matter: Do constituent sub-entities or officials (a) have a right to act independently of the government body of the entity under the city charter or other governing law so that a dispute over the matter may result in litigation between the agency and the overall entity and (b) have contrary positions in the matter. Both elements must be present to create a potential conflict of interest governed by Rule 3-311-(C)(1) . . . [The cases] suggest that a court might be less rigorous in interpreting the scope of the Rules of Professional Conduct relating to conflicts of interest when applied to governmental attorneys than to other attorneys.”); N.Y. City Ethics Op. No. 2004-03 (2004) (Government lawyers are subject to the rules that ordinarily govern the attorney-client relationship, including those governing conflicts of interest and entity representation. However, the conflict of interest questions encountered by government lawyers in civil representation may be particularly complex, and questions may ultimately be analyzed differently for government lawyers, because of the legal framework within which they function. For example, threshold 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 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. When the lawyer learns of wrongdoing by an unrepresented constituent of the agency, the lawyer must take steps to prevent or rectify the wrongdoing as required by DR 5-109(c)) as well as in accordance with legal obligations. When the government lawyer proposes to represent a constituent, a threshold question is whether the constituent will be represented in his or her official or personal capacity. If the constituent would be represented personally, the lawyer must first determine whether the representation is permissible under DR 5-105, and must comply with the rule’s procedural requirements.).

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lawyer and tend to feel that the lawyer represents “their” interests as well as the corporation (since in their minds these interest 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. ABA Model Rule 1.13(d) provides that 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.\textsuperscript{197} Even in the absence of apparent adverse

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\textsuperscript{197} See, e.g., United States v. International Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of Am., 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); Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir. 1978) (law firm for a trade association gave some individual members of association the impression that firm was also representing them when collecting information from the members; when matter arose for another client in which the information collected from the members might be used against them, firm was required to withdraw from representation because of conflicting confidentiality obligations to the members); Skarbrevik v. Cohen, England & Whitfield, 231 Cal. App. 3d 692 (1991) (the lawyer is obligated to explain to the organization’s directors, officers, employees, members, shareholders, or other constituents the identity of the client for whom the lawyer is acting and “shall not mislead such a constituent into believing that the constituent may communicate information to the member in a way that will not be used in the organization’s interest if that is or becomes adverse to the constituent”); Cal. Formal Ethics Op. No. 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.”); D.C. Ethics Op. No. 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. No. 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 in the event of any ambiguity as to his role); Miss. Ethics Op. No. 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); McKinney v. McMeans, 147 F. Supp. 2d 898 (W.D. Tenn. 2001) (corporation’s attorney not disqualified from representing one of two shareholders

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in suit against the other for breach of shareholder agreement; attorney and defendant shareholder did not have attorney client relationship because where lawyer represents corporation, client is corporation and not the corporation’s constituents); University of W. Va. v. Van Voorhies, 278 F.3d 1288 (Fed. Cir. 2002) (graduate student/inventor who communicated with attorney for university in course of university’s prosecution of application for patent on invention that was subject of inventor’s assignment to university did not have attorney-client relationship with attorney that would disqualify attorney from representing university in subsequent action in which inventor asserted breach of contract and other claims; inventor was required to provide information for prosecution of application and inventor admitted to attorney that he was not the attorney’s client). Cf. Zielinski v. Clorox Co., 504 S.E.2d 683 (Ga. Ct. App. 1998) (plant supervisor failed to establish existence of personal attorney-client privilege with respect to communications he allegedly had with corporate counsel during meeting with other company employees forming basis of tort claim against supervisor; supervisor never testified he approached law firm in his individual capacity, counsel stated firm had been hired by company to conduct investigation to assist company in handling its investigation of an alleged embezzlement scheme, supervisor failed to maintain confidentiality of communication by seeking advice in the presence of several other employees, and communications concerned affairs of the company with respect to the embezzlement scheme, not individual matters); Chem-Age Indus., Inc. v. Glover, 652 N.W.2d 756 (S.D. 2002) (insufficient evidence to support investor’s claim that they had an individual attorney-client relationship with attorney who prepared incorporation documents for former client, for purpose of investors’ legal malpractice claim against client; the investors sought no individual advice from attorney, the attorney never sent them a bill for services rendered, and attorney had no personal communication with investors regarding creation of the corporation).

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 otherwise in connection with that proceeding. Although what you say may be considered a confidential communication between the company and its attorney, I do not represent you personally and thus cannot promise to keep anything you tell me from appropriate company officials.” See also Section III. A.6., supra (”Suggestions for Attorney Interviews of Management Employees”); Cal. Formal Ethics Op. No. 2001-156 (2001) (“To avoid unintended formation of such personal attorney-client relationships with constituent officials, attorneys should comply with Rule 3-600(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
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. Additionally, an explanation of counsel’s loyalty to the organization is often appropriate in connection with internal investigations. In disclaiming representation, counsel 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. In some circumstances, counsel may wish to advise the employee to retain separate counsel.

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See, e.g., In re Grand Jury Subpoenas, 144 F.3d 653 (10th Cir. 1998) (individual 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 that the conversations did not concern matters within the company or the general affairs of the company); Moore v. Yarbrough, Jameson & Gray, 993 S.W.2d 760 (Tex. Ct. App. 1999) (attorney can be held negligent when the attorney fails to advise a party that he is not representing her in a case where circumstances lead the party to believe that the attorney was representing her in the matter). Cf. 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 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. Prior to 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.), cert. denied sub nom., Under Seal v. United States, 126 S.Ct. 1114 (2006).
Note that this “who is the client” question also arises where the attorney is hired by the union to represent a member in a legal matter that is part of the collective bargaining or union arbitration process. In such cases, it is the union—and not the member—that is the attorney’s client.200

C. Responses to Unlawful Activity

In-house counsel has a special duty to take reasonable remedial action when counsel learns that an officer, employee or other person associated with 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.

200 See, e.g., Peterson v. Kennedy, 771 F.2d 1244, 1258 (9th Cir. 1985) (“We do not believe that an attorney who is handling a labor grievance on behalf of a union as part of the collective bargaining process has entered into an ‘attorney-client’ relationship in the ordinary sense with the particular union member who is asserting the underlying grievance. . . . [W]hether it be house counsel or outside union counsel, where the union is providing the services, the attorney is hired and paid by the union to act for it in the collective bargaining process.”); United States v. International Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., 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 campaign’s 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); Gwin v. National Marine Engineers Beneficial Ass’n, 966 F. Supp. 4, 7 (D.D.C. 1997) (“[A]n attorney handling a labor grievance on behalf of a union does not enter an ‘attorney-client’ relationship with the union member asserting [a] grievance.”), aff’d, 1998 WL 104580 (D.C. Cir. Jan. 29, 1998); Best v. Rome, 858 F. Supp. 271, 276-77 (D. Mass. 1994) (same), aff’d, 47 F.3d 1156 (1st Cir. 1995); Adamo v. Hotel, Motel, Bartenders, Cooks & Restaurant Workers’ Union, 655 F. Supp. 1129, 1129 (E.D. Mich. 1987) (“[I]n a labor dispute with an employer it is the union which carries on the dispute . . . and it is the union which is the client of the law firm.”); Hague v. United Paperworkers Int’l Union, 949 F. Supp. 979, 987 (N.D.N.Y. 1996) (same); Brown v. Maine State Employees Ass’n, 690 A.2d 956, 960 (Me. 1997) (member did not enter into an attorney-client relationship with union attorney during grievance procedure). See also N.Y. Ethics Op. No. 743 (2001) (union attorney who represents union member in arbitration proceeding must make clear to member that he/she is not the client and that member’s disclosures will not be kept confidential; having done so, the attorney may share disclosures with union and, at union’s discretion, may distribute arbitrator’s decision).
and is likely to result in substantial injury to the organization.\textsuperscript{201} 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.\textsuperscript{202} Model Rule 1.13 also provides that counsel may “report out” where, despite counsel’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 counsel may disclose only to the extent that the lawyer reasonably believes necessary to prevent substantial injury to the organization.\textsuperscript{203} However, this reporting out provision does not apply with respect to 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.\textsuperscript{204}

The Sarbanes-Oxley Act of 2002\textsuperscript{205} subjects attorneys to new ethical standards in the context of their representation of public companies, including issuers with securities registered under Section 12 of the Securities Exchange Act of 1934, those required to file reports under Section 15(d) of the Securities Exchange Act, and those that file or have filed a registration statement that has not yet become effective. Section 307 of the Sarbanes-Oxley Act requires the Securities and Exchange Commission to adopt new rules setting forth “minimum professional standards” for lawyers practicing before the SEC and/or representing issuers, including a rule:

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\item requiring an attorney to report “evidence of a material violation of securities law or breach of fiduciary duty or similar violation” by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the legal equivalent thereof); and
\end{enumerate}

\begin{itemize}
\item\textsuperscript{201} ABA MODEL RULES, Rule 1.13(b).
\item\textsuperscript{202} ABA MODEL RULES, Rule 1.13(b).
\item\textsuperscript{203} ABA MODEL RULES, Rule 1.13(c). \textit{See also} ABA MODEL RULES, 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).
\item\textsuperscript{204} ABA MODEL RULES, Rule 1.13(d).
\item\textsuperscript{205} H.R. 3763 (2002).
\end{itemize}
(2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.206

The SEC adopted final attorney regulations as new Part 205, “Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer,” which:

- require an attorney to report evidence of a material violation, determined according to an objective standard, “up the ladder” within the issuer to the chief legal counsel or the chief executive officer of the company or the equivalent;

- require an attorney, if the chief legal counsel or the chief executive officer of the company does not respond appropriately to the evidence, to report the evidence to the audit committee, another committee of independent directors, or to the full board;

- clarify that the rules only cover attorneys providing legal services to an issuer who have an attorney-client relationship with the issuer, and who have notice that documents they are preparing or assisting in preparing will be filed with or submitted to the SEC;

- provide that foreign attorneys not admitted to the U.S. and who do not advise clients regarding U.S. law, would not be covered by the rule, while foreign attorneys who provide legal advice regarding U.S. law would be covered to the extent that they are appearing and practicing before the SEC, unless they provide such advice in consultation with U.S. counsel;

- allow companies to establish a “qualified legal compliance committee” (QLCC) as an alternative procedure for reporting evidence of a material violation. Such a QLCC would consist of at least one member of the issuer’s audit committee, or an equivalent committee of independent directors, and two or more independent board members, and would have the responsibility, among other things, to recommend that an issuer implement an appropriate response to evidence of a material violation. One way in which an attorney could satisfy the rule’s reporting obligation is by reporting evidence of a material violation to a QLCC;

206 Id., Section 307.
authorize, but do not require, an attorney, without the consent of an issuer client, to reveal confidential information related to his or her representation to the extent the attorney reasonably believes necessary (1) to prevent the issuer from committing a material violation likely to cause substantial financial injury to the financial interests or property of the issuer or investors; (2) to prevent the issuer from committing an illegal act; or (3) to rectify the consequences of a material violation or illegal act in which the attorney’s services have been used; 207

- state that the rules govern in the event the rules conflict with state law, but will not preempt the ability of a state to impose more rigorous obligations on attorneys that are not inconsistent with the rules; 208

- state that an attorney who complies in good faith with the regulations “shall not be subject to discipline or otherwise liable under inconsistent standards imposed by any state or other United States jurisdiction where the attorney is admitted or practices,” 209 and

- affirmatively state that the rules do not create a private cause of action and that authority to enforce compliance with the rules is vested exclusively with the SEC. 210

The SEC has also proposed, but not yet adopted, a so-called “noisy withdrawal” provision, under which a covered attorney would be required to withdraw from representing (or working as an in-house attorney for) an issuer and to notify the SEC that they have withdrawn for professional reasons under certain circumstances if there is not an appropriate response to the up-the-ladder reporting. 211 The Commission also voted to propose an alternative to the “noisy withdrawal” that would 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

207 17 C.F.R. § 205.3(d) (2003).

208 17 C.F.R. § 205.1.

209 17 C.F.R. § 205.6(c)).

210 17 C.F.R. § 205.

Commission 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. The 60-day comment period for the “noisy withdrawal” provision has expired; the proposal has received almost universal criticism from law firms representing issuers and from the ABA.

The SEC regulations purport to immunize lawyers who make disclosures required or authorized by the regulations from discipline for violating state confidentiality provisions or other state rules. This portion of the rule has set up a developing conflict between the SEC and at least two state bar committees. For example, the Washington State Bar has opined that the SEC regulations may not protect lawyers from discipline for violating state privilege or ethics rules, at least insofar as the regulations permit, but do not require, certain disclosures. In response to a draft of the Washington State Bar opinion, the SEC general counsel submitted a written comment asserting that the SEC regulations preempt otherwise conflicting state privilege and ethics rules, to the extent that the SEC regulations require or authorize disclosures that might otherwise violate those state rules. In response to the SEC general counsel’s letter, the Corporations Committee of the California State Bar’s Business Law Section sent a letter to the


213 17 C.F.R. § 205.6(c)).

214 See Washington State Bar Ass’n Interim Formal Ethics Op. Re: The Effect of the SEC’s Sarbanes-Oxley Regulations on Washington Attorney’s Obligations Under the RPCs (July 26, 2003) (Washington lawyers RPC obligations have not been affected by the SEC regulations; 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 Washington lawyer cannot as a defense against a RPC violation fairly claim to be complying in “good faith” with the SEC regulations, if he/she took an action contrary to this opinion). Compare N.C. Bar 2005 Ethics Op. No. 9 (Jan. 20, 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.).

215 Letter from SEC General Counsel Giovanni P. Prezioso Regarding Washington State Bar Ass’n’s Proposed Op. on the Effect of the SEC’s Attorney Conduct Rules (July 23, 2003) (the SEC regulation preempts otherwise conflicting state rules and shields an attorney from state discipline if he/she complies in “good faith” with the Commission’s rules. SEC rules also preempt state rules that prohibit attorney actions that are authorized, but not required, by the SEC rules).
SEC notifying it that the SEC regulations conflict with California law and that in the absence of an appellate judgment in favor of the SEC’s preemption claim, the California State Bar may not refuse to enforce the obligation under California Business and Professions Code § 6068(e) to maintain client confidences “at every peril to himself or herself.”

D. Joint Representation of the Organization and Its Constituents

Rule 1.13(e) makes clear that an in-house lawyer may also represent any of its directors, officers, employees, members, shareholders, or other constituents, provided the provisions regarding dual representation are followed. If informed consent of the organization to dual representation is required, the consent must be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

E. In-House Counsel As Witness

In-house lawyers are frequently potential fact witnesses in litigation. For example, lawyers involved in drafting or adopting personnel policies are likely witnesses in employment disputes. As noted in Section II, supra (“The Lawyer As Witness”), the lawyer-witness rule does not present a significant problem for in-house counsel, especially larger departments and those which employ outside counsel for litigation. The lawyer-witness rule disqualifies only the testifying lawyer from acting as an advocate at trial; the rule does disqualify other lawyers in the corporate law department from actually litigating the case. Moreover, the testifying lawyer can always help in preparing the case for trial; the only prohibited conduct is “taking an active role before the tribunal in the presentation of the matters.”

F. In-House Counsel Business Advice
It is often the case that the in-house counsel blends the roles of business adviser, corporate employee and lawyer. The risk in such situations is that communications with the in-house attorney may not be protected by the attorney-client or work product privilege. In general, to be privileged, it must be shown that the communication was for the purpose of giving legal services rather than general business advice. For example, in In re Sealed Case, 737 F.2d 94, 99 (D.C. Cir. 1984), the court set forth the issue as follows:

The lawyer whose testimony the government seeks in this case served as in-house counsel. That status alone does not dilute the privilege. We are mindful, however, the attorney was a company vice-president, and that certain responsibilities were outside the lawyer’s sphere. The company can shelter the attorney’s advice only upon a clear showing that the lawyer gave it in a professional, legal capacity.220

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220 See also SEC v. Gulf & W. Indus., Inc., 518 F. Supp. 675, 681 (D.D.C. 1981) (“Business and personal advice are not covered by the privilege.”); Texaco P.R., Inc. v. Department of Consumer Affairs, 60 F.3d 867 (1st Cir. 1999) (same); Southern Bell Tel. & Tel. Co. v. Deason, 632 So. 2d 1377 (Fla. 1994) (Upjohn test applied but 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); Dawson v. New York Life Ins. Co., 901 F. Supp. 1362 (N.D. Ill. 1995) (communications made by general counsel, vice president, and senior vice president of company to company’s attorneys who were members of company’s control group were not made for purpose of securing legal advice and thus were not protected by attorney-client privilege in defamation action brought by former employee, where attorneys were simply called upon to provide factual information to persons receiving information; attorneys acted more as couriers of information than as legal advisors); B.F.G. of Ill., Inc. v. Ameritech Corp., 2001 WL 1414468 (N.D. Ill. Nov. 13, 2001) (courts “will not tolerate the use of in-house counsel to give a veneer of privilege to otherwise non-privileged business communications”); Resnick v. American Dental Ass’n, 95 F.R.D. 372, 375 (N.D. Ill. 1982) (personnel practices study and employee relations communication documents all undertaken with the advice and assistance of counsel were not protected by the privilege because they were “essentially management-oriented for ADA’s overall business purposes”); 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); Lexington Pub. Library v. Clark, 90 S.W.3d 53 (Ky. 2002) (privilege is inapplicable when the attorney acts merely as a business advisor); E.I. du Pont de Nemours & Co. v. Forma-Pack, Inc., 718 A.2d 1129 (Md. 1998) (“When DuPont, the corporate client, consulted with its attorneys, the legal department, it was not doing so for legal advice regarding the Forma-Pack debt. Instead, the client corporation was simply routing the debt collection matter to its legal department, which in turn was to transmit it to an outside, non-lawyer collection agency.”); Du Pont was consulting with the (continued...)
department in a business capacity); City of Springfield v. Rexnord Corp., 196 F.R.D. 7 (D. Mass. 2000) (documents that might have been prepared with the assistance of in-house counsel in anticipation of possible litigation with Mass. Department of Environmental Quality Engineering were not protected by attorney-client privilege, where they were prepared in anticipation of media inquiries, and thus represented corporation’s public, albeit potential, statements); SR Int’l Business Ins. Co. Ltd. v. World Trade Ctr. Props. L.L.C., 2003 WL 1903071 (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 than legal, matters, and attorneys later asked all non-lawyers to step out so that lawyers could meet separately); SR Int’l Business 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; “No privilege attaches to an attorney’s communications when the attorney is hired to give business or personal advice or to do the work of a non-lawyer.”). Accord Ga.-Pac. Corp. v. GAF Roofing Mfg. Corp., 1996 WL 29392 (S.D.N.Y. 1996) (in-house counsel who negotiated key provisions of a contract could not raise attorney-client privilege when testimony indicated that the lawyer was making substantive business decisions in addition to rendering legal advice); SmithKline Beecham Corp. v. Teva Pharmaceuticals USA, Inc., 232 F.R.D. 467 (E.D. Pa. 2005) (“What would otherwise be routine, non-privileged communications between corporate officers or employees transacting general business of the company do not attain privileged status solely because in-house or outside counsel is ‘copied in’ on correspondence or memoranda.” (citations omitted)); Randall v. City of Philadelphia, 2005 U.S. Dist. LEXIS 31368 (E.D. Pa. Nov. 18, 2005) (although witness was an attorney and former city employee, witness worked in a position independent of the city and its law department as director of its Office of Integrity and Accountability and, therefore, her communications with the city were not within the scope of the city’s attorney-client privilege.); United States v. Chevron Corp., 1996 WL 264769 (N.D. Cal. 1996) (to claim the privilege “a corporation must make a clear showing that in-house counsel’s advice was given in a professional legal capacity”). Compare Motley v. Marathon Oil Co., 71 F.3d 1547 (10th Cir. 1995) (draft memorandum, 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 were within the scope of the attorney-client privilege, where the documents were prepared for the purpose of giving legal advice, were treated as confidential documents, the in-house counsel did not render business advice in the memorandum and lists, and the in-house counsel served as legal advisor to the committee); Tucker v. Fischbein, 237 F.3d 275 (3d Cir. 2001) (that reporters regularly consult with in-house
V. INADVERTENT DISCLOSURE AND IMPROPER ACQUISITION (THEFT, DECEIT) OF DOCUMENTS AND OTHER INFORMATION OF THE OPPOSING PARTY

A. Tape Recording of Parties and Witnesses

220(...continued)
counsel to discuss potential liability for libel does not thereby deprive those communications of the protection of the attorney-client privilege); United States v. Seidman, LLP, 2004 WL 1470034 (N.D. Ill. June 29, 2004) (there is a presumption that a lawyer in a legal department of the corporation is giving legal advice, and an opposite presumption for a lawyer who works on the business or management side); TVT Records v. Island Def Jam Music Group, 214 F.R.D. 143 (S.D.N.Y. 2003) (internal emails to and from corporation’s in house counsel, who were also management executives, were protected by attorney-client privilege only to the extent they included legal strategy or advice, as opposed to discussions of business strategy and negotiations); In re Buspirone Antitrust Litig., 2002 WL 3172112 (S.D.N.Y. Dec. 5, 2002) (documents that consisted of information sent to corporate counsel in order to keep counsel apprised of ongoing business developments, with expectation that attorney would respond if any matter raised important legal issues, was privileged to same extent as explicit request, and it was not of any significance that information transmitted to attorneys was of highly technical nature); Ferko v. NASCAR, Inc., 218 F.R.D. 125 (E.D. Tex. 2003) (documents given to independent auditor for attorney, and all communications relating to those documents, were protected by attorney-client privilege, since attorney retained auditor’s accountants to serve as listening posts, and interpret documents related to Statement of Financial Accounting Standards; although attorney did not hire attorney just for lawsuit, work done by accountant for attorney concerned potential litigation with SEC regarding economic issue that also existed in case). See also Jasmine Networks, Inc. v. Marvell Semiconductor, Inc., 117 Cal. App. 4th 794 (2004) (in concluding inadvertent disclosure of information was made by client as opposed to client’s attorney and therefore a waiver of the attorney-client privilege, court noted that in making the call and leaving voice mail to Jasmine; “Gloss was acting not only as Marvell’s general counsel, but also as the vice-president of business affairs and an officer of the corporation, with authority to speak to Jasmine on issues related to the terms of the agreement.”), review granted, 2004 WL 1718015 (Cal. July 21, 2004).
It is generally unethical in many states for an attorney to record any person, including adverse parties, without consent. The conduct constitutes deceit and trickery. Some jurisdictions have carved 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. Other jurisdictions, however, have found that secret recordings made by private attorneys for law enforcement purposes are unethical. Of the latter cases, most involved an attorney attempting to entrap a client or former client so that the attorney could receive leniency for his own criminal misconduct.

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222 See authorities cited at note 152, supra. See also People v. Selby, 606 P.2d 45 (Colo. 1979) (“Inherent in the undisclosed use of a recording device is an element of deception, artifice, and trickery which does not comport with the high standards of candor and fairness by which all attorneys are bound.”); Anderson v. Hale, 202 F.R.D. 548, 556 (N.D. Ill. 2001) (“Simply put, such tactics are not becoming of an officer of the court.”).

223 See, e.g., In re Attorney Gen’l’s Pet., 417 S.E.2d 526, 527 (S.C. 1992). See also N.Y. City Ethics Op. No. 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.City Formal Ethics Op. Nos. 80-95 and 95-10.

224 See, e.g., Committee on Prof’l Ethics & Conduct of Iowa State Bar Ass’n, 488 N.W.2d 168, 172 (Iowa 1992); People v. Smith, 778 P.2d 685, 687 (Colo. 1989).

225 See authorities cited at note 155, supra.
Some jurisdictions have held that secret taping, in itself, is not violative of 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. For example, in ABA Formal Opinion No. 01-422 (June 24, 2001), the ABA’s Standing Committee on Ethics and Professional Responsibility concluded that a lawyer who electronically 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. The Committee was divided as to whether a lawyer may record a client conversation without the knowledge of the client, but agrees that it is inadvisable to do so. The Committee in Opinion No. 01-422

expressly withdrew ABA Formal Opinion No. 337 (1974), which had concluded that recording without consent was generally prohibited.

Although witness statements obtained by or at the direction of an attorney constitute privileged work product, the privilege is vitiated if the attorney clandestinely recorded the statements or directed his client to do so.  See Parrott v. Wilson, 707 F.2d 1262, 1270-72 (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); Anderson v. Hale, 202 F.R.D. 548 (N.D. Ill. 2001) (surreptitious tape recording of witnesses made by defendants’ counsel was unethical and, therefore, any work product protection that would have otherwise applied to the tapes is vitiated); Ward v. Maritz, Inc., 156 F.R.D. 592 (D.N.J. 1994) (in former employee’s sexual harassment and constructive discharge action, protection of work product doctrine regarding recorded statements with employees was vitiated and recordings discoverable in light of unprofessional behavior of plaintiff’s counsel in advising plaintiff to surreptitiously record those conversations, even if conduct did not violate ethics rules; plaintiff may be deposed regarding circumstances surrounding surreptitious telephone conversations); Bogan v. Northwestern 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) (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 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); 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 prior to 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.).

See also Chapman & Cole v. Itel (continued...)
courts have required production of secret recordings.\(^{229}\)

\(^{229}\) (...continued)

*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 of Professional Conduct); *Wilson v. Lamb*, 125 F.R.D. 142 (E.D. Ky. 1989). *See also 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. Ct. App. 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). *See also* Tex. Ethics Op. No. 514 (1995) (although attorney cannot secretly tape record, he can ethically advise clients that federal and state law permits them to record conversations without informing the other parties; however, attorney may not circumvent his obligations by requesting that clients secretly record conversations to which the attorney is a party); *Apple Corps Ltd., MPL v. International Collectors Soc’y*, 15 F. Supp. 2d 456 (D.N.J. 1998) (tape recording approved in context of investigation of compliance with terms of consent decree in copyright action); *Gidatex S.r.L.. v. Campaniello Imports, Ltd.*, 82 F. Supp. 2d 119 (S.D.N.Y. 1999) (The 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). *Cf. Gonzalez v. Trinity Marine Group*, 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). *See also* Philadelphia Ethics Op. No. 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).

