STATE-FEDERAL JUDICIAL COUNCIL ADVISORY COMMITTEE

CLE COMMITTEE

JUNE 2015 PRIVILEGE CLE PROGRAM OUTLINE

ETHICS PANEL TOPICS

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I. NY RULE 1.6: CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

(1) the client gives informed consent, as defined in Rule 1.0(j);

(2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or

(3) the disclosure is permitted by paragraph (b).

"Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

(b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime;

(3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;

(4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm;

(5) (i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or

(ii) to establish or collect a fee; or

(6) when permitted or required under these Rules or to comply with other law or court order.

(c) A lawyer shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidential information of a client, except that a lawyer may reveal the information permitted to be disclosed by paragraph (b) through an employee.

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RULE 1.6 COMMENTS

Scope of the Professional Duty of Confidentiality

[1] This Rule governs the disclosure of information protected by the professional duty of confidentiality. Such information is described in these Rules as "confidential information" as defined in this Rule. Other rules also deal with confidential information. See Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients; Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client; Rule 1.14(c) for information relating to representation of a client with diminished capacity; Rule 1.18(b) for the lawyer's duties with respect to information provided to the lawyer by a prospective client; Rule 3.3 for the lawyer's duty of candor to a tribunal; and Rule 8.3(c) for information gained by a lawyer or judge while participating in an approved lawyer assistance program.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, or except as permitted or required by these Rules, the lawyer must not knowingly reveal information gained during and related to the representation, whatever its source. See Rule 1.0(j) for the definition of informed consent. The lawyer's duty of confidentiality contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer, even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Typically, clients come to lawyers to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is thereby upheld.

[3] The principle of client-lawyer confidentiality is given effect in three related bodies of law: the attorney-client privilege of evidence law, the work-product doctrine of civil procedure and the professional duty of confidentiality established in legal ethics codes. The attorney-client privilege and the work-product doctrine apply when compulsory process by a judicial or other governmental body seeks to compel a lawyer to testify or produce information or evidence concerning a client. The professional duty of client-lawyer confidentiality, in contrast, applies to a lawyer in all settings and at all times, prohibiting the lawyer from disclosing confidential information unless permitted or required by these Rules or to comply with other law or court order. The confidentiality duty applies not only to matters communicated in confidence by the client, which are protected by the attorney-client privilege, but also to all information gained

during and relating to the representation, whatever its source. The confidentiality duty, for example, prohibits a lawyer from volunteering confidential information to a friend or to any other person except in compliance with the provisions of this Rule, including the Rule's reference to other law that may compel disclosure. See Comments [12]-[13]; see also Scope.
[4] Paragraph (a) prohibits a lawyer from knowingly revealing confidential information as defined by this Rule. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal confidential information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation with persons not connected to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client.

[4A] Paragraph (a) protects all factual information "gained during or relating to the representation of a client." Information relates to the representation if it has any possible relevance to the representation or is received because of the representation. The accumulation of legal knowledge or legal research that a lawyer acquires through practice ordinarily is not client information protected by this Rule. However, in some circumstances, including where the client and the lawyer have so agreed, a client may have a proprietary interest in a particular product of the lawyer's research. Information that is generally known in the local community or in the trade, field or profession to which the information relates is also not protected, unless the client and the lawyer have otherwise agreed. Information is not "generally known" simply because it is in the public domain or available in a public file.

Use of Information Related to Representation

[4B] The duty of confidentiality also prohibits a lawyer from using confidential information to the advantage of the lawyer or a third person or to the disadvantage of a client or former client unless the client or former client has given informed consent. See Rule 1.0(j) for the definition of "informed consent." This part of paragraph (a) applies when information is used to benefit either the lawyer or a third person, such as another client, a former client or a business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not (absent the client's informed consent) use that information to buy a nearby parcel that is expected to appreciate in value due to the client's purchase, or to recommend that another client buy the nearby land, even if the lawyer does not reveal any confidential information. The duty also prohibits disadvantageous use of confidential information unless the client gives informed consent, except as permitted or required by these Rules. For example, a lawyer assisting a client in purchasing a parcel of land may not make a competing bid on the same land. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client, even to the disadvantage of the former client, after the client-lawyer relationship has terminated. See Rule 1.9(c)(1).

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer may make disclosures of confidential information that are impliedly authorized by a client if the disclosures (i) advance the best interests of the client and (ii) are either reasonable

under the circumstances or customary in the professional community. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter.
In addition, lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers. Lawyers are also impliedly authorized to reveal information about a client with diminished capacity when necessary to take protective action to safeguard the client's interests. See Rules 1.14(b) and (c).

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions that prevent substantial harm to important interests, deter wrongdoing by clients, prevent violations of the law, and maintain the impartiality and integrity of judicial proceedings. Paragraph (b) permits, but does not require, a lawyer to disclose information relating to the representation to accomplish these specified purposes.

[6A] The lawyer's exercise of discretion conferred by paragraphs (b)(1) through (b)(3) requires consideration of a wide range of factors and should therefore be given great weight. In exercising such discretion under these paragraphs, the lawyer should consider such factors as: (i) the seriousness of the potential injury to others if the prospective harm or crime occurs, (ii) the likelihood that it will occur and its imminence, (iii) the apparent absence of any other feasible way to prevent the potential injury, (iv) the extent to which the client may be using the lawyer's services in bringing about the harm or crime, (v) the circumstances under which the lawyer acquired the information of the client's intent or prospective course of action, and (vi) any other aggravating or extenuating circumstances. In any case, disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to prevent the threatened harm or crime. When a lawyer learns that a client intends to pursue or is pursuing a course of conduct that would permit disclosure under paragraphs (b)(1), (b)(2) or (b)(3), the lawyer's initial duty, where practicable, is to remonstrate with the client. In the rare situation in which the client is reluctant to accept the lawyer's advice, the lawyer's threat of disclosure is a measure of last resort that may persuade the client. When the lawyer reasonably believes that the client will carry out the threatened harm or crime, the lawyer may disclose confidential information when permitted by paragraphs (b)(1), (b)(2) or (b)(3). A lawyer's permissible disclosure under paragraph (b) does not waive the client's attorney-client privilege; neither the lawyer nor the client may be forced to testify about communications protected by the privilege, unless a tribunal or body with authority to compel testimony makes a determination that the crime-fraud exception to the privilege, or some other exception, has been satisfied by a party to the proceeding. For a lawyer's duties when representing an organizational client engaged in wrongdoing, see Rule 1.13(b).

[6B] Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present

and substantial risk that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims. Wrongful execution of a person is a life threatening and imminent harm under paragraph (b)(1) once the person has been convicted and sentenced to death. On the other hand, an event that will cause property damage but is unlikely to cause substantial bodily harm is not a present and substantial risk under paragraph (b)(1); similarly, a remote possibility or small statistical likelihood that any particular unit of a mass distributed product will cause death or substantial bodily harm to unspecified persons over a period of years does not satisfy the element of reasonably certain death or substantial bodily harm under the exception to the duty of confidentiality in paragraph (b)(1).

[6C] Paragraph (b)(2) recognizes that society has important interests in preventing a client's crime. Disclosure of the client's intention is permitted to the extent reasonably necessary to prevent the crime. In exercising discretion under this paragraph, the lawyer should consider such factors as those stated in Comment [6A].

[6D] Some crimes, such as criminal fraud, may be ongoing in the sense that the client's past material false representations are still deceiving new victims. The law treats such crimes as continuing crimes in which new violations are constantly occurring. The lawyer whose services were involved in the criminal acts that constitute a continuing crime may reveal the client's refusal to bring an end to a continuing crime, even though that disclosure may also reveal the client's past wrongful acts, because refusal to end a continuing crime is equivalent to an intention to commit a new crime. Disclosure is not permitted under paragraph (b)(2), however, when a person who may have committed a crime employs a new lawyer for investigation or defense. Such a lawyer does not have discretion under paragraph (b)(2) to use or disclose the client's past acts that may have continuing criminal consequences. Disclosure is permitted, however, if the client uses the new lawyer's services to commit a further crime, such as obstruction of justice or perjury.

[6E] Paragraph (b)(3) permits a lawyer to withdraw a legal opinion or to disaffirm a prior representation made to third parties when the lawyer reasonably believes that third persons are still relying on the lawyer's work and the work was based on "materially inaccurate information or is being used to further a crime or fraud." See Rule 1.16(b)(1), requiring the lawyer to withdraw when the lawyer knows or reasonably should know that the representation will result in a violation of law. Paragraph (b)(3) permits the lawyer to give only the limited notice that is implicit in withdrawing an opinion or representation, which may have the collateral effect of inferentially revealing confidential information. The lawyer's withdrawal of the tainted opinion or representation allows the lawyer to prevent further harm to third persons and to protect the lawyer's own interest when the client has abused the professional relationship, but paragraph (b)(3) does not permit explicit disclosure of the client's past acts unless such disclosure is permitted under paragraph (b)(2).

[7] [Reserved.]

[8] [Reserved.]

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about compliance with these Rules and other law by the lawyer, another lawyer in the lawyer's firm, or the law firm. In many situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with these Rules, court orders and other law.

[10] Where a claim or charge alleges misconduct of the lawyer related to the representation of a current or former client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. Such a claim can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, such as a person claiming to have been defrauded by the lawyer and client acting together or by the lawyer acting alone. The lawyer may respond directly to the person who has made an accusation that permits disclosure, provided that the lawyer's response complies with Rule 4.2 and Rule 4.3, and other Rules or applicable law. A lawyer may make the disclosures authorized by paragraph (b)(5) through counsel. The right to respond also applies to accusations of wrongful conduct concerning the lawyer's law firm, employees or associates.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Paragraph (b) does not mandate any disclosures. However, other law may require that a lawyer disclose confidential information. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of confidential information appears to be required by other law, the lawyer must consult with the client to the extent required by Rule 1.4 before making the disclosure, unless such consultation would be prohibited by other law. If the lawyer concludes that other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

[13] A tribunal or governmental entity claiming authority pursuant to other law to compel disclosure may order a lawyer to reveal confidential information. Absent informed consent of the client to comply with the order, the lawyer should assert on behalf of the client nonfrivolous arguments that the order is not authorized by law, the information sought is protected against disclosure by an applicable privilege or other law, or the order is invalid or defective for some other reason. In the event of an adverse ruling, the lawyer must consult with the client to the extent required by Rule 1.4 about the possibility of an appeal or further challenge, unless such consultation would be prohibited by other law. If such review is not sought or is unsuccessful, paragraph (b)(6) permits the lawyer to comply with the order.

[14] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified in paragraphs (b)(1) through

(b)(6). Before making a disclosure, the lawyer should, where practicable, first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose, particularly when accusations of wrongdoing in the representation of a client have been made by a third party rather than by the client. If the disclosure will be made in connection with an adjudicative proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know the information, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[15] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may, however, be required by other Rules or by other law. See Comments [12]-[13]. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). E.g., Rule 8.3(c)(1). Rule 3.3(c), on the other hand, requires disclosure in some circumstances whether or not disclosure is permitted or prohibited by this Rule.

Withdrawal

[15A] If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw pursuant to Rule 1.16(b)(1). Withdrawal may also be required or permitted for other reasons under Rule 1.16. After withdrawal, the lawyer is required to refrain from disclosing or using information protected by Rule 1.6, except as this Rule permits such disclosure. Neither this Rule, nor Rule 1.9(c), nor Rule 1.16(e) prevents the lawyer from giving notice of the fact of withdrawal. For withdrawal or disaffirmance of an opinion or representation, see paragraph (b)(3) and Comment [6E]. Where the client is an organization, the lawyer may be in doubt whether the organization will actually carry out the contemplated conduct. Where necessary to guide conduct in connection with this Rule, the lawyer may, and sometimes must, make inquiry within the organization. See Rules 1.13(b) and (c).

