Agenda

The American Employment Law Council

Twenty-Third Annual Conference

The Ojai Valley Inn & Spa
Ojai, California
October 21–24, 2015

Protecting Domestic and Global Employers from High-Stakes Challenges While Gaining a Competitive Edge in an Age of Unprecedented Change and Governmental Scrutiny

The American Employment Law Council (AELC) 2015 conference will take a deep dive into pressing international employment law developments and strategies, the unprecedented volume and scope of federal government compliance and enforcement initiatives, the effect of new technologies on employment practices and litigation, what pay equity means and what it will take to make it a reality, worker centers and new forms of concerted activity, pitfalls and pratfalls in classifying employees in light of federal exemption regulations, and advanced techniques for defending individual and class employment litigation—among others. Senior lawyers from national and multi-national companies and experienced outside counsel from around the world will address the most pressing legal issues and offer key insights and advice for tackling the major challenges we face.

The plenary sessions, smaller group discussions, and afternoon panels will offer attendees an opportunity to meet and benchmark with peers, address issues of mutual concern and interest, and socialize throughout the three-day conference.

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<td>Hope Eastman, Chair, Board of Directors</td>
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<td>Lawrence Ashe</td>
<td>Parker, Hudson, Rainer &amp; Dobbs LLP</td>
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<td>Mark Dichter</td>
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<td>Orrick, Herrington &amp; Sutcliffe LLP</td>
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Wednesday, October 21, 2015

12:00 noon – 1:30 p.m.  AELC Board of Directors Meeting

1:30 p.m. – 2:30 p.m.  AELC Advisory Board Meeting (Board of Directors and Members of Advisory Board)

2:30 p.m. – 5:30 p.m.  Working Sessions: A Deep Dive into Pressing International Employment Law Developments and Strategies

Wednesday’s sessions are designed for international practitioners, in-house counsel with global operations, and U.S. counsel who coordinate international employment advice. Participants are encouraged to contribute actively in these sessions through advance submission of documents that will be included in the program materials and/or remarks during the sessions that will focus on recent developments, experiences and strategic advice on:

2:30 p.m. – 3:50 p.m.  The Challenges of Acquiring Businesses Internationally: Legal Overview and Best Practices for In-house Counsel

This panel will focus on the practical and legal aspects of managing an international M&A transaction (i.e., a stock sale, asset sale or merger) from an employment law perspective, including topics such as the Acquired Right Directive in Europe and other unique requirements elsewhere; planning and executing reductions in force; establishing new terms and conditions; the content and timing of consultation with unions and works councils; challenges regarding global announcements; practical solutions to assist in-house counsel in achieving business targets and limiting legal exposure, litigation costs, and business disruption.

Panelists and Discussion Leaders:

Melanie Crowley  Mason Hayes & Curran
Ming Henderson  Seyfarth Shaw (UK) LLP
Sally Sommers  Western Union

3:50 p.m. – 4:10 p.m.  Break

4:10 p.m. – 5:30 p.m.  Self-Inflicted Agony: Background Checks that Bite. How Much (or Little) Can Domestic and Global Employers Find Out About Candidates and Employees?

Global organizations increasingly use background checks as part of their hiring process, but legal restrictions on their permissible use, content, and retention of results vary from country to country. Drawing on U.S. and a number of international examples, the panel will discuss data privacy restrictions, including employee consent and transfer to the U.S.; reliability of background checks; the onslaught of class claims and systemic cases arising from background and credit checks based on the Fair Credit Reporting Act or the EEOC’s guidance on reliance on criminal convictions; and best background check practices for domestic and global employers.

Panelists and Discussion Leaders:

Teresa Hutson  Microsoft Corporation
Trishanda Treadwell  Parker, Hudson, Rainer & Dobbs LLP

5:00 p.m. – 8:00 p.m.  Registration Open

6:00 p.m. – 7:30 p.m.  Welcoming Reception for All Registrants and Their Guests
Thursday, October 22, 2015

7:15 a.m. – 8:00 a.m.  Continental Breakfast

9:00 a.m.  Spouse/Guest Breakfast

7:15 a.m. – 3:30 p.m.  Registration Open

8:00 a.m. – 8:10 a.m.  Welcome and Greetings

Hope Eastman, Chair, Board of Directors  Paley, Rothman, Goldstein, Rosenberg, Eig, & Cooper, Chtd.

Nancy Abell, 2015 Program Chair  Paul Hastings LLP

8:10 a.m. – 9:00 a.m.  Corporate Counsel Roundtable: Challenging Issues Confronting In-House Counsel of Global Employers

Our corporate counsel lead-off will explore the threats and disasters that keep in-house counsel up at night and the proactive strategies they have adopted (or wish they had adopted) to best protect their companies: Foreign corrupt practices; trusted-advisor-turned-whistleblower; BYOD gone wrong; cyber breaches; labor organizing using the company email; and anticipating, training for and managing challenges that employees face on global assignments—from security of employees and their families, to hatred directed at multi-racial couples, LGBT employees and religious minorities, to exposure to life-threatening illnesses.

Moderator and Panelist:

Jane Howard-Martin  Toyota Motor Sales, U.S.A. Inc.

Panelists:

Ted Borromeo  McKesson Corporation

John Hamlin  Marsh & McLennan Companies, Inc.

Shawna Swanson  The Walt Disney Company

9:00 a.m. – 10:15 a.m.  Finding a Needle in a Haystack or Something More Painful: The Use of Algorithms and Big Data in the Hiring Process

One of the EEOC’s enforcement priorities is curbing discriminatory barriers to hiring. Dozens of hiring software programs and vendors promise to harness the power of big data by using proprietary algorithms to search the universe of potential job applicants and narrow the field to a few extremely qualified candidates. Streamlining and improving the hiring process is tantalizing but presents legal risks that must be carefully analyzed and addressed. This panel will introduce the available technology; present empirical results and validation studies thus far; identify applicant-tracking, privacy and data-loss challenges; caution of the vulnerabilities, if a plaintiff or the EEOC demonstrates that alternative software is equally accurate with less adverse impact; discuss the ADA implications of personality testing; review Fair Credit Reporting Act liability theories, including whether a vendor’s actions subject it and the employer to FCRA liability; evaluate whether individual arbitration agreements in the application process minimize class-action risks; and reveal best practices for hiring processes that garner the new technology’s benefits and protect against what may become the next big wave of class actions.

Panelists:

Allan King  Littler

Kathleen Lundquist, Ph.D.  APTMetrics, Inc.

Heather Morgan  Paul Hastings LLP
10:15 a.m. – 10:30 a.m.  Break

10:30 a.m. – 11:45 a.m.  Pay Equity: A Close Look at the Actions by Regulatory Authorities and Private Claimants to Level the Compensation Playing Field and Employer Processes to Define and Achieve Gender Equity

Plaintiffs have taken to heart the *Dukes* Court’s insistence that plaintiffs point to an “employment practice” that had an effect on pay differences. Their statistics now attempt to parse out the effect of performance evaluations, starting pay or 360-degree reviews. This panel will review key domestic and international policies, guidance, data collection requirements and demands, audit tactics, and recent enforcement and litigation actions to address the gender gap. It will conclude by presenting the details of some programs that actual employers have used to manage starting pay on a domestic and global basis to avoid the contention that it perpetuates the impact of societal discrimination.

**Moderator and Panelist:**

William Sailer  
Qualcomm Incorporated

**Panelists:**

Donald Livingston  
Akin, Gump, Strauss, Hauer & Feld LLP

Janet Thornton, Ph.D.  
ERS Group

Juana Schurman  
Oracle Corporation

11:45 a.m. – 12:15 p.m.  Post-*Dukes*, Pre-*Tyson*: An Important Update on Class Actions for In-house Advisors and Litigators

Four years after the Supreme Court decided *Wal-Mart Stores, Inc. v. Dukes*, class actions continue unabated. General Counsel regularly identify employment class actions as one of the main issues keeping them up at night. The speaker will discuss the current battleground in the class action wars; plaintiffs’ new “innovative procedural devices”; and how the landscape likely will change with the Supreme Court’s decision next Term in *Tyson Foods, Inc. v. Bouaphakeo*, which presents in the FLSA context the questions (1) whether differences among individual class members may be ignored, and a class certified, when plaintiffs use statistical techniques that presume rather than demonstrate that class members are identically situated, and (2) whether a class may be certified where a substantial number of class members have no legal right to damages at all.

**Moderator:**

Mark Nordstrom  
General Electric Company

**Speaker:**

Jeffrey Klein  
Weil, Gotshal & Manges LLP

12:15 p.m.  Break

12:15 p.m. – 12:45 p.m.  Box Lunch Pick Up (separate ticket required)
12:45 p.m. – 2:15 p.m. Practical Problem Roundtable Discussions

Option One: Juror Questionnaires, Voir Dire and Jury Selection Strategy for Trial Lawyers

Participants will share their favorite juror questionnaire inquiries, voir dire questions, and jury selection strategies for discrimination, harassment, retaliation, and wage-hour cases.

Discussion Leaders:

Leah Lively
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

Terence Connor
Hunton & Williams, LLP

Option Two: Your Time with the Labor Economists: A Presentation and Roundtable Discussion on New Approaches Labor Economists Are Using to Help Employers Win

Participants will be treated to a presentation by labor economists, followed by a group discussion on (1) the latest post-Dukes approaches by plaintiffs’ and defendants’ experts in structuring statistical analyses in support of and in opposition to class certification, judicial reaction to aggregated and disaggregated statistical analyses in assessing class certification, and situations in which a defendant’s expert may find it advantageous to present aggregated statistics; and (2) the usefulness of data collected from job interest surveys taken before litigation and job posting systems that require candidates to apply for a specific position (and have well developed filters for “must have” and “preferred” characteristics). Participants also will have the opportunity to ask questions of the labor economists and share their latest strategies to combat plaintiffs’ statistical presentations in class and collective actions.

Panelists and Discussion Leaders:

Mary Dunn Baker, Ph.D.
ERS Group

Janet Thornton, Ph.D.
ERS Group

Option Three: Wage-Hour and Fair Credit Reporting Act: Class Certification and Merit Strategies; Answers to Old Questions That Still Perplex Us and New Questions That Arise

Participants will discuss perplexing questions under the wage-hour laws, concerning both class certification and the merits, and also focus on the flood of Fair Credit Reporting Act cases arising from criminal background checks. The discussion will include joint-employer status; the war against independent contractor status; time rounding; timecard certifications; the use of declarations from present and former employees in defeating class certification; continued ambiguities in calculating the regular rate; and the advantages and disadvantages of seeking summary judgment against the named plaintiff before class certification, including the one-way intervention rule. Participants also will discuss FCRA issues, including the substantive and formal requirements for a lawful disclosure form; permissible content of the authorization; how and where an employer can require a release of claims against those who provide information; and issues relating to appeal rights, adverse action (and pre-adverse action) notices, and “expert” vendors (who are now being sued along with their employer clients).

Discussion Leaders:

Anthony Oncidi
Proskauer Rose LLP

Gary Eisenstat
Figari & Davenport, LLP
Option Four: Roundtable Discussion Group: Domestic and Global Labor Pressure Tactics, Organizing Drives, Elections, and Bargaining

Participants will discuss the NLRB’s new quickie election rules; employer responses and legal challenges to those rules; the impact of Free Trade Agreements and ILO Conventions covering both the EU-USA and the EU-Canada as unions strive to import works councils, OECD guidelines and International Framework Agreements onto the North American labor scene; and other global labor developments.

Discussion Leaders:

Bernard Bobber      Foley & Lardner LLP
Danny Kaufer      Borden Ladner Gervais LLP

Option Five: Corporate Counsel Legal Issues Forum (for In-house Counsel Only)

From 12:45 p.m. to 2:45 p.m., AELC in-house counsel leadership will facilitate this corporate-counsel-only discussion of key legal problems that corporations face.

Facilitators:

Jocelyn Hunter  The Home Depot
Nancy Lee       Google Inc.
Mark Nordstrom       General Electric Company
Matthew Swaya       Starbucks Coffee Company

3:00 p.m. – 4:00 p.m. Roundtable Discussion: AELC for Thought Leaders: Leading the Attainment of Pay Equity

Please join AELC thought leaders for a timely discussion of practical approaches for defining and attaining “pay equity.” Both the U.S. Department of Labor’s Final Rule implementing Executive Order 13665, designed to promote equal pay, and the transformative California Fair Pay Act go into effect on January 1, 2016. The Fair Pay Act places the onus on employers to prove that a wage differential between men and women performing “substantially similar work” is not based on or derived from a sex-based differential; factors the employer relies upon to explain a differential are job related, applied reasonably and account for the entire differential; and the differential is consistent with business necessity (i.e., an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purposes it is supposed to serve).

4:00 p.m. – 6:30 p.m. Free Time

6:30 p.m. – 7:30 p.m. Reception
7:30 p.m. – 9:00 p.m. Dinner for Registrants and Their Guests (separate tickets required)
9:00 p.m. – 11:00 p.m. Dessert and Fun

Friday, October 23, 2015

7:15 a.m. – 3:00 p.m. Registration Open
7:15 a.m. – 8:00 a.m. Continental Breakfast
8:00 a.m. – 8:05 a.m. Introduction
Today unregulated worker centers—acting alone or with support of unions—are recruiting workers, protesting for better wages and benefits, and the force behind long picket lines and wildcat strikes that would be illegal for a labor union to conduct. Retail, restaurant, hospitality and warehouse occupations have been principal targets. The speakers will educate us on these developments; preventive and responsive strategies; and the potentially devastating consequences of being a joint employer with a vendor or franchisee who mishandles worker center intrusions.

Moderator:
Carl Jordan       Vinson & Elkins LLP

Panelists:
Mark Codd       Publix Super Markets, Inc.
James Rowader       Target Corporation

Many of today’s employment investigations require significant securities law, Foreign Corrupt Practices Act, False Claims Act, regulatory, government contracts, state law and other expertise to avoid missing issues and obligations. The speakers will provide an update on critical legal developments in the law of retaliation, including the U.S. Department of Labor’s March 2015 Final Rule protecting various employees of public companies (and their subsidiaries, contractors and subcontractors) from retaliation for reporting actions they believe to be violations of securities laws; the Securities and Exchange Commission’s recent Dodd-Frank $500,000 bounty award, which demonstrates that even individuals with compliance-related jobs are fully able to report to the SEC and profit from it; and the SEC’s recent crackdown on employment contracts, nondisclosure agreements, and other documents that impose confidentiality obligations on employees. The panel will discuss advanced legal and practical strategies for conducting appropriate internal investigations when the “traditional” EEO investigation morphs into something else and more dangerous. The panel will explain steps that employers and their counsel should take before, during, and after investigating claims of to minimize civil and criminal litigation and other liability risks.

Moderator and Panelist:
Eric Reicin       MorganFranklin Consulting, LLC

Panelists:
Jocelyn Hunter       The Home Depot
Lori Lightfoot       Mayer Brown LLP
Gerlind Wisskirchen       CMS Hasche Sigle
9:55 a.m. – 10:25 a.m.  
**Pregnancy Discrimination and Accommodation Viewed Through a New Lens**

Plaintiffs are pursuing a variety of theories under the Pregnancy Discrimination Act, the Americans with Disabilities Amendments Act, the Family and Medical Leave Act, and a host of state and local laws to protect pregnant women who require accommodation. This panel will analyze employer obligations; best policies and practices to analyze, document and respond to pregnancy accommodation requests; the EEOC’s enforcement guidance on pregnancy discrimination and accommodation; and the implications of *Young v. United Parcel Service, Inc.* for discovery, proof, jury instructions and special verdict forms.

**Panelists:**

- Rick Rufalo  
  United Parcel Service, Inc.
- Catherine Conway  
  Gibson Dunn & Crutcher LLP

10:25 a.m. – 10:40 a.m.  
**Break**

10:40 a.m. – 12:00 noon  
**Pitfalls and Pratfalls in Classifying Employees in Light of the (Upcoming) Federal Exemption Regulations**

The Department of Labor’s anticipated exemption regulations may require sweeping changes in the classification of employees for many employers. Plaintiffs are focused on discovering employer self-analyses that admit misclassification in the wake of *Scott v. Chipotle Mexican Grill Inc.*, which ordered the fast-food chain to produce a report delivered to its counsel by an outside consultant. This panel will focus on nuances of the new regulations; ambiguities that are likely to provoke litigation; recent court decisions holding many highly paid employees to be misclassified; specific strategies for planning and executing a classification study or self-analysis without waiving privilege.

**Moderator:**

- James Hammerschmidt  
  Paley, Rothman, Goldstein, Rosenberg, Eig, Cooper, Chtd.

**Panelists:**

- Fred Alvarez  
  Jones Day
- William Cory Barker  
  AT&T Services, Inc.
- Karen Schanfield  
  Fredrikson & Byron, P.A.

12:00 noon – 1:15 p.m.  
**Buffet Lunch (separate ticket required)**
1:15 p.m. – 2:30 p.m.  Workshop Options Below

Option One:  OFCCP 2015

This panel will discuss the OFCCP’s latest developments, including Executive Order 13672’s prohibition on sexual orientation and gender identity discrimination; the notices of proposed rulemaking that would require submission of an annual compensation report, update rules prohibiting gender discrimination, and implement Executive Order 13665, which encourages greater pay transparency by prohibiting adverse action against employees and job applicants for discussing, disclosing or inquiring about compensation; expansive agency requests for information; latest regression designs; notices to show cause; and OFCCP’s recent demands that all employees be notified of the agency’s onsite presence and interest in talking with workers.

Panelists:

David Fortney  
Fortney & Scott, LLC

Robert O’Hara  
United Technologies Corporation

Juana Schurman  
Oracle Corporation

Option Two:  Employing Workers in California? Expensive Mistakes the Uninformed May Make and Tips for Derailing a Private Attorneys’ General Act Representative Action

This panel will discuss strategies for derailing PAGA claims and a myriad of new California laws that present significant risk for employers, including mandatory sick leave under the Healthy Workplaces, Healthy Families Act of 2014; amendments to the California Family Rights Act regulations; AB 2617’s prohibition of pre-dispute agreements to arbitrate certain civil rights claims; mandatory “abusive conduct” training; the Fair Chance Employment Act; amendments to California Heat Illness Prevention regulations; imposition of joint-employer liability for wage-hour violations of labor providers; and the new surprises that will be signed into law in early October 2015.

Panelists:

Warren Jackson  
DIRECTV Group, Inc.

Christian Rowley  
Seyfarth Shaw LLP

Option Three:  Presentation and Roundtable Discussion Group: Ten Themes and Techniques in Defending Employment Cases

This panel for inside and outside counsel will focus on ten themes and techniques for winning cases with tough liability issues, large damages potential and difficult personalities. Participants will share techniques and themes that resonate well with today’s diverse jurors.

Panelists:

Elaine Koch  
Bryan Cave LLP

Terrence Murphy  
Littler

2:30 p.m. – 4:15 p.m.  Free Time
4:15 p.m. – 5:15 p.m. Cocktails and Conversation: Lessons Learned from Litigating the High Profile Case: Reflections on the Trial of Ellen Pao v. Kleiner Perkins Caufield & Byers

Like Anita Hill’s 1991 accusations of sex harassment during Supreme Court Justice Clarence Thomas’s confirmation hearings, the trial of Ellen Pao’s claims of gender discrimination will have implications beyond its own results. Lynne Hermle, lead counsel, in the San Francisco jury trial of Ellen Pao v. Kleiner Perkins Caufield & Byers will share insights from her experience about strategy decisions that worked well; techniques we should expect to see plaintiffs replicate in other cases; the impact (or not) of experts in the case; feedback from the jury; and impact of the media on the defendant.

Host:
Michael Reiss
Davis Wright Tremaine LLP

Commentator:
Lynne Hermle
Orrick, Herrington & Sutcliffe LLP

5:30 p.m. – 7:00 p.m. Reception for All Attendees and Their Guests
(Dinner is on your own.)

Saturday, October 24, 2015

7:00 a.m. – 8:30 a.m. Continental Breakfast

8:10 a.m. – 8:15 a.m. Introduction

8:15 a.m. – 8:45 a.m. Employee Wellness Programs (EWPs) and The Affordable Care Act (ACA): Does No Good Deed Go Unpunished?
The speaker will share the latest research on the cost, employee health and employee morale impacts of EWPs; the EEOC’s rule-making on the interplay of the Americans with Disabilities Act and the ACA; recent litigation challenging wellness programs; considerations in structuring participatory versus outcome-based programs and incentive-focused versus penalty-focused designs; how to coordinate wellness limits and the affordable coverage standard as an ACA safe harbor; and the foundation employers must establish to overcome privacy objection.

Speaker:
Kevin Covert
Honeywell International Inc.

8:45 a.m. – 9:15 a.m. Hiring Recent Graduates into an Aging Work Force While Laying Off Older Workers: Lawful Survival or Age Discrimination?
The EEOC is focused on employer “new grad” hiring programs, rejections of “overqualified” workers, and layoffs of older workers in organizations that are recruiting “generalists” from campus. This panel will outline the latest developments, along with policy and practice traps for the unwary.

Moderator:
Carrie Dove Storer
Discovery Communications, Inc.

Speaker:
Michael Burkhardt
Morgan, Lewis & Bockius LLP
9:15 a.m. – 10:15 a.m.  **Ethics: Domestic and Global Obligations and Unfortunate Waivers of the Attorney-Client and Work Product Privileges**

Our panel will discuss ethics issues that arise in the course of internal and government investigations; up-the-ladder reporting obligations when reportable misconduct is discovered; attorney-client privilege waivers that may result from production of information to the government; creation of a *de facto* client relationship and implied obligations; corporate “Miranda” warnings; disclosures of rights; and obligations to furnish separate counsel to subjects of investigation and other witnesses.

**Speakers:**

- **Dennis Duffy**
  - Baker Hostetler
- **James Murphy**
  - Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

10:15 a.m. – 10:30 a.m.  **Break**

10:30 a.m. – 11:50 a.m.  **EEO Caselaw Update**

In the annual update of significant EEO decisions, you will learn everything you need to know about recent major EEO decisions, including the ones that should drive employer policy changes and those that litigators should exploit.

**Speaker:**

- **Paul Grossman**
  - Paul Hastings LLP

11:50 a.m.  **Closing Remarks by Hope Eastman and Nancy Abell**

6:00 p.m. - 7:30 p.m.  **Reception for All Registrants and Their Guests**
Acknowledgement and Statement of Program Chair

October 2015

Welcome to the Twenty-Third Annual Conference of the American Employment Law Council (AELC). The AELC Board and I are delighted that you have joined us in Ojai to collaborate, network, and enjoy lifelong friendships in a beautiful setting.

The theme of this year’s Conference is “Protecting Domestic and Global Employers from High-Stakes Challenges While Gaining a Competitive Edge in an Age of Unprecedented Change and Governmental Scrutiny.” We will take a deep dive into pressing international employment law developments and strategies, the unprecedented volume and scope of federal government compliance and enforcement initiatives, and the effect of new technologies on employment practices and litigation—among others. Each program will address practical strategies and best practices. We encourage each of you to ask questions and offer your insights during the plenary sessions, smaller group discussions, and afternoon panels.

Please join us on Thursday afternoon at 3 p.m. in the Anacapa Ballrooms 4 and 5 for the AELC University for Thought Leaders: Leading the Attainment of Pay Equity. We will have an open discussion of how to define pay equity, determine the comparator jobs under the applicable statutes, develop statistical models and other processes to assess equity, and make equity adjustments.

I extend my gratitude to the many people who are making this Conference possible: our speakers, panelists and discussion leaders for their outstanding papers and presentations; AELC Board Chair Hope Eastman, the Board, the Advisory Board, and many AELC members who provided significant input in the design and planning of this year’s Conference; Adriana Joens, Maria Audero and Daniel Swiggum for assembling all of the papers and delivering them in electronic format to you; Jim Swartz for managing AELC’s website; Miguel Escalera for preparing the historical index of all of the Conference materials; and Susan Feldman and her team at Certified Travel for their tireless planning and execution of the Conference details.

AELC is your organization, and your input is important. Please let the Board and me know your ideas for next year’s AELC Conference and how AELC can better serve you this year and in the future.

You will want to mark your calendars for the 2016 AELC Annual Conference and join your fellow AELC members at the Ritz Carlton in Naples, Florida from October 19-22, 2016.

I look forward to visiting with you during the Conference. Please let me know if you have any needs that are not being met. Have a wonderful time.

Kindest personal and professional regards,

Nancy L. Abell

Nancy L. Abell
2015 Conference Chair
Paul Hastings LLP
The American Employment Law Council was founded in 1993 by leading labor and employment lawyers representing employers in the United States and internationally. It serves as a meeting ground for lawyers committed to professional excellence in the resourceful and principled representation of American employers. The Council’s membership consists of experienced and accomplished lawyers whose practice principally involves the representation of an employer or employers at a significant level of responsibility.

As a non-profit organization, the Council is dedicated to education and does no lobbying, but it will further its founders’ commitment to enlightened and fair-minded practices, to full participation in the workplace of qualified men and women from every avenue, and to the competitive success of employers in national and international markets. The Council provides an annual forum for candid and careful thinking about hard questions that good lawyering requires. It seeks to encourage and promote the highest standards of professional competence and responsibility in the field of labor and employment law.
THE AMERICAN EMPLOYMENT LAW COUNCIL
TWENTY-THIRD ANNUAL CONFERENCE

Board of Directors and Advisory Board – 2015

Nancy L. Abell***
*Paul Hastings LLP*

Fred W. Alvarez
*Jones Day*

Barbara D’Aquila
*Norton Rose Fulbright*

Mark S. Dichter*
*Morgan Lewis & Bockius LLP*

Hope B. Eastman**
*Paley Rothman, Chtd.*

Allan Dinkoff
*Amgen Inc.*

David S. Fortney
*Fortney & Scott, LLC*

Paul Grossman*
*Paul Hastings LLP*

Jane Howard-Martin
*Toyota Motor Sales, USA, Inc.*

Hunter R. Hughes, III
*Rogers & Hardin LLP*

Jocelyn J. Hunter*
*Home Depot, USA, Inc.*

Elizabeth Finn Johnson
*The Coca-Cola Company*

W. Carl Jordan*
*Vinson & Elkins LLP*

Nancy M. Lee
*Google Inc.*

Robert K. McCalla*
*Fisher & Phillips*

Mark A. Nordstrom*
*General Electric Company*

Eric D. Reicin
*MorganFranklin Consulting, LLC*

Michael Reiss*
*Davis Wright Tremaine LLP*

Gary R. Siniscalco*
*Orrick, Herrington & Sutcliffe LLP*

Matthew Swaya
*Starbucks Coffee Company*

*Board of Directors
**Chair, Board of Directors
***2015 Program Chair
THE AMERICAN EMPLOYMENT LAW COUNCIL  
TWENTY-THIRD ANNUAL CONFERENCE  

expresses its great appreciation to the  
Emeritus Members of our  
Board of Directors and Advisory Board  

Ralph H. Baxter, Jr.  
Bruce J. Brafman  
Jana Howard Carey  
David Cathcart*  
Edmond J. Dilworth*  
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Jill A. Goldy  
Catherine B. Hagen  
Eugene Hartwig  
Allen E. Hill  
Arthur E. Joyce  
William J. Kilberg  
Lloyd C. Loomis  
Edward Miller  
Joseph R. Moderow  
David Perez  
Charles A. “Butch” Powell, III*  
N. Thompson Powers*  
Ezra Singer  
Mark Snyderman  
Stephen Tallent*  

*Deceased
Welcome to the Twenty-Second Annual Conference of the American Employment Law Council (AELC). The AELC Board and I are delighted that you have joined us in Palm Beach to collaborate, network and enjoy lifelong friendships in a beautiful setting.

The theme of this year’s Conference is “The 2014 Employment Law Landscape: Attaining domestic and global business objectives in a highly mobile, regulated, litigious, wired world.” Together we will explore significant risks that employers face today, including cyber-attacks that bring operations to a halt, social media posts that expose employer confidential information, departed employees whose glasses transport your trade secrets to the competition, new regulations that increase your payroll and reduce operational efficiency, and class and collective actions that drain your budget, among others. Each program will address practical strategies and best practices. We encourage each of you to ask questions and offer your insights during the plenary sessions, smaller group discussions, and afternoon panels.

Please join us on Thursday afternoon at 3 p.m. in the Gold Room for the AELC University for Thought Leaders. We will have an open discussion of arguments that employers should be making and expert testimony that will be important to shape the law.

I extend my gratitude to the many people who are making this Conference possible: our speakers, panelists and discussion leaders for their outstanding papers and presentations; AELC Board Chair Hope Eastman, the Board, the Advisory Board, and many AELC members who provided significant input in the design and planning of this year’s Conference; Maria Audero and Daniel Swiggum for assembling all of the papers and delivering them in electronic format to you; Jim Swartz for managing AELC’s website; and Susan Feldman and Jeff Rubtchinsky at Certified Travel for their tireless planning and execution of the Conference details.

AELC is your organization, and your input is important. Please let the Board and me know your ideas for next year’s AELC Conference and how AELC can better serve you this year and in the future.

You will want to mark your calendars for the 2015 AELC Annual Conference and join your fellow AELC members at The Ojai Valley Inn & Spa in Ojai, California from October 21-24, 2015.

I look forward to visiting with you during the Conference. Please let me know if you have any needs that are not being met. Have a wonderful time.

Kindest personal and professional regards,

Nancy L. Abell
Nancy L. Abell
2014 Conference Chair
Paul Hastings LLP
THE AMERICAN EMPLOYMENT LAW COUNCIL
TWENTY-SECOND ANNUAL CONFERENCE

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STATEMENT OF PURPOSE

The American Employment Law Council was founded in 1993 by leading labor and employment lawyers representing employers in the United States and internationally. It serves as a meeting ground for lawyers committed to professional excellence in the resourceful and principled representation of American employers. The Council’s membership consists of experienced and accomplished lawyers whose practice principally involves the representation of an employer or employers at a significant level of responsibility.

As a non-profit organization, the Council is dedicated to education and does no lobbying, but it will further its founders’ commitment to enlightened and fair-minded practices, to full participation in the workplace of qualified men and women from every avenue, and to the competitive success of employers in national and international markets. The Council provides an annual forum for candid and careful thinking about hard questions that good lawyering requires. It seeks to encourage and promote the highest standards of professional competence and responsibility in the field of labor and employment law.
EMPLOYEE WELLNESS PROGRAMS (EWPS) AND THE AFFORDABLE CARE ACT (ACA): DOES NO GOOD DEED GO UNPUNISHED?

OCTOBER 21-24, 2015
OJAI, CALIFORNIA
WELLNESS PLANS AND THE EEOC
TOPICS TO BE COVERED

• Overview of wellness incentives and issues
• Discussion of EEOC v. Honeywell International Inc.
• Preserving Employee Wellness Programs Act
• EEOC’s proposed wellness regulations
• Additional DOL, HHS, and IRS guidance
• Tips for creating wellness programs
WELLNESS INCENTIVES

• Wellness incentives are commonly used by employers as incentives to achieve and maintain a healthy lifestyle.

• Changes to wellness plans implemented by the Affordable Care Act (“ACA”):
  - The ACA amended the rules that were issued under the Health Insurance Portability and Accountability Act (“HIPAA”) that prescribed how employers may permissibly use wellness programs to vary group health plan premiums or benefits.
  - The ACA increased the limit on wellness plan rewards that employers could provide under the HIPAA rules from 20% of the cost of health plan coverage to 30% (50% in the case of wellness initiatives related to tobacco use cessation).
TENSION BETWEEN TREASURY/ DOL/ HHS AND EEOC

• The EEOC had informally expressed concern that wellness programs may violate the ADA.

• Competing interests exist among the various government agencies and, without coordinated regulatory and enforcement efforts, create tension:

  - The ACA is enforced by the Department of the Treasury, the Department of Labor and the Department of Health and Human Services.

  - The ADA is enforced by the EEOC— an “independent agency.”
ADA ISSUES

• The ADA generally prohibits an employer from making disability-related inquiries/requiring medical examinations unless they are job related and consistent with business necessity.
  - Nevertheless, the ADA permits an employer to make disability-related inquiries or request medical examinations as part of a “voluntary” wellness program.
  - Because (i) health risk assessments (“HRAs”) commonly contain disability-related inquiries, and (ii) biometric screenings are generally considered medical examinations, wellness programs that include HRA or biometric screening requirements could violate the ADA—at least according to the EEOC—unless the inquiries are “voluntary.”
SEFF V. BROWARD COUNTY (11TH CIRCUIT)

- The employer imposed a surcharge of $20 per bi-weekly paycheck on any employee who did not complete an HRA and biometric screening.
- The Eleventh Circuit held that this wellness program fell within the ADA’s insurance safe harbor provision and affirmed summary judgment for the employer.
- This case created a “safe harbor” relating to the application of the ADA to wellness plans.
  - The court sided with the employer, relying on an exception under the ADA that provides that the rules on medical examinations do not prohibit employers from “establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks or administering such risks that are based on or are not inconsistent with state law.”
- The court found Broward County’s wellness plan acceptable because the employer used aggregate data from the HRAs to classify various employee health risks and decide on the types of benefits that should be offered in the future to reduce plan costs.
VOLUNTARY PROGRAMS

• The key issue for the EEOC is whether a wellness program is “voluntary.”
  - The ADA does not explicitly address wellness programs at all.
  - Prior to April 16, 2015, the EEOC had issued enforcement guidance on wellness programs, but that guidance did not define “voluntary,” except to say that a wellness program is voluntary if an employer neither requires participation nor penalizes employees who do not participate.
  - That guidance did not make clear how much of an economic incentive would cause a wellness program to be deemed “involuntary.”
LITIGATION OVER WELLNESS PROGRAMS: ORION AND FLAMBEAU

• EEOC v. Orion Energy Systems Inc.
  - The employer paid 100% of the cost of its health plan coverage for each employee who completed an HRA and a fitness test.
  - If an employee did not complete an HRA, the employee was required to pay the full cost of the health plan premium.
  - If an employee did not complete the fitness test, the employee was penalized $50.

• EEOC v. Flambeau Inc.
  - The employer required that each of its employees complete an HRA and biometric screening to be eligible for the health plan.
  - Employees that did not complete an HRA and a biometric screening at the appointed time would be subject to disciplinary action.

• Key Issues in Orion and Flambeau:
  - Clearly not voluntary; employees were required to participate in order to get subsidized health coverage.
  - Severe penalties/ disciplinary action for nonparticipation.
EEOC v. Honeywell International Inc.

• Honeywell’s wellness program required biometric testing before the end of open enrollment.
  - The testing included a blood pressure check; measurement of height, weight, and waist circumference; and a blood draw that tested for sugar, cholesterol, and a by-product of nicotine usage (to verify whether the individual is a user of tobacco).
  - The testing program was administered by a third party; employees could go to a selected provider (Qwest) for free screening (including on-site testing) or use their own doctors (at Honeywell’s expense).
  - Honeywell did not have access to the results; employees and spouses could only access their own results.
EEOC V. HONEYWELL INTERNATIONAL INC. (CONTINUED)

• Honeywell’s wellness program provided that:
  - If an employee did not complete biometric testing, the employee would be required to pay a $500 annual additional premium surcharge for health coverage. In addition, the employee would not be eligible for contributions (up to $750) that the employer would otherwise make to the employee’s HSA (and if a spouse was covered and not screened, the employee would lose up to another $750 in HSA contributions).

  - Any employee or covered spouse who did not complete the biometric testing would be presumed to be a tobacco user, with each subject to a $1,000 annual tobacco surcharge (subject to narrow exceptions).
**EEOC v. Honeywell International Inc. (Continued)**

- The EEOC sued Honeywell in federal court in Minneapolis in late 2014, seeking to enjoin Honeywell’s wellness program during open enrollment.
  - It argued that the program violated the ADA because it was not voluntary, due to the size of the penalties.
  - It argued also that the Seff safe harbor did not apply to Honeywell’s self-insured plan, since the plan was not an insurer and thus did not engage in “underwriting.”
  - It also alleged that the biometric screening of spouses was intended to elicit “family medical history” in violation of GINA.
**EEOC v. Honeywell International Inc.**
(Continued)

- The court denied the EEOC’s request for an injunction and dismissed the case.

  - The court did not rule on the merits of the EEOC’s position, though it expressed skepticism about it, particularly in light of the Seff case, the Honeywell plan’s compliance with the ACA wellness standards, and the EEOC’s lack of any regulations defining voluntariness under the ADA.

  - Instead, the court ruled that the EEOC had failed to demonstrate that the participants being screened would suffer “irreparable harm” and that greater harm would likely be caused by interfering with Honeywell’s open enrollment process, including setting employee premiums.
**EEOC v. Honeywell International Inc. (Continued)**

- Immediate fallout from the case:
  - Industry groups lambasted the EEOC for interfering with key wellness initiatives that complied with the ACA, and were designed to lower costs and encourage employees to address health risks, without any definitive guidance.
  - The EEOC General Counsel was grilled by Republican minority members of the Senate HELP Committee during confirmation hearings late last year (and Republican members voted against his confirmation).
  - After the GOP took control of that committee in January, it held hearings in which the EEOC underwent a further round of tough questioning.
PRESERVING EMPLOYEE WELLNESS PROGRAMS ACT

On March 2, 2015, the House and Senate introduced legislation designed to provide legal certainty to employers offering wellness programs.

Key provisions of the legislation:

- Plans that comply with the wellness provisions of HIPAA that were amended by the ACA shall not violate the ADA or GINA by offering rewards in compliance with the ACA. In general, this protection extends to health contingent wellness programs, including activity-only and outcome-based programs.

- Participatory programs shall receive the same protection if the reward amount is less than or equal to the maximum reward amounts applicable to health contingent wellness programs.

- The collection of information about the “manifested disease or disorder of a family member shall not be considered an unlawful acquisition of genetic information with respect to another family member participating in workplace wellness programs” and shall not violate GINA.

- If adopted, the legislation shall take effect as if enacted on March 23, 2010 (the date the ACA was signed into law), and shall apply to the ADA and GINA, including amendments made under those laws.
EEOC’S PROPOSED WELLNESS REGULATIONS

• In response to all this political and industry pressure, the EEOC issued proposed regulations on April 16, 2015 that would provide interpretive guidance regarding employer wellness programs.
• The proposed regulations represent a substantial concession by the EEOC, particularly with respect to a program like Honeywell’s.
• However, the EEOC’s guidance still leaves room for improvement, and it does not address all of the issues of concern.
• The proposed regulations address:
  - The definition of an “employee health program”
  - What it means for an employee health program to be voluntary
  - What incentives an employer may offer as part of a voluntary health program
  - Confidentiality requirements that apply to medical information obtained as part of a voluntary health program
EEOC’S PROPOSED WELLNESS REGULATIONS (CONTINUED)

• “Reasonably Designed” requirement
  - In order to be an employee health program, a wellness program must be reasonably designed to promote health or prevent disease.
    ▪ The program must have a reasonable chance of improving health or preventing disease in participating employees, must not be unduly burdensome to employees, and must not violate the ADA.
    ▪ A program that collects information on an HRA to provide feedback to employees about their health risks, or that uses aggregate information from HRAs to design programs aimed at particular medical conditions, is reasonably designed. A program that collects information without providing feedback to employees or without using the information to design specific health programs is not reasonably designed.
EEOC’S PROPOSED WELLNESS REGULATIONS (CONTINUED)

• **Voluntary requirement**
  - A wellness program must be voluntary. In order to be considered voluntary, an employer:
    - May not require its employees to participate in the program.
    - May not deny access to health coverage or generally limit coverage under its health plans for nonparticipation.
    - May not take any other adverse action or retaliate against, interfere with, coerce, intimidate, or threaten employees (such as by threatening to discipline an employee who does not participate or who fails to achieve certain health outcomes).
    - Must provide employees with a notice that describes what medical information will be collected as part of the wellness program, who will receive it, how it will be used, and how it will be kept confidential if a wellness program is part of a group health plan.
• Incentives
  - Employers may offer limited incentives for employees to participate in wellness programs or to achieve certain health outcomes.
    - The amount of the incentive that may be offered for an employee to participate or to achieve health outcomes may not exceed 30% of the total cost of employee-only coverage.
    - The incentive can be either a “reward” or a “penalty”
    - Note that any additional cost for participant and spouse or family coverage may not be taken into account, even if the wellness incentives are offered to spouses and/or dependents.
    - Note also that the proposed regulations extend the 30% limit to participatory programs (such as HRAs or screenings); under HIPAA/ACA regulations, the limits apply only to outcome-based programs.
EEOC’S PROPOSED WELLNESS REGULATIONS (CONTINUED)

• Confidentiality requirements
  - Medical information obtained as part of a wellness program must be kept confidential
    - Generally, employers may only receive medical information in aggregate form that does not disclose, and is not reasonably likely to disclose, the identity of specific employees.
    - Wellness programs that are part of a group health plan may generally comply with their obligation to keep medical information confidential by complying with HIPAA.
    - Employers that are not HIPAA-covered entities may generally comply with the ADA by signing a certification, as provided for by HIPAA regulations, that they will not use or disclose individually identifiable medical information for employment purposes and abiding by that certification.
    - Practices such as training individuals in the handling of confidential medical information, encryption of information in electronic form, and prompt reporting of breaches in confidentiality can help assure employees that their medical information is being handled properly.
  - Employers must provide reasonable accommodations that enable employees with disabilities to participate and to earn whatever incentives the employers offer (e.g., a sign-language interpreter must be provided for weight-loss training classes if any hearing-impaired employees will be participating.)
EEOC’S PROPOSED WELLNESS REGULATIONS (CONTINUED)

• Outstanding Issues/Concerns with Proposed Regulations
  - EEOC-proposed regulations impose hard percentage caps on financial incentives that do not match up to permitted ACA/HIPAA percentages.
    ▪ HIPAA/ACA permit incentives up to 30% (50% for smoking cessation) of the total cost of participant and spouse or family coverage (vs. self-only coverage under EEOC regs).
    ▪ EEOC regs note that if a program merely asks individuals if they are tobacco users, the incentive will not be subject to the ADA and an incentive of up to 50% may be allowed, but if biometric screening (e.g., a blood test) is used to determine the presence of tobacco, any incentive is capped at 30% rather than the permitted 50% under HIPAA/ACA.
  - EEOC-proposed regulations do not address GINA, including whether the use of incentives with respect to spousal HRAs or other inquiries regarding a spouse’s medical information implicates GINA.
  - EEOC-proposed regulations appear to definitively reject the outcome in Seff and the notion that any wellness plan can be part of a bona fide benefit plan and fall within the safe harbor established under the ADA.
POTENTIAL FALLOUT FROM EEOC ACTION

• Employers can, at the very least, rely on the proposed regulations in designing their wellness programs for 2016; the EEOC said that compliance with the proposed regulations would be considered compliance with the ADA pending final regulations.

• Employers should (individually or through trade groups) submit comments demanding that the EEOC conform the final regulations to all of the HIPAA/ACA guidance, and also make clear that obtaining wellness information from a spouse is not barred by GINA.

• The comments also ought to seek clarification of what, if any, limits apply to wellness initiatives offered outside a group health plan.

• Depending on how the EEOC responds to comments, the proposed legislation may still be a possibility.
ADDITIONAL DOL, HHS AND IRS GUIDANCE ISSUED

- On the same day that the EEOC released its regulations, the DOL, HHS, and IRS issued additional interpretive guidance in the form of FAQs.
- The FAQs provide that a wellness program that complies with the ACA must be “reasonably designed,” meaning it must:
  - have a reasonable chance of improving the health of, or preventing disease in, participating individuals;
  - not be overly burdensome;
  - not be a subterfuge for discrimination based on a health factor; and
  - not be highly suspect in the method chosen to promote health or prevent disease.
- The guidance confirmed that a wellness screening program that does not provide data to employees or offer them programs intended to manage health risk factors is not “reasonably designed.”
- The guidance reinforced the view that compliance with the HIPAA/ACA rules does not constitute compliance with other federal laws, such as the ADA.
- Also on the same day, HHS issued guidance affirming that HIPAA’s privacy and security requirements apply to protected health information obtained in connection with a wellness program that is part of an employer group health plan.
TIPS FOR CREATING 2016 WELLNESS PROGRAMS

• Consider revising your plan to use “penalties.”
  - It’s now clear that penalties are treated no differently than rewards; it’s all about the dollars.
  - Penalties demonstrably work better – people feel more strongly about avoiding a penalty than getting a reward.

• Consider boosting your reward/penalty, but stay under the 30% employee-only level.
  - Final regulations may loosen this restriction, but for now, it’s safest to conform.
  - Be particularly careful where incentives are offered for spousal/dependent participation and where biometric screening includes tobacco use.

• Make sure to comply with the notice/feedback/confidentiality requirements.
TIPS FOR CREATING 2016 WELLNESS PROGRAMS (CONTINUED)

• Tie the wellness program to the medical plan and use (de-identified) data from the program to design future benefits, so that if you fall outside the EEOC’s parameters, the Seff “underwriting” safe harbor can be asserted (and state laws, e.g., “smokers’ rights” laws, can be preempted by ERISA).

• Ensure that the aggregate penalty would not cause the coverage to exceed the 9.5% “affordability” requirement under the ACA (the EEOC asked for comments on this).

• Ensure that reasonable accommodations are provided to allow sufficient participation in the program for individuals with disabilities (e.g., no blood draw required for hemophiliacs).

• Don’t take any adverse employment action against employees who don’t participate, including denying health insurance or charging 100% of the premium cost.
QUESTIONS?
The American Employment Law Council

Twenty-Third Annual Conference

Hiring The Next Generation To Replace An Aging Work Force: Acceptable Business Strategy Or Age Discrimination?

October 21-24, 2015
Ojai, California
American Employment Law Council  
October 2015  
Ojai, California  

Hiring The Next Generation To Replace An Aging Work Force: Acceptable Business Strategy Or Age Discrimination?  

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† The authors thank Ali Kliment and Alyssa Kovach for their assistance with this paper.
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I. Introduction

It is hard to read the news these days without running across an article about companies who are looking to attract and retain millennials to their workforces. According to some estimates, millennials will make up a majority of the workforce after 2020, and some companies, such as consulting giant PwC, estimate that 80% of their workforce will be comprised of millennials by 2016. Even some law firms are adapting to this new generation of employees, such as by getting rid of the corner office for senior partners and replacing them with offices of the same size for everyone from partners to associates to paralegals. Starbucks Corp. is leading a coalition of more than a dozen employers to hire 100,000 young workers in the next three years.

Efforts to hire younger workers into an ageing workforce, however, raise obvious age discrimination concerns. Lawsuits brought by the EEOC asserting claims under the Age Discrimination in Employment Act (“ADEA”) jumped from 37 in 2013 to 111 in 2014, and EEOC’s challenges to early retirement incentive programs more than doubled from 2014 to 2015 (from 15 to 37). The following are examples of the types of ADEA claims recently brought by EEOC:

- **Aerotek, Inc.,** No. 15-cv-275 (N.D. Ill.). EEOC filed this action in the Northern District of Illinois after conducting an investigation into allegations that Aerotek, a staffing agency, complied with employers’ requests to hire young people. EEOC indicated that Aerotek produced in response to its requests for information hundreds of discriminatory job requests by Aerotek’s clients, such as “Looking for young energetic [sic] guys with some sports knowledge and good attention to detail,” and “We’re looking for a Fresh College Grad.” The case is still pending before the court.

- **LA Enterprise Rent-A-Car, No. 3:10-cv-2373 (S.D. Cal.).** EEOC filed this lawsuit in the Southern District of California alleging that defendant, a car rental company with 48 branch offices in the Austin metropolitan area, refused to hire individuals age 40

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4 See Wal-Mart, other companies join Starbucks drive to hire young workers, Los Angeles Times, July 31, 2015, [http://touch.latimes.com/#section/-1/article/p2p-83984023/](http://touch.latimes.com/#section/-1/article/p2p-83984023/)

and older into entry-level management positions in favor of younger, less qualified applicants in violation of the ADEA. The case was resolved on September 19, 2012 pursuant to a consent decree which provides for a total payment of $160,000 in monetary relief and enjoining defendant from engaging in age discrimination with regard to recruiting, interviewing, rejecting, selecting and/or hiring individuals for management trainee positions.

- **Darden Restaurants, Inc.,** 15-cv-20561 (S.D. Fl.). EEOC filed this lawsuit in the Southern District of Florida to claim that defendants told unsuccessful older applicants that they were “too experienced” and that they were “looking for people with less experience,” and that hiring officials stated they were “looking for ‘fresh’ employees” and “people with less experience” because they wanted a “youthful” image. The case is still pending.

- **AmerisourceBergen,** No.12-cv-5538 (E.D. Pa.). EEOC filed this lawsuit in the Eastern District of Pennsylvania to challenge under the ADEA AmerisourceBergen’s alleged refusal to hire an individual who is 60 because he purportedly was overqualified in favor of someone 20 years younger. The case was dismissed by the parties in June of 2013.

- **Mattress Firm,** 13-cv-1745 (D. Nev. Sept. 23, 2013). EEOC alleged that defendant forced out a class of older workers after acquiring a Las Vegas mattress chain while also setting a “goal of replacing approximately 90% of the existing staff with younger employees.” The case is still pending.

- **Cavalier Telephone, LLC,** No. 3:10-cv-00664-HEH (E.D.Va.). EEOC brought a class failure to hire claim against defendant, alleging that a single recruiter was involved in hiring all new Account Executives in the mid-Atlantic region, and that this recruiter made ageist statements regarding his hiring strategies such as the company was on a “youth movement” and was looking for candidates to hire for the sales department who were “young and fit.” EEOC also alleged that the company advertised for candidates that were recent college graduates, and that the recruiter emailed staff asking how they can target younger employees (offering a $500 bonus for referrals of younger brothers or sisters). The parties entered a consent decree on July 15, 2011.

- **Resource Residential,** No. 4:10-cv-00230 (S.D. Ga.). EEOC claimed that defendant terminated the three plaintiffs because of their age and that, “[p]rior to, and during the time frame of the three victims’ terminations, higher management officials for Defendant made various remarks indicating a preference for a younger-aged workforce, including ‘a younger image is needed in the offices’ and that a certain job position required someone who was ‘young, bubbly’ and ‘energetic.’” The defendant entered into a consent decree on July 22, 2011.

This activity shows EEOC’s focus on employers who layoff older workers while recruiting/hiring younger workers, who use advertisements with age preferences or seeking “recent grads,” or who reject older workers on the grounds that they are “overqualified.” This paper discusses the recent caselaw addressing these types of ADEA claims, and explores
employment strategies for transforming a workforce while avoiding or reducing the risk of ADEA claims.

II. Hiring Younger Workers During Or Shortly After A Layoff And The Risk of Class Litigation.

Companies that continue to hire or hire younger workers during or shortly after a layoff have faced ADEA claims, including class action claims brought under either disparate impact and/or pattern or practice disparate treatment theories. This section provides a brief description of both class theories, then discusses cases addressing ADEA challenges to employers who have laid off older workers while hiring or retaining younger ones, which demonstrate the critical importance of statistical evidence in these cases and the importance of articulating and documenting the business rationale for these types of programs.

A. Disparate Impact Claims

The Supreme Court held in Smith v. City of Jackson, 544 U.S. 228 (2005) that disparate impact claims are cognizable under the ADEA. Courts, interpreting and following the Supreme Court’s decision in Smith v. City of Jackson, have held that disparate impact claims are cognizable under Section 623(a)(2) of the ADEA. See, e.g., EEOC v. Allstate Ins. Co., 458 F. Supp. 2d 980, 986 (E.D. Mo. 2006).

To establish a prima facie case under the disparate impact theory, the plaintiff is “responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.” Smith, 544 U.S. at 241. Even after a prima facie case is established, if an employer then shows that the challenged employment practice is

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6 Under the ADEA, it is “unlawful for an employer ... to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age.” 29 U.S.C. § 623(a)(1) (1985). It is also unlawful under the ADEA for an employer “to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities adversely affect his status as an employee, because of such individual’s age.” 29 U.S.C. § 623(a)(2).

7 See 29 U.S.C. § 623(a)(2) (“It shall be unlawful for an employer to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s age”); 29 C.F.R. § 1625.7(c) (“Any employment practice that adversely affects individuals within the protected age group on the basis of older age is discriminatory unless the practice is justified by a ‘reasonable factor other than age’.. An individual challenging the allegedly unlawful practice is responsible for isolating and identifying the specific employment practice that allegedly causes any observed statistical disparities.”).
“based on reasonable factors other than age” (commonly abbreviated RFOA), a disparate-impact claim cannot survive.


Next, the plaintiff must show that the policy caused an adverse impact on individuals 40 and over; “that is, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group.” See Ficken v. Clinton, 841 F. Supp. 2d 85, 89 (D.D.C. 2012) (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988)); Powell, 776 F. Supp. 2d at 257 (“The plaintiff’s burden is heavy, not only to isolate and identify the specific employment practices, but to establish causation by introducing a ‘substantial statistical disparity between protected and non-protected workers’ with respect to the employment practices in question” (citations omitted)).

Even if a plaintiff states a prima facie disparate impact claim, an employer can prevail if it can demonstrate that there were reasonable factors other than age that caused the impact – the (“RFOA”) defense. The ADEA permits employers “to take any action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age[.]” 29 U.S.C. § 623(f)(1) (1985). The Supreme Court in Meacham v. Knolls Atomic Power Laboratory, 554 U.S. 84 (2008), held that RFOA is an affirmative defense, for which employers bear the burdens of production and persuasion. Thus, under Meacham, the employer must show that the “factor other than age” was a reasonable one. The the more plainly reasonable the employer’s “factor other than age” is, the easier it is for an employer to persuade a factfinder that the defense is meritorious. It will be mainly in cases where the reasonableness of the non-age factor is obscure.
or unclear, that the employer will have more evidence to reveal and more convincing to do in going from production to persuasion. Meacham, 554 U.S. at 101.

Unlike the business necessity defense to Title VII disparate impact claims, it is not relevant under the RFOA defense whether an alternative method would have had a lessor impact on older workers. See, e.g., Smith v. City of Jackson, 544 U.S. 228, 243 (2005); Powell, 776 F. Supp. 2d at 258 n.9 (“Unlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement.”) (quoting City of Jackson, 544 U.S. at 243, 125 S.Ct. 1536); Aldridge v. City of Memphis, No. 10-1129, 2008 WL 2999557 (W.D. Tenn. July 31, 2008) (“The reasonableness inquiry does not require a defendant to show that there are no other ways for it to achieve its goals that do not result in a disparate impact on a protected class.”). The Meacham Court also clarified that the business necessity test has no place in ADEA disparate impact cases because applying both that test and RFOA defense would entail a wasteful and confusing structure of proof. Meacham, 554 U.S. at 85.

EEOC has published regulations regarding the RFOA defense. Under the regulations, an RFOA is a “non-age factor that is objectively reasonable when viewed from the position of a prudent employer mindful of its responsibilities under the ADEA under like circumstances.” 29 C.F.R. § 1625.7(e)(1). “To establish the RFOA defense, an employer must show that the employment practice was both reasonably designed to further or achieve a legitimate business purpose and administered in a way that reasonably achieves that purpose in light of the particular facts and circumstances that were known, or should have been known, to the employer.” 29 C.F.R. § 1625.7. Relevant considerations for determining whether a practice is based on an RFOA include, but are not limited to:

(i) The extent to which the factor is related to the employer's stated business purpose; (ii) The extent to which the employer defined the factor accurately and applied the factor fairly and accurately, including the extent to which managers and supervisors were given guidance or training about how to apply the factor and avoid discrimination; (iii) The extent to which the employer limited supervisors' discretion to assess employees subjectively, particularly where the criteria that the supervisors were asked to evaluate are known to be subject to negative age-based stereotypes; (iv) The extent to which the employer assessed the
adverse impact of its employment practice on older workers; and (v) The degree of the harm to individuals within the protected age group, in terms of both the extent of injury and the numbers of persons adversely affected, and the extent to which the employer took steps to reduce the harm, in light of the burden of undertaking such steps.