\(^{229}\) *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 Justice Department lawyer; the tapes were not protected as work product because plaintiff’s unethical conduct in secretly taping the conversations vitiated the privilege), *appeal dismissed*, 180 F.3d 298 (D.C. Cir. 1999); *Gratron v. Great Am. Communications*, 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 (continued...)

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A growing number of attorneys face ethical problems in connection with inadvertent receipt or disclosure of attorney-client communications, attorney work product or other confidential documents or information from an adversary. Such inadvertent or improper disclosure may occur as a result of a document production, a misdirected facsimile or electronic mail transmission (pushing the wrong speed dial number on a facsimile machine or modem, for example), a “switched envelope” mailing, or misunderstood distribution list instructions. In some cases an employee of a corporate adversary (or the plaintiff himself) may deliver to the attorney documents which are considered by the corporation to be its confidential or proprietary information or otherwise privileged. Does the attorney have the obligation to return such documents to the adversary or to even notify the adversary of his possession of such documents? May the attorney utilize the documents in preparing his complaint and litigation activities in the case?

B. Inadvertent Disclosure of Documents and Other Information from the Opposing Party

1. Ethical Obligations of Recipient of Inadvertently or Improperly Obtained Documents and Information

In this advanced technological age with its frequent use of facsimile machines and electronic mail and the increase in multi-party and document intensive cases, inadvertent disclosures frequently occur, and today’s beneficiary of such disclosures may likely become tomorrow’s victim. Thus, in ABA Formal Opinion 05-437 (2005), the ABA’s Standing Committee on Ethics and Professional Responsibility 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 in order to permit the sender to take protective measures. Rule 4.4(b) of the ABA Model Rules do not require the receiving lawyer either to refrain from examining the materials or to abide by the instructions of the

secretly recorded tapes of conversations with his supervisors and failed to comply with an order to explain this spoilation); Robertson v. National R.R. Passenger Corp., 79 Fair Empl. Prac. Cas. (BNA) 1369 (E.D. La. 1998) (plaintiff who had produced 18 of 36 surreptitiously made tape recordings of statements of co-workers ordered to produce remainder of tapes before co-workers’ depositions were taken). Virtually all cases dealing with this issue have held that clandestine recordings of conversations with potential fact witnesses, whether made by a party or by counsel, before or after counsel is consulted, are not shielded under the work product doctrine. See Otto v. Box USA Group, Inc., 177 F.R.D. 698, 701 (N.D. Ga. 1997); Sea-Ray Corp. v. Sunbelt Equip. & Rentals, Inc., 172 F.R.D. 179, 183 (M.D.N.C. 1997); Robertson v. National R.R. Passenger Corp., 1999 WL 199093 (E.D. La. Apr. 8, 1999) (court exercised its discretion to order that secretly recorded tapes be produced prior to any depositions of the taped witnesses); Gildai v. Albert Einstein Coll. of Med., 1998 WL 183874 (S.D.N.Y. Apr. 15, 1998).
ABA Formal Ethics Op. No. 05-437 (2005). See also ABA MODEL RULES, 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 whether the lawyer is required to take additional steps, such as returning the document, is beyond the scope of the Rule. 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). See also Gomez v. Vernon, 255 F.3d 1118 (9th Cir. 2001) (state prison officials and their attorneys acted in bad faith in inmates’ civil rights retaliation suit, and thus were subject to sanctions under court’s inherent power and under 28 U.S.C. § 1927 due to their collection, reading and retention of inmates’ communications with their counsel, where communications were obviously privileged, prison officials obtained letters from restricted area of prison law library, and attorneys continued to collect and read documents after being advised by State Bar to send documents to court; counsel’s actions in case “do not pass even the most lenient ethical ‘smell test’”); Ariz. Rules of Prof. Conduct 4.4(b) (receiving lawyer has duty to notify the sending lawyer and to preserve the status quo for a reasonable period to allow the sending party to take protective action, if any); Ariz. Ethics Op. No. 2001-04 (2001) (former employee gave her attorney copies of documents of the ex-employer that appear, on their face, to be subject to sanctions under court’s inherent power and under 28 U.S.C. § 1927 due to their collection, reading and retention of inmates’ communications with their counsel, where communications were obviously privileged, prison officials obtained letters from restricted area of prison law library, and attorneys continued to collect and read documents after being advised by State Bar to send documents to court; counsel’s actions in case “do not pass even the most lenient ethical ‘smell test’”); Ariz. Ethics Op. 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(...continued)

counsel failed to comply with State Compensation Insurance Fund v. WPS, Inc. by failing to refrain from examining the documents any more than was essential to ascertain if the documents were privileged, and by failing to promptly advise defendants’ counsel that she had come into possession of the documents, which she was obligated to do; counsel’s failures resulted in no prejudice to defendants and thus trial court properly addressed whether documents were in fact privileged, and it correctly determined that they were not); State Comp. Ins. Fund v. WPS, Inc., 70 Cal. App. 4th 644 (1999) (following ABA Formal Ethics Op. No. 92-368) (when a lawyer receives materials that obviously appears to be subject to an attorney-client privilege or otherwise appear to be confidential and privileged, and where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appear to be privileged; however, lawyer and client in this case would not be sanctioned for attorneys’ failure to return the materials since such conduct had not been clearly proscribed by any state decision, statute, or rule of professional conduct) (distinguishing Aerojet-General Corp. v. Transport Indem. Ins., 18 Cal. App. 4th 996 (1993), on ground that information at issue in that case was not privileged); Colo. Formal Ethics Op. No. 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 deposition); D.C. Rules of Prof. Conduct 4.4(b) (A lawyer who receives a writing relating to the representation of the client and knows, before examining the writing, that it has been inadvertently sent, shall not examine the writing, but shall notify the sending party and abide by the instructions of the sending party regarding the return or destruction of the writing); D.C. Ethics Op. 318 (Dec. 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; D.C. Ethics Op. 256 (1995) (lawyer who receives confidential information inadvertently released to him by adversary may retain and use it if he has reviewed it before learning the information was not intended for him); D.C. Ethics Op. No. 242 (1993) (an attorney whose client provides documents that may be property of the client’s former employer should, upon the client’s request, return the documents to the client if the client has a plausible claim to ownership of them; as to documents with respect to which the client has no such claim, the attorney should return them to the employer unless to do so would reveal attorney-client confidences); Fla. Ethics Op. No. 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. Formal Ethics Op. No. 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); Ky. Ethics Op. No. E374; In re Shell Oil Refinery, 143 F.R.D. 105 (E.D. La. 1992) (where current employee of a party provided an adverse party with confidential documents belonging to his employer, the receiving party is barred from making any use of the materials); Me. Ethics Op. No. 146 (1994) (receiving lawyer has duty to notify sending lawyer of receipt of inadvertently disclosed privileged or confidential documents); Md. Ethics Op. No. 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 Bar Association decision distinguished); Resolution Trust Corp. v. First of Am. Bank, 868 F. Supp. 217 (W.D. Mich. 1994) (receiving counsel not disqualified, but should have notified sender immediately, cannot use the document at trial and must destroy document); Arnold v. Cargill Inc., 2004 WL 2203410 (D. Minn. Sept. 24, 2004) (attorney who receives privileged documents has an ethical duty to cease review of the documents, notify the privilege holder, and return the documents); Miss. Rules of Prof. Conduct 4.4(b) (conforms to Rule 4.4(b) of the ABA Model Rules.); Miss. Ethics Op. No. 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 (continued...)
to handle the disclosure. In other instances, it may be necessary to seek judicial resolution of the legal issues.); *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.) N.Y. County Ethics Op. No. 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); *Knitting Fever, Inc. v. Coats Holding Ltd.*, 2005 U.S. Dist. LEXIS 28435 (E.D. N.Y. Nov. 14, 2005) (Upon receipt of documents of defendant outside the discovery process, plaintiffs’ counsel had a clear ethical responsibility to notify defendants’ counsel and either follow the latter’s instructions with respect to the disposition of the documents or refrain from using them pending ruling by the court. The relevant issue is not whether the documents are privileged; rather, the issue is whether upon receipt the documents, which on their face appear to be privileged, and later upon defendants’ assertion of the privilege, plaintiffs’ counsel satisfied his professional and ethical responsibilities.); *American Express v. Accu-Weather, Inc.*, 1996 WL 346388 (S.D.N.Y. June 25, 1996) (receiving lawyer must notify the sending lawyer that documents which appear on their face to be privileged or confidential have been disclosed); *Kondakjian v. Port Auth. of N.Y. and N.J.*, 1996 WL 139782 (S.D.N.Y. Mar. 28, 1982) (same); N.C. Ethics Op. No. RPC 252 (July 18, 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); *Transportation 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); *Hull v. Marriott Courtyard*, 1999 WL 688300 (N.D. Ohio Aug. 18, 1999) (same); Or. Formal Ethics Op. No. 2005-150 (2005) (“By its express terms, Oregon RPC 4.4(b) does not require the recipient of the document to return the original nor does it prohibit the recipient from openly claiming and litigating the right to retain the document if there is a nonfrivolous basis on which to do so. The purpose of the rule is to permit the sender to take protective measures; whether the recipient lawyer is required to return the documents or take other measures is a matter of law beyond the scope of the [rules], as is the...
230(...continued)

question of whether the privileged status of such documents has been waived.” If applicable
court rules or substantive law require the lawyer to return the documents or to cease reading
documents as soon as the lawyer realizes that they were inadvertently produced, a lawyer who
does not do so could be subject to discipline or disqualification on other grounds.; Pa. Ethics
the holding and rationale of ABA Formal Ethics Opinion Nos. 92-368 and 94-382); 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; although ABA
Formal Ethics Op. No. 92-368 represents standard to which attorneys should aspire, 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); Utah Ethics Op. No. 99-01 (1999) (a lawyer is required to bring to the attention
of opposing counsel the receipt of the opposing party’s attorney-client communications unless it
is clear from the circumstances that the attorney-client privilege has been intentionally waived);
F. Supp. 2d 1195 (W.D. Wash. 2001) (noting requirement to return privileged materials to the
privilege holder even if no pending litigation).

A number of state ethics rules are in accord with the current version of Rule 4.4(b) of the
ABA Model Rules. See Ariz. Rules of Prof. Conduct 4.4(b); Ark. Rules of Prof. Conduct 4.4(b);
Conn. Rules of Prof. Conduct 4.4(b); Del. Rules of Prof. Conduct 4.4(b); Fla. Rules of Prof.
Conduct 4.4(b); Idaho Rules of Prof. Conduct 4.4(b); Iowa Rules of Prof. Conduct 32:4.4(b);
Minn. Rules of Prof. Conduct 4.4(b); Miss. Rules of Prof. Conduct 4.4(b); Missouri Rules of
Prof. Conduct 4.4(b) (Effective July 2007); Mont. Rules of Prof. Conduct 4.4(b); Neb. Rules of
Prof. Conduct 4.4(b); Nev. Rules of Prof. Conduct 4.4(b); N.C. Rules of Prof. Conduct 4.4(b); N.
Dak. Rules of Prof. Conduct 4.4(b); Ohio Rules of Prof. Conduct 4.4(b); Oregon Rules of Prof.
Conduct 4.4(b); Pa. Rules of Prof. Conduct 4.4(b); R.I. Rules of Prof. Conduct 4.4(b); S.C. Rules
of Prof. Conduct 4.4(b); S. Dak. Rules of Prof. Conduct 4.4(b) (notify sender or sender’s lawyer
if sender is represented); Utah Rules of Prof. Conduct 4.4(b); Wash. Rules of Prof. Conduct
4.4(b); Wis. Rules of Prof. Conduct 4.4(b). Cf. La. Rules of Prof. Conduct 4.4(b) (lawyer who
receives a writing that, on its face, appears to be subject to the attorney-client privilege or
otherwise confidential, under circumstances where it is clear that the writing was not intended
for the receiving lawyer, shall refrain from examining the writing, promptly notifying the
sending lawyer and return the writing); Md. Rules of Prof. Conduct 4.4(b) (lawyer who receives
(continued...)
Similarly, recent amendments to the Federal Rules of Civil Procedures pertaining to electronic discovery that took effect on December 1, 2006, may supersede the applicable ethics standards in the context of federal court litigation. Fed. R. 26(b)(5) provides as follows:

Information produced. If information is produced in discovery that is subject to a claim of privilege or protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

Proposed Federal Rule of Evidence 502. On June 11, 2007, the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States approved proposed Evidence Rule 502 (Attorney-Client Privilege and Work Product; Limitations on Waiver). If ultimately approved by the Judicial Conference and enacted by the Congress, proposed Rule 502 would provide as follows with respect to inadvertent disclosure: (a) a subject matter waiver should be found only when the privilege or work product has been disclosed voluntarily, the disclosed and undisclosed communications or information concern the same subject matter, and they “ought in fairness” be considered together; (b) an inadvertent disclosure does not constitute a waiver if the holder of the privilege or work product protection took reasonable precautions to prevent disclosure and took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error; (c) a disclosure in a state proceeding would not operate as 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; (d) 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 (e) 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.

230(...continued)
information that is protected from disclosure shall (1) terminate the communication immediately and (2) give notice of the disclosure to any tribunal in which the matter is pending and to the person entitled to enforce the protection against disclosure).

231 Id.

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The proposed rule would apply in all cases in federal court, including cases in which state law provides the rule of decision. It would also apply in state court with respect to the consequences of disclosures previously made in a federal proceeding.

In contrast to the above, a number of state bar ethics committees have concluded that the receiving lawyer has no obligation to disclose to a court or to an adverse party that she possesses the adverse party’s privileged or confidential information and that the receiving lawyer may use the materials.232

232 See Aerojet-General Corp. v. Transport Indem. Ins., 18 Cal. App. 4th 996 (1993) (attorney who represented insured could not be faulted for examining and utilizing memorandum from insurers’ counsel to insurers’ parent corporation, which attorney received innocently, and attorney could not be sanctioned for failing timely to disclose his receipt of memorandum); McGinty v. Superior Court, 26 Cal. App. 4th 204 (1994) (sanctions inappropriate when documents received inadvertently would have discoverable through normal channels); Ill. Ethics Op. No. 98-04 (1999) (lawyer who, without notice of the inadvertent transmission, receives and reviews an opposing party’s confidential materials through the error or inadvertence of opposing counsel, may use information in such materials; indeed, lawyer may have ethical obligation to use the material if it is relevant to the representation); Ky. Ethics Op. E-374 (1995) (a lawyer who uses inadvertently sent privileged documents will not be disciplined for using them); Me. Ethics Op. No. 146 (1984); Md. Ethics Op. No. 89-53 (1989) (lawyer who receives from unidentified source copies of opponent’s documents has no obligation to reveal matter to the court or opponent; lawyer should keep copies to avoid destruction of evidence, but must return originals received to rightful owner), distinguished in part by Md. Ethics Op. No. 2000-04 (Mar. 8, 2000); Md. Ethics Op. No. 2007-09 (2006); Mass. Ethics Op. No. 1999-4 (1999) (where a lawyer mistakenly receives from his opposing counsel a letter addressed to the opposing counsel’s client and contains important evidence of which he had previously been unaware and informs opposing counsel of what has occurred, the lawyer has no obligation to return the letter; in fact, 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. No. CI-970 (1983) (“a lawyer who comes into possession of an internal private memorandum of the opposite party during litigation” may use the document at trial for impeachment purposes in civil rights 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. City Ethics Op. No. 2003-04 (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

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Of course, it is generally the case that the lawyer has the duty to notify her own client that confidential information was inadvertently transmitted to and read by opposing counsel.²³３

2. Waiver of Privilege Due to Inadvertent Disclosure

Counsel should be aware that even an inadvertent disclosure of privileged documents can result in waiver of the attorney-client privilege. The question 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:

a. Inadvertent Disclosure Never Waives the Privilege.

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²³²(...)continued

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 in order to give the sending attorney a reasonable opportunity to promptly take whatever steps he or she feels are necessary); N.Y. City Ethics Op. No. 1989-1 (1989) (although a lawyer was under an ethical obligation to notify opposing counsel that a client had improperly obtained confidential communications between opposing counsel and that counsel’s client, the lawyer was ethically barred from notifying counsel without client’s consent because “the fact that the inquirer has obtained the documents through an unauthorized interception is a ‘secret’ within the meaning of DR-4-101(A)’); Ohio Ethics Op. No. 93-11 (1993) (lawyer conducting public records search that obtains, through no wrongdoing, copy of attorney-client privileged memorandum may ethically read it or reveal its contents to client; however, attorney has ethical obligation to notify source and return copy of memorandum on request); Philadelphia Ethics Op. 94-3 (1994) (no obligation to return confidential fax inadvertently received from adversary); Philadelphia Ethics Op. No. 91-19 (1991) (without client consent, Rule 1.6(a) “affirmatively 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).

²³³ See Ill. Ethics Op. No. 98-04 (1999). See also Colo. Ethics Op. No. 113 (2005) (As part of the general ethical duty to keep a client reasonably informed about the status of a matter, a lawyer should fully and promptly inform the client of material developments, including those resulting from the lawyer’s own errors.)
Some courts follow the “never waived” approach, which holds that a disclosure that was merely negligent can never effect a waiver because, a fortiori, the holder of the privilege lacks a subjective intent to forego protection of the privilege.234

234 See 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); First Interstate Bank of Cal. v. Winncrest Homes, Inc., 2003 WL 21734032 (Cal. App. July 25, 2003) (waiver does not occur upon the accidental, inadvertent disclosure of privileged information by the attorney; courts do not favor a “gotcha” theory of waiver, whereby “an underling’s slip-up in a document production becomes the equivalent of actual consent”); State Comp. Ins. Fund v. WPS, Inc., 70 Cal. App. 4th 644 (1999) (inadvertent disclosure of privileged information by attorney does not waive privilege absent intent to disclose by client); Kusch v. Ballard, 645 So. 2d 1035 (Fla. Dist. Ct. App. 1994) (defendant’s lawyer inadvertently faxed to opposing counsel letter addressed to client along with a proposed motion to withdraw; plaintiff’s counsel read portions of the letter, notified defendant’s counsel, and sought discovery of the letter, and also made disclosures to his client’s adversary in another pending case; the court of appeals concluded that privileged had not been waived and plaintiff’s counsel was disqualified); Lazar v. Mauney, 192 F.R.D. 324 (N.D. Ga. 2000) (plaintiff did not waive attorney-client privilege with respect to three pages inadvertently disclosed by his counsel, since privilege can be waived only by the intentional relinquishment of the privilege by the client; moreover, counsel inadvertently produced three pages of privileged materials within a batch of nearly 1,000 produced pages and had taken reasonable precautions to prevent inadvertent disclosure); Moclaire v. Georgia, 451 S.E.2d 68 (Ga. Ct. App. 1994) (without evidence that client authorized disclosure of attorney-client privileged communications to third persons, there is no waiver); Mendenhall v. Barber-Greene Co., 531 F. Supp. 951, 954-55 (N.D. Ill. 1982) (“A truly inadvertent disclosure cannot and does not constitute a waiver of the attorney-client privilege.”; “[U]nless receiving counsel has a reasonable belief that the disclosure was authorized by the client and intended by the attorney, the receiving attorney should return the document and make no further use of it.”); Excell Constr., Inc. v. Michigan State Univ. Bd. of Trustees, 2003 WL 124297 (Mich. Ct. App. Jan. 14, 2003) (a document inadvertently produced that is otherwise protected by the attorney-client privilege remains protected); Leibel v. General Motors Corp., 646 N.W.2d 179 (Mich. Ct. App. 2002) (involuntary disclosure through inadvertence or court orders in other jurisdictions does not constitute a voluntary waiver of the privilege); Sterling v. Keidan, 412 N.W.2d 255 (Mich. Ct. App. 1987) (no waiver of the attorney-client privilege where attorney inadvertently included in the client’s file a letter from the attorney’s malpractice lawyer regarding a potential cause of action that the client might raise against the lawyer); Premiere Digital Access, Inc. v. Central Tel. Co., 360 F. Supp.2d 1168 (D. Nev. 2005) (There was no waiver of the attorney-client privilege, which applied to email prepared by in-house counsel discussing procedures for terminating contract to provide support services for customer, when they were made available to another customer bringing suit alleging breach of similar contract, as part of discovery, through inadvertence of paralegal and attorney (continued...)
b. Inadvertent Disclosure Always Waives the Privilege.

Some courts have applied a “strict accountability” rule, which finds a waiver of the privilege regardless of the privilege holder’s intent to waive.235

234(...)continued

supervising production.); Bowen v. Parking Auth. of City of Camden, 89 Fair Empl. Prac. Cas. (BNA) 939 (D.N.J. 2002) (executive director of parking authority did not inadvertently disclose privileged documents to authority employee and thus privilege was waived; director had deliberately discussed and disclosed at least three of eight letters with her, director had predicted to employee that adversary in underlying action might call employee as witness, and employee was permitted to read copy, and retain at home her own set of documents for personal purposes); 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). Accord Kansas-Nebraska Natural Gas Co. v. Marathon Oil Co., 109 F.R.D. 12 (D. Neb. 1985); Corey v. Norman, Hanson & DeTroy, 742 A.2d 933, 941-42 (Me. 1999); Helman v. Murry’s Steaks, Inc., 728 F. Supp. 1099, 1104 (D. Del. 1990); Georgetown Manor, Inc. v. Ethan Allen, Inc., 753 F. Supp. 936 (S.D. Fla. 1991); Stratagem Dev. Corp. v. Heron Int’l N.V., 153 F.R.D. 535 (S.D.N.Y. 1994); Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A., 2000 WL 1159273 (S.D.N.Y. Aug. 15, 2000).

Compare Jasmine Networks, Inc. v. Marvell Semiconductor, Inc., 117 Cal. App. 4th 794 (2004) (attorney-client privilege waived as to conversation among corporation’s officers as well as the general counsel which had been inadvertently recorded on another company’s voice mail; uncoerced, inadvertent disclosure of privileged communications by the client, as opposed to inadvertent disclosure by the client’s counsel, waives the privilege, even if the client did not intend to waive the privilege), review granted, 94 P.3d 475 (Cal. 2004). See St. Peter & Warren, P.C. v. Purdom, 140 P.D. 478 (Mont. 2006) (Law firm failed to demonstrate that either trustees of account holding client’s funds or trustees’ counsel voluntarily disclosed letter from counsel to trustees, as would support its claim that attorney-client privilege was waived; firm only showed that it had somehow obtained the letter and asserted that either the trustees or counsel “caused such letter to be disclosed to third parties where it was discoverable,” but firm did not demonstrate which party disclosed the letter or whether the disclosure was inadvertent or intentional.).

235 See SEC v. Lavin, 111 F.3d 921, 929 (D.C. Cir. 1997) (inadvertent disclosure can constitute a broad waiver of the privilege); In re United Mine Workers of Am. Employee Benefits Plan Litig., 156 F.R.D. 507 (D.D.C.) (inadvertent disclosure is a waiver, recipient must show knowledge of “gist” of documents before discovering inadvertence in order to use it), motion for (continued...)
reconsideration denied in part and granted in part on other grounds, 159 F.R.D. 307 (D.D.C. 1994); In re Sealed Case, 877 F.2d 976 (D.C. Cir. 1989) (possessor of privileged information must guard it carefully — “like jewels;” any uncompelled disclosure, even if inadvertent, will waive the privilege); General Elec. Co. v. Johnson, 2006 WL 2616187 (D.D.C. Sept. 12, 2006) (The subject matter of a specific disclosed document for waiver purposes consists of only the information that is contained within, or has by its terms been brought within, the document’s four corners. Hence, the inadvertent production by EPA of the eighteen privileged documents has caused a waiver of the attorney-client privilege with respect to: (1) the inadvertently-disclosed documents, to the extent that they address the same subject matter; (3) comments on, and discussions of, the inadvertently-disclosed documents; (4) those portions of other allegedly-privileged materials that address the precise subject matter of the inadvertently-disclosed documents; and (5) those portions of other allegedly-privileged materials that are incorporated in, or cited for substantive support by, the inadvertently-disclosed documents. This waiver does not, of course, extend to those portions of documents that are subject to another claim of protection, such as the work-product doctrine or deliberative process privilege.); State of N.Y. v. Microsoft Corp., 2002 WL 649492 (D.D.C. Apr. 8, 2002) (“Disclosure of otherwise privileged materials, even where the disclosure was inadvertent, serves as a waiver of the privilege.”); Recon/Optical, Inc. v. Lockheed Martin Corp., 2000 WL 1210874 (D.D.C. May 25, 2000) (although it is the law of the Circuit that inadvertent disclosure of a document protected by the attorney-client privilege waives the privilege as to all communications relating to the same subject matter, that principle does not apply with equal force to documents protected by the attorney work product privilege where there are competing considerations militating against its application in the context of the assertion of the latter privilege); Wichita Land & Cattle Co. v. American Fed. Bank, 148 F.R.D. 456 (D.D.C. 1992) (same); FDIC v. Singh, 140 F.R.D. 252 (D. Me. 1992) (same); Ares-Serono, Inc. v. Organon Int’l B.V., 160 F.R.D. 1, 4 (D. Mass. 1994); International Digital Sys. Corp. v. Digital Equip. Corp., 120 F.R.D. 445, 449-50 (D. Mass. 1988); In re Diet Drugs Prods. Liab. Litig., 2004 WL 1058160 (E.D. Pa. May 11, 2004) (applying Utah law, waiver of attorney-client privilege does not require proof that the client intended to do so, only that he or she intended to make the disclosure); Doe v. Maret, 984 P.2d 980 (Utah 1999) (same); Carter v. Gibs, 909 F.2d 1450, 1451 (Fed. Cir. 1990) (en banc). See also Bowles v. National Ass’n of Home Builders, 2004 WL 2203871 (D.D.C. Sept. 30, 2004) (in action against home builder’s association by plaintiff, a former president of subsidiary of association, association waived attorney-client privilege as to all documents of the same subject matter as the privileged documents that association gave to plaintiff when she was president and has since allowed plaintiff to possess; association failed to take reasonable steps to recover the documents and preserve any privilege once it was aware that they were in the hands of a party opponent; waiver extended to all documents of the same subject matter as the documents association gave to former president); Texaco P.R., Inc. v. Department of Consumer Affairs, 60 F.3d 867 (1st Cir. 1995) (“[I]n general, a waiver premised on inadvertent disclosure will be

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c. Balancing Test.