Duty to Preserve Confidentiality

[16] Paragraph (c) requires a lawyer to exercise reasonable care to prevent disclosure of information related to the representation by employees, associates and others whose services are utilized in connection with the representation. See also Rules 1.1, 5.1 and 5.3. However, a lawyer may reveal the information permitted to be disclosed by this Rule through an employee.

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is

protected by law or by a confidentiality agreement. A client may require the lawyer to use a means of communication or security measures not required by this Rule, or may give informed consent (as in an engagement letter or similar document) to the use of means or measures that would otherwise be prohibited by this Rule.

[18] [Reserved.]

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II. RULE 1.18: DUTIES TO PROSPECTIVE CLIENTS

(a) A person who discusses with a lawyer the possibility of forming a client lawyer relationship with respect to a matter is a "prospective client."

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing; or

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the firm acts promptly and reasonably to notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;

(ii) the firm implements effective screening procedures to prevent the flow of information about the matter between the disqualified lawyer and the others in the firm;

(iii) the disqualified lawyer is apportioned no part of the fee therefrom; and

(iv) written notice is promptly given to the prospective client; and

(3) a reasonable lawyer would conclude that the law firm will be able to provide competent and diligent representation in the matter.

(e) A person who:

(1) communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship; or

(2) communicates with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter, is not a prospective client within the meaning of paragraph (a).

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RULE 1.18 COMMENT

[1] Prospective clients, like current clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Prospective clients should therefore receive some, but not all, of the protection afforded clients.

[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. As provided in paragraph (e), a person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a). Similarly, a person who communicates with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter is not entitled to the protection of this Rule. A lawyer may not encourage or induce a person to communicate with a lawyer or lawyers for that improper purpose. *See* Rules 3.1(b)(2), 4.4, 8.4(a).

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7 or Rule 1.9, then consent from all affected current or former clients must be obtained before accepting the representation. The representation must be declined if the lawyer will be unable to provide competent, diligent and adequate representation to the affected current and former clients and the prospective client.

[5] A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(j) for the definition of "informed consent," and with regard to the effectiveness of an advance waiver see Rule 1.7, Comments [22]-[22A] and Rule 1.9, Comment [9]. If permitted by law and if the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] Under paragraph (c), even in the absence of an agreement the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in that matter.

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened, and written notice is promptly given to the prospective client. *See* Rule 1.10. Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified. Before proceeding under paragraph (d)(1) or paragraph (d)(2), however, a lawyer must be mindful of the requirement of paragraph (d)(3) that "a reasonable lawyer would conclude that the law firm will be able to provide competent and diligent representation in the matter."

[7A] Paragraph (d)(2) sets out the basic procedural requirements that a law firm must satisfy to ensure that a personally disqualified lawyer is effectively screened from participation in the matter. This Rule requires that the firm promptly: (i) notify, as appropriate, lawyers and relevant nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client, and (ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and others in the firm.

[7B] A firm seeking to avoid disqualification under this Rule should also consider its ability to implement, maintain, and monitor the screening procedures permitted by paragraph (d)(2) before undertaking or continuing the representation. In deciding whether the screening procedures permitted by this Rule will be effective to avoid imputed disqualification, a firm should consider a number of factors, including how the size, practices and organization of the firm will affect the likelihood that any confidential information acquired about the matter by the personally disqualified lawyer can be protected. If the firm is large and is organized into separate departments, or maintains offices in multiple locations, or for any reason the structure of the firm facilitates preventing the sharing of information with lawyers not participating in the particular matter, it is more likely that the requirements of this Rule can be met and imputed disqualification avoided. Although a large firm will find it easier to maintain effective screening, lack of timeliness in instituting, or lack of vigilance in maintaining, the procedures required by this Rule may make those procedures ineffective in avoiding imputed disqualification. If a

personally disqualified lawyer is working on other matters with lawyers who are participating in a matter requiring screening, it may be impossible to maintain effective screening procedures. The size of the firm may be considered as one of the factors affecting the firm's ability to institute and maintain effective screening procedures, but it is not a dispositive factor. A small firm may need to exercise special care and vigilance to maintain effective screening but, if appropriate precautions are taken, small firms can satisfy the requirements of paragraph (d)(2).

[7C] In order to prevent any other lawyer in the firm from acquiring confidential information about the matter from the disqualified lawyer, it is essential that notification be given and screening procedures implemented promptly. If any lawyer in the firm acquires confidential information about the matter from the disqualified lawyer, the requirements of this Rule cannot be met, and any subsequent efforts to institute or maintain screening will not be effective in avoiding the firm's disqualification. Other factors may affect the likelihood that screening procedures will be effective in preventing the flow of confidential information between the disqualified lawyer and other lawyers in the firm in a given matter.

[8] Notice under paragraph (d)(2), including a general description of the subject matter about which the lawyer was consulted and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, *see* Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.

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III. CPLR § 4503. ATTORNEY

(a) 1. Confidential communication privileged. Unless the client waives the privilege, an attorney or his or her employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his or her employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing, or administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or local governmental agency or by the legislature or any committee or body thereof. Evidence of any such communication obtained by any such person, and evidence resulting therefrom, shall not be disclosed by any state, municipal or local governmental agency or by the legislature or any committee or body thereof. The relationship of an attorney and client shall exist between a professional service corporation organized under article fifteen of the business corporation law to practice as an attorney and counselor-at-law and the clients to whom it renders legal services.

2. Personal representatives.

(A) For purposes of the attorney-client privilege, if the client is a personal representative and the attorney represents the personal representative in that capacity, in the absence of an agreement between the attorney and the personal representative to the contrary:

(i) No beneficiary of the estate is, or shall be treated as, the client of the attorney solely by reason of his or her status as beneficiary; and
(ii) The existence of a fiduciary relationship between the personal representative and a beneficiary of the estate does not by itself constitute or give rise to any waiver of the privilege for confidential communications made in the course of professional employment between the attorney or his or her employee and the personal representative who is the client.

(B) For purposes of this paragraph, "personal representative" shall mean (i) the administrator, administrator c.t.a., ancillary administrator, executor, preliminary executor, temporary administrator or trustee to whom letters have been issued within the meaning of subdivision thirty-four of section one hundred three of the surrogate's court procedure act, and (ii) the guardian of an incapacitated communicant if and to the extent that the order appointing such guardian under subdivision (c) of section 81.16 of the mental hygiene law or any subsequent order of any court expressly provides that the guardian is to be the personal representative of the incapacitated communicant for purposes of this section; "beneficiary" shall have the meaning set forth in subdivision eight of section one hundred three of the surrogate's court procedure act and "estate" shall have the meaning set forth in subdivision nineteen of section one hundred three of the surrogate's court procedure act.

(b) Wills. In any action involving the probate, validity or construction of a will, an attorney or his employee shall be required to disclose information as to the preparation, execution or revocation of any will or other relevant instrument, but he shall not be allowed to disclose any communication privileged under subdivision (a) which would tend to disgrace the memory of the decedent.

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IV. FEDERAL RULES OF EVIDENCE RULE 501. PRIVILEGE IN GENERAL

The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute; or
- rules prescribed by the Supreme Court.

But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

FEDERAL RULES OF EVIDENCE RULE 502. ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT; LIMITATIONS ON WAIVER

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) **Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver.** When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:

(1) the waiver is intentional;
(2) the disclosed and undisclosed communications or information concern the same subject matter; and
(3) they ought in fairness to be considered together.

(b) **Inadvertent Disclosure.** When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:
(1) the disclosure is inadvertent;
(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

(c) **Disclosure Made in a State Proceeding.** When the disclosure is made in a state proceeding and is not the subject of a state-court order concerning waiver, the disclosure does not operate as a waiver in a federal proceeding if the disclosure:
(1) would not be a waiver under this rule if it had been made in a federal proceeding; or
(2) is not a waiver under the law of the state where the disclosure occurred.

(d) **Controlling Effect of a Court Order.** A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court--in which event the disclosure is also not a waiver in any other federal or state proceeding.

(e) **Controlling Effect of a Party Agreement.** An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) **Controlling Effect of This Rule.** Notwithstanding Rules 101 and 1101, this rule applies to state proceedings and to federal court-annexed and federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if state law provides the rule of decision.

(g) **Definitions.** In this rule:
(1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and
(2) "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

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V. FEDERAL RULES OF CIVIL PROCEDURE 26(b)

FRCP 26(b)(3) Trial Preparation: Materials.

(A) **Documents and Tangible Things.** Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and
(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) **Protection Against Disclosure.** If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

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FRCP 26(b)(5) Claiming Privilege or Protecting Trial-Preparation Materials.

(A) Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and
(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed--and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) Information Produced. If information produced in discovery is subject to a claim of privilege or of 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; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

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VI. ETHICAL FOUNDATIONS OF THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT PROTECTION IN NEW YORK STATE & FEDERAL COURT

A. NY RULE 1.6 COMMENT 3

1. [3] The principle of client-lawyer confidentiality is given effect in three related bodies of law: the attorney-client privilege of evidence law, the work-product doctrine of civil procedure and the professional duty of confidentiality established in legal ethics codes. The attorney-client privilege and the work-product doctrine apply when compulsory process by a judicial or other governmental body seeks to compel a lawyer to testify or produce information or evidence concerning a client. The professional duty of client-lawyer confidentiality, in contrast, applies to a lawyer in all settings and at all times, prohibiting the lawyer from disclosing confidential information unless permitted or required by these Rules or to comply with other law or court order. The confidentiality duty applies not only to matters communicated in confidence by the client, which are protected by the attorney-client privilege, but also to all information gained during and relating to the representation, whatever its source. The confidentiality duty, for example, prohibits a lawyer from volunteering confidential information to a friend or to any other person except in compliance with the provisions of this Rule, including the Rule's reference to other law that may compel disclosure.

B. ATTORNEY-CLIENT PRIVILEGE OVERVIEW

1. **Scope**
    a. Attorney-client privilege in New York may be invoked in any type of judicial, administrative or legislative proceeding. CPLR 4303(a). ROBERT A. BARKER & VINCENT C. ALEXANDER, EVIDENCE IN NEW YORK STATE AND FEDERAL COURTS 285 (West, 2nd ed. 2011).
    b. Under New York law, "the burden of establishing any right to protection is on the party asserting it; the protection claimed must be narrowly construed; and its application must be consistent with the purposes underlying the immunity." *Spectrum Sys. Int'l Corp. v. Chemical Ban*k, 78 N.Y.2d 371, 377 (1991) (Kaye, J.), *see also Melworm v. Encompass Indem. Co*., 112 A.D.3d 794 (2d Dep't 2013).
    c. Federal courts generally construe attorney-client privilege strictly "within the narrowest possible limits consistent with the logic of its principle." ROBERT A. BARKER & VINCENT C. ALEXANDER, EVIDENCE IN NEW YORK STATE AND FEDERAL COURTS 308 (West, 2nd ed. 2011) (quoting JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2291 (McNaughton rev. 1961).
2. **Burden of Proof**
    a. The party who claims attorney-client privilege carries the burden of proving its applicability. *People v. Mitchell*, 58 N.Y. 2d 368, 373 (N.Y. 1983); *In re County of Erie*, 473 F.3d 413, 418 (2d Cir. 2007).
3. **Privilege Log**
    a. CPLR 3122(b) requires the privilege holder to submit a privilege log setting forth the factual basis for the claimed privilege. In *Anonymous v.*

High School for Environmental Studies, 32 A.D.3d 353, 358-59, 820 N.Y.S.2d 573, 578 (1st Dep't 2006), the First Department held that the failure to timely "object to the demand generally limits our review to the question of privilege under CPLR 3101(b)." As to defendant's argument that the documents were privileged, the court noted that defendants failed to submit a privilege log as required by CPLR 3122(b) and merely responded with "boilerplate claims of privilege, which are insufficient as a matter of law." Id. at 359, 820 N.Y.S.2d at 578. The court held that the "defendants' failure to comply with any provision of article 31 constitutes a waiver of any objections to disclosure," including those related to privilege. Id. at 359, 820 N.Y.S.2d at 579. Note, the work product privilege may be waived if a party deliberately chose to use the label "Trial Preparation Privilege" instead of "Work Product Doctrine" in its privilege log. *Gama Aviation Inc. v. Sandton Capital Partners*, L.P., 99 A.D.3d 423 (1st Dep't 2012).

b. Similarly, FRCP 26(b)(5)(A) requires the preparation of a "privilege log" containing the circumstances of the communications when asserting the privilege or work product doctrine during pretrial discovery in civil actions. *McNamee v. Clemens*, 2014 WL 1338720 (E.D.N.Y 2014) (deficient and incomplete privilege log waived privilege claims).