29 C.F.R. § 1625.7(e)(2).

Statistical analysis is a critical component of a disparate impact case. A statistical analysis in a disparate impact case must test whether the outcomes of a practice or policy are correlated with a specified characteristic, such as age or gender or whether an observed difference can be attributed to random chance. See, e.g., Jones v. City of Boston, 752 F.3d 38, 40 (1st Cir. 2014); Tabor v. Hilti, Inc., 703 F.3d 1206, 1223 (10th Cir. 2013) (when disparate impact claim is based on subjective decisionmaking, the statistical analysis must control for constraints on the use of subjective criteria. A plaintiff isolates the challenged practice by controlling for key factors outside of the challenged practice that could potentially cause or contribute to the disparity. The analysis need not control for all variables, but cannot exclude key variables. Mere imbalance in workfroce without causal connection to specific practice is not sufficient); Hodge v. Oakland Unified School Dist., 748 F.3d 749 (9th Cir. 2014) (rejecting disparate impact analysis where it failed to compare the number of protected group members hired with available applicant pool); EEOC v. Kaplan Higher Education Corp., No. 13-3408, 2014 WL 1378197 (6th Cir. Apr. 9, 2014) (applying Daubert principles to reject plaintiffs’ expert analysis of race data in credit history case and concluding that EEOC’s expert conducted unreliable analysis and used unrepresentative sample compared to population and therefore could not establish disparate impact); Caldwell v. University of Houston System, 520 F. App’x 289 (5th Cir. 2013) (disparate impact claim rejected because plaintiff failed to present analysis to demonstrate how university’s failure to follow its reclassification procedures caused a disparate impact); Chin v. Port Authority of New York & New Jersey, 685 F.3d 135 (2d Cir. 2012) (finding that plaintiffs must use the proper population for analysis, which should be the relevant applicant pool or eligible labor pool).

Where there is a difference that cannot be attributed to, or explained by random chance, statisticians and courts refer to the result as statistically significant. Id. The Jones court discussion of statistical significance follows the approach set forth by the Supreme Court in
Hazelwood and followed by statisticians and labor economists in evaluating disparities in employment discrimination cases:

Statisticians employ a number of different methods to assess statistical significance in a variety of different contexts. Federal Judicial Center, *Reference Manual on Scientific Evidence* 251 (3d ed.2011) (hereinafter “FJC Reference Manual”). In the approach most relevant here, statisticians may compare outcomes for two different groups (e.g., black employees and white employees) presuming that members of the two groups have the same likelihood of receiving a given outcome (e.g., a promotion). See Paul Meier, Jerome Sacks, and Sandy L. Zabell, *What Happened in Hazelwood: Statistics, Employment Discrimination, and the 80% Rule*, 1984 Am. Bar Found. Res. J. 139, 147 (1984). Statisticians are well aware that this assumption of equal opportunity, even if true, does not mean that the two groups will experience exactly equal outcomes: random variation will often create differences. To assess the likelihood that an observed difference in outcomes resulted from mere chance, statisticians calculate the probability of observing a difference equal to or greater than that which actually occurred, assuming equal opportunity. They call this probability the “p-value.” *FJC Reference Manual* at 250. Statisticians usually apply the label “statistically significant” to the observed differential outcomes if the p-value is less than five percent, see *Fudge v. City of Providence Fire Dep’t*, 766 F.2d 650, 658 n. 8 (1st Cir.1985), although they sometimes use a different cut-off, such as one percent, *FJC Reference Manual* at 251–52.

Thus, a finding of statistical significance means that the data casts serious doubt on the assumption that the disparity was caused by chance. When statisticians find a disparity between racial groups to be statistically significant, they are willing to reject the hypothesis that members of the groups truly had an equal chance of receiving the outcome at issue. *Id.*

Statistical significance and p-value are often connected with a third concept, “standard deviation.” In disparate impact cases, standard deviation serves as another way of measuring the amount by which the observed disparity in outcomes differs from the average expected result given equal opportunity, e.g., equal rates of promotion for black and white employees. A difference of 1.96 standard deviations generally corresponds to a p-value of five percent, while a difference of three standard deviations generally corresponds to a p-value of approximately 0.5%. *FJC Reference Manual* at 251 n. 101. As the Supreme Court observed in a case involving allegations of discriminatory jury selection, “[a]s a
general rule ..., if the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that the jury drawing was random would be suspect to a social scientist.” Castaneda v. Partida, 430 U.S. 482, 496 n. 17, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977).

Id. (footnotes excluded); accord Tabor v. Hilti, Inc., 703 F.3d 1206, 1223 (10th Cir. 2013) (statistical significance equals “two or three standard deviations”); Chin, 685 F.3d at 145, 153-54 (“[S]tatistical significance at the five-percent level is generally sufficient”); Stagi v. Nat'l R.R. Passenger Corp., 391 F. App'x 133, 140, 144–45 (3d Cir. 2010) (significance means “a probability level at or below 0.05, or at 2 to 3 standard deviations or greater”).

Courts critically examine statistical evidence presented in disparate impact cases, such as by applying Daubert and/or evaluating whether statistical analysis isolates and tests whether the alleged practice or policy at issue caused a disparate impact. See, e.g., Tabor, 703 F.3d at 1223 (requirement to isolate and test challenged employment practice is important because it goes directly to causation. Failure to properly model statistical analysis with key variables will invalidate analysis and preclude finding of disparate impact); Hodge, 748 F.3d 749 (rejecting disparate impact analysis where it failed to compare the number of protected group members hired with available applicant pool); Kaplan, 2014 WL 1378197 (applying Daubert principles to reject plaintiffs’ expert analysis of race data in credit history case and concluding that EEOC’s expert conducted unreliable analysis and used unrepresentative sample compared to population and therefore could not establish disparate impact).

B. Pattern or Practice Claims

Many courts have held that pattern or practice claims can be asserted under the ADEA. See, e.g., Thompson v. Weyerhaeuser Co., 582 F.3d 1125 (10th Cir. 2009) (recognizing that “[t]his circuit has applied the pattern-or-practice framework in ADEA actions”); (stating that the “ADEA has no parallel provision [to Title VII's 42 U.S.C. § 2000e-6(a)], but courts nevertheless have adopted the pattern-or-practice terminology and the shifting burden of persuasion to ADEA actions”); Haskell v. Kaman Corp., 743 F.2d 113, 119 (2d Cir. 1984) (“As in race discrimination cases, a plaintiff [in an ADEA case] may through statistical evidence establish a pattern or practice of discharging or failing to promote older employees, from which an inference of age discrimination may be drawn.”); EEOC v. W. Elec. Co., 713 F.2d 1011, 1016 (4th Cir. 1983)
(applying the Teamsters pattern-or-practice procedural framework to an ADEA claim); Marshall v. Sun Oil Co., 605 F.2d 1331, 1336 n. 2 (5th Cir. 1979) (same).

The phrase “pattern or practice” comes from Section 707 of Title VII, which authorizes EEOC to file a lawsuit alleging a “pattern or practice of resistance to the full enjoyment of any of the rights secured” by Title VII. 42 U.S.C. § 2000e-6(e). Section 707 “pattern or practice” claims are subject to the bifurcated method of proof set forth by the Supreme Court in Int’l Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977). Under the Teamsters framework, during the first phase of trial, EEOC must “demonstrate that unlawful discrimination has been a regular procedure or policy followed by an employer.” 431 U.S. at 324. EEOC typically must present statistical evidence to make this showing. 431 U.S. at 337-39; see also Adams v. Ameritech Serv., Inc., 231 F. 3d 414, 422-23 (7th Cir. 2000) (discussing the importance of statistical evidence in pattern or practice claims). A finding of discrimination in the first phase justifies injunctive relief for the class as a whole, but typically does not permit individual relief. During the second phase of Teamsters, individuals seeking relief must demonstrate that they were actually harmed by the policy or practice of discrimination established during phase one.

EEOC may pursue pattern or practice claims on behalf of a group of allegedly aggrieved persons without satisfying the requirements of a class action set forth in Rule 23 of the Federal Rules of Civil Procedure. See International Brotherhood of Teamsters v. U.S., 431 U.S. 324 (1977) (recognizing and explaining framework for pattern or practice discrimination claim); Gen. Tel. Co. of Nw. v. EEOC, 446 U.S. 318, 324 (1980) (noting that the EEOC’s “authority to bring such actions is in no way dependent upon Rule 23, and the Rule has no application to a § 706 suit”).

Although Section 707 claims must be brought by the government, courts have clearly extended the “pattern or practice” doctrine by permitting private litigants to bring class action

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§ Section 706 also authorizes EEOC to bring lawsuits on behalf of charging parties. There has been some confusion in the caselaw regarding whether Section 706 or Section 707 authorizes EEOC to use the pattern or practice method of proof. See Serrano and EEOC v. Cintas Corp., Case No. 04-40132 (S.D. Mich., February 9, 2010) (criticizing other courts for blurring the line between Section 706 and 707 claims, noting distinctions between the two types of claims such as the availability of compensatory and punitive damages under Section 706 but not Section 707, and holding that EEOC was not entitled to use the Teamsters method of proof for a claim brought under Section 706).
lawsuits, subject to Rule 23’s requirements, alleging classwide intentional discrimination to proceed under the Teamsters method of proof. See Davis v. Coca-Cola Bottling Co. Consol., 516 F.3d 955, 965 (11th Cir. 2008) (“A pattern or practice claim for [declaratory and injunctive relief] may also be brought under Title VII as a class action, pursuant to Federal Rule of Civil Procedure 23(b)(2), by one or more of the similarly situated employees.”) (citing Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 876 n.9 (1984) (“[I]t is plain that the elements of a prima facie pattern-or-practice case are the same in a private class action [as when the Government brings the claim].”).

As in lawsuits brought by EEOC, private litigants typically must present statistical evidence to establish that intentional discrimination was the employer’s standard operating procedure. See, e.g., Haskell, 743 F.2d at 119 (noting plaintiffs in ADEA case can establish pattern or practice through statistical evidence); Stanojev v. Ebasco Servs., Inc., 643 F.2d 914, 921 (2d Cir. 1981) (“Through statistical evidence, it may be possible to demonstrate a pattern of failure to hire or promote older persons, or an apparent policy of forced early retirement for older employees.”). Of course anecdotal evidence also plays a critical role in pattern or practice cases and as we discuss in the subsequent sections, actions like hiring younger workers just before, during or shortly after a layoff creates significant risk of providing a group of older laid off workers with precisely the type of anecdotal evidence needed to support a pattern or practice claim.

C. Cases Addressing Challenges To Employers Who Laid Off Older Employees While Hiring Or Retaining Younger Ones.

Many companies that have laid off older workers while hiring or retaining younger ones have faced class action lawsuits. Courts evaluating such claims focus on the statistical evidence and anecdotal evidence surrounding the layoff (e.g., layoff design and communications), as well as, the evidence offered by employers to support the RFOA defense, which typically would be premised on obtaining cost savings.

In Apsley v. Boeing Co., 591 F.3d 1184 (10th Cir. 2012), for instance, the plaintiffs sued under the ADEA seeking to represent a class of about 700 former Boeing employees who were not hired by Spirit after Boeing laid off all employees in a division (more than 10,000 employees) it had sold to Spirit. The day after the layoffs, Spirit re-hired 8,354 employees
selected by Boeing managers. Although older employees predominated in the workforce both before and after the sale, a lower percentage of older workers than younger ones were rehired.

The Tenth Circuit affirmed summary judgment for defendants on plaintiffs’ ADEA disparate impact and pattern or practice claims, finding that plaintiffs’ statistical evidence was insufficient as a matter of law to support either class liability theory. In particular, the Apsley plaintiffs presented an aggregated statistical model that showed a difference of just 60 between the number of people over 40 predicted to be recommended for hire (8,028) and the actual number of people over 40 recommended for hire (7,968), which was statistically significant at greater than five standard deviations. After observing that some courts have found that levels of statistical significance greater than 1.96 standard deviations is sufficient to infer discrimination, the Apsley court held that the plaintiffs’ statistical evidence lacked “practical significance” because a shortfall of 60 hires was so small relative to the total hires at issue. In addition, the court found that the defendants hired over 99% of the older employees that plaintiffs’ own statistical model predicted should have been hired in the absence of discrimination, and that the statistical significance generated from plaintiffs’ model was misleading because it was driven not by the shortfall, but instead by the large sample size of the aggregated population.

Moreover, the Apsley court found that plaintiffs’ anecdotal evidence, which consisted of a handful of isolated statements, also was insufficient to avoid summary judgment for defendants. For instance, the court found “innocuous” an alleged statement by the CEO that “an older workforce was indicative of an unhealthy business and was very concerned about the aging workforce,” and reasoned that this was simply a “fact of life” given the high percentage of older workers.

After being terminated in a RIF, the plaintiff in McGuigan v. CAE Link Corp., 851 F. Supp. 511 (N.D.N.Y. 1994) claimed that the decision to exclude recent college graduates and new hires from consideration for layoffs constituted a per se violation of the ADEA and moved for judgment as a matter of law. The court rejected this argument and explained:

The bare fact that an employer encourages employment of recent college and technical school graduates does not constitute unlawful age discrimination. Only when those recruits are insulated from reduction at the expense of employees within the protected age group is the ADEA implicated.
Id., at 514 (quoting *Williams v. General Motors Corp.*, 656 F.2d 120, 130 n.17 (5th Cir. 1981)). The court went on to find that the plaintiff had failed to present any evidence showing that employees in the protected group were disfavored by the company’s policy.

Similarly, in *Powell v. Dallas Morning News L.P.*, 776 F. Supp. 2d 240 (N.D. Tex. 2011), the plaintiffs brought an ADEA disparate impact challenge to a “rejuvenation policy” used during a reduction in force (“RIF”) that excluded two subsidiary companies that allegedly focused on hiring younger writers and editors to rejuvenate a newspaper to appeal to a younger audience. The court granted summary judgment to defendants, holding that plaintiffs failed to present any statistical evidence of a disparate impact.

The *Powell* court also held that the rejuvenation policy satisfied the RFOA defense because defendants demonstrated that they implemented the policy after conducting extensive market research and surveys to determine how to reach more readers and thus increase revenue. *Id.* at 266-67 (holding that formulating a policy or plan to attract the audience most likely to raise profitability is a reasonable factor other than age and citing *Lit v. Infinity Broad. Corp. of Penn.*, No. 04-3413, 2005 WL 3088364 (E.D. Pa. Nov. 16, 2005) for notion that a repackaging effort to appeal to a younger audience and thus keep the radio station successful was a RFOA). The *Powell* decision could be very useful for employers in defending against inevitable age discrimination claims relating to efforts to reshape or change the demographics of their workforces. The key fact in that case, however, seemed to be the business rationale for hiring younger workers.

Several other courts have wrestled with the issue of whether an employer who conducts a RIF while hiring lower paid employees with the goal of obtaining costs savings is lawful under the ADEA. In *Allen v. Highlands Hosp. Corp.*, 545 F.3d 387 (6th Cir. 2008), the Sixth Circuit held that an employer’s stated policy of increasing employee turnover to replace higher-paid senior employees was based on a reasonable factor other than age. The *Allen* plaintiffs claimed that defendant had a policy of demanding terminations of the highest paid employees which had a disparate impact on older employees. The court held that plaintiffs failed to identify a specific employment practice that disproportionately impacts employees at least 40 years of age, explaining:
[Plaintiffs] at best [have] alleged that HHC desired to reduce costs associated with its highly paid workforce, including those costs associated with employees with greater seniority. But the plaintiffs have not established that this corporate desire evolved into an identifiable practice that disproportionately harms workers who are at least 40 years old.

_Id._ at 404.

In addition, the _Allen_ court held that plaintiffs failed to present sufficient statistical evidence of a disparate impact on older employees. The court rejected plaintiffs’ reliance on evidence showing that the number of terminations of employees over 40 increased from 14.3% to 62.5% between 2002 and 2003, because the pools from which these numbers were drawn were very small (there were only 21 terminations in 2002 and 16 terminations in 2003). In addition, the defendant demonstrated that employees under 40 were terminated in higher proportion than workers 40 and over.

Moreover, the Sixth Circuit in _Allen_ agreed with the district court’s determination that defendant established the RFOA defense: “‘[l]owering overall employee costs by increasing turnover and discouraging employees from using vacation and sick time might not be the wisest method of running a hospital, but it is a reasonable factor other than age in response to HHC’s bulging employee costs.’” _Id._ at 405.

Similarly, in _Aldridge v. City of Memphis_, 404 F. App’x 29 (6th Cir. 2010), the Sixth Circuit rejected a disparate impact challenge to the city’s elimination of the captain rank. The court found persuasive defendant’s evidence “showing that the employment action was based on the inefficiency of paying the captains more (in some cases, tens of thousands of dollars more) than patrol officers, sergeants, or lieutenants to perform the very same duties those lower-ranked officers performed.” _Id._ at 41. Citing its earlier decision in _Allen_, the Sixth Circuit affirmed the principle that “terminat[ing] employees based on seniority to facilitate the hiring of new, less costly employees qualified as an RFOA.” _Id._ (citing _Allen_, 545 F.3d at 405) (internal quotation marks omitted).

Although these cases approve the goal of obtaining cost savings as a valid RFOA, an employer will bear the burden of demonstrating actual costs savings. As the EEOC’s regulations provide, an employer cannot differentiate based on the average cost of employing older
employees as a group. 29 C.F.R. § 1625.7(f) (“a differentiation based on the average cost of employing older employees as a group is unlawful except with respect to employee benefit plans which qualify for the section 4(f)(2) exception to the Act.”).

For instance, the employer in Silver v. Leavitt, No. Civ.A. 05-0968 JDB, 2006 WL 626928 (D.D.C. Mar. 13, 2006) presented sufficient evidence to persuade the court that its practice of recruiting candidates at the lowest level possible was designed with the goal of reducing salary costs. The plaintiff in Silver brought a disparate impact challenge to defendant’s policy of interviewing only those applicants who applied for a vacant position at the GS-9 level, even though the position was posted as a GS-9/11/12 level role, as having a disparate impact on applicants who were over 40. In granting summary judgment for defendant, the court held that this practice satisfied the RFOA defense:

[T]he record shows that defendant was validly concerned about its strained administrative budget, the costly burden of salaries and benefits, attracting new workers to the laborforce, and the likely possibility of attrition of a large number of employees. The Court cannot say that it was unreasonable for defendant to maximize its limited fiscal resources by initially recruiting candidates at the lowest level possible. Lower level employees (and, ordinarily, new employees) are paid less than higher level employees, and are less likely to retire within a short period of time. By recruiting workers who cost less to employ and are less likely to retire in the near future, defendant was arguably making the most of the money spent on the selection, hiring, and training of employees.

Id. at *14. Reviewing the evidence presented, the court concluded that nothing in the record indicated that either the GS-9 interview policy or the statements made by other employees in support of that policy were motivated by “‘inaccurate and stigmatizing stereotypes’ about members of the protected class, such as a lack of productivity or decreased competence.” Id. (citing Hazen Paper, 507 U.S. at 610; Breen, 2005 WL 3276163, at *4-5 (finding that federal employer’s statement that fiscal budget was strained and approximately forty percent of relevant employees were eligible for retirement did not constitute evidence of discrimination because the statement only identified concerns about excessive costs and the “probability of attrition of large numbers of experienced personnel in the foreseeable future” rather than “inaccurate and denigrating generalizations about age’’)).
Ultimately, the Silver court held that “[w]ithout more, actions designed to save costs do not equate with age discrimination, even when those costs are correlated with age.” Id. (quoting Breen, 2005 WL 3276163, at *6 (citing Hazen Paper, 507 U.S. at 612-13)). In so holding, the court emphasized that plaintiff failed to submit empirical, statistical or other evidence regarding the allegedly adverse impact the interview policy had on employees over forty, and noted that plaintiff was employed as a GS-9 and thus benefitted from the interview policy. The court continued that if younger workers were promptly promoted from the GS-9 level, while older workers were denied lateral promotion and vertical hiring, then there “may actually be a higher concentration of older workers at the GS-9 level,” but it is not enough for a plaintiff to just allege there is a disparate impact. Id. at *14. As the Silver court explained, “[c]ertainly, longevity of employment is a factor that has a strong correlation with age, and it may well be that lower-level employees are likely to be younger than higher level employees. But mere correlation—however strong—is insufficient if the employer’s decision was ‘wholly motivated by factors unrelated to age.’” Id. (citing Breen v. Mineta, 2005 WL 3276163, at *3 (D.D.C. 1999); Hazen Paper Co., 507 U.S. at 611-12).

III. What Kinds Of Advertisements Can Employers Use To Hire A Younger Workforce?

As discussed above, EEOC has brought litigation challenging employers who use advertisements seeking younger employees. Obviously, employment advertisements with express age preferences or limitations run afoul of the ADEA. However, even advertisements without express age preferences can create litigation risk, as EEOC believes that advertisements that use words that may deter older applicants (such as “seeking recent college graduates”) violate the ADEA. This section discusses case law developments regarding challenges to employment advertisements cases involving alternative recruiting strategies that are permissible under the ADEA.

A. Advertisements With Express Age Preferences

The ADEA itself prohibits advertisements with express age preferences or limitations. 29 U.S.C. § 623(e) (1985) (prohibiting employers from publishing or printing “any notice or advertisement relating to employment by such an employer . . . indicating any preference, limitation, specification, or discrimination, based on age.”).
The EEOC’s Compliance Manual also indicates EEOC’s position that employers may not structure job advertisements in such a way as to indicate that a group of people would be excluded from consideration from employment based on age. See 632.2 Employment Opportunity Advertising, 2006 WL 4672861 (EEOC Compliance Manual). The Compliance Manual further provides that an investigator should consider requesting a Commissioners’ Charge or initiating a directed investigation if it comes to the EEOC’s attention that an advertisement or notice contains an age preference such as “maximum age 35” or “young” See EEOC Compliance Manual Section 8: Intake of Commission Initiated Actions, 2006 WL 4673001 (EEOC Compliance Manual).

The EEOC further indicates in its Compliance Manual that an advertisement with a “statement of absolute preference based on age that excludes those within the protected age range of 40 to 70 or some portion of that group is prohibited” unless it satisfies the BFOQ or RFOA defenses.” See 632.2 Employment Opportunity Advertising, 2006 WL 4672861 (EEOC Compliance Manual).

Employers likely cannot rely on the BFOQ defense to defend advertisements with express age preferences. The BFOQ defense is an affirmative defense to a facially discriminatory criterion or practice. See, e.g., Western Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985) (ADEA). To establish the BFOQ defense to an age discrimination claim, the employer must show that: (1) the challenged criterion is reasonably necessary to the essence of the employer’s business; and (2) either (a) all or substantially all individuals excluded from the

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2 Although EEOC’s regulations may be entitled to deference, EEOC’s Compliance Manuals and other materials like opinion letters are not entitled to deference. See, e.g., Univ. of Texas Southwestern med. Ctr. v. Nassar, 133 S. Ct. 2517, 2533 (2013) (holding that EEOC guidance manual is not entitled to Chevron or Skidmore deference); Ludlow v. Northwestern Univ., No. 14 C 4614, 2015 WL 508431, at *4 (N.D. Ill. Feb. 5, 2015) (“[P]laintiff cites to the Department of Justice Civil Rights Division’s Title IX Manual giving the Department’s position that Title VII and Title IX are ‘separate enforcement mechanisms’ and ‘[i]ndividuals can use both statutes to attack the same violations.’ While this may be the Department’s position, a policy manual is not entitled to Chevron-style deference, but rather ‘respect . . . but only to the extent that those interpretations have the power to persuade.’” (citations omitted)).

10 The BFOQ defense is a statutory defense under the ADEA. 29 U.S.C. § 623(f)(1) (1985) (providing it is not unlawful under the ADEA for an employer “to take any action otherwise prohibited where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age.”); see also 29 C.F.R. § 1625.6. Because BFOQ is a defense to a facially discriminatory practice, courts have declined to extend the BFOQ defense to disparate impact claims. See, e.g., Ferrill v. Parker Group, Inc., 168 F.3d 468, 473 (11th Cir. 1999); MacNamara v. Korean Air Lines, 863 F.2d 1135, 1146 n.14 (3d Cir. 1988).

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job by the age-based criterion are in fact disqualified; or (b) the employer’s age-based criterion was a legitimate proxy for valid job qualifications by proving that it is impossible or highly impractical to distinguish on an individualized basis which members of the protected class possess the valid qualifications. See, e.g., Western Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985) (quoting Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976)); Childers v. Morgan County Bd. of Educ., 817 F.2d 1556 (11th Cir. 1987) (ADEA case).

In addition, some courts require an employer who asserts a BFOQ defense to establish that there was no acceptable alternative to its adoption of a facially discriminatory criterion that would serve its business needs equally well but with a lesser discriminatory impact. See, e.g., Harden v. Dayton Human Rehab. Center, 520 F. Supp. 769 (S.D. Ohio 1981), judgment aff’d, 779 F.2d 50 (6th Cir. 1985); Local 567 American Federation of State, County, and Mun. Employees, AFL-CIO v. Michigan Council 25, American Federation of State, County, and Mun. Employees, AFL-CIO, 635 F. Supp. 1010 (E.D. Mich. 1986). EEOC’s implementing regulations of the ADEA contain a similar requirement. See 29 C.F.R. § 1625.6(b) (“An employer asserting a BFOQ defense has the burden of proving that (1) the age limit is reasonably necessary to the essence of the business, and either (2) that all or substantially all individuals excluded from the job involved are in fact disqualified, or (3) that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age.”).

Courts have construed the BFOQ defense narrowly, and we found no cases addressing whether age can be a BFOQ for a company that is selling products and services marketed to younger individuals. The vast majority of cases addressing the BFOQ defense to ADEA claims involve safety considerations. 29 C.F.R. § 1625.6(b) (If the employer’s objective in asserting a BFOQ is the goal of public safety, the employer must prove that the challenged practice does indeed effectuate that goal and that there is no acceptable alternative which would better advance it or equally advance it with less discriminatory impact.). Although some employers have tried to argue that having a cost-effective workforce is a BFOQ, most courts have rejected extending BFOQ in these cases. See, e.g., Hahn v. City of Buffalo, 596 F. Supp. 939 (W.D.N.Y. 1984) (“An employer's desire to have the most cost-effective work force cannot justify age discrimination where age is not a BFOQ. Although it is reasonable to believe that persons hired younger will work longer and therefore be a better “investment”, “economic considerations...
cannot be the basis of a BFOQ.”), aff’d, 770 F. 2d 12 (2d Cir. 1985) (citing Smallwood v. United Air lines, Inc., 661 F. 2d 303 (4th Cir. 1981), cert. denied, 456 U.S. 1007 (1982)).

With respect to the RFOA defense, EEOC has indicated that this defense “will generally not apply in the context of advertising as 29 C.F.R. § 1625.7(c) provides that the defense will not be available when an employment practice uses age as a limiting criterion. See 632.2 Employment Opportunity Advertising, 2006 WL 4672861 (EEOC Compliance Manual).

Courts have held that employers may not structure job advertisements in such a way as to indicate that a group or groups of people would be excluded from consideration for employment on the basis of age. For instance, the court in Park v. Seoul Broadcasting System Co., No. 05 CV 8956 (BSJ)(DFE), 2008 WL 619034 (S.D.N.Y. Mar. 6, 2008) held that an advertisement listing a position open to those born after a certain year could give rise to an inference of age discrimination. The plaintiff in Park was employed by Seoul Broadcasting System (“SBS”) as a cameraman from 1998 until 2005, when his employment was terminated. Following plaintiff’s termination, another employee was promoted into plaintiff’s position and defendant placed an advertisement in the Korea Central Daily News that sought candidates born after 1975.

Plaintiff’s boss testified that he included age in the ad because he believed there was a “problem in the . . . labor culture in Korean tradition if older people are employed . . . because it is rare in Korea that older people receive work orders from young people.” Id. at *5. The person ultimately hired was born after 1975. Id. The court in Park found that the circumstances surrounding plaintiff’s termination, including the newspaper advertisement listing age as a requirement, were sufficient evidence to allow a jury to find for plaintiff on his ADEA disparate treatment claim. Id. at *10. Thus, defendant’s motion for summary judgment as to plaintiff’s age discrimination claim was denied. Id.

Similarly, in Marshall v. Goodyear Tire & Rubber Co., 554 F. 2d 730 (5th Cir. 1977), the Fifth Circuit held that an advertisement listing age as a requirement gave rise to an inference that an older worker’s termination was “tainted by the impermissible criterion of age.” Id. at 735. The plaintiff in Marshall (who was 57) was hired because the defendant thought he would be “a more mature, stable individual than the younger people who usually applied for the position.” Id. at 732. The defendant terminated plaintiff two weeks later and shortly thereafter placed an advertisement in a local newspaper requesting applicants “between the ages of 19 and 26.” Id.
Defendant’s job orders with a local employment agency also included express age preferences. Id. The Fifth Circuit affirmed the district court’s finding after a bench trial that the most reasonable inference from these facts was that defendant terminated plaintiff because of his age. Id. at 736.

B. Advertisements That Limit Or Deter Employment Of Older Individuals.

Although the ADEA does not speak to advertisements that limit or deter employment of older applicants, EEOC has issued a regulation that states that employers may not use such advertisements, such as one seeking “recent college graduates,” among others:

Help wanted notices or advertisements may not contain terms and phrases that limit or deter the employment of older individuals. Notices or advertisements that contain terms such as age 25 to 35, young, college student, recent college graduate, boy, girl, or others of a similar nature violate the Act unless one of the statutory exceptions applies.

29 C.F.R. § 1625.4(a) (emphasis added). Section 1625.4(b) goes on to state, “[h]elp wanted notices or advertisements that ask applicants to disclose or state their age do not, in themselves, violate the Act. But because asking applicants to state their age may tend to deter older individuals from applying, or otherwise indicate discrimination against older individuals, employment notices or advertisements that include such requests will be closely scrutinized to assure that the requests were made for a lawful purpose.” Id. (emphasis added).

Notably, EEOC received comments during the notice period that “paragraph (a) of this section [should] be reworded to indicate that the use of terms such as “young” or “college student” does not, per se, constitute a violation of the act,” and the EEOC revised the final

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\[\text{See also 632.2 Employment Opportunity Advertising, 2006 WL 4672861 (EEOC Compliance Manual) (indicating that that “[w]hen help wanted notices or advertisements contain terms and phrases such as ‘age 25 to 35,’ ‘young,’ ‘college student,’ ‘recent college graduate,’ ‘boy,’ ‘girl,’ or others of a similar nature, such a term or phrase deters the employment of older persons and is a violation of the Act, unless one of the exceptions applies.’); EEOC Compliance Manual Section 8: Intake of Commission Initiated Actions, 2006 WL 4673001 (stating by way of example that advertisements that contain terms like “college student,” “recent college graduate,” or “no more than three years experience” as ones that appear to be neutrally stated but which adversely affect older workers); see also Prohibited Employment Policies/Practices, http://www1.eeoc.gov/laws/practices/index.cfm?renderforprint=1 (noting that a help-wanted ad seeking recent college graduates may discourage people over 40 from applying and may violate the law); Id. (stating that advertisements that “describe the employer or job in a manner designed to deter workers from applying, e.g., ‘Young company seeks eager go-getters[,]’ in the EEOC’s view, can point to discriminatory hiring practices by respondents with a higher level of sophistication and awareness of the ADEA).}\

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language of § 1625.4(b) by “insert[ing] qualifying language in the final interpretation” to address these comments. 46 FR 47724-01 at 47724. The chart below compares the original proposed version of Section 1625.4 to the final one:

<table>
<thead>
<tr>
<th>Original Proposal (44 FR 68858 at 68861)</th>
<th>Final Regulation</th>
</tr>
</thead>
<tbody>
<tr>
<td>When help wanted notices or advertisements contain terms and phrases such as “age 25 to 35,” “young,” “college student,” “recent college graduate,” . . . or others of a similar nature, such a term or phrase discriminates against the employment of older persons and is a violation of the Act.</td>
<td>Notices or advertisements that contain terms such as age 25 to 35, young, college student, recent college graduate, … or others of a similar nature violate the Act unless one of the statutory exceptions applies.</td>
</tr>
</tbody>
</table>

Despite indicating that it would insert qualifying language, EEOC’s final version of this regulation still states that such advertisements violate the ADEA, and simply adds that such advertisements can be lawful if they meet one of the statutory exceptions, such as BFOQ or RFOA.

There is an open question, however, as to whether the EEOC’s regulation regarding advertisements that may limit or deter the employment of older applicants, such as ones seeking recent college graduates, is entitled to any deference. In determining whether an agency’s guidance is binding (or receives Chevron deference) or receives less or no deference, courts apply the Supreme Court’s analysis in Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) and the Administrative Procedure Act. In Chevron, the Supreme Court held a court should defer to an agency’s interpretation of a statute if: (1) the statute is silent or ambiguous on the question at issue, and (2) the agency’s interpretation is based on a permissible construction of the statute. 467 U.S. at 842-44. The Administrative Procedure Act (“APA”) requires that when an agency promulgates rules and regulations, it may do so only after it gives the public notice of the proposed regulations and an opportunity to comment. 5 U.S.C. § 553.

Even if an agency’s interpretation is not afforded Chevron deference, the court may still determine that the interpretation is persuasive under Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). Rumble v. Fairview Health Services, No. 14-cv-2037 (SRN/FLN), 2015 WL 1197415, at *10-11 (D. Minn. Mar. 16, 2015). Under Skidmore, the weight that the court places on an
agency’s interpretation [in the OCR’s opinion letter] is based on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.  Id. (quoting Skidmore, 323 U.S. at 140).

Congress, in passing the ADEA, provided the EEOC with the power to “issue such rules and regulations as it may consider necessary or appropriate for carrying out this chapter, and may establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest.”  See 29 U.S.C. § 628.  The EEOC issued 29 C.F.R. § 1625.4 as part of this delegated authority, and put this regulation through the formal notice and comment period.  See 44 FR 68858 (publishing proposal to add Part 1625 to Title 29 of the CFR); 46 FR 47724-01 at 47724 (indicating that EEOC published its own interpretations of the ADEA after inviting, receiving, and considering public comment); 72 FR 36873-01.

We are not aware of any cases specifically addressing whether Section 1625.4 is entitled to Chevron deference.  As noted above, § 623(e) prohibits employers from publishing employment advertisements that have “any preference, limitation, specification, or discrimination, based on age.”  An advertisement seeking “college students” or “recent college graduates” does not, on its face, have an express preference, limitation, specification, or discrimination based on age.  Although such advertisements may have a disparate impact, a plaintiff challenging such advertisements should be required to meet their burden to prove such a claim, rather than relying on the text of the advertisement and §1625.4.  By deferring to EEOC’s regulation, a court would bypass the burden of proof established by Congress for challenging a facially neutral advertisement such as one seeking recent college graduates.  And, courts repeatedly have held that they owe no deference to a regulation if it is based on an unreasonable interpretation of a statute.  See, e.g., Norsk Hydro Canada Inc. v. U.S., 350 F. Supp. 3d 1172 (Ct. Int’l Trade 2004) (holding that Commerce Department’s interpretation of 19 U.S.C. Section 1671 results in an unreasonable interpretation of the statute and thus is not entitled to Chevron deference); Mansour v. Holder, 739 F.3d 412, 414 (8th Cir. 2014) (“This court reviews de novo the BIA’s legal determinations, but accords ‘substantial deference to the agency's interpretation of a federal statute,’ unless ‘it is inconsistent with the plain language of the statute or constitutes an unreasonable interpretation of an ambiguous statute.’” (citing Afolayan v. INS, 219 F.3d 784, 787 (8th Cir. 2000)); Brown v. Metro. Life Ins. Co., No. Civ. A. No. 94-7693, 1995 WL 298220 (E.D. Pa. May 10, 1995) (finding that courts need not defer to agency regulation that is
inconsistent with the statute (citing *Chevron*, 467 U.S. 842-43); *Uktor v. McElroy*, 930 F. Supp. 881, 884 (S.D.N.Y. 1996) (“As to matters of law, a court owes ‘substantial deference’ to the BIA, but will reverse an ‘unreasonable interpretation,’ or one ‘contrary to Congress’ intent.’); *Prevor v. United States Food and Drug Admin.*, 67 F. Supp. 3d 125, 139 (D.D.C. 2014) (“[T]he Court cannot affirm the FDA’s classification decision [that a spray canister was a drug and device combination product to be regulated as a drug] because it was based on an erroneous and unreasonable interpretation of the law.”); *O’Connor v. U.S.*, No. 05-02075 (HHK), 2007 WL 274755, at *2 (D.D.C. Jan. 29, 2007) (“The regulations issued by an agency interpreting and applying a statute are entitled to deference as long as the regulations implement the statute in a reasonable manner.”); *Afolayan v. I.N.S.*, 219 F.3d 784 (8th Cir. 2000) (“In fact, we must defer to the agency’s interpretation unless it is inconsistent with the plain language of the statute or constitutes an unreasonable interpretation of an ambiguous statute.”).

Courts have, however, analyzed whether other sections of the ADEA regulations are entitled to *Chevron* deference, and they typically conclude that those sections are entitled to such deference. See, e.g., *Smith v. City of Jackson, Miss.*, 544 U.S. 228 (2005) (Scalia, J., concurring in part and concurring in the judgment) (finding that *Chevron* deference is afforded to the 2004 version of 29 C.F.R. § 1625.7, which states that when an employment practice has an adverse impact on protected individuals but is claimed to be based on a factor other than age, it can only be justified as business necessity, because the EEOC promulgated this regulation after notice-and-comment rulemaking, the regulation affirmed the longstanding position of the Department of Labor, and the EEOC has defended the position that the ADEA authorizes disparate-impact claims numerous times before so the EEOC’s reasonable view that the ADEA authorizes disparate-impact claims is deserving of deference); *EEOC v. Seafarers Int’l Union*, 394 F.3d 197 (4th Cir. 2005) (engaging in *Chevron* analysis regarding 29 C.F.R. § 1625.21 and finding that the regulation was entitled to *Chevron* deference because the EEOC did not exceed its authority under the ADEA by promulgating the regulation and it was a permissible interpretation of the ADEA given the ADEA’s purpose and breadth); *Snowwhite v. IBEW Local 117 Joint Apprenticeship and Training Fund*, No 11. C 8466, 2013 WL 3754622, at *7 (N.D. Ill. July 16, 2013) (discussing *Seafarers* and holding that the EEOC’s regulation that apprenticeship programs are covered by the ADEA is a reasonable interpretation of the statute and thus the court will defer to the EEOC’s interpretation); *Anderson v. Duncan*, 20 F. Supp. 3d 42, 61 n.17
(D.D.C. 2013) (holding disparate impact liability under the ADEA is not cognizable under the ADEA federal-sector provision and stating that while deference is due to an agency’s interpretation of its enabling statute in appropriate circumstances, it is not appropriate to award Chevron deference here where the EEOC “assumed the availability of a reasonable factor other than age under the ADEA federal-sector provision,” but that assumption is doubtful.”); Rupert v. PPG Industries, Inc., Nos. 07-cv-0705, 08-cv-0616, 2009 WL 596014, at *40 (W.D. Pa. Feb. 26, 2009) (concluding that 29 C.F.R. § 1625.23(b) (regarding releases of ADEA claims) is entitled to Chevron deference); cf. Smiarowski v. Philip Morris USA Inc., No. 04 Civ. 00074(PKC), 2005 WL 1575002, at *5 (S.D.N.Y. July 5, 2005) (finding 29 C.F.R. § 1625.5 persuasive without engaging in Chevron analysis and stating that “[b]ecause the EEOC is the primary agency charged with implementing the ADEA, its interpretation is entitled to great deference” and citing Kralman v. Illinois Department of Veterans’ Affairs, 23 F.3d 150, 155 (7th Cir. 1994)). These cases, however, involved an analysis of different regulations and different portions of the ADEA, so they should not be controlling in a Chevron analysis of § 1625.4.

Although we found no cases addressing whether Section 1625.4 is entitled to Chevron deference, a few courts have had occasion to consider whether such advertisements violate the ADEA. In Hodgson v. Approved Personnel Service, Inc., 529 F.2d 760 (4th Cir. 1975), a decision that pre-dates EEOC’s publication of Section 1625.4, the Fourth Circuit held that an advertisement seeking “recent graduates” violated the ADEA because it was not merely informational, and instead operated to discourage older applicants from seeking that particular job. In Hodgson, the Department of Labor contended that an employment agency violated the ADEA by publishing employment advertisements containing such terms as “young” and “recent college graduate,” among others. Id. at 763. Applying the now defunct Department of Labor’s interpretive regulations, the Hodgson court found that an employment agency advertisement directed to “recent graduates” as part of a broad, general invitation to a specific class of prospective customers coming into the job market at a particular time of year to use the services it offers does not violate the ADEA. But when these same words are used in an advertisement for a specific position, the Fourth Circuit found that such advertisements on their own violate the ADEA because they imply that persons older than the typical “recent graduate” need not apply.

In a more recent case from the Southern District of Ohio, the court denied an employer’s motion to dismiss an applicant’s ADEA claim where the employer’s job advertisement asked for
“true recent college graduates,” finding that the advertisement, coupled with allegations of intentional disproportionate consideration of younger applicants and a policy of hiring only inexperienced individuals, were sufficient at the pleadings stage to state an ADEA claim. Sterry v. Safe Auto Ins. Co., No. C2-02-1271, 2003 WL 23412974 (S.D. Ohio Aug. 25, 2003).

Although it was unclear whether the plaintiff was asserting a disparate treatment or impact claim, the plaintiff in Sterry alleged that Safe Auto published an advertisement for a claims adjuster position which stated, “[o]nly true recent college graduates need apply” and that no experience was necessary. Plaintiff applied and interviewed for the job, but Safe Auto allegedly did not hire her because, although she was a college graduate, she was not a recent one. Id. at *1. The Sterry court found that the complaint alleged sufficient facts to survive the motion to dismiss because the advertisement, coupled with additional evidence such as the alleged informal policy of hiring only those individuals lacking experience, could raise an inference of age discrimination. Id. at *14.

C. Permissible Advertisements And Recruiting Strategies

1. Advertisements Seeking Entry or Junior Level Candidates

Courts have found that employers may use advertisements stating that the position is open to those with no experience or that the position is junior or entry level. In Moss v. BMC Software, Inc., 610 F.3d 917 (5th Cir. 2010), for instance, a 68 year-old plaintiff applied for an entry level in-house counsel position. Defendant did not hire plaintiff and instead hired a substantially younger candidate. Id. at 921-22. Plaintiff argued that he was more qualified than the younger candidate and that the general counsel said that she was looking for a lawyer at a “more junior” level. Id. at 928. Affirming summary judgment for defendant on plaintiff’s disparate treatment claim, the Fifth Circuit held that the general counsel’s comment was not age-related because, in this context, “more junior level” could refer to an older individual who went to law school later in life or an individual who had less experience. The Moss Court also observed that the plaintiff characterized the position as “effectively an entry level position.” Id. at 929.

Similarly, in Hodgson, discussed more fully above, the Fourth Circuit rejected the Department of Labor’s contention that advertisements containing the term “junior” executive or “junior” secretary violated the ADEA, reasoning that the adjective “‘junior’ when applied to an
employee's job description designates the scope of his duties and responsibilities within the employer’s organization, and does not carry connotations of youth prohibited by the [ADEA].” 529 F.2d at 765.

It also may be acceptable to use employment advertisements that tend to appeal to particular groups, such as by using pop culture icons, as long as the employer utilizes other varied recruiting and advertising approaches and not all advertisements are aimed solely at young people. See Rufo v. Dave & Busters, Inc., No. 1:04-CV-698, 2005 WL 3454231 (S.D. Ohio 2005), aff’d, 2007 WL 257891 (6th Cir. 2007) (finding no support for employee’s claim that the employer engaged in a pattern of recruiting younger people at the expense of older workers and rejecting claim that advertisement that referred to pop culture icons of the 1980’s was a “subtle effort to recruit younger people who would relate to the cultural references”).

2. Recruiting or Targeting Recent Graduates

Although using advertisements seeking recent college graduates carries ADEA risk, some courts have held that recruiting college graduates is permissible under the ADEA. See, e.g., Carraher v. Target Corp., 503 F.3d 714 (8th Cir. 2007) (As for Target’s decision to recruit on college campuses, we have previously stated that recruitment of “recent college graduates is not evidence [that a company] discriminates against older workers.”) (citing Grossmann v. Dillard Dep't Stores, 109 F.3d 457, 459 (8th Cir. 1997); Arafat v. Sch. Bd. of Broward Cnty., 549 F. App’x 872, 875 (11th Cir. 2013) (“the bare fact that an employer encourages employment of recent college and technical school graduates does not constitute unlawful age discrimination.”).

In the Sterry decision discussed above (where the court found that an advertisement seeking recent college graduates could support an inference of age discrimination), the court also found that the mere fact that an employer recruits recent college graduates is not evidence of discrimination against older workers: “‘true recent college graduates’ can be of any age; for example, along with a vast pool of twenty-one year-old graduates, a fifty, sixty, seventy or even ninety year-old individual can be a recent college graduate. 2003 WL 23412974. That fact would serve to undercut Sterry’s contention that the recent graduate requirement is a proxy for age discrimination; the requirement might well be tied to the company’s findings concerning the ease with which it can train recent college graduates-regardless of their age-and, taken alone, might arguably constitute a Hazen Paper motivating factor other than age.” Id. at *14 (citing
Hazen Paper v. Biggins, 507 U.S. 604, 610-11, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993) (recognizing that an employer’s ability to consider analytically distinct factors preclude saying that a decision is necessarily age based, even where a factor correlates with age)).

The court in Magnello v. TJX Companies Inc., 556 F. Supp. 2d 114 (D. Conn. 2008) addressed a disparate impact challenge to an employer’s practice of recruiting on college campuses for an entry-level position. The court granted summary judgment for the employer, finding that plaintiff failed to present statistical evidence showing that this practice caused the exclusion of applicants 40 and over. In addition, the court found that plaintiff failed to demonstrate that it was unreasonable for defendant to use college recruitment for this entry level position. Id. at 123 (citing Sack v. Bentsen, 51 F.3d 264 (1st Cir. 1995) for the principle that the ADEA does not prevent employers from seeking out recent college graduates for entry-level positions, provided that employer does not discriminate based on age).

Similarly, the court in Gustin v. Schneider Corp., rejected the argument that there was an overall shift in the employer’s corporate culture to begin focusing on “cultivating a more youthful image” by increasing recruiting efforts on college campuses and tailoring marketing campaigns to younger applicants. No. 1:09-cv-1452-TWP-TAB, 2011 WL 1486007 (S.D. Ind. Apr. 19, 2011) (granting employer summary judgment on plaintiff’s claim that he was laid off during the 2008 economic downturn because of his age). The plaintiff in Gustin argued that a social group within the company “sponsored outings to recreational facilities and other locales favored by the younger crowd, and went so far as to print up T-shirts for the members of the [redacted] group to wear in the workplace.” Id. at *7. The Gustin court rejected this argument, finding that countless older people enjoy “recreational facilities” and that older employees also wear t-shirts “because comfort knows no age barriers.” Id.

3. Advertisements Seeking Specific Qualifications/Skills.

Courts have held that employers may use advertisements seeking specific educational degrees that are requirements for the position at issue without violating the ADEA. For example, in Boyd v. City of Wilmington, N.C., 943 F. Supp. 585 (E.D.N.C. 1996) the court granted defendant’s motion for summary judgment on plaintiff’s disparate treatment claim, finding that a job advertisement for the position of Personnel Analyst I, which stated that “candidates for MPA or MSIR degrees are preferred,” did not violate the ADEA because it set forth minimum
educational requirements for the position, as opposed to seeking an applicant of a particular age group. In reaching this conclusion, the Boyd court distinguished Hodgson, stating there was no connection in Hodgson between the job sought and type of educational experience needed. The Boyd court also rejected plaintiff’s argument that a person completing a graduate program is analogous to a student finishing a college degree, as plaintiff offered no support for this proposition and did not address “whether, in the modern workforce, many of those completing graduate degrees have actually returned to school mid-career and thus are significantly more advanced in years than the average college graduate in 1974” (as in Hodgson). Id. at 591.

Courts also have held that employers may state a preference for certain years of experience. For instance, in Johnson v. Cook, 587 F. Supp. 2d 1020, 1027 (N.D. Ill. 2008), the court granted defendant’s motion for summary judgment where defendant rejected plaintiff’s application for a sales training program for new sales associates because of, among other reasons, plaintiff’s significant sales experience. The Johnson court held that such a preference was permissible, explaining that “[w]hen the employer’s decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears . . . even if the motivating factor is correlated with age.” Id. at 1027 (citing Hazen Paper); see also Gedos v. Dettelbach, No. 09-cv-2728, 2011 WL 597067 (N.D. Ohio Feb. 11, 2011) (holding it was not age discrimination for US Attorney’s Office to require that an applicant “have between 3-8 years post-bar admission experience”); cf. DeBuhr v. Olds Prods. Co., No. 95 C 1462, 1996 WL 277644 (N.D. Ill. May 22, 1996) (holding that an advertisement that the company was “looking for someone with ‘high energy’ who has between 5 and 10 years experience,” when combined with other ageist comments, provided evidence of discriminatory intent).

In addition, employers may require candidates to have proficiency with technology. See Dusek v. City of Moorhead, Minn., No. 06-3233 (MJD/RLE), 2007 WL 4321823, at *5 (D. Minn. Dec. 6, 2007) (rejecting claim that defendant’s requirement that plaintiff use certain technology, particularly Outlook, tended to discriminate against older workers and “declin[ing] this invitation to hold that requiring computer skills for a promotion is alone sufficient to create a prima facie case of age discrimination.”) (quoting Hartsel v. Keys, 87 F.3d 795, 802 (6th Cir. 1996)).
IV. Can Employers Refuse to Hire Overqualified Applicants?

Courts generally have found that employers may reject applicants on the grounds that they are overqualified for the position at issue without violating the ADEA, but only if the employer supports this rationale with objective, non-age related reasons for rejecting the overqualified candidate.

For instance, in Stein v. National City Bank, 942 F2d 1062 (6th Cir. 1991), the Sixth Circuit affirmed summary judgment for the employer, who argued that its unwritten policy of not hiring college graduates for a specific position was lawful because college graduates may not find the position challenging and thus may leave the job sooner than non-graduates. The Stein Court approved the defendant’s policy because it would promote the employer’s interest in reducing turnover.

Similarly, in EEOC v. Insurance Co. of North America, 49 F.3d 1418 (9th Cir. 1995), the Ninth Circuit held that, although rejecting an applicant on the basis of “overqualification” may be a pretext for age discrimination, the defendant’s refusal to hire an applicant based on an honest belief that he was overqualified for a position does not by itself violate the ADEA. Indeed, the Ninth Circuit determined that defendant’s rejection of plaintiff due to his “overqualification” was based on a defined business interest: that plaintiff’s 30 years of experience would cause him to delve too deeply into accounts to which he is assigned instead of performing the clerical duties required by the lower level position, which in turn would result in him becoming too involved in “uncomplicated risks” to the financial detriment of defendant’s clients. The Ninth Circuit further explained that the mere fact that overqualification may be strongly correlated with advanced age does not necessarily make its use a violation of the ADEA. Id. at 1420.

A bare assertion that an applicant is overqualified, however, will be more closely scrutinized. In Taggart v. Time, Inc., 924 F.2d 43 (2d Cir. 1991), the Second Circuit reversed and remanded the district court’s conclusion that it was reasonable to exclude an overqualified applicant on the grounds that the job would not challenge the applicant. The court found that the employer’s use of the term “overqualified” was a euphemism for “too old” because it was used as the sole reason not to hire an older applicant. The Taggart opinion suggests that if the employer had provided any other legitimate reason for not hiring the older applicant, the
An overqualified argument would be less suspicious. Id. at 47 (“Time admits that the sole reason for refusing to hire Taggart for this position was because he was overqualified. It did not cite any of Taggart’s obviously pestering job search techniques as a basis for not hiring him.”); cf. Binder v. Long Island Lighting Co., 57 F.3d 193, 197 (2d Cir. 1995), abrogated on other grounds by, James v. New York Racing Ass’n, 233 F.3d 149 (2nd Cir. 2000) (stating that although a trier or fact could conclude that an employer has “a genuine desire” to avoid placing “overqualified” individuals in a job in which they “might be frustrated, exhibit low morale and perform poorly,” it was an abuse of discretion for the district court to order a new trial where a jury found the employer’s argument to be pretext for age discrimination).

Other courts have held that an employer may reject overqualified individuals if the employer shows that there was a legitimate business reason for rejecting the overqualified candidate. See, e.g., Coleman v. Quaker Oats Co., 232 F.3d 1271, 1290 (9th Cir. 2000) (holding that during a reduction in force, employer’s choice to fill a remaining position with a younger, less qualified worker was permissible because the older employee was overqualified and taking the position would have meant a demotion and a sharp cut in salary); Bay v. Times Mirror Magazines, Inc., 936 F.2d 112, 118 (2d Cir. 1991) (finding employer’s decision not to retain older employee during a restructuring on the ground that over qualification may affect performance negatively was not pretext for discrimination where employee expressed dissatisfaction with downgraded position); Phillips v. Mabus, No. 12-00384 LEK-RLP, 2013 WL 4662960, at *17-18 (D. Hawaii Aug. 29, 2013) (dismissing age discrimination claim and crediting defendant’s concern that overqualified applicant may not be satisfied with the position if he was hired); Stein v. National City Bank, 942 F. 2d 1062, 1065-66 (6th Cir. 1991) (finding employer’s policy of not hiring college graduates for non-exempt positions permissible as a way of furthering employer’s goal of reducing turnover by “hiring those individuals most likely to remain employed for a prolonged period of time.”); E.E.O.C. v. Atlantic Community School Dist., 879 F.2d 434, 436-37 (8th Cir. 1989) (holding that school’s decision not to hire 40 year old applicant where it considered the salary level for which she would have been eligible based on her years of experience, was not a pretext for age discrimination).
V. Conclusion

Employers who are considering strategies to transform their ageing workforces should be aware of the potential ADEA implications and carefully review their strategies and proposed execution plans. Both the private bar and EEOC are actively bringing ADEA challenges to employers who are hiring next generation employees to replace ageing workforces, but as the case law discussion above shows, savvy employers can employ strategies that avoid or reduce ADEA risk while still achieving their business goals. The key takeaways from these cases are summarized below.

A. When Laying Off Older Workers While Hiring Younger Workers, Conduct Proper Statistical Analyses And Document The Business Justification

Employers who want to transform their workforce by laying off older workers while hiring or retaining younger ones should understand the class risk associated with these strategies and the critical importance of statistical evidence and articulating and documenting the business rationale to mitigate against this risk. The ADEA claims in Apsley, Powell, and Allen all failed because the plaintiffs failed to present meaningful statistical evidence to support their disparate impact claims. Employers who want a similar outcome when they transform their workforces should conduct proper statistical analyses of the contemplated lay off and hiring/retention decisions for adverse impact on older individuals before the decisions are made final.