Most courts have taken an intermediate position and have applied a balancing test, which includes an examination of the reasonableness of the precautions taken against inadvertent disclosure.236

235 (...continued)
deemed to encompass ‘all other such communications on the same subject.’

236 See K.L. Group 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); Transamerica Computer Co. v. IBM Corp., 573 F.2d 646, 652 (9th Cir. 1978) (17 million documents to be screened in 3 months); Gomez v. Vernon, 255 F.3d 1118 (9th Cir. 2001) (inmates did not waive attorney client privilege with respect to letters from outside counsel relating to retaliation litigation against prison officials by placing them in binders marked with name of the case and storing them in prison law library, where inmates required sign-out procedure for use of the file, and could not have done anything more to secure confidentiality of documents because there were no areas in prison that were accessible only to inmates); Gray v. Bicknell, 86 F.3d 1472, 1483-84 (8th Cir. 1996); Dellwood Farms, Inc. v. Cargill, Inc., 128 F.3d 1122 (7th Cir. 1997); Alldread v. City of Grenada, 988 F.2d 1425 (5th Cir. 1993); Wells Fargo Bank v. Superior Court, 22 Cal. 4th 201 (2000) (disclosure in good faith belief that law required it not a waiver where law was unsettled and debatable); Hartford Fire Ins. Co. v. Garvey, 109 F.R.D. 323 (N.D. Cal. 1985) (inadvertent disclosure may result in waiver if client and client’s attorney did not take adequate steps to prevent the 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); Berg Elecs., Inc. v. Molex, Inc., 875 F. Supp. 261 (D. Del. 1995) (same); 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); Save Sunset Beach Coalition v. City & County of Honolulu, 78 P.3d 1 (Haw. 2003) (adopting approach of Alldread v. City of Grenada, 988 F.2d 1425 (5th Cir. 1993); Mattenson v. Baxter Healthcare Corp., 2003 WL 22839808 (N.D. Ill. Nov. 26, 2003) (defendant waived attorney-client privilege with respect to document inadvertently disclosed to plaintiff; defendant made no showing that reasonable precautions were taken to prevent (continued...)
disclosure and scope of discovery was not so large that precautions to prevent inadvertent disclosure could not have been properly taken); Zagone v. Bosques, 2003 WL 1581999 (N.D. Ill. Mar. 26, 2003) (defendant waived attorney-client privilege with respect to a document inadvertently filed with another pleading; the document was attached to a two-page motion that was only to contain one five-page exhibit, defendant had the opportunity to review the filing and identify the inadvertent disclosure, and at the time the disclosure was discovered, the decumbent was fully disclosed); MG Capital, LLC v. Sullivan, 2002 WL 14245 (N.D. Ill. July 1, 2002) (employee waived attorney-client privilege with respect to letter he sent to prospective counsel over claim he contemplated bringing against employer; production occurred in context of formal discovery and was available for attorney review, production was relatively small, same document had previously been inadvertently disclosed in deposition of prospective counsel, and employee did not attempt to undertake remedial measures until almost one month after knowledge of disclosures); Urban Outfitters, Inc. v. DPIC Cos., 203 F.R.D. 376 (N.D. Ill. 2001) (insured’s disclosure to third party of letter from her insurance company waived attorney-client privilege; reasonable precaution of in-person review of documents that included letter was not taken by insured or her attorney, insured’s attorney did not request return of letter from third party for more than a year after its production, letter was included among only 40 other documents produced in discovery, suggesting that it was voluntarily surrounded, and disclosure was limited in that it involved a single document); R.J. Reynolds Tobacco Co. v. Premium Tobacco Stores, Inc., 2001 WL 1571447 (N.D. Ill. Dec. 7, 2001) (“In the instant case, the gravity of the mistake, having one page of 750,000 slip through the cracks of a privilege review, is not enough to justify a [finding of waiver].”); Sanner v. Board of Trade of City of Chicago, 181 F.R.D. 374 (N.D. Ill. 1998) (inadvertent disclosure of certain privileged documents was not a waiver when 22,500 documents were presented for review); Tokar v. City of Chicago, 1999 WL 138814 (N.D. Ill. Mar. 5, 1999); Stewart v. General Motors Corp., 1988 WL 6927 (N.D. Ill. Jan. 27, 1988) (inadvertent disclosure just one factor to consider in determining if waiver occurred; consider also extent of disclosure, precautions taken to prevent disclosure, actions taken to rectify disclosure, delay in taking action, and issues of fairness and justice, aff’d, 892 F.2d 81 (7th Cir. 1989); Harmony Gold U.S.A., Inc. v. FASA Corp., 169 F.R.D. 113 (N.D. Ill. 1996) (finding inadvertence when 2 documents of 25,000 pages of documents were mistakenly released); Suburban Sew ’N Sweep, Inc. v. Swiss-Bernina, Inc., 91 F.R.D. 254, 257-61 (N.D. Ill. 1981) (involving retrieval of ostensibly privileged documents from trash containers; privilege waived because defendant should have shredded the documents); Draus v. Healthtrust, Inc., 172 F.R.D. 384 (S.D. Ind. 1997); Simon Prop., Group, L.P. v. mySimon, Inc., 194 F.R.D. 644 (S.D. Ind. 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); Cardiac Pacemakers, Inc. v. St. Jude’s Med., Inc., 2001 WL 699850 (S.D. Ind. May 29, 2001) (following “skeptical balancing (continued...)
approach” of Simon Property Group); Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., 132 F.R.D. 204 (N.D. Ind. 1990) (inadvertent disclosure waived privilege due to the sending lawyer’s failure to take precaution to prevent disclosure and to correct error); Buntin v. Becker, 727 N.E.2d 734 (Ind. Ct. App. 2000) (physician against whom malpractice action had been brought waived attorney-client privilege with respect to documents which had been affirmatively placed in materials provided to defense expert for review in preparation for his deposition, even though physician did not affirmatively intent to waive privilege; physician himself had placed allegedly confidential documents into file in his shared office which was not accessible by him alone); JWP Zack, Inc. v. Hoosier Energy Rural Elec. Coop., Inc., 709 N.E.2d 336 (Ind. Ct. App. 1999) (trial court did not abuse its discretion in determining that under all the circumstances inadvertent disclosure of documents did not constitute waiver of attorney-client privilege and on that basis denying motion to compel); Metzger v. City of Leawood, 2000 WL 1909637 (D. Kan. Dec. 20, 2000); IMC Chems., Inc. v. Niro, Inc., 2000 WL 1466495 (D. Kan. July 19, 2000) (plaintiff waived attorney-client privilege by failing to move expeditiously to recover documents after consultant had taken documents with him when his consultation agreement expired); Wallace v. Beech Aircraft Corp., 179 F.R.D. 313 (D. Kan. 1998); Corey v. Norman, Hanson & DeTroy, 742 A.2d 933 (Me. 1999) (counsel’s inadvertent disclosure of a memorandum summarizing a telephone conference between counsel and his client, to opposing counsel in legal malpractice action did not constitute a waiver of the attorney-client privilege, where the documents were mistakenly placed in boxes that were available to opposing counsel to photocopy, and the memorandum was labeled “confidential and legally privileged”); F.H. Chase, Inc. v. Clark/Gilford, 341 F.Supp.2d 562 (D. Md. 2004) (defendants’ inadvertent disclosure of over 500 pages of privileged documents out of 7,155 produced in breach of contract action did not waive the attorney-client privilege; disclosure was result of non-attorney assistant’s transmission of database containing both privileged and unprivileged documents to contractor that branded and printed them for defendants, and although defendants failed to review the printed documents after receiving them from contractor, they notified plaintiff of the mistake on the day it was discovered.); Elkton Care Ctr. Assocs. Ltd. P’ship v. Quality Care Mgmt., Inc., 805 A.2d 1177 (Md. 2002) (nursing home owner waived attorney-client privilege by inadvertently disclosing memorandum that outlined defenses to wrongful termination action, where memo was included in a half-full box of documents and owner’s counsel had two occasions to assert attorney-client privilege, and inadvertent disclosure occurred during pretrial discovery but was not brought to judge’s attention until penultimate day of trial); McCafferty’s, Inc. v. Bank of Glen Burnie, 179 F.R.D. 163 (D. Md. 1998) (attorney-client privilege attaching to memorandum from attorney was not inadvertently waived when employee of client tore it into 16 pieces and threw it into trash can in her office, from which it was taken and placed into dumpster located within boundary of client’s property and later recovered by an opponent; it was reasonable for employee to have concluded that by tearing up the memo and throwing it away in a private location she was continuing to preserve confidentiality); Amgen, Inc. v. Hoechst

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Marion Roussel, Inc., 190 F.R.D. 287 (D. Mass. 2000) (defendant’s inadvertent disclosure of privileged documents effected waiver of attorney-client privilege and work product protection, considering defendant’s inadequate precautions to prevent inadvertent disclosure—not having a paralegal review the copy vendor’s work to ensure that only the intended documents were among the 23 boxes copied to be produced on a single day—the magnitude of the disclosure which consisted of approximately 200 documents comprising 3821 pages, and overriding interests of fairness and justice which dictated the recognition of a waiver of the privilege); Fleet Nat’l Bank v. Tenneson & Co., 150 F.R.D. 10, 13 (D. Mass. 1993); In re Reorganization of Elec. Mut. Liab. Ins. Co., 425 Mass. 419, 423, 681 N.E.2d 838 (1997); Milford Power Ltd. P’ship v. New England Power Co., 896 F. Supp. 53, 58 (D. Mass. 1995); City of Worcester v. HCA Mgmt. Co., 839 F. Supp. 86, 89 (D. Mass. 1993); Franzel v. Kerr Mfg. Co., 600 N.W.2d 66 (Mich. Ct. App. 1999) (trial court erred in admitting privileged letter written by defendant’s then-counsel to defendant’s vice president of human resources; no waiver of privilege because letter was not intentionally presented to plaintiff nor indiscriminately intermingled with routine corporate documents); Resolution Trust Corp. v. First of Am. Bank, 868 F. Supp. 217 (W.D. Mich. 1994) (no waiver of privilege where plaintiff’s attorney should have advised defendant’s counsel of inadvertent production of privileged documents); United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461 (E.D. Mich. 1954) (risk of inadvertent disclosure due to insufficient precautions rests with party claiming the privilege, and confidential documents inadvertently intermingled with routine corporate documents deemed admissible); Starway v. Independent Sch. Dist. No. 625, 187 F.R.D. 595 (D. Minn. 1999) (defendant’s inadvertent disclosure of privileged document did not waive attorney client privilege with respect to that document where precautions taken to prevent disclosure were reasonable, inadvertent disclosure was limited to 4 out of 541 pages, and defendant promptly asserted the privilege when disclosure of the document became known at a deposition); 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.); Ciba-Geigy Corp. v. Sandoz, Ltd., 916 F. Supp. 404 (D.N.J. 1995) (actions of plaintiff’s counsel in examining documents inadvertently disclosed by defendants and protected by attorney-client privilege, and failing to notify defense counsel of disclosure, instead attaching copy of document to letter to judge, presented no clear ethical violation, as plaintiff’s counsel reasonably may have assumed that defense counsel intended to produce document, as plaintiff’s counsel received six copies of document over course of two productions, and second production involved English translations which defendants admitted were clearly protected by
privilege); *Atronic International, GmbH v. SAI Semispecialists of America, Inc.*, 232 F.R.D. 160 (E.D. N.Y. 2005) (Inadvertent disclosure of documents containing legal advice may constitute a waiver of the attorney-client privilege unless the party asserting the privilege intended to maintain confidentiality and took reasonable steps to prevent its disclosure, promptly sought to remedy the situation after learning of the disclosure, and the party in possession of the materials did not suffer undue prejudice if a protective order is granted.); *Tse v. UBS Fin. Servs., Inc.*, 2005 U.S. Dist. LEXIS 12227 (S.D. N.Y. June 21, 2005) (Where defendant employer found diskette belonging to plaintiff at her work station after her employment ended which contained letter she had written to her attorney, the letter had not been inadvertently disclosed to defendant and, therefore, there was no waiver of the attorney-client privilege. The letter was stored out of sight, on a disk, inside a file folder in the plaintiff’s work area. It was not printed out or stored in any way that made it easily accessible, or even its existence 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.); *Oxyn Telecommunications, Inc. v. Onse Telecom*, 2003 WL 660848 (S.D.N.Y. Feb. 27, 2003) (defendant’s inadvertent production of a particular document did not waive its attorney-client privilege with respect to that document; document production in the case was voluminous, document was listed on defendant’s privilege log, and once defendant’s attorneys learned that it had been mistakenly produced, it demanded its immediate return); *New York Times Newspaper Div. v. Lehrer McGovern Bovis, Inc.*, 752 N.Y.S.2d 642 (App. Div. 2002) (disclosure of a privileged document operates as a waiver unless it can be shown that the client intended to maintain the confidentiality of the document, that reasonable steps were taken to prevent disclosure, and that the party asserting privilege acted promptly after discovering the disclosure to remedy the situation, and that the parties who received the documents will not suffer undue prejudice if a protective order against use of the document is issued); *Semi-Tech Litig. LLC v. Bankers Trust Co.*, 2002 WL 1751267 (S.D.N.Y. July 27, 2002) (any attorney-client or work product privilege protecting documents produced by plaintiff was waived where privileged documents should have been obvious to any reviewer, privilege was not asserted until months after production, and there was no suggestion that plaintiff prepared a privilege list required by court rule; there was no waiver of privilege regarding five documents which were inadvertently produced by plaintiff as part of a much larger production because the error was discovered and called to defendants’ attention within twenty-four hours); *Bank Brussels Lambert v. Credit Lyonnais*, 1995 U.S. Dist. LEXIS 2275 (S.D.N.Y. 1995) (consider multiple factors, including nature of precautions taken, promptness of discovery, comparison of volume of privileged documents with total production, and fairness to parties); *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1989) (setting forth the factors for determining a waiver of the privilege as the reasonableness of the precautions to prevent (continued...)

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inadvertent disclosure, the time taken to rectify the error, the scope of the discovery, the extent
of the disclosure, and the overriding issue of fairness); Baliva v. State Farm Mut. Auto. Ins. Co.,
during discovery process in employee’s sexual harassment action against employer, in denying
employer’s motion for return of allegedly privileged document that was inadvertently disclosed,
where there were issues of fact concerning privileged nature of document and concerning
whether employee would have suffered prejudice if a protective order was issued); In re Copper
was inadvertent and did not result in waiver, where 17 pages of the approximately 15,000 total
pages produced were inadvertently disclosed and counsel took reasonable precautions to prevent
inadvertent disclosure); United States Fidelity and Guar. Co. v. Braspetro Oil Serv. Co, 2000
WL 744369 (S.D.N.Y. June 8, 2000) (“inadvertent production” provision of confidentiality
agreement intended to provide broader protection to parties than case law—which applies a
balancing approach—and therefore, agreement protects confidentiality of privileged documents
unless it can be shown the production was completely reckless and the producing party showed
no regard for preserving the confidentiality of the privileged documents); United States Fidelity
waived attorney-client privilege by providing their experts access to “the entire universe of
defendants’ documents [including otherwise privileged database] for use in connection with the
experts’ reports and testimony;” no evidence defendants attempted to limit access to the database
according to the purpose for which it was being used); Hydraflow, Inc. v. Enidine, Inc., 145
F.R.D. 626, 637 (W.D.N.Y. 1993) (in considering whether inadvertent disclosure results in
waiver, courts should consider a number of factors, including reasonableness and extent of
precautions, extent of disclosure, and promptness of remedial measures); Douglas v. Victor
Capital Group, 1997 WL 716912 (S.D.N.Y. Nov. 17, 1997) (by testifying without objection
about the reference in an allegedly privileged document, defendants waived any privilege in the
document); Kymissis v. Rozzi, 1997 WL 278055 (S.D.N.Y. May 23, 1997) (“If an attorney
allows a deponent to testify concerning an area to which an alleged privilege would normally
apply, the client is bound by the resulting waiver.”); Parkway Gallery Furniture, Inc. v.
whether a document has lost its privilege when it has been inadvertently disclosed include
whether the lawyer took reasonable precautions to prevent inadvertent disclosure, the number
of the inadvertent disclosures, the extent of the disclosures, any delays in rectifying the disclosure,
and whether justice would be served by relieving party of its error); Goldsborough v. Eagle
Crest Partners, Ltd., 838 P.2d 1069 (Or. 1992) (waiver by disclosure in response to discovery
request; no evidence of mistake, inadvertence or lack of client authorization); GLP Treatment
exclusion of evidence on determination of no waiver by inadvertent disclosure, no awareness by
sender of recipient’s intent to offer as evidence until offered at trial), aff’d on other grounds, 914
(continued...)
For example, in *Granada Corp. v. First Court of Appeals*, 844 S.W.2d 223 (Tex. 1992), a company inadvertently included four privileged memoranda among 150,000 pages which it had produced for inspection. The Texas Supreme Court held that a party seeking to preserve a privilege after disclosure must do more than show that the disclosure was “inadvertent,” it must show that the disclosure was “involuntary.” Disclosure is involuntary “only if efforts reasonably calculated to prevent the disclosure were unavailing.” The court held that although the scope of discovery and extent of involuntary disclosure were relevant to the determination of waiver, the relative small proportion of documents inadvertently produced was, standing alone, not

236(...continued)

P.2d 682 (Or. 1996); *Kaminski v. First Union Corp.*, 2001 WL 793250 (E.D. Pa. July 20, 2001) (defendant in age discrimination case waived attorney client privilege with respect to document entitled “Key Human Resource Issues,” where defendant twice placed the document into the public record by inadvertently attaching it as exhibits to two motions filed with the court); *Sampson Fire Sales, Inc. v. Oaks*, 201 F.R.D. 351 (M.D. Pa. 2001) (inadvertent disclosure of letter from attorney to client which occurred when it was faxed to the wrong number did not waive attorney client privilege, considering that attorney took reasonable precautions to prevent disclosure, there was only one inadvertent disclosure totaling one page, the letter arguably revealed strategy, attorney acted promptly to rectify disclosure, and overriding interests of justice required that attorney be relieved of his error); *Rotelli v. 7-Up Bottling Co.*, 1995 U.S. Dist. LEXIS 5277 (E.D. Pa. Apr. 19, 1995) (same); *Ferko v. NASCAR, Inc.*, 218 F.R.D. 125 (E.D. Tex. 2003) (client’s inadvertent disclosure of two documents did not waive attorney-client privilege to those documents, since client utilized team of attorneys in discovery who reviewed all documents to be produced and organized those documents into separate categories, client marked many documents, including two documents at issue, as “Highly Confidential,” client promptly requested that opponent return both documents, client produced approximately 63,000 pages of documents, and opponent did not have any legitimate interest in keeping documents labeled as “Highly Confidential”); *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. American Barrick Resources 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); *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); *State ex rel. Allstate Ins. Co. v. Gaughan*, 508 S.E.2d 75, 95 (W. Va. 1998).

237 844 S.W.2d at 226.
enough to justify the trial court’s finding that the company had taken reasonable precautions to prevent disclosure. This was particularly true since the company had several opportunities to discover the disclosure, and a corporate officer was shown the document in deposition and discussed it at length without objection.\textsuperscript{238}

\textsuperscript{238} Note that in 1999 the Texas Supreme Court amended Rule 193.3 of the Texas Rules of Civil Procedure to overturn the rule of \textit{Granada Corp.}. New Rule 193.3(d) provides 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.” According to the Comments to the 1999 change, the focus of the new rule “is on the intent to waive the privilege, not the intent to produce the material or information. A party who fails to diligently screen documents before producing them does not waive a claim of privilege.” Notes and Cmts. to 1999 Changes to Rule 193.3. \textit{See also In re Avantel}, 343 F.3d 311, 323 (5th Cir. 2003) (“Texas law clearly protects inadvertent publishing of confidential documents.”); \textit{In re Univ. of Tex. Health Ctr.}, 33 S.W.3d 822 (Tex. 2000) (per curiam) (“An involuntary production of documents did not constitute a waiver, even before implementation of our new rules of procedure governing discovery.”). \textit{See also In re Parnham}, \textit{____ S.W.3d ____}, 2006 WL 2690306 (Tex. Ct. App. Sept. 21, 2006) (Rule of civil procedure permitting a party to “snap-back,” or to retrieve, materials that it has inadvertently produced and to maintain a claim of privilege with respect to the documents governs instances of inadvertent disclosure that occur during discovery; therefore, trial court abused its discretion in disqualifying attorney who examined and attempted to copy documents produced inadvertently by his opponent); \textit{Warrantech Corp. v. Computer Adapters Serv. Inc.}, 134 S.W.3d 516 (Tex. Ct. App. 2004) (trial court did not abuse discretion by finding that plaintiff repair company had not waived its attorney-client privilege in regard to letter sent from company to its attorney that was inadvertently produced to defendant company three years before trial; court could reasonably have concluded that defendant’s designation of letter as “invoice with attachments” in trial list exhibit filed a month before trial did not sufficiently establish identity of letter, and that plaintiff repair company did not become aware of its mistake, and thus the 10-day period for company to assert its privilege did not begin to run, until defendant company amended its trial exhibit list to identify letter as letter from repair company to its attorney); \textit{In re Lincoln Elec. Co.}, 91 S.W.3d 432, 437-37 (Tex. Ct. App. 2002); \textit{In re Carbo Ceramics, Inc., Realtor}, 81 S.W.3d 369, 376 (Tex. Ct. App. 2002). \textit{Compare Crossroads Systems (Texas), Inc. v. Dot Hill Systems Corp.}, 2006 WL 1544621 (W.D. Tex. May 31, 2006) (attorney’s outright failure to recognize a viable privilege objection did not fall within the scope of the inadvertence exception to the voluntary waiver doctrine, especially where the attorney did not act promptly enough to preserve its rights after the disclosure in question); \textit{Kovacs v. The Hershey Co.}, 2006 WL 2781591 (D. Colo. Sept. (continued...)
C. Surreptitious/Improper Acquisition and Inspection of Information

Note that not all acquisition of information is “inadvertent;” the ethical rules generally preclude lawyers from improperly 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.239

Similarly, courts have generally discouraged a party’s resort to self-help evidence-gathering in pursuit of litigation outside legal process. Thus, where employees have purloined company documents to support their claim or have otherwise circumvented the formal discovery process, courts have ordered return of evidence obtained.240 In some cases, courts have awarded

238 (...continued)

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 Older Worker Benefit Protection Act and its implementing regulations apply to the case and the employer’s exposure to an “age claim risk” if the Act and its regulations do not apply; and (3) whether any adverse impact analyses were conducted by employer in connection with the retirement plan at issue).

ABA Formal Ethics Op. No. 97-408 (1997) ("Gaining from a former government employee information that the lawyer knows is legally protected from disclosure for use in litigation nevertheless may violate Model Rules 4.4, 8.4(c) and 8.4(d) . . . ."); ABA Formal Ethics Op. No. 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, regarding respect for the rights of third persons); Conn. Informal Ethics Op. No. 96-4 (1996) (Rule 4.4 precludes lawyer from reviewing and copying psychiatric records of client’s ex-wife made confidential by statute); N.J. Ethics Op. No. 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. State Ethics Op. No. 749 (2001) (lawyer may not ethically use available technology to surreptitiously examine and trace email and other electronic documents); Pa. Informal Ethics Op. No. 93-135 (1993) (Rule 4.4 prohibits lawyer from conducting surreptitious inspection of psychiatric records of major witness against client; although information would be very useful in impeaching witness, Pennsylvania case law makes such records absolutely confidential).

240 See In re IBP Confidential Bus. Documents Litig., 754 F.2d 787 (8th Cir. 1985); 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 (continued...)
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); Conn v. Superior Court, 196 Cal. App. 3d 774, 781 (1987) (trial court within discretion in ordering plaintiff and his attorney to return substantially all documents taken by plaintiff when he was terminated and claimed were his personal files, since “defendants have, and have always had, the right to keep their own documents until met with proper discovery requests or ordered to disclose them by the Court”; documents claimed to be privileged by plaintiff ordered returned because plaintiff’s attorney created the “privileged” documents by making notes on and about documents he had no right to have in the first place); Giardina v. Ruth U. Fertel, Inc., 2001 WL 1628597 (E.D. La. Dec. 17, 2001) (plaintiff’s counsel produced in discovery copy of letter by defendant’s attorney containing attorney-client privileged information of defendant, but refused to reveal how he obtained letter; regardless of whether plaintiff’s communication with defendant violated ex parte communication rules, his receipt of the letter in this manner was inappropriate and contrary to fair play, since the plaintiff “effectively circumvented the discovery process and prevented [the defendant] from being able to raise any objections against the production of the letter”; plaintiff ordered not to make any use of the letter or the information contained therein); Furnish v. Merlo, 128 Lab. Cas. (CCH) ¶ 57,755 (D. Or. 1994) (former manager and her attorney sanctioned where manager copied a number of confidential documents of her employer and turned them over to her counsel for use in litigation). Compare Coral Reef of Key Biscayne Developers, Inc. v. Lloyd’s Underwriters, 911 So.2d 155 (Fla. Ct. App. 2005) (A higher standard applies when considering a motion to disqualify counsel were the plaintiff’s counsel received the privileged documents by a court order that was subsequently quashed. Under those circumstances, the party moving to disqualify counsel must show that the opposing counsel’s review of the privileged documents caused actual harm to the moving party and disqualification is necessary because the trial court lacks means to remedy the moving party’s harm.).
obtained by a party,241 or disqualification of the employee’s attorney who has received such

241 See Leon v. IDX Systems Corp., ____ F.3d ____, 2006 WL 2684512 (9th Cir. Sept. 20, 2006) (Employee’s destruction of data on his employer-owned laptop amounted to willful spoliation of evidence, as would support dismissal with prejudice and award of $65,000 as sanction in his action against employer alleging violation of the anti-retaliation provision of the False Claims Act, Title VII, the ADA, and state law; employee knew he was under a duty to preserve all data on the laptop, and employee not only destroyed private files, but he intentionally deleted employment-related files and then wrote a program to write over deleted documents, after he filed his lawsuit; although it was impossible to identify which files could have been relevant or how they could have been used, over 2200 files were deleted, and some of files that employee deleted were likely at the heart of employer's defense. Ninth Circuit reversed the order denying defendant’s request to enjoin the DOL investigation and adjudication of employee's complaint, alleging that his unpaid leave violated the whistleblower protection provision of the Sarbanes-Oxley Act since such investigation and adjudication was barred, under doctrine of res judicata, by the court's dismissal with prejudice of employee's lawsuit since it was based on the same nucleus of facts, and the DOL and the employee were in privity, since the DOL was suing for employee-specific rights of precisely the type that employee had already pursued. Matter remanded for the district court to consider whether it should, in the exercise of its discretion, enjoin the DOL's proceedings under the All Writs Act); Lipin v. Bender, 597 N.Y.S.2d 340, 343 (App. Div. 1993) (former manager surreptitiously read her employer’s counsel’s internal memoranda during a court hearing; trial court dismissed complaint as a sanction for her “highly improper” evidence-gathering). Compare Curto v. Medical World Communications, Inc., 2006 WL 1318387 (E.D. N.Y. May 15, 2006) (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); Bland v. Fiatallis N. Am., Inc., 2002 WL 31655213, 29 Employee Benefit Cas. (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); 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 (continued...)
plaintiff’s counsel to identify four new witnesses to depose, and that this additional testimony could potentially harm defendant).