C. **GENERAL ELEMENTS OF ATTORNEY-CLIENT PRIVILEGE:**

1. **Attorney-Client Relationship**

a. An attorney-client relationship exists at the time of the communication when a person has contacted an attorney in her capacity as an attorney for the purpose of obtaining legal advice or assistance. *Priest v. Hennessy*, 51 N.Y.2d 62, 68-69 (N.Y. 1980) (attorney-client relationship is not dependent on payment of a fee); P*eople v. Belge*, 59 A.D.2d 307, 309 (4th Dep't 1977) (attorney-client privilege extends to client and prospective client). In *Bernacki v. Bernacki*, 47 Misc.3d 316 (Sup. Ct., Monroe County 2015), the court observed that "courts have carved out of the prospective client doctrine situations in which parties moving for disqualification 'were motivated primarily by a desire not to secure representation from ... [the lawyer in question], but to ensure that ... [the lawyer] would not, or could not, represent ... [the current client].'" The court concluded that plaintiff contacted several experienced matrimonial attorneys "for the purpose of disqualifying the lawyer from handling" his wife's defense of the action. N.Y. Rule 1.18(e)(2).

2. **Confidential Communications**

a. Must establish client intended the communication with counsel to be confidential. *People v. Harris*, 57 N.Y.2d 335, 343 (N.Y. 1982) (privilege did not attach when a client knew that a police officer in her home could overhear her telephone conversation with her attorney); *Morgan v. New York State Dept. of Environmental Conservation*, 9 A.D.3d 586, 587-88 (3d Dep't 2004) (written communication to attorney with "carbon copy" to third party lacks confidentiality); *U.S. v. Mejia*, 655 F. 3d 126, 132-35 (2d

Cir. 2011) (expectation of confidentiality lacking where prison inmate knew that prison personnel were recording his phone call to his sister during which he asker her (as his agent) to contact his attorney about pleading guilty when prison regulations allowed unmonitored phone calls directly to counsel). Compare *People v. O'Neil*, 43 Misc. 3d 693, 699 (N.Y. Dist. Ct. Nassau County, 2014) (privilege upheld where confidential conversation with attorney in the presence of an officer was required by law and client had no opportunity to be alone on the phone).

b. The attorney-client privilege applies only to *confidential communications* with counsel (*see,* CPLR 4503), it does not immunize the underlying factual information from disclosure to an adversary. *Niesig v. Team I,* 76 N.Y.2d 363, 372 (N.Y. 1990).

c. CPLR 4548 provides that privileged communications made through e-mail or other electronic means retains their privileged status. However, the client must have a reasonable expectation of privacy in the e-mail account to maintain confidentiality. *Willis v. Willis*, 79 A.D.3d 1029 (2d Dep't 2010) (no reasonable expectation of confidentiality when client communicated with counsel via an e-mail account that her children regularly accessed with her permission); *Scott v. Beth Israel Med. Ctr., Inc.*, 17 Misc.3d 934, 938 (Sup. Ct N.Y. County 2007) (no expectation of confidentiality when hospital's e-mail account used by plaintiff doctor to send attorney-client messages).

d. CPLR 4503(a) prohibits disclosure of an attorney-client communication by any person who acquires evidence of the communication without the knowledge of the client.

3. **Between a Client and Attorney**

a. Privilege extends to communications from client to attorney and from attorney to client made. *Rossi v. Blue Cross & Blue Shield of Greater New York,* 73 N.Y.2d 588, 591-92, 593 (N.Y. 1989) ("CPLR 4503 speaks of communications "between the attorney. . . and the client" (CPLR 4503(a)), and the privilege thus plainly extends as well to the attorney's own communications to the client.")

b. The attorney-client privilege extends to corporations and applies to communications with attorneys, whether corporate staff counsel or outside counsel. *Rossi,* 73 NY2d at 591-92.

c. Communication through agents of the attorney or client does not destroy confidentiality. *Carter v. Cornell University*, 173 F.R.D. 92, 94 (S.D.NY. 1997) (interviews conducted at the request of Cornell's defense counsel by Associate Dean of Cornell employees fell within university's privilege because the dean was acting as counsel's agent.) Federal courts have extended this principle to include the participations of accountants and others whose expertise may be "necessary, or at least highly useful, for the effective consultation between the client and lawyer." *U.S. v. Kovel*, 296 F.2d 918, 922, 62-1 U.S. Tax Cas. (CCH) P 9111 (2d Cir. 1961).

4. **Made for the Purpose of Obtaining or Conveying Legal Advice or Services**

a. Privilege applies to communications made for the purpose of obtaining or facilitating the rendition of legal advice or services. *Rossi*, 73 NY2d at 593. However, privilege is not lost if the communication also refers to nonlegal matters, so long as the communication is primarily or predominantly of a legal character. *Id.* at 594; *Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014) (attorney-client privilege available if one of the significant purposes of the communication is obtaining legal assistance; fact that corporation hired counsel to conduct internal investigation because of mandatory regulatory compliance program did not divest communications of privilege: sole purpose of consulting counsel need not be the obtaining of legal advice).

5. **Client Did Not Waive Privilege**
    a. Waiver involves a loss of confidentiality subsequent to the communication. *Harris*, 57 N.Y.2d at 343 n.1.
    b. Waiver occurs if the client voluntarily testifies to the contents of the communication with counsel or otherwise discloses it to others. *People v. Patrick*, 182 N.Y. 131, 175 (N.Y. 1905); *AMBAC Indem. Corp. v. Bankers Trust Co.*, 151 Misc. 2d 334, 340-41. However, the clients testimony about the same events that the client described to his lawyer is not waiver. *People v. Lynch*, 23 N.Y.2d 262, 271 (N.Y. 1968) ("testimony about an event . . . should not be construed as a waiver of the privilege, merely because the subject matter of the testimony may also have been discussed in the privileged communication").

D. **EXCEPTIONS**

1. **Wills Exception**
    a. CPLR 4503(b) creates an exception for a deceased client's privileged communications with counsel regarding the preparation, execution or revocation of a will or relevant instrument involving probate, validity, or construction.
2. **Crime-Fraud Exception**
    a. Crime-fraud exception to attorney client privilege applies when there is a factual "showing of probable cause to believe that a fraud or crime has been committed, and that communications in question were in furtherance of such fraud or crime." *Nowlin v. People of State of New York*, 1 A.D.3d 172 (1st Dep't 2003); *Superintendent of Ins. Of State v. Chase Manhattan Bank*, 43 A.D.3d 514, 516 (3d Dep't 2007) (attorney-client privilege inapplicable to communications in furtherance of fraudulent scheme, breach of fiduciary duty or other wrongful conduct); *In re New York City Asbestos Litigation*, 109 A.D.3d 7 (1st Dep't) (to determine whether crime-fraud exception applied, plaintiffs in asbestos litigation made sufficient showing to justify court's in camera review of defendant's communications relating to counsel's undisclosed involvement in purportedly objective and independent studies showing absence of toxicity of defendant's product.).
3. **Legal Malpractice Exception ("Attorney's Sword")**

a. Attorney-client privilege is waived when a client sues an attorney for malpractice based on the attorneys' need to defend against charges of wrongdoing. *Finger Lakes Plumbing & Heating, Inc.* v. O'Dell, 101 A.D.2d 1008 (4th Dep't 1984); N.Y. Rules of Prof'l Conduct, rule 1.6(b)(5) (i) (lawyer may reveal confidential information "to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct").

4. **Public Policy Exception**
   a. "[E]ven where the technical requirements of the privilege are satisfied, it may, nonetheless, yield in a proper case, where strong public policy requires disclosure." *Matter of Priest v. Hennessy*, 51 N.Y.2d 62, 69 (N.Y. 1980); *People v. Mitchell*, 58 N.Y.2d 368 (N.Y. 1983); *People v. O'Neil*, 43 Misc. 3d 693, 699 (N.Y. Dist. Ct. Nassau County, 2014).
5. **Federal *Garner* Exception**
   a. Federal courts have developed an exception to the corporate attorney-client privilege in shareholder actions, derivative and class actions, based on wrongdoing that was injurious to the shareholders' interest. *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970); *RMED Intern., Inc. v. Sloan's Supermarkets, Inc.*, 2003 WL 118495 (S.D.N.Y. 2003) (*Garner* doctrine "alive and well within Second Circuit; in shareholder class action good cause was shown for discovery of counsel's advice to corporation). *Garner* held, privileged communications between management and the corporation's lawyers is "subject to the right of stockholders to show cause why it should not be invoked in the particular instance."

E. **FEDERAL ATTORNEY-CLIENT PRIVILEGE**

1. **FRE Rule 501**
   a. Federal Substantive Law: Federal courts are governed by attorney-client privilege principles of the common law as interpreted by federal courts "in the light of reason and experience." Fed. R. Evid. 501.
   b. Diversity or State Law Application Required: Federal courts must apply State privilege law. "[I]n a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision." Fed. R. Evid. 501; *Vector Capital Corp. v. Ness Technologies, Inc.*, No. 11 CIV. 6259 PKC, 2014 WL 171160, at *1 (S.D.N.Y. 2014).

F. **FEDERAL ELEMENTS OF ATTORNEY-CLIENT PRIVILEGE**

1. The privilege applies only if:
   (1)The asserted holder of the privilege is or sought to become a client;
   (2) The person to whom the communication was made
      (a) is a member of a bar of a court, or his subordinate and
      (b) in connection with this communication is acting as a lawyer;
   (3) The communication relates to a fact of which the attorney was informed
      (a) by his client
      (b) without the presence of strangers

(c) for the purposes of securing primarily either
(i) an opinion on law or
(ii) legal services or
(iii) assistance in some legal proceeding, and not
(d) for the purpose of committing a crime or tort; and
(4) The privilege has been
(a) claimed and
(b) not waived by the client.*

**United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357 (D. Mass. 1950) (Judge Wyzanski articulated the traditional and most commonly used test for determining the applicability of the privilege in federal courts).