Employers should also ensure that there is a non-age related business justification for the layoffs and simultaneous hiring or retention of younger employees, and should document the reasons and data supporting that justification. For instance, the Powell court found that the employer’s rejuvenation policy (of appealing to a younger audience to become more profitable) satisfied the RFOA defense because the employer implemented this policy after conducting extensive market research and surveys to determine how to reach more readers. Similarly, the employers in the Allen and Aldridge decisions presented evidence to demonstrate that their actions were designed with the goal of obtaining employee cost savings. Employers should assess whether they are overpaying for a particular segment of their workforce and whether cheaper replacement labor is available, and document this cost analysis. In addition, although employers may use non-age criteria such as seniority that may be correlated with age, courts may
reject the use of such factors if they are accompanied by stigmatizing stereotypes about older workers.

Employers who want to transform their workforce should also consider whether to implement a voluntary early retirement program ("VERP"). Voluntary early retirement plans have been expressly permitted by statute since the enactment of the Older Workers’ Benefit Protection Act ("OWBPA") of 1990, 29 U.S.C. § 623(f)(2)(B)(ii), amending the Age Discrimination in Employment Act ("ADEA"), which states, in pertinent part: “It shall not be unlawful for an employer … to observe the terms of a bona fide employee benefit plan … that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.” EEOC also has indicated that employers may use VERP. See EEOC Compliance Manual Chapter 3: Benefits, 2006 WL 4672904 (indicating that employers may reduce their workforce through early retirement incentive programs); OWBPA Exemption & Senate Report, http://www.eeoc.gov/eeoc/history/35th/thelaw/owbpa.html ("It shall not be unlawful for an employer, employment agency, or labor organization … to observe the terms of a bona fide employee benefit plan … that is a voluntary early retirement incentive plan consistent with the… purposes of [the ADEA].").

There are technical legal requirements for a VERP to comply with the ADEA, the details of which are beyond the scope of this paper, but in general the employer must prove that a VERP: (1) was truly voluntary; (2) was offered for a reasonable time period to enable an employee to make a considered choice; and (3) did not arbitrarily discriminate on the basis of age. See Auberbach v. Bd. of Educ. of the Harborfields Cent. Sch. Dist., 136 F.3d 104, 112 (2d Cir. 1998). Moreover, when requesting that an employee waive ADEA claims in connection with an exit incentive program such as a VERP, an employer must also: (1) specifically refer to the ADEA by name in the waiver; (2) advise the employee to consult with an attorney prior to executing the agreement; (3) provide the employee with a minimum of 45 days to consider the agreement; (4) provide the employee with seven days following the employee’s execution of the agreement to revoke the agreement; (5) inform eligible employees at the commencement of the 45 day period of the group of individuals covered by a Program, the eligibility factors and time limits applicable to such program, and the job titles and ages of all individuals in the group who are eligible and not eligible for a Program. 29 C.F.R. § 1625.22.
There is litigation risk associated with any early retirement program and this risk is applicable to a VERP as well. For example, employees who accept a VERP may later allege that their decision was not entirely voluntary due to misstatements made by management regarding their future at a company or the effects of future involuntary RIFs. See, e.g. Herbert v. Mohawk Rubber Co., 872 F.2d 1104 (5th Cir. 1989). Alternatively, employees who decline a Program and are later involuntarily terminated may bring a fraud or breach of contract claim and argue they were told their jobs were secure if they declined a Program. See, e.g. Olsen v. Pratt & Whitney, No. 96-9643, 1998 WL 846742 (D. Conn. Nov. 17, 1998). Furthermore, because a VERP may not “arbitrarily discriminate on the basis of age,” where a plan is based solely on age as the election factor, it may be deemed unlawful. Karlan v. City Colleges of Chicago, 837 F.2d 314 (7th Cir. 1988) (reversing the lower court’s grant of summary judgment to the employer where the early retirement plan determined employee’s level of benefits solely on the basis of age without considering more accurate proxies such as years of service, salaries, or cost); see also O’Brien v. Bd. of Educ. of the Deer Park Union Free Sch. Dist., 92 F. Supp. 2d 110, 119 (E.D.N.Y. 2000). Courts have made clear that where an employer’s policy uses age as the sole determination in plan benefits, the employer must prove that such a plan is not a subterfuge to evade the purposes of the ADEA by showing a legitimate business reason for structuring the plan as it did, such as cost justifications, years of service or some other legitimate objective. See Karlan, 837 F.2d at 320.

B. Use Age-Neutral Employment Advertisements And Targeted Recruiting

As discussed above, employers who use advertisements with express age preferences or ones that EEOC believes limit or deter the employment of older workers face substantial risk of ADEA claims. There are several alternative strategies that carry less ADEA risk:

- Indicating that an open entry or junior level position is entry or junior level position;
- Describing the education or experience required for the job;
- Describing the responsibilities and requirements of the job, including proficiency with technology required to perform the role;
- Describing the salary range for the position;
- Recruiting on college campuses;
• Using advertisements with popular culture references that may appeal to particular groups as part of a diversified recruiting strategy that does not solely target younger workers;

Employers also should consider analyzing the demographics of their existing population of employees who hold a particular position for which they are hiring or recruiting and compare it to the targeted population. For instance, plaintiffs attacking an advertisement seeking entry-level candidates may seek to rely on evidence showing that the majority of the current employees holding that position have more relevant work experience than the targeted population.

In addition, employers also should conduct disparate impact studies on any advertisement or recruiting policy, as plaintiffs could argue that such practices are specific enough to support a disparate impact claim. For example, an employer who uses an advertisement seeking entry-level candidates but hires only a small percent of applicants 40 or over with no experience in that role could face a disparate impact claim.

C. Documenting Business Justification For Rejecting Overqualified Candidates

Employers may not reject older workers on the grounds that they are overqualified based on unsupported stereotypes, and will face ADEA risk unless they can show that there was a legitimate non-age, business reason for the challenged employment decision. For example, an employer who believes that reducing turnover is a sufficient basis to reject overqualified applicants should consider analyzing the historical turnover rate of employees who held that position to assess whether individuals with greater qualifications have in fact left the position more quickly than those with less qualifications, such as by comparing the tenure of individuals who were demoted into the role versus those who voluntarily entered the role.
ETHICS: DOMESTIC AND GLOBAL OBLIGATIONS AND UNFORTUNATE WAIVERS OF THE ATTORNEY-CLIENT AND WORK PRODUCT PRIVILEGES

OCTOBER 21-24, 2015
OJAI, CALIFORNIA
Ethics: Domestic and Global Obligations and Unfortunate Waivers of the Attorney-Client and Work Product Privileges

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THE AMERICAN EMPLOYMENT LAW COUNCIL
TWENTY-THIRD ANNUAL CONFERENCE

Ojai, California
October 21-24, 2015
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I. CONFLICTS OF INTEREST

The most common ethics issue that arises in labor and employment law practice is the problem of conflicts of interests. A lawyer owes his or her client a duty of zealous representation and loyalty, which may present problems when the client’s interests are adverse or potentially adverse to those of the lawyer’s present, former or prospective clients.¹

A. Conflicts Involving Corporate Employees as “De Facto” Clients

The issue of disqualification may arise where the lawyer gives advice in the course of the firm’s representation of a corporate employer to managerial employees who later bring claims against the employer or otherwise becomes adverse to the corporate entity. For example, in Cole v. Ruidoso Municipal Schools,² the plaintiff, a former principal suing a school district in a sex discrimination and Equal Pay Act case, claimed that the school’s law firm should be disqualified because as principal she had consulted with attorneys from the firm regarding dismissal of several district employees and other “sensitive personnel matters” and acted on their advice. The Tenth Circuit held that the district court properly refused to disqualify the firm, since plaintiff consulted with the firm only for the purpose of carrying out her duties as principal and thus the attorney-client relationship was not with her individually, but as an agent of the school district.³

¹ See ABA MODEL RULES OF PROF’L CONDUCT R. 1.7 (2003) [hereafter ABA MODEL RULES] (absent informed consent, a lawyer shall not represent a client if the representation of that client will be directly adverse to another client or there is a significant risk that the representation of one or more clients will be materially limited by the lawyers’ responsibilities to another client, a former client or a third person or by a personal interest of the lawyer); ABA MODEL CODE OF PROF’L RESPONSIBILITY DR 5-105 [hereafter ABA MODEL CODE] (absent informed consent a lawyer shall decline proffered employment or continue multiple employment if the exercise of the lawyer’s independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment or continuance of multiple employment, or if it would be likely to involve the lawyer in representing different interests).
² 43 F.3d 1373 (10th Cir. 1994).
³ See also Prof’l Serv. Indus., Inc. v. Kimbrell, 758 F. Supp. 676 (D. Kan. 1991) (attorney-client relationship did not exist between former president of company and attorney for corporation which purchased company, and thus, former president was not entitled to have attorneys disqualified in corporation’s action against him based on conflict of interest; former president never sought or obtained legal advice or assistance on any personal issue from attorneys); United States v. Int’l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., 119 F.3d 210 (2nd Cir. 1997) (attorney-client privilege did not protect communications that union president candidate’s campaign manager had with campaign’s law firm about campaign contribution violations, where communications concerned only matters relevant to the campaign and manager never sought advice in his individual capacity from the campaign’s law firm); Allegaert v. Perot, 565 F.2d 246, 250-51 (2nd Cir. 1977) (rejecting disqualification where attorney previously represented employee as an individual, where the representation of the former employee was done with the knowledge that the firms were still representing the employer’s interests and would continue to do so); Newberry v. Cotton States Mut. Ins. Co., 531 S.E.2d 362 (Ga. App. 2000) (trial court properly denied motion to disqualify counsel for insurer in action brought by insurers; the insureds were not in an attorney-client relationship.
Notwithstanding cases like Cole, some courts and ethics opinions have held that an attorney-client relationship may be implied by conduct based on the putative client’s subjective belief coupled with an objectively reasonable basis for that belief, such as, where the lawyer was not sufficiently clear to an individual corporate employee concerning whom the lawyer represented and the employee disclosed personal confidential information to the lawyer in response. Conversely, where the surrounding circumstances do not support the putative client’s

with their liability insurer’s attorney who took sworn statements in investigating their claim; “An attorney-client relationship cannot be created unilaterally in the mind of the client: a reasonable belief is required.”); Rojicek v. River Trails Sch. Dist. 26, 2003 WL 1903987 (N.D. Ill. April 17, 2003) (former superintendent being sued for retaliation in violation of first amendment rights is not entitled to an order disqualifying counsel for the district and the other co-defendants or blanket waiver of the attorney-client privileged communications between her and such counsel in order to advance an advice of counsel defense; although superintendent was occasionally provided legal advice by the district’s counsel in matters concerning the plaintiff that are at issue in the litigation, all advice was given to the superintendent solely in the context of her role as superintendent and not concerning her personal liability, and thus the privilege is exclusively vested in the district’s board and superintendent is not authorized to waive the privilege without the board’s consent); Polovy v. Duncan, 702 N.Y.S.2d 61 (App. Div. 2000) (prior relationship between former executive director of not-for-profit corporation and lawyer who negotiated director’s leave and resignation on behalf of corporation would not have led a reasonable person to have concluded that lawyer was her “personal attorney” such that lawyer’s conduct during negotiations created a conflict of interest; there was no retainer agreement between the director and the lawyer with respect to any prior matter in which the lawyer may have assisted the director and such assistance apparently was in furtherance of the corporation’s interests); Nilavar v. Mercy Health Sys., 143 F. Supp. 2d 909 (S.D. Ohio 2001) (motion to disqualify denied where plaintiff provided no evidence that he reasonably believed attorney and attorney’s firm represented him individually; rather, the evidence showed that the plaintiff believed his communications arose as a shareholder of the corporation attorney and the attorney’s firm represented, not as an individual). Cf. S.C. Ethics Op. No. 99-08 (1999) (lawyer who represents client in action against manager and employer where manager was material witness for employer, may represent manager in action against employer; lawyer may have to obtain client’s consent only if representation is in a related case and is materially adverse to client); Vt. Ethics Op. No. 2000-07 (2000) (attorney who formerly represented corporation in litigation may subsequently handle an unrelated matter adverse to the president of that corporation provided that no confidential information is used to the disadvantage of the corporation).

See, e.g., Home Care Indus., Inc. v. Murray, 154 F. Supp. 2d 861 (D. N.J. 2001) (law firm was disqualified from representing corporation in lawsuit against corporation’s former chief executive officer (CEO) under New Jersey Rules of Professional Conduct; firm and CEO had shared implied attorney-client relationship while CEO was employed by corporation, since CEO had sought firm’s assistance to defend him against claims by former employees of corporation, firm failed to inform CEO that it represented corporation, not CEO, firm had access to CEO’s files, thoughts, and strategies regarding employees’ claims, and firm fostered environment in which CEO felt he could confide in firm, and corporation’s suit against CEO shared common core of facts with employees’ claims against CEO). See also IBM Corp. v. Levin, 579 F.2d 271, 281 (3rd Cir. 1978) (law firm that provided labor law advice to corporation for several years held to be in an ongoing attorney-client relationship with corporation for purposes of disqualification motion, even though firm provided legal services on a fee for services basis rather than under a retainer agreement and was not representing the corporation at the time of the motion); Rosenbaum v. White, 692 F.3d 593 (7th Cir. 2012) (Under Indiana law, an attorney-client relationship need not be express; it may be implied by the conduct of the parties, but there must be evidence of a consensual relationship, existing only after both the attorney and client have consented to its formation.); Advanced Mfg. Techs. Inc. v. Motorola, Inc., 2002 WL 1446953 (D. Ariz. July 2, 2002) (implied attorney-client relationship was created between non-party retired employee of defendant and defendant’s counsel, because employee had voluntarily appeared at counsel’s office and communicated freely in preparation for deposition, and at deposition itself employee clearly stated that counsel represented him and counsel, by silence, acquiesced; protective order rather than disqualification appropriate because counsel may have been intentionally misled by employee that employee’s interests were not adverse to defendant’s, and counsel had been representing defendant for three years and thus balance of equities weighed against disqualification); Goldberg v. Warner/Chappell Music, Inc., 125 Cal. App. 4th 752 (2005) (Goldberg, a
subjective belief, the courts have not implied an attorney-client relationship. This is particularly

former in-house counsel at Warner/Chappell, filed a discrimination action against her former employer and moved to disqualify the law firm representing Warner/Chappell on the ground that a former member of the law firm had given informal advice to Goldberg concerning the terms of her employment contract with Warner; the court of appeals found that, despite the informality, an attorney-client relationship existed between Goldberg and the former member of the law firm; however, the court found that this informal attorney-client relationship did not warrant disqualification of law firm in present action, since the former member had left the firm three years prior to Goldberg bringing the lawsuit and had no opportunity to inadvertently pass on confidential information to others at the firm); Good Samaritan Home, Inc. v. Lancaster Pollard & Co., 2012 WL 952825 (S.D. Ind. March 20, 2012) (An attorney in effect consents to an attorney-client relationship when a client reasonably relies on the attorney’s statements or conduct to his detriment and the attorney is aware of such reliance and fails to negate it); Montgomery Acad. v. Kohn, 50 F. Supp. 2d 344 (D. N.J. 1999) (attorney disqualified from representing academy in suit to recover from its former director in an investment made in a worthless Ponzi scheme, after director provided attorney with confidential information regarding her investment of the academy’s funds in the scheme; at the time of the disclosure, there was an implied attorney-client relationship between the attorney and the insurer); Stillwagon v. Innsbrook Golf & Marina, LLC, 2014 WL 4272766 (E.D. N.C. Aug. 29, 2014) (relation of attorney and client may be implied from the conduct of the parties, and is not dependent on the payment of a fee, nor upon the execution of a formal contract); Hill v. Hunt, 2008 WL 4108120 (N.D.Tex. Sept. 4, 2008) (A signed engagement letter is not required for the formation of an attorney-client relationship, which can be implied from the conduct of the parties.); Vt. Ethics Op. No. 2000-10 (2000) (a lawyer who discloses a potential conflict of interest to a caller who sought to retain the lawyer and divulges the general nature of an employer-employee disagreement and potential litigation and the name of the employer, is not disqualified from representing the institutional client because the lawyer involved explained to the caller that a conflict existed and that the caller would have to seek legal representation elsewhere; under these facts, the lawyer may not then inform the institutional client of the telephone call or its content). 5

5 See, e.g., Int’l Strategies Group, Ltd. v. Greenberg Traurig, LLP, 482 F.3d 1 (1st Cir. 2007) (express attorney-client relationship did not exist between investor in corporation and corporation’s attorney absent evidence of a retainer agreement or other contract for legal services or evidence of billing or remittances for such services; the investor’s asking the corporation’s attorney about potential civil claims by corporation to recover funds was quite different from investor’s seeking legal advice from attorney regarding its own potential claims, and thus was not sufficient to establish an implied attorney-client relationship; even assuming that investor relied on the corporation’s attorney to provide direct legal services, such reliance was unreasonable and would not give rise to an implied attorney-client relationship; attorney had told investor on several occasions that he represented attorney alone, investor made several statements which indicated its understanding of this arrangement, investor chose to forebear in bringing its own legal action, hoping instead that attorney’s negotiations on behalf of corporation would succeed, resulting in an eventual financial benefit to the investor, and investor was aware of its ability to bring suit against the corporation, reminding attorney and corporation of this fact on several occasions); Shen v. Miller, 212 Cal.App.4th 48 (2012) (Attorney did not form an attorney-client relationship with corporation, in representing the co-president and 50 percent shareholder of the corporation in filing a shareholder derivative action on the corporation's behalf, and thus attorney was not disqualified from representing the co-president in litigation against the corporation, absent evidence of an express or implied agreement between corporation and attorney for the provision of legal advice); Zenith Ins. Co. v. Cozen O’Connor, 148 Cal. App. 4th 998 (2007) (no implied attorney-client relationship between reinsurer and law firm, retained by reinsurer to provide legal services with respect to claims against insurer’s insured, that created firm’s duty of care owed to the reinsurer; reinsurer had no contractual or legal obligations to insurer’s insured, it had no involvement in insurer’s selection of firm, and it had no right to participate in settlement, adjustment, or defense of any claims, even though it would ultimately be responsible for paying them; an alleged client’s subjective belief that an attorney-client relationship existed, standing alone, cannot create such a relationship; instead, it is the intent and conduct of the parties that controls whether such a relationship has been created); Koo v. Rubio’s Rests., Inc., 109 Cal. App. 4th 719 (2003) (counsel’s declaration, during discovery dispute in manager’s class action suit against restaurant company, that firm represented both company and its managers, such that plaintiff-managers could not contact company’s managers ex parte, did not create an attorney-client relationship between firm and managers individually, but rather indicated that firm represented managers in their capacity as managerial agents, and thus firm could not be disqualified for representing parties with adverse interests;
true where the lawyer advises the corporate employee in writing that the firm represents only the corporate entity and expressly disclaims representation of the employee.\(^6\)

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\(^6\) See, e.g., In re Grand Jury Subpoena, 415 F.3d 333 (4th Cir. 2005), cert. denied sub nom., Under Seal v. United States, 546 U.S. 1131 (2006) (when company began an internal review of certain business transactions, its inside and outside counsel interviewed three former employees; later, the SEC began to investigate the same matter and a grand jury was investigation was initiated; the three employees became targets of the grand jury investigation and one of them was later indicted; when the grand jury issued a subpoena for documents relating to the interviews, the company voluntarily waived its privilege; the employees moved to quash, claiming that the lawyers investigating the business transactions individually represented each of them as well as the company and, therefore, the interviews were individually privileged; the Fourth Circuit disagreed, ruling that no individual attorney-client privilege attached to the employees’ communication with the company’s attorneys; prior to the interviews, attorneys told the employees that the lawyers represented the company and that the company could waive the privilege if it so chose; the lawyers also told the employees that the lawyers “could” represent them; the lawyers did not say that they “did” represent them; thus, the employees could not have reasonably believed that the investigating attorneys represented them personally during that period); United States v. Ruehle, 583 F.3d 600 (9th Cir. 2009) (Statements made by chief financial officer (CFO) of corporation to corporation’s attorneys who were conducting internal investigation regarding propriety of corporation’s stock option granting practices were not made in confidence, but were instead made for purpose of disclosure to outside auditors, and thus CFO’s statements were not protected by attorney-client privilege; CFO admitted he understood the fruits of attorneys’ inquiries would be disclosed to accounting firm in order to convince independent auditors of the integrity of corporation’s financial statements or to take appropriate accounting measures to rectify any misleading reports and CFO was charged with primary responsibility for corporation’s financial affairs.); Fox v. Pollack, 181 Cal. App. 3d 954, 959 (1986) (attorney avoided formation of an attorney-client relationship by disclosing relationship in advance of discussion; individuals’ states of mind, “unless reasonably induced by representations or conduct of respondent, are not sufficient to create the attorney-client relationship).
B. Former Outside Counsel for Employer Bringing Claims on Behalf of Plaintiffs against the Employer

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

relationship; they cannot establish it unilaterally”); State, ex rel. Blackhawk Enters., Inc. v. Bloom, 633 S.E.2d 278 (W. Va. 2006) (attorney-client relationship never existed between attorney and corporation or majority stockholder, even though attorney drafted corporation’s bylaws, stock purchase agreements, and other legal documents, and thus corporation and majority stockholder were not entitled to order disqualifying attorney and his law firm from representing minority stockholders in underlying civil action seeking dissolution of corporation; attorney was employed by minority stockholders to protect their sole interests throughout numerous transactions, and attorney expressly advised majority stockholder that he was not representing him in any way and advised him to obtain his own legal counsel); D.C. Ethics Op. No. 328 (2005) (an attorney representing a constituent of an organization personally should make clear at the outset of the representation when he or she does not represent the organization as an entity; the attorney should ensure that the client, as well as non-client constituents of the organization with whom the lawyer may interact, understand the attorney’s role; further, in view of the pervasive nature of confidential information of the organization to which such an attorney is likely to be exposed, in determining whether it is permissible to subsequently undertake matters that are adverse to the organization, the attorney must consider whether the organization is a “de facto client” for purposes of assessing potential conflicts of interest; the analysis is similar to that where an attorney represents a subsidiary or other affiliate of the organization; ideally, the attorney should expressly address these issues with the client at the outset of the representation and incorporate the understanding in the retainer agreement). Compare In re State Grand Jury Investigation, 983 A.2d 1097 (N.J. 2009) (Attorneys representing employees in grand jury investigation of employer were not required to be disqualified on grounds that the employees’ corporate employer had chosen the attorneys and paid for employees’ representation; even though employer offered only to pay for attorneys of its own choosing, employees certified that they were satisfied with the attorneys chosen by employer, retention letters between attorneys and employer explained that attorneys’ had professional obligations only to employees, selected attorneys had no current relationship with employer at time they were selected, attorneys were required not to disclose to employer any information regarding the representation, and employer was required to continue paying attorneys except unless court granted leave to discontinue payment. A lawyer may represent a client but accept payment, directly or indirectly, from a third party provided each of six conditions is satisfied: (1) the informed consent of the client is secured; (2) the third-party payer is prohibited from, in any way, directing, regulating or interfering with the lawyer’s professional judgment in representing his client; (3) there cannot be any current attorney-client relationship between the lawyer and the third-party payer; (4) the lawyer is prohibited from communicating with the third-party payer concerning the substance of the representation of his client; (5) the third-party payer shall process and pay all such invoices within the regular course of its business, consistent with manner, speed and frequency it pays its own counsel; and (6) once a third-party payer commits to pay for the representation of another, the third-party payer shall not be relieved of its continuing obligations to pay without leave of court brought on prior written notice to the lawyer and the client.)

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disqualification may not be warranted in such situations where the lawyer possessed no confidential information relevant to the current representation or where the current and former representations are not substantially related.8

nonprofit organization once director left organization); Conley v. Chaffinich, 431 F. Supp. 2d 494 (D. Del. 2006) (in state police captain’s employment discrimination suit against operational commander, opposing counsel’s representation of commander violated professional conduct rule prohibiting counsel’s representation of client on a matter substantially related to his representation of former client where current client’s interests are materially adverse to the interests of the former client; opposing counsel’s prior work for captain was for the purpose of general legal advice and representation in state police disciplinary proceedings, and in defending commander on gender discrimination claim based on failure to promote captain, opposing counsel might have acquired information from captain in the earlier representation that was related to the subject matter of the discrimination lawsuit; however, employee waived her objection by not raising the disqualification issue until nine months after the potential conflict of interest should have been, and was, apparent to her and her counsel); Farris v. Fireman’s Fund Ins. Co., 119 Cal. App. 4th 671 (2004) (attorney and his law firm were disqualified from representing insured and others in lawsuit alleging bad faith and breach of insurance contract against insurer, on ground that attorney had formerly represented insurer and had access to confidential information material to the action; a substantial relationship existed between the subjects of the two representations, inasmuch as the attorney acted as a coverage attorney for insurer for 13 years, he actively participated in the representation provided to insurer with respect to coverage and bad faith cases, and coverage disputes were substantially related to bad faith actions because both turned on whether or not there was coverage under the terms of the policy; entire law firm was subject to disqualification absent some showing that an ethical shield was created, and no such showing appeared on the record); Freiburger v. J-U-B Eng’rs, Inc., 111 P.3d 100 (Idaho 2005) (former employee’s attorney did not obtain confidential information through representation of former employer that affected his ability to represent former employee in declaratory judgment action regarding covenant not to compete, so as to have required attorney’s disqualification; alleged confidential information was simply former employer’s tendency to aggressively defend its legal rights, the possession of that information did not give former employee any advantage, and attorney had no discussions with former employer concerning its noncompete agreements, employment policies, or former employee’s employment relationship); Henry v. Delaware River Joint Toll Bridge Comm’n, 2001 WL 1003224 (E.D. Pa. Aug. 24, 2001) (attorneys disqualified from representing plaintiff employees against commission where one of its attorneys while as an associate for a previous law firm represented bridge commission in employment relations matters and was publicly identified as commission’s labor counsel); Ulrich v. Hearst Corp., 809 F. Supp. 229 (S.D. N.Y. 1992) (attorney who had represented corporate client on labor matters for over 20 years prohibited from representing former employees of corporation in retaliatory discharge, severance, and sex discrimination cases; by virtue of background, attorney knew confidential information regarding corporate matter toward acting in a retaliatory fashion, the general criteria on which performance levels of employees were judged, and corporate management’s assessment of general vulnerability on labor claims, which could be put to use in current litigation).

8 See Moore v. Olson, ___ P.3d ___, 2015 WL 4031624 (Alaska July 2, 2015) (Superior court did not abuse its discretion by refusing to disqualify opposing counsel from arbitration confirmation and vacatur proceedings, as requested by former business partner asserting a conflict of interest, arguing that she was opposing counsel’s former client, where former business partner’s alleged participation in helicopter hangar lease negotiations with opposing counsel were not substantially related in any way to the legal dispute raised in her allegations that her former partner and his businesses had breached their settlement agreement relating to the helicopter businesses); EEOC v. Luby’s Inc., 347 F. Supp. 2d 743 (D. Ariz. 2004) (attorney for defendant’s membership on board public-interest law firm did not create a conflict of interest warranting disqualification of attorney or her firm in EEOC lawsuit in which public interest law firm represented the employee as intervenor; even though the attorney may have had general access regarding public interest law firm’s litigation strategies and likely settlement position, prior to the filing of the employee’s case, the attorney resigned from the board, the attorney had never represented the employee, and the attorney acquired no confidential information about the employee or her claims while serving on the board); Valdez v. Pabey, 2005 WL 3556428 (N.D. Ind. Dec. 27, 2005) (law firm that had represented city for 27 years on a variety of matters, including employment and hiring issues, and was subsequently replaced after a change in city administration was not disqualified from representing plaintiff former employee in employment-related matter
C. Former In-House Counsel Representing Plaintiffs Against the Employer

The disqualification issues arise when an in-house lawyer for a corporation or organization leaves and seeks to represent clients adverse to his/her former employer. Some courts and ethics opinions considering this issue have applied the same former client rules to determine whether disqualification is warranted in these circumstances.9

against the city and city officials; since the new city administration would have different policies and strategies than when the law firm represented it, it was unlikely that the firm would have learned anything confidential while representing the city that would be relevant to the current case; Briggs v. Aldi, Inc., 218 F. Supp. 2d 1260 (D. Kan. 2002) (attorney’s earlier representation of employer in defending sex discrimination and harassment suit filed by former assistant manager did not warrant disqualification from representing former employee in her race discrimination action against employer; two cases were not substantially related since the employees worked at different stores and made different claims, and different decision-makers, witnesses and documents were involved; similarly, attorney’s prior representation of employer in workers’ compensation and real estate matters did not warrant disqualification absent showing of relationship between factual contexts of cases); Pa. Informal Ethics Op. No. 2006-06 (2006) (lawyer who previously provided advice and representation to university on employment matters may represent union in relation to matters between the union and the university, where the lawyer work for the university had been reduced seven years previously and phased out entirely five years previously, and there was a complete change in senior leadership, whereby all of the persons the attorney dealt with were retired or had otherwise moved into other positions, and the collective bargaining agreement with which the lawyer was familiar had been replaced by a successor agreement).

9 See ABA Formal Ethics Op. No. 99-415 (1999) (if a former in-house lawyer personally represented his former employer in a matter, neither he nor his new firm may undertake a representation adverse to his former employer in the same or substantially related matter absent the former employer’s consent; even if the former in-house lawyer did not personally represent his former employer in a matter, but obtained protected information concerning that matter while it was being handled by others in his legal department, he will be disqualified and his disqualification will be imputed to his new firm); Franzoni v. Hart Schaffner & Marx, 726 N.E.2d 719 (Ill. App. 2000) (trial court did not err in disqualifying plaintiff’s counsel and his law firm in employment discrimination action; plaintiff’s counsel was formerly general counsel of defendant’s parent company and his considerable involvement in employment-related matters exposed him to confidential policies and practices regarding issues raised in plaintiff’s complaint, and thus the present and former representations were shown to be substantially related); Ky. Ethics Op. No. E-387 (1995) (former in-house lawyer for a corporation or other entity may not represent a client in a matter adverse to the interests of the corporation or entity if the matter is substantially related to matters handled by the lawyer when he or she worked “in-house” for the corporation or entity); Babineaux v. Foster, 95 FEP Cases (BNA) 1264 (E.D. La. 2005) (previous employment of employee’s counsel as assistant city attorney did not require disqualification in employee’s discrimination lawsuit against the city; although the employee had filed a grievance while the attorney was employed with the city, the attorney’s cursory involvement in the grievance, by being copied on two letters with respect to the grievance, did not rise to the level of personal and substantial participation which would require disqualification, and the attorney possessed no confidential information that could be used to the material disadvantage of the city); Franklin v. Clark, 454 F. Supp. 2d 356 (D. Md. 2006) (plaintiff’s lawyer not disqualified in employment litigation against police department and its officials, despite his prior employment as an attorney in the city solicitor’s office where he worked on various employment matters for the police department, including EEOC cases and settlement negotiations, where the lawyer was fired from the solicitor’s office two months before the events giving rise to plaintiff’s termination, and he was not involved as a city solicitor in any of the incidents leading up to the plaintiff’s termination, and the memorandum he drafted as a solicitor that relates to the current case no longer contains confidential information because the city waived confidentiality by disclosing the memorandum in discovery without objection); Jamaica Pub. Serv. Co. Ltd. v. AIU Ins. Co., 707 N.E.2d 414 (N.Y. App. Div. 1998) (although one of the attorneys representing plaintiff had previously been in-house counsel for a different company in defendant’s corporate family, ethical rules not violated since attorney’s work while in-house neither involved defendant nor touched on coverage disputes similar to those involved in the current lawsuit); Richards v. Lewis, 2005 WL 2645001 (D. V.I. Oct. 14, 2005) (attorney’s prior

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D. Former In-House Counsel Bringing Personal Claims Against the Employer

Although not a former client issue, ethical issues arise when an in-house counsel chooses to litigate wrongful termination or other employment claims against his/her former employer. Because the former in-house counsel has had access to client confidences of the former employer, there is a tension between the attorney’s duty of loyalty to the former employer-client and the right to pursue legitimate claims against the former employer. Thus, most courts and ethics opinions have held that the ethical rules do not prohibit the former in-house counsel from suing his/her former employer, but they suggest that the former in-house counsel should take care to preserve client confidences to the greatest extent practicable in pursuing such claims.10

representation of police department in employee’s unfair labor practice proceeding before the public relations board did not require her disqualification as employee’s counsel in a civil rights action against the department based on the same core facts; although counsel was unquestionably involved as the sole attorney representing the department against the employee in the unfair labor practice charge, her representation was limited, pro forma, and ultimately nominal, and there was no “investigative or deliberative process” in which counsel participated to warrant her disqualification). Cf. Levin v. Raynor, 2004 WL 2937831 (S.D. N.Y. Dec. 17, 2004) (retired employees and their beneficiaries filed suit against several defendant unions under ERISA; defendants moved to disqualify plaintiffs’ counsel based on the fact that one of the plaintiffs was, until his recent retirement, general counsel of one of the defendants and that his prior position made him both privy to and in actual receipt of confidential information; the court denied the motion since the former director never worked for defendants in a legal capacity and there was no evidence that the defendant’s privileged information had reached, or would reach, the plaintiffs’ lawyers and, therefore, the defendants had not been prejudiced).

10 See ABA Formal Ethics Op. No. 01-424 (2001) (Model Rules do not prohibit a lawyer from suing her former clients and employer for retaliatory discharge; in pursuing such a claim, however, the lawyer must take care not to disclose client information beyond that information the lawyer reasonably believes is necessary to establish her claim, relying on Model Rule 1.6); Siedel v. Putnam Invs., Inc., 147 F.3d 7 (1st Cir. 1998) (complaint filed by former in-house counsel that revealed privileged information must be kept under seal; court rejected counsel’s argument that disclosure was needed to defend himself against accusations of wrongful conduct; although attorneys may reveal privileged information to defend themselves against charges of ineffective assistance or legal negligence, they cannot use privileged information offensively, the self-defense exception is a shield, not a sword.); Kachmar v. SunGard Data Sys., 109 F.3d 173 (3rd Cir. 1997) (“[I]t is difficult to see how statements made to [an in-house attorney] and other evidence offered in relation to her own employment and her own prospects in the company would implicate the attorney-client privilege. It is also questionable whether information that was generally observable by [plaintiff] as an employee of the company, such as her observations concerning the lack of women in [defendant’s offices] would implicate the privilege.”); Van Asdale v. Intern’l Game Techn., 577 F.3d 989 (9th Cir. 2009) (confidentiality concerns alone do not warrant dismissal of Sarbanes Oxley whistleblower claims brought by two married former in-house counsel who alleged they were fired for reporting fraud in the context of a corporate merger; it was not at all clear the extent to which the claim would require the disclosure of confidential information and, in any event, the district court could use the many equitable remedies at its disposal to minimize the possibility of harmful disclosures, rather than to dismiss the suit altogether), later proceedings, 2011 WL 2118893 (D. Nev. 2011) (magistrate judge upheld a jury verdict including actual damages of $955,597 for Shawn Van Asdale and $1,270,303 for Lena Van Asdale); Cal. Ethics Op. No. 2012-183 (2012) (While a senior associate in a law firm has the right to consult with attorney concerning a potential wrongful discharge claim against her former firm, and in that consultation to reveal, as necessary, client confidential information, except in the narrowest of circumstances, attorney may not publicly disclose those client confidences to pursue senior associate’s wrongful discharge claim.); Fox Searchlight Pictures, Inc. v. Paladino, 89 Cal. App. 4th 294 (2001) (attorneys representing former in-house counsel in wrongful termination action against corporation were not disqualified by reason of counsel’s disclosing to them confidential or privileged information she acquired while counsel to corporation; former in-house counsel entitled to sue her employer for wrongful termination as long as she did not publicly disclose information employer was entitled to keep secret); Gen. Dynamics v. Super. Ct., 7 Cal. 4th 1164 (1994) (action permitted if complaint
based on in-house lawyer’s adherence to obligations imposed by the Code of Professional Responsibility, but prohibited if pursuit of claim would result in disclosure of client confidences or secrets; Schaefer v. General Electric Co., 102 FEP Cases (BNA) 1332 (D. Conn. Jan. 22, 2008) (in-house counsel’s ethical obligations do not bar her from serving as class representative against her employer in a Title VII disparate impact gender discrimination class action; striking the class allegations based on concerns that in-house counsel would betray client confidences would be premature, and the company’s confidential information can be adequately protected by a protective order); Lewis v. Nationwide Ins. Co., 19 Ind. Empl. R. Cases (BNA) 1470 (D. Conn. 2003) (Connecticut Supreme Court would recognize the public policy violation asserted by a former in-house counsel employed by insurance company to defend its insured against liability claims who alleged he was demoted, harassed, and eventually fired because he refused to permit the insurance company to interfere with his exercise of independent professional judgment on behalf of his client-insureds in violation of the rules of professional conduct); Alexander v. Tandem Staffing Solutions, Inc., 881 So. 2d 607 (Fla. App. 2004) (former general counsel’s disclosures to her attorney reasonably pertaining to the whistleblower claims were permissible and did not require disqualification of former general counsel’s attorney in the whistleblower claim); Heckman v. Zurich Holding Co., 242 F.R.D. 606 (D. Kan. 2007) (“The overwhelming majority of courts . . . have permitted in-house attorneys to bring retaliatory discharge claims against their former employers/clients so long as they do not run afoul of their duty of confidentiality”); Hoffman v. Baltimore Police Dep’t, 379 F. Supp. 2d 778 (D. Md. 2005) (former in-house attorney for police department may maintain wrongful discharge and discrimination claims against department and its officials, so long as the court uses equitable measures to balance the need protection of confidential information against the in-house attorney’s right to maintain the suit, and as long as the in-house attorney continues to exercise his professional judgment and utmost care in protecting any confidences of his employer that have not been waived); GTE Prods. Corp. v. Stewart, 653 N.E.2d 161 (Mass. 1995) (action permitted if complaint based on in-house lawyer’s adherence to obligations imposed by the Code of Professional Responsibility; action prohibited if pursuit would result in a disclosure of client confidences or secrets); Burkhart v. Semitech, Inc., 5 P.3d 1031, 1041 (MONT. 2000) (Rule 1.6 of Montana Rules of Prof’l Conduct contemplates revealing confidential client information by a former in-house lawyer pursuing a retaliatory discharge claim against her former employer); N.Y. City Ethics Op. No. 1994-1 (1994) (former in-house attorney may sue former employer for alleged discrimination and participate in the preparation of a class action against the former employer, provided the attorney does not reveal any confidences or secrets of the former employer or serve as class representative or class counsel); Tartaglia v. USB PaineWebber Inc., 961 A.2d 1167 (N.J. 2008) (Attorney alleging common-law claim for retaliatory discharge founded on a public policy embodied in a rule of professional conduct (RPC) must demonstrate that the employer’s behavior about which she complained actually violated the RPC forming the basis of the claim, both because attorneys should be knowledgeable about the RPCs, and because they have an independent obligation to report violations to the appropriate authorities); Wise v. Consol. Edison Co., 723 N.Y.S.2d 462 (2001) (action permitted if complaint based on in-house lawyer’s adherence to obligations imposed by the Code of Professional Responsibility; action prohibited if pursuit would result in a disclosure of client confidences or secrets); Meadows v. Kindercare Learning Centers, 2004 WL 2203299 (D. Ore. Sept. 29, 2004) (Oregon courts would permit an action for wrongful discharge by a former in-house counsel if the complaint is based on an in-house lawyer’s refusal to violate the Code of Professional Responsibility or where the in-house counsel plaintiff alleges that she personally suffered a discriminatory job action; however, where, as here, the plaintiff has alleged only that she was terminated for not agreeing to defendants’ discriminatory company policies, she cannot maintain a claim for retaliatory discharge because the alleged protected conduct is inconsistent with the requirements of the employee’s position); Ore. Formal Ethics Op. No. 2005-136 (2005) (“claim or defense” exception to Rule 1.6 plainly permits “disclosure to establish a wrongful discharge claim”); Philadelphia Ethics Op. No. 99-6 (1999) (former in-house counsel, in the course of pursuing a wrongful termination claim against his former employer and client, may use confidential privileged information provided the information is reasonably necessary to advance the claim, the claim is a reasonable one, the information is used only after the client has been forewarned that it might possibly be used in connection with advancing the claim, and the information is used in the most minimal way possible and in a way that is designed to preserve the confidentiality of the information to the extent reasonably possible); San Diego County Ethics Op. No. 2008-1 (2008) (discharged in-house lawyer who wishes to sue her former employer may always speak confidentially with her own counsel to evaluate possible claims, but in a lawsuit she may not reveal information, other than ordinary employment-related information, unless the disclosure is authorized by a protective order or by a specific exception to the duty of confidentiality or the attorney-client privilege); S.C. Ethics Op. No. 99-08 (1999) (lawyer’s representation of manager in action against employer, where
However, a few jurisdictions have barred—or limited—the claims that can be made by a former in-house counsel against his/her former employer/client based on the in-house counsel’s ongoing fiduciary duties and ethical obligation to maintain former employer/client confidences.  

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11 See, e.g., United States v. Quest Diagnostics Inc., 734 F.3d 154 (2d Cir. 2013) (Former in-house counsel for clinical laboratory violated New York rule of professional conduct prohibiting use of confidential information of a former client to the disadvantage of that client when he filed and participated as relator in False Claims Act (FCA) qui tam action against the laboratory and its parent company alleging violations of federal Anti-Kickback Statute; although a separate New York rule allowed attorney to disclose confidential information he reasonably believed necessary to prevent former client from committing a crime, the confidential information counsel revealed as plaintiff in FCA suit was greater than reasonably necessary to prevent any alleged ongoing fraudulent scheme stemming from laboratory's actions eight years earlier, and suit could have been brought based only on information co-relators had obtained as former executives of the laboratory); Douglas v. DynMcDermott Petroleum Operations Co., 144 F.3d 364 (5th Cir. 1998), (information regarding in-house attorney’s investigation into employee’s
interoffice discrimination complaint and separate business matter she had handled was confidential and, under Louisiana law, attorney’s disclosure of those matters to Department of Energy in response to inquiries regarding employment practices of her employer constituted breach of her professional ethical duties of confidentiality and loyalty; employer, not DOE, was counsel’s client and employer had not consented to any arrangement whereby DOE was to be treated as a client; such disclosure was not protected activity under Title VII; Jones v. Flagship Int’l, 793 F.2d 714 (5th Cir. 1986) (employer did not impermissibly retaliate for filing an EEOC complaint when it suspended employee who was employer’s manager of EEO programs, in view of evidence that employee had solicited others to file EEOC complaint and was seeking to be the vanguard of a class action and in view of the sensitive role which the employee played in such matters for the company); Doe v. A Corp., 709 F.2d 1043 (5th Cir. 1983) (former in-house counsel could prosecute an action in his own behalf against his former employer with respect to ERISA claims, despite his having advised the employer corporation on matters relating to his lawsuit, but he was ethically barred from prosecuting such litigation either as an attorney for, or as the class representative of other employees); Rand v. CF Indus., Inc., 42 F.3d 1139 (7th Cir. 1994) (employer’s “decision to fire one of its attorneys must be given special deference”); Kelly v. City of Albuquerque, 542 F.3d 802 (10th Cir. 2008) (assistant city attorney’s participation as defense attorney in an EEOC mediation qualifies as “participation” for purposes of purposes of Title VII retaliation claim); Ausman v. Arthur Andersen LLP, 810 N.E.2d 566 (Ill. App.), leave to appeal denied, 823 N.E.2d 962 (Ill. 2004) (affirmed dismissal of in-house counsel’s claim that firm fired her in retaliation for several objections she had raised to ventures it had assembled for clients as possible violations of SEC regulations; lawyer actions for retaliatory discharge would chill the client-lawyer relationship and discourage executives from confiding in in-house counsel for fear that company secrets one day may be spilled in open court); Balla v. Gambro, Inc., 584 N.E.2d 104 (Ill. 1991) (total ban on wrongful discharge cases that raise attorney-client concerns); Kidwell v. Sybaritic, 784 N.W.2d 220 (Minn. 2010) (in-house general counsel fired for notifying senior management of his concerns about possible corporate wrongdoing may not obtain relief under state whistleblower statute); N.C. 2000 Formal Ethics Op. No. 11 (2001) (lawyer who was formerly in-house legal counsel for a corporation must obtain the permission of the court prior to disclosing confidential information of the corporation to support a personal claim for wrongful termination). Cf. Biller v. Toyota Motor Corp., 2011 WL 1103630 (C.D. Cal. March 17, 2011), affirmed, 668 F.3d 655 (9th Cir. 2012) (court confirms arbitration award of $2.5 million in liquidated damages and $100,000 in punitive damages and mandatory injunction against former in-house counsel for breach of confidentiality agreement, conversion and unauthorized computer access; former in-house counsel improperly accessed, took and kept thousands of company’s confidential documents and made numerous public disclosures of confidential information in violation of his contract obligations including: a) former in-house counsel’s website “credentials” section revealed specific facts and figures concerning company’s settlements and litigation costs, settlement policies and tactics and conversation with the client; b) in a public seminar conducted by former in-house counsel he discussed specific details about cases, the company’s strategies, litigation costs and payments to outside counsel and discussions with the client about discovery practices; and c) he sent thousands of confidential documents to a Texas court without request, subpoena or legal compulsion); Fremont Reorganizing Corp. v. Faigan, 198 Cal. App.4th 1153 (2011) (former employer’s allegations that day after he was fired former in-house counsel told authorities about the company’s allegedly illegal conduct stated a claim against former in-house counsel for breach of fiduciary duty and confidentiality); In re White, 11 A.3d 1226 (D.C.), cert. denied, 131 S.Ct. 2941 (2011) (Board on Professional Responsibility did not err in finding attorney violated professional conduct rules in connection with purported “whistleblower” complaint against her former employer and subsequent dealing with government entities; investigation demonstrated that attorney had manipulated and fabricated supporting documents and presented false testimony, and that complaint had been filed in apparent attempt to head off attorney’s termination for performance reasons); Rabin v. Karlin & Fleisher, LLC, 945 N.E.2d 681 (Ill. App.), appeal denied, 955 N.E.2d 479 (Ill. 2011) (former law firm investigator’s claim that he was fired for refusing to send out invoices for the investigator’s work at higher rates than he was paid and disguising that he was an employee did not state a public policy claim; attorneys’ duty to uphold the law and to act with scrupulous honesty were too general to justify an exception to the at-will rule); Tex. Ethics Op. No. 601 (August 2010) (lawyer who is employed by a city as assistant city attorney may not refuse to withdraw from legal representation of the city because the lawyer is protected from termination by civil service employment provisions of the city charter); Perin v. Spurney, 2005 WL 3498621 (Ohio App. Dec. 22, 2005), appeal not allowed, 847 N.E.2d 6 (Ohio 2006) (employee filed wrongful termination action against her employer, Honda R & D Americas, Inc. (“Honda”) and various managers, alleging she was terminated because she complained that Honda was illegally shipping hazardous
E. Conflicts Arising From Pre-Retention Contacts

In cases where the communication of confidential information from a prospective client is unsolicited, such as in response to an Internet Web site maintained by the firm, or an advertisement, disclosure of the information would not generally disqualify the firm, although the lawyer may have a duty not to disclose or use the information for the benefit of the lawyer’s other clients. Whether confidentiality obligations are created will also depend on the clarity and

materials; during the action, Honda subpoenaed the employee’s husband, who was an in-house counsel for Honda and also on Honda’s ethics committee and had provided legal advice to the employer regarding the issue of transportation of the hazardous materials; the employee’s attorney represented the husband for the purposes of the deposition and announced that the husband would assert the spousal privilege on behalf of the employee, and the attorney-client privilege on behalf of Honda; the court of appeals affirmed disqualification of the employee’s counsel; although there was no evidence that the husband actually gave Honda’s confidences to the employee’s counsel, the appearance of impropriety arose due to counsel representing and communicating with an in-house attorney for Honda while also representing the employee in a wrongful termination action against Honda, raising concerns that the in-house attorney revealed Honda’s secrets to the employee’s counsel and that Honda experienced a breach of loyalty due to the employee’s counsel representing and communicating with both the in-house counsel and the employee).

12 See Fla. Ethics Op. No. 07-3 (2009) (A lawyer who receives information unilaterally from a person seeking legal services has no conflict of interest if already representing or is later asked to represent an adversary, and may use or disclose the information. If the lawyer agrees to consider representing the person or discussed the possibility of representation with the person, then the person is a “prospective client,” and the lawyer does owe a duty of confidentiality that may create a conflict of interest for the lawyer. Lawyers should post a statement on their websites that the lawyer does not intend to treat as confidential information sent to the lawyer via the website, and that such information could be used against the person by the lawyer in the future.); N. H. Ethics Op. No. 2009-2010/1 (2009) (when law firm’s website invites public to send email to one of firm’s lawyers, it is opening itself to potential obligations to prospective clients); N.Y. City Ethics Op. No. 2001-01 (2001) (information provided by prospective client to a lawyer or law firm in email generated in response to Internet Web site maintained by the lawyer or firm would generally not disqualify the lawyer or firm from representing another present or future client in the same manner; where the web site does not adequately warn that information transmitted to the lawyer or firm will not be treated as confidential, the information should be held in confidence by the attorney receiving the communication and not disclosed or used for the benefit of the other client even though the attorney declines to represent the potential client); N.Y. State Ethics Op. No. 960 (2013) (Lawyer may ethically represent a client seeking payment of fees tendered to a prior prospective client, who had earlier sought advice from the lawyer regarding the damage that was subsequently repaired by the client, unless the lawyer learned confidential information from the prospective client that would be significantly harmful to the prospective client). See also Ariz. Ethics Op. No. 02-04 (2002) (an attorney does not owe a duty of confidentiality to individuals who unilaterally email inquiries to the attorney when the email is unsolicited; law firm websites, with attorney email addresses, however, should include disclaimers, regarding whether or not email communications from prospective clients will be treated as confidential); Ariz. Ethics Op. No. 97-04 (1997) (lawyers should not answer specific questions or give fact-specific advice in chat rooms because they would be unable to screen for potential conflicts and would risk confidentiality problems); Med-Trans Corp., Inc. v. City of California City, 156 Cal. App. 4th 655 (2007) (no confidential information was imparted in meeting between attorney and city official regarding federal lawsuit concerning ambulance service permits that established attorney-client relationship that disqualified attorney from representing air ambulance company in its fraud action against city; the only relevant information at the meeting was the city’s plan to hire company and apply for ambulance permit, attorney had contacted city to consult concerning federal case rather than city’s contacting attorney, and conversation included other lawyers representing third party whose interest was limited to federal lawsuit); Colo. Ethics Op. No. 117 (2007) (Pro bono or legal services intake interview conducted by intake attorney or non-attorney intake specialist to screen for possible conflicts, to determine

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prominence with which the firm disclaims these issues in the Web site or other communications with the potential client. Similarly, responses to legal questions posed in a public or non-office

eligibility for services, and to identify his/her legal needs or objectives generally does not create an attorney-client relationship. The intake attorney or specialist should stress that no attorney-client relationship is created until the legal services or pro bono program determines the prospective client’s eligibility for the program’s services. If the initial inquiry suggests a conflict of interest, the intake specialist may still obtain limited information to determine eligibility for purposes of referral or possible representation, because obtaining such information does not create an attorney-client relationship); Sowders v. Lewis, 241 S.W.3d 319 (Ky. 2007) (attorney-client privilege attached to any confidential communications between prospective co-counsel in medical malpractice action, and a medical expert that the prospective co-counsel consulted before deciding not to join plaintiffs’ attorney as co-counsel.); N.H. Rule of Prof’l Conduct R. 1.18 (Even when no client-lawyer relationship ensues, a lawyer who has received and reviewed information from a prospective client shall not use or reveal that information except as the rules would permit with respect to information of a former client); Va. Ethics Op. No. 1832 (2007) (Where prospective client called lawyer’s office and spoke only with the lawyer’s secretary and provided the secretary with confidential details regarding her case, the lawyer may continue to represent an individual in a case against to the prospective client if the lawyer establishes an ethical screen between the secretary and the lawyer as to the prospective client as to the prospective client and the current client’s case, instructions the secretary that she cannot reveal to the lawyer any confidential information obtained from the prospective client, and uses other staff persons in lieu of the secretary for any work relating to the representation of the current client. The lawyer should send a written communication to the prospective client or her lawyer that these measures have been taken); Wis. Formal Ethics Op. No. EF-11-03 (2011) (the duties lawyer owes to prospective clients are not triggered by unsolicited email communication that lawyer receives “out of the blue from a stranger in search of counsel” so long as lawyer did not do or publish anything that would lead reasonable people to believe that they could share information with the lawyer without first meeting the lawyer and establishing a lawyer-client relationship; to avoid creating ethical duties to a person in search of counsel a lawyer who places ads or solicits email communications should use disclaimers or other similar methods to warn the individual in terms easily understood by laypersons that there is no lawyer-client relationship and that the communications are not confidential).