242 Snider v. Superior Court, 113 Cal. App. 4th 1187 (2003) (if an attorney violates the attorney-client privilege of the opposing party, the court may disqualify him or her from further participation in the case and, under certain circumstances, may exclude improperly obtained evidence or take other appropriate measures to achieve justice and ameliorate the effect of the improper conduct); Truck-A-Way v. Burke, 2003 WL 22232743 (E.D. Cal. Sept. 10, 2003) (“Counsel’s willful seizure, inspection, and retention of an adversary’s privileged documents would, alone, support disqualification.”); MMR/Wallace Power & Industrial, 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); 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.); In re Marketing Investors Corp., 80 S.W.3d 44 (Tex. Ct. App. 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 rejects 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 11 months of 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). Compare Neal v. Health Net, Inc., 100 Cal. App. 4th (continued...
D. Examination of “Meta Data” Hidden in Electronic Documents Which Reveal Confidences

It is increasingly the case that opposing attorneys transmit electronic documents by electronic mail, such as drafts of employment agreements, settlement agreements, pretrial discovery, joint submissions and the like. Such documents, which are created by software such as Microsoft Word or WordPerfect, may contain much more information than the visible text the attorney intends to send. Such information is known as “meta data.” Some examples of meta data that may be stored in the document includes the name of the author of the document, the

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name of the network server or hard disk where the document was saved, other file properties and summary information, names of previous document authors, document revisions, hidden text, comments, prior edits or corrections to the document, and time spent editing the document.

At least two ethics opinions have concluded that, although the transmitting party intended to transmit the visible document, “absent an explicit direction to the contrary counsel plainly does not intend the lawyer to receive the ‘hidden’ material or information.” Therefore, such a transmittal of “hidden” data is inadvertent and it is unethical for the lawyer to examine it without consent of the opposing counsel.243 However, a recent ABA opinion has concluded that an attorney is free to inspect meta data, even if it contains confidential information, without contacting the opposing lawyer. It suggests that lawyers concerned about disclosing confidential information in the meta data should employ “scrubbing” programs or other methods to prevent disclosure to an opponent.244 Note that recent amendments to the Federal Rules of Civil Procedures pertaining to electronic discovery that took effect on December 1, 2006, may supersede the applicable ethics standards in the context of federal court litigation. Fed. R. 26(b)(5) provides as follows:


244 ABA Formal Ethics Op. No. 06-442 (2006) (The Model Rules do not contain any specific prohibition against a lawyer’s reviewing and using embedded information in electronic documents, whether received from opposing counsel, an adverse party, or an agent of an adverse party. A lawyer who is concerned about the possibility of sending, producing, or providing to opposing counsel a document that contains or might contain metadata, or who wishes to take some action to reduce or remove the potentially harmful consequences of its dissemination, may be able to limit the likelihood of its transmission by “scrubbing” metadata from documents or by sending a different version of the document without the embedded information.); Md. Ethics Op. No. 2007-09 (2006) (recipient may review metadata and has no obligation to contact opposing counsel).
Information produced. If information is produced in discovery that is subject to a claim of privilege or protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

Similarly, lawyers have an obligation to use reasonable care when transmitting documents by e-mail to prevent the disclosure of meta data containing client confidences or secrets.245

E. Minimizing the Impact of Inadvertent Disclosure or Interception

To err is human — to be unprepared in the face of the possibility of such errors is unforgivable. Attorneys may not be able to prevent switched envelopes, misdirected intercepted faxes, e-mail transmissions, or express delivery packages. But there are some things lawyers can do to minimize the risk that such inadvertent disclosure will waive the privileged nature of such communication or document:

a. Cellular telephones: Use digital-based (rather than analog) cellular telephones, since they are harder to intercept.

b. Letters, telecopy, E-mail, and express mail deliveries: Wherever possible, stamp each page of a confidential and/or privileged document “Confidential” and/or “Privileged.” On correspondence or other communications, each page should use a footer/header identifying the document as, for example:

245 See N.Y. State Ethics Op. No. 782 (2004) (exercising reasonable care may, in certain circumstances, require the lawyer to remove meta data, such as “where the lawyer knows that the meta data reflects client confidences and secrets, or that the document is being sent to an aggressive and technologically savvy adversary.”). See also N.Y. State Ethics Op. No. 709 (1998) (a lawyer who uses technology to communicate with clients must use reasonable care with respect to such communication, and therefore must assess the risks attendant to the use of that technology and determine if the mode of transmission is appropriate under the circumstances); Fla. Ethics Op. No. 06-2 (2006) (same).
“PRIVILEGED AND CONFIDENTIAL: ATTORNEY-CLIENT COMMUNICATION.” 246

c. Telecopy and E-mail transmissions: The transmittal page of any telecopy or E-mail transmission should contain a “disclaimer,” which should state something like 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 ________.” 247

F. Lawyer Participation in Deception by Undercover Investigators and Discrimination Testers

Undercover investigations have long been a part of fact-gathering and evidence collection in the labor and employment context. For example, employers often conduct investigations to learn about acts of wrongdoing in the workplace using undercover agents posing as employees. Similarly, civil rights organizations have used discrimination “testers” to determine whether an employer is complying with equal employment opportunity laws and guidelines in hiring and recruitment activities. To be effective, both undercover agents and discrimination testers customarily misrepresent (i.e., lie about) their identities and engage in misrepresentations as to their true purposes and activities. These undercover activities are often supervised and

246 See Resolution Trust Corp. v. First of Am. Bank, 868 F. Supp. 217 (W.D. Mich. 1994) (attorney would be required to destroy all copies of letters from opposing counsel to client, marked “privileged and confidential,” which had been sent through inadvertence, even though a state ethics opinion provided that document could be used to impeach opposite party’s witnesses, if that use was permitted by court).

247 See also D.C. Ethics Op. No. 303 (2001) (In context of unaffiliated lawyers sharing offices, it is “impermissible for unaffiliated attorneys to have unrestricted access to each other’s electronic files (including e-mail and word processing documents) and other client records. If separate computer systems are not utilized, each attorney’s confidential client information should be protected in a way that guards against unauthorized access and preserves client confidences and secrets.” The opinion notes that similar concerns are raised by sharing a single fax line. Shared computer resources likely involve sharing of employees or third party contractors for technical support who must be instructed regarding their obligations to maintain client confidences and secrets and the lawyers must ensure that this occurs).
conducted by the lawyers of the employer or the organization. Generally, lawyers are prohibited from making material representations of law or fact in the course of representing a client,\(^\text{248}\) and from engaging in conduct that involves misrepresentations,\(^\text{249}\) and lawyers are, in certain circumstances, held vicariously responsible for the conduct of non-lawyers acting under their direction or under their supervision.\(^\text{250}\) To what extent may a lawyer supervise or participate in deceptive activities of undercover investigators and discrimination testers?

Most of the few jurisdictions that have considered the issue have concluded that lawyers do not violate the ethics rules by supervising or participating in undercover investigations and discrimination testing based on misrepresentations necessarily made by undercover agents and testers solely as to their identity and purpose and solely for evidence-gathering purposes, particularly where such investigations are conducted by governmental bodies.\(^\text{251}\)

\(^\text{248}\) ABA MODEL RULES, Rule 4.1(a).

\(^\text{249}\) ABA MODEL RULES, Rule 8.4(c).

\(^\text{250}\) ABA MODEL RULES, Rules 5.3(c) and 8.4(a). See also MODEL CODE, DR 1-102(a)(1)(4) (lawyer prohibited from engaging in conduct involving dishonest, fraud, deceit or misrepresentation).

\(^\text{251}\) Ala. Ethics Op. No. RO-89-31 (1980) (it is permissible for a lawyer to direct an investigator to pose as a customer in order to determine whether the plaintiff lied about his injuries); D.C. Ethics Op. No. 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 are reasonably intended to further the conduct of their official duties); Apple Corps. Ltd. v. International 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.”); N.Y. County Op. No. 737 (2007) (lawyer may ethically employ an investigator who “dissembles” to third parties during an investigation, provided (1) the investigation either involves “intellectual property” or “civil rights”; (2) the lawyer reasonably believes 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 the ethics rules; and (6) the investigator’s conduct does not rise to a fraud or crime); Utah Ethics Op. No. 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 the Rules of Professional Conduct); Va. Ethics Op. No. 1765 (2003) (lawyer who works for federal intelligence agency may use deceit and misrepresentation, such as use of alias (continued...
Of course, ethical violations may be found if the misrepresentations of an undercover investigator or discrimination tester go beyond identity and purpose and involve fraud or

25¹(continued)
and secret taping, in undercover work without running afoul of Rule 8.4(c));. See generally David B. Isbell and Lucantonio N. Salvi, Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentations Under the Model Rules of Professional Conduct, 8 Geo. J. Legal Ethics 791, 816 (1995). But see In re Gatti, 8 P.3d 966, 976 (Or. 2000) (Oregon Supreme Court reprimanded lawyer for lying when he posed as a doctor during telephone calls to an insurance company he was preparing to sue). See also In re Ositis, 40 P.3d 500 (Or. 2002) (applying the same rule to a lawyer’s participation in such misrepresentation or deceit by others). In response to the decision in In re Gatti, the Oregon Legislature passed into law HB 3857 (2001) which authorizes prosecutors and other government lawyers to “participate in covert activities that are conducted by public bodies . . . for the purpose of enforcing laws, or in covert activities that are conducted by the federal government for the purpose of enforcing laws, even through the participation may require the use of deceit or misrepresentation.” HB 3857 leaves the holding of In re Gatti intact for private lawyers in cases not connected to governmental activities. Similarly, in response to the In re Gatti decision the Oregon State Bar adopted and the Oregon Supreme Court approved RPC 8.4(b), which provides that 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 the lawyer’s conduct is otherwise in compliance with the disciplinary rules. Under RPC 8.4(b), covert activity may be commenced by the lawyer or involve the lawyer as an advisor or supervisor 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.” See also Or. Ethics Op. No. 2005-173 (2005) (interpreting RPC 8.4(b) in the context of several hypothetical scenarios).

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perjury. 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.

VI. MODERN COMMUNICATIONS TECHNOLOGY AND THE DUTY OF CONFIDENTIALITY

A. Cellular and Cordless Telephones

The increasing use of cellular telephones and other advanced communications technologies has increased the concerns regarding confidentiality of such communications mediums. Communications by means of cellular and cordless telephones are broadcast over public airwaves rather than telephone lines. For this reason, a conversation over a cordless or cellular telephone may be more easily intercepted than a regular telephone. A cordless telephone uses AM or FM radio signals to transmit a communication from the handset to the base unit. This signal can be intercepted, intentionally or unintentionally, by a standard radio. Similarly, a communication by cellular telephone can be intentionally intercepted by means of a sophisticated scanner specifically designed for that purpose, or a regular radio scanner, available...
in most electronic stores, that has been modified. Citing these risks of interception, a number of bar ethics opinions have warned against the use of cellular and cordless telephones to discuss confidential client information absent consent. As the technology to secure communication over cordless telephones and cellular telephones improves, it is likely that such


256 See N.Y. City Formal Ethics Op. No. 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. No. RPC 215 (1995) (in using cellular or cordless telephone to communicate client information that is intended to be confidential lawyer must take care to use a mode of communication that, in light of the exigencies of the existing circumstances, will best maintain any confidential information that might be conveyed in the communication; if the communication is susceptible to interception, the lawyer must advice the other parties to the communication about the risks of interception and the potential for confidentiality to be lost). See also ABA Formal Ethics Op. No. 99-413 (1999) (nature of cellular and cordless phone technology exposes them to risks not present with e-mail and other communication modes); Ill. Ethics Op. No. 90-7 (1990); Iowa Ethics Op. No. 90-44 (1991); Mass. Ethics Op. No. 94-5 (1994) (lawyers should disclose dangers regarding disclosing confidences when speaking with client on cell phone); Minn. Ethics Op. No. 19 (1999) (a lawyer may use digital cordless and cellular phones to communicate confidential client information when used within a digital service area; analog cordless and cellular phones may be used only if the lawyer obtains consent after consultation with client about the confidentiality risks associated with inadvertent interception; and when the lawyer knows or reasonably should know that a client or other person is using an insecure means, such as an analog cordless or cellular phone, to communicate with the lawyer about confidential information, the lawyer shall consult with the client about the confidentiality risks associated with inadvertent disclosure and obtain the client’s consent); N.H. Ethics Op. No. 1991-92/6 (1992); Wash. Informal Ethics Op. 91-1 (Oct. 1991). 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).

257 For example, cellular telephones using digital technology are more difficult to intercept than cellular telephones using analog-technologies. Attorneys and clients concerned about interception risks are advised to acquire more secure digital-based cellular telephones where feasible.
communications will eventually be treated, for confidentiality purposes, no differently than communication over regular telephones.\footnote{258}{See, e.g., Ariz. Ethics Op. No. 95-11 (1995) (use of cordless phones to communicate with clients does not violate duty of confidentiality); Del. Ethics Op. No. 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).}

Even if communications over cordless telephones or cellular telephones do not raise a substantial ethical risk, attorneys should be aware that the clients they are calling may not fully appreciate the security risks involved. At the very least, attorneys should advise their clients that they are using a cordless or cellular telephone and explain the risk of interception before engaging in confidential communications. Similarly, attorneys should be aware of the possibility that, although their own telephones may be “secure,” their clients and others with whom they deal may be using a cordless or cellular telephone, and they should caution those parties regarding the risks of interception of confidential communications.\footnote{259}{See, e.g., N.Y. City Ethics Op. No. 1994-11 (1994).}

B. Electronic Mail and Computer Communications

Although electronic mail or “E-mail” is not conveyed over the public airwaves like communications by cordless or cellular telephones, many of the same concerns for client confidences apply to communications by E-mail. E-mail is susceptible to interception by anyone who has access to the computer network to which a lawyer “logs on” and such communications are rarely protected from interception by anything more than a simple password. In using E-mail or similar communication technologies, precautions must be taken to protect client confidentiality from intercepted communications.\footnote{260}{N.C. Ethics Op. No. RPC 215 (1995).}

Two early state ethics opinions had concluded that attorneys should not engage in confidential communications with clients by E-mail using on-line services or the Internet, unless the messages are encrypted or the client expressly consented to “non-secure” communications.\footnote{261}{See, e.g., S.C. Ethics Op. No. 94-027 (1995) (unless certainty can be obtained regarding the confidentiality of communications via electronic media, that representation of a client, or communication with a client, via electronic media, may violate the duty of confidentiality).}
Later opinions have concluded that a lawyer does not violate the ethics rules by using electronic mail services, including the Internet, without encryption and without client consent to communicate with clients unless unusual circumstances require enhanced security measures. These opinions reason that the expectation of privacy for electronic mail is no less reasonable than the expectation of privacy for ordinary telephone calls, and the unauthorized interception of an electronic message subject to the Electronic Communications Privacy Act, 18 U.S.C. 2510, et. seq., is illegal. Unusual circumstances involving an extraordinarily sensitive matter might require enhanced security measures like encryption. These situations would, however, be of such a nature that ordinary telephones or other normal means of communication would also be deemed inadequate.\textsuperscript{262} Similarly, a number of courts

\textsuperscript{261}(...continued)

...
information relating to the representation of a client by encrypted or unencrypted e-mail sent over the Internet without violating HRPC 1.6(a); Iowa Ethics Op. No. 97-01 (1997) (amending Op. Nos. 96-01 and 96-33) (client consent needed, not necessarily encryption); Iowa Ethics Op. No. 96-33 (1997) (with sensitive material to be transmitted on e-mail, counsel must have written acknowledgment by client of the risks, such acknowledgment includes consent for communication thereof on the Internet or non-secure Intranet or other forms of proprietary networks to be protected as agreed between counsel and client) (amended by Iowa Ethics Op. No. 97-01 (1997)); Ky. Ethics Op. E-403 (1998) (absent “unusual circumstances,” lawyers may use e-mail, including unencrypted Internet e-mail, to communicate with clients); Me. Ethics Op. No. 174 (2000) (attorneys may participate in commercial web sites 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 web site operator that the attorney will withdraw from representation only if the client consents); Mass. Ethics Op. No. 00-01 (2000) (it is generally not an ethics violation to exchange unencrypted e-mail with a client); Mich. Ethics Op. No. RI-328 (2002) (a 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); Minn. Ethics Op. No. 19 (1999) (a lawyer may use unencrypted e-mail to communicate confidential client information); Mo. Ethics Op. No. 99-7 (1999) (difficult to create a comprehensive client consent form to cover concerns raised by e-mail; lawyers encouraged to discuss with their clients the risks associated with e-mail communication and storage); Mo. Ethics Op. No. 97-10 (1997) (lawyer who sets up a website and invites consultation by e-mail should include in the website a statement that e-mail is not necessarily confidential); N.Y. State Ethics Op. No. 709 (1998) (lawyers may in ordinary circumstances use unencrypted e-mail to transmit confidential information; however, in circumstances where lawyer on notice for a specific reason that a particular e-mail transmission is a heightened risk of interception or where information is of such extraordinary sensitive nature that it is reasonable to use only a means of communication that is completely under the lawyer’s control, the lawyer must select a more secure means of communication than unencrypted e-mail); N.Y. City Formal Ethics Op. No. 1998-2 (1998) (firm need not encrypt all e-mail containing confidential client information, but should advise clients and prospective clients that communication over the Internet is not as secure as other forms of communication); N.C. Ethics Op. No. RPC 215 (1995) (lawyers must minimize the risk of disclosing confidential communications when using cellular phones or e-mail; if the lawyer is aware that the communication can be intercepted, the lawyer must notify the parties to the conversation); N.D. Ethics Op. No. 97-09 (1997) (lawyers need not use encryption to send routine e-mail to clients); Ohio Ethics Op. No. 99-9 (1999) (it is proper for an attorney to provide legal services, including advice, on-line by use of e-mail, provided appropriate caution exercised with respect to client confidences and attorney does not “practice law” by e-mail in a (continued...)
VII. ETHICAL OBLIGATIONS IN SETTLEMENT NEGOTIATIONS

jurisdiction where to do so would violate professional standards in that jurisdiction); Ohio Ethics Op. No. 99-2 (1999) (a lawyer does not violate the duty to preserve confidences and secrets by communicating with clients through e-mail without encryption; however, a lawyer must use his/her professional judgment in choosing the appropriate method of each attorney-client communication); Pa. Informal Ethics Op. No. 97-130 (1997) (absent unusual circumstances, lawyer may use e-mail to communicate with a client without encryption; however, the lawyer should advise the client concerning the risks associated with the use of e-mail and obtain the client’s consent, either orally or in writing); S.C. Ethics Op. No. 97-08 (1997) (reexamining the issue and reversing Op. No. 94-27); Tenn. Ethics Op. No. 98-A-650(a) (1998) (lawyer may use e-mail via the Internet to transmit client confidences and secrets); Utah Ethics Op. No. 00-01 (2000) (a lawyer may, in ordinary circumstances, use unencrypted Internet and e-mail to transmit client confidential information); Vt. Ethics Op. No. 97-5 (1997). Cf. Cal. Evid. Code § 952 (attorney-client communications do not lose their privileged character “solely because the communication is transmitted by facsimile, cellular telephone or other electronic means between the client and his or her lawyer.”); N.Y. Civ. Prac. and Rules 4547 (“No communication privileged under this article shall lose its privileged character 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.”).

City of Reno v. Reno Police Protective Ass’n, 59 P.3d 1212 (Nev. 2002), modified 2003 Nev. LEXIS 25 (Nev. May 14, 2003); Mold-Masters Ltd. v. Husky Injection Molding Sys., 2001 WL 1558303 (N.D. Ill. Nov. 1, 2001); United States v. Keystone Sanitation Co., 903 F. Supp. 803 (M.D. Pa. 1995); Yurick ex rel. Yurick v. Liberty Mut. Ins. Co., 201 F.R.D. 465 (D. Ariz. 2001). See also See also Ariz. Ethics Op. No. 05-04 (2005) (It is not unethical to store confidential client information on computer systems including those connected to the Internet. However, the attorney is obligated to take competent and reasonable steps to assure that the client’s confidences are not disclosed to third parties through theft or inadvertence and to assure that the client’s electronic information is not lost or destroyed.); Va. Ethics Op. No. 1791 (2003) (attorney not precluded from providing legal services to his clients via electronic communication so long as the content and caliber of those services otherwise comport with the duties of competence and communication).
A. Conditioning Settlement on Waiver of Attorneys’ Fees

Ethical issues may arise in situations where a lump sum settlement is offered with no separate provision for attorneys’ fees or in which the settlement is conditioned on the waiver of attorneys’ fees. In *Evans v. Jeff D.*, the Supreme Court held that a class action settlement agreement including a waiver of statutory attorneys’ fees as a condition of settlement did not present an ethical dilemma to an attorney. The Court reasoned that a lawyer has an ethical obligation to his or her client to exercise professional judgment on behalf of the client without allowing his or her own financial interests to influence his or her professional advice. To avoid the strategic use of lump sum or fee waiver settlement offers, plaintiffs’ counsel should consider explicitly and clearly addressing the issue in the retainer agreement at the outset of litigation. For example, the agreement could provide that the attorney would normally be paid on a contingent-fee basis, but alternatively on an hourly fee basis if there is no recovery of attorneys’ fees from the defendant. However, at least one jurisdiction has held that it is unethical for an attorney to contract in advance with a client that the client may not accept or that the


266 *Id.*

267 *See* Cal. Ethics Op. No. 1994-136 (1994) (at the outset of the attorney-client relationship, an attorney may ethically contract with a client that the rights to apply for and receive an award of attorneys’ fees are the attorney’s alone and that the client shall not attempt to waive such rights, provided the agreement is the product of the client’s informed consent); Utah Ethics Op. No. 98-05 (1998) (plaintiff’s counsel may resolve the potential conflict issue by full disclosure with the client in advance of this problem and execution of an appropriate attorney-client fee agreement addressing this eventuality); Washington Informal Ethics Op. No. 2102 (2005) (An attorney who receives a settlement offer wholly acceptable to the client and which requires the attorney to waive the potential of statutory fees awarded to the prevailing party has a duty to promptly inform the client of the offer and to abide by the client’s decision whether to accept or reject it. If the attorney’s pecuniary interest in the settlement may materially limit the advice the attorney gives the client then the attorney must satisfy the requirements of informed consent.) *See generally* Conn. Ethics Op. No. 97-31 (Nov. 3, 1997) (general discussion of ethical considerations in negotiating settlements when an attorney’s fee award is sought).
attorney may veto a particular offer in settlement of the case. The client has the ultimate authority to accept settlement offers and this authority cannot be contracted away.

Although the Jeff D decision allows defendants to make strategic use of settlement offers conditioned on plaintiff’s waiver of his counsel’s attorneys’ fees as a matter of federal law under 42 U.S.C. section 1988, nothing in that opinion limits the ability of state ethical tribunals to limit the practice. Thus, in some jurisdictions, it may be unethical for defense counsel to make such conditional offers, notwithstanding Jeff D.

B. Settlements Conditioned on An Attorney’s Agreement to Refrain From Future Lawsuits or Claims Against the Same Defendant

Occasionally, settlement agreements are conditioned on the opposing counsel’s agreement to refrain from representing other parties against the defendant. As both the ABA Model Code and the ABA Model Rules specifically prohibit settlements conditioned on agreeing to refrain from representing other parties, such a settlement offer violates ethical standards.


271 See ABA MODEL RULES, Rule 5.6; ABA MODEL CODE, DR 2-108(B); ABA Formal Ethics Op. No. 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 not only where the controversy is between private parties, but also where the party is a government entity); ABA Formal Ethics Op. No. 93-371 (1997) (same); Alaska Ethics Op. No. 2000-2 (2000) (attempt to use settlement agreement in bankruptcy action to (continued...)
C. Confidentiality Clauses

Often, settlement agreements contain confidentiality clauses, which provide that the terms and conditions of the settlement are confidential and that the plaintiff and plaintiff’s counsel will not reveal the terms and conditions of the settlement. Generally, such clauses are not prohibited by the ethics rules, and a prohibition against negotiation of such clauses is inappropriate.272

271(...continued)

preclude an attorney from representing subsequent creditors against the same debtor might violate Alaska Rule of Professional Conduct 5.6); Fla. Ethics Op. No. 04-2 (2005) (A lawyer may not propose or agree to either a direct or indirect restriction on the lawyer’s right to practice as part of a settlement agreement. Confidentiality provisions and general releases of liability do not violate the rule.); Florida Bar v. Lewis, No. SC 04-49 (Fla. May 3, 2007) (lawyer disbarred for agreeing not to represent other plaintiffs against defendant as part of settlement); Tenn. Formal Ethics Op. No. 97-F-141 (1998) (it is ethically inappropriate to propose as part of a settlement a restriction of a plaintiff’s attorney from representing future claimants against same defendant; similarly, it is unethical to require plaintiff’s counsel to become a party to a release, except in cases where the attorney is releasing a claim for attorneys’ fees); Tex. Ethics Op. No. 505 (1994) (law firm may not agree, as part of settlement, not to solicit third parties in the future to prosecute claims against the opposing party or to share fees with anyone in the future regarding lawsuits or claims brought against the opposing party). Cf. ABA Formal Ethics Op. No. 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); 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); Tex. Ethics Op. No. 551 (2004) (It is permissible for a lawyer who was formerly employed as a lawyer by a city to be required to comply with a provision of 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). See generally ABA Section of Litigation, Ethical Guidelines for Settlement Negotiations (2002).