G. **CASE LAW:**

1. *Spectrum Sys. Int'l Corp. v. Chem. Bank*, 78 N.Y.2d 371, 575 N.Y.S2d 809, 581 N.E.2d 1055, (N.Y. 1991)
    a. Attorney-client privilege protected report by outside counsel that was specially retained to conduct internal investigation into possible fraud on client bank and render legal advice about that problem, including counseling about litigation options.
    b. The Court of Appeals further held that the fact that report by outside counsel for bank did not focus on any imminent litigation, reflected no legal research, and reached no conclusion with regard to parties' legal position did not change character of document which would otherwise be protected from disclosure by attorney-client privilege.
2. *Cohen v. Cohen*, 2015 WL 745712, at *1 (S.D.N.Y. Jan. 30, 2015)
    a. Communications between plaintiff and litigation funder are not subject to attorney-client privilege and privilege cannot be contractually created between two parties. Where a funder of litigation is neither necessary to facilitate the plaintiff's communications with counsel nor in possession of a legal claim against defendant, the funder’s communications with the plaintiff are not privileged.
3. *S.E.C. v. Carrillo Huettel LLP*, 2015 WL 1610282, at *1 (S.D.N.Y. Apr. 8, 2015)
    a. The attorney-client privilege does not survive dissolution of a corporation.
    b. The SEC filed a complaint alleging that two principals from a San Diego Law Firm engaged in “pump and dump” stock scheme and are asking defendants to turnover the money. The defendants allegedly provided misleading legal opinions, concealed ownership interests in companies, and drafted misleading securities filings. The SEC wanted the company’s documents, and testimony relating to those documents. Defendants claimed this information was protected by the attorney-client privilege; the magistrate said no. According to the magistrate, the policy of allowing the privilege to extend beyond the death of an individual does not apply to a dissolved corporation. This policy is rooted in an individual’s ability to speak frankly with their attorney, something which is not a concern for a dissolved corporation. Additionally, the attorney-client attorney privilege

is to be interpreted narrowly because it withholds information from the judicial process.

H. **WORK PRODUCT IMMUNITY**

1. **New York Civil Cases**
    a. Absolute Work Product Immunity - CPLR 3101(c) provides attorneys' work product absolute immunity from discovery.
        I. Limited to those materials which are uniquely the product of a lawyer's learning and professional skills, such as materials which reflect his legal research, analysis, conclusions, legal theory or strategy. *Hoffman v. Ro-San Manor*, 73 A.D.2d 207, 211 (1st Dep't 1980).
        II. Determining document immunity claims, and reviewing them, are largely fact-specific processes. *Spectrum*, 78 N.Y.2d at 381.
    b. Conditional Litigation Preparation Materials Immunity- CPLR 3101(d)(2) provides "materials . . . prepared in anticipation of litigation or for trial" by a party or the party's representative are entitled to qualified immunity and "may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means."
2. **New York Criminal Cases**
    a. Attorneys' work product is exempt from material that must be disclosed pursuant to the discovery provisions of the Criminal Procedure Law. *See* Article 240 of New York Criminal Procedure Law.
3. **Federal Civil and Criminal Cases**
    b. In federal practice, a qualified immunity precludes discovery of materials prepared in anticipation of litigation. *U.S. v. Nobles*, 422 U.S. 225, 238 (1975).

I. **GENERAL ELEMENTS OF WORK PRODUCT PROTECTION UNDER CPLR 3101(C):**

1. **Work Product Prepared by an Attorney Acting in their Capacity as an Attorney**
    a. Attorney work product under CPLR 3101(c), which is subject to an absolute privilege, is generally limited to materials prepared by an attorney, while acting as an attorney. *Matter of New York City Asbestos Litig.*, 109 A.D.3d 7, 12 (1st Dep't 2013); *Salzer v. Farm Family Life Ins. Co.*, 280 A.D.2d 844, 846 (3d Dep't 2001). In *Geffner v. Mercy Medical Center*, 125 A.D.3d 802 (2d Dep't 2015), the court observed that "[a]ttorney work product under CPLR 3101(c), which is subject to an absolute privilege, is generally limited to materials prepared by an attorney, while acting as an attorney, which contain his or her legal analysis, conclusions, theory, or strategy."

J. **GENERAL ELEMENTS OF TRIAL PREPARATION PROTECTION UNDER CPLR 3101(d)(2)**

1. **Work Product Generated for Litigation**

a. Documents generated for litigation are generally classified as trial preparation materials (CPLR 3101(d)(2)), unless they contain otherwise privileged communications, such as memoranda of private consultations between attorney and client. *People v. Kozlowski*, 11 N.Y.3d 223, 244 (N.Y. 2008)(*citing* Connors, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3101:27, at 53–54); *In re New York City Asbestos Litig.*, 109 A.D.3d at 12-13.

2. **Disclosed Only Upon Showing of Substantial Need and Undue Hardship**
    a. May be disclosed "only upon a showing that the party seeking discovery has a substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means." CPLR 3101(d)(2); *Giordano v. New Rochelle Mun. Hous. Auth.*, 84 A.D.3d 729, 732 (2d Dept. 2011).

K. **FEDERAL ELEMENTS OF ORDINARY (OR FACT) WORK PRODUCT PROTECTION**

1. **Documents and Tangible Things**
    a. Ordinary work product may include statements of witnesses, investigative reports, photographs, diagrams and charts. BARKER & ALEXANDER, EVIDENCE IN NEW YORK STATE AND FEDERAL COURTS 337.
2. **Prepared in Anticipation of Litigation or for Trial**
    a. See *U.S. v. Aldman*, below.
3. **By or for Another Party or its Representative**
    a. Representatives include the other party's attorney, consultant, surety, indemnitor, insurer, or agent. Fed. R. Civ. P. 26(b)(3)(A).
4. **Disclosed Only Upon Showing of Substantial Need and Undue Hardship.**
    a. The party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means. Fed. R. Civ. P. 26(b)(3)(A)(ii).

L. **FEDERAL ELEMENTS OF "OPINION" PRODUCT PROTECTION**

1. **Work Product Prepared in Anticipation of Litigation**
    a. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation. Fed. R. Civ. P. 26(b)(3)(B).
2. **That Reflects the Attorney's "Mental Impressions, Conclusions, Opinions or Legal Theories" about the Litigation**
    a. Heavy burden required to prove materials are opinion work product that sufficiently reflect the attorney's thought processes. *In re Grand Jury Subpoena Dated July 6, 2005*, 510 F.3d 180, 184 (2d Cir. 2007).
3. **Must not be Disclosed**
    a. Federal Circuits split regarding whether protection is absolute or must yield to "extraordinary" need and hardship.

M. **WORK PRODUCT CASE LAW**

1. *U.S. v. Adlman*, 134 F.3d 1194, 1198 (2d Cir. 1998).

a. Legal documents prepared to analyze the potential outcome of litigation that is likely to follow a transaction are prepared in anticipation of litigation.
b. The Second Circuit adopted a broad standard in determining whether a document was prepared "in anticipation of litigation" as required by Rule 26(b)(3). At issue was whether a study prepared for an attorney assessing the likely result of an expected litigation is ineligible for protection under the Rule 26(b)(3) if the primary or ultimate purpose of making the study was to assess the desirability of a business transaction, which, if undertaken, would give rise to the litigation. The Second Circuit held, "that a document created because of anticipated litigation, which tends to reveal mental impressions, conclusions, opinions or theories concerning the litigation, does not lose work-product protection merely because it is intended to assist in the making of a business decision influenced by the likely outcome of the anticipated litigation. Where a document was created because of anticipated litigation, and would not have been prepared in substantially similar form but for the prospect of that litigation, it falls within Rule 26(b)(3)."

2. *Spectrum Sys. Int'l Corp. v. Chem. Bank*, 78 N.Y.2d 371, 575 N.Y.S2d 809, 581 N.E.2d 1055 (N.Y. 1991)
    a. Privilege log and record must be described with particularity and included in argument to the Court.
    b. A party's own labels are obviously not determinative of work product, and the generalized descriptions—lacking identification of persons, time periods and circumstances—do not convey the information and analysis necessary to decide whether a particular document should be immunized from disclosure under CPLR 3101(c) or (d).
3. *Geffner v. Mercy Med. Ctr*., 125 A.D.3d 802 (2d Dep't 2015).
    a. Attorney work product under CPLR 3101(c) must contain elements of opinion, analysis, theory, or strategy. The mere fact that a narrative witness statement is transcribed by an attorney is not sufficient to render the statement "work product."
    b. In an action to recover damages for medical malpractice and wrongful death, the plaintiff appealed from an order directing her to provide defendants with an audio recording of an interview she conducted with the defendant. The order also conditionally precluded plaintiff from introducing the recording for any purpose at trial if she failed to provide the defendants with copies of the recording by the next scheduled conference. The court held the plaintiff did not meet her burden of establishing that an audio recording of an interview she conducted with the defendant prior to the commencement of the action constituted attorney work product.

VII. ATTORNEY'S DUTY TO EXERCISE REASONABLE CARE TO PREVENT DISCLOSURE OF INFORMATION SUBJECT TO THE ATTORNEY CLIENT PRIVILEGE AND WORK PRODUCT PROTECTION

A. **NY RULE 1.6(C):**

A lawyer shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidential information of a client, except that a lawyer may reveal the information permitted to be disclosed by paragraph (b) through an employee.

B. **RULE 1.6(C) DUTY TO PRESERVE CONFIDENTIALITY, COMMENTS:**

New York: Acting Competently to Preserve Confidentiality.

[16] Paragraph (c) requires a lawyer to exercise reasonable care to prevent disclosure of information related to the representation by employees, associates and others whose services are utilized in connection with the representation. See also Rules 1.1, 5.1 and 5.3. However, a lawyer may reveal the information permitted to be disclosed by this Rule through an employee.

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to use a means of communication or security measures not required by this Rule, or may give informed consent (as in an engagement letter or similar document) to the use of means or measures that would otherwise be prohibited by this Rule.

Recent Additions to Comments to ABA Rule 1.6

[18] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards,

and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

[19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

C. **RECENT ETHICS OPINIONS**

1. **NYSBA Opinion 1019- 8/6/2014**
    a. A law firm may give its lawyers remote access to client files, so that lawyers may work from home, as long as the firm determines that the particular technology used provides reasonable protection (see possible factors below) to client confidential information, or, in the absence of such reasonable protection, if the law firm obtains informed consent from the client, after informing the client of the risks.
        I. Because of the fact-specific and evolving nature of both technology and cyber risks, the Committee cannot recommend particular steps that constitute reasonable precautions to prevent confidential information from coming into the hands of unintended recipients. If the firm cannot conclude that its security precautions are reasonable, then it may request the informed consent of the client to its security precautions, as long as the firm discloses the risks that the system does not provide reasonable assurance of confidentiality, so that the consent is "informed" within the meaning of Rule 1.0(j).

2. **NYSBA Opinion 842- 9/10/2010**
    a. A lawyer may use a password protected, data encrypted online data storage system ("cloud") to store and back up client confidential information provided that the lawyer takes reasonable care to ensure that confidentiality will be maintained in a manner consistent with the lawyer's obligations under Rule 1.6. In addition, the lawyer should stay abreast of technological advances to ensure that the storage system remains sufficiently advanced to protect the client's information, and should monitor the changing law of privilege to ensure that storing the information online will not cause loss or waiver of any privilege.
    b. "Reasonable care" to protect a client's confidential information against unauthorized disclosure may include consideration of the following steps:
        (1) Ensuring that the online data storage provider has an enforceable obligation to preserve confidentiality and security, and that the provider will notify the lawyer if served with process requiring the production of client information;
        (2) Investigating the online data storage provider's security measures, policies, recoverability methods, and other procedures to determine if they are adequate under the circumstances;
        (3) Employing available technology to guard against reasonably foreseeable attempts to infiltrate the data that is stored; and/or
        (4) Investigating the storage provider's ability to purge and wipe any copies of the data, and to move the data to a different host, if the lawyer becomes dissatisfied with the storage provider or for other reasons changes storage providers.