13 ABA Formal Ethics Op. No. 10-457 (2010) (warnings or cautionary statements on a lawyer’s website can be written so as to avoid a misunderstanding by the website visitor that (1) a client-lawyer relationship has been created, (2) the visitor’s information will be kept confidential, (3) legal advice has been given, or (4) the lawyer will be prevented from representing an adverse party); Cal. Ethics Op. No. 2005-168 (2005) (a lawyer who provides to Web site visitors who are seeking legal advice, a means for communicating with him, whether by email or some other form of electronic communication on his Web site, may effectively disclaim owing a duty of confidentiality to web site visitors only if the disclaimer is in sufficiently plain terms to defeat the visitor’s reasonable belief that the lawyer is consulting confidentially with the visitor; simply having a visitor agree that an “attorney-client relationship” or “confidential relationship” is not formed would not defeat a visitor’s reasonable understanding that the information submitted to the lawyer on the lawyer’s Web site is subject to confidentiality; in this context, if the lawyer has received confidential information from the visitor, that is relevant to a matter in which the lawyer represents a person with interests adverse to the visitor, acquisition of confidential information may result in the lawyer being disqualified from representing either); D.C. Ethics Op. No. 316 (2002) (lawyers may take part in online chat rooms and similar communications with Internet users seeking legal information; to avoid formation of attorney-client relationship, lawyers should avoid giving specific legal advice; if a lawyer engages in communications of sufficient particularity and specificity to give rise to an attorney-client relationship under substantive law of the applicable jurisdiction, lawyer must comply with full array of D.C. ethics rules governing attorney-client relationships); Ill. Ethics Op. No. 96-10 (1997) (lawyers participating in chat rooms or other online services that could involve offering personalized legal advice to anyone who happens to be connected to the service, should be mindful that the recipients of such advice are the lawyer’s clients, with the benefits and burdens of that relationship); Iowa Ethics Op. No. 07-02 (2007) (where the law firm’s marketing materials would suggest that the lawyer is available and would expect to receive information regarding the matter from the prospective client in confidence, the lawyer cannot represent a party adverse to the prospective client, if the lawyer receives the confidential material from the prospective client; however, where all the lawyer did was publish his/her phone number in the marketing materials, no reasonable person would believe that he/she may send information to the

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lawyer in confidence); Mass. Ethics Op. No. 2007-01 (2007) (in absence of an effective disclaimer, a lawyer who receives unsolicited information from a prospective client through an email link on a law firm Web site must hold the information in confidence even if the lawyer declines the representation; whether the attorney may represent the opposing party depends on whether the lawyer’s obligations to preserve the prospective client’s confidences, will materially limit the firm’s ability to represent the opposing party); Nev. Ethics Op. No. 32 (2005) (generally, an attorney-client relationship cannot be created as the result of the unilateral act of the prospective client, such as the sending of an unsolicited letter containing confidential information; however, an attorney who advertises or maintains a website may be deemed to have solicited the information from the prospective client, thereby creating a reasonable expectation on the part of the prospective client that the attorney desires to create an attorney-client relationship); N.H. Ethics Op. No. 2009-10/1 (2010) (firm that invited emails from the public on its website should set up procedures to minimize risk that emails will create a disqualifying conflict); N.J. Ethics Op. No. 712 (2008) (nonprofit trade association that sets up legal hotline staffed by attorneys to provide limited legal services to its members may not disclaim the formation of an attorney-client relationship, as it is likely such a relationship will arise in the course of the provision of services by attorneys staffing the hotline); N.J. Ethics Op. No. 671 (1993) (attorney-client privilege ordinarily arises during one-on-one discussions between a lawyer and a person seeking legal advice, and legal organization cannot disclaim an attorney-client relationship); N.M. Ethics Op. No. 2001-1 (2001) (appropriate disclaimers of attorney-client relationship should accompany any response to listserve message board, but any response that would suggest to a reasonable person that, despite disclaimer, relationship is being or has been established, would negate the disclaimer); N.Y. State Ethics Op. No. 899 (2011) (lawyer may provide general answers (but not individual advice) in response to legal questions from laypersons on real-time or interactive social sites on the Internet, but the lawyer may not engage in “solicitation” absent compliance with Rule 7.3. If a person initiates a request on site to retain the lawyer, the lawyer may respond with a private written proposal outside the site so that persons who did not request the proposal may not see it); N.C. 2011 Ethics Op. No. 8 (2011) (Use of live chat support services on a law firm’s website is permitted under the Rules of Professional conduct, but the law firm using this service must exercise precautions to ensure that visitors who elect to participate in a live chat session are not misled to believe that they are conversing with a lawyer if such is not the case and that the nonlawyer agent does not give any legal advice. The firm should also be wary of creating an “inadvertent” lawyer-client relationship and should be mindful of its duties to prospective clients under Rule 1.18(c)); N.C. Formal Ethics Op. No. 2000-3 (2000) (lawyers who do not want to create client-lawyer relationships on law firm message board should use specific disclaimers on any communications with inquirers, but substantive law will determine whether client-lawyer relationship is created); Ohio Ethics Op. No. 99-9 (1999) (attorneys who answer legal questions for a fee posed by visitors to firm’s Web site, are subject to same constraints that govern other methods of delivering legal services, including requirements of conflict checks, competence, and confidentiality); Pa. Ethics Op. No. 2010-6 (2010) (Rule 7.3 does not categorically bar use of social media for solicitation purposes where the prospective clients to whom the lawyer’s communication is directed have the ability, readily exercisable, to comply ignore the lawyer’s overture); S.C. Ethics Op. No. 12-03 (2012) (Lawyer may participate in legal information websites in general, if a website complies with all communications and advertising rules, lawyer could participate in such a program but with specific caution against inadvertently forming an attorney-client relationship by offering more than basic information of general applicability.); S. Dak. Ethics Op. No. 2002-2 (2002) (lawyer website that invites viewers to send email through jump site creates expectation of confidentiality); Vt. Ethics Op. No. 2000-10 (2000) (a lawyer who discloses a potential conflict of interest to a caller who sought to retain the lawyer and divulges the general nature of an employer-employee disagreement, potential litigation and the name of the employer, is not disqualified from representing the institutional client because the lawyer involved explained to the caller that a conflict existed and that the caller would have to seek legal representation elsewhere; under these facts, the lawyer may not then inform the institutional client of the telephone call or its content); Va. Ethics Op. No. 1842 (2008) (Lawyer does not owe duty of confidentiality to a person who unilaterally transmits confidential information via email to the firm using the lawyer’s email address posted to the firm’s website or by leaving a voicemail using the firm’s public listing in the telephone directory. To avoid any inference that an attorney-client relationship has been established or that the information a prospective client provides will be kept confidential, a law firm may wish to consider inclusion of a disclaimer on its website and external voicemail clearly worded so as to overcome a reasonable belief on the part of the prospective client that the information would be maintained as confidential. The Committee also recommends use of a “click-through” disclaimer which requires the prospective client to assent to the terms of the disclaimer before being permitted to submit the information).

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setting such as a legal educational seminar, in social settings, or a radio call-in show, would generally not establish an attorney-client relationship.\textsuperscript{14} Similar considerations apply in initial consultations between a prospective client and an attorney concerning a potential engagement, particularly with respect to pending or proposed litigation, which may create disqualifying conflicts if an attorney-client relationship is established as a result of the consultation and/or confidential information is disclosed under circumstances triggering the attorney’s fiduciary obligations to the prospective client.\textsuperscript{15} But if the person disclosing information to the lawyer was

\textsuperscript{14} See Cal. Ethics Op. No. 2003-161 (2003) (a person’s communication made to an attorney in a non-office setting may result in the attorney’s obligation to preserve confidentiality of the communication (1) if an attorney-client relationship is created by the contact, or (2) even if no attorney-client relationship is formed, the attorney’s words or actions induce in the speaker a reasonable belief that the speaker is consulting the attorney, in confidence, in his professional capacity to retain the attorney or to obtain legal services or advice); Cal. Ethics Op. No. 2003-164 (2003) (normally, under circumstances when the public or a segment of the public is present, such as a radio call-in show, an attorney-client relationship will not be formed when an attorney answers specific legal questions posed by persons with whom the attorney has not previously established an attorney-client relationship; by taking care when answering specific legal questions in such a setting, particularly questions outside the attorney’s area of expertise and by use of appropriate disclaimers, an attorney can ensure that the persons posing the questions do not have a reasonable expectation that an attorney-client relationship has been formed or that their communications are confidential); N.Y. State Ethics Op. No. 833 (2009) (attorney not ethically required to respond to unsolicited letters from incarcerated individuals requesting legal representation).

\textsuperscript{15} See EEOC v. Peters’ Bakery, 2014 WL 7272943 (N.D. Cal. Dec. 22, 2014) (counsel for employer disqualified due to a conflict of interest arising from a telephone consultation that he had with charging party when she was seeking legal advice regarding the action; although consultation was preliminary, he spoke directly with charging party concerned her and therefore had a direct professional relationship with her before he switched sides); Li v. A Perfect Day Franchise, 2011 WL 4635176 (N.D. Cal. Oct. 5, 2011) (lawyer disqualified from representing putative class against employer in FLSA collective action lawsuit where, before suit was brought, defendant employer had met with lawyer concerning possible retention and those preliminary consultations were substantially related to the current lawsuit, including topics that were central to the issue in the case; even though the employer did not ultimately retain the lawyer it was likely that the employer imparted relevant confidences to the lawyer; co-counsel was not disqualified because there was no showing that employer’s confidences were imparted to co-counsel); Barton v. United States Dist. Ct., 410 F.3d 1104 (9th Cir. 2005) (law firm posted a questionnaire on its website to gather information from potential plaintiffs in a class action lawsuit, which required respondents to check a box acknowledging that the questionnaire did not constitute a request for legal advice and that the respondent was not forming an attorney-client relationship by submitting the information; district court’s order compelling plaintiffs to produce the questionnaires vacated because the disclaimers did not act as a waiver of the privilege; prospective clients’ communications with a view to obtaining legal services were plainly covered by the privilege under California law, regardless of whether they have retained the lawyer and regardless of whether they ever retain the lawyer; the privilege does not apply where the lawyer has specifically stated that he would not represent the individual and in no way wanted to be involved in the dispute, “but the law firm did not do that in this case, it just made clear that it did not represent the submitter yet.” (emphasis in original)); EEOC v. Swissport Fueling, Inc., 2012 WL 1648416 (D. Ariz. May 10, 2012) (individuals who signed Participation Agreements and returned them to the EEOC had, by the terms of the Agreement, an expectation of privacy in a communication with an attorney representing their interests and evaluating their claims, such communications are thus privileged); Liebow v. Boston Enterprises, Inc., 296 P.3d 108 (Colo. 2013) (out of state firm specializing in food poisoning cases properly denied admission pro hac vice as counsel for plaintiff in a Colorado lawsuit because one of its attorneys consulted with defense counsel about defendant restaurant’s possible trial strategy); Gates v. Rohm and Haas Co., 2006 WL 3420591 (E.D. Pa. Nov. 22, 2006) (an attorney-client relationship was formed when individuals, hearing the attorney’s directions that only those seeking legal advice or representation should fill out questionnaires, chose to complete and submit the questionnaires; therefore, the questionnaires are protected by the attorney-client privilege); Gilmore v. Goedcke Co., 954 F. Supp. 187 (E.D. Mo. 1996) (law firm disqualified from representing employer in age discrimination lawsuit where, before bringing suit, plaintiff employee had consulted with a member of the firm about the case, even though representation of plaintiff was declined and even if defendant, whom firm had
not genuinely seeking legal services from the lawyer, but instead attempting to disqualify the lawyer from being engaged by an opposing party (“taint shopping”), then the information disclosed is not protected by the confidentiality or former client rules.\textsuperscript{16}

II. THE LAWYER AS WITNESS

It is common for the attorney to be asked to become involved in various employer-employee disputes before actual litigation arises. For example, in conducting internal investigation of harassment claims, attorneys should be wary of the potential of being later disqualified as a witness.\textsuperscript{17} Plaintiffs’ attorneys may confront this issue when they conduct an investigation and receive potentially useful information from management employees.\textsuperscript{18} Unlike

represented in various matters over a period of 50 years, was regarded as existing client, since without consent of plaintiff, firm could not relay to defendant the nature of any information it had regarding plaintiff, and thus defendant could not make informed decisions as to whether to consent to representation despite material limitation due to firm’s responsibilities to plaintiff; N.J. Ethics Op. No. 17 (1994) (fiduciary relationship extends to preliminary consultation with prospective client, even though actual employment does not result); Wis. Ethics Op. No. EF-10-03 (2010) (When lawyer has received information from a prospective client that could be significantly harmful to the prospective client, the lawyer may not thereafter represent a client whose interests are adverse to the prospective client in the same or a substantially related matter; “significantly harmful” information includes sensitive or privileged information, or that which may have a substantial impact on the prospective client’s interests in the matter. Lawyers may avoid such conflicts by limiting the information received from a prospective client and, with appropriate waivers, seek a prospective client’s agreement that consultations will not result in subsequent disqualification). Cf. Zaug v. Virginia State Bar, ex rel. Fifth District—Section III Committee, 737 S.E.2d 914 (Va. 2013) (Attorney did not violate professional conduct rule relating to communications with persons represented by counsel when, after realizing that caller to her law firm was a plaintiff in medical malpractice action in which attorney’s firm was representing physician, attorney failed to hang up instantaneously, but listened no longer than 30 seconds more to caller's emotional outburst about the toll the litigation was taking on her family before telling caller that attorney's firm could not help her, stating that caller needed to try to reach her own counsel, and terminating the call; rule did not obligate attorney to hang up on a represented person without regard to courtesy.)

\textsuperscript{16} See III. Ethics Op. No. 12-18 (2012) (An attorney may not encourage a client to engage in “taint shopping”; an attorney who participates in an initial consultation with a prospective client, but who is not retained by the prospective client, is not prohibited from representing a client with materially adverse interests in the same or in a substantially related matter if, among other things, the attorney can establish that the prospective client revealed information to the attorney with no intention of retaining the attorney); Mont. Ethics Op. No. 010830 (2000). See also N.J. Ethics Op. No. 703 (2006) (practice under which a client was advised to contact other lawyers for representation essentially on a pretextual basis, in order to disqualify those lawyers from representation of an adversary would run afoul of the Rules of Professional Conduct as it is “conduct prejudicial to the administration of justice,” and should cease immediately); N.Y. City Ethics Op. No. 2006-2 (2006) (no disqualification if prospective client revealed information for purpose of disqualifying lawyer or firm); N.Y. State Ethics Op. No. 923 (2012) (An individual whose purpose in communicating with an attorney is to defraud that attorney rather than to obtain legal services is not a client or prospective client entitled to confidentiality, and it would not violate any ethical rules for the attorney to disclose relevant information to investigators).

\textsuperscript{17} See ABA MODEL RULES R. 3.7 (a lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except, where the testimony relates to an uncontested issue or to the nature and value of legal services rendered in the case, or disqualification of the lawyer would work substantial hardship on the client). If a potential exists for the client to make a decision based upon the attorney’s investigation, the better practice is for the client, or someone else, to conduct the investigation. The attorney’s role should be limited to legal advice.

\textsuperscript{18} See Stewart v. Bank of Am., N.A., 203 F.R.D. 585 (M.D. Ga. 2001) (attorneys who were eyewitnesses to and had personal knowledge of the foreclosure transaction and events subsequent thereto, that were the subject matter of the litigation, were disqualified from representing plaintiff under advocate-witness rule, especially where disqualification would not work a hardship on plaintiff since litigation was in early stage prior to discovery);
the conflict of interest rules, the attorney-witness rule in the majority of jurisdictions only requires the disqualification of the individual lawyer and not the lawyer’s firm, although a few courts have required disqualification of the firm as well. Moreover, the lawyer-witness rule, if applicable, only disqualifies the lawyer from acting as an advocate at trial; other matters, such as participating in pretrial activities, preparation of briefs and pleadings, and planning and trial strategy, are not generally barred in most jurisdictions. Some courts, however, have disqualified

_Hambrick v. Union Township_, 81 F. Supp. 2d 876 (S.D. Ohio 2000) (an attorney who investigated alleged sexual misconduct at police department was disqualified from serving as counsel for victims of alleged misconduct in action against police department; there was good possibility that attorney would be called as witness and that his testimony might be detrimental, prejudicial or contrary to plaintiffs’ claims); _Caplan v. Braverman_, 876 F. Supp. 710 (E.D. Pa. 1995) (motion to disqualify due to conversation between management employee and plaintiff’s attorney concerning plaintiff’s departure from firm; motion denied with respect to attorney’s participation in pretrial and discovery matters; decision regarding trial disqualification delayed until completion of discovery to determine importance of testimony); _Ayus v. Total Renal Care, Inc._, 48 F. Supp. 2d 714 (S.D. Tex. 1999) (attorney-witness rule disqualified attorney for defendant, who wrote letters to plaintiff prior to plaintiff’s discharge, where the truth of the underlying facts stated in letter were squarely at issue; attorney’s firm was not disqualified, nor is attorney precluded from participating in pretrial discovery and pretrial proceedings, with the exception of representing client at his own deposition); _Mt. Rushmore Broad., Inc. v. Statewide Collections_, 42 P.3d 478 (Wyo. 2002) (the likelihood of prejudice to creditor outweighed possible substantial hardship to debtor if debtor’s attorney was allowed to testify on its behalf, while also representing its interests as an advocate, in bench trial dispute over a dishonored check, where district court cited the importance of witness credibility in the case, had concerns about the attorney challenging the credibility of the creditor’s witnesses and, simultaneously, vouching for his own credibility, and noted that the attorney could have reasonably foreseen he would be a witness but, nevertheless, chose to proceed as an advocate).

19 See ABA MODEL RULES R. 3.7(b); _Cardenas v. Benter Farms_, 2001 WL 292576 (S.D. Ind. Feb. 7, 2001) (lawyer-witness rule inapplicable to trial testimony of former members of Legal Services Organization that represented plaintiffs where former members no longer represent the plaintiffs); _Meyer v. Iowa Mold Tooling Co._, 141 F. Supp. 2d 973 (N.D. Iowa 2001) (under Iowa law, attorneys and firm representing employer in employee’s disability discrimination case could not be disqualified based on employee’s intent to call as witness an attorney who was former member of firm); _Cunningham v. Sams_, 588 S.E.2d 484 (N.C. App. 2003) (although disqualification of attorney was proper as attorney was a material and necessary witness, attorney’s law firm should not have been disqualified from representing client at trial); R.I. Ethics Op. No. 2000-02 (2000) (an attorney may not continue to represent agency if he/she will be a witness in the case; however, the attorney may continue to represent agency in the matter where other lawyers for agency are witnesses, provided the lawyer is not otherwise precluded from representation by reason of a conflict of interest); _In re Acevedo_, 956 S.W.2d 770 (Tex. App. 1997) (disqualification of a lawyer who may be a witness does not disqualify other attorneys in that attorney’s law firm, provided the client’s informed consent is obtained). _Cf. Hagood v. Sommerville_, 607 S.E.2d 707 (S.C. 2005) (rule of professional conduct governing “lawyer as witness” did not prohibit individual employed full-time as a professional investigator and accident reconstruction expert by attorney for plaintiff from testifying in personal injury case handled by that attorney in which there existed no conflict of interest between the attorney and the plaintiff, or between the attorney’s employee and the plaintiff: “Jurors are not likely to be confused by a lawyer’s employee testifying as a witness for a client while the lawyer serves as the client’s advocate. Jurors should readily perceive the distinction, particularly since the opposing party may emphasize the fact of the witness’s employment.”).

20 See Ohio Ethics Op. No. 2003-5 (2003) (it is improper for a law firm director or an assistant law director to act as an advocate in a trial in which another attorney in the law director’s office will testify as a witness on behalf of the city unless permitted to do so under one of the exceptions in DR 5-101(B)(1) through (4), or under compelling and extraordinary circumstances recognized by a court); _Reed Elsevier, Inc. v. thelaw.net Corp._, 197 F. Supp. 2d 1025 (S.D. Ohio 2002) (when one lawyer is disqualified because he will testify as a witness, his entire law firm and all other lawyers in it must also be disqualified).

21 See, e.g., ABA Informal Ethics Op. No. 1525 (1989) (a lawyer who expects to testify at trial may represent client in pretrial proceedings, provided client consents after consultation and lawyer believes representation will not
be adversely affected by the lawyer’s interest in the expected testimony; Culebras Enters. Corp. v. Rivera-Rios, 846 F.2d 94 (1st Cir. 1988) (lawyers performing substantial pretrial work did not violate advocate-witness rule because they did not plan to act as advocates at trial if called as witnesses); Murray v. Metropolitan Life Ins. Co., 583 F.3d 173 (2d Cir. 2009) (Even if some portion of testimony of four lawyers with law firm representing insurer would be adverse to the insurer in policyholders’ action challenging its demutualization, disqualification of law firm by imputation was not required under New York’s witness-advocate rule; testifying lawyers would not be trying the case to the jury, and the insurer, a sophisticated client with sophisticated in-house counsel, wished to keep the law firm as its trial counsel.); Petrelli v. Drechsel, 94 F.3d 325, 329 (7th Cir. 1996) (the lawyer-witness rule does not preclude in-house counsel from testifying in employee’s ERISA action since counsel’s role was solely that of a fact witness; although counsel was involved in litigation, he did not act as advocate); Merrill Lynch Bus. Fin. Serv. Inc. v. Nudell, 239 F. Supp. 2d 1170 (D. Colo. 2003) (the attorney for lender, disqualified from representing lender at trial due to likelihood attorney would be called as witness, was not disqualified from representing lender in pretrial matters); Fogani v. Young, 115 P.3d 1268 (Colo. 2005) (courts have discretion to permit an attorney who is disqualified from acting as an advocate because he is likely to be called as a witness at trial, to participate fully in pretrial litigation activities such as strategy sessions, pretrial hearings, mediation conferences, motion practice, and written discovery, so long as the client has consented to the representation and unless such participation would disclose attorney’s dual advocate/witness role to the jury); D.C. Ethics Op. No. 228 (1992) (a lawyer who is likely to be a necessary witness at trial ethically may assist counsel in both pre-trial matters and trial preparation and may continue to represent the party in most pretrial proceedings); Cerillo v. Highley, 797 So. 2d 1288 (Fla. App. 2001) (plaintiff’s counsel was not disqualified from participating in pretrial proceedings in civil battery action, even though there was possibility that counsel would be a witness at trial because he had witnessed the battery); Hallmark Developers, Inc. v. Fulton County, 2007 WL 2819519 (N.D. Ga. Sept. 27, 2007) (the lawyer-witness prohibition only applies when the lawyer acts both as an advocate and a witness at trial; courts refuse to follow jurisdictions who have found that a lawyer who submits an affidavit in a matter thereby becomes a witness for purposes of Rule 3.7.); Ill. Ethics Op. No. 11-06 (2011) (lawyer who is disqualified from representing client at trial because lawyer is likely to be a necessary witness must stop the representation once the trial commences; he may not wait until he is actually called to testify); Ill. Ethics Op. No. 11-05 (2011) (lawyer disqualified from representing client as trial counsel if the lawyer is likely to be a necessary witness is free to represent the client until the trial commences); Drago v. Davis, 1996 WL 479696 (N.D. Ill. Aug. 20, 1996) (defendant’s attorney and his law firm were not disqualified as witnesses even though attorney had a conversation with plaintiff concerning alleged harassment by defendant’s employee; no proof that testimony regarding the conversation would be disputed or that the testimony of defendant’s attorney would be prejudicial to his client); Nguyen v. Louisiana State Bd. Of Cosmetology, 2014 WL 6801797 (M.D. La. Dec. 2, 2014) (lawyer-witness rule does not automatically require that lawyer be disqualified from pretrial activities, such as participating in strategy sessions, pretrial hearings, settlement conferences or motion practice; lawyer not disqualified from acting as an advocate at trial unless he is a necessary witness at the trial); Jackson v. Adcock, 2004 WL 1661199 (E.D. La. July 22, 2004) (rule does not automatically require that lawyer be disqualified from pretrial activities); Smaland Beach Assn., Inc. v. Genova, 959 N.E.2d 955 (Mass. 2012) (unfairness concerns “are absent or, at least, greatly reduced, when the lawyer-witness does not act as trial counsel, even if he performs behind-the-scenes work for the client in the same case” and, therefore, if judge were to disqualify counsel based on Rule 3.7 alone, he is limited to barring the attorney’s participation in the case at trial; any disqualification that might extend to pretrial activities must derive from a different source); Mich. Ethics Op. No. RI-299 (1997) (lawyer not disqualified from representing client in pretrial matters even if lawyer might eventually be disqualified from acting as trial counsel); DiMartino v. Eighth Judicial Dist. Ct., 66 P.3d 945 (Nev. 2003) (rule does not preclude attorney from representing client in the pretrial stage); Main Events Prods. v. Lacy, 220 F. Supp. 2d 353 (D.N.J. 2002) (a lawyer who is likely to be a necessary witness in a case may represent the party in pretrial matters related to that case, even though he cannot be an advocate at trial); Adams v. Suozzi, 340 F. Supp. 2d 279 (E.D. N.Y. 2004), affirmed, 433 F.3d 175 (2nd Cir. 2005) (motion to disqualify denied where attorney is not appearing as a litigator in the case and, instead, the advocacy role is being performed by his partner and an associate of the law firm); 2011 N.C. Ethics Op. No. 1 (2011) (prohibition on lawyer acting as an advocate at a trial in which the lawyer is “likely to be a necessary witness” does not apply to pretrial work, settlement negotiations, or assisting with the trial strategy; nor does it apply to an attorney that represents himself as a litigant); Javorski v. Nationwide Mut. Ins. Co., 2006 WL 3242112 (M.D. Pa. Nov. 6, 2006) (the attorney-witness rule does not disqualify attorney from participating in pretrial activities; disqualification occurs at time of trial); S.C. Ethics Op. No. 81 (2003) (law firm was not disqualified from proceeding in pretrial matters even though the client had previously been a witness for the firm).
counsel at the pretrial stage. Finally, some jurisdictions hold that the rule does not apply unless the attorney is a necessary witness for his own client.

Op. No. 99-03 (1999) (ethics rules do not prohibit lawyer from acting solely as witness at preliminary hearing); Anderson v. Koch Oil Co., 929 S.W.2d 416, 422 (Tex. 1996) (the attorney-witness rule only prohibits testifying attorney from acting as an advocate before a tribunal, not from engaging in pretrial, out-of-court matters such as preparing and signing pleadings, planning trial strategy, and pursuing settlement negotiations). Compare Ramey v. Dist. No. 141, Int’l Ass’n of Machinists and Aerospace Workers, 378 F.3d 269 (2nd Cir. 2004) (in airline mechanics’ RLA action against union for breach of duty of fair representation, trial court did not abuse its discretion in permitting testimony of attorney who previously represented mechanics, where relationship between attorney and mechanics was of short duration and ended long before case came to trial and attorney’s testimony, that union was hostile to mechanics who associated with another union, went to heart of case; under advocate-witness rule, remedy where attorney is called to testify may be to disqualify the attorney in his representational capacity, not his testimonial capacity); Brand v. 20th Century Ins. Co., 124 Cal. App. 4th 594 (2004) (because defendant’s former attorney was personally involved in providing legal advice and services to defendant in matters substantially related to the instant litigation, he is barred from testifying as an expert witness against defendant).

See General Mills Supply Co. v. SCA Servs., Inc. 697 F.2d 704, 716 (6th Cir. 1982) (the term “trial” includes pretrial proceedings); World Youth Day, Inc. v. Famous Artists Merch. Exch., Inc., 866 F. Supp. 1297, 1303 (D. Colo. 1994) (a disqualification from pretrial matters may be appropriate where that activity “includes obtaining evidence which, if admitted at trial, would reveal the attorney’s dual role”); Mercury Vapor Processing Technologies, Inc. v. Village of Riverdale, 545 F. Supp.2d 783 (N.D.Ill. 2008) (In company’s section 1983 action against village for allegedly driving company out of business, disqualification of village attorney, who represented village in counterclaim against company for allegedly operating an illegal solid waste storage and disposal facility, was premature, under advocate-witness rule, at pretrial stage of litigation, even though attorney played significant role in events leading up to litigation, including meetings and phone calls with company officials, issuance of a cease-and-desist order, and denial of business license application; nothing prohibited attorney from participating in discovery, drafting motions, or serving in some other pretrial capacity prior to being called as a witness, case was only at pleading stage and no discovery had yet occurred, it remained conjectural what claims would proceed to trial, let alone whether attorney would be called as a witness, and whether attorney would be allowed to continue as counsel if called to testify depended upon who called him as a witness); Freeman v. Vicchiarelli, 827 F. Supp. 300 (D.N.J. 1993) (a lawyer likely to be called as witness for client may not represent client even during pretrial stages); Munk v. Goldane Nat’l Corp., 697 F. Supp. 784 (S.D. N.Y. 1988) (lawyer-witness rule disqualifies lawyer from all aspects of representation); Hood v. Midwest Sav. Bank, 2001 WL 327723 (S.D. Ohio Mar. 22, 2001) (the lawyer-witness rule extends disqualification to all phases of litigation, including pretrial proceedings).

See Macheca Transp. Co. v. Philadelphia Indem. Co., 463 F.3d 827 (8th Cir. 2006) (disqualifying attorney as insured’s counsel was an abuse of discretion, where district court considered only whether attorney’s testimony was relevant, without considering whether attorney was the only witness available to testify in support of insured’s vexatious refusal to pay claim against all-risk insurer); Horaist v. Doctor’s Hosp. of Opelousas, 255 F.3d 261 (5th Cir. 2001) (plaintiff’s attorney not disqualified from representing plaintiff in employment discrimination action on ground that he could be called to testify as to nature of plaintiff’s intimate relationship with attorney and the fact that she did not reveal her harassment to him at the time; attorney was not a necessary witness since his testimony was cumulative of information that was available from another source, and plaintiff had no interest in discrediting attorney’s testimony because his testimony corroborated hers); Pigott v. Sanibel Dev., LLC, 2007 WL 2713188 (S.D.Ala. Sept. 17, 2007) ( the “necessary witness” standard of the Alabama advocate-witness rule requires the party seeking disqualification to establish that relevant, material evidence could not be obtained other than by calling the attorney as a witness); McNair v. County of Maricopa, 2005 WL 3079027 (D. Ariz. Oct. 26, 2005), affirmed, 229 Fed. App. 482 (9th Cir. 2007) (“A party’s mere declaration of an intention to call opposing counsel as a witness is an insufficient basis for disqualification even if that counsel could give relevant testimony.” It must be shown “that the attorney will give evidence material to the determination of the issues being litigated and that the evidence is unobtainable elsewhere[].” (citations omitted)); Weigel v. Farmers Ins. Co., 158 S.W.3d 147 (Ark. 2004) (attorney-witness rule applies in cases where the attorney will be called to testify as witness for the opposing party provided the attorney’s testimony is material to the determination of the issues being litigated, the evidence is unobtainable
elsewhere, and the testimony is or may be prejudicial to the testifying attorney’s client; Colyer v. Smith, 50 F. Supp. 2d 966 (C.D. Cal. 1999) (plaintiffs’ claim that defense counsel may be needed as fact witnesses did not warrant disqualification of defense counsel, absent showing that plaintiff needed testimony of opposing counsel or that it could not obtain desired information from other witnesses); AlliedSignal Recovery Trust v. AlliedSignal, Inc., 934 So.2d 675 (Fla. App. 2006) (seller of business, which was defendant in fraud action brought by creditors’ trust of bankrupt buyer, failed to show that trust’s attorney, when called as seller’s witness, would give any testimony adverse to factual allegations of trust’s fraud complaint, as required to disqualify attorney from representing trust as “key witness” for seller.); Hallmark Developers, Inc. v. Fulton County, 2007 WL 2819519 (N.D. Ga. Sept. 27, 2007) (the use of an affidavit in opposition to a motion for summary judgment does not make the affiant a likely necessary witness under Georgia Rule 3.7 absent a showing that the information contained therein is unobtainable elsewhere); Bogosian v. Bd. of Educ. of Cnty. Unit Sch. Dist. 200, 95 F. Supp. 2d 874 (N.D. Ill. 2000) (teacher’s attorney would not be disqualified because of possibility that the attorney would testify to authenticity of attorney’s letter to school board that memorialized alleged oral agreement that items would be removed from teacher’s file upon his resignation; teacher sought to show that the resignation was contingent on board’s agreement with those terms, rather than to enforce the oral contract and, therefore, attorney’s testimony was not essentially); Zurich Ins. Co. v. Knotts, 52 S.W.3d 555 (Ky. 2001) (affidavit filed by accident victims’ attorney in opposition to a motion for summary judgment in action for bad faith in insurance claims process; the limited and specialized use of an affidavit by an attorney, who does not testify at trial for his clients, provides an insufficient justification to allow opposing counsel to deprive a party of its right to counsel of its choice); EEOC v. Bardon, Inc., 2010 WL 323067 (D. Md. Jan. 19, 2010) (attorney who conducted sexual harassment investigation for defendant corporation disqualified under the lawyer-witness rule from acting as an advocate at trial); Smaland Beach Assn., Inc. v. Genova, 959 N.E.2d 955 (Mass. 2012) (Trial court in trespass and adverse possession action between property owner and neighbors could not disqualify property owner’s attorney as a necessary witness on ground that property owner had raised an advice of counsel defense to certain of neighbors’ claims, without determining whether information sought from attorney could be adduced through other means; neighbors failed to articulate expected content of attorney’s testimony or explain why attorney’s testimony was necessary to defend property owner.); Aleynu, Inc. v. Universal Property Development and Acquisition Corp., 564 F. Supp.2d 751 (E.D. Mich. 2008) (Disqualification of holder’s attorney was not warranted under Michigan ethics rule prohibiting a lawyer from acting as an advocate in a trial in which the lawyer was likely to be a necessary witness, although his extensive involvement with all parties on both sides of the lawsuit rendered intolerable the likelihood that he would slip into and out of his roles as advocate and fact witness, which would undermine detached professionalism that was required by members of the Bar); Nelson v. Hartford Ins. Co. of the Midwest, 2012 WL 761965 (D. Mont. March 8, 2012) (where plaintiff’s lawyer found to be necessary witness for her client in matter, lawyer shall be disqualified from trying the case; she may not make opening or closing arguments or examine witnesses, nor may she take depositions. Attorney may still participate as counsel or co-counsel in other ways that are consistent with the applicable rules and case law, including all pretrial activities besides depositions.); Finkel v. Frattarelli Bros., Inc., 740 F. Supp.2d 368 (E.D. N.Y. 2010) (employer motion to disqualify counsel for trustees of union trust funds in ERISA action against employer for fraudulent failure to pay contributions to the funds under the witness-advocate rule denied where counsel’s testimony would be merely cumulative of testimony provided by others, and the testimony sought to elicited from them—how the industry standard was created and what the process was for deciding whether to act against double-breasted operations—is not probative on the issue of defendants’ intent); Decker v. Nagel, Rice LLC, 716 F. Supp.2d 228 (S.D. N.Y. 2010) (Request for pro hac vice admission denied because proposed attorney for plaintiffs would be disqualified under the advocate-witness rule; in order to disqualify an attorney on the basis of the advocate-witness rule, a party must demonstrate that the testimony is both necessary and likely to be prejudicial to his client’s position and prejudice in this context means testimony that is ‘sufficiently adverse to the factual assertions or account of events offered on behalf of the client, such that the bar or the client might have an interest in the lawyer’s independence in discrediting that testimony.’”); Hamrick v. Union Township, 81 F. Supp. 2d 876 (S.D. Ohio 2000) (an attorney who investigated alleged sexual misconduct at police department was disqualified from serving as counsel for victims of alleged misconduct in action against police department; there was good possibility that attorney would be called as witness and that his testimony might be detrimental, prejudicial, or contrary to plaintiff’s claims); In re Sanders, 153 S.W.3d 54 (Tex. 2004) (assuming that evidence of husband’s barter arrangement with his attorney, was essential to the case because it would show that husband’s employment schedule would affect his ability to care for his minor child or pay child support, testimony from the attorney was not necessary, and thus disqualification of attorney under the
III. ISSUES INVOLVING CORPORATE/GOVERNMENTAL PARTIES

A. Attorney-Client Privilege

The attorney-client privilege protects disclosure of contents of communications between an attorney and the attorney’s client. Because lawyers representing corporations and organizations owe their fundamental allegiance to the entity, not to any of its officers, directors or employees, it must be determined which individuals within the entity are included within the scope of the attorney-client privilege.

1. The Tests for Determining Corporate “Client Confidences”

Courts have developed two different approaches to determining which communications between a lawyer and members of a corporation or organizational party are protected from disclosure by the attorney-client privilege: the “control group” test and the “subject matter” test.

“Control Group” Test. The “control group” test applies the privilege only to persons in a position to control or take substantial part in a decision about any action that the corporation

Communications made to an individual in the reasonable, but mistaken, belief that the individual was an attorney may also be protected. See Gucci America, Inc. v. Guess?, Inc., 2011 WL 9375 (S.D. N.Y. Jan. 3, 2011) (communications between plaintiff corporation and its in-house counsel were protected by the attorney-client privilege even though at the time of the communications the counsel was an “inactive” member of the California bar; attorney-client privilege attaches to confidential communications made to an individual in the genuine, but mistaken, belief that the individual is an attorney and the corporation had a reasonable belief that the in-house counsel was an attorney throughout the relevant period).
could take upon advice of counsel.  

“Subject Matter” Test. The United States Supreme Court explicitly rejected the “control group” test in *Upjohn Co. v. United States*, 449 U.S. 383 (1981). Although not endorsing any broad alternative rule, the Court’s ad hoc, case-by-case balancing approach was consistent with the subject matter test of *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 609 (8th Cir. 1977), which the Court cited with approval. Under the subject matter test of *Diversified Industries*, the attorney-client privilege is applicable to an employee’s communication if: (1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee’s corporate duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.  

*Upjohn* and its progeny are binding only upon federal courts, although many state

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28 See *In re County of Erie*, 473 F.3d 413 (2nd Cir. 2007) (emails between assistant county attorney and county officials were protected from disclosure by the attorney-client privilege; each of the emails was sent for the predominant purpose of soliciting or rendering legal advice since they conveyed to the officials responsible for formulating, implementing and monitoring county’s correctional policies, a lawyer’s assessment of the Fourth Amendment requirements and provided guidance in drafting and implementing alternative policies for compliance); *In re Ford Motor Co.*, 110 F.3d 954, 964-65 (3rd Cir. 1997) (minutes of meeting attended by top-level executives of automobile manufacturer, in which general counsel briefed attendees about a report he had drafted regarding vehicle that was subject of plaintiff’s product liability claims, were protected by attorney-client privilege under either Pennsylvania or Michigan law, as ultimate decision at meeting was reached only after legal implications of doing so were discussed, and disclosure of documents would reveal legal advice secured by attendees); *Exxon Mobil Corp. v. Hill*, 751 F.3d 379 (5th Cir. 2014) (Under Louisiana law, memorandum that recorded the advice of oil company’s in-house lawyer regarding how to respond to another company's request for certain test results during contract negotiations was protected by the attorney-client privilege; document was prepared during contract negotiations in which both sides were assisted by legal counsel, the negotiations involved a number of legal issues, including indemnity for downstream tort claims, storage and handling of nuclear residue, licensure, trade secrets, and other issues, and the manifest purpose of the memorandum was to deal with any legal liability that could stem from under-disclosure of data, hedged against any liability that could occur from any implied warranties during complex negotiations); *In re Grand Jury Subpoena*, 886 F.2d 135 (6th Cir. 1989) (city council was client of city attorney with respect to closed condemnation hearings held pursuant to city code; therefore, district court erred in concluding that city council could not invoke attorney-client privilege to protect minutes of the meetings); *Shaffer v. American Medical Assn.*, 662 F.3d 439 (7th Cir. 2011) (in FMLA case, memorandum prepared by department head regarding rationale for staff reductions, prepared for the sole purpose of meeting with in-house counsel regarding threatened litigation concerning the decision, was privileged, even though prepared after the decision in question was made); *United States v. Graf*, 610 F.3d 1148 (9th Cir. 2010) (Defendant, who was functional equivalent of employee of health insurance company, was not entitled to personal claim of attorney-client privilege to protect his communications with corporate counsel for company; although defendant was primary agent with whom corporate counsel communicated, counsel never informed defendant that he was their client, all matters discussed between defendant and counsel related to the company, the company paid all legal bills, and defendant admitted that he never requested that counsel represent him personally.); *Sprague v. Thorn Ams., Inc.*, 129 F.3d 1355 (10th Cir. 1997) (legal memorandum allegedly addressing employer’s disparate treatment of women prepared for higher management by in-house attorney acting within scope of employment protected by attorney-client privilege, even if communications do not contain confidential matters; plaintiff’s affidavit by management employee referring to contents of memorandum did not waive privilege; power to waive privilege rests with corporation’s management
courts now reach the same result. Note that the privilege will not apply if the communications

and is normally exercised by its officers and directors); Reyes v. United States Environmental Protection Agency, 991 F. Supp.2d 20 (D.D.C. 2014) (emails between agency counsel and other agency staff were subject to attorney-client privilege, and thus emails were properly withheld from disclosure under Freedom of Information Act (FOIA) exemption for information that would not be available by law to a party other than an agency in litigation with the agency; emails pertained to an issue for which agency sought the legal advice of its lawyers, and emails were kept confidential as they were limited to those responsible for developing agency's position on the subject of the communications); A.N.S.W.E.R. Coalition v. Jewell, 292 F.R.D. 44 (D.D.C. 2013) (Communications between government attorneys and United States Secret Service were protected by attorney-client privilege in anti-war organization's suit against the agency seeking declaratory and injunctive relief regarding agency's prohibition on sign supports along presidential inaugural parade route, since they involved weighing the legal risks associated with certain agency undertakings and working to tailor those undertakings to the requirements of the law.); Howell v. Joffe, 483 F. Supp. 2d 659 (N.D. Ill. 2007) (lawyer for defendant left voice mail message on answering machine of former parochial school student who had sued church and diocese for allege childhood sexual abuse, then incorrectly hung up phone and proceeded to speak with an employee of the defendant about the plaintiff; the communication was protected from disclosure under the attorney-client privilege, to the extent the message inadvertently memorialized prior confidential conversation between defense counsel and clergy; prior conversation involved, inter alia, comparison between former student and others who had made similar allegations.); Sky Angel U.S., LLC v. Discovery Communications, LLC, ___ F. Supp.2d ___, 2014 WL 2964080 (D. Md. June 30, 2014) (Under Maryland law, a magistrate judge's determination, that the primary purpose of a chain of emails regarding due-diligence review of a prospective contract partner's distribution methodology was to obtain legal advice, and thus the emails were protected under attorney-client privilege, was not clearly erroneous or contrary to law, as required to sustain a party's objection to the magistrate judge's ruling, even though the resulting due-diligence memo was distributed to both the in-house attorney and non-legal employees, where the attorney testified that he acted exclusively in a legal and not a business capacity as an in-house attorney, and that he used the memo in drafting a distribution agreement with the partner); Verschoth v. Time Warner, Inc., 85 Fair Empl. Prac. Cas. (BNA) 1528 (S.D. N.Y. 2001) (conversations between a freelance editor and a staff editor in which legal advice about the plaintiff was discussed was not protected by the attorney-client privilege because the freelance editor did not manage or supervise employees and was not responsible for effecting corporate policy regarding the legal advice given). Rivera v. Kmart Corp., 190 F.R.D. 298, 303 (D.P.R. 2000) (documents authored by corporate official in charge of corporation’s insurance claims were protected by attorney-client privilege, where the information was needed by the corporation’s lawyers, and in-house counsel who received information from official was acting as an attorney when he received the documents; moreover, subjects discussed therein were consistent with giving subsequent legal advice); Brennan v. Western Nat. Mut. Ins. Co., 199 F.R.D. 660 (D.S.D. 2001) (handwritten note by employee of insurer which memorialized advice given by insurer’s attorney over telephone was covered by attorney-client privilege in insured’s bad faith action against workers’ compensation insurer); Variable Annuity Life Ins. Co. v. PENCO, Inc., 2006 WL (S.D. Tex. January 7, 2006) (questions asked and answers given in interviews conducted by a company employee at president’s request were not protected by the attorney-client privilege simply because the company communicated the information to its counsel and one cannot bring communications within the attorney-client privilege simply by giving them to an attorney; however, any communications between company employees and company’s counsel regarding the proper course of action based on the results of the interviews would be protected as an attorney-client communication); Cf. Miles v. Great Northern Ins. Co., 671 F.Supp.2d 231 (D.Mass. 2009), judgment affirmed, 634 F.3d 61 (1st Cir. 2011) (information withheld from fire insurer by attorney/insured in examination under oath conducted during insurer’s investigation into whether insured had intentionally set fire, namely identities of persons that allegedly had threatened to “destroy” insured, was not protected by attorney-client privilege; information in question was within except for prevention of criminal or fraudulent act reasonably believed likely to result in substantial injury to financial interests or property of another); State ex rel. Leslie v. Ohio Hous. Fin. Agency, 824 N.E.2d 990 (Ohio 2005) (communications by attorney-employees of State Departments are subject to the attorney-client privilege.).

29 See In re Bieter Co., 16 F.3d 929 (8th Cir. 1994).
client privilege precluded property insurer’s attorney from being compelled to answer deposition questions as to (a) what she told a partner in her firm in order for him to write a personal check to a witness in an investigation of insured’s property damage claims, (b) as to whether attorney explained to partner who the witness was before partner wrote the check, and (c) as to how another attorney at the firm drafted a witness’s declaration without speaking to the witness, in an investigation of insured’s property damage claims; the questions sought the other attorney’s evaluation of the witnesses and legal opinions involved in the drafting of the declaration and are not discoverable, absent evidence that those legal opinions had been shared with anyone outside the firm.; Scripps Health v. Super. Ct., 109 Cal. App. 4th 529 (2003) (confidential occurrence reports prepared by a hospital were protected by the attorney-client privilege where the reports were confidential reports prepared by hospital employees under its risk management plan and pursuant to the directive of its legal department and the reports were “primarily created for the purpose of attorney review, whether or not litigation is actually threatened at the time the report is made”); Woodbury Knoll, LLC v. Shipman and Goodwin, LLP, 48 A.3d 16 (Conn. 2012) (Trial court’s decision to grant the request of defendant law firms in an underlying legal malpractice case for privileged, attorney-client communications from a non-party law firm, on the basis the requested materials were not, or no longer were protected by the attorney-client privilege, constituted an abuse of discretion; the request for any and all documents related to non-party law firm’s representation of plaintiff clients in an unrelated action clearly embodied a request for privileged materials); Lash v. Freedom of Information Commission, 14 A.3d 998 (Conn. 2011) (Communications between assistant town attorney and town’s first selectman related to legal advice, as required to establish that the communications were exempt, pursuant to attorney-client privilege, from disclosure requirements of FOIA; communications discussed strategy concerning pending litigation arising from request to town board of estimate and taxation for geographical information system (GIS) data, stated that attorney took action in response to a suggestion by one of the town official, reported the results of the action, and offered a strategic analysis of those results.; Ford Motor Co. v. Hall-Edwards, 997 So.2d 1148 (Fla. App. 2008), review denied, 14 So.3d 241 (Fla. 2009) (Corporate counsel database was a mechanism for manufacturer’s inside and outside counsel to communicate among each other, exchanging thoughts, opinions, strategies, mental impressions, and advice regarding defense of lawsuits and claims solely for the purpose of, and in furtherance of, the rendition of legal services to manufacturer, and, thus, was confidential communication immune from discovery under attorney work product and attorney-client privileges, where opposing party did not challenge manufacturer’s affidavits or testimony attesting to privileges); Keefe v. Bernard, 774 N.W.2d 663 (Iowa 2009) (Iowa rejects “control group” test); Lexington Pub. Library v. Clark, 90 S.W.3d 53 (Ky. 2002) (definition of “representative of the client” in Ky. Rules of Evidence was intended to embody the principles enunciated in Upjohn); Neighborhood Dev. Collaborative v. Murphy, 233 F.R.D. 436 (D. Md. 2005) (the “intermediary doctrine” protected the attorney-client privilege with respect to communications between the law firm representing defendant and financial advisor, as these privileged communications were made in confidence for the purpose of obtaining legal advice from the law firm); Gifford v. Target Corp., 723 F. Supp.2d 1110 (D. Minn. 2010)(E-mail sent by employer’s senior manager to her supervisor with a courtesy copy to employer’s in-house counsel and another employee, which summarized conversation between manager and outside counsel as to selection of store team leaders, was entitled to attorney-client privilege in employees’ FLSA action against employer; manager, pursuant to her supervisors’ discretion, included counsel on communication relating to matter affecting scope of manager’s duties and requested thoughts of in-house counsel, and e-mail also described content of a previous privileged discussion manager had with outside counsel regarding legal analysis and strategy.); Mich. Ethics Op. No. RI-348 (2010) (lawyer may rely on nonlawyer assistant as an intermediary to gather information from client and then relay the lawyer’s advice back to the client, provided lawyer takes steps to prevent the assistant from elaborating or adding to the lawyer’s advice); ATV Watch v. New Hampshire Dep’t of Transportation, 20 A.3d 919 (N.H. 2011) (Documents related to discussions between attorney for Department of Transportation and attorney for New Hampshire Department of Resources and Economic Development were made for purposes of facilitating rendition of professional legal services to DOT, and thus, were privileged attorney-client communications, for purposes of petitioners’ request to DOT for records relating to use of all-terrain vehicles on former railroad corridors converted to rail trails; State ex rel. Leslie v. Ohio Hous. Fin. Agency, 824 N.E.2d 990 (Ohio 2005) (communications by attorney-employees of State Departments are subject to the attorney-client privilege.); Tobaccoville USA, Inc. v. McMaster, 692 S.E.2d 526 (S.C. 2010) (Attorney client privilege applied to documents between Attorney General (AG) and National Association of Attorneys General concerning cigarette importer’s status as tobacco product manufacturer under Master Settlement Agreement (MSA) on recovery of tobacco related health care costs, if the documents contained confidential communications pertaining to legal matters; although AG

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at issue were not created for the purpose of securing legal advice to the corporation;\textsuperscript{31} or the

had not retained Association attorneys, Attorney General was paid member and solicited Association attorneys for
legal advice and consultation on matters relating to the tobacco litigation, the MSA, subsequent enforcement of the
 privilege may apply to communications between attorneys and employees who are not executives or supervisors); In
re Small, 346 S.W.3d 657 (Tex. App. 2009) (in suit by former lessee against energy company and its landman for
fraudulent inducement, assertion by former lessee that company’s attorney-client privilege was waived because it
included company’s landman was rebutted by evidence that landman was retained to assist attorney regarding
curative measures being taken on the property title, and he understood his communications were confidential); In re
Houseman, 66 S.W.3d 368 (Tex. App. 2001) (psychiatrist employed by attorney to assess client’s mental
competency was “representative of the lawyer” and thus his testimony was barred by attorney-client privilege);
Moler v. CW Management Corp., 190 P.3d 1250 (Utah 2008) (For a person to qualify as a representative of the
client, for purposes of attorney-client privilege, there is no requirement that the person must be retained to give legal
advice or that the person’s services must be essential to legal representation of the client; in order to resolve whether
a person qualifies as a representative of the client, the district court need make only determine whether the
individual was “one having authority to obtain professional legal services, or to act on advice rendered pursuant
thereo, on behalf of the client, or one specifically authorized to communicate with the lawyer concerning a legal
matter”); Broyles v. Thurston County, 195 P.3d 985 (Wash. App. 2008) (Communications that occurred at meeting
between female deputy prosecuting attorneys (DPAs) and attorneys who ultimately represented them in workplace
discrimination action against county were privileged, regardless of whether a female DPA who attended the meeting
but was not a plaintiff in the subsequent action believed she was a client or was willing to waive the privilege). See
also Section 12-2234.B of the Ariz. Statutes (communication between an attorney for a corporation, government
agency, partnership, or other similar entity, and an employee, agent or member of the entity or employer is
privileged if it concerns acts or omissions of or information obtained from the employee, agent or member if the
communication is either: (1) for the purpose of providing legal advice to the entity or employer or to the employee,
agent or member; or (2) for the purpose of obtaining information in order to provide legal advice to the entity or
employer or to the employee, agent or member).

\textsuperscript{31} See, e.g., In re Google, Inc., 462 Fed. Appx. 975 (Fed. Cir. 2012) (in patent infringement action, email from
in-house counsel responding to a request from company management was not shown to be privileged where the
email’s discussion was directed at a negotiation strategy as opposed to a license negotiation as a component or legal
strategy, the email did not evidence any sort of infringement or invalidity analysis and nothing in the content of the
email indicated that the in-house counsel prepared it in anticipation of litigation or to further the provision of legal
advice; the fact that the email contained the words “confidential” do not demonstrate entitlement to the privilege in
light of the email’ contents); Northrop Grumman Corp. v. United States, 80 Fed. Cl. 651 (Fed.Cl. 2008) (Claim
research papers which were created by the government primarily for use by contracting officer in preparing his final
decision on contractor’s claim were not protected by the work product doctrine or the attorney-client privilege, and
thus their voluntary disclosure by the government in contractor’s suit for breach of contract did not effect a subject
matter waiver of privilege); United States v. Leonard-Allen, 739 F.3d 948 (7th Cir. 2013) (Attorney-client privilege
did not protect client intake form on which defendant listed her co-defendant as the person who referred her to the
bankruptcy lawyer, in defendant's prosecution for perjury for testifying before a grand jury that co-defendant had not
referred her to her bankruptcy lawyer; defendant's disclosure of who referred her did not reflect either the lawyer's or
defendant's thinking, and it was not instrumental to the substance of the bankruptcy advice that lawyer provided, and
statement on form that defendant's reason for seeking representation was financial did not reveal otherwise
confidential information about defendant's motives, as it was widely known that lawyer represented defendant for
bankruptcy.); Southern Utah Wilderness Alliance v. Automated Geographic Reference Center, 200 P.3d 643 (Utah
2008) (Records maintained by Center, regarding rights-of-way that State and county claimed they obtained under
repealed federal statute that offered free rights-of-way across federal lands, were not protected by the attorney-
client privilege when wilderness preservation group requested such records under the Government Records Access
and Management Act, though the State and the county were involved in litigation with federal government regarding
such rights-of-way, as the Center was not a party to the litigation agreement between the Attorney General’s office,
the State and the county that created the attorney-client relationship, a state statute required the Center to create and
maintain records on such rights-of-way for the benefit of State and federal agencies as well as private persons, and
individual providing the advice is not an attorney or acting in the capacity as such;\footnote{In re Grand Jury Subpoena (Mr. S.), 662 F.3d 65 (1st Cir. 2011) (Where an attorney acts merely as a scrivener—facilitating the consummation of a real estate transaction, passing title, and disbursing funds—the documents generated by those actions are typically not privileged.); In re Grand Jury Subpoena, 542 Fed. Appx. 252 (4th Cir. 2013) (Certain e-mails sent by a government-employed lawyer were not protected by the attorney-client privilege, and thus, were required to be produced in response to grand jury subpoena, absent showing that the government-employed lawyer was acting as a lawyer or providing a legal opinion in those e-mail.); United States v. Spencer, 700 F.3d 317 (8th Cir. 2012) (Attorney-client privilege did not apply to communications between defendant, who was charged with wire fraud and other fraud-related offenses, and attorney who prepared his income tax returns; attorney provided no legal advice to defendant, but acted in his capacity as a certified public accountant (CPA) while assisting defendant with his taxes.); Baran v. Walsh Construction Co., 2007 WL 54065 (N.D. Ill. Jan. 4, 2007) (emails between various officials of defendant construction company and its vice president in charge of insurance department were not protected by the attorney-client privilege, even though the vice president also worked in the legal department of the company, where the vice president was acting in his capacity as the head of the insurance department, not in his capacity as the company’s legal counsel.); HPD Lab., Inc. v. Clorox Co., 202 F.R.D. 410 (D. N.J. 2001) (communications between defendant’s marketing department and paralegal did not come from a legal consultation process, thereby not falling within the scope of the attorney-client privilege.)} or if its

the records were not created for the purpose of providing or obtaining legal advice); \textit{Ponca Tribe of Indians v. Continental Carbon Co.}, 2008 WL 4372802 (W.D. Okla. Sept. 28, 2008) (Attorney-client privilege did not apply to e-mails exchanged between defendant corporation’s employees, even if they were also sent to corporation’s attorney. The e-mails contained routine business information that made no explicit request for legal advice or reference to an attorney’s review. The protection of the privilege applies only if the primary or predominant purpose of the attorney-client consultation is to seek legal advice or assistance. Evidence did not link specific requests for legal advice to the broad range of apparently routine matters discussed among corporation’s employees.); \textit{Baez-Eliza v. Instituto Psicoterapeutico de Puerto Rico}, 275 F.R.D. 65 (D. P.R. 2011) (following communications found not to fall within the scope of the attorney-client privilege: (1) string of emails setting forth date, time and participants of party’s employees’ meetings with attorneys; (2) email from employer’s president to its attorney, in which president conveyed his opinion about former employee who was suing employer for disability discrimination, even though it was marked as “confidential” and addressed to attorneys; (3) email between employer’s president and its director of operations, in which they discussed words to use in upcoming meeting with former employee who was suing for employment discrimination; and (4) email sent by employer’s director of operations to its president, in which director indicated that she was drafting factual account of events to obtain legal advice from employer’s attorneys in connection with former employee’s employment discrimination suit); \textit{State ex. Rel. State v. Burnside}, 757 S.E.2d 803 (W.Va. 2014) (Audio recording of conversation between confidential informant and defendant, an attorney, was not made in violation of section of West Virginia Wiretapping Act governing interception of communications in a law office, since conversation was not privileged as an attorney-client conversation; informant was not seeking legal advice from defendant, but was only seeking to purchase cocaine from him, and informant, having agreed to wear a recording device, did not intend that the conversation be kept confidential). Compare \textit{Oasis International Waters, Inc. v. United States}, 110 Fed. Cl. 87 (2013) (Passage in contracting officer’s “Memorandum for Record” discussing government's reasoning for issuing modification to a government contract, in which contracting officer summarized advice provided by legal counsel, was protected by attorney-client privilege, even though the passage partly concerned financial and operational matters and not just legal advice; totality of the passage indicated that contracting officer requested legal advice regarding how to proceed with the contract with reference to counsel's knowledge and discretion in law. An attorney's focus during contract negotiations on achieving the most financially advantageous outcome for his or her client does not transform the attorney's communications into business advice that would not be protected by attorney-client privilege); \textit{Skansgaard v. Bank of America, N.A.}, 2013 WL 828210 (W.D. Wash. March 6, 2013) (attorney-client privilege applied to business presentation document prepared by defendant bank’s in-house counsel and presented to the president of a bank division regarding both the business and legal bases and risks associated with the change to the bank’s flood insurance placement methodology; although communications made by an attorney performing a dual role of providing legal advice as well as advising on business affairs poses a challenge in determining whether the communication was of a legal nature and thus privileged, a review of the document reveals that counsel was assessing the legal risks of instituting the change and thus, the document is subject to the attorney-client privilege.);
within attorney-client privilege; department approached paralegal for her own legal views, not for the purpose of obtaining legal advice from an attorney, and she gave her advice independently, rather than as part of effort to assist attorney in formulating and rendering legal advice to the client; Anwar v. Fairfield Greenwich Ltd., 982 F. Supp. 2d 260 (S.D. N.Y. 2013) (Magistrate judge's ruling that Dutch bank could not have reasonably believed its unlicensed, in-house attorney was in fact an attorney, as would provide an exception under United States law to rule that attorney-client privilege did not protect communications with non-attorneys, was not clearly erroneous or contrary to law, where in-house attorney was not, and never had been, licensed in any jurisdiction, and he neither held himself out to be a licensed attorney nor performed acts suggesting to bank that he was admitted to the Netherlands bar); Wultz v. Bank of China Limited, 979 F. Supp. 2d 479 (S.D. N.Y. 2013) (Chinese bank's in-house documents governed by United States privilege law, except documents which were actually communications from and to licensed attorneys, were not protected by attorney-client privilege, in suicide bombing victims' action against bank under Antiterrorism Act (ATA); because Chinese law did not require in-house counsel to be licensed, there can be no “reasonable mistake” as to whether an in-house counsel served as a licensed attorney, on motion for reconsideration, 2013 WL 6098484 (S.D. N.Y. Nov. 20, 2013) (clarifying that American privilege law applies to all communications that properly “touch base” with U.S., legal matters, even if those matters are unrelated to the present litigation, and that it may assert privilege with respect to internal investigatio if it proceeded at the direction of counsel for the purpose of obtaining legal advice); Financial Techs. Int'l, Inc. v. Smith, 2000 WL 1855131 (S.D. N.Y. Dec. 19, 2000) (corporate communications with an unlicensed in-house attorney are not privileged if the corporation fails to verify its counsel’s status with the Bar).