D. Duty of Candor in Settlement Negotiations.

A lawyer is prohibited from making a false statement of material fact during settlement. This prohibition has been interpreted broadly and applied in a variety of contexts, including

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No. 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); Tenn. Formal Ethics Op. No. 97-F-141 (1998). However, note that some jurisdictions may, as a matter of public policy, prohibit negotiation of such confidentiality agreements. For example, the Texas Open Records Act has been interpreted to prohibit a state agency from entering into a mediated settlement agreement that contains a confidentiality clause, since disclosure of the terms of settlements by a state agency is in the public interest. See Tex. Attorney General Op. No. 658 (July 1, 1998). See also D.C. Ethics Op. No. 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 not provide that the term of the settlement and other non-public information may be kept confidential).
E. Duty of Candor and “Puffing” in Settlement Negotiations.

Although a lawyer may not make a false statement of material fact during settlement negotiations, false statements regarding the party’s willingness to settle or the party’s negotiation omission of material information during settlement negotiations and settlement demands made prior to filing the complaint, and during discovery and other litigation activity.

274 See, e.g., Fire Ins. Exchange v. Bell, 643 N.E.2d 310, 312 (Ind. 1994) (plaintiff could sue for fraud where defendant insurance company’s counsel misrepresented the limits of the applicable insurance policy); Sheppard v. River Valley Fitness One, L.P., 428 F.3d 1 (1st Cir. 2005) (Defense attorney’s letter to plaintiff’s counsel, in sexual harassment action, indicating 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 misrepresentation supporting monetary sanction against attorney for discovery misconduct).
goals, or statements that can fairly be described as negotiation “puffing” do not constitute false statements of material fact within the meaning of the Model Rules.275

VIII. LAWYER PROFESSIONALISM: CIVILITY AND COURTESY TO OPPOSING COUNSEL, PARTIES, WITNESSES, AND THE TRIBUNAL

A. Incivility/Lack of Professionalism By Lawyers

There is a growing consensus that professionalism among lawyers is on the decline and lawyers’ overzealousness in advancing a client’s cause (so-called “Rambo” tactics) have created a bad public image for lawyers.276 As a result, many courts and state bars have attempted to resolve the problem by mandating professionalism through lawyer civility and courtesy codes.277

275 ABA Formal Ethics Op. No. 06-439 (2006) (Under Model Rule 4.1, in the context of a negotiation, including a caucused mediation, a lawyer representing a party may not make a false statement of material fact to a third person. However, statements regarding a party’s negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation “puffing”, are ordinarily not considered “false statements of material fact” within the meaning of the Model Rules.). See also United States v. Contra Costa County Water Dist., 678 F.2d 90, 92 (9th Cir. 1982) (“Settlement negotiations are typically punctuated with numerous instances of puffing and posturing since they are ‘motivated by a desire for peace rather than from a concession of the merits of the claim.’”).

276 See Chevron Chem. Co. v. Deloitte & Touche, 501 N.W.2d 15, 19-20 (Wis. 1993) ("There is a perception both inside and outside the legal community that civility, candor and professionalism are on the decline in the legal profession and that unethical, win-at-all-costs, scorched-earth tactics are on the rise."); Nakoff v. Fairview Gen’l Hosp., 75 Ohio St. 3d 254, 256 (1996); A National Action Plan on Lawyer Conduct and Professionalism: A Report of the Working Group on Lawyer Conduct and Professionalism, adopted by the Conference of Chief Justices (Jan. 21, 1999) (“[T]he unprofessional and unethical conduct of a small, but highly visible, proportion of lawyers taints the image of the entire legal community and fuels the perception that lawyer professionalism has declined precipitously in recent decades.”); Final Report of the Comm. on Civility of the Seventh Circuit Federal Judicial Circuit, 143 F.R.D. 441, 445 (1992) (discovery is the area where uncivil conduct is most likely to arise); N.Y. State Bar Ass’n Comm. on Professionalism in Litig. of the Commercial and Fed. Litig. Section, Report on Uncivil Conduct in Depositions (1995).

277 See, e.g., Texas Lawyer’s Creed – A Mandate for Professionalism (adopted by Supreme Court of Texas and Court of Criminal Appeals of Texas, Nov. 7, 1989); ABA Guidelines for Litigation Conduct (Aug. 1998); ABA Creed and Pledge of Professionalism; A (continued...
Discourteous or uncivil conduct by attorneys is governed by some extent by the

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Lawyer’s Creed of Professionalism of the ABA Tort and Insurance Practice Section (1999); American College of Trial Lawyers’ Code of Trial Conduct (rev. 1987); Ala. State Bar Code of Prof’l Courtesy (1992); A Lawyer’s Creed of Professionalism of the State Bar of Ariz. (1989); Colo. Bar Ass’n Lawyer’s Principles of Professionalism; Del. Rules of Prof’l Conduct, Rule 3.5(c); D.C. Bar Voluntary Standards for Civility in Prof’l Conduct (as Amended Mar. 11, 1997); Del. State Bar Ass’n Statement of Principles of Lawyer Conduct; Principles of Professionalism (adopted by Connecticut Bar Ass’n House of Delegates, June 6, 1994) (attorney will strive to be courteous and civil in both oral and written communications); Fla. Bar Ass’n, Ideals and Goals of Professionalism (1990); Ky. Bar Ass’n Code of Prof’l Courtesy; La. Code of Professionalism (lawyer’s conduct should be characterized at all times by personal courtesy and professional integrity); Aspirational Goals for Lawyer Professionalism, Maine Bar Rule 2-A (Feb. 1, 2005). Mass. Bar Ass’n Statement on Lawyer Professionalism (1989); State Bar of New Mexico, A Lawyer’s Creed of Professionalism; Oklahoma State Bar Ass’n Guidelines for Prof’l Courtesy (1989); Or. State Bar Statement on Professionalism (1996); Ethical Guidelines for Mediators, Misc. Docket No. 05-9107 (Tex. June 13, 2005); Administrative Order Misc. Docket No. 96-9078, 917 S.W.2d 786 (Tex. 1996) (at least 16 states require lawyers to take a course in professionalism as a condition of licensure, or within a set period of licensure; Texas adopts similar rule); Washington State Bar Ass’n Creed of Professionalism (2001). See also Dondi Props. Corp. v. Commerce Sav. & Loan Ass’n, 121 F.R.D. 284 (N.D. Tex. 1988) (en banc, per curiam) (adopting civility standards of the Dallas Bar Association’s “Guidelines of Professional Courtesy” and a “Lawyer’s Creed” as standards of practice to be observed by attorneys appearing in civil actions in the Northern District of Texas).

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attorney’s duty of candor and fairness to opposing counsel and the tribunal,\(^{278}\) and by rules of practice and procedure.\(^{279}\)

A growing number of courts have sanctioned or expressed strong disapproval of attorneys’ discourteous, uncivil or rude conduct during the course of pretrial proceedings and

\(^{278}\) See ABA Model Rules, Rules 3.1, 3.3, 3.4; ABA Model Code, DR 7-102. See also ABA Formal Ethics Op. No. 87-353 (1987); Nix v. Whiteside, 475 U.S. 157, 171 (1986) ("[U]nder no circumstance may a lawyer either advocate or passively tolerate a client’s giving false testimony."); Ariz. Ethics Op. No. 05-05 (2005) (Unless the proceedings are deemed concluded, an attorney in an unemployment appeal must take reasonable remedial measures upon learning that he or she has unwittingly offered false material evidence to a client’s apparent perjury.); Datig v. Dove Books, Inc., 73 Cal. App. 4th 964, 980 (1999) ("Honesty in dealing with the courts is of paramount importance and misleading the judge is, regardless of motives, a serious offense."); [O]nce the attorney realizes that he or she has misled the court, even innocently, he or she has an affirmative duty to request that it set aside any orders based on such misrepresentation; also, counsel should not benefit from such improvidently entered orders."); Daniels v. Alander, 844 A.2d 182 (Conn. 2004) (associate attorney had duty to correct a false statement of material fact the associate’s employer-attorney made to the trial court in the associate’s presence; rule on candor to the tribunal does not merely prohibit material misrepresentations that take the form of an affirmative statement; it can also prohibit misrepresentations that take the form of a failure to disclose); Office of Disciplinary Counsel v. Greene, 655 N.E.2d 1299, 1301 (Ohio 1995) ("The attorney’s duty, as an officer of the court, is to uphold the legal process and demonstrate respect for the legal system by at all times being truthful with a court and refraining from knowingly making [or permitting] statements of fact or law that are not true."); Utah Ethics Op. No. 00-06 (2000) (counsel who knows that a client has materially misled the court may not remain silent and continue to represent the client; to do so would be “assisting” the client in committing a fraud on the court; rather, counsel is obligated to remonstrate with the client and attempt to persuade the client to rectify the misleading or untruthful statements to the court; if this is not successful, counsel must seek to withdraw; if withdrawal is denied, counsel must disclose the fraud to the court.).

trial, even where such conduct does not violate a particular provision of the disciplinary rules. Such conduct includes, but is not limited to:

(1) discourteous, uncivil or rude behavior toward opposing counsel;  

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280 Aspen Servs., Inc. v. IT Corp., 583 N.W.2d 849 (Wis. Ct. App. 1999) (disciplinary authorities enforce Standards of Courtesy and Decorum for the Courts of Wisconsin, but judges may use them as a basis for sanctions during any litigation); Wickings v. Arctic Enters., Inc., 624 N.W.2d 197 (Mich. Ct. App. 2000), leave for appeal denied, 630 N.W.2d 623 (Mich. 2001) ("[I]n a society where there seems to be no limits to the lengths to which lawyers will go to secure a ‘win’ for their clients, it is easy to ignore that civility, honor, and trustworthy character are indispensable qualities in lawyers.");

281 Lee v. American Eagle Airlines, Inc., 93 F. Supp. 2d 1322 (S.D. Fla. 2000) (attorneys fee request by plaintiff, who prevailed in Title VII action, reduced from $1.6 million requested to slightly more than $300,000 because of his attorney’s unprofessional and abusive behavior before and during trial, including insulting the court reporter, and “trash talk” directed at defendant’s lawyers and representatives; “The manner in which a lawyer interacts with opposing counsel and conducts himself before the court is as indicative of the lawyer’s ability and skill as is his mastery of the rules of evidence.”); United States v. Ortlieb, 274 F.3d 871 (5th Cir. 2001) (attorney’s use of profanity during trial was criminal “misbehavior” that obstructed the administration of justice, warranting conviction for contempt); Lockheed Martin Energy Sys., Inc. v. Slavin, 190 F.R.D. 449 (E.D. Tenn. 1999) (defendant violated Rule 11 by pursuing a campaign of personal attacks on plaintiff and plaintiff’s attorney and asserting irrelevant matters to portray plaintiff as an entity of ill repute, undeserving of legal rights and protections, without any legal or rational basis to believe such materials were germane in any way to the court’s determination; sanctions of a written apology and monetary sanctions appropriate); Edberg v. Neogen Corp., 17 F. Supp. 2d 104 (D. Conn. 1998) (court concerned with plaintiff counsel’s lack of forthrightness and professionalism in letter sent to her adversary and the threatened use of Rule 11 sanctions to intimidate her adversary into not filing motion to dismiss; court also referred to curt and uncivil response of defense counsel to letter); In re Ramunno, 625 A.2d 248, 250 (Del.1993) (lawyer violated disciplinary rules for use of profanity and insulting conduct toward opposing counsel); In re Wilkins, 782 N.E.2d 985 (Ind. 2003) (statement in footnote of appellate brief impugning integrity of judges by suggesting that court favored opponent regardless of facts or law violated professional conduct rule, but attorney’s sanction would be reduced from a 30 day suspension to public reprimand already in effect by content of Supreme Court’s initial opinion); Office of Disciplinary Counsel v. Breiner, 969 P.2d 1285 (Haw. 1999) (lawyer suspended for six months for belligerent behavior at trial, including being argumentative in opening statements, arguing with and being disrespectful to a witness, and making improper comments to the jury, despite repeated warnings by the trial judge); In re Williams, 414 N.W.2d (continued...)
(2) discourteous, uncivil or rude behavior toward the court;\textsuperscript{282}

\textsuperscript{281}(...continued)

394, 397 (Minn. 1987) (en banc) (per curiam) (attorney sanctioned for insults to religious background of opposing counsel); \textit{Mink v. Conifer Park, Inc.}, 531 N.Y.S.2d 400, 403 (App. Div. 1988) (plaintiff’s counsel sanctioned for his disruptive tactics and use of coarse and gutter language in addressing opposing counsel), appeal dismissed sub nom., \textit{Williams v. Lawyers Prof’l Responsibility Bd.}, 485 U.S. 950 (1988); \textit{Couch v. Private Diagnostic Clinic}, 554 S.E.2d 356 (N.C. Ct. App. 2001) (attorney who appeared pro hac vice as plaintiff’s counsel in medical malpractice action sanctioned for characterizing defense witnesses and opposing counsel as liars approximately 19 times during her closing argument); \textit{Office of Disciplinary Counsel v. Jackson}, 704 N.E.2d 246 (Ohio 1999) (uttering obscene statement toward opposing counsel warranted public reprimand); \textit{5500 N. Corp. v. Willis}, 729 So. 2d 508 (Fla. Dist. Ct. App. 1999) (“[W]e observe that the circumstances of this case present a textbook example of lack of cooperation between opposing counsel. We would expect more civility from Beavis and Butthead than was displayed here by Attorneys Bailey and Mercer.”); \textit{Office of Disciplinary Counsel v. Levin}, 517 N.E.2d 892 (Ohio 1998) (per curiam) (public reprimand issued to attorney representing himself, threatened to take his questioner’s mustache off his face, to give him “the beating of his life, to slap him across his face, and to break his head;” attorney also addressed opposing counsel in a variety of expletives and otherwise unprofessional terms); \textit{Pesek v. University Neurologists Ass’n}, 721 N.E.2d 1011 (Ohio 2000) (trial court’s failure to intervene, sua sponte, to admonish counsel for pediatric neurologists and correct the prejudicial effect of counsel’s closing argument—in which counsel accused patient’s counsel of “half-truths,” “untruths,” and “the threatening of witnesses, [and] the suppression of evidence,” and called patient’s expert witness a “second-class expert” who “bought his way into pediatric neurology”—was reversible error in medical malpractice action); \textit{Checker Bag Co. v. Washington}, 27 S.W.3d 625 (Tex. Ct. App. 2000) (attacks on opposing counsel’s integrity are categorically prohibited; such conduct violates the rules of professional conduct and an express provision of the Texas Lawyer’s Creed). \textit{See also In re Joel I. Keiler, Case AD-3, 1995 DLR 54 (Mar. 15, 1995)} (suspension of attorney from practice before Board for one year warranted where attorney made ad hominem comments and scurrilous characterizations of counsel for General Counsel, repeatedly calling him a liar, misuse of a General Counsel-provided affidavit, and misrepresentations to the judge and obstruction and delay of hearing); Nat’l Lab. Relations Bd. Rules (procedure for disciplining misconduct during course of Board proceedings).

\textsuperscript{282} \textit{See, e.g., Travelers Ins. Co. v. Liljeberg Enters.}, 38 F.3d 1404, 1409 n.6 (5th Cir. 1994) (sanctions for frivolous appeal; attorney belated filed baseless Rule 60(b) motions to disqualify trial judge and wrote and recorded on compact disc a song constituting a personal and extremely unprofessional attack on the judge: “That a lawyer, an officer of the court, would stoop to this sort of conduct reflects a gross lack of understanding of professional conduct and the role that lawyers should play in assisting to uphold the dignity of the courts.”); \textit{Allen v.} (continued...)
282(...continued)

Seidman, 881 F.2d 375 (7th Cir. 1989) (conduct of Department of Justice attorney in scribbling in margin of district court judge’s opinion, submitted as appendix to Department’s brief, the word “WRONG” beside several findings of the district judge, was “indecorous and unprofessional conduct.”); In re Koven, 134 Cal. App. 4th 262 (2005) (Attorney’s apology was insufficient to purge her of the criminal contempt she had committed because unsupported accusations of judicial misconduct by the appellate court in her petition for rehearing were patently outrageous and contumacious on their face. Among other things, the attorney alleged that (1) because of the court’s personal relationship with the defendants and bias in their favor it “fixed” the appeals and “conspired” with defendants so that defendants would prevail, (2) the court ignored the law and misrepresented the evidence “[i]n order to manipulate an affirmation,” and (3) the court undertook an “ends-justifies the means” approach in which the “ends” was to eliminate plaintiff from the judicial system, whatever the cost—“the cost being this Court’s integrity and continuing viability as a depository of the public trust.” The attorney’s request to recuse a justice was frivolous, as she presented no evidence that the justice would not be impartial. The attorney’s contemptuous statements were not blurted out inadvertently in the heat of a courtroom battle, but were deliberately made in petitions for rehearing after consideration of the issues, and the attorney’s thinking capacity was not impaired by any physical or psychological problem. The record showed a pattern of abuse—focused on impugning the integrity of everyone in the legal system who obstructed the achievement of her goals—which served to aggravate the contempts committed by the attorney.); Notopoulos v. Statewide Grievance Committee, 890 A.2d 509 (Conn. 2006) (Reprimand of lawyer affirmed where lawyer wrote a letter accusing probate judge of, inter alia, extorting money; the first amendment did not insulate the attorney from discipline since the record contained sufficient evidence of the lawyer’s reckless disregard as to the truth or falsity of his statements.); Banderas v. Advance Petroleum, Inc., 716 So. 2d 876 (Fla. Dist. Ct. App. 1998) (show cause order issued due to motion for hearing, which was insulting, frivolous, and apparently filed solely as a tool to express appellant attorney’s personal displeasure with court’s per curiam affirmance of trial court’s decision without opinion); City of Jackson v. Estate of Stewart, 2005 Miss. LEXIS 833 (Miss. Dec. 15, 2005) (Plaintiff’s motion for rehearing stricken by supreme court where it contained disrespectful language—such as accusing the supreme court of “abandoning balance and neutrality” and legislating from the bench by issuing an opinion which as “unscholarly, illogical, silly, and politically motivated.”: “Lawyers who might in the future be of the opinion that they can exhibit with impunity conduct similar to that exhibited by the lawyers in today’s case, all under the guise of zealous advocacy, are woefully mistaken.”); Office of Disciplinary Counsel v. Jackson, 704 N.E.2d 246 (Ohio 1999) (public reprimand upheld for attorney who uttered obscene statements under his breath toward opposing party and counsel); Merrill Dow Pharmaceuticals, Inc. v. Havner, 953 S.W.2d 706 (Tex. 1998) (Texas Supreme Court referred plaintiff’s lawyer to state bar for possible disciplinary action based on the “tenor” of his motion for rehearing which, among other things, described the court as one of the four horsemen of the...
apocalypse, and the “nine nutty professors,” and the decision as “science fiction, filled with skewed observations and prissy platitudes,” and stating that “Justice is no longer for sale in Texas, the money has been escrowed, the deed has been signed, the deal has been done”); Welsh v. Mounger, 912 So.2d 823 (Miss. 2005) (Public reprimand and a $1,000 sanction were warranted for attorney’s flagrantly disrespectful conduct before the Supreme Court, his false accusations and repeated false statements to the Court, even after Court admonished attorney that statements were false, and his untimely motion to recuse two Justices, in light of his inability to fully accept responsibility for his improper conduct.); Puchner v. Hepperla, 625 N.W.2d 609 (Wis. Ct. App. 2001) (court of appeals sanctioned party who filed brief filled with vindictive, baseless and scurrilous attacks on the circuit court judge, other circuit court judges, opposing party and her counsel; court struck the brief and barred party from filing further pleadings in the matter until party paid the costs, fees and reasonable attorneys fees awarded by circuit court on remand). Note that some courts have held that First Amendment principles may limit a court’s ability to sanction expressions by attorneys with respect to the tribunal. See Standing Comm. on Discipline of the U.S. Dist. Court for the Cent. Dist. of Cal. v. Yagman, 55 F.3d 1430 (9th Cir. 1995) (district court order suspending attorney from practice in Central District for 2 years for impugning the integrity of the court reversed; attorney’s statements that judge was anti-Semitic and dishonest are statements of opinion protected by the First Amendments, his statement that the judge was drunk on the bench, although a statement of fact, was not shown to be false). But see Board of Prof’l Responsibility v. Slavin, 2004 Tenn. LEXIS 669 (Tenn. Aug. 27, 2004) (attorney properly suspended from practice for two years where attorney, among other things, (1) referred to one judge as a chain smoker causing his client restricted breathing, (2) filed documents in another court replete with unnecessary, irrelevant, baseless and frivolous claims, defenses and legal contentions, and in response to a Rule 11 petition he repeated the substance of the earlier document and added more irrelevant allegations, (3) asserted in an administrative hearing that an administrative review board decision “ranks with the Dred Scott decision among the injustices in American history” and is a “disgrace to the human race,” and (4) left voice mail messages calling opposing counsel a “red neck peckerwood” and describing counsel collectively as “Nazis”; First Amendment does not bar sanctioning attorney’s speech if it is highly likely to obstruct or prejudice the administration of justice); Gentile v. State Bar of Nev., 501 U.S. 1030 (1991) (“It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to ‘free speech’ an attorney has is extremely circumscribed.”); In re Garaas, 652 N.W.2d 918 (N.D. 2002) (“The First Amendment does not preclude sanctioning a lawyer for intemperate speech during a courtroom proceeding.”), cert. denied, 539 U.S. 928 (2003); Kentucky Bar Ass’n v. Waller, 929 S.W.2d 181 (Ky. 1996) (“There can never be justification for a lawyer to use such scurrilous language with respect to a judge in pleadings or in open court.”).
(3) hard-ball litigation tactics, whether by lawyers for plaintiffs or defendants;\textsuperscript{283}

(4) “coaching” conferences with witnesses during depositions;\textsuperscript{284}

\textsuperscript{283} *Acushnet Co. v. Birdie Golf Ball Co.*, 166 F.R.D. 42 (S.D. Fla. 1996) (“tit for tat” approach to litigation employed by defense counsel in seeking postponement of due dates of responses to discovery requests until after plaintiffs responded to defendants’ requests was inappropriate; rather than seeking to emulate perceived faults of his adversaries, defense counsel was required to fulfill his own obligations and allow court to determine whether plaintiffs had failed to do so); *Schaffhausen v. Bank of Am.*, 2004 U.S. Dist. LEXIS 1773 (D. Minn. Feb. 2, 2004) (court sanctioned plaintiff’s counsel who would not agree to defense counsel’s request to extend the time to answer unless defendant agreed to essentially the relief plaintiff sought in the underlying dispute, which forced defendant to file a motion for enlargement of time, creating unnecessary work for the court’s staff and unnecessary expense for opposing counsel); *Ryan v. Surprise*, 2003 WL 22071005 (Tenn. Ct. App. Aug. 27, 2003) (trial court did not abuse its discretion in determining that a sanction for failure to timely produce billing records was warranted, where there were three prior requests to produce the records at defendant’s deposition and an order for production was in place, and records were not produced until 28 days after the deposition, the day before the trial court’s hearing on the motion for discovery sanctions; case remanded for determination regarding appropriate sanctions); *Kotil v. Hydra-Sports, Inc.*, 1994 Tenn. App. LEXIS 551 (Tenn. Ct. App. Oct. 5, 1994) (affirmed dismissal of case due to attorney for plaintiff’s discovery abuse and violation of orders; however, court criticized both sides; “[Opposing Counsel] put aside common courtesy and professional civility and resorted to hardball tactics and ad hominem attacks on opposing counsel’s character. This type of conduct reinforces the dominant popular belief that attorneys magnify the inherent divisiveness of litigation rather than facilitate the efficient resolution of disputes.”); *Teletel, Inc. v. Tel-Tel U.S. Corp.*, 2000 WL 1335872 (S.D.N.Y. Sept. 15, 2000) (sanctions levied against plaintiff; plaintiff’s failure to produce its witnesses for deposition was not excused by defendants’ delay in producing documents, or plaintiff’s desire not to have its principals deposed before that production was complete).

