SUPPORTING MATERIALS

ACC NCR CLE PRESENTATION
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Alston & Bird LLP

A DAY IN THE LIFE OF TAYLOR TRUTH

Ethical Questions We Face in the Corporate World

DEPUTY GENERAL COUNSEL OF

BigCo

BigCo is a large company doing business across the United States and internationally. BigCo is heavily regulated by several state and federal agencies. BigCo's Deputy General Counsel is Taylor Truth and its primary outside law firm is Most Favored Firm ("MFF"). BigCo is well-managed, but like many in-house counsel, Taylor has a heavy workload. Here are some of the scenarios that Taylor faced on one day in October 2018.

Scenario 1:

7:30 a.m.

After her husband had to catch a last-minute flight to California to pitch a potential client, Taylor was tasked with dropping off her son at daycare on her way to work. At a stoplight, Taylor looks in her purse and realizes that she left her new iPhone X at the drycleaner where she just picked up her clothes. Taylor spent yesterday working with John from BigCo's IT department to ensure that she had access to her work emails and files on her iPhone. Heaving a sigh at the inconvenience, Taylor suddenly sits straight up in a complete panic, realizing that she had promised John that she would password protect her phone immediately and meant to do so, but had not quite gotten around to it. Taylor drives back to the cleaners, but she can't find her phone. A harried clerk assures her that no one turned it in.

Questions:

1. Is Taylor's panic justified?
2. What should Taylor do?

Scenario 2:

7:35 a.m.

Taylor searches her purse and breathes a sigh of relief—her phone was under some files all along. And she actually had set a passcode the day before. Just then, Taylor's son, Techie Toddler, begs to play his favorite game on Taylor's phone. Before Taylor can say, "Just five minutes," Techie Toddler grabs Taylor's iPhone, keys in the password, and starts playing with his favorite app. Taylor knows that one of the apps he likes requires access to photos on her phone.

Questions:

1. Should Taylor buy her son an iPhone? (joke)
2. Are there any ethical issues with Taylor's son accessing her phone?

Suggested References – Scenarios 1 & 2

Virginia Rule of Professional Conduct – Rule 1.6 (Confidentiality of Information)[1]

(a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

(b) To the extent a lawyer reasonably believes necessary, the lawyer may reveal:

(1) such information to comply with law or a court order;
(2) such information to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
(3) such information which clearly establishes that the client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation;
(4) such information reasonably necessary to protect a client's interests in the event of the representing lawyer's death, disability, incapacity or incompetence;
(5) such information sufficient to participate in a law office management assistance program approved by the Virginia State Bar or other similar private program;
(6) information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, printing, or other similar office management purposes, provided the lawyer exercises due care in the selection of the agency, advises the agency that the information must be kept confidential and reasonably believes that the information will be kept confidential;
(7) such information to prevent reasonably certain death or substantial bodily harm.

(c) A lawyer shall promptly reveal:

(1) the intention of a client, as stated by the client, to commit a crime reasonably certain to result in death or substantial bodily harm to another or substantial injury to the financial interests or property of another and the information necessary to prevent the crime, but before revealing such information, the attorney shall, where feasible, advise the client of the possible legal consequences of the action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client's criminal intention unless thereupon abandoned. However, if the crime involves perjury by the client, the attorney shall take appropriate remedial measures as required by Rule 3.3; or
(2) information concerning the misconduct of another attorney to the appropriate professional authority under Rule 8.3. When the information necessary to report the misconduct is protected under this Rule, the attorney, after consultation, must obtain client consent. Consultation should include full disclosure of all reasonably foreseeable consequences of both disclosure and non-disclosure to the client.

[1] Unless otherwise specified, all references to "Rules" shall mean the Virginia Rules of Professional Conduct.

(d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information protected under this Rule.

Virginia Rule of Professional Conduct – Rule 1.15 (Safekeeping Property)

Rule 1.15 generally requires a lawyer to preserve client property, specifically requiring at 1.15(a) that: "all other property [besides funds] held on behalf of a client should be placed in a safe deposit box or other place of safekeeping as soon as practicable." Comment 1 states that "[a] lawyer should hold property of others with the care required of a professional fiduciary."

Other states have extended safekeeping obligations to reach ESI in the lawyer's possession. For example, Suzanne Lever, assistant ethics counsel for the North Carolina State Bar, authored *"There's an App for That"—Risks of Inadvertent Disclosure of Client Information on Mobile Devices* (Mar. 2016), https://www.ncbar.gov/for-lawyers/ethics/ethics-articles/theres-an-app-for-that-risks-of-inadvertent-disclosure-of-client-information-on-mobile-devices/. "[A]llowing apps to access information on [cell phones] may have ethical implications . . . If a lawyer uses his phone's camera to take a photo of a confidential document in a case, and the lawyer then opens Instagram to upload a picture of his child playing soccer, technically the lawyer has disclosed client information because Instagram has access to the lawyer's photos." *Id.* "In general, a law firm that permits [bring-your-own-device] telecommunication and a lawyer who elects to make use of such technology must both carefully consider and address the risks associated with BYOD technology." That's because those policies "affect[] a law firm's ability to control the use of employee owned/managed devices in the same manner it controls the use of computers and equipment owned and managed by the firm." *Id.*

ABA Model Rule of Professional Conduct 1.6: Confidentiality of Information

In 2012, the ABA voted to amend Rule 1.6 to address the impact of technology on the practice of law. Rule 1.6 was revised to include a new paragraph (c), which states that:

> "[a] lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."

New comments addressing paragraph (c) explain that the unauthorized access to or the inadvertent or unauthorized disclosure of information do not constitute a violation of paragraph (c) *if* the lawyer made reasonable efforts to prevent the access or disclosure. Factors to be considered in deciding if a lawyer took reasonable 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)." The comment also adds that "[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."

J.S. Christie*, Ethics in the Tech Age: What Every Lawyer Should Consider* (Apr. 1, 2015), https://www.law360.com/articles/637991/ethics-in-the-tech-age-what-every-lawyer-should-consider

"If a child plays with a work mobile device, a lawyer should consider the risks of the child's deleting documents, sending documents to the wrong people, or downloading malware."

Scenario 3

8:00 a.m.

Taylor pulls into her office parking lot having successfully dropped of her son at daycare. She heads into the office, grabs her morning cup of coffee and signs into her computer. As she does every morning, Taylor scrolls her LinkedIn feed to catch up on news.

She notices a story that highlights an ethical dilemma that she now faces. Over the years, Taylor helped BigCo's CEO quietly settle sexual harassment claims brought by other BigCo employees. The first settlement took place when BigCo was a private company owned by CEO, but the rest occurred after BigCo went public.

CEO is a leader in BigCo's industry and key to the company. His contract with the BigCo Board has a morals clause. All of the settlements included nondisclosure provisions; Taylor made sure of it. None of the settlements exceeded 5 figures.

Questions:

1. Does Taylor have an ethical duty to inform the BigCo Board about the settlements?
2. Does it make a difference if the settlements were paid by BigCo or CEO?
3. What if the CEO objects to Taylor's disclosing the settlements to the Board?

Suggested References – Scenario 3

Numerous Rules are implicated:

Virginia Rule of Professional Conduct – Rule 1.2 (Scope of Representation)

(c) A lawyer shall not assist or counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

…

(e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

> **Comment 10:**
>
> When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing, except where permitted or required by Rule 1.6 [Confidentiality of Information]. However, the lawyer is required to avoid furthering the [client's unlawful] purpose, for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. See Rule 1.16 [Declining or Terminating Representation]

Virginia Rule of Professional Conduct – Rule 1.7 (Conflict of Interest: General Rule)

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or
(2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph(a), a lawyer may represent a client if each affected client consents after consultation, and:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
(2) the representation is not prohibited by law;
(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
(4) the consent from the client is memorialized in writing.

Virginia Rule of Professional Conduct – Rule 1.12 (Organization as Client)

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking for reconsideration of the matter;
(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization;
(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign or may decline to represent the client in that matter in accordance with Rule 1.16.

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Comments

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors,

employees, shareholders and other constituents. These persons are referred to herein as the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] The decisions of constituents of the organization ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of a constituent that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Substantial justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

[4] ABA Model Rule Comments not adopted.

[5] In an extreme case, it may be reasonably necessary for the lawyer to refer the matter to the organization's highest authority. Ordinarily, that is the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions highest authority reposes elsewhere; for example, in the independent directors of a corporation.

Relation to Other Rules

[6] The authority and responsibility provided in paragraph (b) are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.6, 1.8, 1.16, 3.3 or 4.1. If the lawyer's services are being used by an

organization to further a crime or fraud by the organization, Rule 1.2(c) can be applicable.

[7 - 8] ABA Model Rule Comments not adopted.

Government Agency

[9] The duty defined in this Rule applies to government organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Government lawyers, in many situations, are asked to represent diverse client interests. The government lawyer may be authorized by the organization to represent subordinate, internal clients in the interest of the organization subject to the other Rules relating to conflicts.

Although in some circumstances the client may be a specific agency, it is generally the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the government as a whole may be the client for purpose of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This Rule does not limit that authority. See note on Scope.

Clarifying the Lawyer's Role

[10] When the organization's interest may be or become adverse to those of one or more of its constituents, the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

[12] Paragraph (e) recognizes that a lawyer for an organization may also represent individuals within the organization. When an organization's lawyer is assigned or authorized to represent such an individual, the lawyer has an attorney-client relationship with both that individual and the organization. Accordingly, the lawyer's representation of both is controlled by the confidentiality and conflicts provisions of these Rules.

Derivative Actions

[13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

Virginia Code Comparison

There was no direct counterpart to this Rule in the Disciplinary Rules of the Virginia Code. EC 5-18 stated that a "lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and the lawyer’s professional judgment should not be influenced by the personal desires of any person or organization. Occasionally, a lawyer for an entity is requested by a stockholder, director, officer, employee, representative, or other person connected with the entity to represent the individual in an individual capacity; in such case the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present." EC 5-24 stated that although a lawyer "may be employed by a business corporation with non-lawyers serving as directors or officers, and they necessarily have the right to make decisions of business policy, a lawyer must decline to accept direction of his professional judgment from any layman." DR 5 106(B) provided that a lawyer "shall not permit a person who ... employs ... him to render legal services for another to direct or regulate his professional judgment in rendering such legal services."

Scenario 4

8:30 a.m.

Taylor turns to her top priority for the day: NewCo. Newco is a business venture BigCo is negotiating with a former employee that could be a game changer and is very high profile within BigCo. Taylor used to work closely with the former employee and knows him well.

Since leaving BigCo, the former employee hatched the idea for NewCo and secured backing by a powerful California-based VC firm. Before VC firm became involved, the former employee hired a lawyer, Opposing Counsel, who had represented him in various personal matters, to assist. During the negotiations for this business venture, Taylor has had lots of communication, primarily emails, with Opposing Counsel.

Taylor finds working with Opposing Counsel frustrating because Opposing Counsel, though certainly a good lawyer in his focus areas, lacks the experience in this area. Taylor wishes that she could communicate directly with the former employee or that the VC firm would bring in someone who focuses on these sort of business transactions. If Taylor only had an opening to suggest to former employee and the VC firm that they should supplement their legal support. . . .

Questions:

1. May Taylor copy the former employee on emails to Opposing Counsel?

    A. Yes, Taylor may copy the former employee.

    B. No, Taylor may not copy the former employee.

2. Does the answer change if Opposing Counsel copied his client on emails to Taylor?

    A. Yes.

    B. No.

Suggested References - Scenario 4

Virginia Rule of Professional Conduct – Rule 4.2 (Communication With Persons Represented by Counsel)

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

Comment

…

[3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule. A lawyer is permitted to communicate with a person represented by counsel without obtaining the consent of the lawyer currently representing that person, if that person is seeking a "second opinion" or replacement counsel.

[4] This Rule does not prohibit communication with a represented person, or an employee or agent of a represented person, concerning matters outside the representation. For example, the existence of a controversy between an organization and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification or legal authorization for communicating with the other party is permitted to do so.

[5] In circumstances where applicable judicial precedent has approved investigative contacts prior to attachment of the right to counsel, and they are not prohibited by any provision of the United States Constitution or the Virginia Constitution, they should be considered to be authorized by law within the meaning of the Rule. Similarly, communications in civil matters may be considered authorized by law if they have been approved by judicial precedent. This Rule does not prohibit a lawyer from providing advice regarding the legality of an interrogation or the legality of other investigative conduct.