33 See, e.g., United States ex rel Barko v. Halliburton Co., 2014 WL 6657103 (D.D.C. Nov. 20, 2014) (finding that attorney-client privilege did not apply to (i) documents with attorneys merely as incidental recipients, (ii) documents that merely reflect that a consultation occurred, and (iii) litigation hold notices that were not intended to be kept confidential—they were sent to large groups such as “all KBR employees,” and follow-up emails encouraged employees to share some of the litigation hold notices with other employees who may not have received or read the first notice, and no warning was given that these notices should not be discussed outside the company or with unauthorized persons); Reed v. Baxter, 134 F. 3d 351 (6th Cir. 1998) (two councilmen were not clients of city attorney with respect to meeting among city attorney, city manager and fire chief regarding EEOC charges of white firefighters and thus the contents of the meeting were not protected by privilege; the councilmen were present as elected officials investigating reasons for executive behavior and not as clients, since they played no part in the decision at issue); Keeve v. Bernard, 774 N.W.2d 663 (Iowa 2009) (Memorandum that attorney for clinic and doctor prepared after meeting with patient’s treating orthopedic surgeon was not protected by clinic’s attorney-client privilege, even though orthopedic surgeon was employee of clinic; memorandum reflected orthopedic surgeon’s observations as witness or expert regarding doctors’ treatment decisions based on his position as subsequent treating physician. If a corporate employee is interviewed by corporate counsel as a witness to the actions of others, the communication is not protected by the corporation’s attorney-client privilege.); Dahl v. Bain Capital Partners, LLC, 714 F. Supp. 2d 225 (D. Mass. 2010) (Email communications between counsel for leveraged buyout target and financial advisor, which was copied on or forwarded legal documents and communications about legal issues between target and its lawyers in order for advisor to provide “feedback” based on its financial expertise and industry experience, did not fall within the exception to rule waiving attorney-client privilege by disclosure of communications to third parties; advisor’s role with respect to the emails was to provide business advice rather than legal advice, and there was no showing that advisor’s review of legal documents and legal advice was necessary, or at least highly useful, in facilitating legal advice.).

34 Shaffer v. American Medical Ass’n, 662 F.3d 439 (7th Cir. 2011) (Memorandum prepared by employee’s supervisor for the sole purpose of meeting with in-house counsel regarding the elimination of employee’s position was protected by attorney-client privilege; memorandum was prepared in connection with the provision of legal services in that supervisor was told that, in preparation for the meeting with in-house counsel with respect to anticipated litigation regarding the elimination of employee’s position, he should put in writing his recollection of his decision-making regarding elimination of employee’s position); Zurich Amer. Ins. Co. v. Superior Ct., 155 Cal. App. 4th 1485 (2007) (in bad faith action by insured against insurer, the attorney-client privilege presumptively
And the privilege can extend to communications beyond the direct attorney-client relationship, such as separately represented parties with a “common interest” in the communications at issue.15

applied to communications between and among personnel who were not lawyers insofar as legal advice was discussed or contained in communications among insurer’s employees to whom disclosure of legal advice or opinions was necessary to further purpose of legal consultation; Ryskamp v. Looney, 2011 WL 3861437 (D. Colo. Sept. 1, 2011) (communications between law firm and its clients—a closed-end fund, its director and its managing advisor—were protected by attorney-client privilege despite inclusion of the fund management, the fund’s compliance officer, interested directors and adviser portfolio managers and counsel in the communications; the individuals had a significant relationship to the matter at issue, the purpose of the communications was to gain or provide legal assistance, the subject matter was within the individuals’ duties, and the communications were treated as confidential. Communications where the law firm was not a participant were nevertheless privileged where the communications were either directed by the firm or which discussed legal advice provided by the firm); Carter v. Cornell Univ., 173 F.R.D. 92 (S.D. N.Y. 1997) (associate dean who conducted interviews of employees at request of outside counsel could not be deposed since he was a representative of outside counsel); Oregon Health Sciences Univ. v. Haas, 942 P.2d 261 (Ore. 1997) (university department head’s communication with faculty, at faculty meeting regarding internal report on discrimination in department triggered by lawsuit by female physician, did not waive the attorney-client privilege; the communication was confidential and made in furtherance of providing legal services to client and, even though no lawyer was present, statement was communication between “representatives of the client”); Moffatt v. Wazana Bros. Intern., 2014 WL 5410201 (E.D. Pa. Oct. 23, 2014) (attorney-client privilege that attached to email from defendant’s CFO and HR manager seeking legal advice from corporate counsel was not waived when the CFO relayed counsel’s legal advice to the defendant’s President and CEO since these recipients “needed to know” the contents of the communications in order to make informed decisions concerning the subject matter of the communication, the termination and severance of the plaintiff); Perkins v. Gregg County, Tex., 891 F. Supp. 361, 363-64 (E.D. Tex. 1995) (employee’s verbal “notes” on tape of his conversations with his former employers were made for the purpose of seeking legal advice and assistance for them are protected by attorney-client privilege, even though attorney ultimately declined representation); Snyder v. Value Rent-A-Car, 736 So. 2d 780 (Fla. App. 1999) (in personal injury action, creation of a diary by victim’s spouse without her attorney directing her to do so did not prevent diary from containing work product). Cf. Bice v. Robb, 511 Fed. Appx. 108 (2d Cir. 2013) (Under New York law, emails between siblings considering their potential claims against their older brother were not protected by attorney-client privilege, where counsel for siblings was not party to discussions.); Fireman’s Fund Ins. co. v. Superior Court, 196 Cal. App.4th 1263 (2011) (the attorney-client privilege is broad enough to cover a lawyer’s in-firm communications in furtherance of a client’s interests even if the client is not present; therefore, communications between a lawyer with her partner and investigator that reflected lawyer’s opinion about the value of a possible witness in pending litigation was privileged).

15See United States v. Gonzalez, 669 F.3d 974 (9th Cir. 2012) (Express oral or implied joint defense agreement (JDA) existed between married fraud defendants and their counsel, at least to a point, during defendants’ criminal proceedings, such that joint defense privilege applied to communications made thereunder, where counsel for both defendants indicated that they met and discussed confidential information for purposes of trial preparation and strategy, with the understanding that such communications were privileged and confidential, notwithstanding that JDA might have ended once defendant-husband decided to pursue his own defense and blame defendant-wife for crime, thereby ending their common legal interests); United States v. BDO Seidman, LLP, 492 F.3d 806 (7th Cir. 2007), cert. den. sub nom., Cuillo v. United States, 128 S.Ct. 1471 (2008) (in action by IRS to enforce administrative summons against accounting firm, common interest doctrine applied to sustain accounting firm’s attorney-client privilege as to memorandum written by accounting firm’s in-house attorney to its outside counsel, which was sent by accounting firm to a second law firm that did not represent it; because the accounting firm and the second law firm jointly serviced a number of common clients with respect to the tax products at issue, they and the accounting firm’s law firm had a common interest in sustaining the viability of their tax advice, and thus the attorney-client privilege was not waived by transmittal of the memorandum to the second law firm); Jenkins v. Bartlett, 487 F.3d 482 (7th Cir.), cert. denied, 128 S.Ct. 654 (2007) (in Section 1983 action against police officer, officer’s claim of attorney-client privilege with respect to his conversations with his attorney were not defeated by the presence of his union representative, where the trial court specifically found that the union representative was present solely to assist the attorney in rendering legal services to the officer; the third-party’s status as a union representative was material

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to the privilege question); In re Cardinal Health, Inc., 2007 WL 495150 (S.D. N.Y. Jan. 26, 2007) (where corporation disclosed confidential documents and information prepared by outside counsel hired by the audit committee to investigate the corporation’s practices with the SEC pursuant to a confidentiality agreement, it did not waive the attorney-client and work product privileges in later civil litigation by making comparable disclosures to the U.S. Attorney’s Office without a similar agreement since the common interest doctrine shielded such information from discovery because the government and the corporation’s audit committee had a shared interest in investigating financial irregularities at the corporation); McKesson HBOC, Inc. v. Super. Ct., 115 Cal. App. 4th 1229 (2004) (parties aligned on the same side in an investigation or litigation may, in some circumstances, share privileged documents without waiving the attorney-client privilege if cooperation is reasonably necessary for counsel to provide representation in the investigation or litigation); OXY Res. Cal. LLC v. Super. Ct., 115 Cal. App. 4th 874 (2004) (noting statutorily recognized “joint client” or “common interest” exception to attorney-client privilege, which applies where two or more clients have retained or consulted a lawyer on a matter of common interest in which event neither may claim the privilege in an action by one against the other; joint client or common interest doctrine is not an extension of the attorney-client privilege, but is more appropriately characterized as a nonwaiver doctrine); Hanover Ins. Co. v. Rap & Jepsen Ins. Serv., Inc., 870 N.E.2d 1105 (Mass. 2007) (common interest privilege protected communications among defendants and their lawyers from discovery, and the privilege applies even in the absence of consent of the clients and the common interest agreement need not be in writing); O’Boyle v. Borough of Longport, 94 A.3d 299 (N.J. 2014) (Private attorney, who represented former municipal officer and private residents in litigation previously filed by public records requester, shared common interest with municipality at time private attorney disclosed work-product documents to municipal attorney, such that, under common interest rule, documents were not government records subject to production in response to requester’s Open Public Records Act request; municipal attorney and private attorney had common purpose to defend their public and private clients from pending and anticipated litigation filed by requester, who did not agree with manner in which elected and appointed municipal officials discharged their public duties, and private attorney’s work product was disclosed in manner calculated to preserve its confidentiality); Ambac Assur. Corp. v. Countrywide Home Loans, Inc., 2014 WL 6803006 (N.Y. A.D. 1 Dept. Dec. 4, 2014) (in today’s business environment, pending or reasonably anticipated litigation is not a necessary element of the common-interest privilege.” Therefore, documents relating to the pending merger between BAC and Countrywide Financial Corp. were protected from disclosure to the extent that they had a common legal interest with respect to the merger and sought advice from counsel together); In re Bank of New York Mellon Corp. Forex Transactions Litigation, ___ F. Supp.3d ___, 2014 WL 5810612 (S.D. N.Y. Nov. 10, 2014) (document containing a legal memorandum originally prepared for defendant bank but that Bank later forwarded to its third-party investment pension plan investment managers, aimed at securing compliance with the requirements of ERISA, was protected by the common interest doctrine and the attorney-client privilege); In re JDN Real Estate-McKinney L.P., 211 S.W.3d 907 (Tex. App. 2006, mandamus denied) (city did not waive, by disclosure to its economic development corporation, the ability to assert the attorney-client privilege for documents inadvertently produced in condemnation action, where city and corporation were both represented by the same law firm and they shared a common interest). Cf. Vicor Corp. v. Vigilant Ins. Co., 674 F.3d 1 (1st Cir. 2012) (Under Massachusetts law, insured’s defense counsel in action brought against it by customer represented both insured and its insurers, and thus under common-interest doctrine, attorney-client privilege did not necessarily apply with respect to communications between insured and its defense counsel in customer’s action, in insured’s action against insurers seeking coverage under primary and excess-level general liability insurance policies for settlement payments it made to resolve customer’s damages claims, where primary insurers paid insured’s defense counsel impliedly Motor Co. v. Edgewood Properties, Inc., 2011 WL 5080347 (D.N.J. Oct. 25, 2011) (Where counsel represents one entity that enters a joint participation agreement with another, an implied attorney-client relationship may exist); North American Rescue Products, Inc. v. Bound Tree Medical, LLC, 2010 WL 1873291 (S.D. Ohio May 10, 2010) (Distributor’s interest in former employee of competitor’s continued employment with its business was insufficient to establish common interest privilege, which would have prevented disclosure of distributor’s communication with employee’s counsel in competitor’s action to enforce employment agreement and non-competition agreement with employee. Distributor, who paid for employee’s defense against competitor’s action, and employee shared a common interest in employee prevailing in competitor’s action against her, but their joint interest in her continued employment was commercial, rather than legal. As such, the common interest exception to general lack of attorney-client or work product privilege over statements distributor made to employee’s counsel regarding the litigation did not apply.).

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And at least one court has recognized a union-member privilege, similar to the attorney-client privilege, where the union provides grievance-related representative services to the employee bargaining unit member.\footnote{\textit{See Peterson v. State of Alaska}, 280 P.3d 559 (Alaska 2012) (Alaska Supreme Court held that “[b]ased on the strong interest in confidential union-related communications and statutory protection against unfair labor practices, we hold [the state labor relations act] impliedly provides the State’s union employees a union-relations privilege.” The reasoning employed by the Court – that “the proper function of [a] mandatory grievance and arbitration system . . . requires some protection for confidential communications made for the purpose of facilitating the rendition of grievance-related representative services to the employee” and that recognizing a privilege “harmonizes [the state labor relations act]’s strong public policy in favor of contractual resolution of labor disputes with the civil discovery rules” – should be useful in other states and in other settings where this issues frequently arises).}

The privilege extends to confidential communications in a variety of forms such as emails.\footnote{\textit{See Blumenthal v. Kimber Mfg., Inc.}, 826 A.2d 1088 (Conn. 2003) (firearms manufacturer and its president established that attorney-client privilege applied to insulate corporate email, concerning agreement by another firearm manufacturer with various government agencies and the firearm industry’s reaction to it, from disclosure to state attorney general, who sought email in connection with antitrust investigation; counsel to whom email was sent was manufacturer’s outside counsel, current employees or officials of manufacturer sent email to counsel, email related to legal advice sought by manufacturer from counsel, given that it could be inferred that manufacturer was anticipating threat of similar litigation, and email was intended to be confidential); \textit{Loftin v. Bande}, 258 F.R.D. 31 (D.D.C. 2009) (Documents purporting to involve non-attorneys providing legal advice, for purposes of discovery request to former corporate counsel in investors’ securities fraud action against corporation, were protected under attorney-client privilege to extent that documents assisted in rendition of professional legal services; documents consisted in part of e-mails between non-attorneys employed in in-house legal department and other corporate employees regarding master services agreement at issue in action.); \textit{In re Mentor Corp. Obotomy Transobturator Sling Products Liability Litigation}, 632 F. Supp.2d 1370 (M.D. Ga. 2009) (Series of e-mails between and among seller’s employees and its outside counsel was an attempt by seller’s employees to secure legal advice from counsel, and, thus, since there was no indication that the e-mails were ever distributed further than among each identified recipient, and contents of the e-mails appeared reasonably related to recipients’ job titles, the e-mails were protected under the attorney-client privilege, in products liability action against seller brought by patients who were surgically implanted with product designed to treat stress urinary incontinence.); \textit{In re JDN Real Estate-McKinney L.P.}, 211 S.W.3d 907 (Tex. App. 2006) (single email from CEO and President of city’s economic development corporation was protected by the attorney-client privilege, in city’s condemnation action to acquire property through eminent domain, as part of a string of emails that were privileged, even though the document itself did not reveal anything privileged, because it is part of the context and subject of the privileged string of emails); \textit{Clover Staffing, LLC v. Johnson Controls World Serv., Inc.}, 238 F.R.D. 576 (S.D. Tex. 2006) (emails from corporate official to other corporate officials were protected by the attorney-client privilege, notwithstanding that none of the officials were attorneys, where emails were sent at the suggestion of the corporate legal department to gather information that could be used by attorneys in negotiating with subcontractor to resolve contract issues; however, PowerPoint slides based on notes taken at the meeting to review the subcontract were not protected by the attorney-client privilege since the documents were created for a business purpose rather than to aid in possible future litigation.); \textit{Pearce v. Coulee City}, 2012 WL 3643676 (E.D. Wash. Aug. 24, 2012) (in wrongful termination lawsuit, privilege applied to (a) emails from defendant mayor which transmitted memorandum written by him and addressed directly to the City’s retained counsel containing detailed “synopsis” of the events which preceded Plaintiff’s termination, along with editorial comments by Defendant mayor concerning the City’s reasons for terminating Plaintiff; and (b) email from defendant mayor to the City Clerk asking for information concerning individuals on Defendants’ witness list which was specifically requested by the City’s retained counsel and relying the substance of a comment made by counsel concerning legal strategy).} Privilege may also attach to preliminary drafts of documents, even if the final document is disclosed to third parties where the drafts contain attorney legal advice in the form of notations.
or suggestions; however, some courts hold that such drafts are not privileged, or that privilege was waived when the final document was published to third parties.

See, e.g., Loftin v. Bande, 258 F.R.D. 31 (D.D.C. 2009) (Draft documents, for purposes of discovery request to former corporate counsel in investors’ securities fraud action against corporation, were protected under attorney-client privilege to extent that documents concerned privileged conversations; notes of conversations involving government staff attorney, although allegedly containing attorney’s thoughts and mental impressions, simply transcribed unprivileged conversation); In re Grand Jury Subpoena Duces Tecum, 731 F.2d 1032, 1037 (2d Cir. 1984) (determining that the attorney client confidentiality surrounding drafts of documents is not waived when the client sends the final draft of a document to another party because the clients have an intention of confidentiality while sharing the drafts with attorneys, which reflects a request for legal advice and that intention is not diminished by the possibilities that the final draft of a document may be distributed); In re Mentor Corp. Omtape Transobturator Sling Products Liability Litigation, 632 F. Supp.2d 1370 (M.D. Ga. 2009) (Draft letters of intent between seller and manufacturer were protected under the attorney-client privilege where the drafts were prepared by an attorney and reflected legal advice, information contained in the drafts was not disseminated to any third party, and the drafts postdated final letter of intent already produced to patients); Dewitt v. Walgreen Co, 120 WL 3837764 (D. Idaho Sept. 4, 2012) (Preliminary drafts of corporate document are often protected by attorney-client privilege because they may reflect not only client confidences, but also legal advice and opinions of attorneys, all of which is protected by the attorney-client privilege.); Johnson v. Smith, 2007 WL 178522 (S.D. Ill. Jan. 28, 2007) (preliminary drafts of key employee agreements and compensation of company employees are generally protected by the attorney-client privilege because they reflect client confidences, legal advice and opinions of the company’s attorneys); Long v. Anderson Univ., 204 F.R.D. 129 (S.D. Ind. 2001) (attorney-client privilege applied to (1) electronic mail sent from University’s Human Resources Director to Dean of Students regarding conversation she had with university’s legal counsel and his legal advice, (2) summary report prepared by counsel and human resources director, and (3) draft response to former student athlete’s civil rights complaint that was prepared by dean of students and sent to legal counsel, investigating conclusions and codes prepared by counsel, and letter to counsel by Human Resources Director regarding discovery requests); Kobluk v. University of Minn., 574 N.W.2d 436 (Minn. 1998) (a provost’s preliminary draft of a letter denying tenure, the final version of which was meant to be published to a third party, forwarded to university counsel for review, is protected by the attorney-client privilege where tenure candidate was represented by counsel and the university assigned an attorney to the matter, and the provost sent the draft to counsel because he anticipated that the letter denying tenure would “becom[e] a legal document”); Ideal Elec. Co. v. Flowserv Corp., 230 F.R.D. 603 (D. Nev. 2005) (draft affidavits prepared by employee’s counsel to which the employee made changes were protected by the attorney-client privilege as well as the work product doctrine.); In re Kidder Peabody Sec. Litig., 168 F.R.D. 459, 474 (S.D.N.Y. 1996) (“A client may intend to direct or permit the release of the final version of a document while still intending that his communications with his attorney prior to the finalization of the document remain confidential.”); Randleman v. Fidelity Nat. Title Ins. Co., 251 F.R.D. 281 (N.D. Ohio 2008) (Even assuming privilege in the first instance, title insurance company waived attorney-client privilege as to draft affidavits and counsel communications about drafts, where company’s counsel discussed advice and documents with agents, brokers, and lenders, all third parties to the suit. However, the draft affidavits and counsel communications were opinion work product, and thus protected from discovery documents where plaintiffs did not show a substantial need to discover them, where plaintiffs had the ability to test the credibility of affiants through depositions in order to determine the extent to which an affiant endorsed or qualified the statements in the affidavits, and affiants swore to the final affidavits, not the preliminary drafts); In re U.S. Healthcare Inc. Sec. Litig., 1989 WL 11068, at *2 (E.D. Pa. Feb. 7, 1989) (“[T]he only discoverable information is that which is contained in the publicly filed documents.”); In re Monsanto Co., 998 S.W.2d 917 (Tex. App. 1999) (attorney-client privilege protected copies of electronic mail and memoranda, facsimile cover pages, reports with handwritten notes, draft pages of legal documents, etc. constituting communications by and between counsel); Apex Mun. Fund v. N-Group Sec., 841 F. Supp. 1423, 1428 (S.D. Tex. 1993) (“Under [the Schlegel,] rule preliminary drafts of documents and communications made between attorney and client during the drafting process are privileged . . . . Only those parts of attorney-client documents that ultimately appear in published documents are outside the privilege.”).
2. Only Confidential Communications Protected

The attorney-client privilege only protects disclosure of contents of communications themselves between an attorney and the attorney’s client; it does not protect against disclosure of the underlying facts by the person who has personal knowledge of those facts, even though that person consulted an attorney.\(^\text{40}\) Moreover, otherwise nonprivileged communications do not attain

actually issued in this case. The significant fact is that the information given the [attorney] was to assist in preparing such prospectus which was to be published to others and was not intended to be kept in confidence.”); United States v. Under Seal, 748 F.2d 871, 877 (4th Cir. 1984) (drafts of documents relating to the purchase of another business, a public transaction, and which contain information that could reasonably be expected to be imparted to third parties were not protected by the privilege); United States v. Pipkins, 528 F.2d 559, 563 (5th Cir. 1976) ("[C]ourts have refused to apply the privilege to information that the client intends his attorney to impart to others."); United States v. Lawless, 709 F.2d 485, 487 (7th Cir. 1983) (“When information is transmitted to an attorney with the intent that the information will be transmitted to a third party (in this case on a tax return), such information is not confidential.”); Heidelberg Harris, Inc. v. Mitsubishi Heavy Indus., 1996 WL 732522, at *3 (N.D. Ill. Dec. 9, 1996) (draft of a purchasing agreement was not within the privilege); United States v. Willis, 565 F.Supp. 1186, 1207 (S.D. Iowa 1983) (recognizing that documents designed to be disclosed to third parties are not privileged and holding that drafts of corporate documents, real estate documents, contracts, and leases could not be privileged); Burroughs Wellcome Co. v. Barr Labs., Inc., 143 F.R.D. 611, 618 (E.D.N.C. 1992) (draft patent applications are not privileged information); Dudley v. Ski World, No. 1989 WL 73208, at *2 (S.D. Ind. 1989) ("[A]ny communications between Ski World or its officers and directors and [Ski World’s attorney] which relate to the preparation of a prospectus to be used in the enlistment of investors in Ski World are not privileged and are discoverable by the plaintiff."); North Carolina Elec. Membership Corp. v. Carolina Power & Light Co., 110 F.R.D. 511, 516 (M.D.N.C. 1986) ("Preliminary drafts of letters or documents which are to be published to third parties lack confidentiality.").

\(^{40}\) Upjohn Co., 449 U.S. at 395-96. See also In re Grand Jury Proceedings, 616 F.3d 1172 (10th Cir. 2010) (Questions which requested subpoenaed attorney to testify at grand jury regarding information he received from the government and then communicated to his client were not protected by attorney-client privilege; questions did not request information regarding privileged legal advice provided by the attorney to his client, nor would they tend, directly or indirectly, to require the attorney to reveal the substance of any legal confidence.); Ex Parte Alfa Mut. Ins. Co., 631 So. 2d 858 (Ala. 1993) (attorney-client privilege did not bar deposition of corporation’s general counsel regarding facts upon which he relied in authorizing corporation’s outside counsel to threaten plaintiff and his attorney with sanctions); Seybert v. Cominco Alaska Exploration, 182 P.3d 1079 (Alaska 2008) (Attorney-client privilege and work product doctrine do not protect the existence and amount of loss reserves from discovery when they are relevant, absent some showing that the documents in question were prepared at the direction of an attorney); Clark v. Oakhill Condominiums Ass’n, Inc., 2008 WL 4099152 (N.D. Ind. Sept. 2, 2008) (attorney-client privilege does not protect a cover e-mail that effectively says, “We received a communication from our attorney, and that communication is attached;” the cover e-mail discloses no content of any communication); Allen v. Chicago Transit Auth., 198 F.R.D. 495 (N.D. Ill. 2001) (employer did not show that document sent from employee’s discrimination complaint file, which was authored by a vice president of communications and sent to an equal employment opportunity coordinator, was protected from discovery by the attorney-client privilege, where document was neither authored nor reviewed by an attorney, and employer did not indicate when the matter was handed over to the employer’s legal department); Zamorando v. Wayne State University, 2008 WL 3929573 (E.D. Mich. Aug. 22, 2008) (attorney-client privilege does not prohibit inquiry into the subject matter of the communication, rather than the contents of the communication itself); Clark v. Buffalo Wire Works Co., 190 F.R.D. 93 (W.D. N.Y. 1999) (although former employee’s notes handed over to counsel during period of possible age discrimination were protected by attorney-client privilege, facts underlying such notes were discoverable); Boone v. Vanliner Ins. Co., 744 N.E.2d 154 (Ohio 2001) (documents containing communications between an insurer’s claims employees about discussing an issue with an attorney did not contain attorney-client communications and were not protected by the attorney-client privilege.); Gillard v. AIG Insurance Co., 15 A.3d 44 (Pa. 2011) (Pennsylvania attorney-client privilege operates in a two-way fashion to protect confidential client-to-attorney or attorney-to-client communications made for the purpose of obtaining or providing professional legal advice); Abraham v. Alpha Chi...
privileged status solely because the lawyer is “copied in” on correspondence or memoranda, nor are routine communications protected simply because they are with an attorney.

3. Waiver of the Privilege

The attorney-client privilege may be expressly waived, or found not to exist, in the following contexts, among others: (1) voluntary disclosure of privileged information to the government; however, some courts have found only a limited waiver (or no waiver) if the

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*Omega*, 271 F.R.D. 556 (N.D. Tex. 2010) (attorney-client privilege did not preclude disclosure of identity of former employees of organization). *But see In re Grand Jury Investigation*, 22 N.E.3d 927 (Mass. 2015) (Attorney-client privilege protects against compelled production of a target’s cellular telephone by his law firm, where phone was transferred from target to the law firm to obtain legal advice; and that it contains in the information stored on its memory, particularly in its record of text messages, evidence of a crime under investigation by the grand jury).

*Zelaya v. Unico Serv. Co.*, 682 F.Supp.2d 28 (D.D.C. 2010) (Carbon copying emails to in-house counsel will not provide the basis for attaching the attorney-client privilege.); *Kleen Products, LLC v. International Paper*, 2014 WL 6475558 (N.D. Ill. Dec. 12, 2014) (rejecting privilege with respect to “numerous allegedly privileged emails [that]… contain nothing more than mundane chatter about routine business matters.” “It is improper to infer as a blanket matter that any email asking for ‘comments’ that copies in-house counsel along with several other high level managers automatically is a request for legal review.”); *Graves v. Deutsche Bank Securities, Inc.*, 2011 WL 6057554 (S.D.N.Y. Dec. 5, 2011) (plaintiff’s handwritten notes were not privileged; although received by plaintiff’s counsel the contents were not communicated to counsel and thus not essential to plaintiff’s procurement of legal advice); *Zurich Amer. Ins. Co. v. Super. Ct.*, 155 Cal. App. 4th 1485 (2007) (otherwise routine, non-privileged communications between corporate officers or employees transacting the general business of the company do not attain privileged status solely because in-house or outside counsel is “copied in” on correspondence or memoranda and, in addition, a client may not shield facts, as opposed to communications, from discovery.); *Bobbitt v. Academy of Court Reporting, Inc.*, 2008 WL 4056323 (E.D. Mich. Aug. 26, 2008) (communication between individuals is not transformed into a privileged one simply by virtue of an attorney being copied on the communication).

*In re Grand Jury Subpoena (Mr. S.)*, 662 F.3d 65 (1st Cir. 2011) (Client’s blanket assertion of attorney-client privilege in attempt to quash documents subpoenaed from client’s attorney in grand jury proceeding was insufficient to show that the privilege attached to any particular item or items identified by the subpoena, particularly where documents sought were not confidential in nature.); *Park West Radiology v. CareCore Nat. LLC*, 675 F.Supp.2d 314 (S.D.N.Y. 2009) (Email chain containing an e-mail forwarding a document for signature from an attorney followed by a mix of strictly ministerial communications relating to the signature and delivery of a declaration and social communications was not protected by the attorney-client privilege.); *Concast Services, L.P. v. United States*, 91 Fed. Cl. 496 (Fed. Cl. 2010) (IRS attorney’s notes regarding series of meetings involving IRS attorneys and pertaining to audit were not protected from disclosure, under attorney-client privilege, in consolidated tax refund cases, where notes did not incorporate and reveal substance of confidential client communication to obtain legal advice, but rather, recounted attorneys’ views on significance of issues they encountered in context of audit.); *McWatters v. State*, 36 So.3d 613 (Fla.), cert. denied, 131 S.Ct. 510 (2010) (Telephone calls that capital murder defendant made to his lawyers while he was in jail were not confidential, for purposes of attorney-client privilege, where a recording was played before each telephone call that advised defendant that the call was subject to monitoring and recording.).

*In re Pacific Pictures*, 679 F.3d 1121 (9th Cir. 2012) (client waived attorney-client privilege by producing privileged documents to Government in response to subpoena; court declined to adopt “selective waiver” exception accepted by the Eighth Circuit in *Diversified Indus., Inc v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977) but rejected by every other circuit to consider the issue since.); *In re Grand Jury (Attorney-Client Privilege)*, 527 F.3d 200 (D.C. Cir. 2008) (Even if psychiatrist under investigation for Medicaid fraud shared originals of patient records with his attorney for the purpose of obtaining legal advice, his attorney’s sharing the records with the government in an attempt to exonerate his client destroyed whatever attorney-client privilege might have attached to them, given that the records were shown with the psychiatrist’s approval.); *United States v. MIT*, 129 F.3d 681 (1st Cir. 1997) (university forfeited attorney-client privilege and work product protection with respect to IRS summons by
privileged information is provided in response to a government agency’s subpoena or pursuant to a confidentiality agreement with the government, based on promoting the strong public policy interest in encouraging disclosure and cooperation with law enforcement agencies; or (2) disclosing documents to Defense Contracting Audit Agency; Westinghouse Elec. Corp. v. Republic of the Phil., 951 F.2d 1414, 1429 (3rd Cir. 1991) (voluntary disclosures to government agencies investigating companies waived attorney-client privilege, despite argument that companies reasonably expected SEC and DOJ would maintain confidentiality of information disclosed to them); In re Qwest Comm’ns Int’l Inc., 450 F.3d 1179 (10th Cir.), cert. denied sub nom., Qwest Comm’ns Int’l, Inc. v. New England Health Care Employees Pension Fund, 127 S.Ct. 584 (2006) (corporation defending securities class action had waived attorney-client privilege and protection of work-product doctrine for documents sought by plaintiffs, by previously voluntarily producing same documents to federal agencies in connection with their investigations into corporation’s business practices; there was no showing that “selective waiver doctrine” advocated by corporation was necessary to assure companies’ cooperation in government investigations, agreements between corporations and agencies purported to maintain privileges but did little to limit further government disclosure, and selective waiver would not promote purposes of privileges); United States v. Bergonzì, 216 F.R.D. 487 (N.D. Cal. 2003) (attorney-client privilege did not protect investigative report and related material created by law firm in course of internal investigation ordered by its corporate client into allegations of accounting irregularities and securities fraud, where prior to preparation of the documents company agreed to disclose them to the government, and terms of confidentiality agreements governing the disclosure gave the government discretion to disclose the documents in certain circumstances such as criminal prosecution); McKesson HBOC, Inc. v. Super. Ct., 115 Cal. App. 4th 1229 (2004) (corporation that was target of federal government investigation waived its attorney-client privilege as to audit committee report and interview memoranda, which had been prepared by attorneys retained by corporation to perform internal review of alleged securities fraud, and which corporation had shared with government, despite confidentiality agreements stating corporation’s intent not to waive privilege, as such disclosure was unnecessary to accomplishment of purpose for which attorneys had been retained); McKesson Corp. v. Green, 610 S.E.2d 54 (Ga. 2005) (surviving corporation waived attorney work product protection with respect to outside counsel’s investigation of absorbed corporation’s pre-merger accounting problems, when surviving corporation disclosed documents to the Securities and Exchange Commission (SEC); surviving corporation’s confidentiality agreement with the SEC did not prevent waiver of the attorney work product protection); Hoffman v. Baltimore Police Dept., 379 F. Supp. 2d 778 (D. Md. 2005) (in action against police department and its officials by a former in-house employment attorney alleging termination based on race, although documents relating to legal advice the former in-house attorney gave to the defendants may have fallen within the scope of the attorney-client privilege, such privilege was waived when defendants produced the documents to the EEOC in response to the former in-house attorney’s discrimination charge); Alpert v. Riley, 2009 WL 1226767 (S.D. Tex. April 30, 2009) (Materials generated by an attorney during his representation of a client were not protected by attorney-client privilege. The attorney stated that he gave information and documents he generated during his representation of the client to his own attorneys when he became part of investigation with the IRS into the client’s taxes. The attorney could not claim privilege for documents prepared on behalf of the client or for the client’s trust simply because he passed them on to his own attorneys. Further, some of the material was passed onto the government and could not be protected under the attorney-client privilege.).

44 Diversified Indus., Inc v. Meredith, 572 F.2d 596, 611 (8th Cir. 1977) (corporation that discloses internal investigation materials in response to government subpoena subject only to a “limited waiver” and documents not necessarily discoverable in a subsequent private civil proceeding); Hanson v. U.S. Agency for Int’l Dev., 372 F.3d 286 (4th Cir. 2004) (attorney’s unilateral release of report he created after he was hired by project engineer to provide report regarding dispute arising from construction project funded by defendant government agency did not amount to waiver of the attorney work product exemption of the FOIA which applied to report; defendant did not authorize release of report, defendant did not authorize attorney to release report, and attorney could not waive defendant’s rights without defendant’s consent); Bickler v. Senior Lifestyle Corp., 266 F.R.D. 379 (D. Ariz. 2010) (Assisted living home and skilled nursing center did not waive attorney-client privilege when it shared document with Arizona Department of Health Services (DHS) that was created by executive director for its in-house counsel in connection with investigation into injuries suffered by two residents who were allegedly pushed to ground and injured by another resident; policy of Arizona, as reflect in statutes requiring DHS to license, regulate, discipline health care institutions and to investigate allegations of improper conduct or poor patient care, favored full

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disclosures to persons other than the client that are not demonstrated to have an interest in maintaining the confidentiality of the contents of the writing such as accountants, outside auditors, supervisors and managers not essential to providing or obtaining legal advice, board

disclosure by home to DHS;); Spears v. First American eAppraiseIT, 2014 WL 6783737 (D.D.C. Dec. 2, 2014) (government agency’s disclosure of privileged information to Senate committee under seal pursuant to a subpoena did not waive attorney-client privilege); Police and Fire Retirement System of the City of Detroit v. Safenet, Inc., 2010 WL 935317 (S.D. N.Y. March 12, 2010) (in private securities fraud class action brought by pension fund, selective waiver doctrine applied to bar production of privileged and nonprivileged documents defendant produced to the SEC in the course of an investigation by the SEC and the US Attorney’s Office pursuant to confidentiality agreements that provided for nonwaiver, there is a strong public interest in encouraging disclosure and cooperation with law enforcement agencies, and plaintiffs have not demonstrated a pressing need for the privileged materials, which consist only of counsel’s analytical processes); In re Linerboard Antitrust Litig., 237 F.R.D. 373 (E.D. Pa. 2006) (in antitrust action brought against linerboard manufacturers, protection of in-house counsel’s recollection of internal investigation interviews as opinion work product was not waived by manufacturer’s submission of investigation report to Federal Trade Commission (FTC); fairness did not dictate disclosure of recollection, manufacturer did not put report at issue in litigation, and manufacturer did not preclude plaintiffs from inquiring about basis or accuracy of facts disclosed in report). Compare Regents of University of California v. Superior Court, 165 Cal. App. 4th 672 (2008) (Energy suppliers’ disclosures of documents to government agencies, according to policy under which the Department of Justice (DOJ) treated a corporation’s willingness to waive the attorney-client and attorney work product privileges as an important consideration in determining whether it would indict the corporation, did not waive suppliers’ attorney-client and attorney work product privileges as to the disclosed documents for purposes of later antitrust suit brought by public and private energy users; as a practical matter, DOJ policy coerced suppliers to disclose the privileged materials); In re BP Products N. Am. Inc., 263 S.W.3d 106 (Tex. App. 2006) (oil company did not waive its work product and attorney-client privileges regarding the methodology it used to compute reserve amounts, when it disclosed to the SEC the amount of money it reserved to resolve liability for personal injuries and fatalities arising from explosion at refinery; disclosure to the SEC was strictly limited to the reserve figure itself, and there was no disclosure of its methodology outside of the company). Cf. St. Luke Hosps., Inc. v. Kopowski, 160 S.W.3d 771 (Ky. 2005) ( “[W]hen a communication is protected by the attorney-client privilege it may not be overcome by a showing of the need by an opposing party to obtain the information contained in the privileged communications.”).

45 United States v. El Paso Co., 682 F.2d 530, 540-41 (5th Cir. 1982) (revealing privileged documents to accountants for tax consultation waived the attorney-client privilege with respect to the information that was provided to the accountants); United States v. SDI Future Health, Inc., 464 F. Supp. 2d 1027 (D. Nev. 2006) (corporate and individual defendants waived attorney-client privilege with respect to memoranda from their attorneys that were attached to letter sent by corporation’s employee to its accountants). Cf. In re Currency Conversion Fee Antitrust Litig., 2003 WL 22389169 (S.D. N.Y. Oct. 21, 2003) (credit card issuer waived attorney-client privilege as to documents provided to outside company providing computer services since computer company’s role was “akin to that of an accountant or other ordinary third-party specialist, disclosure to whom destroys the attorney-client privilege”); Calvin Klein Trademark Trust v. Washer, 124 F. Supp. 2d 207 (S.D. N.Y. 2000) (inclusion of an investment banking firm in discussions between corporation and its counsel, as to what the corporation was legally required to disclose to prospective purchasers at various stages of negotiations, did not waive the attorney-client privilege; the firm’s roles involved rendering expert advice as to what a reasonable business person would consider “material,” a mixed question of law and fact which a responsible law firm would not be able to adequately resolve without the benefit of an investment banker’s expert assessment).

46 See United States v. Mass. Inst. of Tech., 129 F.3d 681, 684-86 (1st Cir. 1997) (attorney-client privilege waived as to materials supplied to outside auditors despite the fact that the federal government required the submissions to the auditors as a condition to obtaining the work the institution was performing on behalf of the government). Compare United States v. Deloitte LLP, 610 F.3d 129 (D.C. Cir. 2010) (Corporation did not waive work-product protection by disclosing documents to independent auditor; auditor was not an adversary of corporation because in preparing the documents, which concerned the tax implications of partnerships owned by the corporation, the corporation anticipated a dispute with the Internal Revenue Service (IRS), not with the auditor, and the corporation had a reasonable expectation of confidentiality because the auditor had an obligation to refrain from
and committee members, and other “public” disclosures, such as communications media representatives or in public forums such as websites or blogs; or (3) disclosure to insurance brokers, adjusters or representatives (however, some insurance-related communications with disclosing confidential client information).

47 See Lexington Pub. Library v. Clark, 90 S.W.3d 53 (Ky. 2002) (even if investigatory memorandum regarding supervisor’s job performance was drafted with assistance of employer’s attorney, and even if it was partially based on privileged information, any attorney-client privilege was waived when information was voluntarily disclosed to supervisor; supervisor was not a “representative of the client” because, as the target of the investigation and potential adverse litigant, he was not in a position to make communications “to effectuate legal representation for the client”). Cf. Tex. Ethics Op. No. 572 (2006) (unless the client has instructed otherwise, a lawyer may deliver materials containing privileged information to an independent contractor, such as a copy service, hired by the lawyer in the furtherance of the lawyer’s representation of the client if the lawyer reasonably expects that the confidential character of the information will be respected by the independent contractor).

48 See Morgan v. City of Federal Way, 213 P.3d 596 (Wash. 2009) (Municipal judge waived any attorney-client privilege protecting e-mail that he sent to city attorney regarding investigation of municipal court employee’s hostile work environment complaint, and thus e-mail could be disclosed pursuant to Public Records Act, since judge had forwarded the e-mail to a third party, a city council member; forwarding the e-mail to city council member did not impair any common legal interest.). Compare TP Orthodontics, Inc. v. Kesling, 15 N.E.3d 985 (Ind. 2014) (When corporation formed a special litigation committee to investigate shareholders’ derivative claims brought against corporation's president, and then later requested dismissal of those claims based on the findings of the committee, the corporation did not implicitly waive attorney-client privilege with regard to its special litigation committee report by putting the committee's good faith at issue, and thus, the trial court abused its discretion in ordering disclosure of the full report; the corporate secretary, in an affidavit designated in support of corporation's motion to dismiss, asserted that the copy of the attached committee report had been redacted to prevent disclosure of attorney-client privileged information, and attorney-work product prepared in anticipation of litigation, and it was the shareholders who put the committee's good faith, or lack thereof, at issue by filing a derivative suit.); Ross v. Abercrombie & Fitch Co., 2008 WL 3286346 (S.D. Ohio Aug. 8, 2008) (Defendant in derivative action did not waive attorney-client privilege with respect to the contents of a final report of a Special Litigation Committee (“SLC”) created by defendant to investigate derivative plaintiffs’ claims when it filed a motion to dismiss and provided the report to the court as it was required to do under Delaware statutory procedures; disclosure of an SLC report under these unique circumstances is essentially involuntary).

49 See Lluberes v. Uncommon Productions, LLC, 663 F.3d. 6 (1st Cir. 2011) (Attorney-client privilege would not protect communications between documentary filmmakers, attorney that they had retained to assist them in procuring insurance against potential “errors and omissions” in their film, and third party to whom attorney had referred filmmakers as someone qualified to act as fact-checker for their script, at least not to extent that communications consisted of annotated script prepared by factfinder, after verifying information in script with outside sources, with expectation that attorney would provide this annotated script to insurers to convince them to provide insurance for filmmakers’ project, notwithstanding any declarative markings of confidentiality on such communications); In re Chevron Corp., 650 F.3d 276 (3d Cir. 2011) (Attorney-client privilege never attached to attorney’s comments, made during production of documentary, regarding Ecuadorian class action in which attorney represented plaintiffs against oil company, because comments were not made “in confidence” due to presence of film crew, and comments thus were not a selective disclosure of privileged communication that effected a broad subject-matter waiver of privilege for material in attorney’s file regarding Ecuadorian action); Lenz v. Universal Music Group, 2010 WL 4789099 (N.D. Cal. Nov. 17, 2010) (plaintiff who sent emails, posted a blog, and engaged in Gmail chat sessions through which she disclosed information relating to her attorneys’ litigation strategy waived the attorney-client privilege for related information); In re Sveaas, 249 F.R.D. 96 (S.D. N.Y. 2008) (Attorney-client privilege was waived with respect to emails and attachments which reflected legal advice by law firm which represented buyer of sculpture when they were disclosed to art broker, where broker did not function as buyer’s exclusive agent, and her participation in transaction was not necessary to firm’s furnishing of legal advice to buyer).

50 See, e.g., Sony Computer Entm’t Am., Inc. v. Great Am. Ins. Co., 229 F.R.D. 632 (N.D. Cal. 2005) (attorney-client privilege was waived where the privileged communications between the client and the client’s lawyer took place in the presence of the client’s insurance broker, absent evidence that the presence of the broker...
the insurer or its representatives may be deemed essential to the representation of the insured and thus within the privilege); or (4) disclosures to public relations specialists; or (5) disclosure to

was “reasonably necessary to accomplish the client’s purpose in consulting counsel”); SR Int’l Bus. Ins. Co. v. World Trade Ctr. Props. LLC, 2002 WL 1334821 (S.D. N.Y. June 19, 2002) (attorney-client privilege did not shield post-9/11 communications between attorneys for leaseholder on the World Trade Center and employees of insurance broker that obtained insurance coverage for the WTC; although case law extends privilege to communications without outside agents whose role is the functional equivalent to that of a corporate employee, the conversations here were between the insurance broker, “a multi-national corporation with its own retained counsel and the lawyers for one of its many clients;” common interest privilege was not established because no showing that leaseholder and broker shared an identical legal interest since broker was “not a party to this litigation and its legal position will be unaffected by the outcome of this case”). See also American Zurich Ins. Co. v. Montana Thirteenth Judicial District Court, 280 P.3d 240 (Mont. 2012) (Letter that attorney retained by workers’ compensation insurer wrote to his client insurer and that insurer’s adjuster voluntarily disclosed to the insured employer, when workers’ compensation claim was pending, was not privileged under the attorney-client privilege when the workers’ compensation claimant subpoenaed the letter in claimant’s unfair settlement practices action against insurer, as insurer was a Plan II insurer, in evaluating and settling claimant’s claim insurer bore direct liability to claimant, employer’s role during the adjustment process was similar to that of a witness, employer was not a co-litigant, employer was not solely aligned with insurer but shared interest with both the insurer and the claimant, and insurer’s disclosure of the letter to employer was not necessary for insurer to obtain legal advice.); In re XL Specialty Insurance Co., 373 S.W.3d 46 (Tex. 2012) (in a bad faith action brought by an injured employee against a workers’ compensation insurer, the attorney-client privilege does not apply to communications between the insurer’s lawyer and the employer during the underlying administrative proceedings).  

51 See Atmel Corp. v. St. Paul Fire & Marine Ins. Co., 409 F. Supp. 2d 1180 (ND Cal. 2005) (insured did not waive attorney client privilege as result of disclosure of its documents to its insurance broker, where broker was necessary to further insured’s interests and disclosure to broker was reasonably necessary to provide information to insurers); Bank of America, N.A. v. Superior Court, 212 Cal. App. 4th 1076 (2013) (“When an insurer retains counsel to defend its insured, was not privileged under the attorney-client privilege when the workers’ compensation claimant subpoenaed the letter in claimant’s unfair settlement practices action against insurer, as insurer was a Plan II insurer, in evaluating and settling claimant’s claim insurer bore direct liability to claimant, employer’s role during the adjustment process was similar to that of a witness, employer was not a co-litigant, employer was not solely aligned with insurer but shared interest with both the insurer and the claimant, and insurer’s disclosure of the letter to employer was not necessary for insurer to obtain legal advice.); State Farm Mut. Auto. Ins. Co. v. Fed. Ins. Co., 72 Cal. App. 4th 1422 (1999) (“an attorney-client relationship is formed between an insurance company and counsel it hires to defend an insured,” the insurance company is a client with respect to its ability to assert the attorney-client privilege, and it has an independent right, as a client, to bring a legal malpractice action against counsel hired to defend its insured); Jentz v. Conagra Foods, 2011 WL 5325669 (S.D. Ill. Nov. 3, 2011) (Illinois law recognizes that under circumstances where an insurance carrier is obligated to defend an insured, the attorney-client privilege may properly be extended to include communications between an insurer and an insured as well; however, the insurer-insured privilege is to be narrowly construed); Bronsink v. Allied Property and Casualty Insurance, 2010 WL 786016 (W.D. Wash. March 4, 2010) (in plaintiffs’ action against insurer, although an attorney acting as a claims adjuster for insurer, and not as legal advisor, the insurer could still claim the privilege if that attorney was an agent necessary for the provision of legal advice, the record does not demonstrate that the withheld documents and communications by the adjuster was necessary for the provision of legal advice to the insurer); Atmel Corp. v. St. Paul Fire & Marine Ins. Co., 409 F. Supp. 2d 1180 (N.D. Cal. 2010) (insured did not waive attorney-client privilege as result of disclosure of its documents to its insurance broker, where broker was present to further insured’s interests and disclosure to broker was reasonably necessary to provide information to insurers); Draggin’ Y Cattle Co., Inc. v. Addink, 312 P.3d 451 (Mont. 2013) (where the insured communicates with the insurer for the express purpose of seeking legal advice with respect to a concrete claim, or for the purpose of aiding an insurer-provided attorney in preparing a specific legal case application of the attorney-client privilege is appropriate as an extension to those employed to assist the attorney. However, a statement from an insured to an insurer betraying neither interest in, nor pursuit of, legal counsel bears only the most attenuated nexus to the attorney-client relationship; if what is sought is not legal advice but insurance, no attorney-client privilege extending to the statement can or should exist.); Dakota, Minnesota & Eastern R.R. Corp. v. Acuity, 771 N.W.2d 623 (S. Dak. 2009) (Attorney-client privilege did not protect communications between attorney and insurer client regarding investigation and denial of insured’s claim for uninsured motorist benefits, where insurer delegated its initial claims

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nonessential third parties which may include social workers, family members and friends; or (6)

function to attorney and attorney exclusively conducted investigation into claim and solely made the initial determination to deny uninsured motorist benefits; In re Tetra Technologies, Inc., 2010 WL 1335431 (S.D. Tex. April 5, 2010) (communications between company’s employees, its counsel and its insurance brokers is protected as attorney-client communications, as long as communications were made for the purpose of facilitating the rendition of legal services to the client); State v. Recht, 583 S.E.2d 80 (W. Va. 2003) (statements made by doctor to law firm representing him in medical malpractice action remained privileged in unfair settlement practices action by estate of deceased patient against doctor’s medical malpractice insurer, even though such statements were repeated by law firm to the insurer). Cf. Pine Island Farmers Coop. v. Erstad & Riemer, P.A., 649 N.W.2d 444 (Minn. 2002) (in the absence of a conflict of interest between the insured and the insurer, the insurer can become a co-client of the law firm defending the insured; however, the record did not contain any evidence that the law firm or any other attorney consulted with the insured regarding the possibility of dual representation or that the insured consented to dual representation after being informed of the risks; therefore, the law firm was entitled to dismissal of the insurer’s malpractice action against it); Montpelier U.S. Ins. Co. v. Bloom, 757 S.E.2d 788 (W. Va. 2014) (an insurer’s lawyer does not waive the attorney-client privilege for his coverage opinion by sending a coverage denial letter directly to the insured).

See, e.g., Church & Dwight Co., Inc. v. SPD Swiss Precision Diagnostics, 2014 WL 7238354 (S.D. N.Y. Dec. 19, 2014) (communication to company’s outside marketing firm waived attorney-client privilege where it was not shown that the marketing firm enabled counsel to understand aspects of the client’s own communications that could not otherwise be appreciated in the rendering of the legal advice); LG Electronics U.S.A., Inc. v. Whirlpool Corp., 661 F.Supp.2d 958 (N.D. Ill. 2009), mandamus denied, 597 F.3d 858 (7th Cir. 2010) (attorney-client privilege did not extend to protect defendant’s corporate communications with third party advertising agencies; outside agencies did not act as the functional equivalent of defendant’s employees so as to constitute de facto employees since defendant did not allow its agencies the freedom to design advertisements without its internal marketing approval, and retained all rights in the agencies’ work product.); Ebin v. Kangadis Food Inc., 2013 WL 6085443 (S.D. N.Y. Nov. 12, 2013) (defendant waived attorney client privilege by copying non-attorney public relations agents on the redacted emails); Haugh v. Schroeder Inv. Mgmt. N. Am., Inc., 92 F.3d 1043, 1044 (S.D. N.Y. 2003) (attorney-client privilege did not extend to public relations consultant engaged by plaintiff’s former counsel; plaintiff failed to show that consultant performed anything other than standard public relations services and failed to show that communications were necessary so that counsel could provide legal advice); In re Copper Mkt. Antitrust Litig., 200 F.R.D. 213 (S.D. N.Y. 2001) (certain communications between defendant and public relations consultant, hired by it, to assist it with the intense media scrutiny brought on by a government investigation and anticipated litigation privileged; the consultant was indistinguishable from a corporate employee, and acted on behalf of the defendant and assisted legal counsel in rendering advice); Calvin Klein Trademark Trust v. Wachner, 198 F.R.D. 53, 54 (S.D. N.Y. 2000) (attorney-client privilege did not apply to documents and communications between plaintiffs’ counsel and its third-party public relations firm where public relations firm had preexisting relationship with the plaintiffs and was “simply providing ordinary public relations advice so far as the documents . . . in question [were] concerned”). Compare Fed. Trade Comm’n v. GlaxoSmithKline, 294 F.3d 141 (D.C. Cir. 2002) (drug manufacturer being investigated by FTC established attorney-client privilege in action to enforce FTC subpoena, with respect to communications it shared with its public relations and government affairs consultants; corporate counsel worked with the consultants in the same manner as they did with full-time employees, and consultants acted as part of team with full-time employees regarding their particular assignments); In re Grand Jury Subpoenas, 265 F. Supp. 2d 321 (S.D. N.Y. 2003) (attorney-client privilege extended to discussions with public relations firm hired by lawyers for grand jury target where investigation was “a high profile matter” and had been “a matter of intense press interest and extensive coverage for months”); In re New York Renue With Moisturelock Product Liability Litigation, 2009 WL 2842745 (D. S.C. July 9, 2009) (communications that include a public relations firm are not privileged because the public relations firm is not necessary to the legal representation.; the public relations firm was hired by the defendant, not its lawyers, and the communication at issue was not sent to corporate or outside counsel).