\textsuperscript{284} See *Hall v. Clifton Precision*, 150 F.R.D. 525, 530 (E.D. Pa. 1993) (ruling on “coaching” conferences between deposed witness and their lawyers both during deposition and during recesses, and prohibiting objections and colloquy designed to disrupt the question and answer rhythm of a deposition); *Plaisted v. Geisinger Med. Ctr.*, 210 F.R.D. 527 (M.D. Pa. 2002) (defense counsel acted improperly under *Hall* guidelines when, during four separate depositions, she made repeated objections, instructed witnesses not to answer certain questions, and left the deposition room while a question was pending; appropriate to allow plaintiff’s counsel to re-depose each witness in the areas where their answers were incomplete or where (continued...)}
they were not permitted to answer questions because of defense counsel’s behavior; also appropriate to permit plaintiff’s counsel to pose questions to witness about any discussions that may have taken place during the two breaks defense counsel improperly took during his deposition); *American Directory Serv. Agency, Inc. v. Beam*, 131 F.R.D. 15, 18 (D.D.C. 1990) (order imposing sanctions) (attorney engaged in outrageous conduct, including “coaching” responses, and frequently instructing his clients not to answer at all; his “repeated objections, puerile arguments with opposing counsel, and vexatious requests for clarification prevented the elicitation of any meaningful testimony and needlessly added to the expense of the litigation”); *McDermott v. Miami-Dade County*, 753 So. 2d 729 (Fla. Dist. Ct. App. 2000) (judge of compensation claims had discretion to prohibit workers compensation claimant from communicating with her attorney about circumstances giving rise to alleged injury until claimant appeared for continuation of her deposition, where deposition was interrupted improperly by claimant’s attorney and order was not so broad and vague as to totally preclude any attorney-client communication whatsoever); *Van Pilsum v. Iowa State Univ. of Sci. & Tech.*, 152 F.R.D. 179, 180 (S.D. Iowa 1993) (sanctions awarded and protective order granted; although it appeared that the plaintiff had no difficulty communicating in English, her counsel repeatedly took it upon himself to restate defendant counsel’s questions in order to “clarify” them for the plaintiff; he also consistently interrupted counsel and the witness, interposing “objections” which were thinly veiled instructions to the witness, who would then incorporate her counsel’s language into her answer); *Armstrong v. Hussmann Corp.*, 163 F.R.D. 299, 304-05 (E.D. Mo. 1995) (pretrial order stipulating that counsel and their witnesses “shall not engage in private, off-the-record conferences during depositions or during breaks or recesses, except for the purpose of deciding whether to assert a privilege”); *Damaj v. Farmers Ins. Co.*, 164 F.R.D. 559 (N.D. Okla. 1995) (deponent’s attorney may not object in a manner that suggests the desired answer to the deponent and may not confer with the deponent regarding documents presented to the deponent at the deposition). *Contra: Birdine v. City of Coatesville*, 225 F.R.D. 157 (E.D. Pa. 2004) - *Hall v. Clifton Precision*,” “goes too far in forbidding an attorney who defends a deposition [] from instructing the witness from making most objections and from instructing the witness not to answer an objectionable question.” On the other hand, court agreed with *Hall* that a defending attorney’s objections should be “succinct and verbally economical, stating the basis for the objection and nothing more.” When an objection arises in the course of a deposition, questioning attorney should explain to the defending attorney that insistence on the objection will require the attorney to file a motion to compel. If the objection is not withdrawn, the questioning attorney should then begin a new line of questioning and file a motion to compel as soon as possible after the deposition has ended. If the court ultimately overrules the objection and grants the motion to compel, the court will order the deposition to resume at the earliest time that is convenient to the questioning attorney, without sympathy for any inconvenience that it may cause the defending party.); *In re Stratosphere Corp. Sec. Litig.*, 182 F.R.D. 614, 621 (D. Nev. 1998) (“*Hall* goes too far in its solution.”); *Odone v. Croda Int’l PLC*, 170 F.R.D. 66, 68 (continued...
improper objections in depositions;\textsuperscript{285}

\textsuperscript{284}(...continued)

See generally Federal Bar Council Comm. on Second Circuit Courts, “A Report on the Conduct of Depositions,” 131 F.R.D. 613, 613 (1990) (“Depositions have often become theaters for posturing and maneuvering rather than efficient vehicles for the discovery of relevant factors or the perpetuation of testimony.”); Comm. on Professionalism in Litigation, Commercial and Federal Litigation Section, N.Y. State Bar Ass’n, “Report on Uncivil Conduct in Depositions” (1995) (same); Paramount Communications, Inc. v. Q.V.C. Network, 637 A.2d 34 (Del. 1994) (attorney’s actions during deposition in improperly directing witness not to answer certain deposition questions, engaging in extraordinary rude, uncivil and vulgar conduct and interposing objections designed to obstruct ability of questioner to elicit testimony “demonstrated such an astonishing lack of professionalism and civility that it is worthy of special note here as a lesson for the future – a lesson of conduct not to be tolerated or repeated”); Wilson v. Sundstrand Corp., 2003 WL 22012673 (N.D. Ill. Aug. 25, 2003) (as a sanction for improper “speaking” objections by plaintiff’s counsel at deposition of plaintiffs’ expert, court struck supplemental answer expert gave after improper objection and ordered that defendant be able to use the non-supplemented answer to impeach expert at trial and plaintiffs and their expert will be barred from pointing out that he expanded on the answer in deposition); Martinez v. University of Ill. at Chicago, 1999 WL 592106 (N.D. Ill. Aug. 2, 1999) (“[T]here was no legitimate reason for too many of the constant objections that were injected by University’s counsel during the Dunlap deposition. Thus all too often questions that were perfectly understandable to an ordinary listener were made the subject of hyper technical interruptions that professed to find the questions either vague or without foundation or as misstating the witness’ prior testimony or what have you, only to be followed by answers that showed that the witness (if not the objecting lawyer) had comprehended the question full well and had no difficulty in responding. One might ask, ‘To what end?’”) (sanctions awarded for baseless motion to bar allegedly improper ex parte communications); Mercer v. Gerry Baby Prods. Co., 160 F.R.D. 576 (S.D. Iowa 1995) (sanctions and special master appointed to oversee deposition fraught with interruptions,

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instructions not to answer, and unilateral time limits); Higginbotham v. KCS Int’l, Inc., 202 F.R.D. 444 (D. Md. 2001) (sanctions warranted against attorney who intentionally disregarded discovery rules by terminating deposition after one hour in order to retaliate against opposing counsel for termination of prior deposition); Philen v. Atlantic City Showboat, Inc., No. 96-2282 (D.N.J. May 6, 1997) (sanctions order to redepose witnesses; “[Defense counsel] incited arguments with deposing attorney; improperly instructed witnesses not to answer questions; and insisted on interjecting long and inappropriate objections. These interruptions slowed the proceedings and might have affected the candor of the witnesses.”); Fed. R. Civ. P. 30(d)(1) (objections during depositions must be “stated concisely and in a non-argumentative and non-suggestive manner”); Calzaturificio S.C.A.R.P.A. v. Fabiano Shoe Co., 201 F.R.D. 33 (D. Mass. 2001) (counsel for deponents behaved inappropriately during a deposition by conferring with deponents while questions were pending, instructing deponents not to finish answers, suggesting to deponents how they should answer questions, instructing witness not to answer on grounds other than privilege grounds, asserting the “asked and answered” objection 81 times, engaging in lengthy colloquies on the record, and making ad hominem attacks against opposing counsel); Morales v. Zondo, Inc., 85 Fair Empl. Prac. Cas. (BNA) 1399 (S.D.N.Y. 2001) (sanctions awarded where defendant’s counsel at deposition lodged detailed objections, held private consultations with witness, gave instructions not to answer and instructions how to answer, engaged in colloquies, interruptions and ad hominem attacks to disrupt the examination and protracted the length of the deposition; “zealous representation has its limits”); Corsini v. U-Haul, Int’l, Inc., 212 A.D.2d 288 (N.Y. App. Div. 1995) (pro se attorney-plaintiff’s behavior, including repeatedly refusing to answer and giving evasive and improper responses to deposition questions, making personal attacks against defense counsel, mimicking counsel’s speech pattern in a manner suggesting an ethnic slur, was a violation of his obligation to refrain from uncivil and abusive behavior and warranted dismissal of case). See also In re Feld’s Case, 737 A.2d 656 (N.H. 1999) (New Hampshire Supreme Court publicly censured lawyer who failed to advise a client of the need to correct false testimony in a civil deposition; on reconsideration (149 N.H. 19 (2002), court held that a one-year suspension was appropriate sanction); Castillo v. St. Paul Fire & Marine Ins. Co., 828 F. Supp. 594 (C.D. Ill. 1992) (plaintiff’s counsel found in civil contempt and suspended from practice of law for a year for deliberate frustration of defendant’s discovery attempts including, among other things, instructing witness not to answer several questions court ordered him to answer, and threatening counsel not to use his office telephone to call the judge concerning the matter); Castillo v. St. Paul Fire & Marine Ins. Co., 938 F.2d 776 (7th Cir. 1991) (affirmed dismissal of plaintiff’s case with prejudice after he followed his attorney’s instructions at two different depositions and refused to answer questions posed to him); Unique Concepts, Inc. v. Brown, 115 F.R.D. 292, 293 (S.D.N.Y. 1987) (sanctions imposed on plaintiff’s counsel; attorney accused examining attorney of being “an obnoxious little twit,” instructed him to keep his mouth shut, and when cautioned by defending attorney that his conduct would result in a request for sanctions, attorney stated that counsel should go ahead and

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he would agree to contribute money for lessons on how to ask questions; counsel appeared on
91% of the pages of the deposition transcript with statements other than objections as to form);
on attorney for her abusive and contumacious conduct during the deposition of a witness were
appropriate and just under Rule 215 and the trial court's inherent powers.) Stengel v. Kawasaki
Heavy Indus., 116 F.R.D. 263, 267-68 (N.D. Tex. 1987) (granting discovery sanctions in favor of
the plaintiff’s attorney for the defendant attorney’s “unprofessional and insulting sidebar
comments”); Smith v. Gardy, 569 So. 2d 504 (Fla. Dist. Ct. App. 1990) (“[T]he arrogance of the
defense attorney in instructing his witness not to answer [question in deposition] is without legal
justification.”). Note, however, that sequestration under Rule 615 does not apply to depositions
in the typical case. See Rule 30(c)), Fed. R. Civ. P.; In re Terra Int’l, Inc., 134 F.3d 302 (5th
Cir. 1998) (district court abused discretion in issuing protective order for sequestration during
depositions; order was unsupported by a particular and specific demonstration of fact). Note that
a number of federal district courts have adopted local rules prohibiting improper private
conferences between witnesses and their attorneys during depositions. See, e.g., U.S. Court
Local Rules for the Dist. of Alaska, Rule 30.1, Depositions Upon Oral Examination; Local Rules
of Practice for the U.S. Court for the Dist. of Colo., Rule 30.1C, Sanctions for Abusive
Deposition Conduct; Local Rules for the U.S. Court for the S. Dist. of Fla., Rule 26.1, Discovery
and Discovery Documents, and Rule 30.1, Sanctions for Abusive Deposition Conduct; Local
Rules for the U.S. Court for the S. Dist. of Ind., General Rule 30.1, Conduct of Depositions;
Local Bankruptcy Rules for the Bankruptcy Court for the Dist. of Md., App. B, Discovery
Guidelines for the State Bar; Rules of the U.S. Court for the Middle Dist. of N.C., Rule 204,
Differentiated Case Management and Discovery; Local Rules for the U.S. Court for the Dist. of
S.C., Rule 10.04, Conduct During Depositions.

See, e.g., McLeod, Alexander, Powel & Apffel v. Quarles, 894 F.2d 1482, 1486 (5th
Cir. 1990) (sanctions for, among other things, unspecific and “vacuous” objections to discovery;
“Counsel have an obligation, as officers of the Court, to assist in the discovery process by
making diligent, good-faith responses to legitimate discovery requests.”); Green v. Baca, 219
F.R.D. 485 (C.D. Cal. 2003) (a party may not make a blanket assertion of privilege in response
to a discovery request); Miller v. Panucci, 141 F.R.D. 292, 302 (C.D. Cal. 1992) (boilerplate
objections are improper); St. Paul Reinsurance Co. v. Commercial Fin. Corp., 198 F.R.D. 508
(N.D. Iowa 2000) (counsel’s boilerplate, frivolous and obstructionist objections to discovery in
civil action warranted sanction, in which court required counsel to write an article explaining
why it was improper to assert objections he made and submit such article to both a N.Y. and
Iowa bar journal for publication); Auscape Int’l v. National Geographic Soc’y, 2003 WL 134989
(S.D.N.Y. Jan. 17, 2003) (sanction was warranted against attorney who failed to communicate to
(continued...)

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(7) improper actions during discovery;287

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his clients district court’s order for production of documents and stonewalled opposing party’s continued attempts seeking production of same documents); House v. Giant of Maryland, LLC, 232 F.R.D. 257 (E.D. Va. 2005) (“The party to whom requests for admissions are propounded acts at his own peril when answering or objecting. Gamesmanship in the form of non-responsive answers, vague promises of a future response, or quibbling objections can result in the request being deemed admitted or in a post-trial award of sanctions . . . Requests for admissions are not games of ‘Battleship’ in which the propounding party must guess the precise coordinates that the responding party deems answerable.”).

287 Estate of Miles v. Miles, 994 P.2d 1139 (Mont. 2000) (court properly sanctioned counsel for making discovery requests that sought information regarding estate attorney’s law school transcripts, performance and disciplinary record and information regarding whereabouts of law firm partner during course of litigation, as requests were not designed to elicit any relevant information, but to harass and embarrass counsel and needlessly increase costs of litigation); Freeman v. Schointuck, 192 F.R.D. 187 (D. Md. 2000) (unprofessional behavior of defendant’s attorney during deposition of plaintiff’s expert witness, which included insulting, demeaning, antagonistic, sarcastic and threatening comments—such as accusing deponent of “playing games,” demeaning deponent’s professional competence, accusing deponent of having a hearing problem, mocking plaintiff’s counsel by mimicking him, and repeatedly threatening to terminate the deposition and “slap” another motion to dismiss the case on plaintiff’s counsel—warranted sanctions; also, plaintiff’s expert witness would not be precluded from testifying where expert’s allegedly evasive, incomplete, and non-responsive answers might have been more complete but for unprofessional behavior of defendant’s counsel); Beck v. Sapet, ___So.2d ___, 2006 WL 2623325 (Miss. Sept. 24, 2006) (dismissal of breach of contract complaint with prejudice, based on home owners’ failure to comply with discovery orders, was not an abuse of discretion; the trial court entered its first order to compel discovery almost one year after builder propounded interrogatories and requests for production on home owners, home owners violated the order when they responded to the requests outside of the 15 days required by the order, builder obtained a second order to compel that was violated when home owners failed to supplement their discovery within the ten days provided in the order, and home owners filed a motion to reconsider on the tenth day after the second order compelling discovery was entered and failed to supplement their discovery within the time period specified.); Mississippi Farm Bureau Mut. Ins. Co. v. Parker, 921 So.2d 260 (Miss. 2005) (In bad faith action against insurer, 130 interrogatories and over 26,000 requests for production propounded by insurer were grossly excessive in number and unduly burdensome. Court chastised both litigants regarding contentious litigation practices and actions contrary to the Mississippi Lawyer’s Creed.); Katoch v. Mediq/PRN Life Support Servs., Inc., 2005 U.S. Dist. LEXIS 27627 (E.D. Mo. Nov. 14, 2005) (In employment discrimination action, employee’s counsel sanctioned where he willfully made a (continued...)

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(8) lack of candor to counsel and the court, false/misleading statements and suppression of evidence;\textsuperscript{288}

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unilateral decision not to produce his client for a properly noticed deposition in willful and bad faith disobedience of the court’s oral order setting a deadline to complete depositions in the case. Counsel for employee’s claim that defendant had engaged in discovery abuse was irrelevant, and counsel’s other excuses for failing to produce his client and cooperate with defendant’s counsel in scheduling the deposition within the deadline were not substantially justified.), \textit{later proceeding}, \textit{2005 U.S. Dist. LEXIS 37571} (E.D. Mo. Dec. 29, 2005) (counsel later held in contempt of court for failure to comply with this order.); \textit{Ashkinazi v. Sapir}, \textit{2005 U.S. Dist. LEXIS 6900} (S.D. N.Y. April 19, 2005) (Employer’s repeated failures to appear at scheduled depositions were intentional and willful and warranted harsh sanctions, including order precluding employer from testifying at trial as to state and federal discrimination claims.); \textit{Metropolitan Opéra Ass’n v. Local 100, Hotel Employees & Restaurant Employees Int’l Union}, \textit{212 F.R.D. 178} (S.D.N.Y. 2003) (union counsel’s participation in and supervision of discovery was inconsistent with spirit and purposes of rule of civil procedure requiring counsel to certify that disclosure was incomplete, warranting imposition of judgment against union on issue of liability; counsel’s responses to company’s discovery requests, in formal responses, in letters, and to court, particularly counsel’s repeated representation that all responsive documents had been produced, were made without any real reflection or concern for their obligations under the discovery rules and, in the absence of adequate search for responsive documents, without reasonable basis and counsel were given numerous last clear chances to comply with their discovery obligations); \textit{Appraisal Management Co. III, LLC v. FNC, Inc.}, \textit{2005 U.S. Dist. LEXIS 28310} (N.D. Ohio Nov. 17, 2005) (Plaintiff company’s action dismissed as sanctions for its willful failure to cooperate in discovery, where defendant has been prejudiced by plaintiff’s conduct, it had been warned that its refusal to cooperate could lead to dismissal, and less drastic sanctions had been imposed. A plaintiff “has no right to maintain a civil action in which [it] refuses to disclose relevant documents.”). \textit{Compare Costello v. International Business Machines Corp.}, \textit{2006 WL 2370246} (S.D.N.Y. Aug. 16, 2006) (sanctions denied against plaintiff an her attorney in employment case since the record indicates a good faith belief in the validity of the action, and does not indicate they made anything other than good-faith efforts to comply with discovery).

\textsuperscript{288} \textit{Sheppard v. River Valley Fitness One, L.P.}, \textit{428 F.3d 1} (1\textsuperscript{st} Cir. 2005) (Defense attorney’s letter to plaintiff’s counsel, in sexual harassment action, indicating 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 misrepresentation supporting monetary sanction against attorney for discovery misconduct); \textit{In re Sealed Appellant}, \textit{194 F.3d 666} (5th Cir. 1999) (finding that attorney testified falsely or was deliberately (continued...)
misleading while under oath and that attorney backdated endorsement of stock certificate supported order disbarring attorney from practice before federal district court; *Amlong & Amlong, P.A. v. Denny’s Inc.*, 457 F.3d 1180 (11th Cir. 2006) (District court’s decision in Title VII action in which deposition of plaintiff employee was reopened when errata sheet prepared by her attorneys demonstrated that she had told numerous lies in response to questions initially asked at deposition, to hold employee’s attorneys jointly liable for fees and costs incurred in reopening deposition, constituted an abuse of discretion, as did later order requiring attorneys to pay 10% back interest when these sanctions were not timely paid, absent a finding of bad faith); *Greviskes v. Universities Research Ass’n., Inc.*, 417 F.3d 752 (7th Cir. 2005) (Plaintiff filed a Title VII complaint against her former employer. The district court dismissed the case with prejudice due to plaintiff’s “blatant misconduct” in the course of discovery and awarded $5,613.50 in attorneys fees to defendant as an additional sanction. Plaintiff had attempted to obtain her former supervisor’s payroll records, through the use of confidential materials obtained through discovery, by faxing a forged request for the records from the second line in her home. When defendants initiated discovery with on to this issue, plaintiff changed the telephone number and lied to the phone company in an attempt to block production of the phone records (first by trying to convince the phone company that a motion to quash had been granted with respect to the records and, on learning that the records had already been released, telling the phone company that the records were related to a murder case). The Seventh Circuit affirmed the dismissal and sanctions and gave notice of intent to award attorneys’ fees on appeal, finding that the district court rightly invoked its inherent authority to dismiss the suit when plaintiff engaged in fraudulent misconduct in the course of discovery and, rather than admit her initial wrongdoing, attempted to obstruct justice by concealing the records in an attempt to obstruct justice); *In re Shannon*, 876 P.2d 548 (Ariz. 1994) (attorney who made changes to client’s answers to interrogatories and submits them to court knowing that they do not represent client’s position makes a false statement to a tribunal, despite whether the answers, as altered, are “correct”); *Markham v. National States Ins. Co.*, 2004 WL 3019309 (W.D. Okla. Dec. 27, 2004) (Plaintiffs moved for sanctions under Fed. R. Civ. P. 37 based on the insurer's violation of the court's order compelling discovery. Prior to trial, the court granted the motion to compel the insurer to identify all life insurance policies that it had rescinded in the last five years, to produce a list or copies of all lawsuits filed against the insurer in the last five years, and to produce all claim files for all rescissions by the insured in the past five years. The insurer responded only in part, and as to those documents it did provide, the insurer did not turn them over until after the first day of trial. On the motion for sanctions, the court held that the insurer's stonewalling was deliberate, significant, and was likely to keep the plaintiffs from proving that the insurer had a history of acting with bad faith in denying claims. During the punitive damages phase of the trial, the insurer's representative testified that he was unaware of any jury verdicts against the company with respect to its rescission practices. Defense counsel stated during closing argument that the insurer had not been to trial before and had never had a jury verdict awarded against it (continued...)
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for its claims practices. However, the court found that if the insurer had not violated the
discovery order, it would have been required to produce information showing that it had been
sued in 32 life insurance cases, including 27 rescission cases, and that it had settled the claims.
The evidence of the insurer's treatment of its insureds both inside and outside Oklahoma would
have been relevant to rebut the insurer's deceptive arguments, and the court found that the
violation of the order had the ultimate effect of significantly depressing the punitive damages
award. The court decided that $50,000 was the smallest increment by which the punitive
damages verdict was likely influenced and was an appropriate sanction.; Maris v. McGrath, 850
A.2d 133 (Conn. 2004) (award of attorneys fees to former girlfriend was warranted as sanction
against boyfriend for bad faith in bringing claim for return of money deposited in joint account;
trial court found that boyfriend repeatedly testified untruthfully and in bad faith and that claims
were totally false and wholly without merit, matters about which boyfriend untruthfully testified
were matters particularly within his firsthand knowledge, and all bad faith untruths went to heart
of boyfriend’s claims, and trial court’s findings were based on ample and clear evidence); N.Y.
lawyer to the court contains a material omission, and that the client has perpetrated a fraud on the
tribunal, must call upon the client to rectify the material omission. If the lawyer knows or it is
obvious that continued employment will result in violation of a disciplinary rule, the lawyer must
withdraw from the representation, with the court’s permission if required under its rules.; Fla.
Ethics Op. No. 04-1 (2004) (When a lawyer is representing a client who has stated an intention
to commit perjury, the lawyer is obligated to disclose the client’s intent to the court. If the
lawyer is not given advance notice of the client’s intent to lie, and the client offers false
testimony, then the lawyer must convince the client to agree to disclose to the court anyway.
Absent client consent, the lawyer’s disclosure of the client’s false testimony or intent to offer
false testimony will create a conflict between the lawyer and the client requiring the lawyer to
move to withdraw from representation. If the court requires the lawyer to remain in the case,
despite good cause for withdrawal, the lawyer must do so. It is then up to the court to determine
what should be done with the information.; McMunn v. Memorial Sloan-Kettering Cancer Ctr.,
191 F. Supp. 2d 440 (S.D.N.Y. 2002) (former employee bringing ADA action against employer
committed fraud on the court by intentionally and in bad faith lying during deposition which
directly led to destruction of potentially critical evidence which could have harmed her case,
repeatedly lying and misleading employer to prevent deposition of key witnesses, editing certain
tapes before turning them over to employer so that they would provide stronger evidence in
lawsuit, and engaging in sham sale of her apartment in order to unfairly bolster her claim that her
termination left her destitute and with sever emotional damage; dismissal of action with
prejudice as well as sanction of $20,000 was appropriate); Aloi v. Union Pacific R.R. Corp., 129
P.3d 999 (Colo. 2006) (Trial court did not abuse its discretion by providing the jury with an
adverse inference instruction as a sanction for the spoliation of evidence where it found that
defendant had willfully destroyed relevant evidence, where otherwise naturally would have been
(continued...)
introduced at trial.); See also Nix v. Whiteside, 475 U.S. 157 (1986) (attorney may have a duty to disclose in-court client or witness perjury to the court); 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 attorneys 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); Norelus v. Denny’s, Inc., 2000 WL 33541630 (S.D. Fla. Mar. 21, 2000) (preparation and filing of an errata sheet for plaintiff’s deposition demonstrated counsel’s bad faith and justified award of attorneys fees, costs and expenses; “when an Errata Sheet sixty-three pages long with 868 corrections is necessary to validate testimony, any reasonable attorney would be on notice that such testimony may be incredulous.”); Ill. Ethics Op. No. 01-06 (2002) (while a lawyer may zealously represent the interests of a client, a lawyer must be truthful in dealings with adversaries and third parties and cannot take actions designed merely to harass or burden such other parties); N.Y. State Ethics Op. No. 797 (April 26, 2006) (if a lawyer determines that a client has made false representations to the court in an affidavit, the lawyer must call upon the client to correct the information in the affidavit, and, if the client refuses, the lawyer must withdraw any misstatements the lawyer made in certifying the client's statements. The lawyer must also consider whether the lawyer is required or permitted to withdraw from the representation); Sossi v. Willette & Guerra, 139 S.W.3d 85 (Tex. Ct. App. 2004) (sanctions for filing frivolous appeal warranted, where attorney had misrepresented nature of appeals, but representing that it was an appeal from a trial court order denying his motion for joinder in a civil action, for which an interlocutory appeal would be available, when in fact attorney was appealing from order denying his motion to consolidate, from which an interlocutory appeal was not available); Hill & Griffith Co. v. Bryant, 139 S.W.3d 688 (Tex. Ct. App. 2004) (monetary and community service sanctions against seller of silica-based products, its law firm, and attorney for failing to disclose labeling memo in response to request of employees of company that purchased seller’s products was not abuse of discretion in failure to warn lawsuit; trial court had been explicit at motion to compel that all information and documentation relating to potential health hazards of silica were to be turned over to employees prior to depositions of seller’s executives and employees, memo described thought process of seller in placing warning labels on their products, and producing labels but withholding memo was not act of good faith); Schlafly v. Schlafly, 33 S.W.3d 863 (Tex. Ct. App. 2000) (party blatantly misrepresented and mischaracterized the facts of the proceedings in his appellate brief, giving court of appeals good cause for ordering him to pay all costs of the appeal). Compare Philadelphia Ethics Op. No. 95-3 (1995) (where attorney knows client made false statement in deposition he has no obligation to disclose it unless it is on an issue material to the merits of the case; where the attorney did not elicit the false statement and does not submit the statement to a tribunal for any purpose, no obligation to correct it unless it is material); Kadri v. Johnson, 2005 U.S. Dist. LEXIS 37143 (W.D. Tenn. Dec. 16, 2005) (In Title VII action against Secretary of the Navy, the plaintiff’s untruthful testimony that he held a doctoral degree from the University of Texas, which he
subsequently recanted, did not evince an “unconscionable plan or scheme” designed to improperly influence the court, where the testimony did not pertain to a material issue of fact in the case, the jury did not rely on his falsehood to reach a verdict, since the plaintiff admitted, on the stand, that he did not hold a Ph.D., and there was no evidence that plaintiff colluded with his attorneys to present false testimony. Therefore, the court denied request for sanctions under the court’s inherent authority based on plaintiff’s untruthful testimony.; Tex. Ethics Op. 504 (1994) (duty of candor does not require defense counsel to correct mistaken or inaccurate statements made in court by a prosecutor where neither defense counsel nor defendant made any false statements to the court about the matter); Chaplin v. DuPont Advance Fiber Systems, 303 F. Supp.2d 766 (E.D. Va. 2004) (out-of-state attorney’s conduct in ghost-writing responsive pleadings, which were signed and filed by litigants, ostensibly proceeding pro se, warranted public reprimand).
disregarding court-imposed deadlines, orders, and other legal process. 289