…

[7] In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons in the organization's "control group" as defined in *Upjohn v. United States*, 449 U.S. 383 (1981) or persons who may be regarded as the "alter ego" of the organization. The "control group" test prohibits ex parte communications with any employee of an organization who, because of their status or position, have the authority to bind the corporation. Such employees may only be contacted with the consent of the organization's counsel, through formal discovery or as authorized by law. An officer or director of an organization is likely a member of that organization's "control group." The prohibition does not apply to former employees or agents of the organization, and an attorney may communicate ex parte with such former employee or agent even if he or she was a member of the organization's "control group." If an agent or employee of the organization is represented in the matter by separate counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule.

[8] This Rule covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question. Neither the need to protect uncounselled persons against being taken advantage of by opposing counsel nor the importance of preserving the client-attorney relationship is limited to those circumstances where the represented person is a party to an adjudicative or other formal proceeding. The interests sought to be protected by the Rule may equally well be involved when litigation is merely under consideration, even though it has not actually been instituted, and the persons who are potentially parties to the litigation have retained counsel with respect to the matter in dispute.

[9] Concerns regarding the need to protect uncounselled persons against the wiles of opposing counsel and preserving the attorney-client relationship may also be involved where a person is a target of a criminal investigation, knows this, and has retained counsel to receive advice with respect to the investigation. The same concerns may be involved where a "third-party" witness furnishes testimony in an investigation or proceeding, and although not a formal party, has decided to retain counsel to receive advice with respect thereto. Such concerns are equally applicable in a non-adjudicatory context, such as a commercial transaction involving a sale, a lease or some other form of contract.

Other State Rule: New York Rules of Professional Conduct

New York Rule 4.2: Communication with Person Represented by Counsel

Rule 4.2(a) states that “a lawyer shall not communicate or cause another to communicate about the subject of the representation with a person 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.”

New York City Bar Committee on Professional and Judicial Ethics Formal Opinion No. 2009-1

In 2009 Formal Ethics Opinion 1 (issued January 1, 2009) the New York City Bar Association said:

> The no-contact rule, by its terms, requires that a lawyer have the "prior consent" of a represented person's lawyer before communicating directly with that person. Simultaneously sending a letter or email to a represented person and her lawyer does not satisfy this "prior consent" requirement. Prior consent means just that -- consent obtained in advance of the communication. A lawyer receiving a copy of a letter or email sent to her client has not, by virtue of receiving the copy, consented to the direct communication with her client.
>
> We agree that in the context of group email communications involving multiple lawyers and their respective clients, consent to "reply to all" communications may sometimes be inferred from the facts and circumstances presented. While it is not possible to provide an exhaustive list, two important considerations are (1) how the group communication is initiated and (2) whether the communication occurs in an adversarial setting.
>
> Initiation of communication: It is useful to consider how the group communication is initiated. For example, is there a meeting where the lawyers and their clients agree to await a communication to be circulated to all participants? If so, and no one objects to the circulation of correspondence to all in attendance, it is reasonable to infer that the lawyers have consented by their silence to inclusion of their clients on the distribution list. Similarly, a lawyer may invite a response to an email sent both to her own client and to lawyers for other parties. In that case, it would be reasonable to infer counsel's consent to a "reply to all" response from any one of the email's recipients."

The Committee clarified that the "opinion applies equally to simultaneous communications (i) addressed to the lawyer and 'cc'd' to the client, (ii) addressed to the client and 'cc'd' to the lawyer, and (iii) addressed to both lawyer and client."

Scenario 5

9:00 a.m.

As the new business venture with NewCo comes together, the CEO of BigCo walks into Taylor's office.

BigCo CEO: Taylor, I'm worried about NewCo's CFO. I think he might be stealing; he seems to have an extravagant lifestyle. How can we find out about him without hiring a PI? They're so sleazy.

Taylor: There is a lot of online information now about people through their social networking sites like Facebook. You would be surprised to see what folks put on the internet. The CFO knows my name from the deal, but why don't I get my friend, a paralegal who formerly worked here, to sign up as a "friend" to the CFO and get access to his Facebook page. Then we wouldn't have to identify BigCo and can find out what he is up to.

BigCo CEO: Good idea; let's do it.

Questions:

1. Is "friend-ing" a negotiation counterparty unethical?
2. Is social media research proper if the individual's posts and pictures are all public?
3. If it is improper for an attorney to perform social media research or to "friend" the target of research, can the attorney instruct a paralegal to perform the research?
4. What if the paralegal uses his or her actual profile, but doesn't disclose who she works for?
5. Are the rules different in a litigation context?
6. What about "friend-ing" a potential juror or witness in a litigation matter?
7. What about contacting an unrepresented party with a potential claim against your client through social media?

Suggested References – Scenario 5

Georgia Rule 4.2 prohibits a lawyer from contacting directly an opposing party who is represented by counsel – you must contact the counsel instead. At least one state – Oregon – has looked at this issue and said the social media site notification to the person constitutes such prohibited communication. Oregon State Bar Opinion No. 2001-164 (Jan. 2001). *See also* Mary L. Galvin, *Can You Ethically View a Represented Party's Web Site?*, Minnesota Lawyer (2001) (concluding that Minnesota would follow the Oregon rule).

Note that the same holds true if an attorney contacts in this manner a juror in a trial. *See, e.g.*, New York City Bar Committee on Professional Ethics Formal Opinion 2012-2 ("We conclude that if a juror were to (i) receive a "friend" request (or similar invitation to share information on a social network site) as a result of an attorney's research, or (ii) otherwise to learn of the attorney's viewing or attempted viewing of the juror's pages, posts, or comments, that would constitute a prohibited communication if the attorney was aware that her actions would cause the juror to receive such message or notification. We further conclude that the same attempts to research the juror might constitute a prohibited communication even if inadvertent or unintended. (emphasis in original)).

Virginia

Rule 4.1 Truthfulness In Statements To Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of fact or law; or
(b) fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

Comment

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by failure to act or by knowingly failing to correct false statements made by the lawyer's client or someone acting on behalf of the client.

Statements of Fact

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

Fraud by Client
[3] Paragraph (b) recognizes that substantive law may require a lawyer to disclose certain information to avoid being deemed to have assisted the client's crime or fraud. The requirement of disclosure is governed by Rule 1.6.

Virginia Code Comparison
Paragraph (a) is substantially similar to DR 7102(A)(5), which stated, "n his representation of a client, a lawyer shall not ... [k]nowingly make a false statement of law or fact."

With regard to paragraph (b), DR 7102(A)(3) provided, "In his representation of a client, a lawyer shall not. . . [c]onceal or knowingly fail to disclose that which he is required by law to reveal."

Committee Commentary
The Committee deleted the ABA Model Rule's references to a "third person" in the belief that such language merely confused the Rule. Additionally, the Committee deleted the word "material" preceding "fact or law" from paragraph (a) to make it more closely parallel DR 7-102(A)(5). The word "material" was similarly deleted from paragraph (b) as it appears somewhat redundant. Finally, the modified Comment expands the coverage of the Rule to constructive misrepresentation – i.e., the knowing failure of a lawyer to correct a material misrepresentation by the client or by someone on behalf of the client.

ABA
ABA Formal Opinion 466 clarifies that a lawyer may review a juror's public information, but may not send the juror an access request for information that the juror has not made public, i.e. friending, because that would be a type of ex parte communications prohibited by **Model Rule 3.5(b).**

Similarly, if friending a juror would be considered contact by a lawyer, contacting an unrepresented party could run afoul of **Model Rule 4.2** (Communication with person represented by counsel) or **4.3** (Dealing with an unrepresented person)

Also, see generally: *Transactions With Persons Other Than Clients*, Rule 4.1 Truthfulness In Statements To Others
In the course of representing a client a lawyer shall not knowingly:
(a) make a false statement of material fact or law to a third person; or
(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

California
Rule 5-320(A), cannot communicate with jurors, even indirectly, and friending a juror would be such communication.
Cal. Bus. & Prof. Code § 6106 prohibits lawyers from engaging in any act "involving moral turpitude, dishonesty, or corruption, whether the act is committed in the course of his relations as an attorney or otherwise". This provision may apply to social media activity.
No opinions specifically on point, but the San Diego Bar has released a persuasive opinion, ostensibly based on California ethics guidelines:

"Social media sites have opened a broad highway on which users may post their most private personal information. But Facebook, at least, enables its users to place limits on who may see that information. The rules of ethics impose limits on how attorneys may obtain information that is not publicly available, particularly from opposing parties who are represented by counsel.
We have concluded that those rules bar an attorney from making an ex parte friend request of a represented party. An attorney's ex parte communication to a represented party intended to elicit information about the subject matter of the representation is impermissible no matter what words are used in the communication and no matter how that communication is transmitted to the represented party. We have further concluded that the attorney's duty not to deceive prohibits him from making a friend request even of unrepresented witnesses without disclosing the purpose of the request. Represented parties shouldn't have "friends" like that and no one – represented or not, party or non-party – should be misled into accepting such a friendship. In our view, this strikes the right balance between allowing unfettered access to what is public on the Internet about parties without intruding on the attorney-client relationship of opposing parties and surreptitiously circumventing the privacy even of those who are unrepresented"

Minnesota

Rule 4.2, against contacting an unrepresented party, would probably prohibit such conduct. *See* Mary L. Galvin, *Can You Ethically View a Represented Party's Web Site?*, Minnesota Lawyer (2001) (concluding that Minnesota would follow the Oregon rule).

New Jersey

No rule specifically on point, but a New Jersey lawyer had a complaint filed against him for ordering a paralegal to friend the plaintiff. The complaint alleged violations of **Rule 4.2** (Contact with a represented party) **Rule 5.3** (Failure to supervise a non-lawyer assistant) (**Rule 8.4(c)** Conduct involving dishonesty through another's actions, and **Rule 8.4(d)** conduct prejudicial to the administration of justice.

New York

New York State Bar Opinion 843

A lawyer who represents a client in a pending litigation, and who has access to the Facebook or MySpace network used by another party in litigation, may access and review the public social network pages of that party to search for potential impeachment material. As long as the lawyer does not "friend" the other party or direct a third person to do so, accessing the social network pages of the party will not violate Rule 8.4 (prohibiting deceptive or misleading conduct), Rule 4.1 (prohibiting false statements of fact or law), or Rule 5.3(b)(1) (imposing responsibility on lawyers for unethical conduct by nonlawyers acting at their direction).

Under the New York Rules of Professional Conduct (the "Rules"), an attorney and those in her employ are prohibited from engaging in this type of conduct. The applicable restrictions are found in Rules 4.1 and 8.4(c). The latter provides that "[a] lawyer or law firm shall not . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation." N.Y. Prof'l Conduct R. 8.4(c) (2010). And Rule 4.1 states that "[i]n the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person." Id. 4.1. We believe these Rules are violated whenever an

attorney "friends" an individual under false pretenses to obtain evidence from a social networking website.

For purposes of this analysis, it does not matter whether the lawyer employs an agent, such as an investigator, to engage in the ruse. As provided by Rule 8.4(a), "[a] lawyer or law firm shall not . . . violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." Id. 8.4(a). Consequently, absent some exception to the Rules, a lawyer's investigator or other agent also may not use deception to obtain information from the user of a social networking website. See id. Rule 5.3(b)(1) ("A lawyer shall be responsible for conduct of a non-lawyer employed or retained by or associated with the lawyer that would be a violation of these Rules if engaged in by a lawyer, if . . . the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it . . . .")

See also Obligations to Third Persons: Defense Lawyer Didn't Contravene Rules By Using Ruse to Get Dirt on Complainant, 25 Law. Man. on Prof. Conduct (ABA/BNA) 115 (Mar. 4, 2009).

See also Dishonesty: Attorneys May Not Mislead Witnesses Into Granting Access to Facebook Pages, 25 Law. Man on Prof. Conduct (ABA/BNA) 218 (Apr. 29, 2009).

Pennsylvania

The Philadelphia Bar Association Professional Guidance Committee Opinion 2009-02 (March 2009)

"Turning to the ethical substance of the inquiry, the Committee believes that the proposed course of conduct contemplated by the inquirer would violate Rule 8.4(c) because the planned communication by the third party with the witness is deceptive. It omits a highly material fact, namely, that the third party who asks to be allowed access to the witness's pages is doing so only because he or she is intent on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness. The omission would purposefully conceal that fact from the witness for the purpose of inducing the witness to allow access, when she may not do so if she knew the third person was associated with the inquirer and the true purpose of the access was to obtain information for the purpose of impeaching her testimony."

Scenario 6

9:45 a.m.