VIII. IN-HOUSE COUNSEL CONSIDERATIONS TO AVOID EARLY COMPROMISE OF THE PRIVILEGE

A. CASE LAW

1. *Rossi v. Blue Cross & Blue Shield of Greater New York,* 73 N.Y.2d 588, 590, *591-92* (N.Y. 1989).
    a. The attorney-client privilege extends to corporations and applies to communications with attorneys, whether corporate staff counsel or outside counsel.
    b. A radiologist brought an action against insurer for defamation arising out of denial of claims for diagnostic scanning. New York County Supreme Court directed disclosure of memorandum of insurer's in-house counsel, and insurer appealed. The First Department reversed and radiologist appealed. The Court of Appeals found the memorandum was protected from disclosure by attorney-client privilege, holding "[a]n internal memorandum from a corporate staff attorney to a corporate officer communicating advice regarding a company form that was the subject of an imminent defamation action is protected from disclosure in that action by the attorney-client privilege (CPLR 4503 [a])." The Court of Appeals reasoned, "it is plain from the content and context of the communication

that it was for the purpose of facilitating the lawyer's rendition of legal advice to his client. While we are mindful of the concern that mere participation of staff counsel not be used to seal off discovery of corporate communications, here "[n]othing suggests that this is a situation where a document was passed on to a defendant's attorney in order to avoid its disclosure." It appears that [the attorney] was exercising a lawyer's traditional function in counseling his client regarding conduct that had already brought it to the brink of litigation."

2. *Roswell Park Cancer Institute Corp. v. Sodexo America, LLC*, 68 A.D.3d 1720 (4th Dep't 2009).
    a. Documents created by corporate employees as part of in-house counsel's fact-gathering process for legal advice and services to corporate client, and made in response to counsel's oral request to top management, qualified as privileged communications even though documents themselves were not addressed to counsel.
3. *Swift Spindrift, Ltd. v. Alvada Ins*., 2013 WL 3815970 (S.D.N.Y. 2013)
    a. Corporate communications with in-house counsel primarily in his role as corporate business advisor fell outside scope of privilege.
4. *Koumoulis v. Independent Financial Marketing Group*, 295 F.R.D. 28 (E.D.N.Y. 2013), *aff'd in part*, 29 F.Supp.3d 142 (E.D.N.Y. 2014).
    a. Whether the attorney-client privilege applies to communications with counsel during a workplace investigation depends upon whether each communication constitutes a request for or the delivery of legal advice, or the communication concerns discussions regarding day-to-day activities conducted in the ordinary course of business.
    b. In the context of an employer's investigation of allegations of discrimination, the court held that communications between outside counsel and human resources personnel were not protected by the attorney-client privilege because "their predominant purpose was to provide human resources and thus business advice, not legal advice." As a result, the court ordered production of documents the employer had withheld as privileged, and the deposition of the employer's outside counsel regarding those communications.

B. **RECENT ETHICS OPINIONS**

1. **NYSBA Opinion 782- 12/08/04**
    a. Lawyers must exercise reasonable care to prevent the disclosure of confidences and secrets contained in "metadata" in documents they transmit electronically to opposing counsel or other third parties. E-mailing documents that may contain hidden data reflecting client confidences and secrets.
2. **NYSBA Opinion 749- 12/14/2001**
    a. Lawyers may not ethically use available technology to surreptitiously examine and trace e-mail and other electronic documents. *See* NYCLA Op. 739 (2008) ("[a] lawyer who receives from an adversary electronic documents that appear to contain inadvertently produced metadata is

ethically obligated to avoid searching the metadata in those documents."); *but see* ABA Formal Op. 06-442 (2006)(permitting search of metadata).

IX. COMMUNICATIONS WITH A LAW FIRM'S IN-HOUSE ETHICS COUNSEL

A. **ISSUE**

1. Whether communications will be protected from discovery by the attorney-client privilege when lawyers seek confidential legal advice from their firm's in-house counsel regarding potential disputes with a firm client.

B. **NYSBA OPINION 789- 10/26/2005**

1. 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 thereby 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.
2. On the issue of whether communications with in house ethics counsel are privileged as against the client, Opinion 789 noted that the question of applicability of the privilege is an evidentiary issue for the courts and the law firm's duty to disclose its conclusions will vary with the circumstances of the matter.

C. **CASE LAW**

1. Some recent cases - *VersusLaw, Inc. v. Stoel Rives*, LLP, 111 P.3d 866, 878, 127 Wash. App. 309, 332 (2005), *Koen Book Distrib. v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo*, 212 F.R.D. 283, 283-85 (E.D. Pa. 2002), and *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 220 F. Supp. 2d 283, 286-88 (S.D.N.Y. 2002) - suggest that an in-house legal counsel's advice to law firms may not be subject to claims of attorney-client privilege as against their then-clients based on the courts' view that the firm's consultation with its in-house lawyers introduced a conflict between the law firm and its clients.
    a. These cases all rely on *In re Sunrise Sec. Litig.*, 130 F.R.D. 560 (E.D. Pa. 1989), which held "a law firm's communication with in house counsel is not protected by the attorney-client privilege if the communication implicates or creates a conflict between the law firm's fiduciary duties to itself and its duties to the client seeking to discover the communication." The *Sunrise* court relied in part on the so-called "fiduciary exception" to the privilege. *See Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970).
2. *Stock v. Schnader Harrison Segal & Lewis LLP*, 2014 NY Slip Op 33171(U), *1 (Sup. Ct. N.Y. County 2014)
    a. Documents regarding communications between a firm's general counsel and its attorneys were not protected from the firm's former client by the attorney-client and work product privileges.
    b. Plaintiff argued that the documents were not privileged as to him because defendants were representing him at the time, the subject of the

communications was that very representation, the participants did not consider the communications to be confidential as to plaintiff, and they were aware that the continued representation would be conflicted. Defendants failed to prove the communications are protected by the in-house attorney-client privilege. The court held the former client has a right to disclosure from his fiduciaries of communications that directly correlate to his claims of self-dealing and conflict of interest.

c. The court applied what is sometimes referred to as a "fiduciary exception" to the attorney-client privilege to permit a former client to take discovery relating to otherwise confidential internal communications between a lawyer and his firm's general counsel. The decision breaks with a nationwide trend among state courts that largely uphold the privilege in similar circumstances, and instead echoes the rationale of many federal courts that have declined to do so.

D. **OTHER STATE GUIDANCE**

1. *RFF Family P'ship, LP v. Burns & Levinson, LLP*, 465 Mass. 702, 703, 991 N.E.2d 1066, 1067-68 (2013).
    a. The Massachusetts Supreme Court held that confidential communications between law firm attorneys and a law firm's in-house ethics counsel concerning a malpractice claim asserted by a current client of the firm are protected from disclosure to the client by the attorney-client privilege provided:
        (1) the law firm has designated an attorney or attorneys within the firm to represent the firm as in-house counsel,
        (2) the in-house counsel has not performed any work on the client matter at issue or a substantially related matter,
        (3) the time spent by the attorneys in these communications with in-house counsel is not billed to a client, and
        (4) the communications are made in confidence and kept confidential.
2. *St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C.*, 293 Ga. 419, 419, 746 S.E.2d 98, 102 (2013).
    a. In the context of a discovery dispute in a legal malpractice action by a former client, the former client sought communications made to the in-house ethics counsel in anticipation of a malpractice claim. The court ruled that the attorney client privilege attaches where:
        (1) there is an attorney-client relationship between the firm and its in house ethics counsel (“so long as an actual attorney-client relationship has been formed, with the firm clearly established as the client of the in-house counsel, the privilege may attach to their communications so long as the other requisites of the privilege are met);
        (2) the communications in question relate to the matters on which legal advice was sought (“In the law firm in-house counsel context, these principles require that the communications be made between

the in-house counsel in its capacity as firm counsel and the firm's attorneys in their capacity as representatives of the client, the law firm, regarding matters within the scope of the attorneys' employment with the firm");
(3) the communications have been maintained in confidence ("As applied within law firms, this principle means that, in order to maintain privileged status, intra-firm communications regarding the client's claims against the firm should generally involve only in-house counsel, firm management, firm attorneys, and other firm personnel with knowledge about the representation that is the basis for the client's claims against the firm"); and
(4) no exceptions to privilege are applicable ("Thus, to the extent there is an allegation that in-house counsel has been employed by firm attorneys in an effort to defraud rather than merely defend against a client, the privilege may be waived").

3. *Moore v. Grau*, NO. 2013-CV-150 (N.H. Super. Ct., Merrimack County 2014)
    a. New Hampshire law firms may be able to claim the attorney-client privilege for internal legal advice about problems with a current client's representation even if the lawyer consulted within the firm has not been officially designated as the firm's in-house counsel, a New Hampshire trial court decided Dec. 15, 2014.

X. REPRESENTING CORPORATIONS: *UPJOHN* SITUATION

A. INTERNAL INVESTIGATIONS

1. *Upjohn v. U.S.*, 449 U.S. 383, 386, 394 (1981). In *Upjohn*, the Court addressed the scope of the attorney-client privilege in the corporate context. Although declining "to lay down a broad rule," the Court held that pursuant to the "underlying purposes of the attorney-client privilege," direct communications made by lower and middle-level corporate employees to in-house corporate counsel, during the course of an internal investigation "at the direction of corporate superiors in order to secure legal advice from counsel, . . . must be protected against compelled disclosure." (Upjohn v. U.S., 449 U.S. 383, 386, 394 (1981)). The communications at issue arose after an independent audit of petitioner, Upjohn Co., revealed that one of its foreign subsidiaries "made payments to or for the benefit of foreign government officials in order to secure government business." (*Id.* at 386). Upon learning this information, Upjohn Co.'s General Counsel and Chairman of the Board decided to conduct an internal investigation. As part of this investigation the attorneys prepared and sent a letter to "All Foreign General and Area Managers." (*Id.* at 386). The letter stated that the Chairman had directed General Counsel "to conduct an investigation for the purpose of determining the nature and magnitude of any payments made . . . ." (*Id.* at 387). The included questionnaire sought detailed information about the payments in question, and instructed Managers to "treat the investigation as 'highly confidential' and not to discuss it with anyone other than Upjohn employees who might be helpful in providing the requested information." (*Id.* at

387-88). Following the investigation, Upjohn Co., voluntarily disclosed its preliminary findings to the SEC and IRS. (*Id.* at 387). Subsequently, the IRS began its own investigation into the tax consequences of the payments, and demanded production of the written questionnaires and "memorandums or notes of the interviews conducted" during the internal investigation. (*Id.* at 388). Upjohn Co. refused to produce the documents, citing the attorney-client privilege. (*Id.* at 388). The Supreme Court granted certiorari on a judgment enforcing disclosure from the U.S. Court of Appeals for the Sixth Circuit. The Sixth Circuit declined to extend the attorney-client privilege to the communications of lower and mid-level corporate employees "for the simple reason that the communications were not the 'client's.'" (*Id.* at 388). The Supreme Court reversed, referencing both the ABA Code of Professional Responsibility, and the Court's long-standing understanding that the attorney-client privilege "exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." (*Id.* at 390). Additionally, in the corporate context, "it will frequently be employees beyond . . . the officers and agents responsible for directing the company's actions in response to legal advice . . . who will possess the information needed by the corporation's lawyers. Middle-level – and indeed lower-level – employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees should have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties." (*Id.* at 391).