289 See, e.g., Young v. Gordon, 330 F.3d 76 (1st Cir. 2003) (trial court properly dismissed case because plaintiff, having been forewarned of the likely consequences of noncompliance, failed to abide by a court order to appear for a deposition within seven days); Morrison v. International Programs Consortium, Inc., 240 F. Supp. 2d 53 (D.D.C. 2003) (defense counsel’s failure to appear for trial date in FLSA action warranted monetary sanctions against counsel pursuant to court’s inherent power and its statutory authority to impose sanctions against counsel for multiplying proceedings; counsel’s non-appearance was vexatious, reckless, deliberately indifferent and in bad faith, as evidenced by counsel’s initial claim of unawareness of date, despite evidence to the contrary, and counsel’s subsequent claim that he was entitled to await return order memorializing date); Byrd v. Reno, 1998 WL 429676 (D.D.C. 1998) (confronted with discovery deadline, counsel must either comply with obligation, seek a court order enlarging the time within which to comply, or stipulate with opposing counsel if such a stipulation does not interfere with the court’s scheduling order); Youn v. Track, Inc., 324 F.3d 409 (6th Cir. 2003) (trial court did not abuse its discretion in imposing sanctions on plaintiffs for failing to comply with order to produce requested financial statements, despite plaintiffs’ claim that statements never existed); Te-Te-Ma Truth Foundation-Family of URI, Inc. v. World Church of the Creator, 392 F.3d 248 (7th Cir. 2004) (Oppressive litigation conduct of defendant in trademark infringement action qualified case as exceptional under Lanham Act's fee-shifting provision, allowing trademark holder to receive award of reasonable attorney fees as prevailing party, given evidence that defendant purposely orchestrated campaign of harassment throughout the litigation which targeted trademark holder and its attorneys, that harassment was intended to force trademark holder and its attorneys to drop trademark claim and drive up costs of litigating case, that harassment involved explicit threats of violence, and that defendant set out to purposely flout district court's injunction and thus to purposely infringe holder's trademark.); Ramos v. Ashcroft, 371 F.3d 948 (7th Cir. 2004) (A brief must be tendered when due. If a party needs more time, a request for an extension must be filed in advance of the due date. If extra time has not been granted in advance, then the litigant must file its brief as scheduled); Tracinda Corp. v. Daimler Chrysler AG, 2005 U.S. Dist. LEXIS 6741 (D. Del. April 20, 2005) (Attorneys fees and costs in the amount of $556,061 awarded due to defendants’ failure to comply with discovery and scheduling orders. Although defendants did not act intentionally or in bad faith in withholding the documents in question from production, the documents were highly relevant to the issues raised throughout the litigation, yet they were produced 11 months after the close of discovery and on the eve of the last day of trial, which resulted in additional hearings on the late production and rescheduling of the remaining days of trial.); Molski v. Mandarin Touch Restaurant, 347 F. Supp.2d 860 (C.D. Cal. 2004) (Pre-filing order warranted declaring ADA plaintiff a vexatious litigant and requiring him to obtain district court’s leave before filing further ADA claims; plaintiff had filed hundreds of nearly identical Title III claims against restaurants and other entities as part of apparent scheme of systematic extortion, examination of complaints in aggregate revealed a clear intent to harass given repetition of same fact patterns and injuries, (continued...)
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and plaintiff revealed financial motive by raising state-law claims in addition to ADA claims, plaintiff was represented by counsel, and other sanctions would not adequately protect court and parties due to difficulty of determining vexatious nature of complaints when not viewed in the aggregate. Plaintiff’s “shotgun litigation” tactics “undermine both the spirit and purpose of the ADA.”); Molski v. Mandarin Touch Restaurant, 359 F. Supp.2d 924 (C.D. Cal. 2005) (later proceeding, same result); Stipe v. First Interstate Bank of Polson, 125 P.3d 591 (Mont. 2005) (Plaintiffs’ attempt to take a second run at issues previously determined by the district court and their repeated, unilateral and improper refusal to attend properly noticed depositions, justified an award of sanctions.); Barry v. Lindner, 81 P.3d 537 (Nev. 2003) (sanctions of $500 against attorney were warranted for attorney’s failure to follow rules of appellate procedure, where brief prepared by attorney made assertions that were not supported by citations to the record, attorney failed to provide adequate supporting law in brief, brief failed to comply with form requirements in that it was not double-spaced and the page numbers were handwritten); Internet Law Library, Inc. v. Southridge Capital Mgmt., L.L.C., 2003 WL 21537782, 55 Fed. R. Serv. 3d 1138 (S.D.N.Y. Jul. 8, 2003) (“harsh” sanction of dismissal warranted because plaintiffs’ lawyers showed “repeated and flagrant disregard for the court’s orders” when they attempted an end-run around restrictions on discovery with broad-ranging subpoenas); Sterling Promotional Corp. v. General Accident Ins. Co., 212 F.R.D. 464 (S.D.N.Y. 2003) (sanction of dismissal of complaint was warranted for repeated and deliberate evasion of deposition by plaintiff’s president and main witness and failure to comply with court orders during two-year period, during which president unilaterally failed to appear for scheduled depositions on three occasions, dishonoring court orders, and aborted two deposition sessions shortly after they began, resulting in five applications for dismissal and even more judicial conferences, where lesser remedies were inappropriate given president’s ongoing intransigence; imposition of $2,550 in attorneys fees as sanctions in addition to dismissal, assessed jointly against plaintiff and counsel, was appropriate for such conduct under Rule 37(b)(2) and under court’s inherent power), aff’d, 86 Fed. Appx. 441 (2d Cir. 2004); Douglas v. Victor Capital Group, 1997 WL 716912 (S.D.N.Y. Nov. 17, 1997) (plaintiff’s lawyer sanctioned for failing to meet deadlines: “A ‘no further extensions’ order means just that; it does not mean even a one business day extension, or that a ‘short’ extension can unilaterally be taken if it does not prejudice the other side. At a minimum, [the attorney] should have called this Court to seek an extension. He did not do so.”); Mid-Atlantic Constructors, Inc. v. Stone & Webster Construction, Inc., 231 F.R.D. 465 (E.D. Pa. 2005) (Sanctions warranted against defendant for serving a “proposed” subpoena past the discovery deadline, without notice to the plaintiff and without the court’s permission, where defendant’s conduct was intentional and undertaken in bad faith.); Vulcan Materials Co. v. Bowers, 2004 WL 2997852 (Tex. Ct. App. Dec. 29, 2004) (Trial court did not abuse its discretion in sanctioning trial counsel for violation of the court’s order on the motion in limine and its ruling during the course of the trial, even though the amount exceeded the maximum statutory fine for contempt of court, where the sanctions were based on the court’s inherent power to sanction.); Lawson v. (continued...)
or

(10) other dishonest or “sharp” practices.  

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Brown’s Home Day Care Ctr., Inc., 861 A.2d 1048 (Vt. 2004) (sanctions of $2000 against attorney affirmed based on evidence that attorney acted in bad faith in filing unsealed materials from a confidential mediation session with the court); Anderson v. Kunduru, 600 S.E.2d 196 (W. Va. 2004) (fairness dictated that sanction imposed on client for attorney’s failure to produce an expert witness report within court-ordered time frame should have been imposed on attorney rather than client; sanction was striking testimony of expert, failure to produce report was entirely fault of attorney, and there were other sanctions available to reduce cost and prejudice to defendants without denying plaintiff her day in court); Lahrichi v. Lumera Corp., 2006 U.S. Dist. LEXIS 1161 (W.D. Wash. Jan. 4, 2006) (In employment discrimination action where plaintiff alleged that defendants’ conduct exacerbated a preexisting neurological disorder, court sanctioned plaintiff for his failure to produce records relating to this issue and financial records. “[B]ecause Plaintiff has practically told this Court that he is disinclined to comply with discovery orders on these issues, the Court finds rather severe sanctions justified in this case.”). Cf. In re Sargent Karch, 1994 NLRB LEXIS 547, 314 NLRB No. 80 (1994) (Karch, attorney for respondent in pending unfair labor practice charges involving the National Football League, committed “aggravated misconduct” warranting suspension under section 102.44(b) of the Board’s Rules by giving copy of the transcript of testimony of a witness for the General Counsel to a prospective respondent witness in violation of the ALJ’s sequestration order).

280 See Flury v. Daimler Chrysler Corp., 427 F.3d 939 (11th Cir. 2005) ($250,000 personal injury award reversed and case dismissed due to plaintiff’s bad faith spoilation of evidence: “Plaintiff failed to preserve an allegedly defective vehicle in a crash worthiness case. The vehicle was, in effect, the most crucial and reliable evidence available to the parties at the time plaintiff secured representation and notified defendant of the accident. By the time plaintiff filed suit, years after the accident had taken place, plaintiff had allowed the vehicle to be sold for salvage despite a request from defendant for the vehicle’s location. For these reasons, we believe the resulting prejudice to the defendant incurable, and dismissal necessary.”); EEOC v. Asplundh Tree Expert Co., 340 F.3d 1256 (11th Cir. 2003) (EEOC violated its Title VII duty to conciliate racial harassment and retaliation dispute, warranting attorneys fee award as sanction, where, after 32-month investigation in which employer cooperated, EEOC sent far-reaching remediation proposal to employer that failed to identify any theory of liability, but provided only 12 days to respond, did not acknowledge response from employer’s retained attorney that expressed desire to resolve dispute out of court but arrived just beyond the 12-day deadline, immediately sent second letter terminating conciliation and announcing intent to sue, and sued 13 days later); Chavez v. New Mexico, 397 F.3d 826 (10th Cir. 2005) (Employer defendants were entitled to recission of settlement agreement in Title VII case where employees’ counsel (continued...)
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.; Sally Beauty Co., v.
Beautyco, Inc., 372 F.3d 1186 (10th Cir. 2004) (district judge did not violate settling parties’
attorneys’ due process rights when he assigned costs to attorneys on ground that they could have
alerted the court to the settlement in time to avoid the expense of requiring the attendance of
jurors in court the following morning; given the amount of costs taxed to counsel, the judge’s
explicit renunciation of an intent to sanction counsel, her warning to counsel to inform the court
of any settlement in time to apprise the jury, and the opportunity given to counsel to respond to
the assessment of costs at the hearing, counsel received all the process that was due); Lasar v.
Ford Motor Co., 399 F.3d 1101 (9th Cir.), cert. denied sub nom., Sutter v. Lasar, 126 S. Ct. 381
(U.S. 2005) (Civil contempt sanctions, including both monetary sanctions and a revocation of
defense counsel’s pro hac vice admission, were appropriate where counsel twice referred to
excluded evidence in his opening statement, based on district court’s finding that counsel
willfully violated the district court’s order concerning references to plaintiff’s alcohol use.);
Earthquake Sound Corp. v. Bumper Indus., 352 F.3d 1210 (9th Cir. 2003) (award of attorneys’
fees incurred by prevailing trademark infringement plaintiff in opposing defendant’s motion for
stay of enforcement and for waiver or reduction of supercedeas bond was not abuse of discretion;
motion was frivolous and filed in bad faith); Jackson v. Microsoft Corp., 78 Fed. Appx. 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 through 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); Martin v. Daimler
Chrysler Corp., 251 F.3d 691 (8th Cir. 2001) (Dismissal of action appropriate as sanction where
employee misrepresented during deposition whether she had been party to employment
discrimination suit against previous employer and failed to reveal in interrogatory and deposition
answers her prior treatment by mental health counselors.); Good Stewardship Christian Cir. v.
Empire Bank, 341 F.3d 794 (8th Cir. 2003) (affirming dismissal as a sanction for discovery
abuses; even though case was still at discovery stage, the district court docket contained over
200 entries despite overt warnings from the district court about the propriety of excessive
filings); Stevenson v. Union Pac. R.R. Co., 354 F.3d 739 (8th Cir. 2004) (district court did not
abuse discretion in imposing sanction of adverse inference jury instruction against defendant for
its prelitigation destruction of tape-recorded voice radio communications between train crew and
dispatchers on date of collision and track maintenance inspection records, pursuant to its routine
document retention policy, even though document retention policy was not unreasonable or
instituted in bad faith, where it was unreasonable and amounted to bad faith conduct for railroad
to adhere to its policy in light of its knowledge of collision and relevance of tape and records to
pending litigation); Kelly v. Golden, 352 F.3d 344 (8th Cir. 2003) (district court did not abuse its
(continued...)
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discretion in awarding attorneys fees to opponent under Mo. case law in case relating to rights on patent, on findings that party’s pleadings and correspondence “were meant to intentionally harm [opponent] professionally and personally,” pleadings and hearing reflected party’s consistent animosity toward opponent, and district court concluded that party’s conduct during course of lawsuit constituted “special circumstances” justifying award of attorneys fees); Dal Pozzo v. Basic Machinery Co., Inc., ___ F.3d ___, 2006 WL 2548250 (7th Cir. Sept. 6, 2006) (appeal brought by defendant's attorney challenging district court's imposition of sanctions against him for postsettlement obstruction was frivolous, thus attorney was required to pay opponents' reasonable fees and double costs on appeal as sanction for needlessly and frivolously multiplying proceedings; attorney did not argue that his behavior was defensible, on appeal attorney only raised procedural shortcomings under Rule 11 yet sanctions were not imposed under Rule 11, and attorney wasted time of opposing counsel and court by purporting to appeal enforcement of settlement only to abandon issue in reply brief.); Claiborne v. Wisdom, 414 F.3d 715 (7th Cir. 2005) (District court did not abuse its discretion when it imposed the full amount of defendants’ attorneys fees on plaintiff’s attorney—save the $1 that the plaintiff was to pay—where the attorney pursued a number of claims without any factual basis and engaged in evasive and dilatory tactics, such as filing an incomplete disclosure of witnesses, failing to file a response to defendants’ interrogatories and production requests, and failing to respond to defendants’ summary judgment motion.); County, Mun. Employees’ Supervisors’ & Foremen’s Union Local 1001 v. Laborers Int’l Union, 365 F.3d 576 (7th Cir. 2004) (appeal dismissed and law firms referred to state disciplinary commission after they filed notices of appeal and petition for leave to appeal on behalf of union after they had been fired by the trustee overseeing the union; court of appeal pronounced as “Twaddle!” firms’ argument that they had duties to the local and its members that superseded any instructions from the trustee. “These law firms have no responsibility at all, fiduciary or otherwise, for they have been sacked.”); Jimenez v. Madison Area Tech. College, 321 F.3d 652 (7th Cir. 2003) (No abuse of discretion in dismissing case under Rule 11 as sanction for submission of falsified documents.); Cleveland Hair Clinic, Inc. v. Puig, 200 F.3d 1063 (7th Cir. 2000) (attorney for defendants in federal lawsuit had a duty to disclose a state court lawsuit he had prepared and that was simultaneously being filed in an attempt to obtain records from the federal plaintiff after federal district court denied motion for temporary restraining order seeking those records, at hearing to decide whether the state plaintiff should be added as a party in the federal case and whether to enjoin any state action, despite contention that any duty to reveal the existence of the state court suit was outweighed by attorney’s duty to maintain the confidences of his clients in both actions); Banner v. City of Flint, 99 Fed. Appx. 29 (6th Cir.), cert. denied sub nom., Pabst v. City of Flint, 543 U.S. 926 (2004) (attorney representing plaintiff properly ordered to pay $15,000 to defendant city and $5,000 to one of the city’s employees, Rose, as sanction for attorney’s improper use of confidential information obtained from Rose in Banner’s reverse discrimination action against city; attorney conducted initial consultation with Rose to discuss Rose’s potential employment claim against (continued...
city in which Rose shared confidential information with attorney about her job, then attorney later conducted deposition in Banner’s reverse discrimination lawsuit in which Rose divulged confidences, but attorney had not explained to Rose availability of attorney-client privilege, when it could be asserted, or that only Rose, as the former client, could waive it); Skidmore Energy, Inc. v. KPMG, Inc., 455 F.3d 564(5th Cir. 2006) (Rule 11 sanctions affirmed based on both the legally frivolous nature of the suit and the obvious lack of evidentiary support for the sensational allegations in the complaint); Toon v. Wackenhut Corr. Corp., 250 F.3d 950 (5th Cir. 2001) (where plaintiffs’ attorneys negotiated settlement containing a confidentiality clause, then publicly exposed the terms of the settlement by filing an unsealed motion to enforce, the court may change the percentage of fees in contingency fee agreement and impose other penalties using its inherent power to sanction); Dube v. Eagle Global Logistics, Inc., 314 F.3d 193 (5th Cir. 2002) (Appellate counsel sanctioned over $70,000 for filing brief containing specious arguments and grossly distorting the record by using ellipses to misrepresent the trial court’s rulings.); Beam v. Bauer, 88 Fed. Appx. 523 (3d Cir. 2004) (Rule 11 sanctions against contractor was not abuse of discretion, where most of contractor’s claims had been raised in prior suit, contractor filed second suit while first suit was still on appeal, and appellate court found in favor of defendant on nearly identical claims in first suit); In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 278 F.3d 175 (3d Cir. 2002) (totality of conduct by attorney representing classes of policyholders, who objected to settlement of class action against insurer, evidenced pattern of obfuscation and mean spiritedness warranting sanctions under section 1927 and under court’s inherent powers; attorney filed motion to recuse judge without colorable basis and in bad faith, attorney filed untimely motion to vacate order appointing fee examiner after initially approving appointment, attorney released copies of motion to press before providing copies to judge, and attorney filed affidavits asserting that judge had engaged in ex parte communications solely to embarrass judge) (certain specific sanctions reversed for lack of specific notice); Flatley v. Mauro, 39 Cal. 4th 299 (2006) (anti-SLAPP statute did not bar action by entertainer against defendant attorney for civil extortion, intentional infliction of emotional distress and wrongful interference with economic advantage, where defendant’s demands constituted criminal extortion as a matter of law; defendant’s letter and follow-up phone calls threatened to publicly accuse plaintiff of rape and other specified violations of law unless he “settled” by paying a minimum of $1 million, of which defendant would receive 40%, warned that a public record would subject plaintiff to scrutiny by the IRS and other U.S. and British agencies and by the “media worldwide,” and threatened that he knew of plaintiff’s tour dates and that he would publicize the rape story every place plaintiff goes “for the rest of his life.” “That the threats were half-couched in legalese did not disguise their essential character as extortion.”). Moser v. Bret Harte Union High School Dist., 366 F. Supp.2d 944 (E.D. Cal. 2005) (School district and its counsel engaged in serious misconduct in the course of an appeal of an administrative decision, which included making frivolous objections, disputing undisputed facts, making critical misstatements, and mischaracterizing applicable law–lead counsel even admitted (continued...)
34 instances of such “mistakes. Counsel ordered to undergo 20 hours of ethics training and her firm was required to provide at least 6 hours of training for all of its associates and shareholders.; Pollock v. University of S. Cal., 112 Cal. App. 4th 1416 (2003) (former professor at private university and her counsel were subject to sanctions for filing frivolous appeal of judgment against professor, in suit arising from professor’s termination from her tenured position; gravamen of professor’s claims was virtually identical to, and in part verbatim duplicate of, professor’s earlier lawsuit against the same parties, which had become final months before the notice of appeal was filed in present case, and other published cases discussed and rejected many of the same arguments raised by the professor, including one case in which another professor had been represented by the same counsel as the professor in the present case); Briggs v. McWeeny, 260 Conn. 296, 796 A.2d 516 (Conn. 2002) (sanction of disqualification of attorney from representing school district not disproportionate to attorney’s violation of ethical rules, where attorney attempted to suppress relevant, discoverable engineering report to opposing parties that was inimical to district’s interests in litigation, attempted to prevent repair contractor who had commissioned report from disclosing it, and attempted to subvert the discovery process); Young v. Office of the United States Senate Sergeant at Arms, 217 F.R.D. 61 (D.D.C. 2003) (dismissal of action appropriate sanction where plaintiff engaged in bad faith abuse of litigation process through witness tampering, suborning perjury, and repeated refusal to comply with employer’s discovery requests in violation of court order); Cobell v. Norton, 213 F.R.D. 16 (D.D.C. 2003) (counsel for government would be personally sanctioned for repeatedly groundlessly asserting attorney-client privilege as ground for instructing official not to answer question whether co-counsel had made misrepresentations to the district court regarding official’s availability for deposition, ignoring special master’s finding that such questions were proper, and for asserting, without factual basis, that the court had only permitted the deposition to proceed based on its assumption that plaintiff’s questions would be limited to an inquiry into the facts that go to the creation of plaintiffs’ plans; “[T]he conduct of defense counsel in this matter makes a mockery of all that the Department of Justice stands for.”); Lazar v. Mauney, 192 F.R.D. 324 (N.D. Ga. 2000) (defense counsel acted unprofessionally and dishonestly in secretly retaining a copy of an inadvertently disclosed letter from plaintiff to his attorneys, knowing it was allegedly privileged, and publishing it in a public proceeding without seeking guidance from the court); Gap v. Puna Geothermal Venture, 104 P.3d 912 (Hawaii 2004) (Property owner’s attorney failed to conduct reasonable investigation before filing pretrial statement, 13 months after filing complaint, listing two doctors as expert witnesses on medical causation and, therefore, Rule 11 sanctions were warranted. The lawyer admitted that he did not provide the first doctor with medical records before including her in his pretrial statement, and had not spoken to the doctor for over a year when he listed her as an expert witness (the doctor’s heavy work schedule ultimately prevented her from serving as an expert). Had the attorney contacted the doctor at some point prior to the filing, he would have been better informed as to the doctor’s availability and willingness to testify in the case. Similarly, at the time he filed the pretrial...
statement, the attorney had not spoken directly with the second doctor, but instead had relied on
his client and the doctor’s office manager to relay information, and the second doctor ultimately
concluded he was not qualified to testify on medical causation. Case remanded for
redetermination of sanctions since sanctions based on other actions by the attorney, such as filing
the complaint and responses to discovery requests, were found to be an abuse of discretion.);
2, 2002) (sanction of dismissal of defendant’s counterclaims, with prejudice, and award of
reasonable attorneys fees and expenses to opposing party was warranted; lesser sanction would
be insufficient, defendant sent opposing counsel threatening letter to disrupt action, provided
false testimony under oath at deposition regarding letter, letter was sent following magistrate’s
warning about impropriety of sending anonymous letters, and letter expressed contempt for
directive by saying, “You can hand this over to the federal authorities too!”); In re Cook, 932
So.2d 669 (La. 2006) (Suspension for three years, with all but 18 months deferred, was
appropriate sanction for attorney's misconduct in filing repetitive and unwarranted pleadings in
ongoing civil rights litigation and making frivolous and harassing claims for discovery against
third persons not involved in the litigation, where aggravating factors included pattern of
misconduct and refusal to acknowledge the wrongful nature of conduct, and mitigating factors
included the absence of a prior disciplinary record, personal or emotional problems, cooperative
attitude toward disciplinary proceedings, and delay in the disciplinary proceedings.); United
Dec. 13, 2005) (Sanctions awarded under court’s inherent authority based on plaintiff’s bad faith
litigation conduct in pursuing a factually baseless retaliation claim as part of a multi-million
dollar lawsuit, intentionally concealing multiple tape recordings, including crucial minute tapes,
and filing intentionally false affidavits on the minutes issue, all for an “improper purpose” to
harass and extort plaintiff’s former employer.); Ass’n of Holocaust Victims for Restitution of
Artwork & Masterpieces v. Bank Austria Creditanstalt AG, 2005 U.S. Dist. LEXIS 17411 (S.D.
N.Y. Aug. 19, 2005) (Sanctions awarded against attorney for plaintiffs in amount of all of
defendant’s litigation costs and fees and $5,000 fine, due to attorney’s bad faith based on his
filing scattershot pleadings, his disregard for court and its rules, his flagrant misrepresentations
of critical facts in the amended complaint, his attempt to circumvent a comprehensive settlement
that released defendant from the type of claims being initiated in this action, and his attempt to
profit by buying into the litigation.); American Int’l Life Assurance Co. v. Vasquez, 2003 WL
548736 (S.D.N.Y. Feb. 25, 2003) (defense counsel’s unreasonable issuance of subpoena on
behalf of court, compelling dismissed interpleader plaintiff’s counsel to appear and produce
documents, was sanctionable; information sought was protected by attorney-client privilege,
which plaintiff had previously asserted, and subpoena was issued only one business day before
trial); 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
(continued...)