BigCo is involved in multiple lawsuits filed in various jurisdictions across the United States. Under a mandate to reduce legal costs by keeping as much work in-house as possible, Taylor is considering a new software system to help in-house lawyers with case management. This new software system would be accessed through Internet Explorer and data would be stored on the vendor's system rather than on the internal BigCo system. BigCo would pay a monthly fee to use the system. BigCo would upload and store documents for each case, and the files would contain attorney-client communications, attorney work product, and other sensitive data. The case management tool would also allow BigCo to store document productions and deposition transcripts for each case and would generate deadline reminders pursuant to case management orders. Taylor pitches the new system to BigCo's General Counsel, who smiles, takes out his paper calendar and says, "Taylor, just track the cases in your calendar like I do."

Questions:

1. May Taylor use this service and still comply with her duty of confidentiality?

   A. Yes, BigCo may use this service provided steps are taken to minimize risk.
   B. No, the risk of inadvertent disclosure is too high given the BigCo's size.

2. What should Taylor do to minimize risks associated with using this software system?

3. Has the General Counsel violated any ethical obligations in tracking his cases via paper calendar versus using a state-of-the-art electronic case tracker?

Suggested References – Scenario 6

Guidance from Other Jurisdictions

Texas Legal Opinion No. 665 (Dec. 2016) concluded a lawyer's duty of competence requires that lawyers who use electronic documents understand that metadata is created in the generation of electronic documents, that transmission of electronic documents will include transmission of metadata, that the transmitted metadata may include confidential information, that recipients of the documents can access metadata, and that actions can be taken to prevent or minimize the transmission of metadata. This conclusion suggests that the use of technology may fall within an attorney's required ethical obligations if it is reasonably necessary for the scope of the representation accepted by the lawyer. Moreover, as discussed in Comment 6 to Texas Rule 1.05, a lawyer generally is recognized as having implied-in-fact authority to make disclosures about a client when appropriate in carrying out the representation to the extent that the client's instructions do not limit that authority.

North Carolina has issued persuasive guidance in 2008 FEO 5. The committee, considering the matter, held that the use of a web-based document management system that allows access to the client's file is permissible provided the lawyer can fulfill his obligation to protect the confidential information of all clients. A lawyer must take steps to minimize the risk that confidential client information will be disclosed to other clients or to third parties. *See* RPC 133; RPC 215. A security code access procedure that only allows a client to access its own confidential information would be an appropriate measure to protect confidential client information. *See* 2008 FEO 5. If the law firm will be contracting with a third party to maintain the web-based management system, the law firm must ensure that the third party also employs measures which effectively minimize the risk that confidential information might be lost or disclosed.

New York Rules of Professional Conduct

On December 17, 2012, the New York State Bar Association Committee on Professional Ethics issued Opinion No. 950, which notes that attorneys not only have the obligation to refrain from revealing information gained during and related to the representation of a client, but they also have the obligation to "exercise reasonable care to prevent its disclosure of use by 'lawyer's employees, associates, and others whose services are utilized by the lawyer.'" N.Y. State Op. 950 (citing Rule 1.6(c)). A lawyer must ensure that the third-party vendor that maintains the electronic copies of client materials exercises "'reasonable care to ensure that the system is secure and that the client confidentiality will be maintained.'" *Id.* (quoting N.Y. State 842 (2010)). In the context of an internet server storage or "cloud," the New York State Bar Association Committee on Professional Ethics provides the following guidance regarding how exercise reasonable care in protecting confidential information:

> 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"; "Investigating the online data storage provider's security measures, policies, recoverability methods, and other procedures to determine if they are adequate under the circumstances"; and

> "Employing available technology to guard against reasonably foreseeable attempts to infiltrate the data that is stored.

Id. at n.1 (citing N.Y. State Op. 842 (2010); N.Y. State Op. 709 (1998)).

The New York State Bar Association Committee on Professional Ethics has also addressed remote access to a law firm's electronic files in Opinion No. 1019. That opinion emphasized that "[c]yber-security issues have continued to be a major concern for lawyers, as cyber-criminals have begun to target lawyers to access client information, including trade secrets, business plans, and personal data." NY State 1019 at ¶ 9. "Lawyers can no longer assume that their document systems are of no interests to cyber-crooks"—especially when "there is outside access to the internal system by third parties, including law firm employees working at other firm offices, at home or when traveling." *Id.* In New York, a law firm must be able to determine that remote-access technology "provides reasonable assurance that confidential client information will be protected." *Id.* at ¶ 10. That involves analyzing "the degree of password protection that persons who access the system are authorized, the degree of security of the devices that firm lawyers use to gain access, whether encryption is required, and the security measures the firm must use to determine whether there has been any unauthorized access to client information." *Id.* If the firm cannot conclude that reasonable precautions are available, the firm may obtain informed consent from the client to use those systems. *Id.* at ¶ 11.

Technology changes rapidly, so lawyers are encouraged to consult periodically with professionals competent in the area of online security.

Illinois State Bar Association, Professional Conduct Advisory Opinion No. 16-06 (Oct. 2016)

Much like New York, Illinois allows lawyers to use "cloud-based services in the delivery of legal services provided that the lawyer takes reasonable measures to ensure that the client information remains confidential and is protected from breaches." Illinois emphasizes that a "lawyer's obligation to protect client information does not end once the lawyer has selected a reputable provider." "Future advances in technology may make a lawyer's current reasonable protective measures obsolete."

ABA Model Rule of Professional Conduct 1.1: Competence, Comment 8

In a historic but little-heralded move, the American Bar Association said that lawyers must be competent not only in the law and its practice, but also in technology. In August 2012, the ABA's House of Delegates voted to amend the comment to its Model Rule of Professional Conduct governing lawyer competence to make clear that a lawyer's skill set must include technology. The rule itself remains unchanged. Rule 1.1 reads:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

The change was to Comment 8 following the rule, shown in italics here:

> To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, ***including the benefits and risks associated with relevant technology,***

> engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

North Carolina adopted a similar provision related to technology in Comment 8 to Rule 1.1.

ABA Model Rule of Professional Conduct 1.6: Confidentiality of Information

As part of its focus on the impact that technology has had on the practice of law, the ABA House of Delegates also voted to amend Rule 1.6. This rule was revised to include a new paragraph (c), which states that:

> "[a] lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."

New comments (Comments 18 and 19) addressing paragraph (c) explain that the unauthorized access to or the inadvertent or unauthorized disclosure of information does not constitute a violation of paragraph (c) *if* the lawyer made reasonable efforts to prevent the access or disclosure. *See* ABA Rule of Professional Conduct Rule 1.6 Comment 18. Factors to be considered in deciding if a lawyer took reasonable 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)." ABA Rule of Professional Conduct Rule 1.6 Comment 19. The comment also adds that "[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." *Id.*

ABA Formal Opinion 477R, Securing Communication of Protected Client Information (Rev. May 22, 2017)

The ABA recently issued a new formal opinion on this client confidentiality and the internet:

> A lawyer generally may transmit information relating to the representation of a client over the internet without violating the Model Rules of Professional Conduct where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access. However, a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security.

Op. at 1. The ABA also indicated that a lawyer must understand the nature of cybersecurity threats. "Client matters involving proprietary information in highly sensitive industries such as industrial designs, mergers and acquisitions or trade secrets, and industries like healthcare, banking, defense or education, may present a higher risk of data theft." *Id.* at 6.

A lawyer should also evaluate how client information is stored, including how it may be accessed: "The lawyer's task is complicated in a world where multiple devices may be used to communicate with or about a client and then store those communications." *Id.* at 6.

Preventing unauthorized access to client material requires a lawyer to understand electronic security measures:

> A lawyer should understand and use electronic security measures to safeguard client communications and information. A lawyer has a variety of options to safeguard communications including, for example, using secure internet access methods to communicate, access and store client information (such as through secure Wi-Fi, the use of a Virtual Private Network, or another secure internet portal), using unique complex passwords, changed periodically, implementing firewalls and anti-Malware/Anti- Spyware/Antivirus software on all devices upon which client confidential information is transmitted or stored, and applying all necessary security patches and updates to operational and communications software. Each of these measures is routinely accessible and reasonably affordable or free. Lawyers may consider refusing access to firm systems to devices failing to comply with these basic methods. It also may be reasonable to use commonly available methods to remotely disable lost or stolen devices, and to destroy the data contained on those devices, especially if encryption is not also being used.

Id. at 6.

The ABA also reiterated the importance of evaluating vendors:

In ABA Formal Opinion 08-451, this Committee analyzed Model Rule 5.3 and a lawyer's obligation when outsourcing legal and nonlegal services. That opinion identified several issues a lawyer should consider when selecting the outsource vendor, to meet the lawyer's due diligence and duty of supervision. Those factors also apply in the analysis of vendor selection in the context of electronic communications. Such factors may include:

- reference checks and vendor credentials;
- vendor's security policies and protocols;
- vendor's hiring practices;
- the use of confidentiality agreements;
- vendor's conflicts check system to screen for adversity; and
- the availability and accessibility of a legal forum for legal relief for violations of the vendor agreement.

Any lack of individual competence by a lawyer to evaluate and employ safeguards to protect client confidences may be addressed through association with another lawyer or expert, or by education.

Since the issuance of Formal Opinion 08-451, Comment [3] to Model Rule 5.3 was added to address

outsourcing, including "using an Internet-based service to store client information." Comment [3] provides that the "reasonable efforts" required by Model Rule 5.3 to ensure that the nonlawyer's services are provided in a manner that is compatible with the lawyer's professional obligations "will depend upon the circumstances." Comment [3] contains suggested factors that might be taken into account:

- the education, experience, and reputation of the nonlawyer;
- the nature of the services involved;
- the terms of any arrangements concerning the protection of client information; and
- the legal and ethical environments of the jurisdictions in which the services will be
- performed particularly with regard to confidentiality.

Comment [3] further provides that when retaining or directing a nonlawyer outside of the firm, lawyers should communicate "directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer." If the client has not directed the selection of the outside nonlawyer vendor, the lawyer has the responsibility to monitor how those services are being performed.

Scenario 7

10:30 a.m.

Just after deciding to proceed with the helpful software, Taylor fields a call from John in BigCo's IT department. After reminding Taylor that BigCo stores much of its data in the cloud, John frantically informs Taylor that BigCo can no longer access the cloud. Instead, all IT can see is a screen with a timer that is counting down from 24 hours. BigCo has received a ransom note offering to unencrypt that data for $30,000 in Bitcoin. The ransom note states that if BigCo discloses the ransom request, the price goes up to $100,000.

Questions:

1. May Taylor advise BigCo to pay the ransom?
2. Would that answer change if confidential customer data had been taken?
3. What disclosure obligations, if any, does BigCo have?

Suggested References – Scenario 6

Virginia Rule of Professional Conduct – Rule 1.2 (Scope of Representation)

(c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

"[T]here is little specific legal authority on the subject of payment and negotiation with ransomware attackers." John Reed Stark, *The Risks in Making a Ransomware Payment* (July 20, 2017), https://www.law360.com/articles/942290/the-risks-in-making-a-ransomware-payment.

Federal statutes address ransoms for kidnapping (*see* 18 U.S.C. § 1201–1202) but not for ransomware. Those statutes prohibit the receipt (not the payment) of a ransom. Federal statutes also criminalize a person "knowingly provid[ing] material support or resources to a foreign terrorist organization." 18 U.S.C. § 2339B(a)(1).

The U.S. Government's Official Position—Don't Pay[2]

The United States Government "does not encourage paying a ransom to criminal actors. However, after systems have been compromised, whether to pay a ransom is a serious decision, requiring the evaluation of all options to protect shareholders, employees, and customers."

But that Guidance says nothing about the legality of paying any ransom.

Sanctions Laws

A lawyer could not advise her client to pay a ransom if it would violate U.S. sanctions.