2. *In re General Motors Ignition Switch Litigation*, 2015 WL 221057, *5 (S.D.N.Y. 2015). The communications at issue in *General Motors*, were notes and memoranda relating to witness interviews that took place as part of an internal investigation conducted by GM's outside counsel, into certain defects and delays with vehicle recalls. As part of the investigation outside counsel interviewed over 200 current and former GM employees. During the discovery phase of subsequent litigation, New GM agreed to disclose materials related to the investigation, however refused to disclose the notes and memoranda relating to the witness interviews. The principal question before the court was whether those materials are protected from disclosure by . . . the attorney-client privilege. "Upjohn applies squarely to the materials at issue in this case. . . . Here, as in *Upjohn*, the internal investigation and accompanying interviews were conducted 'as part of [the company's] request for legal advice' in light of possible misconduct and accompanying governmental investigations and civil litigation. Here, as in *Upjohn*, the employees interviewed were aware (and, in fact, explicitly told) that the purpose of the interviews was to collect information to assist in providing legal advice to the company, and that the matters discussed were therefore confidential. Here, as in *Upjohn*, the documents reflecting communications between the company's lawyers and its employees during the interview process have not been provided to third parties; instead, they have been shared, if at all, only with King & Spalding (a law firm that has also been representing New GM in connection with the recalls) and with the holder of the

privilege, New GM itself. And although the investigation here was conducted by outside counsel rather than in-house counsel, that difference from *Upjohn* strengthens rather than weakens New GM's claim to the privilege."

3. *Wultz v. Bank of China Limited*, 2015 WL 362667 (S.D.N.Y. 2015). In *Wultz*, the court declined to extend the attorney-client privilege to materials related to an internal investigation, conducted by the defendant bank, into terrorist-related account activity. The court distinguished the communications at issue from those in *Upjohn*, inasmuch as the investigation was conducted at the direction of non-lawyer in-house compliance personnel. The court rejected Defendant bank's argument that the privilege should apply because the non-lawyer employee conducting the investigation did so "with the expectation that U.S. counsel would use the information to provide legal advice," holding: "we are unaware of any case law suggesting that a person's collection of information is protected merely because the person harbors a plan to provide the information later to an attorney––particularly where there is no proof that the attorney sought to have the individual collect the information at issue. Indeed, case law holds just the opposite. . . . 'a party cannot create the relationship based on his or her own beliefs or actions . . . and that the attorney-client privilege 'protects communications between a client and an attorney, not communications that prove important to an attorney's legal advice to a client.'" Thus, when seeking to invoke the attorney client-privilege, it would seem wise that measures should be taken to ensure that in-house counsel's participation is obvious and well documented.

B. **IN-HOUSE COUNSEL & BUSINESS FUNCTIONS**

1. *Voelker v. Deutsche Bank*, 2014 WL 4473351 (S.D.N.Y. 2014). Here, the court applied the attorney-client privilege to communications regarding certain adverse impact analyses and related correspondence between HR personnel and legal counsel, and even communications among HR personnel only. The court chose to extend the privilege because the communications at issue were prepared at the direction of and under close supervision on in-house counsel, or occurred at counsel's insistence and for counsel's assistance.
2. *Zhao v. Deutsche Bank*, 13-cv2116 (S.D.N.Y. 2014). Here the court refused to apply the attorney-client privilege to communications similar to those at issue in *Voelker*. The court found defendant bank failed to prove that the communications were directed by in-house counsel, pointing out that no attorney's were cc'd on the communications at issue, and that the communications themselves lacked any legal analysis that could be used to provide legal advice.

C. **COMMUNICATIONS WITH FOREIGN IN-HOUSE COUNSEL**

1. *Veleron Holding v. BNP Paribas*, 2014 WL 4184806 (S.D.N.Y. 2014). "Morgan Stanley claims that Veleron has improperly withheld documents concerning communications with individuals who appear to be Veleron's 'in-house' or 'outside' counsel based in foreign jurisdictions, specifically Russia and the Netherlands. These documents were listed in Veleron's privilege log, which was produced on February 11, 2014. Morgan Stanley claims that Veleron did not state the source of law on which its privilege assertions were based or provide information on whether the attorneys were licensed to practice, and, if so, in

which jurisdictions. Morgan Stanley wrote to Veleron on May 16, 2014, challenging Veleron's assertions of privilege in the documents at issue. Referring to the documents, Morgan Stanley asserted that 'Russian law does not recognize attorney-client privilege or work product immunity for legal advice or work product provided by Russian-qualified in-house attorneys or unlicensed outside counsel,' and 'the Netherlands does not recognize any attorney-client privilege or work product immunity for legal advice or work product provided by unlicensed attorneys.' Morgan Stanley additionally asserted that United States law has only limited protections for legal advice and work product provided by attorneys who are not admitted in any United States jurisdiction. . . . The Second Circuit applies the 'touch base' test to determine what country's law of privilege applies to foreign documents. Under the Second Circuit's 'touch base' choice of law analysis, this Court must apply the law of the country that has the 'predominant or the most direct and compelling interest in whether [the] communications should remain confidential' to disputes involving foreign attorney-client communications, 'unless that foreign law is contrary to the public policy of this forum.' The jurisdiction with the predominant interest is 'either the place where the allegedly privileged relationship was entered into' or 'the place in which that relationship was centered at the time the communication was sent.'"

2. *Sebastian Holdings v. Deutsche Bank*, 123 A.D.3d 437 (1st Dep't 2014). "We agree with the motion court that the stipulated orders, directing that discovery is to proceed under the CPLR, are dispositive. Indeed, the Request specifically states that Deutsche Bank would prepare a privilege log 'in accordance with the standards of the New York Civil Practice Law and Rules for determination by the Court upon application as to such privilege designations and redactions.' We reject plaintiff's assertion that this language creates a reservation of rights on privilege challenges; on the contrary, the language merely allows plaintiff to challenge Deutsche Bank's privilege designation and redactions. Accordingly, the motion court properly concluded that privilege determinations are governed by New York law, as the parties stipulated. See Tamar S. Wise, *Updates on Privilege Issues for In-House Counsel in New York; Outside Counsel*, N.Y.L.J (Apr. 15, 2015).

XI. RULE 4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

(a) In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.

(b) Notwithstanding the prohibitions of paragraph (a), and unless otherwise prohibited by law, a lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

(c) A lawyer who is acting pro se or is represented by counsel in a matter is subject to paragraph (a), but may communicate with a represented person, unless otherwise prohibited by law and unless the represented person is not legally competent, provided the lawyer or the lawyer's counsel gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

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RULE 4.2 COMMENTS

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and un-counseled disclosure of information relating to the representation.

[2] Paragraph (a) applies to communications with any party who is represented by counsel concerning the matter to which the communication relates.

[3] Paragraph (a) applies even though the represented party initiates or consents to the communication. A lawyer must immediately terminate communication with a party if after commencing communication, the lawyer learns that the party is one with whom communication is not permitted by this Rule.

[4] This Rule does not prohibit communication with a represented party or person or an employee or agent of such a party or person concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party or person or between two organizations does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented party or person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer having independent justification or legal authorization for communicating with a represented party or person is permitted to do so.

[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. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement (as defined by law) of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the state or federal rights of the accused. The fact that a communication does not violate a state or federal right is insufficient to establish that the communication is permissible under this Rule. This Rule is not intended to effect any change in the scope of the anti-contact rule in criminal cases.

[6] [Reserved.]

[7] In the case of a represented organization, paragraph (a) ordinarily prohibits communications with a constituent of the organization who: (i) supervises, directs or regularly consults with the organization's lawyer concerning the matter, (ii) has authority to obligate the organization with respect to the matter, or (iii) whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former unrepresented constituent. If an individual constituent of the organization is represented in the matter by the person's own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. *See* Rules 1.13, 4.4.

[8] The prohibition on communications with a represented party applies only in circumstances where the lawyer knows that the party is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such knowledge may be inferred from the circumstances. See Rule 1.0(k) for the definition of "knowledge." Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by ignoring the obvious.

[9] In the event the party with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

[10] A lawyer may not make a communication prohibited by paragraph (a) through the acts of another. *See* Rule 8.4(a).

Client-to-Client Communications

[11] Persons represented in a matter may communicate directly with each other. A lawyer may properly advise a client to communicate directly with a represented person, and may counsel the client with respect to those communications, provided the lawyer complies with paragraph (b). Agents for lawyers, such as investigators, are not considered clients within the meaning of this Rule even where the represented entity is an agency, department or other organization of the government, and therefore a lawyer may not cause such an agent to communicate with a represented person, unless the lawyer would be authorized by law or a court order to do so. A lawyer may also counsel a client with respect to communications with a represented person, including by drafting papers for the client to present to the represented person. In advising a client in connection with such communications, a lawyer may not advise the client to seek privileged information or other information that the represented person is not personally authorized to disclose or is prohibited from disclosing, such as a trade secret or other information protected by law, or to encourage or invite the represented person to take actions without the advice of counsel.

[12] A lawyer who advises a client with respect to communications with a represented person should be mindful of the obligation to avoid abusive, harassing, or unfair conduct with regard to

the represented person. The lawyer should advise the client against such conduct. A lawyer shall not advise a client to communicate with a represented person if the lawyer knows that the represented person is legally incompetent. *See* Rule 4.4.

[12A] When a lawyer is proceeding *pro se* in a matter, or is being represented by his or her own counsel with respect to a matter, the lawyer's direct communications with a counterparty are subject to the no-contact rule, Rule 4.2. Unless authorized by law, the lawyer must not engage in direct communications with a party the lawyer knows to be represented by counsel without either (i) securing the prior consent of the represented party's counsel under Rule 4.2(a), or (ii) providing opposing counsel with reasonable advance notice that such communications will be taking place.

XII. RULE 4.3: COMMUNICATING WITH UNREPRESENTED PERSONS

In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.

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RULE 4.3 COMMENTS

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. As to misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, *see* Rule 1.13(a), Comment [2A].

[2] The Rule distinguishes between situations involving unrepresented parties whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented party, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature, and

explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

XIII. RECENT ETHICS OPINIONS ON RULES 4.2 AND 4.3

A. **NYSBA Opinion 1047 - 02/17/2015.** A government lawyer whose duties include investigation of fraud is subject to Rule 4.2. Whether the government lawyer may interview a party to a proceeding before the agency about the conduct of his or her private lawyer in that proceeding as part of an investigation of the private lawyer depends on whether the investigation is part of a separate matter and, if so, whether the government lawyer knows that the interviewee is represented by counsel in the separate matter. Even if the matter is the same, or, if it is not the same but the lawyer knows that the interviewee is represented in the separate matter, the government lawyer may interview the private lawyer's clients without the consent of the private lawyer if the contact is "authorized by law," but that is a question of law that is beyond NYSBA's jurisdiction. That is a question of law beyond our jurisdiction.

B. **NYSBA Opinion 1010 – 07/21/2014.** A law firm may advertise its availability to provide second opinions as to pending legal cases on which individuals are already represented. The inquirer is a member of a law firm that advertises via public media including radio. The firm proposes to inform the public that it is available to provide second opinions on pending legal cases on which individuals are already represented. Specifically, the firm proposes to include in its advertisements language such as: "If you are unhappy with your current attorney, you can call [ABC Law Firm] to discuss your matter;" and that it provides second opinions to represented parties. Rule 4.2 applies only to communications made by a lawyer in the course of "representing a client." It does not apply, therefore, to the communications proposed by the inquirer, by which the inquirer's firm would seek to obtain new clients in matters in which the firm is not already involved. *Cf.* Rule 4.2, Cmt. [4] (noting that the Rule does not preclude "communication with a represented party or person who is seeking advice from a lawyer who is not otherwise representing a client in the matter"). Accordingly, the proposed communications are not subject to Rule 4.2(a), however they are subject to restrictions on legal advertisements.