53 Maday v. Pub. Libraries of Saginaw, 480 F.3d 815 (6th Cir. 2007) (by relating the substance of her conversations with her prior attorney to a social worker, plaintiff waived any attorney-client privilege that may have applied to such conversations); Lynch v. Hamrick, 968 So. 2d 11 (Ala. 2007) (communications attorney had with

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disclosure to third party litigation funders;\(^{54}\) or (7) disclosure by revealing privileged information during trial or deposition testimony;\(^{55}\) or (8) use of privileged information by a

client in presence of the client’s daughter were not privileged, and thus attorney could testify about those conversations during trial to set aside deed, drafted by the attorney, that transferred a parcel of property to the daughter; the daughter and the client did not have a common legal interest in the subject matter of the representation, and the daughter’s presence was not necessary for the attorney to prepare the client’s will or deed); United States v. Stewart, 287 F. Supp. 2d 461 (S.D. N.Y. 2003) (defendant waived attorney-client privilege when she forwarded a copy of an email she sent to her attorney, containing her account of the facts relating to her sale of stock, to her adult daughter; however, such disclosure did not waive work product protection in the email, since she intended to keep the email confidential, she believed her daughter would keep its contents strictly confidential, and there was no prejudice to the government in withholding the document).


See Lynch v. Hamrick, 968 So.2d 11 (Ala. 2007) (client waived the attorney-client privilege in proceeding to set aside deed transferring parcel of property to the client’s daughter, where the client’s attorney, during cross-examination of the client’s former attorney, elicited testimony from the former attorney concerning private conversations between the former attorney and the client, had the former attorney read from notes she took during each meeting with the client, and asked former attorney about her conclusions as to the client’s competency); Adler v. Wallace Computer Servs., Inc., 202 F.R.D. 666 (N.D. Ga. 2001) (testimony of witness who served as vice president and general counsel for employer, disclosing statements made by other corporate representatives seeking advice from witnesses in his role as attorney, constituted waiver of attorney-client privilege in Title VII action; employer designated witness as representative of the corporation for discovery purposes, giving witness ability to waive the privilege); Medicines Co. v. Mylan, Inc., 936 F. Supp.2d 894 (N.D. Ill. 2013) (Pharmaceutical manufacturer’s patent attorney’s disclosure during deposition of her communications with manufacturer’s employee regarding irregular results in production batch of product was not inadvertent, and thus constituted waiver of attorney-client privilege, where counsel expressly permitted attorney to testified about communication during deposition.); Thomas v. Euro RSCG Life, 264 F.R.D. 120 (S.D. N.Y. 2010) (attorney-client privilege applied with respect to employee’s notes, but such privilege was waived where she relied on notes in connection with her deposition testimony in the case; employee reviewed the notes approximately fifteen minutes prior to the deposition because she and attorney had many conversations which would have been difficult to recount, and as conversations were central part of the deposition, the notes likely had an impact on employee’s testimony); AHF Community Development, LLC v. City of Dallas, 258 F.R.D. 143 (N.D. Tex. 2009) (City defendants voluntarily waived attorney-client privilege with respect to documents which were used as exhibits at one defendant’s deposition and served as the basis of questioning; the deposition questions and exhibits provided sufficient notice of the possibility that privileged documents had been produced to opposing party and that information regarding privileged communications was being sought.); Skansgaard v. Bank of America, N.A., 2013 WL 828210 (W.D. Wash. March 6, 2013) (defendant bank waived attorney client privilege with respect to email chain document that bank produced during deposition and was read into the record; in the course of the deposition, defendants’ counsel affirmatively stated that there was no attorney-client privilege in regard to the email chain and it was not until approximately two-months later that defendants reversed position and claimed that the email chain document was subject to claw back under the attorney-client privilege.) Compare Prewitt v. Walgreens Co., 2013 WL 6229154 (E.D. Pa. Dec. 2, 2013) (Defendant did not waive attorney-client privilege by deposition testimony of plaintiff’s supervisor that merely revealed the existence, not the substance, of communication; the inadvertent disclosure of documents did not waive privilege because it remedied immediately, and had no intention to use an “advice of counsel” defense.); Barone v. United Indus. Corp., 146 S.W.3d 25 (Mo. App. 2004) (member of top management of former employer, who was client of attorney, did not waive attorney-client privilege regarding discussion he had with attorney regarding release agreement between former employer and former employee, and thus, former employee was not entitled to conduct discovery on these matters; where manager testified that he had limited discussions with attorney regarding release agreement, manager did not attribute release payments to former employee to mistake made by attorney, rather, manager merely testified that payments were inadvertently made and thus did not testify as to the subject matter of his communication to attorney); Carver v. Twp. of Deerfield, 742 N.E.2d 1182 (Ohio App. 2000) (deposition


\(^{55}\) See Lynch v. Hamrick, 968 So.2d 11 (Ala. 2007) (client waived the attorney-client privilege in proceeding to set aside deed transferring parcel of property to the client’s daughter, where the client’s attorney, during cross-examination of the client’s former attorney, elicited testimony from the former attorney concerning private conversations between the former attorney and the client, had the former attorney read from notes she took during each meeting with the client, and asked former attorney about her conclusions as to the client’s competency); Adler v. Wallace Computer Servs., Inc., 202 F.R.D. 666 (N.D. Ga. 2001) (testimony of witness who served as vice president and general counsel for employer, disclosing statements made by other corporate representatives seeking advice from witnesses in his role as attorney, constituted waiver of attorney-client privilege in Title VII action; employer designated witness as representative of the corporation for discovery purposes, giving witness ability to waive the privilege); Medicines Co. v. Mylan, Inc., 936 F. Supp.2d 894 (N.D. Ill. 2013) (Pharmaceutical manufacturer’s patent attorney’s disclosure during deposition of her communications with manufacturer’s employee regarding irregular results in production batch of product was not inadvertent, and thus constituted waiver of attorney-client privilege, where counsel expressly permitted attorney to testified about communication during deposition.); Thomas v. Euro RSCG Life, 264 F.R.D. 120 (S.D. N.Y. 2010) (attorney-client privilege applied with respect to employee’s notes, but such privilege was waived where she relied on notes in connection with her deposition testimony in the case; employee reviewed the notes approximately fifteen minutes prior to the deposition because she and attorney had many conversations which would have been difficult to recount, and as conversations were central part of the deposition, the notes likely had an impact on employee’s testimony); AHF Community Development, LLC v. City of Dallas, 258 F.R.D. 143 (N.D. Tex. 2009) (City defendants voluntarily waived attorney-client privilege with respect to documents which were used as exhibits at one defendant’s deposition and served as the basis of questioning; the deposition questions and exhibits provided sufficient notice of the possibility that privileged documents had been produced to opposing party and that information regarding privileged communications was being sought.); Skansgaard v. Bank of America, N.A., 2013 WL 828210 (W.D. Wash. March 6, 2013) (defendant bank waived attorney client privilege with respect to email chain document that bank produced during deposition and was read into the record; in the course of the deposition, defendants’ counsel affirmatively stated that there was no attorney-client privilege in regard to the email chain and it was not until approximately two-months later that defendants reversed position and claimed that the email chain document was subject to claw back under the attorney-client privilege.) Compare Prewitt v. Walgreens Co., 2013 WL 6229154 (E.D. Pa. Dec. 2, 2013) (Defendant did not waive attorney-client privilege by deposition testimony of plaintiff’s supervisor that merely revealed the existence, not the substance, of communication; the inadvertent disclosure of documents did not waive privilege because it remedied immediately, and had no intention to use an “advice of counsel” defense.); Barone v. United Indus. Corp., 146 S.W.3d 25 (Mo. App. 2004) (member of top management of former employer, who was client of attorney, did not waive attorney-client privilege regarding discussion he had with attorney regarding release agreement between former employer and former employee, and thus, former employee was not entitled to conduct discovery on these matters; where manager testified that he had limited discussions with attorney regarding release agreement, manager did not attribute release payments to former employee to mistake made by attorney, rather, manager merely testified that payments were inadvertently made and thus did not testify as to the subject matter of his communication to attorney); Carver v. Twp. of Deerfield, 742 N.E.2d 1182 (Ohio App. 2000) (deposition
witness to refresh recollection prior to or during testimony; disclosure of privileged information in court or administrative filings; or disclosure to an adversary, or to testimony on cross-examination of town trustee that there “probably” were meetings between counsel for township and the trustees regarding settlement proposal did not waive attorney-client privilege because cross-examination testimony is not considered “voluntary” for the purpose of waiver of the privilege).

See Spertling v. City of Kennesaw Police Dep’t, 202 F.R.D. 325 (N.D. Ga. 2001) (plaintiff in employment discrimination action waived attorney-client privilege with regard to narrative she prepared at her attorney’s request for purpose of responding to defendant’s interrogatories, by referring to the narrative during her deposition, by her attorney effectively disclosing most, if not all, of the narrative’s contents to defense counsel when he attached a modified version of it to plaintiff’s discovery responses, and plaintiff used it during her deposition to refresh her memory); L.V. Dev. Assocs. V. Eighth Jud. Dist. Ct., 325 P.3d 1259 ( Nev. 2014) (witness's reliance on allegedly-privileged, attorney-prepared documents to refresh his recollection prior to giving deposition testimony waived attorney-client privilege and work-product doctrine, allowing adverse party to demand production of documents, inspect them, cross-examine witness on contents, and admit documents into evidence for impeachment purposes); Las Vegas Sands Corp. v. Eighth Judicial District Court, 319 P.3d 618 ( Nev. 2014) (attorney’s admission at sanctions hearing that he reviewed privileged documents to refresh his recollection before or while testifying waived privilege with respect to such documents); Las Vegas Development Associates, LLC v. Eighth Judicial District Court, 325 P.3d 1259 ( Nev. 2014) (witness reliance on allegedly-privileged, attorney-prepared documents to refresh his recollection prior to giving deposition testimony waived attorney-client privilege and work-product doctrine, allowing adverse party to demand production of documents, inspect them, cross-examine witness on contents, and admit documents into evidence for impeachment purposes). Cf. In re Kellogg Brown & Root, Inc., ___ F.3d ___, 2015 WL 4727411 (D.C. Cir. Aug. 11, 2015) (defense contractor’s internal investigation into whether contractor defrauded U.S. Government by inflating costs and accepting kickbacks while administering military contracts in Iraq protected by attorney-client privilege and work product; contractor did not impliedly waive privilege and work product protection when corporate representative reviewed the documents in preparation for his deposition, since relator noticed contractor’s deposition on the subject of whether the investigation documents were privileged, giving the corporate representative no choice but to review the documents in preparation; and contractor’s reference to the investigation in summary judgment papers did not result in an “at issue” waiver since it only referred to the fact of an investigation and did not refer to the contents of any privileged documents); Clampitt v. American University, 957 A.2d 23 (D.C. 2008) (Former employee suing university president following termination of employment was not entitled, under rule governing use of a writing to refresh memory, to compel discovery of document prepared by president’s counsel and reviewed by president prior to his deposition, where there was no showing that document refreshed president’s recollection.).

See In re Powerhouse Licensing, LLC, 441 F.3d 467 (6th Cir. 2006) (by including confidential attorney-client communications in affidavit, counsel for defendants effectively waived the attorney-client privilege); In re Chevron Corp., 633 F.3d 153 (3rd Cir. 2011) (plaintiffs in environmental damages action in Ecuador waived work product and attorney-client privilege protections to documents created by non-testifying environmental consultant by submitting documents to court-appointed damages expert, where there was not reason for submission of documents to expert other than for him to consider those documents to advance plaintiffs’ hope that expert’s final global damages assessment report would reflect materials and conclusions in the document); Cruz v. Coach Stores, Inc., 196 F.R.D. 228 (S.D. N.Y. 2000) (fact that company allowed its agent to file executive summary prepared by investigative firm, following completion of its inquiry into charges of financial improprieties, racial discrimination and sexual harassment by company employees, as part of a successful motion to be dismissed from a closed related litigation alleging that agent withheld discovery in another Title VII action, precluded claim of attorney-client privilege or work product protection asserted in Title VII action in opposing motion for disclosure of underlying notes that summary purported to summarize); Hollingsworth v. Time Warner Cable, 812 N.E.2d 976 (Ohio App. 2004) (employer who voluntarily divulged to former employee’s attorney at unemployment hearing and in response to a discovery request certain of employer’s communications with employer’s legal counsel waived any claim of privilege with respect to the communications); Walker v. River City Logistics, Inc., 14 So.3d 1122 (Fla. App. 2009) (Voluntary disclosure of allegedly privileged documents, by employer/carrier, to workers’ compensation claimant’s public defender in another proceeding, waived privilege for the documents in workers’ compensation proceeding, in absence of any argument by employer/carrier that the disclosure was inadvertent.). Compare Dickson v. Rucho, 737
competitors or potentially adverse parties; or (11) failure to timely assert the attorney-client

S.E.2d 362 (N.C. 2013) (Statute regarding redistricting communications did not waive the right of legislators to assert attorney-client privilege or work-product doctrine in litigation concerning redistricting of General Assembly or Congressional districts by providing that all drafting and information requests to legislative employees and documents prepared by legislative employees for legislators concerning redistricting were no longer confidential and became public records upon the act establishing the relevant district plan becoming law; statute did not mention attorney-client privilege or work-product doctrine, let alone explicitly waive common-law doctrine.).

58 See Wi-Lan, Inc. v. LG Electronics, Inc., 684 F.3d 1364 (Fed. Cir. 2012) (Patent owner’s pre-litigation disclosure of letter to competitor, that law firm had written to owner expressing its legal opinion regarding enforceability of patent, waived both owner’s confidentiality in that letter with law firm that wrote it, as well as owner’s attorney-client privilege, at least as to letter itself, where letter had been marked “CONFIDENTIAL” on every page and it was addressed from attorney to client and contained detailed legal opinions.); Lincoln Diagnostics, Inc. v. Panatrex, Inc., 2008 WL 4330182 (C.D. Ill. Sept. 16, 2008) (Attorney-client privilege with respect to e-mail book containing e-mail communications between Defendant’s prior attorney and Defendant’s president during the pendency of the litigation was waived when Defendant’s president intentionally sent the e-mail book to the court and to plaintiff’s counsel and explained in his faxed letter that he did so in order to get a ruling from the court as to his prior counsel’s “uncommon behaviors,” even though president had been told that he could not file anything on behalf of Defendant and could not represent Defendant, which must be represented by counsel. The court assumed that Defendant’s president had also been advised of this by his prior counsel and current counsel.). Cf. Exotica Botanicals, Inc. v. E.I. Du Pont de Nemours & Co., 612 N.W.2d 801 (Iowa 2000) (although attorney who served as general counsel for company disclosed the general subject matter of requested documents in another case, such limited disclosure was not a waiver of the work product privilege); Morisky v. Public Serv. Elec. & Gas Co., 191 F.R.D. 419 (D. N.J. 2000) (in employees’ class action against employer alleging denial of overtime pay in violation of FLSA, questionnaires distributed by employees’ attorneys at public meeting to which employees were invited before lawsuit was filed were not protected by the attorney-client privilege; meeting was open to the general public rather than limited to employees, purpose of questionnaires was to solicit potential clients, and employees who completed questionnaires were not yet clients at the time); Va. Legal Ethics Op. No. 1787 (2003) (attorney may request a retained expert witness who has received information protected by the attorney work product doctrine to contact the attorney upon receipt of a request or subpoena for the information and obtain an agreement from the witness that he will keep the client information confidential, including not disclosing the information to opposing counsel). Compare Center Partners, LTD v. Growth Head GP, LLC, 981 N.E.2d 345 (Ill. 2012) (Former vice president and former chief executive officer of defendant company did not voluntarily waive attorney-client privilege in their depositions as to legal advice received from counsel and shared with third parties; the disclosures were not voluntary since at the time they disclosed the privileged communications, the trial court had already ruled that the defendants had waived attorney-client privilege for communications shared among defendants.); In re Sealed Case, 737 F.2d 94 (D.C. Cir. 1984) (conversation on board airplane between corporation president and general counsel was privileged even though neither party whispered or made any attempt to safeguard the conversation because there was no evidence that the discussions were actually overheard); Furminator, Inc. v. Kim Laube & Co., Inc., 2009 WL 5176562 (E.D. Mo. Dec. 21, 2009) (Disclosing a general summary of a legal opinion in a PowerPoint slide that was shared with third parties did not result in the waiver of privilege); Ashkinazi v. Sapir, 2004 WL 1698446 (S.D. N.Y. July 28, 2004) (conversation over speakerphone between general counsel and president of defendant corporation was privileged; they were in their respective offices and general counsel had his door closed, demonstrating a reasonable intent to keep the discussion confidential); Coudriet v. International Longshore and Warehouse Union Local 23, 2008 WL 2262322 (W.D. Wash. May 29, 2008) (confidentiality of a privileged attorney-client communication between international union and its attorneys is not destroyed by the fact that a local union affiliate is alleged to have participated in the communication; an attorney is permitted to represent more than one client in the same matter provided there is no conflict or such conflict is waived, and an attorney-client relationship is formed with each client).

59 See Simmons v. Children’s Hosp. of Penn., 89 Fair Empl. Prac. Cas. (BNA) 417 (E.D. Pa. 2002) (employer waived attorney-client privilege as to summary of investigation into employment discrimination claim of employee’s coworker when its attorney intentionally sent summary to employee’s counsel, without knowing whether he was representing employee, along with letter suggesting uncertainty as to whether counsel represented

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employee, where there is no evidence that employer or attorney made any effort to verify whether employee’s
counsel represented employee before sending letter, and there was little reason to include summary with letter, as
document could have been identified in some other way; attorney’s statements coupled with her apparent lack of
diligence, indicates that she and employer did not take reasonable measures to preserve privilege); Goldstein v.
Colborne Acquisition Co., LLC, 873 F. Supp.2d 932 (N.D. Ill. 2012) (Minority shareholders of debtor LLC waived
attorney-client privilege as to e-mail correspondence with their individual attorney using debtor’s e-mail system, in
bankruptcy trustee’s action alleging that UCC sale of debtor’s assets was a fraudulent effort to avoid judgment in
favor of creditor, and seeking to compel production of debtor’s pre-sale e-mails, where their e-mails were
deliberately disclosed, by sale, to purchaser of debtor’s assets, debtor reserved right to disclose messages sent over
its e-mail system, third parties had a right of access to the e-mails, because whatever employees wrote became
debtor’s property under the policy, and shareholders did not allege that they were unaware of the company policy);
In re Santa Fe Int’l Corp., 272 F.3d 705 (5th Cir. 2001) (defendant’s senior counsel’s memorandum, which was
disclosed to its horizontal offshore drilling competitors prior to the filing of antitrust class action against it, was not
protected by “common legal interest” extension of the attorney-client privilege; disclosures were made either to
facilitate future price fixing in violation of the antitrust laws, or in the sole interest of preventing future antitrust
violations, and were not made in response to an anticipated or perceived threat of future antitrust litigation); PSE
Consulting Inc. v. Frank Mercede & Sons, Inc, 838 A.2d 135 (Conn. 2004) (statements made in the presence of a
third party are usually not privileged because there is then no reasonable expectation of privacy); American Zurich
Ins. Co. v. Montana Thirteenth Judicial District Court, 280 P.3d 240 (Mont. 2012) (Disclosure by adjuster to
insured employer of letter that attorney retained by workers’ compensation insurer wrote regarding claimant’s
workers’ compensation claim waived the work product doctrine, and thus claimant could subpoena the letter from
employer in unfair settlement practices action against insurer, as employer’s overlapping relationship with both
claimant and insurer made insurer’s expectations of confidentiality during the claims adjustment process
unreasonable; insurer was a Plan II insurer, insurer bore direct liability to claimant, and the law expressly excluded
(D. Ore. 2012) (Subpoenaed entities waived any claim of attorney–client privilege in relation to portions of offering
documents to prospective investors that explained their business strategy when they distributed documents to third–
party prospective investors, for purposes of competing manufacturer's motion to compel discovery in its defense of
products liability suit, absent evidence that subpoenaed entities’ counsel also served as counsel for and represented
investors’ interests or that entities and investors were engaged in pursuit of common legal strategy or intended to
facilitate representation of either party in making those communications.).

See Nguyen v. Excel Corp., 197 F.3d 200 (5th Cir. 1999) (defendant in FLSA action waived attorney-client
privilege by failing to assert the privilege when confidential information was sought during deposition of company
executives and by selectively disclosing portions of the privileged communications to establish its good faith
defense); United States v. Dakota, 197 F.3d 821 (6th Cir. 1999) (Indian tribe’s implicit consent to inspection of its
documents, which defendants obtained by subpoena from tribal offices while those offices were occupied by an
activist group, many of whom were not tribal officers, waived attorney-client privilege as to the documents, since
the tribe did not object to the subpoena or the inspection of the documents); City and County of San Francisco v.
unreasonable five-year delay in seeking to restrict city's use of work originally developed by city attorney's office,
which was disqualified due to a conflict of interest, was extreme and resulted in waiver of the right to restrict access
to disqualified counsel's work product; in limine motion which related to the use of most or all of the city's evidence
was filed only days before trial, defendants themselves noted that identification of any tainted evidence would be
“extremely difficult, if not impossible,” in part because of “the inability of witnesses to remember” events “nearly a
decade after the fact,” and the delay effectively lulled retained counsel into failing to develop evidence unconnected
to that developed by the city attorney's office.); Ardon v. City of Los Angeles, 2014 WL 6968719 (Cal. App. Dec. 10,
2014) (City's inadvertent production of three documents covered by the attorney-client privilege as part of its
response to city resident's Public Records Act request waived any attorney-client or work product privilege that
might have once existed as to those documents, even though the resident was engaged in litigation against the city,
and even if the documents were produced by “low level” employees not explicitly authorized to waive the

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or (12) by affirmative assertions in the lawsuit or in affirmative defenses or otherwise that put the protected information “at issue” by making it relevant to the case\(^6\) (note, however, that not all intended to provide a redacted version of a document to plaintiffs’ counsel, albeit based on counsel’s admittedly uninformative belief that the remaining information in the document was not privileged and, therefore, defendant’s disclosure was intentional and voluntary and constitutes a waiver of the privilege); Chao v. Local 951, United Food and Commercial Workers Int’l Union, 2006 WL 2380609 (N.D. Ohio Aug. 15, 2006) (union member who filed objections to results of union election waived attorney-client privilege where at his deposition, without a lawyer present, he admitted that the attorney helped him draft his objections, his attorney had advised him to allege in his complaint every possible election irregularity enumerated in the statute, even though, for many of the allegations, and admitted he had no actual knowledge of facts supporting such claims; that the attorney was not represented at his deposition when he made the statements constituting waiver is immaterial—he and the attorney discussed whether the attorney should attend the deposition and decided his presence was unnecessary); Rosado v. Bridgeport Roman Catholic Diocesan Corp., 970 A.2d 656 (Conn. 2009) (Roman Catholic diocese and clergymen sued by purported victims and families alleging sexual abuse of minors by clergymen waived any privileges in connection with documents previously protected by sealing orders, where diocese and clergymen did not assert alleged privileges at time of documents’ initial disclosure via voluntary discovery process, despite claim that diocese and clergymen disclosed information with the understanding that it would be sealed.); Lightbourn v. McCollum, 969 So. 2d 326 (Fla. 2007) (state waived any attorney-client privilege that may have existed with respect to two memoranda in litigation brought by prisoner when it disclosed the memos to prisoner’s attorney as part of a public records request response). Cf. Best Prods., Inc. v. Super. Ct., 119 Cal. App. 4th 1181 (2004) (defendant who asserted the attorney-client and work product privileges in a timely manner, albeit in a boiler-plate fashion, did not thereby waive the privilege; there was no requirement that a privilege log be tendered at that point of the discovery proceedings, and only if defendant had failed to file a timely response to plaintiff’s demand could the court find a waiver of privileges); In re Dep’t of Justice Subpoenas to ABC, 263 F.R.D. 66 (D.Mass. 2009) (Television network did not waive privilege over documents subpoenaed by government during investigation of its business practices, even though network did not provide privilege log for six months; government had permitted late assertions at least thirty times without objection during investigation, network notified government that it would provide privilege log when government complied with network’s request to return inadvertently produced privileged documents, and investigation involved millions of documents.); In re Currency Conversion Fee Antitrust Litig., 2003 WL 22389169 (S.D. N.Y. Oct. 21, 2003) (attorney-client privilege shielded incident report summarizing in-house legal advice on and resolution of particular issue, even though subject matter of report had been publicly disclosed); Clark v. Buffalo Wire Works Co., 190 F.R.D. 93 (W.D. N.Y. 1999) (attorney-client privilege protected former employee’s personal notes, which he kept and turned over to counsel during a period in which he suspected that employer would terminate him because of his age, from discovery in subsequent age discrimination suit brought by other employees; employee did not waive privilege for such notes by testifying to the underlying facts regarding termination at deposition); Nationwide Mut. Ins. Co. v. Fleming, 992 A.2d 65 (Pa. 2010) (insurer waived attorney-client privilege for memorandum containing in-house counsel’s legal advice by previously disclosing two other documents on the same subject matter during discovery).

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\(^6\) See, e.g., U.S. Fire Ins. Co. v. Asbestospray, Inc., 182 F.3d 201, 212 (3rd Cir. 1999) (a party may waive the attorney-client privilege by affirmatively placing the advice of counsel in issue); Rhone-Poulenc Rorer, Inc. v. Home Indem. Co., 32 F.3d 851 (3rd Cir. 1994) (reliance on advice of counsel as an affirmative defense waives privilege); In re Grand Jury Subpoena, 341 F.3d 331 (4th Cir. 2003) (subject of grand jury investigation impliedly waived attorney-client privilege regarding question of whether attorney aided him in filing immigration form and whether attorney told him to answer “no” on the form when, in response to questioning by FBI agents as to why he answered “no” to question asking whether he had ever been convicted of a crime, subject responded that he answered no under attorney’s advice; \(^7\) Commonwealth v. Rosado, 458 Mass. 748, 918 N.E.2d 952, 955 (2010) (defendant who asserted the attorney-client privilege as to his statements was not permitted to testify to the underlying facts underlying those statements); Seneca Ins. Co. v. Western Claims, Inc., ___ F.3d ___, 2014 WL 7240719 (10th Cir. Dec. 22, 2014) (because insurance company cited “advice of counsel” to justify settling with its insured in the underlying action, it could not shield that advice from its

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insurance adjuster in recoupment action by insurer against the adjuster; *Ex Parte Meadowbrook Ins. Group, Inc.*, 987 So. 2d 540 (Ala. 2007) (risk management company and employer failed to affirmatively state that they were not relying on attorney’s advice regarding decision to terminate injured worker’s temporary total disability benefits in defense of worker’s compensation claim of tort of outrage regarding the underlying workers compensation claim, as required to protect the attorney’s advice from disclosure in discovery under the attorney-client privilege); *Arizona ex rel. Goddard v. Frito-Lay, Inc.*, 273 F.R.D. 545 (D. Ariz. 2011) (state FEP agency waived all attorney-client and work product privilege that it may have had in the investigation of an employee’s complaint and preparation of the reasonable cause determination when, in lieu of simply stating the agency’s conclusion that reasonable cause existed that the employer had subjected the employee to a hostile environment and discriminated against her on the basis of race and sex in violation of the Arizona Civil Rights Act, provided a public determination that reasonable cause existed under the signature of one of its lawyers, who signed the document as “Chief Counsel”); *Metro. Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 249 Conn. 36, 52-54 (1999) (where a party puts the content of the lawyer’s advice or actions at issue by raising claims that make the work of the attorney “integral to the outcome of the legal claims of the action,” a waiver of confidentiality has occurred, since a party cannot simultaneously make the attorney’s actions or advice an issue and invoke a privilege against revealing them); *Tracinda Corp. v. Daimler Chrysler AG*, 362 F. Supp. 2d 487 (D. Del. 2005) (plaintiff in action challenging merger opened the door to testimony concerning advice given by attorney to corporation’s board, permitting defendant to use attorney’s testimony about that advice defensively to complete the record after they invoked the attorney-client privilege, where plaintiff’s use of attorney’s opinion when questioning two witnesses was incomplete and misleading because it did not include her reasons for her statement that the transaction did not involve a change of control); *Feld v. Fireman’s Fund Ins. Co.*, 292 F.R.D. 129 (D.D.C. 2013) (insured put at issue, and thus waived the attorney-client privilege with respect to communications relating to his or his attorney's understanding of and actions regarding homeowner's insurer's position on hourly rates, or that otherwise bear on the parties' agreement or lack thereof, in insured's suit against insurer seeking to recover $2.4 million of the more than $4.5 million in legal fees and expenses incurred in underlying suit against insured; although insured need not rely on such communications to prove his claim, he essentially claimed that no communications demonstrating that he and/or his attorney agreed to insured's proposed rates ever took place, thereby making certain attorney-client communications integral to the outcome of his claims.); *Wood v. Neuman*, 979 A.2d 64 (D.C. 2009) (Where a party asserts as an essential element of his defense reliance upon the advice of counsel, the party waives the attorney-client privilege with respect to all communications, whether written or oral, to or from counsel concerning the transactions for which counsel’s advice was sought.); *Shapo v. Tires ’N Tracks, Inc.*, 782 N.E.2d 813 (Ill. App. 2002) (core of litigation is premised on defendant’s complaint that its former attorneys were not authorized to settle case on its behalf; therefore, “defendant has placed the conduct of its former counsel at issue, and waiver is applicable to those earlier communications between it and its former counsel involving the settlement agreement”); *CR-RSC Tower I, LLC v. RSC Tower I, LLC*, 56 A.3d 170 (Md. 2012) (Landlords, defendants in developer-tenants' action against landlords seeking lost profits for landlords' refusal to perform ground leases, waived attorney-client privilege with respect to communication with counsel concerning reason for their refusal to perform, by attempting to use attorney-client privilege as a sword and shield by claiming, in response to questioning seeking to elicit their reasons for taking certain actions, that they relied upon advice of counsel, and subsequently asserting attorney-client privilege as to substance of such advice.); *Clair v. Clair*, 982 N.E.2d 32 (Mass. 2013) (Closely-held companies, against which executrix of one shareholder's estate brought action challenging disposition of business assets remaining after sale of most of companies' assets, waived attorney-client privilege as to communications with corporate counsel about prospective purchase by that shareholder of life insurance policies that had been corporately owned, where companies counterclaimed that now-deceased shareholder had breached fiduciary duties to fellow shareholders by filing to fairly value the policies as of date of sale, or, alternatively, by failing to fully and fairly disclose to fellow shareholders the potential tax liability and consequences of the sale.); *In re Marriage of Perry*, 293 P.3d 170 (Mont. 2013) (Wife, who was a former prospective client of husband's divorce counsel, waived any attorney-client privilege she had with respect to information she had provided to husband's counsel as a prospective client, as wife, by filing motion to disqualify counsel in divorce proceeding, claiming that privileged information she had given attorney over the telephone was being misused and that counsel should be disqualified, put her communications with counsel at issue); *EEOC v. Caesars Entm’t, Inc.*, 237 F.R.D. 428 (D. Nev. 2006) (attorney-client privilege and work product doctrine did not preclude deposition questioning of employer’s corporate representative regarding factual bases for employer’s position statements in response to charges of employment discrimination filed with the EEOC by employees, and for.
litigation references to attorney advice or consultation will result in an at-issue waiver).  

its affirmative defenses in subsequent suit brought by the EEOC against employer; Livingston v. 18 Mile Point Drive, Ltd., 972 A.2d 1001 (N.H. 2009) (Client’s reliance on his attorney’s testimony concerning attorney’s preparation for real estate closing, the closing itself, and attorney’s actions on client’s behalf did not constitute “at-issue” waiver of attorney-client privilege in action for specific performance of option contract; client did not inject privileged material into case); Desclos v. S.N.H. Med. Cir., 903 A.2d 952 (N.H. 2006) (when a party asserting the attorney-client privilege injects privileged material into the case such that the information is actually required for resolution of the issue, the privilege-holder must either waive the attorney-client privilege as to that information or be prevented from using the privileged information to establish the elements of the case); Chevron Corp. v. Donziger, 2013 WL 6182744 (S.D. N.Y. Nov. 21, 2013) (Defendants waived the privilege with respect to minutes of a meeting of the “Assembly of the Affected” because defendants’ assertion of the privilege was a result of defendants’ putting in issue and arguing that Donziger’s role had been altered by virtue of a decision allegedly taken at the meeting, (2) defendants have put the events that occurred at that meeting at issue by using them to bolster that claim, and (3) assertion of the privilege to shield the redactions, if permitted, would deprive Chevron access to information necessary to assess the validity of the claim.); EEOC v. Rekrem, Inc., 2002 WL 27776 (S.D. N.Y. Jan. 10, 2002) (where employer asserted advice of counsel defense to EEOC charge, attorney-client privilege waived with respect to files generated by defendant’s outside counsel regarding such advice); Hulse v. Arrow Trucking Co., 587 S.E.2d 898 (N.C. App. 2003) (truck driver waived attorney-client privilege, in personal injury action relating to collision with motorist, as to handwritten interrogatory responses driver faxed to driver’s attorney, where driver testified at deposition that typed interrogatory response stating that motorist’s vehicle was traveling at 50 miles per hour “was not my answer,” and that “I wrote” in handwritten interrogatory response that motorist was traveling “above the speed limit” of “[f]ifty-five plus”; that testimony puts contents of handwritten interrogatory responses into evidence by identifying obvious differences between handwritten and typed responses, and the handwritten response provided the best evidence of truck driver’s intended response to the interrogatory); Public Serv. Co. v. Lyons, 10 P.3d 166 (N.M. App. 2000) (waiver of attorney-client privilege is recognized only where a party seeks to limit its liability by describing the advice given by the attorney and by asserting that he relied on that advice, or where direct use is anticipated because the holder of the privilege must use the materials at some point in order to prevail); Boone v. Vanliner Ins. Co., 744 N.E.2d 154 (Ohio 2001) (in action alleging bad faith denial of insurance coverage, insured was entitled to discover claims file materials containing attorney-client communications that are related to the issue of coverage that were created prior to the denial of coverage; if the trial court finds that the release of this information will inhibit the insurer’s ability to defend on the underlying claim, it may issue a stay of the bad faith claim and related production of discovery pending the outcome of the underlying claim); Rubel v. Lowe’s Home Ctrs., Inc., 580 F. Supp.2d 626 (N.D. Ohio 2008) (In proceeding brought by defendant to enforce a settlement of a personal injury suit brought by plaintiff, testimony of plaintiff’s former attorney about his communications with plaintiff concerning attorney’s authority to settle plaintiff’s claim is admissible because plaintiff waived the attorney-client privilege when he voluntarily testified in his affidavit and deposition that he neither agreed to settle his case with defendant nor authorized his attorney to do so; moreover, a communication from a client to his attorney conveying authority to the attorney to act on his behalf as his agent in entering into an agreement with the opposing party, is a communication which is intended to be communicated to the opposing party and, therefore, is not privileged.); Bertelesen v. Allstate Ins. Co., 796 N.W.2d 685 (S.D. 2011) A client only waives the attorney-client privilege under the advice-of-counsel exception by expressly or impliedly injecting his attorney’s advice into the case; the key factor is reliance of the client upon the advice of his attorney); Republic Ins. Co. v. Davis, 856 S.W.2d 158, 163-64 (Tex. 1993) (waiver of attorney-client privilege by offensive use; party asserting privilege seeks affirmative relief and the privileged information is determinative of the claim); Cedell v. Farmers Ins. Co. of Washington, 295 P.3d 239 (Wash. 2013) (Attorney for homeowners' insurer performed quasi-fiduciary functions of investigating, evaluating, negotiating, and processing underlying claim, in addition to advising insurer as to the law and strategy, so as to support presumptive waiver of attorney-client privilege by insurer and entitle insured to discovery of claims file in first-party bad faith claim filed by insurer.).

62 See In re Grand Jury Proceedings, 219 F.3d 175 (2nd Cir. 2000) (grand jury testimony of company’s founder, chairman and controlling shareholder, referring to advice of counsel as validating corporation’s actions, did not necessarily waive attorney-client and work product privileges, where witness was compelled to testify, was not the corporation’s legal representative, had no legal training, was not directly involved in preparing the corporation’s

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defense, and where the corporation had formally notified the government of its intention to preserve the privileges and did not itself take any affirmative steps to inject privileged materials into the litigation; rather, district court should carefully weigh circumstances surrounding testimony, including whether witness’s interest in exculpating his own conduct that may override his fidelity to the corporation, in deciding whether, in fairness, that testimony affected waiver; *Ross v. City of Memphis*, 423 F.3d 596 (6th Cir. 2005) (plaintiff police officer sued defendants, the city, a former police director and a police deputy, alleging employment discrimination; the director asserted qualified immunity based on legal advice received from the city’s attorneys and the district court ordered the director to disclose the contents of that advice; on interlocutory appeal, the Sixth Circuit reversed, finding that the city could assert the attorney-client privilege and the director’s assertion of the advice of counsel defense did not result in a waiver by the city; the city still bore the burden of establishing the existence of the privilege, and there was some chance that the director clearly indicated he had sought individual legal advice; the district court was encouraged to consider that issue on remand); *Rock River Communications, Inc. v. Universal Music Group, Inc.*, 745 F.3d 343 (9th Cir. 2013) (defendant who relies on the protection afforded by *Noerr-Pennington* does not give up the right to keep its communications with its lawyer confidential); *Ex Parte Nationwide Mut. Ins. Co.*, 990 So.2d 355 (Ala. 2008) (Electronic communications between insurer and its counsel that occurred after insurer denied insured corporation’s request for defense and indemnity were protected by the attorney-client privilege and work-product doctrine, such that insurer was not required to produce the communications in response to corporation’s discovery request in its bad faith action against insurer); *Ex Parte State Farm Fire and Cas. Co.*, 794 So. 2d 368 (Ala. 2001) (mere fact that plaintiffs claimed damages to compensate for attorneys fees they incurred in earlier action did not indicate a waiver of the attorney-client privilege); *Empire West Title Agency, L.L.C. v. Talamante*, 323 P.3d 1148 (Ariz. 2014) (Purchaser's allegations that title agent breached the parties’ contract by failing to comply with the terms of a Closing Instructions Letter (CIL), which instructed the agent to verify that the legal description of the property corresponded to a description that included an access easement, and that purchaser “reasonably believed” that the CIL's property description was included in all closing documents, did not waive purchaser's attorney-client privilege as to communications revealing whether purchaser knew the easement had been abandoned by quitclaim deed, even though purchaser's knowledge of the alleged title defect might be material to title agent's defense, since purchaser's allegations did not necessarily incorporate knowledge or advice obtained from counsel); *Travelers Ins. Cos. v. Super. Ct.*, 143 Cal. App. 3d 436 (1983) (attorney-client privilege not waived by signing answers to interrogatories); *Woodbury Knoll, LLC v. Shipman and Goodwin, LLP*, 48 A.3d 16 (Conn. 2012) (Although the reasonableness of the settlements reached in another case were directly at issue in a legal malpractice action brought by former clients, the direct communications between the former clients and their attorney’s in the other case were not at issue, and thus, were not subject to the “at issue exception” to the attorney-client privilege, absent any showing that the reasonableness of the settlement in the other case was necessarily determined by the advice the settling clients received from counsel in that case.); *Pfizer, Inc. v. Ranbaxy Labs., Ltd.*, 2004 WL 1376586 (D. Del. June 28, 2004) (fact that an applicant bases its notification on the opinions and advice of its attorneys is insufficient to constitute a waiver of the attorney-client privilege and/or work product immunity with respect to the underlying documents expressing that advice or opinion); *Genovese v. Provident Life and Accident Insurance Co.*, 74 So.3d 1064 (Fla. 2011) (attorney-client privileged communications are not discoverable in action by a first-party insured against insurer for bad faith; goal of privilege would be severely hampered if an insurer was aware that its communications with its attorney, which were not intended to be disclosed, could be revealed upon request of insured, and there is no exception to the privilege that allows discovery of privileged communications based on a showing of need and undue hardship); *Knox v. Cessna Aircraft Co.*, 2007 WL 2874228 (M.D. Ga. Sept. 26, 2007) (defendant did not waive attorney-client privilege by introducing letters between attorneys to establish that the plaintiff had received an unconditional offer of reinstatement); *Am. Nat'l Bank and Trust Co. v. Emerald Insvs. Ltd. P'ship*, 2005 WL 6249757 (N.D. Ill. July 14, 2005) (by denying that it acted in bad faith in breach of contract action, defendant company did not waive attorney-client privilege concerning communications which may have been relevant to the issue of bad faith); *Brandon v. West Bend Mut. Ins. Co.*, 681 N.W.2d 633 (Iowa 2004) (insurer in suit by insured did not waive attorney-client privilege as a result of its in-house attorney verifying the answers to interrogatories and attorney and adjuster providing the information for the answers); *Four Rivers Gaming, Inc. v. Reliable Amusement Co.*, 737 So. 2d 938 (La. App. 1999) (testimonial by owner’s attorney about sending contract termination letter did not waive privilege, since testimony only repeats what is evident from the letter, which was not privileged); *Bennett v. ITT Hartford Group, Inc.*, 846 A.2d 560 (N.H. 2004) (in insured’s action alleging breach of covenant of good faith and fair dealing against homeowner insurer, at-issue waiver of attorney-client privilege did not
Moreover, under the “fiduciary exception,” plaintiffs who are ERISA plan participants may be able to discover otherwise privileged communications between plan fiduciaries and their attorneys that relate to plan administration.\(^{63}\) Finally, disclosure of privileged communications

not apply to compel insurer to produce documents concerning communications between insured and insured’s attorney during insured’s action against manufacturer of dryer, which allegedly caused fire that destroyed insured’s home; what was at issue was not those communications, but rather was whether loss insured claimed to have incurred because of insurer’s investigation of dryer’s role in causing fire prevented insurer from filing action against manufacturer at earlier time); *Miteva v. Third Point Mgmt. Co.*, 218 F.R.D. 397 (S.D. N.Y. 2003) (testimony of employer company’s principal and sole owner in response to deposition question by employee’s counsel, that termination letter did not specify any reason for employee’s dismissal and was so worded on advice of counsel, did not effect waiver of attorney-client privilege; employer had not affirmatively asserted advice of counsel defense in action and was not relying thereon; employer’s limited acknowledgment of reliance on advice of counsel in employer’s preparation of employee’s termination letter was not sufficient to constitute disclosure of the full content of the advice or to serve as a basis for compelling that balance of communication be revealed); *Western Horizons Living Centers v. Feland*, 853 N.W.2d 36 (N.D. 2014) (Trial court's order, compelling nursing home to comply with nursing staff provider's discovery requests, which provided a blanket authorization for disclosure of insurer's entire claims file and all communications during settlement negotiations in a resident's prior lawsuit against nursing home, for which nursing home was seeking indemnification from provider, was an abuse of discretion; court's order was too broad and on remand the court was required to examine the specific information requested for a determination of whether any of the requested information was protected by lawyer-client privilege or constituted protected communications during settlement negotiations.); *In re Waste Management Resources*, 387 S.W.3d 92 (Tex. App. 2012) (employer entitled to protective order prohibiting plaintiff from describing her interview with employer’s lawyer in preparation for a deposition in an earlier lawsuit to support her wrongful discharge claim; interview was privileged because it was for the purpose of advising and representing the employer and related to matters within the scope of the plaintiff’s responsibilities as an employee); *State v. Madden*, 601 S.E.2d 25 (W. Va. 2004) (where the interests of an insured and the insurance company are in conflict with regard to a claim for under-insured motorist coverage and the insurance company is represented by counsel, the bringing of a related first-party bad faith action by the insured does not automatically result in a waiver of the insurance company’s attorney-client privilege concerning the under-insurance claim); *Va. Elec. & Power Co. v. Westmoreland-LG&E Partners*, 526 S.E.2d 750 (Va. 2000) (independent power producer met its burden of producing evidence to show that draft letter prepared by chief financial officer of power producer to memorialize conversation with employee of electric utility was attorney-client privileged and not subject to discovery by electric utility in contract dispute, even though letter was shared with officer and counsel of parent company which formed partnership comprising power producer, where author testified he intended to seek legal advice both on content and whether it should be sent, letter was never sent, and substance of letter constituted very matter for which legal advice was sought). *Cf. Williams v. Sprint/United Mgmt. Co.*, 464 F. Supp. 2d 1100 (D. Kan. 2006) (employer in ADEA suit did not waive attorney-client privilege by deposition testimony of its witnesses that allegedly raised advice of counsel issue; witnesses did not voluntarily raise issue, but did not in response to direct questions from employee’s counsel concerning privileged communications; the employer’s assertion of good faith compliance with the ADEA also did not waive the privilege, since none of the documents sought constituted the type of “policy” on which the employer intended to rely to supports its good faith defense).

\(^{63}\) *Wachtel v. Health Net, Inc.*, 482 F.3d 225 (3rd Cir. 2007) (Fiduciary exception to the attorney-client discovery privilege did not apply to ERISA fiduciary and its corporate parents in beneficiaries’ suit to recover benefits and to redress alleged violations of fiduciary duties and failure to supply information to beneficiaries; beneficiaries were not the “real” clients obtaining legal representation from the fiduciary’s counsel.); *Solis v. Food Employers Labor Relations Assn.*, 644 F.3d 221 (4th Cir. 2011) (Fiduciary exception to attorney-client privilege that extended to communications between ERISA trustee and plan attorney regarding plan administration applied to Department of Labor (DOL) compliance investigation under ERISA just as it did in enforcement action, since Secretary’s investigative role was directly related to her enforcement powers, interests that Secretary sought to protect in enforcement action did not differ from those protected in investigation, and potential for public disclosure in investigation context did not harm beneficiary interests any more than in enforcement context.); *Stephan v. Unum Life Ins. Co. of America*, 697 F.3d 917 (9th Cir. 2012) (Internal memoranda between ERISA plan administrator's

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are sometimes ordered under the crime-fraud exception,\(^6^4\) although the exception has been

claims analyst and its in-house counsel regarding whether to include beneficiary's bonus in his pre-disability
earnings were discoverable under fiduciary exception to attorney-client privilege, in beneficiary's action alleging
breach of long-term disability insurance plan, since communications did not address any potential civil or criminal
liability that administrator might face and there was no indication that they were prepared with such liability in
ERISA plan administrator that solely concern ERISA plan administration are an exception to the general shield of
attorney-client privilege); \(Allen v. Honeywell Retirement Earnings Plan, 698 F. Supp.2d 1197\) (D. Ariz. 2010)
(fiduciary exception applies to an attorney’s advice to an ERISA trustee on matters of plan administration and
where the advice does not implicate the trustee in any personal capacity; where the plan fiduciary retains counsel to defend
itself against the plan beneficiaries the exception does not apply); \(Sizemore v. Pacific Gas & Electric Retirement
Plan, 952 F.Supp.2d 894\) (N.D. Cal. 2013) (Fiduciary exception to attorney-client privilege applied to two e-mails
sent between employer and its counsel in relation to employee's seeking of pension benefits pursuant to ERISA
under his employer's plan, where the e-mails were sent during the appeals process for employee's claims, and
employer's interests were not yet adverse such that the exception no longer applied); \(Carr v. Anheuser-Busch
(email from employer’s associate general counsel to ERISA plan administrator, providing guidance for reviewing appeal of
denied claim, was subject to fiduciary exception to the attorney-client privilege and thus disclosable in action
alleging employer violated ERISA by denying severance, since content of email related to how administrator
interpreted and conducted appeal procedure contained in benefit plan, nothing in email referenced future litigation
strategy, merits of employee’s claim or potential liability, and communication was not between employer and
counsel retained for purposes of litigation. Fiduciary exception did not apply to series of emails between employer’s
associate general counsel and plan administrator discussing content and drafting of letter from administrator to
discharged employee affirming initial denial of his severance benefits on appeal; emails related to substantive merits
of employee’s individual claim and content of final decision letter denying his severance benefits, drafting of final
decision was last step in plan administration process, and, at point emails were drafted, employee’s interests had
become sufficiently adverse to that of administrator’s); \(Lewis v. UNUM Corp. Severance Plan, 203 F.R.D. 615\) (D.
Kan. 2001) (defendants waived attorney-client privilege when its in-house counsel sent otherwise privileged
documents to plan administrator; the plan administrator is a fiduciary acting on behalf of the beneficiaries of the
plan and is not acting in his capacity as a company representative); \(Wal-Mart Stores, Inc. v. Indiana Elec. Workers
Pension Trust Fund IBEW, 95 A.3d 1264\) (Del. 2014) (Production of documentary information protected by
attorney-client privilege was warranted in shareholder's action seeking production of corporate records regarding
bribery scandal involving Mexican subsidiary pursuant to the fiduciary exception to the attorney-client privilege; the
privileged information was necessary and essential to shareholder's investigation into the corporation's handling of
the scandal, and shareholder demonstrated good cause in that shareholder sought specific documents, the material
did not risk the revelation of trade secrets, and the shareholder's allegations implicated criminal conduct).

\(^6^4\) \(United States v. Albertelli, 687 F.3d 439\) (1st Cir. 2012) (Defendant forfeited the attorney-client privilege
under the crime-fraud exception, and, thus, attorney’s testimony about a conversation he had with defendant, in
which defendant revealed his motive for crime of arson and his intent to facilitate its commission, was admissible at
trial for racketeering, racketeering conspiracy, and other crimes.); \(In re Grand Jury Subpoena, 745 F.3d 681\) (3d Cir.
2014) (district court did not err in finding that there was reasonable basis to conclude that attorney's advice had been
used by targets of grand jury investigation to fashion conduct in furtherance of their crime, and thus crime-fraud
exception applied to attorney-client privilege with regard to unmemorialized verbal communications so that attorney
could be compelled to testify before grand jury, where attorney provided information about types of conduct that
violated the law, in addition to advice that he should not make payment, and then target stated that he was going to
make payment anyway.); \(In re Icenhower, 755 F.3d 1130\) (9th Cir. 2014) (Crime-fraud exception to attorney-client
privilege applied to the extent that alleged contemnor consulted with his attorneys for purpose of furthering his
obstruction of bankruptcy court's order; having invoked advice of counsel in support of his position that Mexican
law made it impossible for him to comply with bankruptcy court's order and in support of his argument that, by
contacting the Mexican Ministry of Foreign Affairs and by seeking an amparo, he had not engaged in conduct that
was inconsistent with compliance with bankruptcy court's order, alleged contemnor implicitly waived attorney-client
privilege with regard to communications on those subjects.); \(People v. Radojcic, 998 N.E.2d 1212\) (Ill. 2013)
(Crime-fraud exception to attorney-client privilege applied such that defendant's former attorney could testify about former attorney's communications with defendant and acts that former attorney took in following defendant's instructions with respect to real estate transactions identified in indictment, in prosecution for financial institution fraud and other crimes related to a mortgage fraud scheme allegedly orchestrated by defendant; evidence indicated that defendant used his instructions to former attorney to further defendant's attempts to engage in fraudulent activity concerning sales of condominiums to straw purchasers and subsequent resales from straw purchasers to corporations controlled by defendant; A client may consult with his attorney about the legal implications of a proposed course of conduct, or how to defend against the legal consequences of past conduct, without triggering the crime-fraud exception to the attorney-client privilege; such good-faith consultations are protected by the attorney-client privilege.); Edelstein v. Optimus Corp., 2012 WL 2192292 (D. Neb. June 14, 2012) (Even if communications between administrator of nonqualified plan and ERISA plan attorneys could be considered protected by attorney-client privilege, either the crime-fraud or fiduciary exception to the privilege would apply; the court found that defendant made material misrepresentations or omissions of fact in connection with the settlement of its pension obligations, which would be sufficient to invoke the fraud exception, and although the administrator of a nonqualified plan may not be a fiduciary, the role played by the administrator vis-a-vis the beneficiaries in this case is sufficiently analogous to a fiduciary relationship that application of ordinary contract principles, including the duty of good faith and fair dealing, would compel the finding that the ERISA Plan attorneys may not shield the material from their ultimate clients, the plan beneficiaries.); Antidote Int’l Films, Inc. v. Bloomsbury Publ’g, PLC, 242 F.R.D. 248 (S.D. N.Y. 2007) (email sent to attorney by mother of author of novel, who allegedly fraudulently misrepresented to purchaser of option on novel’s film rights, that events in novel were based on actual experiences and hardships suffered by an individual who did not in fact exist, fell squarely within the crime-fraud exception to the attorney-client privilege; email effectively asked the attorney for assistance in procuring fraudulent corporate documents to show that allegedly fictitious individual was an authorized signatory for contracts).)

65 See, e.g., Shaffer v. American Medical Ass’n, 662 F.3d 439 (7th Cir. 2011) (Crime-fraud exception did not remove attorney-client privilege protection from memorandum prepared by employee’s supervisor for the sole purpose of meeting with in-house counsel regarding the elimination of employee’s position; supervisor specifically told in-house counsel that he had prepared the memorandum in preparation for their meeting, and no attempt was made to hide that fact during the meeting or to anyone else thereafter, employer did not attempt to use the memorandum to support its termination decision, and there was no evidence that in-house counsel assisted supervisor in the commission of a fraud or gave any advice to him regarding the commission of a fraud.); Automated Solutions Corp. v. Paragon Data Systems, Inc., 756 F.3d 504 (6th Cir. 2014) (The crime-fraud exception to attorney-client privilege did not apply to inadvertently disclosed e-mails between a software developer and its attorneys, in a copyright infringement action against the developer, despite contention that the e-mails demonstrated an intent to obstruct justice throughout the discovery process; the e-mails did not discuss violating a current order, nor did they seek advice regarding future illegal conduct, but rather appeared to discuss the ongoing discovery litigation process, a subject undoubtedly within the purview of the attorney-client relationship.); Alaska Interstate Construction, LLC v. Pacific Diversified Investments, Inc., 279 P.3d 1156 (Alaska 2012) (Former manager of limited liability company (LLC) failed to make out a prima facie case against LLC for abuse of process based on LLC’s reporting of manager’s alleged criminal activity, and thus, superior court did not abuse its discretion by refusing to permit discovery of LLC’s privileged communications under exception to attorney-client privilege for use of attorney’s services to commit fraud; manager did not cite any evidence in the record supporting its assertion that LLC wrongfully reported evidence of what it believed to be criminal activity); Harris v. Southwest Power Pool, Inc., 2012 WL 645908 (E.D. Ark. Feb. 28, 2012) (information in plaintiff’s possession regarding 2006 FLSA compliance audit, which the parties agree was an attorney-client privileged communication, was not subject to the crime-fraud exception; if the audit were to establish that, in 2006, employer was aware that plaintiff had been mis-classified yet took no corrective action, the information would certainly be relevant to establish that employer willfully violated the FLSA by continuing to treat plaintiff as nonexempt. Nevertheless, “[t]hat the [audit] may help prove that a fraud occurred does not mean that it was used in perpetrating the fraud.”); Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP, 80 A.3d 155 (Del. Ch. 2013) (Privilege over absorbed corporation’s communications with its counsel, including those relating to absorbed corporation's acquisition by surviving corporation, passed to

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surviving corporation under statute stating that following merger “all property, rights, privileges, powers and franchises, and all and every other interest shall be thereafter as effectually the property of the surviving or resulting corporation.”); Board of Overseers of Bar v. Warren, 34 A.3d 1103 (Me. 2011) (Crime-fraud exception to the attorney-client privilege that existed between law firm and its former general counsel did not apply to defeat the privilege, which firm asserted protected from disclosure to Bar Counsel firm documents that Bar Counsel sought concerning former general counsel’s investigation of firm’s former partner for misconduct, as the firm was not planning or engaged in any fraudulent activity at the time it enlisted former general counsel’s help in the investigation, and the firm did not intend to facilitate or conceal any fraudulent or criminal conduct in the communications with former general counsel.); In re AEP Tex. Cent. Co., 128 S.W.3d 687 (Tex. App. 2003, orig. proceeding) (legal memorandum prepared by attorney, outlining potential claims between company and property owner that was involved in dispute, was protected by attorney-client and work product privileges, where attorney testified that memorandum contained his opinions and legal theories with regard to dispute; attorney testified that memorandum was prepared in anticipation of litigation, then memorandum was transferred to counsel who represented company in the subsequent trespass action, such counsel testified that memorandum was not intentionally produced and that he considered the document privileged, and no evidence supported claim that crime/fraud exception applied).