An article published by the ABA Cyberspace Law Committee[3] identified the Treasury Department's Office of Foreign Assets Control as the primary regulator in this area. OFAC "supervises the implementation of economic sanctions designed to prevent trade or financial transactions with designated payees, entities, or countries" and has a searchable database.[4] OFAC has a cyber-related sanctions program that implements executive orders signed by former President Obama that prohibit payments to certain individuals or entities that have engaged in cyberattacks. *See* Cyber-Related Sanctions Program, Dep't of the Treasury, OFAC (July 3, 2017) ("Unless otherwise authorized or exempt, transactions by U.S. persons . . . are prohibited if they involve transferring, paying, . . . or

[2] *Ransomware Prevention and Response for CISOs*, FBI, https://www.fbi.gov/file-repository/ransomware-prevention-and-response-for-cisos.pdf/view.
[3] Edward A. Morse & Ian Ramsey, *Navigating the Perils of Ransomware*, 72 Bus. Law. 287, 290 (2017); *see also* Paul Rosen & Carlton Greene, *Ransomware: What Every Corporate Executive Needs to Know* CORPORATE COUNSEL (Oct. 30, 2017), https://www.crowell.com/files/20171030-Ransomware-What-Every-Corporate-Executive-Needs-to-Know.pdf (companies should analyze "OFAC's list of Specially Designated Nationals (the SDN List) and review it against what is known about the attacker.").
[4] *Id.*

otherwise dealing in the property or interests in property of an entity or individual listed on the [Specially Designated Nationals] list."), https://www.treasury.gov/resource-center/sanctions/Programs/Documents/cyber.pdf; 31 C.F.R. § 578 *et seq*.; Executive Orders 13,694, 13757

WannaCry Ransomware Cyberattack Raises Legal Issues, **Nat'l Law Review (May 22, 2017)**

> *Determining Any Notification Requirements*
>
> Depending on the facts and nature of the data, the cyber incident may trigger a legal notification requirement. The notifications may be obligated under contractual requirements or statutes depending on the industry and jurisdiction of enforcers. Additionally, it is important to note that there may be different triggering standards for the notification requirement.
>
> As an example, in the United States, 52 jurisdictions (including 48 states, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands) have enacted some version of a data breach notification law. Under these laws, notification may be required for any customer whose personally identifiable information (PII) was acquired or accessed, or reasonably likely to have been acquired or accessed. While most states require some form of notice to their residents depending on applicable legal standards, some states also require notification to public agencies, such as the state attorney general. Until a uniform federal standard is adopted, the nuances and variations among these statutes must be reviewed and evaluated.

Fact Sheet: Ransomware and HIPAA, U.S. Dep't of Health and Human Services, https://www.hhs.gov/sites/default/files/RansomwareFactSheet.pdf

In 2016, HHS issued guidance on ransomware that is still relevant today. That guidance states that "[t]he presence of ransomware (or any malware) on a covered entity's or business associate's computer systems is a security incident under the HIPAA Security Rule." *Id.* at 5. After being notified that ransomware is present, an entity "should immediately activate its security incident response plan." *Id.* Part of that plan involves determining whether there was a "breach of PHI as a result of the security incident." *Id.* The Guidance specifies that "[w]hether or not the presence of ransomware would be a breach under the HIPAA Rules is a fact-specific determination" but "[w]hen electronic protected health information (ePHI) is encrypted as a result of a ransomware attack, a breach has occurred because the ePHI encrypted by the ransomware was acquired . . . and thus is a 'disclosure' under the HIPPA Privacy Rule." *Id.*

The Guidance states that "a breach of PHI is presumed to have occurred" (thus triggering notification requirements) unless "the covered entity or business associate can demonstrate that there is a low probability that the PHI has been compromised." *Id.* at 6 (internal quotation omitted). Companies can demonstrate that a breach has not occurred by analyzing

- "the exact type and variant of malware discovered"
- "the algorithmic steps undertaken by the malware"
- "exfiltration attempts between the malware and attackers' command and control servers" and
- "whether or not the malware propagated to other systems, potentially affecting additional

sources of electronic PHI."
Id.

Companies may wish to also analyze "the impact of the ransomware on the integrity of the PHI. Frequently, ransomware, after encrypting the data it was seeking, deletes the original data leaves only the data in encrypted form. An entity may be able to show mitigation of the impact of a ransomware attack affecting the integrity of PHI through the implementation of robust contingency plans including disaster recovery and data backup plans." *Id.* at 7. HHS says that "[c]onducting frequent backups and ensuring the ability to recover data from backups is crucial to recovering from a ransomware attack and ensuring the integrity of PHI affected by ransomware." *Id.*

The Guidance also notes that "[i]f the electronic PHI (ePHI) is encrypted by the entity in a manner consistent with the *Guidance to Render Unsecured Protected Health Information Unusable, Unreadable, or Indecipherable to Unauthorized Individuals* such that it is no longer 'unsecured PHI,' then the entity is not required to conduct a risk assessment to determine if there is a low probability of compromise, and breach notification is not required." *Id.*

Breach Notification Rule, U.S. Dep't of Health & Human Services, https://www.hhs.gov/hipaa/for-professionals/breach-notification/index.html

Breach Notification Rule

The HIPAA Breach Notification Rule, 45 CFR §§ 164.400-414, requires HIPAA covered entities and their business associates to provide notification following a breach of unsecured protected health information. Similar breach notification provisions implemented and enforced by the Federal Trade Commission (FTC), apply to vendors of personal health records and their third party service providers, pursuant to section 13407 of the HITECH Act.

Definition of Breach

A breach is, generally, an impermissible use or disclosure under the Privacy Rule that compromises the security or privacy of the protected health information. An impermissible use or disclosure of protected health information is presumed to be a breach unless the covered entity or business associate, as applicable, demonstrates that there is a low probability that the protected health information has been compromised based on a risk assessment of at least the following factors:

1. The nature and extent of the protected health information involved, including the types of identifiers and the likelihood of re-identification;
2. The unauthorized person who used the protected health information or to whom the disclosure was made;
3. Whether the protected health information was actually acquired or viewed; and
4. The extent to which the risk to the protected health information has been mitigated.

Covered entities and business associates, where applicable, have discretion to provide the required breach notifications following an impermissible use or disclosure without performing a

risk assessment to determine the probability that the protected health information has been compromised.

There are three exceptions to the definition of "breach." The first exception applies to the unintentional acquisition, access, or use of protected health information by a workforce member or person acting under the authority of a covered entity or business associate, if such acquisition, access, or use was made in good faith and within the scope of authority. The second exception applies to the inadvertent disclosure of protected health information by a person authorized to access protected health information at a covered entity or business associate to another person authorized to access protected health information at the covered entity or business associate, or organized health care arrangement in which the covered entity participates. In both cases, the information cannot be further used or disclosed in a manner not permitted by the Privacy Rule. The final exception applies if the covered entity or business associate has a good faith belief that the unauthorized person to whom the impermissible disclosure was made, would not have been able to retain the information.

Unsecured Protected Health Information and Guidance

Covered entities and business associates must only provide the required notifications if the breach involved unsecured protected health information. Unsecured protected health information is protected health information that has not been rendered unusable, unreadable, or indecipherable to unauthorized persons through the use of a technology or methodology specified by the Secretary in guidance.

. . .

Breach Notification Requirements

Following a breach of unsecured protected health information, covered entities must provide notification of the breach to affected individuals, the Secretary, and, in certain circumstances, to the media. In addition, business associates must notify covered entities if a breach occurs at or by the business associate.

Individual Notice

Covered entities must notify affected individuals following the discovery of a breach of unsecured protected health information. Covered entities must provide this individual notice in written form by first-class mail, or alternatively, by e-mail if the affected individual has agreed to receive such notices electronically. If the covered entity has insufficient or out-of-date contact information for 10 or more individuals, the covered entity must provide substitute individual notice by either posting the notice on the home page of its web site for at least 90 days or by providing the notice in major print or broadcast media where the affected individuals likely reside. The covered entity must include a toll-free phone number that remains active for at least 90 days where individuals can learn if their information was involved in the breach. If the covered entity has insufficient or out-of-date contact information for fewer than

10 individuals, the covered entity may provide substitute notice by an alternative form of written notice, by telephone, or other means.

These individual notifications must be provided without unreasonable delay and in no case later than 60 days following the discovery of a breach and must include, to the extent possible, a brief description of the breach, a description of the types of information that were involved in the breach, the steps affected individuals should take to protect themselves from potential harm, a brief description of what the covered entity is doing to investigate the breach, mitigate the harm, and prevent further breaches, as well as contact information for the covered entity (or business associate, as applicable).

With respect to a breach at or by a business associate, while the covered entity is ultimately responsible for ensuring individuals are notified, the covered entity may delegate the responsibility of providing individual notices to the business associate. Covered entities and business associates should consider which entity is in the best position to provide notice to the individual, which may depend on various circumstances, such as the functions the business associate performs on behalf of the covered entity and which entity has the relationship with the individual.

Media Notice

Covered entities that experience a breach affecting more than 500 residents of a State or jurisdiction are, in addition to notifying the affected individuals, required to provide notice to prominent media outlets serving the State or jurisdiction. Covered entities will likely provide this notification in the form of a press release to appropriate media outlets serving the affected area. Like individual notice, this media notification must be provided without unreasonable delay and in no case later than 60 days following the discovery of a breach and must include the same information required for the individual notice.

Notice to the Secretary

In addition to notifying affected individuals and the media (where appropriate), covered entities must notify the Secretary of breaches of unsecured protected health information. Covered entities will notify the Secretary by visiting the HHS web site and filling out and electronically submitting a breach report form. If a breach affects 500 or more individuals, covered entities must notify the Secretary without unreasonable delay and in no case later than 60 days following a breach. If, however, a breach affects fewer than 500 individuals, the covered entity may notify the Secretary of such breaches on an annual basis. Reports of breaches affecting fewer than 500 individuals are due to the Secretary no later than 60 days after the end of the calendar year in which the breaches are discovered.

. . .

Administrative Requirements and Burden of Proof

Covered entities and business associates, as applicable, have the burden of demonstrating that all required notifications have been provided or that a use or disclosure of unsecured protected health information did not constitute a breach. Thus, with respect to an impermissible use or disclosure, a covered entity (or business associate) should maintain documentation that all required notifications were made, or, alternatively, documentation to demonstrate that notification was not required: (1) its risk assessment demonstrating a low probability that the protected health information has been compromised by the impermissible use or disclosure; or (2) the application of any other exceptions to the definition of "breach."

Covered entities are also required to comply with certain administrative requirements with respect to breach notification. For example, covered entities must have in place written policies and procedures regarding breach notification, must train employees on these policies and procedures, and must develop and apply appropriate sanctions against workforce members who do not comply with these policies and procedures.

45 C.F.R. § 164.412

If a law enforcement official states to a covered entity or business associate that a notification, notice, or posting required under this subpart would impede a criminal investigation or cause damage to national security, a covered entity or business associate shall:

(a) If the statement is in writing and specifies the time for which a delay is required, delay such notification, notice, or posting for the time period specified by the official; or

(b) If the statement is made orally, document the statement, including the identity of the official making the statement, and delay the notification, notice, or posting temporarily and no longer than 30 days from the date of the oral statement, unless a written statement as described in paragraph (a) of this section is submitted during that time.

Securities Laws

Chairman Jay Clayton's September 20, 2017 Public Statement:[5]

With respect to U.S. public company issuers, the SEC's primary regulatory role is disclosure based. To that end, the staff of the Division of Corporation Finance has issued disclosure guidance to help public companies consider how issues related to cybersecurity should be disclosed in their public reports.

. . .

The staff guidance is principles based and, while issued in 2011, remains relevant today.

[5] https://www.sec.gov/news/public-statement/statement-clayton-2017-09-20#_ftn10.

Division of Corporation Finance Guidance[6]

The federal securities laws, in part, are designed to elicit disclosure of timely, comprehensive, and accurate information about risks and events that a reasonable investor would consider important to an investment decision. Although no existing disclosure requirement explicitly refers to cybersecurity risks and cyber incidents, a number of disclosure requirements may impose an obligation on registrants to disclose such risks and incidents. In addition, material information regarding cybersecurity risks and cyber incidents is required to be disclosed when necessary in order to make other required disclosures, in light of the circumstances under which they are made, not misleading. Therefore, as with other operational and financial risks, registrants should review, on an ongoing basis, the adequacy of their disclosure relating to cybersecurity risks and cyber incidents.

[6] *CF Disclosure Guidance: Topic 2, Cybersecurity*, Securities and Exchange Commission, Division of Corporation Finance (Oct. 13, 2011), https://www.sec.gov/divisions/corpfin/guidance/cfguidance-topic2.htm

Scenario 8

11:45 a.m.

As she heads out the door for an in-person meeting, Taylor sees an email from Chris, a mid-level BigCo executive and good friend of hers. Last night, Taylor emailed Chris some legal advice in response to a question. Chris has forwarded Taylor's legal advice to about 30 BigCo employees "to keep everyone in the loop."

Taylor sighs with frustration. Taylor regularly engages with Chris regarding legal and business advice. Chris often copies other employees on emails to Taylor and sometimes forwards information from Taylor to other employees. Chris usually copies Taylor on the forwarded emails. Chris's position is that the email remains privileged as long as Taylor is copied on it. Taylor knows that some of the advice that she gives Chris is business versus legal, but she is still concerned that Chris's practice could result in the waiver of BigCo's attorney-client privilege.

Questions:

1. Should Taylor be concerned?

A. Yes, Taylor should be concerned about the waiver of privilege.
B. No, Chris is spot-on that so long as counsel is cc'd, the attorney-client privilege is preserved.