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adversary, making use of client’s reckless accusations against judges, making scurrilous remarks to judge in motion hearing, and disregarding court directive to make no use of documents in litigation and to secure all copies was conduct warranting two-year suspension from practice of law; *Lipin v. Bender*, 644 N.E.2d 1300, 1304 (N.Y. App. Div. 1994) (copying papers from opposing counsel’s file folders during a break in discovery). *See also Murphy v. Housing Auth. & Urban Redevel. Agency*, 158 F. Supp. 2d 438 (D.N.J. 2001) (employee’s attorney unreasonably and vexatiously multiplied proceedings in employee’s Title VII reverse discrimination action and employee’s wife’s action for loss of consortium, warranting award of attorneys fees as a sanction under 28 U.S.C. § 1927; employee had received multiple promotions within a relatively short period of time, and was paid salary dictated by employment manual, and federal and state law were clear that loss of consortium damages were not available based on an underlying claim of discrimination), *aff’d*, 51 Fed. Appx. 82 (3d. Cir. 2002), *cert. denied sub nom. Van Syoc v. Housing Auth. & Urban Redevel. Agency*, 124 S. Ct. 68 (2003); *Lipin v. National Union Fire Ins. Co.*, 202 F. Supp. 2d 126 (S.D.N.Y. 2002) (sanctions warranted against former employee and her attorney under Rule 11 where plaintiff should have known her claims were barred by res judicata and collateral estoppel, and that they were reformulated previously unsuccessful conspiracy theories); *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); *In re Anonymous Member of S.C. Bar*, 552 S.E.2d 10 (S.C. 2001) (supervisory attorney can be disciplined for failing to make reasonable efforts, even if he did not know of supervised attorney’s inappropriate behavior at deposition—including improper off-the-record conferences with deponent to assist him in framing an answer, to calm down a nervous client or to interrupt the flow of the deposition, objections to questions just because he did not understand question, and stating for the record his interpretation of questions to suggest an answer to deponent—and partner must take action after discovering supervised attorney’s inappropriate behavior); *Howell v. Texas Workers’ Comp. Comm’n*, 143 S.W.3d 416 (Tex. Ct. App. 2004) (trial court did not abuse its discretion by imposing monetary sanctions under its inherent power against health care provider’s attorneys, in health care provider’s action against workers’ compensation commission and workers’ compensation insurers disputing adequacy of administrative review process for fee disputes and independent review organization fees, for carrying out a vexatious litigation campaign by filing in less than two months over 700 lawsuits regarding medical payment disputes; attorneys were aware of administrative process for medical payment disputes, attorneys drafted petitions for the lawsuits and record demonstrated that some of the lawsuits were factually groundless and others concerned claims that had already been settled); *In re Hasbro*, 97 S.W.3d 894 (Tex. Ct. App. 2003) (sanctions warranted for conduct of petitioner’s counsel in

(continued...)
misrepresenting facts to the court of appeals in petition for writ of mandamus, where counsel filed a verified petition, making it appear that trial court both refused to conduct a discovery hearing and turned potentially privileged documents over to opposing party, whereas transcripts, which were not included with the petition, reflected not only a hearing, but counsel’s lack of objections to the discovery procedure, and court of appeals was requested to provide emergency relief based on such representations; *Skepnek v. Mynatt*, 8 S.W.3d 377 (Tex. Ct. App. 1999) (trial court sanctions of $30,000 affirmed against lawyer who attached a client’s false affidavit to two special appearance motions, knowing that the statements it contained were contradicted by deposition testimony by the affiant and another witness); *American Airlines, Inc. v. Allied Pilots Ass’n*, No. 4-90-9860A (N.D. Tex. Feb. 20, 1991) (falsely representing that declarant had signed declaration) (criminal contempt sanction reversed; all other sanctions upheld), aff’d in part and rev’d in part, 968 F.2d 523 (5th Cir. 1992); *FDIC v. Hurwitz*, 384 F. Supp.2d 1039 (S.D. Tex. 2005) (FDIC ordered to pay over $72 million in sanctions, based on the court’s finding that the FDIC attacked the defendant in a perverse combination of personal and political hostility; the purpose of the suit was to bring the forces of the national government to bear on a citizen in order to achieve a result that the agency had not authority to accomplish. The defendant and his two companies would recover its costs because the record revealed that there were corrupt individuals with a corrupt agency with corrupt influences on it bringing the litigation.); *Tex. Ethics Op. 355* (1971) (an attorney should not advise an opposing party represented by counsel as to the law involved in the controversy through the guise of a deposition); *Kocher v. Oxford Life Ins. Co.*, 602 S.E.2d 499 (W. Va. 2004) (trial court ruling imposing sanctions supported by record where a sophisticated corporation deliberately lied to a litigant without his counsel’s knowledge, and improperly sought to influence him to settle the case; however, although trial court could properly as a sanction authorize a jury to award punitive damages against defendant, it could not properly require such an award); ABA Informal Ethics Op. No. 84-1505 (1984) (although decision of intermediate appellate court concerning recently enacted statute was not binding in trial court, attorney had duty to disclose it). *Cf. United States v. Shaffer Equip. Co.*, 158 F.R.D. 80 (S.D. W. Va. 1994) (violations of discovery rules and duty of candor to court by government attorneys, particularly repeated obstructions of defendants’ attempts to uncover perjury by EPA’s on-scene coordinator, who had substantially misrepresented his credentials and given perjured testimony in other matters, and attorneys’ failure to reveal what it knew of misrepresentations once they learned of it, warranted sanctions requiring attorneys to pay from their personal funds, respectively, $2,000 and $2500 into Superfund). *But see* ABA Formal Ethics Op. No. 94-387 (1994) (attorney has no ethical duty to inform an opposing party in negotiations that the statute of limitations has run; to the contrary, it would be unethical to reveal such information without the client’s consent); *Boca Burger, Inc. v. Forum*, 912 So.2d 561 (Fla. 2005), reversing in relevant part Forum v. Boca Burger, Inc., 788 So.2d 1055 (Court of appeals had no authority to directly impose sanctions for the conduct of defense counsel and defendant in the trial court and could only impose sanctions for conduct occurring during the appeal; case (continued...
This is consistent with the emerging trend among courts to assert their “inherent power”
to regulate the practice of law, an authority rooted in constitutional provisions governing the
separation of government power.\textsuperscript{291} This inherent power to impose sanctions to punish abuse of

\textsuperscript{290}(...continued)
remanded to court of appeals to consider whether it will impose sanctions based on conduct
occurring during the appeal and/or whether to remand to the trial court to determine whether to
impose sanctions for conduct that occurred in that court.); \textit{Gilbert v. DaimlerChrysler Corp.}, 685
N.W.2d 391 (Mich. 2004) (excessiveness of $21 million verdict in employee’s sexual
harassment suit was attributable to effect of her counsel’s efforts to cause jury to act on passion
and prejudice, and thus employer was entitled to a new trial; counsel deliberately tried to
provoke the jury by equating employee to a Holocaust concentration camp survivor, which
provocation was exacerbated by employer’s recent merger with German company, counsel
intimated that employee had been physically harmed, when there was no record of such an
injury, by equating plaintiff with a dog that had been kicked and beaten, counsel played on
prejudice against corporations by arguing that employer thought it was above the law, and
counsel deliberately and repeatedly used language calling for punitive damages, which were not
discriminated against “Confederate Southern American” employees on the basis of national
origin, race and religion did not have reasonable evidentiary support and thus attorney was
subject to Rule 11 sanctions, even if claim was not filed in subjective bad faith, where employees
did not suffer adverse employment action, employees had never requested accommodation for
their religious beliefs, and complaint failed to aver any disparate treatment on the basis of race);
\textit{Compaq Computer Corp. v. Ergonome Inc.}, 387 F.3d 403 (5\textsuperscript{th} Cir. 2004), \textit{cert. denied}, 125 S.Ct.
1742 (2005) (order deeming book’s author to be alter ego of corporation she formed to publish
had market her copyrighted book as sanction for repeated discovery violations during litigation
of copyright infringement action was not abuse of discretion; author and corporation had
engaged in delaying tactics to frustrate alleged infringer’s alter ego discovery, and result of the
sanction, author’s personal liability for alleged infringer’s attorney fees, flowed directly from the
finding of alter ego).

\textsuperscript{291} \textit{See, e.g., Chambers v. NASCO, Inc.}, 502 U.S. 32, 41-42 (1991) (“[I]f in the informed
are up to the task, the court may safely rely on its inherent power.”); \textit{First Bank of Marietta v. Hartford Underwriters Ins. Co.}, 307 F.3d 501 (6th Cir. 2002) (district court could properly
invoke its inherent power to sanction party for misconduct, since Rule 11 did not address party’s
noncompliance with discovery orders, delays in providing discovery and withholding material
evidence and Rule 11 conduct was intertwined with other misconduct); \textit{In re Nalls}, 123 Fed.
Appx. 232 (5\textsuperscript{th} Cir. 2005) (“It is beyond dispute that a federal court may suspend or dismiss an
attorney as an exercise of the court’s inherent powers.”); \textit{Chaves v. M/V Medina Star}, 47 F.3d
(continued...)
the judicial process exists even under circumstances where Rule 11 and 28 U.S.C. § 1928 do not apply. 292

291 (...continued)
153, 156 (5th Cir. 1995) (though courts have inherent authority to sanction, such authority must be exercised with restraint and caution); City of Gary v. Major, 822 N.E.2d 165 (Ind. 2005) (Authority of a court to sanction a party for contempt is not a matter of legislative grace; rather, among the inherent powers of the court is that of maintaining its dignity, securing obedience to its process and rules, rebuking interference with the conduct of its business, and punishing unseemly behavior.); 155 N. High, Ltd. v. Cincinnati Ins. Co., 72 Ohio St. 3d 423 (1995) (A trial court has the duty and responsibility to regulate the conduct of the attorneys who appear before it); Pan Am. Grain Mfg. Co. v. Puerto Rico Ports Auth., 193 F.R.D. 26 (D.P.R. 2000) (plaintiff’s failure to respond to defendant’s discovery requests warranted imposition of sanctions pursuant to the court’s inherent powers); Kings Park Apartments, Ltd. v. National Union Fire Ins. Co., 101 S.W.3d 525 (Tex. Ct. App. 2003) (trial court did not abuse its discretion in imposing sanctions under its inherent power based on allegations that insurer instructed a paralegal to steal documents from the chambers of the special trial judge). See also State Bar of Tex. v. Gomez, 891 S.W.2d 243 (Tex. 1994) (court has inherent power to regulate practice of law independent of any statutory constitutional provision); Featherstone v. Schaerr, 34 P.3d 194 (Utah 2001) (trial court had authority to address attorney’s professional misconduct in context of litigation by invoking its inherent power to regulate the conduct of those practicing before it); Beard v. N.C. State Bar, 357 S.E.2d 694 (N.C. 1987); Couch v. Private Diagnostic Clinic, 554 S.E.2d 356 (N.C. App. 2001) (inherent authority encompasses not only the power but also the duty to discipline attorneys, who are officers of the court, for unprofessional conduct); New Mexico State Highway & Transp. Dep’t v. Baca, 1995 N.M. LEXIS 178 (1995) (same); Carter v. Payer, 1994 Ohio App. LEXIS 5129 (1994) (same); Bergeron v. Mackler, 225 Conn. 391, 397 (1993) (trial court has authority to regulate the conduct of attorneys and has a duty to enforce the standards of conduct regarding attorneys). Cf. Gadda v. Ashcroft, 377 F.3d 934 (9th Cir. 2004) (court of appeals has inherent authority to suspend or disbar attorneys who perform incompetently in federal immigration proceedings, and after receiving notice of the attorney’s suspension from practice by state bar court); Kohlmayer v. National R.R. Passenger Corp., 124 F. Supp. 2d 877 (D.N.J. 2000) (attorney’s pattern of uncivilized behavior in past actions, including misconduct resulting in mistrials as well as belligerent conduct toward opposing counsel, warranted denial of attorney’s application for pro hacie vice admission to federal district court, even though no disciplinary proceedings against attorney had proceeded to conclusion and even though attorney was member in good standing of foreign state’s bar).

292 See, e.g., McCready v. EBay, Inc., 453 F.3d 882 (7th Cir. 2006) (Exercise of inherent power of Court of Appeals to sanction was warranted, in way that was tailored to pro se litigant's abuse of judicial process with frivolous litigation, where litigant's actions resulted in filing of five frivolous lawsuits, review of dockets of district courts in circuit revealed that litigant had (continued...)

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However, some appellate courts have cautioned that there are outer limits to a trial

292(...continued)

engaged in pattern of similar behavior against other innocent defendants, and result had been harassment of opposing parties, insult to judicial officers, and waste of limited and valuable judicial resources.); *Dux S.A. v. Megasol Cosmetic GmbH*, 2006 U.S. Dist. LEXIS 395 (S.D. N.Y. Jan. 9, 2006) (“When a motion is brought without legal or factual justification, indeed contrary to facts, many documented, and there being no colorable claim discernable, the bad faith for that motion not only can be inferred, but is obvious, and sanctions are warranted under either 28 U.S.C. § 1927 or this Court’s inherent powers.”).
court’s “inherent powers,”293 to the enforceability of aspirational civility standards,294 and

293 See Revson v. Cinque & Cinque, 221 F.3d 71 (2d Cir. 2000) (reversing $50,000 award of sanctions) (award of sanctions under trial court’s inherent powers requires both clear evidence that the challenged actions are entirely without color, and are taken for reasons of harassment or delay or for other improper purposes, and a high degree of specificity in the factual findings of the lower courts; a claim is colorable when it has some legal and factual support, considered in light of the reasonable beliefs of the individual making the claim); Oliveri v. Thompson, 803 F.2d 1265, 1272 (2d Cir. 1986) (invocation of court’s inherent power to sanction requires a finding of bad faith); Maynard v. Nygren, 332 F.3d 462 (7th Cir. 2003) (“There is no authority under the Rules or under the inherent powers of the court to sanction attorneys for mere negligence.”); United States v. Johnson, 327 F.3d 554 (7th Cir. 2003) (disallowing sanction under court’s inherent powers where there was no bad faith); Byrne v. Nezhat, 261 F.3d 1075, 1106 (11th Cir. 2001) (affirming Rule 11 sanctions against attorney but vacating sanctions awarded against plaintiff; “Because the court’s inherent power is so potent, it should be exercised ‘with restraint and discretion.’”); Cooper Tire & Rubber Co. v. McGill, 890 So. 2d 859 (Miss. 2004) (under rules of civil procedure and the inherent power to protect the integrity of its process, trial court has broad authority to impose sanctions for discovery violations and violations of its orders; however, sanctions of $10,000 against defendant for violating discovery order requiring it to produce or allow inspection of documents reversed because it was a constructive criminal contempt—purely punitive fine which would be paid to the trial court and did not involve rights of plaintiffs or other private parties—therefore, it could not be imposed without procedural safeguards, including that the citing judge recuse himself from conducting the contempt proceeding involving the charges); United Artists Theatre Circuit, Inc. v. Sun Plaza Enterprise Corp., 352 F. Supp.2d 342 (E.D. N.Y. 2005) (Defendant’s motion for sanctions pursuant to the court’s inherent power denied despite defendant’s argument that the plaintiff movie theatre company’s only motivation for filing the complaint was to tie up the site in litigation to deter competitors from developing the property and that plaintiff filed a Rule 41 motion for voluntary dismissal once the lis pendens plaintiff had filed on the site had expired and after years of litigation, where the complaint was not without a colorable basis in fact, there was no evidence to suggest that plaintiff’s sole motive in filing suit was to deter development of the site by competitors and plaintiff had plausible good faith reasons for moving to dismiss the complaint when it did (its financial inability to continue the litigation as evidenced by the fact that the motion closely followed plaintiff’s bankruptcy filing).) Mathias v. Jacobs, 167 F. Supp. 2d 606 (S.D.N.Y. 2001) (magistrate erred in imposing sanctions under court’s inherent power against defendant’s counsel for taking the deposition of prospective defense witnesses; depositions of witnesses were relevant to asserted defenses and taking of the deposition of one witness did not become sanctionable just because counsel did not reach the issue during the actual deposition); New York v. Solvent Chem. Co., 210 F.R.D. 462 (W.D.N.Y. 2002) (“[T]he bad faith standard [for invoking the court’s inherent power] is not easily satisfied in the Second Circuit.”); Walker v. Ferguson, 102 P.3d 144 (Okla. 2004) (Trial court could not order counsel (continued...)

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perhaps even

its ability to sanction parties under Rule 11 and other procedural provisions.\textsuperscript{295}

\textsuperscript{293}(...continued)

for plaintiffs in personal injury action to pay attorneys fees to defendant as sanction for counsel’s
causing a mistrial by mentioning in opening statement that defendant driver had been convicted
of driving under the influence following the collision giving rise to the action, where the trial
court did not find that counsel’s conduct constituted bad faith or oppressive conduct, as required
for an award of attorney’s fees as sanctions under the court’s inherent or equitable power to
impose such sanctions.); \textit{State ex rel. Tal v. City of Oklahoma City}, 61 P.3d 234 (Okla. 2002)
(“[T]he inherent power was not meant to be a mechanism to sanction or punish parties or their
attorneys for raising novel theories or espousing unpopular causes that are neither baseless nor
Supp.2d 340 (S.D. N.Y. 2005) ( Arbitrator exceeded his authority in imposing monetary
sanctions where neither the parties nor the rules of arbitration granted the arbitrator such
authority and the arbitrator did not have “inherent authority” to impose such sanctions.)

\textsuperscript{294} \textit{See Carnival Corp. v. Beverly}, 744 So. 2d 489 (Fla. Dist. Ct. App. 1999) (although
courts have inherent authority to sanction attorney misconduct, including disqualification, the
trial court abused its discretion in disqualifying counsel because it did not provide clear and
unambiguous directions to counsel concerning the conduct requirements at trial); \textit{In re Lerma},
144 S.W.3d 21 (Tex. Ct. App. 2004) (sanctions for filing an allegedly misleading appendix were
not warranted against mandamus petitioner who included in his mandamus appendix a void
dismissal order which the trial court signed and faxed to the parties but never filed; although
Lawyer’s Creed requires lawyers to fairly portray the record on appeal, giving petitioner the
“benefit of the doubt” in a decidedly close question, court would exercise its discretion by
deciding to impose sanctions); \textit{Continental Carbon Co. v. Sea-Land Serv., Inc.}, 27 S.W.3d 184
(Tex. Ct. App. 2000) (Lawyer’s Creed provision requiring that a lawyer notify opposing counsel
regarding his intent to take a default judgment did not trigger the court’s inherent powers, and
thus was not enforceable by the courts, so as to require plaintiff that properly served defendant
with citation on a sworn account to give further notice).

\textsuperscript{295} \textit{See In re Pennie & Edmonds L.L.P.}, 323 F.3d 86 (2d Cir. 2003) (the mental state
applicable to liability for sanctions under Rule 11 initiated by motion is objective
unreasonableness, i.e., liability may be imposed if the lawyer’s claim to have evidentiary support
is not objectively reasonable; that standard is appropriate in circumstances where the lawyer
whose submission is challenged by motion has the opportunity, afforded by the “safe harbor”
provisions, to correct or withdraw the challenged submission). \textit{See also Brickwood Contractors,
Inc. v. Datanet Eng’g, Inc.}, 369 F.3d 385 (4th Cir. 2004) (district court committed plain error in

(continued...)
For example, in *Revson v. Cinque & Cinque*, the trial court imposed $50,000 in sanctions against an attorney (Burstein) who brought suit against his client’s former attorney and law firm alleging fraudulent billing practices. The trial court itemized eleven tactics of Burstein that it found to be “offensive and overly aggressive,” and “clearly and unmistakably ‘beyond the pale:’”

(1) writing a letter to opposing counsel threatening to “tarnish” his reputation and subject him to the “legal equivalent of a proctology exam;”

(2) making a sham settlement offer and setting an unreasonable deadline and then immediately filing suit;

(3) publicly accusing Cinque of fraud without any concrete evidence to support the claim;

(4) threatening to interfere with opposing firm’s other clients, including (i) conducting an investigation to identify those clients, (ii) contacting one or more of the firm’s former clients, and (iii) seeking permission to send a letter to all the firm’s clients to inquire as to “experiences, good or bad,” with the firm’s billing practices;

(5) serving overly broad subpoenas, including a subpoena for all of the firm’s banking records and even a subpoena seeking records from the golf course where Cinque played golf;

(6) threatening to add a RICO claim;

(7) threatening to sue Cinque individually and to seek discovery of Cinque’s personal finances;

(8) threatening to send a letter to the court accusing the firm of criminal conduct if it did not capitulate to his client’s demands;

(9) making good on his threat to “tarnish” Cinque’s reputation by contacting a reporter to influence him to write a story regarding the litigation;

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*(...continued)*

imposing Rule 11 sanctions against plaintiff when defendant failed to comply with safe harbor provision of Rule 11 in making motion for sanctions; defendant did not seek sanctions until after summary judgment had been granted against plaintiff and service of motion and its filing were accomplished without giving plaintiff requisite 21-day notice).

296 221 F.3d 71 (2d Cir. 2000).

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(10) engaging in unfair tactics at trial, including cross-examining Cinque in an unfair manner; and

(11) repeatedly attacking Cinque in an offensive and demeaning fashion, including calling Cinque “a lawyer who . . . has acted in a manner that shames all of us in the profession,” “a disgrace to the legal profession,” and an example of “why lawyers are sometimes referred to as snakes,” and accusing Cinque of “engag[ing] in the type of mail fraud that has led to the criminal conviction of other attorneys,” being so “desperate for money he resorted to . . . extortion,” and being “slimy.”

The trial court in awarding sanctions concluded that, “[a]lthough an attorney must represent his client zealously, he cannot be a zealot.”

Despite the trial court’s characterization of Burstein’s conduct as “Rambo tactics,” the Second Circuit reversed, finding that none of Burstein’s actions, individually or in the aggregate, support the sanctions imposed. With respect to Burstein’s letter’s reference to the legal equivalent of a “proctology exam,” although the court found the reference repugnant, offensive and distinctly lacking in grace and civility, it was not sanctionable, since, it was “regrettably, reflective of a general decline in the decorum level of even polite public discourse.” The threats to “tarnish” Cinque’s reputation was not a basis for sanctions since an attorney is entitled to warn the opposing party of his intention to assert colorable claims, as well as to speculate about the likely effect of those claims being brought. Similarly, a court’s steps to deter attorneys from, or to punish them for, speaking to the press have serious First Amendment implications. Burstein’s threat to bring a RICO suit was not actionable, because Burstein did not assert the claim after being properly enlightened as to the firm’s billing practices. Burstein’s threat to interfere with clients of the firm was also not sanctionable, since his investigation consisted simply of an on-line search and Burstein made no attempt to contact the firm’s current clients when permission to do so was denied. Burstein’s reference to Cinque as a “snake” was not sanctionable: “although likening an attorney to a member of the animal kingdom may well be

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298 Id. at 79 (referencing news reports describing the Mayor of New York addressing a political from which he would preferred to be absent as a place where he could get a “virtual colonoscopy”).

299 Id. at 80, citing Sussman v. Bank of Israel, 56 F.3d 450, 459 (2d Cir.1995) (reversing award of sanctions).

300 Id., quoting Sussman, 56 F.3d at 459.
opprobrious, such colorful troupes are not necessarily injudicious discourse." Burstein’s personal characterizations of Cinque and his conduct was also not sanctionable in part because Cinque was representing his own firm as a party and his own conduct as counsel to Revson was the subject of Revson’s claims. In sum, the Second Circuit reversed, concluding that none of Burstein’s conduct relied upon by the trial court justified the award of sanctions. As one court characterized the Revson decision:

Any fair assessment of [the conduct of the lawyer in Revson] would concur that the lawyer’s extreme language and tactics there sank as close to the threshold of the gutter as imaginable and still escape judicial sanctions. How much lower such conduct could have descended before becoming punishable is difficult to fathom. Suffice it to say that Revson sets the low water mark defining the

301 Id. at 82.

302 Id. Compare Thomas v. Tenneco Packaging Co., 293 F.3d 1306 (11th Cir. 2002) (district court did not abuse its discretion by imposing sanctions against employee’s attorney pursuant to its inherent powers, upon finding of bad faith based on demeaning statements about employer’s attorney contained in documents submitted to court; documents were saturated with personal invective concerning employer’s attorney’s physical traits and demeanor, attacked employer’s attorney’s fitness as member of bar, contained thinly veiled physical threats, and leveled generalized and conclusory accusations of racism amounting to nothing more than race-baiting); Whitehead v. Food Max of Miss., Inc., 332 F.3d 796 (5th Cir. 2003) (en banc), cert. denied sub nom., Minor v. Kmart Corp., 540 U.S. 1047 (2003) (district court did not abuse its discretion in imposing sanctions for judgment creditors’ attorneys’ improper purposes in obtaining a writ of execution, namely, to embarrass the judgment debtor and to promote himself; district court spoke with counsel, including the sanctioned attorney, on the day of the incident and was quite familiar with the parties and litigants, attorney’s execution attempt followed his improper conduct at trial, and attorney’s conduct was exceptional, in that, just 3 days after disposition of post-trial motions, and with significant time remaining for judgment debtor to appeal the judgment and post a supersedeas bond, attorney obtained the execution writ, invited the media to one of the judgment debtor’s K mart retail stores to execute judgment accompanied by United States marshals and in plain view of its customers and employees, and made improper comments to the media regarding the case, judgment debtor, and judgment debtor’s willingness to satisfy the judgment, and where there was not enough cash at the store to satisfy the $3.5 million judgment, and execution was unnecessary to secure the judgment, as the judgment constituted a lien against judgment debtor’s property in the state).
ethical and professional behavior on the part of an attorney that passes muster immune from discipline.303
B. Incivility/Lack of Professionalism by Judges.

Appellate courts are also becoming increasingly aware of (and less tolerant of) trial judges’ hostile treatment of, and meddlesome interference with, counsel.304

303 (...continued)

sanction shareholder for sending prelitigation letters airing grievances and threatening litigation if they were not resolved; shareholder had a good faith belief that his claim had merit and that additional lawsuits could be brought against defendant).

304 See, e.g., Nationwide Mut. Fire Ins. Co. v. Ford Motor Co., 174 F.3d 801 (6th Cir. 1999) (court vacated jury’s verdict because of inappropriate behavior of the trial judge, which included six interruptions of plaintiff’s counsel’s opening statement, as compared with a single interruption of defense counsel’s opening statement; interruptions of plaintiff’s counsel’s witness examination; cross-examination of plaintiff’s witnesses; the intemperate tone and context of the questions asked of plaintiff’s counsel; and suggestions to defense counsel to object. The judge “failed utterly” to set an example of judicial temperament and impartiality, and to allow competent lawyers to proceed in their preferred fashion); Gas Aggregation Services, Inc. v. Howard Avista Energy, LLC, 458 F.3d 733 (8th Cir. 2006) (A bad faith finding is specifically required in order to assess attorneys fees under the court’s inherent power.); See also Canon 3A(3) of the Code of Conduct for United States Judges (judge required to be “patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity); United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (district judge disqualified on remand of antitrust case for numerous out-of-court remarks to press while the trial was proceeding, with an “embargo” on any reporting concerning those conversations until after the trial, and public comments while it was pending on appeal).