C. **NYSBA Opinion 959 – 02/21/2013.** A lawyer who knows that an adverse party's lawyer has withdrawn from the representation or resigned from the bar may contact the adverse party to determine if he or she has retained new counsel or plans to represent himself or herself. Rule 4.2 does not authorize contact with the opposing party if the lawyer "knows" that the opposing party is represented by counsel. In N.Y. State 663 (1994), the Committee discussed when the lawyer "knows" that a client who previously was represented by counsel, or a client who states that he is represented by counsel, is no longer so represented. In that case, the actions of the opposing party and his putative counsel cast doubt on the existence of an attorney-client relationship. Consequently, the Committee suggested that the lawyer must undertake a "complete and thorough inquiry" to determine the ultimate fact of existing or continuing representation, which might include contacting the putative lawyer to determine the status of the representation.

Where the lawyer knows that the opposing party's counsel has resigned from the representation or is no longer a member of the bar, the lawyer has reason to believe that the opposing party is not represented by counsel. Rule 4.3 thus authorizes the lawyer to communicate with the opposing party to ascertain whether he or she has obtained new counsel, or plans to represent himself or herself. Consistent with Rule 4.3, in any such communication with the opposing party, the lawyer should take care not to give legal advice.

D. **NYSBA Opinion 956 – 01/14/2013.** The Rules contemplate the possibility that lawyers may have communications with persons with interests adverse to their clients, both those represented by counsel as well as unrepresented persons. *See* Rule 4.2 (communications with represented persons); Rule 4.3, (communications with unrepresented persons); *see also* Rule 4.3, cmt. [1]. The question of whether a lawyer is permitted to conduct a deposition of an unrepresented party to a pending lawsuit requires a two-step analysis: 1) whether the communications between the lawyer and the party to be deposed could lead to a misunderstanding, and 2) whether the interests of the party, the prospective deponent, are adverse to the lawyer's client. As part of that analysis, the Rules' prohibition against a lawyer's engaging in conduct that involves "dishonesty, fraud, deceit or misrepresentation" must also be considered. Accordingly, it would be misleading for a lawyer to depose an unrepresented person—who is unaware that they are a party to a pending lawsuit—without disclosing that the lawyer's client's interests are adverse to the unrepresented person. Furthermore, the lawyer cannot provide advice to the unrepresented party but is required to tell the party to obtain counsel.

E. **NYSBA Opinion 904 – 01/30/2012.** Under New York Rule 4.2(a), a lawyer representing the victim of an alleged crime for purposes of seeking restitution may not communicate with the subject of a criminal investigation into the same facts if the victim's lawyer knows that the subject is represented by counsel with respect to the criminal investigation unless (a) the victim's attorney has the prior consent of that counsel; (b) the attorney is authorized by law to communicate with the subject directly; or (c) the criminal defense attorney, upon inquiry, disavows representation with respect to the restitution claim.

F. **NYSBA Opinion 894 – 12/01/2011.** An attorney may personally serve process on a represented party as authorized by statute. In the course of making service, the attorney may ask the represented party if he or she is the person named in the papers, and may request the represented party to sign an acknowledgement of receipt of process. The attorney may not, however, without the consent of that person's laywer, go beyond service of process to elicit or participate in communications with that person about the subject of the representation. The purpose of Rule 4.2 is to promote the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible over-reaching by other lawyers who represent clients in the matter. *See* Rule 4.2, Cmt. [1]. Although the rule is popularly known as the "no-contact" rule, by its terms the rule prohibits contact without the opposing lawyer's consent only if (a) such contact involves communication, (b) the communication is about the subject of the representation, and (c) the communication is not authorized by law.

G. **ABCNY Formal Opinion 2011-1: Contacting Former Clients Represented by Successor Counsel.** Absent consent of successor counsel, a lawyer may not contact a former client known to be represented by counsel to discuss matters within the scope of the successor counsel's representation. When a lawyer contemplates any contact with her former client, a threshold question presented by the rule is whether the former client is represented by new counsel in connection with the subject matter of the contemplated communication. If the client is not so represented, direct contact is not prohibited by the rule. If the client is so represented, the former client would be deemed under Rule 4.2 to be a "party" whom the former lawyer knows is "represented by another lawyer in the matter." In that case, new counsel must give "prior consent" to direct communication.

H. **ABCNY Formal Opinion 2009-5: Discouraging Unrepresented Witnesses from Voluntarily Cooperating with Adversaries.** In civil litigation, a lawyer may ask unrepresented witnesses to refrain from voluntarily providing information to other parties to the dispute. A lawyer may not, however, advise an unrepresented witness to evade a subpoena or cause the witness to become unavailable. A lawyer also may not tamper with the witness (*e.g.*, bribe or intimidate a witness to obtain favorable testimony for the lawyer's client). And while lawyers generally are prohibited from rendering legal advice to unrepresented parties, they may inform unrepresented witnesses that they have no obligation to voluntarily communicate with others regarding a matter in dispute and may suggest retention of counsel.

I. **ABCNY Formal Opinion 2009-2: Ethical Duties Concerning Self-represented Persons.** Rule 4.3 permits a lawyer to advise a self-represented person adverse to the lawyer's client to seek her own counsel and to make certain other related statements. These statements may include, where appropriate, identification of general legal issues that the self-represented person should address with a lawyer; undisputed statements of fact or law such as the position of the lawyer's client on a contested issue; and references to court-sponsored programs designed to assist a self-represented litigant. A lawyer may at any time explain or clarify the lawyer's role to the self-represented litigant and advise that person to obtain counsel. The lawyer must volunteer this information if she knows or should know that a self-represented person misunderstands the lawyer's role in the matter.

J. **ABCNY Formal Opinion 2009-1: The No-contact Rule & Communications Sent Simultaneously to Represented Persons & Their Lawyers.** The no-contact rule (DR 7-104(A)(1)) prohibits a lawyer from sending a letter or email directly to a represented person and simultaneously to her counsel, without first obtaining "prior consent" to the direct communication or unless otherwise authorized by law. Prior consent to the communication means actual consent, and preferably, though not necessarily, express consent; while consent may be inferred from the conduct or acquiescence of the represented person's lawyer, a lawyer communicating with a represented person without securing the other lawyer's express consent runs the risk of violating the no-contact rule if the other lawyer has not manifested consent to the communication.

XIV. CASE LAW ON RULE 4.2 AND 4.3

A. ***Niesig v. Team 1,* 76 N.Y.2d 363 (1990).** In *Niesig*, the New York Court of Appeals established a test to determine which corporate employees should be deemed represented parties for purposes of Rule 4.2. The Court stated that for purposes of the Rules of Professional Conduct, the employees of a corporate party who are also considered "parties" include current employees whose acts or omissions in the matter under inquiry are binding on the corporation (in effect, the corporation's "alter ego") or imputed to the corporation for purposes of its liability, or current employees implementing the advice of counsel. All other employees may be interviewed informally by adversary counsel. With respect to the actual conduct of such interviews, it is assumed that attorneys would make their identity and interest known to interviewees and comport themselves ethically. Accordingly, in a personal injury action, plaintiff's counsel is permitted to conduct ex parte interviews of employees of the corporate defendant who were merely witnesses to the underlying accident.

B. ***Berkson v. Gogo LLC***, 2015 WL 1600755, at *43 (E.D.N.Y. Apr. 9, 2015). Applying N.Y. Rule 4.2, the court held that putative consumer representatives cannot be paid off by sidestepping the no-contact rule. Putative Consumer of in-flight wireless internet service suffered injury in fact from wireless internet service provider's alleged recurring and unauthorized monthly billing, as required for Article III standing in putative class action against provider for common law breach of the implied covenant of good faith and fair dealing and common law unjust enrichment, notwithstanding that provider reimbursed consumer for the recurring charges. The provider would not be allowed to "pick[] off named plaintiffs by offering them a payout prior to the filing of a class certification motion," and thus, the court would not consider provider's reimbursing consumer, since provider communicated directly with consumer after being made aware that consumer had retained counsel—in violation of New York's no-contact rule prohibiting communication with a represented party. "Obtaining a tactical advantage by knowingly contacting a represented party without notifying her lawyer is impermissible. It will lead courts, when necessary, to protect the integrity of dispute resolution, including discounting the relevance of actions taken in violation of the rule.

C. ***Jackson v. Bloomberg, L.P.*,** 2015 WL 1822695, at *3 (Apr. 22, 2015). In an employment class action lawsuit, the court sustained Plaintiffs' objections to an order concerning Bloomberg's request to contact certain members of the class, citing that N.Y. "Rule 4.2 applies to members of a class after class certification. Bloomberg L.P. sought to speak with 10 individuals who were direct supervisors during the class period, who were also class members themselves based on their earlier job positions within the company. The court concluded that "the contact sought by Bloomberg will concern the 'subject of the representation.' The only reason that Bloomberg wishes to speak with the class member employees at issue here is that they possess information germane to this lawsuit. Bloomberg apparently plans to elicit that information by asking these class members about their experience of supervising members of the class. This line of questioning might not directly require the employees to talk about their *own* experiences during the time period for which they are class members. However, these questions

would nonetheless concern the subject of the employees' representation because the central issues in this suit focus on the employment and supervision of the class members. That Bloomberg's proposed questioning of these class members would be focused on their experience as supervisors . . . does not make that questioning any less about the 'subject of the representation'; Bloomberg's contrary reading is too narrow to be a fair reading of the phrase. Accordingly, Rule 4.2 applies here."

XV. JOINT DEFENSE AGREEMENTS

A. Joint-Client Rule

1. Attorney-client privilege applies when two or more clients with a legal problem of common interest jointly consult the same attorney. Third parties cannot compel disclosure of confidential conversations between joint clients and their shared attorney. *Root v. Wright*, 84 N.Y. 72, 1881 WL 12787 (1881).
2. However, if the previously joint clients seek individual representation and bring actions against each other, their prior communications regarding their shared interest to their shared attorney are not privileged as between them. *Wallace v. Wallace*, 216 N.Y. 28, 35-36, 109 N.E. 872 (1915); *Hulburt v. Hurlburt*, 128 N.Y. 420, 424 (1891); *Fin v. Morgan*, 46 A.D.2d 229, 235-36 (4th Dep't 1974).