2. What should Taylor do?

Suggested References – Scenario 8

"Any disclosure inconsistent with maintaining the confidential nature of the attorney-client relationship waives the attorney-client privilege." *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982). It is well established that a corporate entity has the right to assert the attorney-client privilege. The attorney-client privilege covers confidential communications between in-house counsel and the client for the purpose of seeking legal advice. The privilege does not cover communications with in-house counsel that are not confidential or where the attorney is providing business (and not legal) advice.

Courts will not allow companies to protect files from discovery just by copying in-house counsel. *See Neuder v. Battelle Pac. Northwest Nat'l Lab.*, 194 F.R.D. 289, 293 (D.D.C. 2000) ("Indeed, the mere fact that in-house counsel is present at a meeting does not shield otherwise unprivileged communications from disclosure."); *Leonen v. Johns-Manville*, 135 F.R.D. 94, 99 (D.N.J. 1990) ("to prevent corporate attorneys from abusing the privilege by using it as a shield to thwart discovery, 'the claimant must demonstrate that the communication would not have been made but for the client's need for legal advice or services.'") (citation omitted). There generally needs to be a reasonable expectation of privacy and the disclosure must be necessary for the client to obtain the legal advice. *See Green v. Beer*, No. 06-cv-4156, 2010 WL 3422723 (S.D.N.Y. Aug. 24, 2010).

Scenario 9

1:00 p.m.

As she heads to her office back from her lunch meeting, Taylor runs into Henry, an EVP who is in line for the presidency of BigCo. Henry asks Taylor to oversee the investigation into a sexual harassment complaint by an employee against Andrew, another EVP with whom Taylor sometimes works.

Henry mentions that one of the individuals the complainant identified as a witness informed HR that she doesn't want to participate in the investigation and, if she is forced to do so, intends to bring her own attorney with her to any interview.

Taylor doesn't tell Henry this, but a few years ago, one of her good friends at BigCo told her that Andrew made inappropriate sexual comments to her and sent her multiple unwelcome text messages. Taylor's good friend begged Taylor not to tell anyone about it and they devised a way for the friend to extract herself from Andrew's attention.

Questions:

1. Should Taylor attend the interview of the employee who said she will bring her own attorney to the interview with HR?

    a. Yes
    b. No

2. Should Taylor decline the assignment to oversee the investigation based on her experience helping her friend deal with Andrew?

    a. Yes
    b. No

3. The complaining employee files a lawsuit. As part of the legal proceeding, the interview notes obtaining facts from those involved in the alleged incidents are sought from the complaining employee's counsel. Must they be produced?

    a. No, interviews are protected by the attorney-client privilege.

b. Yes, Taylor and the BigCo lawyers had an adversarial relationship with the employees being questioned, so no privilege.
c. No, the investigation was part of a legal lawsuit investigation and protected by work product.
d. Partly yes, because the interview notes of that individual must be produced to the individual being interviewed.

4. Assuming Taylor attended the interview, once the complaining employee files suit, can Taylor defend BigCo in the litigation?

a. Yes
b. No

Suggested References – Scenario 9

Virginia Rule of Professional Conduct – Rule 4.2 (Communications with Persons Represented by Counsel)

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

ABA Model Rule of Professional Conduct 4.2

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter unless the lawyer has the consent of the other lawyer.

Virginia Rule of Professional Conduct – Rule 3.7 (Lawyer As Witness)

(a) A lawyer shall not act as an advocate in an adversarial proceeding in which the lawyer is likely to be a necessary witness except where:

(1) the testimony relates to an uncontested issue;
(2) the testimony relates to the nature and value of legal services rendered in the case; or
(3) disqualification of the lawyer would work substantial hardship on the client.

(b) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer may be called as a witness other than on behalf of the client, the lawyer may continue the representation until it is apparent that the testimony is or may be prejudicial to the client.

(c) A lawyer may act as advocate in an adversarial proceeding in which another lawyer in the lawyer's firm is likely to be called as witness unless precluded from doing so by Rule 1.7 or 1.9.

ABA Model Rule of Professional Conduct 3.7

A lawyer shall **not** act as an advocate in which the lawyer is likely to be a necessary witness.

Case Law Regarding Work Product Privilege

Ohio	Work product consists of 'documents and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative' and may be discovered only upon a showing of good cause. Ohio Civ.R. 26(B)(3). This rule is often referred to as the 'work-product doctrine.' The purpose of the work-product doctrine is 'to prevent an attorney from taking undue advantage of his adversary's industry or efforts.' Ohio Civ.R. 26(A)(2)." *Boone v. Vanliner Ins. Co.*, 91 Ohio St.3d 209, 210. **Work product protection belongs to the attorney, not the client**, and

	generally protects a broader range of materials than the attorney-client privilege. *Jackson v. Greger*, 160 Ohio App.3d 258, 2005-Ohio-1588, 826 N.E.2d 900, ¶ 32 (2d Dist.). Disclosure of work product to the adverse party may constitute a waiver when the claim of privilege is not timely raised and the requirements for identifying the potentially privileged materials are not met. *McPherson v. Goodyear Tire & Rubber Co*., 146 Ohio App.3d 441, 2001-Ohio-1517, 766 N.E.2d 1015, ¶ 10 (9th Dist.). If a dispute concerning the work product doctrine is presented to the court for resolution, the court may consider the following factors in determining whether the inadvertent disclosure amounts to a waiver of protection: • The reasonableness of the precautions taken to prevent inadvertent disclosure. • The time taken to rectify the error. • The scope of the discovery. • The extent of the disclosure. • The "overriding issue of fairness." *Guider v. Am. Heritage Homes Corp.*, 3d Dist. Logan No. 8-07-16, 2008-Ohio-2402, ¶ 9-11. The purpose of the work-product rule is to encourage attorneys to thoroughly prepare cases for trial without concern that opposing counsel will take unfair advantage of those efforts. Ohio Civ. R. 26(A). Requires showing of good cause to allow a party to discover documents, electronically stored information and tangible things prepared in anticipation of litigation or for trial. Ohio Civ. R. 26(B)(3). Protects **documents and other materials** that are **prepared in anticipation of litigation by or for a party or its representative.** Ohio Civ. R. 26(B). **"Documents and other materials" means –** Literally <u>anything</u> (including "fact" work product) prepared in anticipation of litigation, regardless of its substantive content. **"Fact" work product includes** witness statements and facts underlying the litigation which are conveyed to, and recorded by, an attorney. *See Jackson v. Greger*, 160 Ohio App.3d 258, 2005-Ohio-1588, 826 N.E.2d 900, ¶ 34 (2d Dist.). But, the individual facts contained in work product documents are not protected from discovery. For example, a party is permitted to discover the identity of persons having knowledge of any discoverable matter. Ohio Civ. R. 26(B)(1). Also, the work product doctrine does not protect facts about the

	creation of work product, for example the "fact" that a particular document was drafted. *See, e.g.*, *Stanton v. Univ. Hosps. Health Sys., Inc.*, 166 Ohio App.3d 758, 2006-Ohio-2297, 853 N.E.2d 343, ¶ 14 (8th Dist.). Ohio courts have been inconsistent in defining what it means to be prepared **"in anticipation of litigation."** To qualify for work product protection, there must be a **causal connection** between the document's creation and anticipated litigation. Some courts require the threat of litigation to be **"real and substantial."** *See, e.g.*, *Perfection Corp. v. Travelers Cas. & Sur.*, 153 Ohio App. 3d 28, 2003-Ohio-2750, 790 N.E.2d 817, ¶ 27 (8th Dist.). Others require the possibility of litigation to be **"substantial and imminent."** *See, e.g.*, *Roggelin v. Auto–Owners Ins.*, 6th Dist. Lucas No. L–02–1038, 2002-Ohio-7310, ¶ 19. Still others require only that the material at issue be created **"because of"** the prospect of litigation. *See Estate of Hohler v. Hohler*, 185 Ohio App. 3d 420, 2009-Ohio-7013, 924 N.E.2d 419, ¶ 50-51 (7th Dist.). As a general rule, work product protection is <u>not</u> available when a document was created: In the ordinary course of business. *See, e.g.*, *Dennis v. State Farm Ins. Co.*, 143 Ohio App.3d 196, 757 N.E.2d 849 (7th Dist.2001). As a result of a routine company duty, policy or process. *See, e.g.*, *DeMarco v. Allstate Ins. Co., 8th Dist. Cuyahoga No. 100192*, 2014-Ohio-933, ¶ 22 (holding that an insurance claim file was not created in anticipation of litigation and not protected work product); Because of a legal duty. *Leonchyk v. FCI USA, Inc.*, 8th Dist. Cuyahoga No. 89331, 2008-Ohio-3796, ¶ 13 (holding that document submitted to OSHA regarding incident was not protected work product).
Pennsylvania	Pennsylvania courts have **embraced the attorney work product doctrine**. *See* Pa. R. Civ. P. No. 4003.3; *see also Dages v. Carbon County*, 44 A.3d 89, fn. 4 (Pa. Cmwlth. 2012) (citing cases); *Barrick v. Holy Spirit Hosp. of Sisters of Christian Charity*, 91 A.3d 680, 689 (Pa. Apr. 29, 2014) (adopting bright-line rule barring discovery of attorney-expert communications to protect attorney work product). Shields from disclosure of **an attorney's** mental impressions, conclusions, opinions, memoranda, notes or summaries, legal research or legal theories. *See* Pa. R. Civ. P. 4003.3. But, protection does <u>not</u> extend to material prepared in anticipation of trial **by the party *except*** for mental impressions, conclusions or opinions respecting the **value or merit of a claim or defense**, or respecting **strategy**

	or tactics. *See* Pa. R. Civ. P. 4003.3. Witness statements concerning the legal action or its subject matter made by a party or witness are discoverable. Pa. R. Civ. P. 4003.4. Even respecting protected material, a party may be entitled to work product upon sufficiently demonstrating **need and hardship in obtaining materials substantially equivalent**. *In re Grand Jury Investigation*, 599 F.2d 1224. 1232 (3d Cir. 1979) (regarding access to interview memoranda where witness is deceased); *see also Hodgson v. L. B. Smith, Inc., 14 Fed. R. Serv. 2d 1285 (M.D. Pa. 1971*) (setting forth general rules about what is sufficient to overcome work product rule). **Work product protection can be waived** through voluntary disclosure of the work product by an attorney to an adverse party or where the work product is put "at issue" in the litigation by the party claiming the protection. *See In re Sunrise Securities Litigation*, 130 F.R.D. 560, 568 (E.D. Pa. 1989)*, decision clarified on denial of reconsideration,* 109 B.R. 658 (E.D. Pa. 1990) (E.D. Pa. 1989) (making disclosure of attorney work product containing legal advice to FSLIC absent agreement to withhold information from adversary waives work-product protection); *S & A Painting Co. v. O.W.B. Corp.*, 103 F.R.D. 407, 409 (W.D. Pa. 1984)) (holding that handwritten notes prepared by witness at suggestion of attorney fell within privilege and work product doctrine, however, both were waived in regard to portions referred to during deposition).
Virginia	**Materials prepared by counsel with an eye toward litigation are generally protected** from discovery pursuant to the work product doctrine. *See Com. v. Edwards*, 235 Va. 499, 510, 370 S.E.2d 296, 302 (1988) (holding work product includes materials such as "interviews, statements, memoranda, correspondence, briefs, mental impressions, [and] personal beliefs."). The work product doctrine **protects an attorney from being required to open his or her files** to opposing counsel. *See Rakes v. Fulcher*, 210 Va. 542, 546, 172 S.E.2d 751, 755 (1970). The work product doctrine protects the **attorney's direct work as well as the work of other party representatives, consultants, and insurance agents**. *See* Va. S. Ct. Rule 4:1(b)(3) ("…a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this Rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions,

	conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.") Under Rule 4:1(b)(6), "[w]hen a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial protection material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection." *See E.I. Du Pont de Nemours & Co. v. Kolon Indus., Inc.*, Civil Action No. 3:09cv58, 2010 WL 1489966, at *8 (E.D. Va. Apr. 13, 2010).
Indiana	The work-product doctrine prevents a party from obtaining from another notes from an attorney and memoranda reflecting the attorney's theories and mental impressions about the matter. *Penn. Cent. Corp. v. Buchanan,* 712 N.E.2d 508, 516 (Ind.Ct.App.1999) "Although a party may obtain discovery of ordinary work product materials by making a special showing, a party seeking discovery is never entitled to the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of the party concerning the litigation. Such material, often called opinion work product, is entitled to absolute protection from discovery." *Nat'l Eng'g & Contracting Co. v. C & P Eng'g & Mfg. Co.,* 676 N.E.2d 372, 376 (Ind.Ct.App.1997)
Nebraska	Neb. Ct. R. of Discovery 26(b)(3) states that a party may refuse to disclose documents prepared in anticipation of litigation or for trial.
Florida	Work product may be created by or on behalf of a party in anticipation of litigation (*Marshalls of MA, Inc. v. Minsal*, 932 So. 2d 444, 446 (Fla. 3d DCA 2006)). Under Rule 1.280, the following persons may create work product: • The party's attorney. • Consultants. • Sureties. • Indemnitors. • Insurers. • Agents. (Fla. R. Civ. P. 1.280(b)(4).) However, this list is not exhaustive. Information created or prepared by other types of representatives of the party or the party's attorney may also be entitled to work product privilege. For example, courts have held that documents created by investigators and employees of a risk

	management department are protected from disclosure. (*Heartland Express, Inc., of Iowa v. Torres*, 90 So. 3d 365, 367-368 (Fla. 1st DCA 2012).)
	