See Commodity Futures Trading Comm’n v. Weintraub, 471 U.S. 343, 348-49 (1985); United States v. Segal, 2004 WL 830428 (N.D. Ill. April 16, 2004) (former executives cannot waive a corporation’s attorney-client privilege); Tucker v. Honda of S.C. Mfg., Inc., 582 S.E.2d 405 (S.C. 2003) (same). See also Martinez v. Butterball, LLC, 2011 WL 4549101 (E.D. N.C. Sept. 29, 2011) (seller corporation’s attorney-client and work product privileges with respect to its turkey business transferred to buyer upon buyer’s assumption of control of the assets; therefore, the fact that seller corporation “left behind” privilege documents after the sale did not waive the privilege). Cf. Clair v. Clair, 982 N.E.2d 32 (Mass. 2013) (Executrix of estate of one of four brothers who owned roughly equal shares in closely-held companies did not, by stepping into that brother's shoes for purposes of administering estate, automatically assume his role as a director of the companies, and was therefore not entitled on that theory, in action challenging disposition of business assets that remained after sale of most of companies' assets to new owner, to access to companies' privileged communications with corporate counsel.); Wilson v. Preston, 378 S.C. 348, 662 S.E.2d 580 (S.C. 2008) (County council member could not independently review county’s attorney-client privileged documents; privilege belonged to county as the client, and council, as a whole, was authorized to release that information and had to waive privilege before individual council member could review privileged documents).

Weintraub, 471 U.S. at 348-49; Sprague v. Thorn Amns., Inc., 129 F.3d 1355, 1371 (10th Cir. 1997). See also Motley v. Marathon Oil Co., 71 F.3d 1547 (10th Cir. 1995) (“The mere fact that [defendant] designated a lawyer, pursuant to Fed. R. Civ. P. 30(b)(6), as its corporate representative at one deposition, is a wholly insufficient ground to hold that [it] waived its attorney-client privilege.”); Larmanger v. Kaiser Foundation Health Plan of the Northwest, 585 Fed. Appx. 578 (9th Cir. 2014) (district court did not abuse its discretion by denying former employee’s motion to compel deposition from two attorneys representing Kaiser; she provided no authority to support her contention that she was entitled to waive Kaiser’s privilege because she and Kaiser were joint clients, and as a former employee she was no longer a “representative” of Kaiser for privilege purposes); Alexander v. FBI, 198 F.R.D. 306 (D. D.C. 2000) (disclosure of privileged information in testimony before various legislative bodies and other third parties, by corporate employee which was not authorized by corporation’s officers and directors, did not waive corporation’s attorney-client privilege); Wheeler v. George, 39 So.3d 1061 (Ala. 2009) (Attorney’s disclosures to non-client did not waive attorney-client privilege in the absence of a showing of client’s consent to disclosure.); State Comp. Ins. Fund v. Super. Ct., 91 Cal. App. 4th 1080 (2001) (insured employer did not have standing to waive attorney-client privilege between insurer and insurer’s attorney regarding documents pertaining to insured employer; insurer retained lawyers to perform services and render advice to it, but that did not bestow “client” status on insured employer); Maplewood Partners, L.P. v. Indian Harbor Ins. Co., 295 F.R.D. 550 (S.D. Fla. 2013) (Corporate representatives of the insureds under financial and professional services indemnity policy did not have independent right to assert attorney-client privilege as to corporate communications with attorney in...
connection with three underlying actions; they did not obtain legal advice as to underlying actions in distinctly individual, rather than representative, capacity, and communications related to their duties with insured.); Sharp v. Trans Union L.L.C., 845 N.E.2d 719 (Ill. App.), review denied, 845 N.E.2d 719 (Ill. 2006) (in action brought by underwriters for declaratory judgment that certain lawsuits against insured were not covered by insurance policy, insured bargained away any privilege that applied to pre-policy documents when it agreed to a broad cooperation clause that required it to cooperate “in all investigations, including investigations regarding coverage,” and to an exclusion which defined coverage in terms of what insured’s counsel knew about existing and potential errors and omissions lawsuits, which in effect constituted an agreement to share the legal reasoning and analysis of its general counsel with the underwriters in a coverage investigation); Rojicek v. River Trails Sch. Dist. 26, 2003 WL 1903987 (N.D. Ill. April 17, 2003) (former superintendent being sued for retaliation in violation of first amendment rights is not entitled to an order disqualifying counsel for the district and the other co-defendants or blanket waiver of the attorney-client privileged communications between her and such counsel in order to advance an advice of counsel defense; although superintendent was occasionally provided legal advice by the district’s counsel in matters concerning the plaintiff that are at issue in the litigation, all advice was given to the superintendent solely in the context of her role as superintendent and not concerning her personal liability and thus the privilege is exclusively vested in the district’s board and superintendent is not authorized to waive the privilege without the board’s consent); IMC Chems., Inc. v. Niro, Inc., 2000 WL 1466495 (D. Kan. July 19, 2000) (when one of plaintiff’s attorneys disclosed the privileged communications during his deposition regarding his and his client’s interpretation of the contract, the intent behind the contract, and the negotiations and drafting of the contract; “[T]he disclosures occurred without the consent of the client; such disclosures thus breached the attorney-client relationship. The disclosures did not, however, waive the attorney-client privilege.” However, court found waiver by plaintiff’s failure to timely object following discovery of disclosure.); Kurstin v. Bromberg Rosenthal, LLP, 24 A.3d 88 (Md. 2011) (client’s current attorney lacked standing to challenge discovery order that required him to reveal allegedly privileged information in dispute between client and previous attorney stemming from underlying divorce action; it was the client that held the attorney-client privilege, not the attorney); Inter-Fluve v. Montana Eighteenth Jud. Dist. Court, 112 P.3d 258 (Mont. 2005) (confidentiality of the attorney-client privilege was not violated when a former director of a closely-held corporation, who had brought claims against the corporation, was allowed to discover communications between the corporation’s counsel and other directors which occurred during his tenure as director; treatment of the directors as joint clients with the corporation was proper because all powers of the corporation were exercised through the board of directors); Las Vegas Sands Corp. v. Eighth Jud. Dist. Ct., 331 P.3d 905 (Nev. 2014) (corporation’s current management was the sole holder of its attorney-client privilege, and thus, attorney-client privilege statute did not allow for a judicially created “class of persons” exception to attorney-client privilege, and therefore former chief executive officer (CEO) of corporation, who was suing corporation for breach of employment agreement, was not permitted to use corporation’s privileged documents for use in litigation; allowing a former fiduciary of a corporation to access and use privileged information after he or she became adverse to the corporation solely based on his or her former fiduciary role was entirely inconsistent with the purpose of the attorney-client privilege, and such a situation would have had a perverse chilling effect on candid communications between corporate managers and counsel); Hedden v. Kean University, 82 A.3d 238 (N.J. Super. A.D. 2013) (University’s women’s basketball coach’s disclosure to national athletic association of confidential e-mail she sent to university’s general counsel did not waive university’s attorney-client privilege of non-disclosure in subsequent litigation; coach was not an officer or director of university and did not serve in a management capacity, coach was not acting under the direction or approval of the university when she released the document, and coach was acting in her own interest and through her own counsel when she disclosed the document.); Girl Scouts-Western Oklahoma, Inc. v. Barringer-Thomson, 252 P.3d 844 (Ok. 2011) (following merger, surviving company was entitled to files of absorbed company’s former attorney regarding attorney’s pre-merger representation of absorbed company; merger agreement transferred all assets, properties and privileges to the surviving company, and ownership of absorbed company’s assets, as well as its attorney-client privilege, transferred to surviving company by operation of law as a result of the merger); Lane v. Sharp Packaging Syst., Inc., 640 N.W.2d 788 (Wis. 2002) (former director could not waive lawyer-client privilege on behalf of corporation, for purposes of subpoena he served on corporation in action he commenced following termination of his employment, even though lawyer-client documents sought by subpoena were created during director’s tenure on the corporation’s board; Wisconsin followed the entity rule, accordingly privilege belonged to the corporation, only corporation could waive privilege, and only current management could act on behalf of the corporation). Cf. American Zurich Ins. Co. v. Montana Thirteenth Judicial District Court, 280 P.3d 240

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Investigation Materials Prepared by Attorneys. It is often the case that an employer will assign an in-house lawyer or an outside attorney to conduct an investigation. In such cases, waiver of the attorney-client privilege is implicated. Some courts have held that it is inconsistent to assert the attorney-client privilege, prohibiting discovery of the matter, while simultaneously seeking to introduce the investigative file, or even selected portions of the investigative file, as evidence at trial. Thus, courts have held that a corporate employer has waived the attorney-client privilege when it contends in a sexual harassment case that its response to plaintiff’s allegations were “reasonable” based on an investigation conducted by its outside counsel.

(Mont. 2012) (Claims adjuster, employed by third-party adjuster that workers’ compensation carrier contracted to provide services for claimant’s workers’ compensation claim, was authorized to waive insurer’s privilege in regards to letter that insurer’s attorney wrote regarding claimants case by sending a copy of the letter to the insured employer, where adjuster in accordance with state statute had absolute authority over management of the claim); Wise v. Consol. Edison Co., 723 N.Y.S.2d 462 (App. Div. 2001) (fact that employee mailed to his attorney, after his termination, certain documents on which he had worked as an attorney, did not constitute knowing waiver of confidentiality, such as would allow their use in attorney’s wrongful discharge suit against employer; employer had previously warned attorney that commencement of legal action would violate his ethical duty to preserve confidences).

Vicnair v. Louisiana Dept. of Public Safety and Corrections, 555 Fed. Appx. 325 (5th Cir. 2014) (in Title VII action against employer, email sent to employer's general counsel was covered by attorney-client privilege, where it was between an employee, a confidential assistant to employer's deputy secretary, and general counsel and concerned a pending internal investigation); State ex rel. Toledo Blade Co. v. Toledo-Lucas County Port Authority, 905 N.E.2d 1221 (Ohio 2009) (Investigative report prepared by port authority’s outside counsel, in connection with allegations that authority’s president had engaged in inappropriate relationship with a vendor to a consortium of which authority was a member, was related to rendition of legal services and was therefore excepted under attorney-client privilege from disclosure pursuant to Public Records Act, though report did not make specific recommendation regarding president’s employment; investigation required counsel to draw upon legal training and experience as well as knowledge of law governing port authority and its policies and personnel, and legal analysis was integrated throughout report). Cf. Mega Manufacturing, Inc. v. Eighth Judicial District Court, 2014 WL 2527226 (Nev. May 30, 2014) (the attorney–client privilege did not protect from disclosure a post-accident investigative report by a manufacturer’s engineer, even where the investigator sent the report to the manufacturer’s outside counsel); Thompson v. C&H Sugar Co., 2014 WL 595911 (N.D. Cal. Feb. 14, 2014) (attorney–client privilege did not protect the HR Manager’s memo regarding his internal investigation of hotline complaints, even though the report was “ghostwritten” by the company’s in-house lawyer; the memorandum qualified as attorney work product, though the plaintiff demonstrated substantial need for its production).

State Farm Mut. Auto. Ins. Co. v. Lee, 13 P.3d 1169, 1177 (Ariz. 2000) (“When a litigant seeks to establish its mental state by asserting that it acted after investigating the law and reaching a well-founded belief that the law permitted the action it took, then the extent of its investigation and the basis for its subjective evaluation are called into question. Thus, the advice received from counsel as part of its investigation and evaluation is not only relevant but, on an issue such as this, inextricably intertwined with the court’s truth-seeking functions. A litigant cannot assert a defense based on the contention that it acted reasonably because of what it did to educate itself about the law, when its investigation and knowledge about the law included information obtained from its lawyer, and then use the privilege to preclude the other party from ascertaining what it actually learned or knew.”); Wellpoint Health Networks, Inc. v. Super. Ct., 59 Cal. App. 4th 110, 128 (1997) (if employer hopes to prevail by showing it investigated an employee’s complaint and took actions appropriate to the findings of the investigation, then it will have put the adequacy of the investigation directly at issue and cannot stand on the attorney-client privilege; “The defendant cannot have it both ways.”); Tackett v. State Farm Fire & Cas. Ins. Co., 653 A.2d 254, 259-60 (Del. 1995) (although a party cannot force insurer to waive attorney-client privilege merely by bringing bad faith action, where insurer makes factual assertions in defense of a claim which incorporate, expressly or implicitly, the advice and judgment of its counsel, it cannot deny an opposing party “an opportunity to uncover the foundation for those
assertions in order to contradict them”); Jackson v. Deen, 2013 WL 3863889 (S.D. Ga. July 25, 2013) (Plaintiff may depose attorney for corporate defendants who investigated harassment complaints and formulated human resources procedures where it appears that defendants do not disavow any intention to rely on the attorney’s testimony during their defense; plaintiff may inquire into attorney’s actions relating to any investigation of discrimination complaints that were not conducted directly for or in anticipation of EEOC administrative action or litigation and is free to explore attorney’s involvement in the formulation and implementation of employment policies for the corporate defendants. However, any information containing attorney’s legal opinions formed in anticipation of EEOC administrative action or litigation is excluded from discovery.); Musa-Muaremi v. Florists’ Transworld Delivery, Inc., 270 F.R.D. 312, 317-19 (N.D. Ill. 2010) (By asserting the Faragher/Ellerth defense, the employer “waives any attorney-client privilege that might apply to a defendant’s investigation documents or communications.”); Rahn v. Junction City Foundry, Inc., 2000 WL 1679419 (D. Kan. Nov. 3, 2000) (defendant affirmatively acted in placing privileged information at issue by asserting the affirmative defense that it took prompt, effective remedial action when it became aware of sexual harassment complaint); Harding v. Dana Transp., Inc., 914 F. Supp. 1084, 1096 (D. N.J. 1996) (employer waived attorney-client privilege by relying on its lawyer’s investigation as affirmative defense to plaintiff’s sexual harassment claims: “By asking [the attorney] to serve multiple duties, the defendants have fused the roles of internal investigator and legal advisor. Consequently, [the employer] cannot now argue that its own process is shielded from discovery”); Brownwell v. Roadway Package Sys., Inc., 185 F.R.D. 19 (N.D. N.Y. 1999) (employer waived attorney-client privilege and work product protection to prevent disclosure of statements during harassment investigation where employer raised adequacy of investigation as a defense); McGrath v. Nassau Health Care Corp., 204 F.R.D. 240 (E.D. N.Y. 2001) (in Title VII action in which employer asserted affirmative defense of appropriate remedial action, employer waived attorney-client privilege and work product privileges, and thus, was required to produce attorney’s report of investigation, her handwritten investigative notes and any part of reports that had been deleted or redacted); Jones v. Nationwide Ins. Co., 2000 WL 1231402 (M.D. Pa. July 20, 2000) (language in affirmative defense by insurer in bad faith action that it acted reasonably in accordance with the policy and state law waived the attorney-client privilege); Cox v. Adm’r U.S. Steel & Carnegie, 17 F.3d 1386, 1419 (11th Cir. 1994) (“Having gone beyond mere denial, affirmatively to assert its good faith [in an FLSA case], [the defendant] injected the issue of its knowledge of the law into the case and thereby waived the attorney-client privilege.”); Energy Capital Corp. v. United States, 45 Fed. Cl. 481 (2000) (plaintiff waived attorney-client privilege and work product protection with regard to complete, unredacted bills from his attorneys by seeking attorney fees as damages for breach of contract); In re ML-Lee Acquisition Fund II, L.P., 859 F. Supp. 765 (D. Del. 1994) (defendants waived right to assert attorney-client privilege by stating in deposition that they took or failed to take certain actions based on advice of counsel defense); Rivera v. Kmart Corp., 190 F.R.D. 298 (D. P.R. 2000) (employer waived attorney-client privilege with regard to document pertaining to interview of store manager when it used such documents as a sword to support its position in a wrongful termination case that the employees were terminated for involvement in destruction of merchandise to be included in an insurance claim); Peterson v. Wallace Computer Servs., 984 F. Supp. 821 (D. Vt. 1997) (attorney-client privilege and work product protection did not preclude disclosure of investigative notes and memoranda where employer asserted adequacy of investigation as defense). Cf. Boling v. First Utility Dist., 1999 WL 917522 (E.D. Tenn. Oct. 5, 1998) (employees’ communications with investigators and attorneys were privileged where employer did not intend to rely on adequacy of investigation as a defense; by the time that the communications had occurred, the prompt and remedial action upon which the employer was relying had already been taken); EEOC v. Lutheran Social Servs., 186 F.3d 959 (D.C. Cir. 1999) (refusing to enforce EEOC subpoena for report of sexual harassment investigation prepared by counsel for Lutheran Social Services on the grounds that it is protected by the attorney-client privilege because attorneys conducted investigation in anticipation of litigation and there was no compelling need requiring disclosure); McPeek v. Ashcroft, 202 F.R.D. 332 (D. D.C. 2001) (work product privilege applied to documents created by Department of Justice’s Equal Employment Opportunity office following DOJ employee’s filing with EEO office administrative complaint of retaliation for lodging sexual harassment complaint against supervisor, since documents were prepared in anticipation of litigation, not in regular course of business); Robinson v. Time Warner, Inc., 187 F.R.D. 144 (S.D. N.Y. 1999) (employer did not waive privilege with respect to its counsel’s investigation into employee’s allegations of discrimination by discussing investigation and counsel’s findings in its response to employee’s EEOC notice, where employer was merely rebutting employee’s claim that counsel’s findings were other than those told to employer’s senior management and employer did not raise adequacy of investigation as a defense to employee’s claims); Reed v. Baltimore Life Ins. Co., 733 A.2d 1106 (Md. 1999) (in former employee’s defamation action against employer,
In contrast, where the investigative materials generated by the employer’s attorney-investigator are reasonably segregated from the attorney’s advice to the employer and other privileged communications, and the plaintiff is afforded full discovery regarding all aspects of the investigation, courts have generally held that the attorney-client privilege has not been waived unless a substantial portion of attorney-client communication has been disclosed to a third party. In the context of criminal investigations, the courts have allowed an opposing party

employer’s counsel was not using the attorney-client privilege as a sword as well as a shield, where employer did not use advice of counsel as an element of defamation defense; fact that defendant’s counsel signed answers to interrogatories as a corporate secretary also did not waive privilege; George v. Wausau Ins. Co., 2000 WL 1728511 (E.D. Pa. Nov. 21, 2000) (insurance company defending bad faith action did not waive attorney-client privilege by pleading as affirmative defense that it acted in a proper and reasonable manner in accordance with the provisions of the policy and with Pennsylvania law).

70 Waugh v. Pathmark Stores, Inc., 191 F.R.D. 427 (D. N.J. 2000) (fact that employer’s in-house counsel attended meeting with employer’s decision-makers, in which manager reported her factual findings from her investigation into employee’s discrimination complaints, and reviewed documents relevant to employee’s discrimination charges did not waive attorney-client privilege with respect to counsel’s participation in employer’s remediation efforts; counsel attended meeting and reviewed documents merely in his capacity as attorney for employer, counsel did not conduct investigation himself or act as decision-maker in employer’s remediation efforts, and the employer declined to rely on counsel’s advice to support its defense regarding reasonableness of its investigation or remedial measure); Walker v. County of Contra Costa, 227 F.R.D. 529 (N.D. Cal. 2005) (in race discrimination and retaliation case against defendants county and fire chief, investigation report by defendants’ attorney as to the pre-litigation investigation into the employee’s claims was discoverable because the language in the defendants’ affirmative defense indicated that they intended to rely on the attorney’s investigation and the county’s human resources report, which waived the attorney-client privilege; however, the attorney’s analysis of the adequacy of the investigation did not fall within the scope of the waiver since it was not relevant to the affirmative defense; defendants’ reliance on the human resources report in their affirmative defense also waived any possible privilege, and there was no reason to believe the report contained any attorney’s mental impressions or analysis); Kaiser Found. Hosps. v. Super. Ct., 66 Cal. App. 4th 1217, 1229 (1998) (where a non-attorney has conducted an in-house investigation of employee complaints and the employee has been afforded full discovery of all aspects of that investigation with the exception of specified communications and documents protected by the attorney-client privilege and work product doctrine; no waiver of either the attorney-client privilege or work product doctrine has been established unless a substantial part of any particular communication has already been disclosed to third parties); In re Witham Mem’l Hosp., 706 N.E.2d 1087 (Ind. App. 1999) (attorney-client privilege protected from disclosure a report and related communications prepared by investigator hired by hospital’s counsel to investigate allegations against hospital employees; hospital did not waive privilege by issuing press release concerning investigation or disseminating memos to its employees, where press release and memos did not include report or excerpts of report but rather summarized and commented on results of the investigation without revealing any of the information which supported those results); Gingrich v. Sandia Corp., 165 P.3d 1135 (N.M. App.), cert. denied, 165 P.3d 327 (N.M. 2007) (nuclear laboratory waived the attorney-client privilege regarding report produced by former federal prosecutor and law professor who had been retained by the laboratory to investigate allegations from the laboratory’s internal ethics investigators that laboratory managers were impeding their work, and thus privilege did not protect work from discovery in former manager’s breach of contract and defamation action against laboratory, where laboratory had disclosed the report to members of Congress and to representatives of the Department of Energy and the laboratory used an “advice of counsel” defense in defending itself against the former manager’s claims. The scope of the waiver did not extend to the law professor’s work product that was not communicated or disclosed to the laboratory, since such information could not have formed a basis for the laboratory’s actions with regard to the former manager); Angelone v. Xerox Corp., 2011 WL 4473534 (W.D. N.Y. Sept. 29, 2011) (assertion of Faragher/Ellerth defense waived privilege not only for investigation report itself, but for all documents, witness interviews, notes and memos created as part of and in furtherance of investigation; however, otherwise privileged documents created after investigation report issued, including those created after plaintiff filed EEOC charge, not subject to waiver); Pray v. New York City Ballet Co., 1998 WL 558796 (S.D. N.Y. Feb. 13, 1998) (where employer
access to the investigative reports prepared by non-attorney experts retained by the attorney—or the testimony of the expert—where the content of the report and the opinions and observations of the investigator are not so bound up with attorney-client communications that the confidential communications cannot be segregated from the investigator’s observations.\(^{71}\)

\(^{71}\) Compare State v. Riddle, 8 P.3d 980 (Ore. 2000) (attorney-client privilege did not prevent an expert whom defense had employed to investigate a factual problem from testifying for the other side as to the expert’s thoughts and conclusions that were segregated from and not based on confidential communications; however, “[i]f an expert’s opinion is so bound up with any such communication that the expert cannot, in the view of the trial court, segregate his or her opinion from some part of the confidential communication, then the expert should not be

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Note that some courts have held that the attorney-client privilege does not apply where the attorney was acting solely in the role of an investigator rather than as an attorney. However, permitted to testify”), with Holt v. McCastlain, 182 S.W.3d 112 (Ark. 2004) (accident reconstruction report and observations of the accident reconstruction firm hired by law firm that in turn was employed by insurer to assist driver in his defense was subject to the attorney-client privilege held by driver and thus subpoena issued by district attorney to accident reconstruction firm and its employee for the firm’s reports and the employee’s observations must be quashed; driver made his confidential communications to lawyer, who in turn made them to accident reconstruction firm, believing they would not be disclosed and in order to assist the lawyer’s legal representation, accident reconstruction firm took the information from the disclosures, went to the scene of the accident and made observations, then wrote a report that opined the expert’s reconstruction of the accident and in such role accident reconstruction firm and its employee were attorney’s representative, report was based on driver’s confidential communications and accident reconstruction firm was never terminated by attorney). See Harris v. Drake, 99 P.3d 872 (Wash. 2004) (insurer properly claimed the work product protection, on behalf of insured, for report of, and opinions gained from, a medical examination of its insured conducted pursuant to the terms of personal injury protection in the insurance policy, where subrogation specialist of insurer indicated to parties that insurer would not allow expert who prepared report to testify against its insured in litigation between the insured and the tortfeasor, and there was no indication that subrogation specialist was not authorized to act on behalf of insurer); Davis v. City of Seattle, 2007 WL 4166154 (W.D. Wash. Nov. 20, 2007) (in sexual harassment case against a city-owned utility, plaintiff was entitled to depose investigator concerning the investigation she performed, the final letter report and supplemental report, and to ask her in deposition whether she changed her reports or did anything further as a result of meetings with the City Attorney’s office to discuss her drafts, but plaintiff was not entitled to copies of the investigator’s draft reports; the drafts at issue are not related to any contention by the utility that it took remedial action in light of plaintiff’s discrimination complaints; to the contrary, some of the drafts concern accusations of wrongdoing on plaintiff’s part, and the City has not asserted a defense based thereon that would result in a waiver of attorney-client privilege. Moreover, the sole purpose of the drafts was to convey information to the attorneys for the utility to aid them in providing sound advice. “To conclude that such drafts are not protected by attorney-client privilege would discourage the ‘full and frank’ discussion necessary to an informed and reasoned legal opinion.”). See In re Tex. Farmers Ins. Exch., 990 S.W.2d 337 (Tex. App. 1999) (attorney-client privilege does not apply where attorney was acting in any capacity other than that of an attorney, such as an investigator; trial court did not abuse its discretion in determining that an attorney hired by an insurance company to conduct witness interviews was acting as an investigator and not as an attorney). See also Diversified Indus., Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1970) (en banc) (attorney’s status as an investigator prevents communications from being protected by the attorney-client privilege); Harper v. Auto-Owners Ins. Co., 138 F.R.D. 655, 671 (S.D. Ind. 1991) (“To the extent this attorney acted as a claims adjuster, claims process supervisor, or claim investigation monitor, and not as a legal advisor, the attorney-client privilege would not apply.”); National Farmers Union Prop. & Cas. Co. v. Dist. Ct., 718 P.2d 1044 (Colo. 1986) (interviews with employees concerning insurance claims investigation held not privileged, in part because there was no showing that persons interviewed by the attorneys were even informed that the attorneys were acting as counsel or told that the investigation was confidential); Keefe v. Bernard, 774 N.W.2d 663 (Iowa 2009) (Memorandum that attorney for doctor and clinic prepared after meeting with patient’s treating orthopedic surgeon was not protected by orthopedic surgeon’s personal attorney-client privilege; memorandum did not reflect legal advice sought by orthopedic surgeon, but instead demonstrated investigation by attorney into clinic’s liability for doctor’s actions.); St. Paul Reinsurance Co. v. Commercial Fin. Corp., 197 F.R.D. 620, 642 (N.D. Iowa 2000) (materials generated by or provided to attorney were not protected by attorney-client privilege because attorney was acting in his capacity as a claims investigator or claims adjuster, not as an attorney, and such materials were generated in the ordinary course of insurer’s business of claims investigator); 7 Mile & Keystone, LLC v. Travelers Casualty Ins. Co. of America, 2012 WL 6553585 (E.D. Mich. Dec. 14, 2012) (unredacted emails between defendant's lawyer and defendant's investigators prior to the denial of plaintiff's claim are not privileged where they reveal that defendant's lawyer was acting in the capacity of an investigator, and not a lawyer; “Defendant cannot simply delegate investigative work to a lawyer and claim it is protected by the lawyer-client privilege or work-product doctrine. Accordingly, the pre-denial emails must be disclosed to plaintiff.”); Mission Nat’l Ins. Co. v. Lilly, 112 F.R.D. 160, 163 (D. Minn. 1986) (rejecting application of the attorney-client privilege to materials generated by or provided to a law firm engaged in the non-legal business of acting as a claims investigator or claims

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where the circumstances surrounding the client’s retention of the lawyer show that the engagement was for the purpose of providing legal advice and the fact-finding by the attorney related to the provision of legal services, courts have held that the attorney-client privilege applies to the communications contained in the report.  

73 See, e.g., T.E. v. South Berwyn School District 100, 600 F.3d 612 (7th Cir. 2010) (Attorneys were acting in capacity as attorneys for school board when they conducted investigation into teacher’s sexual abuse of students, and thus attorney-client privilege applied to communications made and documents generated during investigation, although privilege was invoked to protect communications made by employees of governmental entity rather than private party; during confidential interviews with school-district employees, attorneys emphasized that law firm represented school board and not employee and that school board had control over whether conversations remained privileged, no third parties attended interviews, school board received report of firm’s findings during executive session not open to public, and written executive summary was marked “Privileged and Confidential,” “Attorney-Client Communication,” and “Attorney Work Product,” and affidavits submitted into record by attorneys and school board president emphasized that law firm had been hired to provide legal advice in context of facts it uncovered during internal investigation. Although board was responding to public distress about allegations, possible complicity of school principal, and urgent need to implement prospective protective measures, engagement letter between the law firm and the school district “spells out that the Board retained Sidley to provide legal services in connection with developing the School Board’s response” to the abuse allegations.); In re Kellogg Brown & Root, Inc., ___ F.3d ___, 2015 WL 4727411 (D.C. Cir. Aug. 11, 2015) (defense contractor’s internal investigation into whether contractor defrauded U.S. Government by inflating costs and accepting kickbacks while administering military contracts in Iraq protected by attorney-client privilege and work product; contractor did not impliedly waive privilege and work product protection when corporate representative reviewed the documents in preparation for his deposition, since relator noticed contractor’s deposition on the subject of whether the investigation documents were privileged, giving the corporate representative no choice but to review the documents in preparation; and contractor’s reference to the investigation in summary judgment papers did not result in an “at issue” waiver since it only referred to the fact of an investigation and did not refer to the contents of any privileged documents); In re Kellogg Brown & Root, Inc., 756 F.3d 754 (D.C. Cir. 2014) (defense contractor’s internal investigation into whether the contractor had defrauded the United States government by inflating costs and accepting kickbacks while administering military contracts in wartime Iraq was protected by the attorney-client privilege, even if the investigation was undertaken as part of a mandatory compliance program, rather than for the sole purpose of obtaining legal advice, where a primary purpose of the investigation was to obtain or provide legal advice); In re General Motors LLC Ignition Switch Litigation, 2015 WL 221057 (S.D. N.Y. Jan. 15, 2015) (although manufacturer’s publicly-issued report concerning its ignition switch recall investigation included results from witness interviews, manufacturer established that attorney-client privilege applied to portions of interview materials prepared by its outside counsel reflecting communications between current and former employees and agents and outside counsel in connection with the investigation). See also Ex Parte Schnitzer Steel Indus., Inc., 142 So.3d 488 ( Ala. 2013) (anticipation of litigation was a significant factor in parent corporation’s decision to have investigative report prepared regarding accident in which subsidiary’s employee was injured as a result of workplace accident, and thus report was protected work product and its production could not be compelled during discovery in employee’s personal injury action against parent corporation; there were concerns about potential litigation when preparer of initial report did her inspection of the accident, report was reviewed and revised by in-house counsel before it was finalized, and review of an accident report by in-house counsel did not occur in the ordinary course of business); Costco Wholesale Corp. v. Superior Court, 47 Cal. 4th 725 (2009) (A letter written to employer’s...
corporate counsel by outside counsel who investigated wage classifications of certain employees was presumptively privileged, and thus employees had the burden of proof to establish the letter was not confidential or that the privilege did not for other reasons apply, even if the opinion letter was not prepared in anticipation of litigation, where employer engaged the outside counsel to provide employer with legal advice. Moreover, even if the letter contained factual information from interviews with employees that could have been performed by a nonattorney, such memorandum was privileged since outside counsel was presented with a question requiring legal analysis and was asked to investigate the facts she needed to render a legal opinion.; Harlandale Indep. Sch. Dist. v. Cornyn, 25 S.W.3d 328 (Tex. App. 2000) (attorney was retained by school district to conduct independent investigation in her capacity as attorney for purpose of providing legal services and advice, and thus attorney’s entire report was protected by attorney-client privilege and excepted from disclosure to newspaper under Texas Public Information Act, even though attorney detailed her factual findings in discrete portion of report apart from her legal analysis and recommendations, where retention documents and witnesses demonstrated that district requested investigative report for primary purpose of obtaining legal advice); Suzlon Wind Energy Corp. v. Shippers Stevedoring Co., 662 F. Supp.2d 623 (S.D. Tex. 2009) (Report prepared by in-house counsel for wind turbine distributor and transmitted to its board of directors was protected by the attorney-client privilege; report was prepared at the request of the company’s highest officers and in-house counsel after a fire and the death of a company employee, the memorandum indicates that in-house counsel prepared the report in his capacity as a lawyer, not merely as an investigation, the memorandum itself, and the circumstances under which in-house counsel prepared it, show a desire for confidentiality, and there is no evidence that the memorandum was disclosed to others); In re Int’l Sys. & Controls Corp. Sec. Litig., 91 F.R.D. 552, 557 (S.D. Tex. 1981) (confidential communications made by attorneys “hired to investigate through the trained eyes of an attorney” privileged), vacated on other grounds, 693 F.2d 1235 (5th Cir. 1982); In re LTV Sec. Litig., 89 F.R.D. 595, 600-01 (N.D. Tex. 1981) (rejecting argument that attorney-client privilege should not apply when the attorneys involved performed in an investigative rather than strictly legal function); Archuleta v. City of Santa Fe, 2005 WL 2313706 (D. N.M. Aug. 10, 2005) (former police officer was demoted for failing to respond appropriately to a missing child report; the city retained the attorney’s law firm to investigate allegations that the former officer falsified health insurance documents; attorney hired investigators to investigate the allegations; attorney prepared a report and recommendation for the city, represented defendants at a pre-termination hearing, and was defendants’ co-counsel in the present litigation by the former officer alleging retaliation regarding his demotion and termination; former officer issued a subpoena seeking the attorney’s deposition, primarily seeking to learn whether defendants initiated the attorney’s investigation for retaliatory purposes; court determined that additional discovery was necessary to determine what information was protected by the attorney-client privilege and the work product doctrine; even if the attorney was acting as an investigator and not as an attorney, the work product doctrine would protect the information sought by the former officer; work product doctrine applied to information regarding how the attorney reached his opinion that the former officer violated regulations and policies); Conn. Indem. Co. v. Carrier Haulers, Inc., 197 F.R.D. 564 (W.D. N.C. 2000) (where outside attorney’s involvement in any fact finding or investigation of insurance claim was clearly related to his rendition of legal services to insurer, attorney-client privilege protected confidential communications between attorney, the lawyers assisting him, and his staff, and insurer, its agents, and its employees); Geller v. North Shore Long Island Jewish Health Sys., 2011 WL 5507572 (E.D. N.Y. Nov. 9, 2011) (attorney-client privilege protected from discovery documents relating to internal investigation of plaintiff’s harassment complaint conducted by employer’s compliance officer that were generated after employer retained counsel; although investigator acted in the capacity of a compliance officer and not an attorney, at the point that employer retained counsel she acted as an agent of defense counsel and thus her interviews and any documents she created regarding those interviews were privileged; communications among non-attorneys in a corporation may be privileged if made at the direction of counsel, to gather information to aid counsel in providing legal services; the “sword-shield” exception did not apply because defense counsel affirmatively represented that defendants have no intention of using the investigation to avoid liability); Grinnell Corp. v.ITT Corp., 222 F.R.D. 74 (S.D. N.Y. 2003) (documents and communications generated by attorney retained to investigate personal injury claims filed against company privileged where correspondence and documents clearly are of a legal character providing legal advice or services); In re Grand Jury Proceedings, 2001 WL 1167497 (S.D. N.Y. Oct. 3, 2001) (the results of internal corporate reviews, whether taken at the direction of in-house counsel or outside counsel, may be protected from disclosure under the attorney-client privilege and/or the work product doctrine); In re Allen, 106 F.3d 582, 600-05 (4th Cir. 1997) (attorney-client privilege protected communications between Attorney General’s Office and attorney hired by it to investigate
Federal Rule of Evidence 502 on waiver of the attorney-client privilege and work product. Federal Rule of Evidence 502 embodies five principles regarding waiver of the attorney-client privilege and work product protection: (1) a subject matter waiver will be found only when the waiver of the attorney-client privilege or work product protection is intentional, the disclosed and undisclosed communications or information concern the same subject matter, and they “ought in fairness” be considered together (e.g., inadvertent disclosure would never result in a subject matter waiver; (2) an inadvertent disclosure does not constitute a waiver if the holder of the privilege or work product protection took “reasonable steps” to prevent disclosure and promptly took reasonable steps to rectify the error; (3) a disclosure in a state proceeding would not operate as a waiver in a federal proceeding if the disclosure would not be a waiver if it had been made in a federal proceeding or is not a waiver under the law of the state in which the disclosure occurred; (4) if a federal court orders that the privilege is not waived by disclosure in connection with litigation pending before the court, the disclosure is also not a waiver in any other federal or state proceeding; and (5) an agreement on the effect of disclosure in a federal proceeding is only binding on the parties to the agreement, unless it is incorporated into a court order. Rule 502 applies in all cases in federal court and federal court-mandated arbitration proceedings, including cases in which state law provides the rule of decision. It would also apply in state court with respect to the consequences of disclosures previously made in a federal proceeding.

Possible document mismanagement and confidentiality breaches and to prepare a written report of her findings); Evans v. United Servs. Auto. Ass’n, 541 S.E.2d 782 (N.C. App. 2001) (trial court properly found that certain entries in insurer’s claims diary were protected by the attorney-client privilege, where such entries were either requests to counsel for advice and opinions, or were counsel’s reply to such requests); Marshall v. Hall, 943 S.W.2d 180 (Tex. App. – Houston [1st Dist.] 1997) (interview notes and summaries of the interview notes made during witness interviews by an employee of an attorney, acting as an agent for the attorney, are protected by the work-product privilege); Gray v. Morgan Stanley DW Inc., 130 Wash. App. 1047 (2005) (in gender discrimination action, trial court did not err in denying employee’s motion to compel the discovery of notes taken by employer’s in-house counsel, where the notes sought were taken as part of the employer’s investigation of alleged compliance violations and other issues raised by the employee). Cf. EEOC v. Guess?, Inc., 176 F. Supp. 2d 416 (E.D. Pa. 2001) (employer failed to establish that its robbery investigation file was protected from disclosure under attorney-client privilege and work product doctrine, in response to EEOC subpoena issued in investigation of employer’s alleged Title VII violations in terminating employee after asking racially motivated questions regarding robbery; employer asserted only that when employer’s loss prevention department conducts investigation it produces report for legal department review and advice but did not specify what litigation employer was anticipating when it conducted robbery investigation).

74 Compare Multiquip, Inc. v. Water Management Systems LLC, 2009 WL 4261214 (D. Idaho Nov. 23, 2009) (defendants took reasonable steps to prevent disclosure; although one of the defendants inadvertently included a third party on a privileged email via the “autofill” feature on the email, reliance on the “autofill” feature was not considered unreasonable) with Silverstein v. Federal Bureau of Prisons, 2009 WL 4949959 (D. Colo. Dec. 14, 2009) (defendants’ production of privileged material resulted in a subject matter waiver where material was originally examined and withheld by defendants’ counsel and defendants intentionally disclosed the material to gain advantage in litigation).

75 Umpqua Bank v. First American Title Ins. Co., 2011 WL 4852229 (E.D. Cal. Oct. 12, 2011) (plaintiff waived privilege with respect to emails where it was on notice that the emails had been produced to defendant when it received letter from investigator in 2009; instead of objecting at that time, plaintiff proceeded to attach the letter to its complaint in the matter; although it did notify defendant that the e-mails were privileged during a witness’s deposition in June 2011, but presented no evidence that it followed up with defendant’s prior counsel to obtain the document. These actions suggest a failure to take reasonable steps to protect the communications as privileged.); In
4. Attorney-Client Privilege and Former Employees of the Organization

*Upjohn* left open the question of whether communications between counsel and former employees were included within the privilege. The majority of the lower courts that have addressed this issue have determined that the *Upjohn* rationale applies to former employees where the communication’s purpose is to give legal advice to the employer. Some courts have

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See also Iowa Rules of Evid. 5.502 (conforms to Fed. R. Evid. 502).

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

77 See, e.g., *In re Allen*, 106 F.3d 582 (4th Cir. 1997) (*Upjohn* analysis applies equally to former employees); *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 658 F.2d 1355, 1361 n.7 (9th Cir. 1981) (“Former employees, as well as current employees, may possess the relevant information needed by corporate counsel to advise the client with respect to actual or potential difficulties, [and thus] the attorney-client privilege is served by the certainty that conversations between the attorney and client will remain privileged after the employee leaves.”); *Peralta v. Cendant Corp.*, 190 F.R.D. 38 (D. Conn. 1999) (predeposition communications between former employee of defendant corporation–who was plaintiff’s former immediate supervisor and allegedly the decisionmaker with regard to plaintiff’s discrimination claims–were protected by the attorney-client privilege insofar as their nature and purpose were to learn facts related to plaintiff’s termination); *Cool v. BorgWarner Diversified Transmission Prods.*, Inc., 2003 WL 23009017 (S.D. Ind. Oct. 29, 2003) (where person with critical knowledge of the relevant facts is no longer employed by the corporation, and in order to represent his or her client effectively the corporation’s counsel must seek information from the former employee, such communications are protected by the attorney-client privilege); *Amarin Plastics, Inc. v. Maryland Cup Corp.*, 116 F.R.D. 89 (S.D. Cal. 1987) (communication with former employees privileged when purpose of the communications was to give the former employer legal advice); *Surles v. Air France*, 2001 WL 815522 (S.D. N.Y. July 19, 2001) (communications between company counsel and former company employees protected by attorney-client privilege if they are focused on exploring what the former employee knows as a result of his prior employment about the circumstances giving rise to the lawsuit), aff’d, 210 F. Supp. 2d 501 (S.D. N.Y. 2002); *Miramar Constr. Co. v. Home Depot, Inc.*, 167 F. Supp. 2d 182 (D. P.R. 2001) (attorney-client privilege protected communications between construction company’s attorney and company’s former employee in charge of preparing estimates for construction of store concerning preparation of claim negotiated between him and owner; however, privilege does not extend to former independent contractors for company); *Wuchenich v. Shenandoah Mem’l Hosp.*, 2000 WL 1769577 (W.D. Va. Nov. 2, 2000) (same). But see *Connolly Data Sys. v. Victor Techs.*, Inc. 114 F.R.D. 89 (S.D. Cal. 1987) (no privilege applicable for former employees under California law); *Clark Equip. Co. v. Lift Parts Mfg. Co.*, 1985 WL 2917 (N.D. Ill. Oct.1, 1985) (*Upjohn* did not extend to former employees); *Barrett Indus. Trucks, Inc. v. Old Republic Ins. Co.*, 129 F.R.D. 515 (N.D. Ill. 1990) (no privilege applicable); *Infosys, Inc. v. Ceridian Corp.*, 197 F.R.D. 303, 306 (E.D. Mich. 2000) (“[C]ounsel’s communications with a former employee of the corporation generally should be treated no differently from communications with any other third-party fact witness.”).
noted that the privilege may not protect communications on behalf of the corporation with corporate employees who later become adverse to the corporation.\textsuperscript{78} This situation may also present itself in the case of post-termination communications with an unrepresented former employee for deposition by opposing counsel, and/or such attorney’s communications during the deposition about her testimony in that deposition.\textsuperscript{79}

5. Suggestions for Attorney Interviews of Management Employees

Attorneys conducting interviews of supervisory or management employees that are potentially subject to the attorney-client privilege under\textit{ Upjohn} should consider having the employee read and sign an\textit{ Upjohn} warning statement prior to commencement of the interview.\textsuperscript{80}

B. Ex Parte Communications With Organizational Employees

In representing a client, a lawyer may not communicate about the subject matter of the representation with a party the lawyer knows is represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.\textsuperscript{81} This rule is designed to preserve the integrity of the attorney-client relationship by protecting the party

\textsuperscript{78} See Amatuzio v. Gandalf Sys. Corp., 932 F. Supp. 113 (D. N.J. 1996) (communications with corporate employer’s attorney made by, to, or in presence of non-attorney employee who later becomes adverse to employer not protected by New Jersey ethics rules or attorney-client privilege if litigation involves allegation by employee against corporation relating to duties owed by corporation to employee, and former employee was not responsible for managing litigation or making corporate decision that led to litigation to which the communications relate). Compare Peralta v. Cendant Corp., 190 F.R.D. 38 (D. Conn. 1999) (any privileged information obtained by former employee during her employment with employer, including information conveyed by employer’s counsel during that period, remained privileged upon termination of her employment).

\textsuperscript{79} See Peralta, 190 F.R.D. at 41-42 (no privilege applies to any communications between employer’s counsel and a former employee whom counsel does not represent, which bear on or otherwise potentially affect the witness’s testimony, consciously or unconsciously).

\textsuperscript{80} A sample statement would read as follows: “I am a lawyer and represent [the company]. This interview is for the purpose of giving legal advice to [the company] and for the purpose of investigating facts about issues raised in [describe proceeding or matter]. Anything you tell me may be disclosed to [the company] and or in connection with the [proceeding or matter]. Unless you specifically authorize it in writing, I do not represent you personally. This interview is covered by the attorney-client privilege. This means that the things I say to you during this meeting and the things you say to me during this meeting are considered confidential communications between [the company] and its attorneys. Unless specifically authorized by the [general counsel] of [the company], please do not disclose to others what is said during this meeting. You are not prohibited from discussing the fact that we had this meeting; however, you may not disclose the content of what you and I say during this meeting. [The company] will not retaliate against you because you tell me anything unfavorable to [the company] [you may also wish to add: this guaranty of no-retaliation, however, is of course not a grant of immunity of any violation of company policy you may have already committed, if any]. Also, I cannot promise to keep anything you tell me confidential or secret from [the company]. Finally, please let me know if opposing counsel seeks to contact you about this matter.”

\textsuperscript{81} ABA MODEL RULES R. 4.2; ABA MODEL CODE DR 7-107. See also ABA MODEL CODE EC 7-18. Cf. Cal. Formal Ethics Op. No. 2011-181 (2011) (consent under the no-contact rule may be implied by the facts and circumstances surrounding the communication with the represented party; such facts may include: whether the communication is in the presence of the other attorney; prior course of conduct; the nature of the matter; how the communication is initiated and by whom; the formality of the communication; the extent to which the communication might interfere with the attorney-client relationship; whether a common interest or joint defense privilege exists between the parties; whether the other attorney has reasonable opportunity to counsel the party contemporaneously or immediately following the communication; and the instructions of the represented party’s attorney).
from the superior legal knowledge and skill of the opposing attorney. An attorney cannot circumvent this prohibition by delegating the task of communication to a non-attorney. Moreover, the represented person may not waive the prohibition by consenting to the contact or by initiating contact with the opposing lawyer.82

The prohibition covers not only parties to a negotiation or formal litigation, but any person who has retained counsel in a matter and whose interests are potentially distinct from those of the client on whose behalf the communicating lawyer is acting. Such persons include potential defendants in civil litigation and witnesses who have hired counsel in the matter.83 However, note that, as a threshold matter, it must be shown that the attorney “knows”84 that the


83 ABA Formal Ethics Op. No. 95-396 (1995). See also N.Y. City Ethics Op. No. 2011-1 (2011) (Absent consent of successor counsel, a lawyer may not contact a former client known to be represented by counsel to discuss matters within the scope of the successor counsel’s representation.); Ill. Ethics Op. No. 04-02 (2005) (ex parte communication rules apply to non-litigation situations; where individual hired lawyer to negotiate an employment contract with a business entity, the entity’s general counsel may not contact the individual directly without consent of the lawyer).

84 See ABA Model Rules R. 4.2, cmt. 7 (rule requires actual knowledge, which may be inferred from the circumstances; however, lawyer has no affirmative duty to inquire); ABA Ethics Op. No. 95-396 (1995) (requiring actual knowledge, which may be inferred from the circumstances); Gaylard v. Homemakers of Montgomery, Inc., 675 So. 2d 363 (Ala. 1996) (lawyer’s telephone conversation with employee of corporation that client was preparing to sue, in which lawyer persuaded employee to discuss details of client’s injury, did not violate ex parte rules where conversation took place before client filed suit and lawyer did not know whether corporation had retained counsel); Alaska Ethics Op. No. 2006-1 (2006) (“Knowing” [for purposes of Rule 4.2] denotes actual knowledge. . .that the entity is represented by counsel on a particular matter, which may be inferred from the circumstances.”); Koo v. Rubio’s Rests., Inc., 109 Cal. App. 4th 719 (2003) (ex parte rules are a bar to contact only if the lawyer seeking contact actually knows of the representation); Snider v. Super. Ct., 113 Cal. App. 4th 1187 (2003) (ex parte communication rule does not provide for constructive knowledge, but actual knowledge; however, in cases where an attorney has reason to believe an employee of a represented organization might be covered by the ex parte communication rule, that attorney would be well advised to either conduct discovery or communication with opposing counsel concerning the employee’s status before contacting employee since a failure to do so along with other facts may constitute circumstantial evidence that attorney had actual knowledge; once actual contact made, attorney should first ask questions that would establish employee’s status within an organization, whether the employee is represented by counsel, and whether the employee has spoken to the organization’s counsel concerning the matter at issue, before moving to substantive questions); Truitt v. Super. Ct., 59 Cal. App. 4th 1183 (1997) (no improper ex parte communication occurred when investigator for employee’s law firm in FELA action contacted and obtained written statement from employee’s coworker since law firm had no actual knowledge that railroad was represented by counsel at time of contact; constructive knowledge or knowledge that railroad employs in-house counsel insufficient unless law firm knew in fact that in-house counsel represented person being interviewed when interview was being conducted); Jorgensen v. Taco Bell Corp., 50 Cal. App. 4th 1398 (1996) (action of former employee’s attorney retaining investigator to interview client’s former co-workers without former employer’s consent, seven months prior to filing sexual harassment action against former employer, did not violate ex parte communications rule); Krzyzanowski v. Orkin Exterminating Co., Inc., 2009 WL 4050674 (N.D. Cal. Nov. 20, 2009) (an attorney does not violate the ex parte communication rule unless the attorney has actual knowledge that the other person is represented by counsel. In fact, constructive knowledge is insufficient.); Cal. Ethics Op. No. 1996-145 (1996) (if attorney does not have reason to know whether party represented attorney not requested to inquire whether party represented; knowledge must be either actual or imputed based on objective standard); Fla. Ethics Op. No. 94-4 (1995) (opposing counsel may communicate with an individual who is litigating pro se concerning that
corporation is a “party represented by counsel”\textsuperscript{85} in the matter at the time the contact is made.\textsuperscript{86}

Some courts have not been so limited in application of the rule.\textsuperscript{87} Note that the text of Rule 4.2 of the Model Rules of Professional Responsibility was amended to substitute the word

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\item[\textsuperscript{85}] Jorgensen v. Taco Bell Corp., 50 Cal. App. 4\textsuperscript{th} 1398 (1996) (action of former employee’s attorney retaining investigator to interview client’s former co-workers without former employer’s consent, seven months prior to filing sexual harassment action against former employer, did not violate ex parte communications rule); Johnson v. Cadillac Plastic Group, Inc., 930 F. Supp. 1437 (D. Colo. 1996) (corporation not a “party” at time employee’s former attorney interviewed management employee since matter was at a pre-filing, informal investigatory stage and not clear at time of interview that litigation would in fact be commenced); N.Y. State Ethics Op. No. 785 (2005) (an attorney representing a plaintiff in a personal injury action may engage in settlement discussions with a non-attorney insurance company claims adjuster over the objection of the attorney assigned by the insurance company to represent the defendant-policyholder with respect to the claim, provided that (1) the insurer is not represented by separate counsel with respect to the matter; and (2) the plaintiff’s attorney does not deliberately elicit information protected from disclosure by the attorney-client privilege or work product doctrine).
\item[\textsuperscript{86}] Cf. University of Louisville v. Shake, 5 S.W.3d 107 (Ky. 1999) (university failed to show it would be irreparably harmed by trial court’s refusal to disqualify former university employee’s attorney and his firm from employment discrimination case against university or to suppress any information obtained as a result of attorney’s conversation with another former university employee at a party, and thus, university was not entitled to mandamus relief, given that former employee did not reveal any confidential or privileged information to attorney).
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“person” for “party” to negate the idea that the rule applies only in pending litigation. However, many states still retain the pre-1995 reference to “party.”

The rule also requires that the subject matter of the representation be defined and reasonably specific, such that the contacting lawyer can be placed on notice of the subject matter. Thus, the fact that the corporation has an ongoing relationship with an outside law firm in which the firm represents the corporation in “all” legal matters that might arise, without more, does not trigger the rule with respect to any new matters because the contacting lawyer has no reason to know that the corporation has consulted the firm with respect to the new matter. A similar analysis applies to in-house general counsel, who represents the corporation for all purposes. Thus, the mere existence of a general counsel for the corporation, without any particular involvement in the matter at issue, is insufficient to render the corporation “represented” for purposes of the ex parte rules. Finally, a lawyer does not avoid the rule by sending communications to a party and simultaneously copying the party’s lawyer.