B. Joint Defense Agreements – Requirements, Pitfalls and Differences in Civil and Criminal contexts

1. Joint defense agreements, where two or more parties with separate counsel participate in joint attorney-client discussions for the purpose of preparing a common defence, are privileged against disclosure to outsiders. *People v. Osorio*, 75 N.Y.2d 80, 549 N.E.2d 1183, 550 N.Y.S.2d 612 (1989) (holding that where codefendant was an interpreter for defendant, the admissions defendant made to defendant's attorney, were not protected by the attorney client privilege because these statements were not part of a common defense); *People v. Pennachip*, 167 Misc. 2d 114 (Sup. Ct., Kings County 1995) (upholding application of joint-defense privilege where one of the defendants decided to plead guilty and testify for prosecution; former defendant could be precluded from testifying to confidences that were exchanged at joint defense strategy meetings). *Paris v. Leppard*, 172 Misc. 2d 951 (Sup. Ct., Nassau County 1997) (joint defense/common interest extension of attorney-client privilege is applicable in both civil and criminal cases).
    a. "The interests of the codefendants were similarly conflicted here. Under the general rule, a defendant does not enjoy a confidential privilege when communicating with counsel in the presence of another codefendant *(United States v. Simpson*, 475 F.2d 934 [D.C. Cir.], *cert denied* 414 U.S. 873; *United States v. Melvin*, 650 F.2d 641, 646 [5th Cir.]; *see also, Finn v Morgan*, 46 A.D.2d 229, 234-236). If the codefendants are mounting a common defense their statements are privileged, but unless the exchange is for the purpose of the common defense, the presence of a codefendant or his counsel will destroy any expectation of confidentiality between a

defendant and his attorney *(United States v. McPartlin*, 595 F.2d 1321 [7th Cir.]; *Hunydee v. United States*, 355 F.2d 183 [9th Cir]).

b. Thus, in *United States v Lopez* (777 F.2d 543 [10th Cir]) defendant, who had participated in a meeting between his codefendant and codefendant's counsel, sought at trial to have codefendant's counsel testify as to statements of the codefendant. The court held that Lopez's presence destroyed any claim of privilege because he was not attending the meeting to build a joint defense or to join his codefendant's defense team. Under those circumstances, Lopez's interests were potentially adverse to his codefendant and therefore codefendant had no reasonable expectation of confidentiality." *People v. Osorio*, 75 N.Y.2d at 84.

c. However, if separately-represented parties are not putting forth a common defense, any joint discussions are not deemed confidential and have no privilege. *People v. Osorio*, 75 N.Y.2d 80, 85 (1989); *Stenovich v. Wachtell, Lipton, Rosen & Katz*, 195 Misc. 2d 99, 108-09 (Sup. Ct., N.Y. County 2003) (common interest exception inapplicable where communications were shared with third party for business purposes rather than common defense in potential litigation.

2. **Caselaw**:

a. **State**:

I. The First Department has held that when two parties with a common legal interest seek advice from counsel together, the communication is privileged even if the litigation is not within the parties' contemplation. *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 124 A.D.3d 129, 135-36, 998 N.Y.S.2d 329, 334-35 (2d Dep't 2014). This is true even in the civil context, where a businesses signed a merger agreement, signed a confidentiality agreement, and required legal advice in order to navigate a complex merger.

II. **The First Department has held that a Joint Defense Agreement itself is not protected by the attorney client privilege.** In *Fewer v. GFI Group Inc.*, 78 A.D.3d 412, 909 N.Y.S.2d 629 (1st Dep't 2010), the First Department reversed and granted defendant's motion to compel disclosure of the joint defense agreement. "The agreement is not a communication from an attorney to a client "made for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship." Further, because the attorney client privilege does not protect the joint defense agreement, the common interest rule cannot apply.

III. Supreme Court, New York County holds "that a total identity of interest among the participants is not required under New York law. Rather, the privilege applies where an 'interlocking relationship' or a 'limited common purpose' necessitates disclosure to certain parties." *GUS Consulting GMBH v. Chadbourne & Parke LLP*, 20 Misc. 3d 539, 542, 858 N.Y.S.2d 591, 593 (Sup. Ct., N.Y. County 2008).

b. **Federal**

I. *United States v. Weissman*, 195 F.3d 96 (2d Cir. 1999). Holding Defendant failed to establish existence of Joint-Defense Agreement at the time of the meeting in which he made damaging admissions regarding his own conduct to the company's internal auditor, despite arguing the existence of an implied joint defense agreement. The court states: "[o]nly those communications made in the course of an ongoing common enterprise and intended to further the enterprise are protected." Here, the auditor was not aware of the Defendant's wrong-doing, and therefore preventing the wrong-doing was not a common enterprise that both parties intended to enter. Further, the court notes "[s]ome form of joint strategy is necessary to establish a JDA, rather than merely the impression of one side as in this case."

II. *Lugosch v. Congel*, 219 F.R.D. 220 (N.D.N.Y. 2003). Holding a non-party to the litigation can join joint defense agreement, receive all of the benefit inured under such agreement, and be obligated to the same degree as co-parties, under joint privilege extension of attorney-client privilege, and that co-parties asserting joint defense privilege with respect to materials allegedly protected by work product doctrine will be required to demonstrate that they shared common interest and that, prior to sharing work among themselves, there existed agreement, written or orally, that they would pursue joint defense strategy.

III. "[D]efendants with common interests in multi-defendant actions are entitled to share information protected by the attorney-client privilege without danger that the privilege will be waived by disclosure to a third person. . . . Notwithstanding the existence of an agreement, the joint defense privilege cannot be waived without the consent of all parties to the defense." *United States v. Bicoastal Corp.*, 1992 WL 693384, at *5 (N.D.N.Y. 1992).

IV. "A client who is part of a joint defense arrangement is entitled to waive the privilege for his own statements, and his co-defendants cannot preclude him from doing so…. All that they would be entitled to do, to the extent that a joint defense privilege did attach to the conversations, is stop Agnello from directly or indirectly revealing the privileged communications of other participants." *United States v. Agnello*, 135 F. Supp. 2d 380, 383 (E.D.N.Y.) *aff'd*, 16 F. App'x 57 (2d Cir. 2001).

c. **Civil vs. Criminal**

I. *United States v. Salvagno*, 306 F. Supp. 2d 258, 272 (N.D.N.Y. 2004), discussing impact of Joint Defense agreements, where the co-defendant breached a joint defense agreement in criminal litigation dealing with EPA. The burden is on the defendant to demonstrate that the prosecutor deliberately interfered with the

attorney client privilege created through a joint defense agreement, otherwise, the privilege information disclosed by the obtained is not protected.

C. **Using Attorney Disqualification Motions as a Tactic**

1. **Unsuccessful Motions to Disqualify No basis**
    a. *Jamaica Pub. Serv. Co. v. AIU Ins. Co.*, 92 N.Y.2d 631, 636, 707 N.E.2d 414, 416 (1998). In the context of a former client conflict, the court notes that disqualification motions are viewed through a tactical lens, and general assertions of "access to confidences and secrets" will not meet this burden. The movant must provide enough information to the court that there is a reasonable probability that 1.9(c) will be violated (previously DR 5-108(A)(2)).
    b. *Goodwine v. Lee*, 2014 WL 4377855, at *5 (S.D.N.Y. Sept. 3, 2014). Motion to disqualify denied where petitioner claimed that a Westchester ADA, and by imputation the Westchester DA's office, was conflicted from continuing in the litigation, by conclusory allegations without basis in the record.
    c. *Murray v. Metro. Life Ins. Co.*, 583 F.3d 173, 178 (2d Cir. 2009). Party moving for disqualification on the grounds that all policy-holders of an insurance company were former clients was denied. The petitioners sought disqualification on the eve of trial after settlement negotiations broke down.
2. **Unreasonable delay**
    a. *In re Estate of Peters*, 124 A.D.3d 1266 (4th Dep't 2015). Holding that the party moving to disqualify waived their ability to object to the conflict of interest where the moving party had knowledge of the facts substantiating the motion for one year, which the court considered "an extend[ed] period of time." The motion made after one year was held to be an "offensive tacit," and was denied.
    b. *Hele Asset, LLC v. S.E.E. Realty Assocs.*, 106 A.D.3d 692, 694, 964 N.Y.S.2d 570, 572 (2d Dep't 2013). The plaintiffs waited six years to move to disqualify the firm, when the plaintiffs were aware of the alleged conflict when they commenced the action, was untimely and the court found that plaintiffs had waived their ability to object to the conflict of interest. Further, the court said that this type of delay leads them to believe that the motion was only used as a tactical advantage to encourage settlement.
    c. Compare *Anderson & Anderson LLP-Guangzhou v. N. Am. Foreign Trading Corp.*, 45 Misc. 3d 1210(A) (Sup. Ct. N.Y. County 2014), finding that a two year delay in making a motion to disqualify an attorney based on the lawyer as a witness and former client conflict was timely, where there was a reasonable justification for the delay. In discussing the timeliness of the motion, the court distinguishes both *White v. Burke*, 131 Misc. 2d 59, 61, 498 N.Y.S.2d 990 (Sup. Ct. Saratoga County 1986), and *Eisenstadt v. Eisenstadt*, 282 A.D.2d 570, 571, 723 N.Y.S.2d 395 (2d

Dep't 2001), both holding that a two year delay in making a disqualification motion will defeat the motion. According to the court, the movants were justified because the need for disqualification only became evident after the conflicted attorney was the only person to submit affidavits (creating the 3.7 conflict), and that they were previously unaware of the 1.7 former client conflict.

d. *See also Dolenec v. Pressler & Pressler, LLP.*, No. 12-CV-5500 KNF, 2014 WL 6632942, at *4 (S.D.N.Y. Nov. 24, 2014), where the defendant's motion to disqualify was timely when first becoming aware of the conflict, the defendant opposed the representation promptly. Further, making the motion to disqualify through a *motion in limine* was the first opportunity the defendants could raise this issue after their motion to strike was denied.

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XVI. RULE 3.7: LAWYER AS WITNESS

(a) A lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless:

(1) the testimony relates solely to an uncontested issue;

(2) the testimony relates solely to the nature and value of legal services rendered in the matter;

(3) disqualification of the lawyer would work substantial hardship on the client;

(4) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or

(5) the testimony is authorized by the tribunal.

(b) A lawyer may not act as advocate before a tribunal in a matter if:

(1) another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client; or

(2) the lawyer is precluded from doing so by Rule 1.7 or Rule 1.9.

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Motion to Disqualify Under 3.7 Standard

In order to disqualify counsel on the ground that he or she may be called as a witness, the moving party has the obligation to demonstrate:

- (1) the opposing party's counsel is necessary in his or her case; and
- (2) such testimony would be prejudicial to the opposing party.

Homar v. Am. Home Mortgage Acceptance, Inc., 119 A.D.3d 901, 901, 990 N.Y.S.2d 250, 251 (2d Dep't 2014) (citing *Trimarco v. Data Treasury Corp.*, 91 A.D.3d 756, 757, 936 N.Y.S.2d 574, 574 (1st Dep't 2012).

Motion to Disqualify When Court Considers the Motion a Tacit Under 3.7

- *S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 N.Y.2d 437, 443 (1987).
  - "Whether a witness 'ought' to testify is not alone determined by the fact that he has relevant knowledge or was involved in the transaction at issue. Disqualification may be required only when it is likely that the testimony to be given by the witness is necessary."
  - "The advocate-witness disqualification rules contained in the Code of Professional Responsibility provide guidance, not binding authority, for courts in determining whether a party's law firm, at its adversary's instance, should be disqualified during litigation. Courts must, in addition, consider such factors as the party's valued right to choose its own counsel, and the fairness and effect in the particular factual setting of granting disqualification or continuing representation."

- *Murray v. Metro. Life Ins. Co.*, 583 F.3d 173, 178 (2d Cir 2009).
  - "We have identified four risks that Rule 3.7(a) is designed to alleviate (1) the lawyer might appear to vouch for his own credibility; (2) the lawyer's testimony might place opposing counsel in a difficult position when she has to cross-examine her lawyer-adversary and attempt to impeach his credibility; (3) some may fear that the testifying attorney is distorting the truth as a result of bias in favor of his client; and (4) when an individual assumes the role of advocate and witness both, the line between argument and evidence may be blurred, and the jury confused. These concerns matter because, if they materialize, they could undermine the integrity of the judicial process."

- *Salomone v. Abramson*, 2015 WL 1515253 (Sup. Ct., N.Y. County Apr. 3, 2015).
  - Minority shareholders moved to disqualify majority shareholder's counsel for violating advocate witness rule (Rule 3.7) on the ground that majority shareholder's counsel was a necessary witness. The court denied the motion. It first concluded that the legal services exception to the advocate witness rule did not apply, but then held that the minority shareholders waived their right to disqualification of counsel. In sum, while counsel should be disqualified, the movants waived their right to that relief by delaying too long in making the motion.