	The Florida courts have provided a general description of attorney work product that includes any of the following if generated by the attorney and not used as evidence:
	
	• Views of how and when to present evidence.
	• Evaluation of the importance of evidence.
	• Personal knowledge of strategies for presenting witnesses.
	• Personal notes as to:
	  ○ witnesses;
	  ○ jurors;
	  ○ legal citations;
	  ○ proposed arguments;
	  ○ jury instructions; and
	  ○ diagrams and charts.
	
	(*Bishop ex rel. Adult Comprehensive Protective Servs., Inc. v. Polles*, 872 So. 2d 272, 274 (Fla. 2d DCA 2004).)
	
	Florida law differentiates between "fact" or "opinion" work product and assigns different degrees of protection for each (*Acevedo v. Doctors Hosp., Inc.*, 68 So. 3d 949, 952-53 (Fla. 3d DCA 2011)).
	
	Generally, fact work product includes any information relating to the case that was gathered in anticipation of litigation, regardless of its substantive content. Fact work product is protected from disclosure unless the party seeking discovery shows a need and is unable to obtain its substantial equivalent without undue hardship. (*Heartland Express, Inc., of Iowa v. Torres*, 90 So. 3d 365, 367 (Fla. 1st DCA 2012).)
	
	Opinion work product consists primarily of the mental impressions, conclusions, opinions, and theories of the attorney and is generally afforded absolute immunity from disclosure (Fla. R. Civ. P. 1.280(b)(4) and see *Acevedo v. Doctors Hosp., Inc.*, 68 So. 3d 949, 953 (Fla. 3d DCA 2011)).
	
	Fact work product protection may be overcome if the party seeking discovery shows that it is both:
	
	• In need of the materials in the preparation of their case.
	• Is unable without undue hardship to obtain their substantial equivalent by other means.
	
	(Fla. R. Civ. P. 1.280(b)(4)).
	
	While fact work product is subject to discovery upon a showing of need

	and undue hardship, opinion work product generally remains protected from disclosure (*Acevedo v. Doctors Hosp., Inc.*, 68 So. 3d 949, 953 (Fla. 3d DCA 2011) (opinion work product generally receives "absolute immunity")).
Iowa	Iowa law protects materials "prepared in anticipation of litigation or for trial" from discovery, so long as those materials are made by or for a party or party's representative (examples: attorney, consultant, insurer, agent). Iowa R. Civ. P. 1.503(3). Production of work product is required "only upon a showing that the party seeking discovery has substantial need of the materials ... and ... is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Iowa R. Civ. P. 1.503(3). This rule requires the court, however, to "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney" when ordering such discovery. *Keefe v. Bernard et al.*, 774 N.W.2d 663, 673 (Iowa 2009), quoting Iowa R. Civ. P. 1.503(3). Opinion work product is "for all practical purposes, absolutely immune from discovery" under Iowa law. *Keefe v. Bernard et al.*, 774 N.W.2d 663, 674 (Iowa 2009). The Iowa Supreme Court has held that material "prepared in the ordinary course of business and prepared in anticipation of litigation' are not mutually exclusive concepts" and that internal corporate investigation records can qualify for work product protection. *Wells Dairy, Inc. v. American Indus. Refrigeration, Inc.*, 690 N.W.2d 38, 44 (2004).
Kentucky	Kentucky's work product rule is codified in CR 26.02(3)(a), which states: > Subject to the provisions of paragraph (4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (1) of this rule and **prepared in anticipation of litigation** or for trial by or for another party or **by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent)** only upon a showing that the party seeking discovery has **substantial need** of the materials in the preparation of his case and that he is unable without **undue hardship** to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the **court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories** of an attorney or other representative of a party concerning the litigation. Kentucky's work product doctrine can protect work product even where the attorney or attorney's agent does not work on behalf of a party to the present litigation. *O'Connell v. Cowan*, 332 SW 3d 34, 42 (Ky. 2010).

Wisconsin	A lawyer's work product requires that most materials, information, mental impressions and strategies collected and adopted by a lawyer after retainer in preparation of litigation and relevant to the possible issues be initially classified as work product of the lawyer and not subject to inspection or discovery unless good cause for discovery is shown. *State ex. rel. Dudek v. Circuit Court for Milwaukee Cty.*, 150 N.W.2d 387 (Wis. 1967)
Louisiana	"Louisiana's work product rule states that a court shall not order the production of a document prepared by an adverse party in anticipation of litigation or trial unless the denial of production will unfairly prejudice the party seeing production." *Cacamo v. Liberty Mut. Fire Ins. Co.*, 798 So. 2d 1210 (La. Ct. App. 2001).

Scenario 10

1:00 p.m.

After talking with Henry, Taylor tries to catch up on her to-do list. Among other things, Taylor turns to the newly received due diligence request relating to a divesture of one of BigCo's underperforming subsidiaries. Buyer's lawyer requests copies of letters that BigCo has from its external counsel, Most Favored Firm (MFF), analyzing the risks in five major lawsuits.

Question:

Is there any risk to BigCo in the production of these letters?

A. Not if Buyer buys the company because Buyer will retain the privilege.

B. Yes, privilege is destroyed by disclosure to a third party Buyer regardless of who buys the BigCo subsidiary.

C. No risk if the governing state has a common interest exception to privilege waiver.

D. None of the above. The risk depends on whether it is an asset or stock sale.

Suggested References – Scenario 10

Case Law Regarding the Common Interest Doctrine

Ohio	**The common interest doctrine is not a separate privilege.** *Condominiums at Stonebridge Owner's Assn., Inc. v. K & D Group, Inc.*, 8th Dist. Cuyahoga No. 100261, 2014-Ohio-503, ¶ 15. It merely allows for the sharing of privileged information among separately represented parties. *See State ex rel. Bardwell v. Ohio Atty. Gen.*, 181 Ohio App.3d 661, 680, 2009-Ohio-1265, 910 N.E.2d 504, ¶ 87 (10th Dist.). For the common interest doctrine to apply, **the underlying communication still must satisfy the elements of the attorney-client privilege**. *Condominiums at Stonebridge Owner's Assn., Inc. v. K & D Group, Inc.*, 8th Dist. Cuyahoga No. 100261, 2014-Ohio-503, ¶ 16. In Ohio, the common interest doctrine **applies to communications between attorneys or parties with a common litigation opponent in a joint defense situation**, and may include both civil and criminal litigation. *State ex rel. Bardwell v. Ohio Atty. Gen.*, 181 Ohio App.3d 661, 2009–Ohio–1265, 910 N.E.2d 504, ¶ 87 (10th Dist.). Ohio courts **narrowly construe the common interest exception**, limiting it to communications involving **a common legal strategy in the course of a joint defense effort**. *Buckeye Corrugated, Inc. v. Cincinnati Ins. Co.*, 9th Dist. Summit No. 26634, 2013-Ohio-3508, ¶ 15. If the common interest parties' **interests later become adverse**, **information that was already shared under the agreement generally may not be withheld on privilege in subsequent litigation between those parties**. *See Buckeye Corrugated, Inc. v. Cincinnati Ins. Co.*, 9th Dist. Summit No. 26634, 2013-Ohio-3508, ¶ 16 (noting that the exception applies to prevent disclosure to third parties.). However, common-interest participants who later become adversaries **generally need not disclose to the other participants, communications that they did not already share with those other participants**. *See Buckeye Corrugated, Inc. v. Cincinnati Ins. Co.*, 9th Dist. Summit No. 26634, 2013-Ohio-3508, ¶ 16. After a merger or other succession, the **new entity's management may waive the privilege with respect to the predecessor entity's communications with counsel**. *See* R.C. 1701.82 (granting to the new entity all rights and privileges previously belonging to the former entity); *Commodity Futures Trading Comm. v. Weintraub*, 471 U.S. 343, 349, 105 S.Ct. 1986, 85 L.Ed.2d 372 (1985).

Pennsylvania	In *In re Condemnation by City*, the Commonwealth Court of Pennsylvania held that Pennsylvania law recognizes the common interest privilege in criminal and civil cases, but that few cases have addressed the limits of that privilege. 981 A. 2d 391, 397 (2009). In that case, the court held that adverse parties to a condemnation proceeding did not share a "common legal interest" as required under this doctrine. The court also cited favorably to federal case law holding that solely commercial common interests are insufficient to warrant application of the privilege. *Katz v. AT & T Corp.*, 191 F.R.D. 433 (E.D. Pa. 2000).
Virginia	"Whether an action is civil or criminal, potential or actual, whether the commonly interested parties are plaintiffs or defendants, 'persons who share a common interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims.'" *Hicks v. Com.*, 439 SE 2d 414, 416 (Va. Ct. App. 1994) (internal citation omitted).
Indiana	The common interest privilege allows parties who have coinciding legal interests to share privileged materials in order to help prosecute or defend claims. *Groth v. Pence*, 67 N.E.3d 1104, 1119 (Ind. Ct. App.), *transfer denied*, 86 N.E.3d 172 (Ind. 2017). It is an exception to the rule that privilege is waived by disclosure to third parties. *Id.* The common interest privilege treats all attorneys and clients as a single-unit, as the privilege relates to the specific common issue. *Price v. Charles Brown Charitable Remainder Unitrust Tr.*, 27 N.E.3d 1168, 1173 (Ind. Ct. App. 2015). The common interest doctrine may apply among Plaintiffs even when counsel is not present. *Reginald Martin Agency, Inc. v. Conseco Med. Ins. Co.*, 460 F. Supp. 2d 915, 919 (S.D. Ind. 2006).
Nebraska	Under Nebraska law, "a communication is confidential if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." Neb. Rev. Stat. § 27-503. Nebraska law is not developed as to the common interest doctrine.
Florida	The common interest doctrine requires: • Multiple attorneys representing separate parties. • Clients with some interests in common. • A sharing of information between attorneys for different clients or a client and the attorney for another client in the group.

	• Circumstances where it is reasonable to assume that disclosure to third parties is not intended. • Information exchanged for the limited purpose of assisting in the common cause. (*Visual Scene, Inc. v. Pilkington Bros., plc.*, 508 So. 2d 437, 441 (Fla. 3d DCA 1987).) The common interest doctrine is not a separate privilege. It merely allows for separately represented parties with common legal interests to share information with each other and their respective attorneys without destroying the attorney-client privilege. For the doctrine to apply, the underlying communication must still satisfy the elements of the attorney-client privilege. (See Visual Scene, Inc. v. Pilkington Bros., plc., 508 So. 2d 437, 440 (Fla. 3d DCA 1987) (traditional privilege rules apply to a common interest arrangement, such as waiver by disclosure of privileged information to a non-member of the common interest group).) If the parties invoking the common interest exception later become adversaries, information that was already shared under the agreement generally may not be withheld on privilege grounds in subsequent litigation between those parties (*MapleWood Partners, L.P. v. Indian Harbor Ins. Co.*, 295 F.R.D. 550, 606 (S.D. Fla. 2013) (applying Florida law)).
Iowa	An attorney cannot waive the attorney-client privilege, unless the client gives informed consent as to that waiver, disclosure is impliedly authorized in order to represent the client, or disclosure is permitted or required by the Iowa Professional Rules of Conduct. IRPC 32:1.6. Generally, Attorney-client privilege may be waived. *Miller v. Continental Ins. Co.*, 392 N.W.2d 500, 504 (Iowa 1986); Iowa Code § 622.10 (1993). Waiver may be express or implied. An express waiver occurs when a client voluntarily discloses the content of privileged communications. *Miller*, 392 N.W.2d at 504. An implied waiver occurs where the client has placed in issue a communication which goes to the heart of the claim in controversy. *Squealer Feeds v. Pickering*, 530 N.W.2d 678, 684 (Iowa 1995). Any waiver is limited to attorney-client communications on the matter disclosed or at issue. *Miller*, 392 N.W.2d at 504-05.
Kentucky	Revelation of the statements to a third party who is neither a representative of the client or the attorney would amount to a waiver of the privilege. *Lexington Public Library v. Clark*, 90 S.W.3d 53, 61 (Ky. 2002)
Wisconsin	Where an attorney's services are rendered to several persons, confidential communications to him in regard thereto, in which all such persons are interested, cannot be disclosed unless all join in consenting

	thereto. *Herman v. Schlesinger*, 90 N.W. 460 (Wis. 1902).
Louisiana	Louisiana Code of Evidence Art. 506 provides, in part, that "A client has a privilege to refuse to disclose, and to prevent another person from disclosing, a confidential communication . . . made for the purpose of facilitating the rendition of professional services to the client . . . when the communication is . . . by the client or his lawyer, or a representative of a lawyer, who represents another party concerning a matter of common interest."

Case Law Regarding Waiver

Ohio	An intentional express waiver occurs when the privilege holder intentionally discloses privileged communications to a third party who is outside the attorney-client relationship. (See Surovec v. LaCouture, 82 Ohio App.3d 416, 421, 612 N.E.2d 501 (2d Dist.1992).)
Pennsylvania	Under Pennsylvania law, the client waives the attorney-client privilege when the **client discloses a privileged communication to a third party who is outside the protected attorney-client relationship**. *Smith v. St. Luke's Hosp.*, 40 Pa. D. & C.3d at 60 ("there can be no claim of privilege as to facts which have already been publicly disclosed by the client"); *Bonds v. Bonds*, 689 A.2d 275, 615 (Pa. Super. Ct. 1997) ("the appellate courts of this jurisdiction have found waiver when the communication is made in the presence of or communicated to a third party or to the court…."). Traditionally, the voluntary disclosure of an attorney-client privileged communication to a third party waives the attorney-client privilege for the communication that is disclosed, **even if the third party agrees not to disclose the communication to others**. *Bagwell v. Pennsylvania Dept. of Education*, 103 A.3d 409, 418 (Pa. Commw. Ct. 2014); *Joe v. Prison Health Servs., Inc.*, 782 A.2d 24 (Pa. Commw. Ct. 2001); *Adhesive Specialists, Inc. v. Concept Sciences, Inc.*, 59 Pa. D. & C.4th 244, 262 (Pa. Com. Pl. 2002)), citing *Westinghouse Electric Corporation*, 951 F.2d 1414, 1427 (3d Cir. 1991).
Virginia	Privileged communications may be expressly waived by the client or a waiver may be implied from the client's conduct. *Banks v. Mario Industries of Virginia,* 650 SE 2d 687, 696 (Va. Supreme Ct. 2007). Waiver belongs to the client, not the attorney. *Com v. Edwards*, 370 SE 2d 296, 301 (Va. Supreme Ct. 1988) (also holding that "[w]hen a client communicates information to his attorney with the understanding that the information will be revealed to others, the disclosure to others effectively waives the privilege "not only to the transmitted data but also as to the details underlying that information.")
Indiana	Attorney-client privilege can be expressly or implicitly waived. *Waterfield v. Waterfield*, 61 N.E.3d 314, 324 (Ind. Ct. App. 2016), *transfer denied*, (Ind. Jan. 12, 2017), and *transfer denied,* 76 N.E.3d 141 (Ind. 2017). The privilege belongs to the client and can only be waived by the client.

	Brown v. Katz, 868 N.E.2d 1159, 1166 (Ind. Ct. App. 2007). Although Indiana courts recognize the common interest doctrine, they have not clarified what constitutes waiver. *Bitler Inv. Venture II, LLC v. Marathon Ashland Petroleum LLC*, No. 1:04-CV-477, 2007 WL 465444, at *3 (N.D. Ind. Feb. 7, 2007). The Court of Appeals looked at the various ways of approaching inadvertent disclosure of privileged communications. It considered the objective approach, "which concludes that inadvertent disclosure forfeits the protection of the privilege without regard to the particular circumstances," the subjective approach, "which concludes that the privilege if forfeited only if the disclosure was intentional;" and the balancing approach, "which examines several factors in determining whether the privilege is forfeited." *Id.* Those factors include "the reasonableness of the precautions to prevent inadvertent disclosure, the time taken to rectify the error, the scope of discovery," the extent of the disclosure, and "an overreaching issue of fairness and the protection of an appropriate privilege which, of course, must be judged against the care or negligence with which the privilege is guarded with care and diligence or negligence and indifference." The court found the balancing approach to be the most reasonable. *P.T. Buntin, M.D., P.C. v. Becker*, 727 N.E.2d 734, 740–41 (Ind. Ct. App. 2000).
Nebraska	Generally, "it has long been the rule that communications between client and attorney made in the presence of others do not constitute privileged communications." *State v. Lynch*, 196 Neb. 372, 376, 243 N.W.2d 62, 65 (1976). "Fairness is an important and fundamental consideration in assessing the issue of whether there has been a waiver of the lawyer-client privilege." *League v. Vanice*, 221 Neb. 34, 44, 374 N.W.2d 849, 856 (1985). The District Court of Nebraska noted that state courts were silent on the issue of waiver and predicted that Nebraska courts would take a "middle of the road" approach using a five step analysis that considers "(1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of document production, (2) the number of inadvertent disclosures, (3) the extent of the disclosures, (4) the promptness of measures taken to rectify the disclosure, and (5) whether the overriding interest of justice would be served by relieving the party of its error." *Seger v. Ernest-Spencer Metals, Inc.,* No. 8:08CV75, 2010 WL 378113, at *6 (D. Neb. Jan. 26, 2010) (citations omitted).

Florida	The attorney-client privilege belongs to the client (§ 90.502(2), Fla. Stat.). Generally, only the client or certain client-representatives, such as a personal representative or guardian, can waive the privilege (§§ 90.507 and 90.502(3), Fla. Stat.). Attorneys do not own the client's privilege. However, an attorney has implied authority from the client to act on its behalf. Therefore, an attorney's conduct may waive the client's privilege. (§§ 90.502(3)(e) and 90.507, Fla. Stat.; *see also Nova Se. Univ., Inc. v. Jacobson*, 25 So. 3d 82, 86 (Fla. 4th DCA 2009) (an attorney's failure to demand return of inadvertently produced privileged documents may waive the client's privilege).) The conduct of an attorney's employee, such as a secretary, may also waive the client's privilege because the privilege extends to the attorney's necessary intermediaries and agents (*Stevenson v. Stevenson*, 661 So. 2d 367, 369-70 (Fla. 4th DCA 1995)). Although the privilege may attach to corporate counsel's communications with virtually any type of employee, only the corporation's present management (typically its officers and directors) may waive the corporation's privilege (*Rogan v. Oliver*, 110 So. 3d 980, 983 (Fla. 2d DCA 2013)). However, no individual stockholder, officer, or director has the authority to waive or assert the privilege against the wishes of the corporation's board of directors (*Tail of the Pup, Inc. v. Webb*, 528 So. 2d 506, 507 (Fla. 2d DCA 1988)). A corporation's former executives, managers, and employees cannot waive the corporation's privilege over the wishes of current managers (Rogan, 110 So. 3d at 983). When the control of a corporation passes to new management, so does the authority to assert and waive the attorney-client privilege. Newly installed managers, resulting from a takeover, merger, or normal succession, may therefore waive the attorney-client privilege regarding communications made by former officers and directors. (Rogan, 110 So. 3d at 983.) Other corporate successors, such as assignees, trustees in dissolution, or similar representatives may waive or assert the corporation's attorney-client privilege even if the corporation has been dissolved (§ 90.502(3)(d), Fla. Stat.).
Iowa	An attorney cannot waive attorney-client communications except to "establish a claim or defense" against a client in an attorney-client dispute. Iowa Rule 1.6(b)(5). In an attorney-client relationship between a corporation and a corporate attorney, the corporation is the client, owns the privilege, and has the sole authority to waive the privilege. *See Keefe v. Bernard*, 774 N.W.2d at 669-70.

Kentucky	Under KRE 503, employees of a client can be treated as "representatives" of the client. So, generally speaking, and assuming they meet a few additional requirements, confidential statements made by a client's employees to the client's legal counsel are protected as much as statements by the client itself. Likewise, statements by the lawyer to the client or to the client's employees, again assuming they meet the additional requirements, are also protected. *Collins v. Braden*, 384 S.W.3d 154, 161 (Ky. 2012)
Wisconsin	A lawyer, without the consent or knowledge of a client, cannot waive the attorney-client privilege by voluntarily producing documents, which the attorney does not recognize as privileged. *Harold Sampson Children's Trust v. The Linda Gale Sampson*, 679 N.W.2d 794 (Wis. App. 2003). The client is the holder of the attorney-client privilege, only the client or someone authorized by the client to do so may waive the privilege. *State v. Meeks*, 666 N.W.2d 859 (Wis. 2003).
Louisiana	"A privilege is waived if the holder discloses the communication or consents to its disclosure, unless the disclosure was compelled or the holder did not have opportunity to claim the privilege." Louisiana Civil Law Treatise, § 8.2.

Scenario 11

3:30 p.m.

Rushing to head out to another meeting across town regarding the NewCo deal, Taylor remembers that she never responded to Carl, the EVP of Sales regarding a question he had. Taylor quickly sends the following email to Carl:

"You asked my advice on whether we are obligated to deliver goods in the future under our sales contract with NoPayCo. I understand that NoPayCo has failed to pay for the last two shipments and has not responded to our letters sent over a month ago demanding payment.

I have attached a D&B report showing NoPayCo is past due on obligations to many of its suppliers. Our sales contract says we may terminate if NoPayCo fails to pay shipments after 30 days' notice. In my opinion, you need not make further shipments."

Question:

Is this email protected by the attorney-client privilege?

A. Yes, in its entirety, including the D&B report.

B. Partly, you must disclose the D&B report.

C. Partly, you must disclose (i) the D&B report, (ii) the second sentence of the first paragraph, since it may not have come from the client, and (iii) the second sentence of the second paragraph, since it is just a quote from a contract.

D. Only the D&B report is protected.

Suggested References – Scenario 11

Case Law on Business Advice Versus Legal Advice

Ohio	The advice at issue **must be legal advice** for the privilege to apply. *Nageotte v. Boston Mills Brandywine Ski Resort*, 2012-Ohio-6102, ¶ 8 (9th Dist. Summit). **Business advice that is unrelated to legal advice** generally is not privileged. *See Mickel v. Huntington Bank of Toledo*, 6th Dist. Lucas No. L-82-099, 1982 WL 6496, *2 (July 2, 1982). Advice **relating to litigation has obvious legal character**, but communications concerning legal advice need not necessarily relate to litigation for the privilege to apply. The only requirement is that the communication relate to legal advice. *Nageotte v. Boston Mills Brandywine Ski Resort*, 2012-Ohio-6102, ¶ 8 (9th Dist. Summit). Legal advice of any kind may be the subject of the attorney-client privilege. *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St.3d 261, 267, 2005-Ohio-1508, 824 N.E.2d 990, 997, ¶ 29 (2005). The fact that an attorney was involved in a communication (for example, present at a board meeting) does not make otherwise non-privileged communications privileged. *See Maddox v. Greene Cty. Bd. of Commrs.*, 2nd Dist. Greene No. 2013–CA–71, 2014-Ohio-1541, ¶ 7. Also, referencing an attorney or noting that attorney review is needed does not make a communication privileged. *See Boone v. Vanliner Ins. Co.*, 91 Ohio St.3d 209, 215, 744 N.E.2d 154 (2001).
Pennsylvania	Attorney-client privilege can protect communications to or from legal counsel, whether outside or in-house counsel, **so long as they are not acting principally as business advisors** giving only incidental legal advice. *In Re: Westinghouse Electric Corporation Uranium Contracts Litigation*, 76 F.R.D. 47, 2 Fed. R. Evid. Serv. 87 (W.D. Pa., Jul 19, 1977). Pennsylvania courts will not protect communications unless they are made for the **purpose of obtaining or giving legal advice**. *Maleski by Chronister v. Corporate Life Ins. Co.*, 641 A.2d 1 (Pa. Cmwlth. 1994); *Yi v. Commonwealth*, 646 A.2d 603 (Pa. Cmwlth. 1994) (attorney was asked to translate, not to provide legal advice); *Okum v. Commonwealth*, 465 A.2d 1324 (Pa. Cmwlth. 1983) (attorney was asked by administrator to clarify his administrative authority, not for legal advice); Leonard Packel & Anne Bowen Poulin, PENNSYLVNIA EVIDENCE § 521-1(c), at 391.

Virginia	Generally, the attorney-client privilege does not attach to a communication merely because it is communicated between a client and her attorney, but the privilege does attach to a communication **made with the purpose of delivering legal advice**. *Robertson v. Commonwealth,* 181 Va. 520, 539-40, 25 S.E.2d 352, 360 (1943). Communications between officers and employees of the same entity relayed to corporate counsel for the purpose of obtaining legal advice are entitled to the attorney-client privilege. *Owens-Corning Fiberglas Corp. v. Watson,* 243 Va. 128, 141, 413 S.E.2d 630, 638 (1992) (citing *Upjohn Co. v. United States,* 449 U.S. 383, 101 S. Ct. 677, 66 L.Ed.2d 584 (1981)). The Virginia Supreme Court recognizes that **in-house lawyers can have privileged conversations with employees of companies** they represent. *Va. Elec. & Power Co. v. Westmoreland-LG & E Partners*, 259 Va. 319, 326 (Va. 2000) (holding that the attorney-client privilege protected a draft letter sent for review to an in-house lawyer; explaining that "Communications between officers and employees of the same entity relayed to corporate counsel for the purpose of obtaining legal advice are entitled to attorney-client privilege.") (citing *Owens-Corning Fiberglas Corp. v. Watson*, 413 S.E.2d 630, 638 (Va. 1992)). Virginia Circuit Courts have also confirmed this principle. Inta-Roto, Inc. v. Aluminum Co., 11 Va. Cir. 499, 500 (Henrico 1980) ("That such [attorney-client] privilege does apply to in-house counsel is clear."); Gordon v. Newspaper Ass'n of Am., 51 Va. Cir. 183, 186 (Richmond 2000) (" '[T]he privilege exists between a corporation and its in-house attorney.' The communications protected are those between employees and in-house counsel which aid counsel in providing legal services to the corporation.") (internal citations omitted). The Virginia Supreme Court has held that the attorney-client privilege applies **when corporate employees share a communication that is initially protected as a communication between a corporate employee and in-house counsel**. *See Va. Elec. & Power Co. v. Westmoreland-LG & E Partners*, 259 Va. 319, 326 (Va. 2000) (holding that the attorney-client privilege protected a draft letter sent for review to an in-house lawyer and shared between corporate employees of same parent corporation).
Indiana	Communications between a client seeking advice from an attorney in his professional capacity are strictly confidential. This privilege applies to "all communications made to an attorney for the purpose of professional advice or aid, regardless of any pending or expected litigation." *Groth v. Pence*, 67 N.E.3d 1104, 1118 (Ind. Ct. App.), *transfer denied,* 86 N.E.3d 172 (Ind. 2017). To establish attorney-client privilege, the communication must occur "in the course of an effort to obtain legal advice or aid, on the subject of the client's rights or liabilities, from a professional legal advisor acting in his or her capacity as such." *Techna-Fit, Inc. v. Fluid Transfer Prod., Inc.*, 45 N.E.3d 399,

	411 (Ind. Ct. App. 2015). The privilege may not be claimed when the attorney is acting as an ordinary business person. *Hartford Fin. Servs. Grp., Inc. v. Lake Cty. Park & Recreation Bd.*, 717 N.E.2d 1232, 1236 (Ind. Ct. App. 1999).
Nebraska	Attorney-client privilege applies to communications that are confidential in character and relate "to the subject matter upon which advice was given or sought." *State ex rel. Stivrins v. Flowers*, 273 Neb. 336, 342, 729 N.W.2d 311, 317 (2007). For a communication to be privileged, it must have been made between an attorney and client, during the course of professional employment, and must reference the subject matter of that employment. *State v. Spidell*, 194 Neb. 494, 233 N.W.2d 900 (1975).
Florida	The lawyer-client privilege only protects confidential communications made for the purpose of obtaining or rendering legal services (§ 90.502(1)(b), Fla. Stat.). The privilege applies to attorney-client communications involving either legal advice or information that enables the lawyer to render legal advice. (*Hagans v. Gatorland Kubota, LLC/Sentry Ins.*, 45 So. 3d 73, 78 (Fla. 1st DCA 2010).) Communications that fall outside of this scope do not qualify for privilege protection (see, for example, *Waffle House v. Scharmen*, 981 So. 2d 1266, 1267 (Fla. 1st DCA 2008) (privilege does not protect attorney's mere recitation of statutory language to the client, such as telling a client the statute of limitations or statutory work search requirements); *Valliere v. Florida Elections Com'n*, 989 So. 2d 1242, 1243 (Fla. 4th DCA 2008) (social conversation with attorney unrelated to legal advice not protected); *State v. Branham*, 952 So. 2d 618, 621 (Fla. 2d DCA 2007) (same)). Advice relating to litigation has obvious legal character, but communications concerning legal advice need not relate to litigation for the privilege to apply. Transactional advice may also qualify for privilege protection. For example, the attorney-client privilege protects discussions with an attorney concerning preparation and drafting of a will during the lifetime of the client where the will was not disclosed to third parties. (*Compton v. W. Volusia Hosp. Auth.*, 727 So. 2d 379, 382 (Fla. 5th DCA 1999).) Attorneys may play various roles, giving not only legal advice but at times business advice or general information. Although legal advice concerning a client's business may be protected by the privilege, purely business advice unrelated to legal advice generally is not privileged. Mixed-purpose (for example, business and legal) advice may be privileged if legal advice is the primary purpose of the communication. (*Preferred Care Partners Holding Corp. v. Humana, Inc.*, 258 F.R.D. 684, 689 (S.D. Fla. 2009) (applying Florida law).)

Iowa	Under Iowa's common law, "any confidential communications between an attorney and the attorney's client is absolutely privileged from disclosure against the will of the client." *Squealer Feeds v. Pickering*, 530 N.W.2d 678 (Iowa 1995). Attorney-client privilege is also codified at Iowa Code Section 622.10, which states in pertinent part: A practicing attorney…who obtains information by reason of the [attorney's] employment shall not be allowed, in giving testimony, to disclose any confidential communication properly entrusted to the [attorney] in the [attorney's] professional capacity, and necessary and proper to enable the [attorney] to discharge the functions of the [attorney's] office.
Kentucky	In Kentucky, the basic rule of the privilege allows a client "to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client." KRS 503(b). The communication must be "[b]etween the client or a representative of the client and the client's lawyer or a representative of the lawyer," "[b]etween the lawyer and a representative of the lawyer," "[b]etween representatives of the client or between the client and a representative of the client," or "[a]mong lawyers and their representatives representing the same client." KRE 503(b)(1)–(5).4
Wisconsin	When a communication relates to a business, it does not mean that it cannot also be a communication for purpose of rendering legal services. *Dyer v. Blackhawk Leather LLC*, 758 N.W.2d 167, 313 (Wis. App. 2008). The Court in Dyer also recognized that "virtually all legal advice involves a modicum of business advice." *Id.*
Louisiana	Louisiana Code of Evidence, Article 506 provides that "[a] client has a privilege to refuse to disclose, and prevent another person from disclosing, a confidential communication, whether oral, written, or otherwise, made for the purpose of facilitating the rendition of professional legal services to the client." Louisiana Code of Evidence, Article 506 comment d provides that "The definition of 'lawyer' does not specifically address the matter of 'house counsel.' By not specifically excluding 'house counsel' from the definition, this Article does not automatically exclude the application of the attorney-client privilege to communications between an attorney and the attorney's employer. The availability of a privilege in this context will depend upon the general principles set forth in this Article." Communications from a lawyer to a client providing "business advice divorced from its legal implications" would not be privileged. *Exxon Mobil Corp. v. Hill*, 751 F.3d 379 (5th Cir. 2014).

Scenario 12

5:40 p.m.

Realizing she will likely be late to pick up her son from daycare (which closes at 6 p.m.), Taylor is packing up for the day when she receives a call from Gus in Sales:

"Taylor, I have two sales managers who gave notice of their intention to quit. They say that the laptop computers in their offices are personal computers that they've used from time to time in the business and that these computers have copies of many emails and other materials generated on BigCo computers. They don't object to our downloading that material, but they insist that we may not delete anything. They want to download it all before we review it to ensure that we don't delete anything. What do you think?

In addition, they want to download the sales manual of their former employer, which they brought with them on flash drives when they started working here, and have since copied and downloaded to their office computers. Although proprietary to their former employer, they say they have been using it while they were here. They want to take it to their new jobs."

Question:

What issues should Taylor consider?

Suggested References – Scenario 12

An employee's use of a former employer's confidential or proprietary information may give rise to claims by the former employer against the employee's new employer, including misappropriation of trade secrets and tortious interference with contract or prospective customer relationships. *See, e.g., N. Atl. Instr., Inc. v. Haber*, 188 F.3d 38 (2d Cir. 1999) (granting injunctive relief to former employer against employee and new employer for misappropriation of trade secrets, unfair competition, and breach of employment agreement); *Surgidev Corp. v. Eye Tech., Inc.*, 828 F.2d 452 (8th Cir. 1987) (granting injunctive relief to former employer to prevent new employer from using new employees' confidential customer information); *B-S Indus. Contractors Inc. v. Burns Bros. Contractors Inc.*, 256 A.D.2d 963 (N.Y. Sup. Ct. 3 1998) (holding that an employee's former employer successfully stated a claim against the employee's current employer for misappropriation and tortuous interference).

Virginia enacted the "Uniform Trade Secrets Act" as part of the Code of Virginia (Va. Code. Ann. §§ 59.1-336 – 59.1-343). It permits injunctive relief and provides for exemplary damages and the award of attorneys' fees if willful and malicious misappropriation exists. Full text follows.

§ 59.1-336. Short title and definitions.
As used in this chapter, which may be cited as the Uniform Trade Secrets Act, unless the context requires otherwise:

"Improper means" includes theft, bribery, misrepresentation, use of a computer or computer network without authority, breach of a duty or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.

"Misappropriation" means:

1. Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

2. Disclosure or use of a trade secret of another without express or implied consent by a person who

a. Used improper means to acquire knowledge of the trade secret; or

b. At the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was

(1) Derived from or through a person who had utilized improper means to acquire it;

(2) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use;

(3) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

(4) Acquired by accident or mistake.

"Person" means a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial

entity.

"Trade secret" means information, including but not limited to, a formula, pattern, compilation, program, device, method, technique, or process, that:

1. Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and

2. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

§ 59.1-337. Injunctive relief.
A. Actual or threatened misappropriation may be enjoined. Upon application to the court, an injunction shall be terminated when the trade secret has ceased to exist, but the injunction may be continued for an additional reasonable period of time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation.

B. In exceptional circumstances, an injunction may condition future use upon payment of a reasonable royalty for no longer than the period of time for which use could have been prohibited. Exceptional circumstances include, but are not limited to, a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation that renders a prohibitive injunction inequitable.

C. In appropriate circumstances, affirmative acts to protect a trade secret may be compelled by court order.

§ 59.1-338. Damages.
A. Except where the user of a misappropriated trade secret has made a material and prejudicial change in his position prior to having either knowledge or reason to know of the misappropriation and the court determines that a monetary recovery would be inequitable, a complainant is entitled to recover damages for misappropriation. Damages can include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss. If a complainant is unable to prove a greater amount of damages by other methods of measurement, the damages caused by misappropriation can be measured exclusively by imposition of liability for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret.

B. If willful and malicious misappropriation exists, the court may award punitive damages in an amount not exceeding twice any award made under subsection A of this section, or $350,000 whichever amount is less.

§ 59.1-338.1. Attorneys' fees.
If the court determines that (i) a claim of misappropriation is made in bad faith, or (ii) willful and malicious misappropriation exists, the court may award reasonable attorneys' fees to the prevailing party.

§ 59.1-339. Preservation of secrecy.
In an action under this chapter, a court shall preserve the secrecy of an alleged trade secret by

reasonable means, which may include:

1. Granting protective orders in connection with discovery proceedings;

2. Holding in-camera hearings;

3. Sealing the records of the action; and

4. Ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval.

§ 59.1-340. Statute of limitations.
An action for misappropriation shall be brought within three years after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered. For the purposes of this section, a continuing misappropriation constitutes a single claim.

§ 59.1-341. Effect on other law.
A. Except as provided in subsection B of this section, this chapter displaces conflicting tort, restitutionary, and other law of this Commonwealth providing civil remedies for misappropriation of a trade secret.

B. This chapter does not affect:

1. Contractual remedies whether or not based upon misappropriation of a trade secret; or

2. Other civil remedies that are not based upon misappropriation of a trade secret; or

3. Criminal remedies, whether or not based upon misappropriation of a trade secret.