1. Current v. Former Employees
   a) Former employees.

The ABA and numerous state bar and court decisions have held that an attorney may communicate ex parte with unrepresented former employees of a corporate party. However, a

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91 N.Y. City Ethics Op. No. 2009-1 (2009) (The no-contact rule prohibits a lawyer from sending a letter or email directly to a represented person and simultaneously to her counsel, without first obtaining “prior consent” to the direct communication or unless otherwise authorized by law. Prior consent to the communication means actual consent, and preferably, though not necessarily, express consent; while consent may be inferred from the conduct or acquiescence of the represented person’s lawyer, a lawyer communicating with a represented person without securing the other lawyer’s express consent runs the risk of violating the no-contact rule if the other lawyer has not manifested consent to the communication.); Proposed 2012 N.C. Formal Ethics Op. No. 7 (2012) (Rule 4.2 requires a lawyer to have the express consent of a represented person’s lawyer prior to sending the represented person a copy of an email communication).
92 ABA MODEL RULES R. 4.2, cmt.7 (Consent of the organization’s lawyer is not required for communications with a former constituent); Alaska Ethics Op. No. 91-1 (1991) (former employees can no longer bind corporation, so ex parte communications do not violate rule against communications with adverse party); Ark. Ethics Op. No. 2004-01 (2004) (an attorney is permitted to communicate in regard to the subject matter of representation with former corporate employees without seeking or obtaining the consent of the corporate attorney); Cal. Rules of Prof’l Conduct Rule 2-100, Discussion (citing Triple A Mach. Shop, Inc. v. State of Cal., 213 Cal. App. 3d 131 (1989) (Rules of Professional Conduct specify that the term “party” is “intended to apply only to persons employed at the time of the communication”)); Sequa Corp. v. Lititech, Inc., 807 F. Supp. 653, 659-60 (D. Colo. 1992); D.C. Ethics
Op. No. 287 (1999) (lawyer may contact unrepresented former employee of corporation without consent of the corporation’s lawyer; prior to any substantive communication, the lawyer must disclose to former employee the lawyer’s identity and fact that he/she represents interests adverse to the employee’s former employer; during the communication, the lawyer cannot attempt to solicit privileged information of the corporation); Fla. Ethics Op. No. 88-14 (1988) (lawyer can contact former employees who have not maintained any ties to corporation); H.B.A. Mgmt., Inc. v. Estate of Schwartz, 693 So. 2d 541 (Fla. 1997) (lawyer not prohibited from communicating ex parte with corporate adversary’s former employees); Ill. Ethics Op. No. 09-01 (2009) (consent of organization’s lawyer not required for communications with former corporate constituents about the subject matter of representation; however, if the constituent has his/her own counsel, that counsel must give consent to the communication); EEOC v. Dana Corp., 202 F. Supp. 2d 827 (N.D. Ind. 2002) (employer did not show any reason why ex parte communications by EEOC with former managerial employee would reveal confidential, classified or privileged information and thus, such communications did not violate ex parte communication rules); P.T. Barnum’s Nightclub v. Duhamell, 766 N.E.2d 729 (Ind. App. 2002) (ex parte rule did not prohibit attorney representing patron in action against adult entertainment club from communicating with club’s former general manager); Terra Int'l, Inc. v. Miss. Chem. Corp., 913 F. Supp. 1306 (N.D. Iowa 1996); Aiken v. Bus. & Indus. Health Group, Inc., 885 F. Supp. 1474 (D. Kan. 1995); Humco, Inc. v. Noble, 31 S.W.3d 916 (Ky. 2000) (former employee with no present relationship with the organizational party is not a “party” for purpose of ex parte communication rules); Ky. Ethics Op. No. E-381 (ex parte communications with unrepresented former employees of the organizational party is not a violation of Rule 4.2); Jenkins v. Wal-Mart Stores, Inc., 956 F. Supp. 695 (W.D. La. 1997) (counsel may interview former employee of opposing party so long as they do not discuss information protected by the attorney-client privilege); Collier v. Ram Partners, Inc., 86 Fair Empl. Prac. Cases (BNA) 1008 (D. Md. 2001) (counsel for Title VII plaintiff did not violate professional conduct rule by obtaining affidavit from former plant manager without prior consent of employer or its counsel; employee in question had not been privy to confidential information that might be disclosed following unauthorized contact); Frank v. L.L. Bean, Inc., 377 F. Supp. 2d 233 (D. Me.), motion for relief from sanctions order denied, 377 F. Supp. 2d 229 (D. Me. 2005) (in sexual harassment suit, plaintiff and her counsel did not violate ex parte communication rule by interviewing a former employee of employer who was plaintiff’s former supervisor and who plaintiff alleges failed to take reasonable steps to address his supervisor’s harassment of plaintiff; ex parte communication rule does not bar contacts with unrepresented former employees of defendant employer); Clark v. Beverly Health and Rehab. Servs., Inc., 797 N.E.2d 905 (Mass. 2003) (“no contact” rule neither prohibits, nor purports to regulate, private contacts between an adverse attorney and an organization’s former employees); Mass. Ethics Op. No. 02-3 (2002) (as a general rule, the anti-contact prohibition of Rule 4.2 does not apply to former employees of a corporation; anti-contact rule would apply if former employee is represented by counsel for his former corporate employer, or where the former employee is so exposed to confidential information of the corporation that contact with the employee should only be made through corporate counsel); Smith v. Kalamazoo Ophthalmology, 322 F. Supp. 2d 883 (W.D. Mich. 2004) (plaintiff counsel’s ex parte contacts with unrepresented former employees of defendant did not violate Michigan’s ethical proscription against communications with person represented by counsel, since former employee had no agency relationship with defendant at the time and her interests were even adverse to defendant’s; however, attorney may not inquire into areas subject to the attorney-client privilege or work product doctrine); FleetBoston Robertson Stephens, Inc. v. Innovex, Inc., 172 F. Supp. 2d 1190 (D. Minn. 2001) (plaintiff’s attorney did not violate ex parte contacts rule by contacting unrepresented former executive of corporate defendant, where attorney at no point solicited any privileged information and no privileged information was related); Durham v. Advance Stores Co., Inc., 2007 WL 2903206 (S.D. Miss. Sept. 30, 2007) (Rule 4.2 of the Mississippi Rule of Professional Conduct do not apply to former employees.); Miss. Ethics Op. No. 215 (1994) (in representing a client a lawyer may ethically communicate, ex parte, with an unrepresented individual that was formerly employed by a represented party; however, the attorney has an affirmative duty to clear up any misunderstanding by the unrepresented party about the lawyer’s role); Smith v. Kansas City S. Ry. Co., 87 S.W.3d 266 (Mo. App. 2002) (ex parte communications rule did not prohibit contact with former employees who were not expressly represented by their own counsel or counsel for organization; and even if rule applied to former managerial employees, defendant’s supervisor did not file within classification); United States v. W.R. Grace, 401 F. Supp. 2d 1065 (D. Mont. 2005) (the government does not violate ethical standards of the Court by initiating ex parte contact with former employees of defendant corporation); Wallace v. Valentino’s of Lincoln, Inc., 2002 WL 31323811 (D. Neb. Oct. 17, 2002) (in Title VII case, plaintiff counsel’s interview of former manager of defendant not a violation of ex parte rules); Capitol Records, Inc. v.
few decisions have held that the rule prohibits ex parte communication with former employees whose act or omission in connection with the matter may be imputed to the corporation, or who had access to corporate confidences.\textsuperscript{93} Decisions have also deemed improper communications

\textit{MP3tunes, LLC}, 2009 WL 3364036 (S.D.N.Y. Oct. 16, 2009) (as a general rule, a party cannot prevent an adverse party from conducting ex parte interviews with its former employees); \textit{Muriel Siebert & Co. v. Intuit Inc.}, 8 N.Y.3d 506, 868 N.E.2d 208, 836 N.Y.S.2d 527 (2007) (disqualification of defendant’s attorneys was not warranted by their ex parte interview with plaintiff’s former chief operating officer (COO), merely because COO was at one time privy to plaintiff’s privileged and confidential information; so long as measures are taken to steer clear of privileged or confidential information, adversary counsel may conduct ex parte interviews of an opposing party’s former employee); \textit{Johnson v. Ohio Dep’t of Youth Servs.}, 231 F. Supp. 2d 690 (N.D. Ohio 2002) (affidavit of disability retiree from department of youth services was not procured in violation of disciplinary rule prohibiting communication with represented party; affiant was not on leave of absence despite retained reinstatement rights, and even if affiant’s continuing relationship with department was such that he could not be viewed as a current employee, ex parte contact with him was not prohibited insofar as he had no authority to bind department or settle litigable matter and his act or omission did not give rise thereto); \textit{Davis v. Washington County Open Door Home}, 2000 WL 1457004 (S.D. Ohio Sept. 21, 2000) (contact with former employee of defendant permissible where attorney obtained employee’s consent to interview after explaining that he represented clients with interests adverse to the Open Door Home and other defendants, that the employee could terminate the interview at any time, that the employee could seek independent legal advice, and that the employee should not divulge any communications he may have had with defendants’ counsel); Ohio Ethics Op. No. 96-1 (1996) (attorney permitted ex parte communication with former employee of corporation so long as attorney notifies the former employee that (1) litigation was pending, (2) their participation in the interview was voluntary, (3) that their former employer was represented by counsel, (4) that such counsel could be contacted for further information, (5) that the employee may be represented by his or her own counsel, and (6) that the employee may not reveal any attorney-client communications); \textit{Goodeagle v. United States}, 2010 WL 3081520 (W.D. Okla. Aug. 6, 2010) (ex parte communication rule limited to employees who are currently employed by the represented organization); S.C. Ethics Op. No. 01-01 (2001) (attorney may contact former employees of corporation so long as former employee is not represented by counsel and attorney fully discloses the nature of the matter and the purpose of the contact; attorney must be careful not to elicit privileged or confidential information of corporation); \textit{Sherrod v. Furniture Ctr.}, 769 F. Supp. 1021, 1922 (W.D. Tenn. 1991); Tex. R. Prof’l Conduct R. 4.02 (former employees of the corporation not within scope of ex parte communication prohibition, even if former employee was a manager or supervisor or a person whose act or omission is the basis for the claimed liability against the corporation); Utah Ethics Op. No. 04-04 (2004) (lawyer’s ex parte contact with former employees of a represented corporate defendant is not barred unless at the time of the contact the former employee has returned to the company’s payroll or has been specifically retained for compensation by the organization to participate as principal decision maker for a particular matter); \textit{Wright v. Group Health Hosp.}, 691 P.2d 564 (Wash. 1984) (no-communication rule is not to protect corporate party from revelation of prejudicial facts, but rather to preclude interviewing employees who have authority to bind the corporate party); \textit{Jones v. Rabonco, Ltd.}, 2006 WL 2401270 (W.D. Wash. Aug. 28, 2006) (Rule 4.2 does not apply to former employees); Wis. Ethics Op. No. E-07-01 (2007) (consent of the organization’s lawyer is not required for contact with a former constituent of the organization, regardless of the constituent’s former position); RESTATED (THIRD) OF THE LAW GOVERNING LAWYERS § 162 (Proposed Official Draft 1998) (rule prohibits all contact with former corporate employees who have communicated with corporation’s counsel).

\textsuperscript{93} See, e.g., \textit{Brown v. Oregon Dep’t of Corr.}, 173 F.R.D. 265 (D. Ore. 1997) (lawyer for plaintiff in racial discrimination suit against state agency barred by Rule 4.2 from conducting ex parte interviews of management-level employees and current employees whose conduct is at issue; lawyer may conduct ex parte interview of current non-management employees, those employees whose conduct is not at issue, and all former or transferred employees); Ore. Formal Ethics Op. No. 2005-152 (2005) (same). See also \textit{Lang v. Super. Ct.}, 826 P.2d 1228, 1234-35 (Ariz. App. 1992) (attorney prohibited from contacting former employee of corporate party represented by counsel if: (a) the acts or omissions of the former employee gave rise to the underlying litigation; or (b) the former employee has an ongoing relationship with the employer in connection with the litigation); Ariz. Ethics Op. No. 2000-05 (2000) (following \textit{Lang}); \textit{Zachair, Ltd. v. Driggs}, 965 F. Supp. 741 (D. Md. 1997) (Rule 4.2 applies to ex parte contacts with certain former employees of represented party), aff’d, 141 F.3d 1162 (4th Cir. 1998); \textit{Judd v.
with former employees which are conducted for the purpose of obtaining confidential information, or which entail high risk that such information will be disclosed.\textsuperscript{94} Finally, if the former employee has retained counsel, the consent of his or her counsel is necessary.

b) Current Employees.

A few jurisdictions impose a blanket prohibition on contact with current managerial employees of the organization.\textsuperscript{95} However, the ABA and the majority of jurisdictions interpret the rule to prohibit communications with current employees that have managerial responsibility with the organization that relates to the subject matter of the representation, or employees whose act or omission in connection with the subject matter of the representation may make the organization or entity of government vicariously liable for such act or omission.\textsuperscript{96} Moreover, a

\begin{itemize}
\item Take-Two Interactive Software, Inc., 2008 WL 906076 (S.D. N.Y. April 3, 2008) (generally, a party cannot prevent an adverse party from conducting ex parte interviews with its former employees; with respect to former employees who possess knowledge regarding privileged communications and where a party can show that the former employees were privy to confidential information, a protective order may issue where there exists a real risk that the former employees unintentionally would disclose privileged information or communications);
\item Rentclub, Inc. v. Transamerica Rental Fin. Corp., 811 F. Supp. 651 (M.D. Fla. 1992), aff’d, 43 F.3d 1439 (11th Cir. 1995) (firm that hired former employee possessing privileged information as “trial consultant” was disqualified); Camden v. Maryland, 910 F. Supp. 1115 (D. Md. 1996) (ex parte rule covers former affirmative action specialist of defendant who had initially investigated plaintiff’s claims);
\item G-I Holdings, Inc. v. Baron & Budd, 199 F.R.D. 529 (S.D. N.Y. 2001) (risk of inadvertent disclosure of attorney-client privileged communications by former employees of defendant law firms who had been exposed to the communications, including a claims paralegal, word processor, and administrative assistant, supported protective order barring ex parte interviews of those employees by plaintiff’s investigators; even if investigators directed to instruct employees they were not to reveal privileged materials, investigators and employees were lay people, and it was unrealistic to expect that even the best-intentioned lay person to safeguard attorney-client privilege);
\item Alaska Ethics Op. 91-1 (1991) (attorney may not solicit privileged information);
\item Ariz. Ethics Op. No. 2000-05 (2000) (in interviewing a former employee of an adverse party, a lawyer must refrain from inquiring into any privileged communications the former employee may have had with employer’s counsel during his or her employment);
\item Ohio Ethics Op. No. 96-1 (1996) (attorney may contact former employee without notifying corporate counsel, but attorney must fully explain to former employee that he represents a client adverse to corporation and inform former employee not to divulge any corporate attorney-client communications; if former employee is represented by attorney or has asked corporation’s attorney to represent him, consent of attorney must be obtained);
\item R.I. Ethics Op. No. 2011-03 (2011) (lawyer representing plaintiff in a pending suit may not directly contact former employee of defendant corporation if she was represented by counsel when the lawyer deposed her);
\item S.C. Ethics Op. No. 92-31 (1992) (plaintiff’s attorney may not contact former employees where alleged negligence is the basis of the complaint against the corporation);
\item Va. Ethics Op. No. 1749 (2001) (attorney may initiate ex parte contact with former employee of corporation, who had during the employee’s employment communicated with the corporation’s counsel regarding the pending litigation, so long as employee is not represented by his own counsel, and provided that the contacting attorney identify his role in the matter and refrain from asking the former employee to disclose the content of his communication with the corporation’s attorney).
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\textsuperscript{94} Rentclub, Inc. v. Transamerica Rental Fin. Corp., 811 F. Supp. 651 (M.D. Fla. 1992), aff’d, 43 F.3d 1439 (11th Cir. 1995) (firm that hired former employee possessing privileged information as “trial consultant” was disqualified); Camden v. Maryland, 910 F. Supp. 1115 (D. Md. 1996) (ex parte rule covers former affirmative action specialist of defendant who had initially investigated plaintiff’s claims); G-I Holdings, Inc. v. Baron & Budd, 199 F.R.D. 529 (S.D. N.Y. 2001) (risk of inadvertent disclosure of attorney-client privileged communications by former employees of defendant law firms who had been exposed to the communications, including a claims paralegal, word processor, and administrative assistant, supported protective order barring ex parte interviews of those employees by plaintiff’s investigators; even if investigators directed to instruct employees they were not to reveal privileged materials, investigators and employees were lay people, and it was unrealistic to expect that even the best-intentioned lay person to safeguard attorney-client privilege); Alaska Ethics Op. 91-1 (1991) (attorney may not solicit privileged information); Ariz. Ethics Op. No. 2000-05 (2000) (in interviewing a former employee of an adverse party, a lawyer must refrain from inquiring into any privileged communications the former employee may have had with employer’s counsel during his or her employment); Ohio Ethics Op. No. 96-1 (1996) (attorney may contact former employee without notifying corporate counsel, but attorney must fully explain to former employee that he represents a client adverse to corporation and inform former employee not to divulge any corporate attorney-client communications; if former employee is represented by attorney or has asked corporation’s attorney to represent him, consent of attorney must be obtained); R.I. Ethics Op. No. 2011-03 (2011) (lawyer representing plaintiff in a pending suit may not directly contact former employee of defendant corporation if she was represented by counsel when the lawyer deposed her); S.C. Ethics Op. No. 92-31 (1992) (plaintiff’s attorney may not contact former employees where alleged negligence is the basis of the complaint against the corporation); Va. Ethics Op. No. 1749 (2001) (attorney may initiate ex parte contact with former employee of corporation, who had during the employee’s employment communicated with the corporation’s counsel regarding the pending litigation, so long as employee is not represented by his own counsel, and provided that the contacting attorney identify his role in the matter and refrain from asking the former employee to disclose the content of his communication with the corporation’s attorney).


\textsuperscript{96} ABA MODEL RULES R. 4.2, cmt. 7 (rule includes a constituent of the organization who supervises, directs or
regularly consults with the organization’s lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with that matter may be imputed to the organization for the purposes of civil or criminal liability, or any agent or employee of the organization who is represented in the matter by his or his own counsel); Ala. Ethics Op. No. 2002-03 (2002) (contact permitted with employees of opposing party who are non-managerial, who are not responsible for the act for which opposing party could be liable, and who have no authority on behalf of the organization to make decisions about the course of the litigation); Ark. Ethics Op. No. 2011-2 (2011) (Employees of an organization who have sufficient authority to speak on behalf of the organization and thus legally bind the organization, are subject to the provisions of Rule 4.2. Other employees are not.); Paris v. Union Pacific R.R. Co., 450 F. Supp. 2d 913 (E.D. Ark. 2006) (the rule does not prohibit communications with a person whose statement may constitute an admission against the organization); Cal. Rules of Prof’l Conduct Rule 2-100(B) (defining “party” for purpose of rule as any officer, director or managing agent of party, or individual whose act or omission may bind or be imputed to organization or whose statement may be binding or imputed to organization); Snider v. Super. Ct., 113 Cal. App. 4th 1187 (2003) (ex parte communication rule extends only to “managing agents,” which is defined as employees of an organization that exercise substantial discretionary authority over significant aspects of a corporation’s business; under test a sales manager and a director for production of an events and design company were not managing agents and thus not represented parties of the company and thus contact with them by attorney for former employee of company did not violate the ex parte communication rule); Nestor v. Posner-Gerstenhaber, 857 So. 2d 953 (Fla. App. 2003) (ex parte interviews with former employees of a company represented by counsel are allowed regardless of the existence of contractual confidentiality agreement, and ex parte interviews with current employees may be allowed as well); NAACP v. Florida Dep’t of Corr., 122 F. Supp. 2d 1335 (M.D. Fla. 2000) (court will allow ex parte interviews of defendant’s rank and file—i.e., non “managerial” or “control group” employees—subject to safeguards against disclosure of privileged information); Ill. Ethics Op. No. 09-01 (2009) (lawyer may communicate with a current constituent of a represented organization about the subject matter of the representation without the consent of the organization’s counsel only when the constituent does not (i) supervise, direct or regularly consult with the organization’s lawyer concerning the matter; (ii) have authority to obligate the organization with respect to the matter; or (iii) have acts or omissions in connection with the matter that may be imputed to the organization for purposes of civil or criminal liability); Bolt-by Monahan v. Johnson, 128 F.R.D. 659 (N.D. Ill. 1989) (statements from lower level employees could be gathered by plaintiff’s attorney, but such statements could not be used as admissions under Fed. R. Evid. 801(d)(2)(D)); Bussell v. Minic, 926 F. Supp. 809 (N.D. Ind. 1996) (plaintiff’s counsel may interview employees ex parte where statements would not bind defendant); Hammond v. Junction City, 167 F. Supp. 2d 1271 (D. Kan. 2001) (ex parte contact by plaintiff’s employee’s counsel and defendant city’s director of human relations violated Kansas Rules of Professional Conduct and warranted disqualification and award of attorneys fees and costs; discussion of director’s role in city’s document production and city’s shredding of documents concerned subject of representation, and director’s authority to make hiring decisions and investigations of discrimination complaints constituted managerial responsibilities; the fact that director was potential member of putative class did not except ex parte contact; there was no attorney-client relationship between attorney and director until class certified, and it was only speculation that class would ever be certified), affirmed, 126 Fed. Appx. 886 (10th Cir. 2005) (imposition of sanctions affirmed); Ky. Ethics Op. No. E-382 (contact with present managerial employees prohibited); Shoney’s, Inc. v. Lewis, 875 S.W.2d 514, 515 (Ky. 1994); In re Shell Oil Refinery, 143 F.R.D. 105 (E.D. La. 1992) (corporate employee not a “party” for Rule 4.2 purposes unless the employee has managerial responsibility, the employee’s acts or omissions of the may be imputed to the corporation for liability purposes, or the employee’s statements may constitute admissions on the part of the corporation); Messing, Rudavsky & Weliky, P.C. v. Presidents and Fellows of Harvard Coll., 764 N.E.2d 825 (Mass. 2002) (law firm representing campus police sergeant was not prohibited from making ex parte contacts with two lieutenants, two patrol officers, and a dispatcher employed by the university, in sergeant’s sex discrimination and retaliation action against university; the two employees were not involved in directing the litigation or authorizing the university to make binding admissions, they were mere witnesses to events rather than active participants, and the supervisory authority the two lieutenants exercised over the sergeant was not a subject of the litigation); Mass. Rules of Prof’l Conduct, Comment 4 to Rule 4.2 (2002) (in the case of an organization, the rule prohibits communications only with those agents or employees who exercise managerial responsibility in the matter, who are alleged to have committed the wrongful acts at issue in the litigation, or who have authority on behalf of the organization to make decisions about the course of the litigation; if the agent or employee is represented by his or her own counsel in the matter, consent by that counsel to a...
communication will be sufficient); *Perry v. City of Pontiac*, 254 F.R.D. 309 (E.D. Mich. 2008) (Rank-and-file police officers were not persons represented by another lawyer, and thus discovery protective order preventing arrestees’ counsel in Section 1983 excessive force lawsuit from interviewing officers about retaliation for complaints and reputation of a defendant police officer was not warranted; officers were not managerial-level employees or persons whose acts in connection with matter at issue might have been imputed to city; and interviews were unlikely to lead to statements that would have been admissions by city.); *Porter v. Arco Metals Div. of Atlantic Richfield*, 642 F. Supp. 1116 (D. Mont. 1986) (ex parte prohibition applied to present or former employees with managerial responsibilities concerning the matter in litigation); *Palmer v. Pioneer Inn Assocs., Ltd.*, 59 P.3d 1237 (Neve. 2002) (Nevada no-contact rule applies only to those employees who have legal authority to bind the corporation in an evidentiary sense, i.e., those employees who have “speaking authority” for the corporation (rejecting broader rule set forth in ABA comment and following Washington state rule); *Palmer v. Pioneer Inn Assocs., Ltd.*, 338 F.3d 981 (9th Cir. 2003) (under Nevada’s ex parte communication rules, a plaintiff’s lawyer’s former government client; thus discovery protective order preventing arrestees’ killing a defendant’s past in litigation; if the employee is not an officer or managing employee and the conduct of the employee is not the subject of the representation, and (5) information from employees that may constitute an admission against the organization); *Goodeagle v. United States*, 2010 WL 3081520 (W.D. Okla. Aug. 6, 2010) (Rule 4.2 applies only to those employees who have the legal authority to bind a corporation in a legal evidentiary sense, i.e., those employees who have ‘speaking authority’ for the organization.”); *Penda Corp. v. STK, LLC*, 2004 WL 1628907 (E.D. Pa. July 16, 2004) (contact by paralegal for plaintiff counsel with customer service manager for defendant violated Rule 4.2 because manager’s statements may constitute an admission on the part of defendant; court will preclude plaintiff from using any information obtained through the ex parte contact in the litigation); Pa. Informal Ethics Op. No. 2008-6 (April 30, 2008) (Rule 4.2 prohibits an attorney representing a client in civil proceedings with a state agency from contacting investigators who work as employees of the agency who work hand-in-hand with the agency’s counsel in enforcement proceedings); *Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc.*, 144 F. Supp. 2d 1147 (D. S.D. 2001) (counsel prohibited from ex parte contact with current (1) management employees of organization, (2) those whose acts or omissions may be imputed to the organization for liability purposes, (3) those responsible for implementing the organization’s attorneys, (4) any member of organization whose own interests are directly at stake in the representation, and (5) information from employees that may constitute an admission against the organization); Tex. Rules of Prof’l Conduct R. 4.02; Tex. Ethics Op. 461 (1989) (lawyer may not communicate or cause another to communicate on the subject of representation with an employee of an adverse party without consent of opposing counsel if (1) the employee is an officer or managing employee or (2) the conduct of the employee is the basis of the litigation; if the employee is not an officer or managing employee and the conduct of the employee is not the subject of the controversy, he may be interviewed by an attorney or a party opposing the corporation provided the attorney makes a full disclosure of his connection with the suit and explains the purpose of the interviews); *Featherstone v. Schaerrer*, 34 P.3d 194 (Utah 2001) (Utah ex parte communications rule extends to person having managerial responsibility and to anyone who may legally bind the organization with respect to the matter in question); Vt. Ethics Op. No. 2007-01 (2007) (A lawyer who is representing a terminated employee in litigation against the company that formerly employed him may not communicate with a manager within the “control group” of the company on an employment-based matter, even if the subject matter on which the communication is anticipated does not include the manager’s direct scope of responsibility.); Vt. Ethics Op. No. 2006-7 (2006) (Lawyer may represent private clients in matters before Lawyer’s former governmental agency, provided that lawyer had not participated personally and substantially in such matters during government service, absent consent of the governmental agency; and provided that in the new representation lawyer would not use or reveal confidences of lawyer’s former government client.); *Wright v. Group Health Corp.*, 103 Wash. 2d 192, 691 P.2d 564, 569 (1984) (only organizational employees who have the legal authority to bind the organization “in a legal evidentiary sense, i.e., those employees who have ‘speaking authority’ for the” organization, are off-limits to attorneys seeking

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“blanket” assertion by counsel that the law firm represents all of the organization’s managers and employees is generally insufficient to expand the scope of prohibited contacts. Contact with a

unapproved ex parte communications); *Cole v. Appalachian Power Co.*, 903 F. Supp. 975 (S.D. W. Va. 1995) (counsel prohibited from ex parte contact with current (1) management employees of organization, (2) those whose acts or omissions may be imputed to the organization for liability purposes, (3) those responsible for implementing the advice of the organization’s attorneys, (4) any member of organization whose own interests are directly at stake in the representation, and (5) information from employees that may constitute an admission against the organization); Wis. Ethics Op. No. E-07-01 (2007) (opposing lawyer prohibited from ex parte contacts only with constituents who direct, supervise or regularly consult with the organization’s lawyer concerning the matter, who have authority to obligate the organization with respect to the matter, or whose act or omission with respect to the matter may be imputed to the organization for the purposes of civil or criminal liability). *Cf.* Alaska Ethics Op. No. 2011-1 (2011) (lawyer adverse to a represented organization or corporation may not communicate with an employee or agent who has authority to bind it unless the other lawyer agrees or the communication is authorized by law; Alaska interprets this prohibition narrowly and does not extend it to all employees with managerial responsibilities or all employees whose acts or omissions are imputed to the organization); *In re Employment Discrimination Litig. Against State of Ala.*, 2006 WL 2841081 (M.D. Ala. Oct. 2, 2006) (contact by counsel for plaintiff class with current state employees that was substantially related to plaintiffs’ employment discrimination claims against the state did not violate Rule 4.2 since at the time of the contact the employees had taken a position contrary to their employer in the litigation and thus was not a “representative” of the employer within the meaning of the rule).; *Eagle v. Hurley Medical Center*, 292 F.R.D. 466 (E.D. Mich. 2013) (Pharmacist, a bargaining unit employee at pharmacy, was not a “managerial employee,” and thus could be interviewed by plaintiff's attorney outside the presence of pharmacy's counsel, for purposes of obtaining information in support of former pharmacy technician's claims against employer for violations of FMLA, ADA, and state discrimination law; pharmacist was a member of the nurses’ union, not the supervisor's union, the only supervision she exercised over technician was supervising the dispensing of medications, and as a rank-and-file employee, her statements could not be imputed to employer as admissions.)

97 See, e.g., *Davis v. Creditors Interchange Receivable Management LLC*, 585 F. Supp. 2d 968 (N.D. Ohio 2008) (Plaintiff’s attorneys entitled to contact debt collection agency’s current employees who were not represented by counsel, unless the employee is a “management employee” or “speak[s] for” or bind[s] the corporation” or the employee’s opinions “from the basis of management decisions” or “act or omission in connection with the controversy may be imputed to or be an admission of the corporation.” The plaintiff’s attorneys may also contact unrepresented former employees of the opposing party *ex parte* with the former employee’s consent. The plaintiff’s attorneys must, however, “inform the former employee not to divulge any communications that the former employee may have had with corporate or other counsel,” and the attorney must explain that she represents an interest adverse to the corporation.); Ohio Ethics Op. No. 2005-3 (2005) (despite assertion of blanket representation by counsel of the corporation and all of its current and former employees, counsel representing an interest adverse to the corporation may without the consent of corporate counsel contact (1) all current employees of the corporation, except those who supervise, direct, or regularly consult with the corporation’s lawyer concerning the matter, or whose acts or omission in connection with the matter may be imputed to the corporation for the purposes of civil or criminal liability, and (2) all former employees (unless the former employees are represented by their own counsel and then consent of such counsel is required), where counsel explains that he represents a client adverse to the corporation and informs the former employee not to divulge any communications that the former employee may have had with corporate or other counsel with respect to the matter); Utah Ethics Op. No. 04-06 (2004) (if corporate counsel has actually formed an attorney-client relationship with present and former corporate employee-witnesses, and has properly obtained informed consent to joint representation, then corporate counsel may preclude opposing counsel from interviewing them; however, in the absence of an attorney-client relationship, it is improper for corporate counsel to block opposing counsel’s access to other current corporate constituents, by asserting an attorney-client relationship, unless these individuals were control group members, their acts could be imputed to the organization or their statements would bind the corporation with respect to the matter; similarly, it is improper to block opposing counsel’s access to any former employee in the absence of a current fully formed and proper attorney-client relationship); Wis. Ethics Op. No. E-07-01 (2007) (a lawyer representing an organization may not assert a blanket representation of all constituents and may request, but not require, that current constituents refrain from giving information to a lawyer representing a client adverse to the organization).

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non-managerial employee may also be prohibited where the employee has possession of or access to confidential information of the represented organization. Note that in some jurisdictions, a lawyer is free to contact the in-house counsel of a represented corporation, without the consent of opposing counsel.

In 2002, the ABA amended Comment 7 to Model Rule 4.2 to remove the prohibition on communications with anyone “whose statements may constitute an admission on behalf of the organization” because that prohibition was “broad and potentially open-ended” and “had been read to prohibit communications with anyone whose testimony would be admissible against the organization as an exception to the hearsay rule.”

2. Contact With Class Members by Counsel

The prohibition on contact with a represented party does not apply before class certification because the putative class members are not yet “represented” by class counsel. Once the class has been certified, counsel may be prohibited from contacting members of the class.

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

99 See ABA Ethics Op. No. 06-443 (2006) (lawyer may contact in-house counsel for represented organization without violating Rule 4.2, unless in-house lawyer was engaged in providing only business advice in the matter in question, the in-house lawyer is an individual party represented by counsel in the matter, or where the lawyer has been instructed not to contact in-house counsel); D.C. Ethics Op. No. 331 (2005) (a lawyer may generally communicate with in-house counsel of a represented party about the subject of the representation without obtaining the prior consent of the entity’s outside counsel retained to represent it in the matter); N.Y. City Ethics Op. No. 2007-1 (2007) (no-contact rule does not prohibit a lawyer from communicating with an in-house counsel of a party known to be represented in that matter, so long as the lawyer seeking to make that communication has a reasonable, good faith belief based on objective indicia that such an individual is serving as a lawyer for the entity); Wis. Ethics Op. No. E-07-01 (2007) (a lawyer does not violate the ex parte communication rules by contacting in-house counsel for an organization that is represented by outside counsel in the matter; retention of outside counsel does not normally transform counsel for an organization into a represented constituent and contact with a lawyer does not raise the same policy concerns as contact with a lay person).

100 Annotated ABA Model Rules of Professional Conduct 4.2 (5th ed. 2003) (distinguishing Weeks v. Indep. Sch. Dist. No. 1-89, 230 F.3d 1201 (10th Cir. 2000) as an example of an “overly broad” interpretation of Rule 4.2). Compare Weeks v. Indep. Sch. Dist. No. 1-89, 230 F.3d 1201 (10th Cir. 2000) (in bus driver’s ADA and FLSA action against school district, both operations supervisor and bus driver’s immediate supervisor had “speaking authority” for the district for the purpose of ex parte communication rule and thus counsel was barred from engaging in ex parte communications with those employees with respect to subject matter of action). Note that Arizona, Arkansas, Delaware, Florida, Idaho, Indiana, Iowa, Minnesota, Montana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Virginia, Washington and Wyoming have revised their versions of Rule 4.2 to substitute “person” for “party.”

101 ABA Formal Ethics Op. No. 07-445 (April 11, 2007) (before a class action has been certified, counsel for plaintiff and defense have interests in contacting putative members of the class. Model Rules of Professional Conduct 4.2 and 7.3 do not generally prohibit counsel for either plaintiff or defendant from communicating with persons who may in the future become members of the class; with respect to such contacts, Rule 4.3, which concerns lawyers dealing with unrepresented persons, does not limit factual inquiries but requires both sides to
restrain from giving legal advice other than advice to engage counsel, if warranted; if, on the other hand, plaintiffs’ counsel’s goal is to seek to represent the putative class member directly as a named party to the action or otherwise, the provisions of Rule 7.3, which governs lawyers’ direct contact with prospective clients, applies; the fact that an action has been filed as a class action does not affect the policies underlying Rule 7.3 that prohibit the types of contact with prospective clients that have serious potential for overreaching and other abuse; however, Rule 7.3’s restrictions do not apply to contacting potential class members as witnesses, so long as those contacts are appropriate and comport with the Model Rules; *Lowery v. Circuit City Stores, Inc.*, 77 Fair Empl. Prac. Cases (BNA) 1319 (4th Cir. 1998) (district court did not preclude Circuit City from establishing a defense when it limited ex parte communication between Circuit City and its African-American employee class members), *vaced on other grounds*, 527 U.S. 1031 (1999); *Parris v. Super. Ct.*, 109 Cal. App. 4th 285 (2003) (generally disapproving judicial restrictions on precertification contacts with potential class members based on freedom of speech concerns; however, protective orders may be allowed in appropriate circumstances); *Hernandez v. Vitamin Shoppe Indus., Inc.*, 174 Cal. App.4th 1441 (2009) (Conditional class certification for purposes of settlement, in action in which attorney represented a named plaintiff, triggered professional conduct rule generally prohibiting an attorney, while representing a client, from communicating directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, thereby precluding attorney from communicating with non-client class members after trial court had preliminarily approved the settlement, conditionally certified a class, and ordered claims administrator to send notice to class regarding proposed settlement, which communications involved letters urging non-clients to opt out and join another putative class action in which attorney was representing a named plaintiff and which involved the same wage and hour claims against employer.); *Jacobs v. CSAA Inter-Insurance*, 2009 WL 1201996 (N.D. Cal. May 1, 2009) (where court has conditionally certified a wage and hour class for settlement purposes, plaintiff’s attorneys in similar state class action are prohibited from communicating with represented class members in the federal action about the subject matter of representation without consent of counsel); *Parks v. Eastwood Ins. Serv., Inc.*, 235 F. Supp. 2d 1082 (C.D. Cal. 2002) (in FLSA class action for unpaid wages or overtime, defendant employer may communicate with prospective plaintiff employees who have not yet “opted in,” unless the communication undermines or contradicts the court’s own notice to prospective plaintiffs); *EEOC v. Joslin Dry Good Co.*, 2007 WL 433144 (D. Colo. Feb. 2, 2007), appeal dismissed, 240 Fed. Appx. (10th Cir. 2007) (protective order preventing defendant, in the course of its employee interviews in preparation of its defense to the EEOC’s action, from engaging in ex parte contact with known class members and individuals who have indicated an intention to be a class member with the expectation that the EEOC would represent him or her); if Defendant discovers in the course of its interviews that a current employee is a potential class member, that employee must be given notice in writing of the pending lawsuit before the interview continues); *Resnick v. Am. Dental Ass’n*, 31 Fair Empl. Prac. Cases (BNA) (N.D. Ill. 1982) (district court prohibited employer’s counsel from contacting members of a class certified under Rule 23, Fed. R. Civ. P.; DR 7-104 does not apply before certification because the potential class members are not yet “represented” by class counsel); *EEOC v. Dana Corp.*, 202 F. Supp. 2d 827 (N.D. Ind. 2002) (to extent individual potential class members had not established attorney-client privilege with EEOC, employer could conduct ex parte interviews with these individuals without violating ex parte communication rules); Mich. Ethics Op. No. RI-219 (1994) (in-house counsel for defendant organization in class action suit may answer communications initiated by non-representative class members not otherwise known to be represented by counsel who have contacted the in-house counsel during the class “opt out” notice period to inquire about the nature of the class action and how the case affects them; if in-house counsel for a potential class plaintiff contacts in-house counsel for defendant, future contact with the potential class plaintiff by defense counsel should be through the in-house counsel); *Gifford v. Target Corp.*, 723 F. Supp.2d 1110 (D. Minn. 2010) (law firm must be disqualified as counsel for plaintiffs in putative class action due to firm’s contact with managerial employee of the defendant from whom the firm received privileged information about the defendant); N.Y. City Ethics Op. No. 2004-01 (2004) (when a class has been certified, the class lawyer or the court must consent before a lawyer opposing the class may communicate directly with class members about the action); Pa. Ethics Op. No. 2009-1 (April 2009) (Rule 4.2 bars defense counsel in a state class action from contacting current or former employed class members regarding the subject matter of the lawsuit prior to a decision on certification (unless accomplished via deposition or other formal means of discovery with proper notice provided to the plaintiff’s counsel)); *Dondore v. NGK Metals Corp.*, 2001 WL 516635 (E.D. Pa. May 16, 2001) (court prohibited defense counsel from contacting, ex parte, former management employees of defendant corporation who were part of putative class without prior court approval and under guidelines designed to ensure that such potential witnesses
3. **Contact With a Party’s Insurance Carrier**

Several ethics committees have held that if it is clear that the defense counsel does not also represent the carrier, a plaintiff’s counsel may contact the carrier directly. However, if the defense counsel represents the carrier then direct contact is prohibited, absent consent.\(^\text{102}\)

4. **Client Communication With a Represented Party**

Contacts with a represented party initiated by the client of his own volition do not violate
the ethics rules.\textsuperscript{103} And although a few opinions have held that contacts made by the client at the suggestion of his attorney violate the ethics rules,\textsuperscript{104} the majority of ethics opinions and rules permit the lawyer to advise a client to speak directly to a represented party.\textsuperscript{105}

\textsuperscript{103} See Snider v. Super. Ct., 113 Cal. App. 4\textsuperscript{th} 1187 (2003) (ex parte communication rule not intended to prevent the parties themselves from communicating with respect to the subject matter of the representation); EEOC v. McDonnell Douglas Corp., 948 F. Supp. 54, 55 (E.D. Mo. 1996) (“[T]here is nothing that prohibits one party to a litigation from making direct contact with another party to the same litigation.”); Isaacs v. Dartmouth Hitchcock Medical Center, 2012 WL 2752743 (D. N.H. July 9, 2012) (where pro se litigant was not a lawyer, ex parte communication rules do not prohibit his ex parte contact with defendant’s managers). Compare: Alaska Ethics Op. No. 2006-1 (2006) (Rule 4.2 applies where the lawyer is a pro se litigant; until the lawyer knows that an opposing counsel has been asked by the party to deal with the particular matter, the lawyer is not prohibited from dealing with representatives of the party); D.C. Bar Op. No. 330 (2005) (“even if the lawyer has reason to know that the pro se litigant is receiving some behind-the-scenes legal help, opposing counsel acts reasonably in proceeding as if the opposing party is not represented, at least until informed otherwise.”); Culliford v. American Kiko Goat Assn., 2012 WL 3138971 (N.D. Ga. Aug. 1, 2012) (ex parte communication rules apply to prevent a lawyer appearing pro se from directly contacting a represented party); Kansas Ethics Op. No. 09-01 (2009) (“[a]n attorney who receives pleadings or documents marked with the legend ‘Prepared with Assistance of Counsel’ has no duty to refrain from communicating directly with the pro se party, unless and until the attorney has reasonable notice that the pro se party is actually represented by another lawyer in the matter beyond the limited scope of the preparation of pleadings or documents, or the opposing counsel actually enters an appearance in the matter.”); Nev. Ethics Op. No. 34 (2009) (pro se litigant assisted by a “ghost-lawyer” is considered “unrepresented” and thus communicating attorney must comply with Rule 4.3 governing communications with unrepresented persons); N.Y. State Ethics Op. No. 879 (2011) (when a lawyer is representing himself pro se or is represented by his own counsel with respect to a matter, the lawyer may not engage in direct communications with a counterparty who the lawyer knows is represented by counsel without securing the consent of the party’s lawyer or providing opposing counsel with reasonable advance notice under the rules); In re Disciplinary Action Against Lucas, 789 N.W.2d 73 (N.D. 2010) (Attorney violated Rule 4.2 where attorney while representing himself in litigation against his condominium association sent letters to the association’s board, to an officer, and to a board member while the association was represented by counsel, suggesting settlement and discussing other matters related to the litigation; 30 day suspension warranted); In re Haley, 126 P.3d 1262 (Wash. 2006) (Washington State’s Rule 4.2 prohibits a lawyer who is representing his own interests pro se from contacting another party whom he knows to be represented by counsel).

\textsuperscript{104} See ABA MODEL RULES R. 4.2, cmt. 4 (lawyer may not violate rule by acting through another person); In re Anonymous, 819 N.E.2d 376 (Ind. 2004) (employer’s attorney violated attorney disciplinary rules prohibiting a lawyer from communicating with a represented party and prohibiting a lawyer from using methods to obtain evidence that violate a person’s legal rights, where attorney gave employer an affidavit that attorney wanted lawyer from communicating with a represented party); Kansas Ethics Op. No. 09-01 (2009) (pro se litigant assisted by a “ghost-lawyer” is considered “unrepresented” and thus communicating attorney must comply with Rule 4.3 governing communications with unrepresented persons); N.Y. State Ethics Op. No. 879 (2011) (when a lawyer is representing himself pro se or is represented by his own counsel with respect to a matter, the lawyer may not engage in direct communications with a counterparty who the lawyer knows is represented by counsel without securing the consent of the party’s lawyer or providing opposing counsel with reasonable advance notice under the rules); In re Disciplinary Action Against Lucas, 789 N.W.2d 73 (N.D. 2010) (Attorney violated Rule 4.2 where attorney while representing himself in litigation against his condominium association sent letters to the association’s board, to an officer, and to a board member while the association was represented by counsel, suggesting settlement and discussing other matters related to the litigation; 30 day suspension warranted); In re Haley, 126 P.3d 1262 (Wash. 2006) (Washington State’s Rule 4.2 prohibits a lawyer who is representing his own interests pro se from contacting another party whom he knows to be represented by counsel).

\textsuperscript{105} ABA MODEL RULES R. 4.2, cmt. 4 (“Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make.”); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99(2) (2000) (“[The no-contact rule] does not prohibit the lawyer from assisting the client in otherwise proper communication by the lawyer’s client with a...
Under the Model Code, an attorney has a duty to try to dissuade his client from making ex parte contacts. For example, Rule 2-100 of the Cal. Rules of Professional Responsibility provides that “nothing in the rule prevents a member from advising the client that such communication can be made.” At the same time, the rule prohibits an attorney from indirectly communicating, without consent of counsel, with an adverse party. Accordingly, a fine line exists between “advising” the client that such communication is possible and “encouraging” the client to make such communications. On the other hand, some states have amended their ethics rules to permit a lawyer to suggest that a client communicate directly with a represented party and counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented party’s counsel that such communications will be taking place.

5. Law or Rule Exception

Ex parte communications are not prohibited if the communication is authorized by law. Some permitted communications include service of legal notices, offers of judgment and, in some jurisdictions, settlement offers. Similarly, the rule has been interpreted to allow direct represented nonclient.”); ABA Formal Ethics Op. No. 11-461 (2011) (“[A] lawyer may give substantial assistance to a client regarding a substantive communication with a represented adversary. . .[which] could include, for example, the subjects or topics to be addressed, issues to be raised and strategies to be used. Such advice may be given regardless of who—the lawyer or the client—conceives of the idea or having the communication.”); N.Y. City Ethics Op. No. 2002-3 (2002) (where the client conceives the idea to communicate with a represented party, DR 7-104 does not preclude the lawyer from advising the client concerning the substance of the communication; the lawyer may freely advise the client so long as the lawyer does not assist the client inappropriately to seek confidential information or invite the nonclient to take action without the advice of counsel or otherwise overreach the nonclient).

106 See ABA Formal Ethics Op. No. 524 (1962) (a lawyer should use his best efforts to dissuade his client from communicating with another party without the consent of that party’s counsel).
107 ABA MODEL RULES R. 4.2, cmt. 4 (“Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make.”); S.F. Ethics Op. No. 1985-1 (1985) (an attorney does not have to discourage his or her client from directly negotiating with the opposing party).
108 See Ore. Ethics Op. No. 2005-147 (2005) (rule allows lawyer to inform client that he/she is free to communicate directly with the adverse party; “[T]he lawyer [however] should exercise caution to avoid instructing the client to convey a particular message or fulfill an obligation of the lawyer. The client may not be used as a conduit or vehicle for relaying communications from the lawyer.”).
109 N.Y. State Ethics Op. No. 846 (2010) (a lawyer for insurance carrier may not, without prior consent of claimant’s counsel, send forms directly to a specific claimant where the lawyer knows the claimant is represented by counsel; however, if the lawyer gives reasonable advance notice to claimant’s counsel, the lawyer may cause the insurance carrier’s employees to send the forms); N.Y. Ethics Code, DR 7-104; N.Y. Ethics Code, EC 7-18 (lawyer may advise his/her client to communicate directly with a represented person, including drafting papers for the client to present to the represented person, so long as the attorney gives “reasonable advance notice” that such communications will be taking place). Compare Mass. Ethics Op. No. 11-03 (2011) (it is not a violation of Rules 4.2 and 8.4(a) for a lawyer to advise her client to urge another person to release an attachment on the client’s property, even though the other person is represented by counsel; the lawyer would, however, violate Rule 4.2 if she handed the other person a release of the attachment without first obtaining the permission of the other person’s lawyer).
110 See, e.g., N.Y. State Ethics Op. No. 894 (2011) (when authorized by statute, attorney may personally serve process on represented party and ask related questions, but may not go beyond service of process to communicate on the subject of the representation without the consent of such party’s lawyer); Va. Ethics Op. No. 1752 (2001) (plaintiff’s attorney may not contact multiple defendants represented by the same defense attorney to advise them by
contact to obtain non-substantive information on purely administrative/ministerial matters.  

a) Government Officials and Employees

Because private parties have certain inherent and constitutional rights to approach their government officials, they should not be restricted from seeking direct communication with those officials simply because the officials have employed an attorney to represent them. For example, ABA Formal Ethics Op. No. 97-408 (1997) held that lawyer representing a private party in a controversy with the government may communicate about the matter with government officials who have authority to take or to recommend action in the matter, provided that the sole purpose of the lawyer’s communication is to address a policy issue, including settling the controversy. In such a situation, the lawyer must give government counsel reasonable advance notice of his intent to communicate with such officials to afford an opportunity for consultation between government counsel and the officials on the advisability of their entertaining the communication. In situations where the right to petition has no apparent applicability, either because of the position and authority of the official sought to be contacted or because of the purpose of the proposed communication, Rule 4.2 prohibits communication without prior consent of government counsel. Similarly, some jurisdictions have held that an attorney representing a private party may directly contact a government official about a matter involving the client, even though the government agency was known to be represented by counsel, provided that the attorney informs the official that there is a pending dispute with the agency and

mail or at depositions of their right to separate counsel without the defense attorney’s consent, even though opposing counsel refuses to acknowledge whether defendants have been advised of their right to separate counsel and objects to plaintiff’s counsel advising the defendants in this regard); Va. Ethics Op. No. 521 (1983) (plaintiff’s attorney may not directly contact opposing party without consent of that party’s lawyer even though plaintiff’s attorney believes opposing counsel is wrongfully withholding information from his client, an attorney). Cf. Tex. Ethics Op. No. 613 (defense lawyer retained by insurance company may not notify plaintiff himself, rather than plaintiff’s attorney, when the settlement money has been transferred to the lawyer’s account; the communication is not authorized by law notwithstanding that it is strongly encouraged by the Texas Department of Insurance. The lawyer need not, however, discourage the insurance company from notifying the plaintiff directly). But see Parker v. Pepsi-Cola Gen. Bottlers, 249 F. Supp. 2d 1006 (N.D. Ill. 2003) (“[W]e do not believe that the ‘authorized-by-law’ exception creates a safe haven that allows contact with a represented party via a subpoena.”).

See also ABA MODEL RULES R. 4.2, cmt. 5 (communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government); ABA Formal Ethics Op. No. 95-396 (1995) (an example of “communications authorized by law” is the right of a party to a controversy with a government agency to speak with government officials about the matter - the right in question being the First Amendment right of petition); N.C. 2011 Formal Ethics Op. No. 15 (2011) (a lawyer may communicate with a government official for the purpose of identifying a custodian of public records and with the custodian of public records to make a request to examine public records related to the representation although the custodian is an adverse party, or an employee of an adverse party, whose lawyer does not consent to the communication); Am. Canoe Ass’n v. City of St. Albans, 18 F. Supp. 2d 620 (S.D. W. Va. 1998) (communication by plaintiff’s counsel with defendant City and City’s manager and employees not barred by Rule 4.2 because such contacts are “authorized by law”; however, plaintiff’s counsel must provide defendant with an inventory of any materials received from defendant government agencies and provide the information within court-set discovery deadlines).

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that he is representing the client in the dispute.\textsuperscript{113} Note that a number of jurisdictions apply the same ex parte communication rules applicable to private sector parties when government parties

\textsuperscript{113} See, e.g., Ala. Ethics Op. No. 2003-03 (2003) (attorney for State Board of Education may communicate directly with the members of County Board of Education to discuss settlement of pending lawsuit without obtaining the consent or approval of the attorney representing the County Board of Education); D.C. Ethics Op. No. 340 (2007) (attorney representing client in dispute against a government agency may contact government officials, including those who have authority with respect to the dispute, without the consent of the government’s attorney, so long as the attorney identifies himself and indicates that he represents a party adverse to the government; the attorney may not contact government officials concerning routine discovery matter, scheduling issues and the like, absent consent of government counsel); D.C. Ethics Op. No. 280 (1998) (attorney may communicate directly with government officials on a licensing board without first obtaining consent of the board’s lawyer where the communication concerns the conclusion reached by the board in his client’s case and about alleged improper conduct of governmental personnel, i.e., the board’s counsel and staff; lawyer not required to give the board’s lawyer advance notice of contact); Fla. Ethics Op. No. 09-1 (2010) (A lawyer may not communicate with officers, directors, or managers of State Agency, or State Agency employees who are directly involved in the matter, and other State Agency employees whose acts or omissions in connection with the matter can be imputed to State Agency about the subject matter of a specific controversy or matter on which a lawyer knows or has reason to know that a governmental lawyer is providing representation unless the agency’s lawyer first consents to the communication. A lawyer may communicate with other agency employees who do not fall within the above categories, and may communicate with employees who are considered represented by State Agency’s lawyer on subjects unrelated to those matters in which the agency lawyer is known to be providing representation.); Ill. Ethics Op. No. 13-09 (2013) (an attorney is not precluded from direct communications with a City decision maker as to underlying tax law policy issues, even when there is a pending tax case between the City and the attorney’s client. Moreover, in such instance, prior notice to the City's attorney is not required by Rule 4.2. To the contrary, however, direct communications with the City decision maker as to the settlement or resolution of the pending matter cannot fairly be said to relate to policy issues, and are prohibited without first obtaining the consent of the City's lawyer. In such instance, the providing of prior notice to the City's attorney without obtaining the attorney’s consent is insufficient to allow such direct communication with the City's representative.); Ky. Ethics Op. No. E-332 (1988) (lawyer representing government department in litigation may not prevent private party’s lawyer from contacting all employees of the department); Morrison v. Brandeis Univ., 125 F.R.D. 14 (D. Mass. 1989) (court allowed ex parte interviews with non-party employees of University that voted in favor of granting plaintiff tenure, based on plaintiff’s need to interview these favorable witnesses, provided plaintiff’s counsel clearly identified himself as plaintiff’s counsel and that counsel could not take statements from persons who refuse to talk or who requested their attorney); N.Y. City Ethics Op. No. 1991-4 (1991) (lawyer for private party may communicate with governmental decision-maker at least in writing with copy to government counsel); N.C. Ethics Op. No. RPC 202 (1995) (lawyer did not violate ex parte rule by writing the town council requesting that the town drop its appeal of a decision granting a lawyer’s client a sign variance despite the town council’s objection to the communication, but required a copy of the letter to be sent simultaneously to counsel for the town); Ore. Formal Ethics Op. No. 2005-144 (2005) (attorney may contact a County employee to obtain copy of public records material to pending litigation without obtaining County attorney’s consent where copying and dissemination of records part of County’s day-to-day business; however, inquiries to employee about the meaning of the public documents may risk a violation of the rules); S.D. Ethics Op. No. 90-70 (1990) (lawyer representing party in litigation against municipality may write municipal official about the matter with notice and a copy of the communication to the City Attorney, but may not telephone or meet with officials without City Attorney’s consent); Texas Ethics Op. No. 604 (2011) (Ex parte rule does not apply to communications between a lawyer and members of a state agency’s board when the board is considering whether to act in a legislative capacity to adopt a regulation; after the regulation has been adopted, the lawyer is prohibited, with limited exceptions, from communicating privately with members of the board of the agency for purpose of influencing the board’s decision on a permit application that the lawyer and the client are planning to file, and the lawyer is prohibiting from causing another, including the client, to communicate privately with members of the board for that purpose); Utah Ethics Op. No. 115R (1994) (lawyer representing client in matter against government agency may contact employees of agency orally or in writing outside government attorney’s presence on basis of constitutional guarantee of unrestricted access to government, but where government is represented by counsel must disclose this to government employee being interviewed).
are involved.\textsuperscript{114}

**Ex parte communications by Federal government attorneys.** 28 U.S.C. § 530b(a) makes any “attorney for the government” subject to the state rules governing attorney conduct in any state in which the attorney engages his or her duties.\textsuperscript{115}

\textbf{b) Information Obtained Through Opponent’s Web Site}

Some lawyers view an employer’s corporate Web site as a potentially rich source of discoverable information. Generally, a Web site can be accessed by anyone having access to the Internet and postings are considered in the public domain. “Passive” Web sites afford no method of direct interaction with the owner of the site. Viewing or downloading information posted on a passive site is the equivalent of reading a newspaper, magazine, or other document available for public consumption. Neither viewing nor following links involves any personal response to the

\textsuperscript{114} See, e.g., Alaska Ethics Op. No. 94-1 (1994) (Rule 4.2 bars lawyer for litigant against government agency from presenting the litigant’s settlement position to the agency’s managing board, absent specific authorization by law or consent of agency’s counsel, even if the settlement offers on behalf of the litigant may not have been adequately communicated to the board); Conn. Ethics Op. No. 86-1 (1986) (lawyer in litigation against a government agency may communicate with a nonparty official of the agency on subject related to the litigation if official not in the position to bind agency, but must have government counsel’s consent before a contact with an official who is a party); Ill. Ethics Op. No. 92-3 (1992) (defendant’s lawyer may not send City officials correspondence with City Attorney about the matter); N.C. Ethics Op. No. RPC 132 (1993) (addresses a number of instances of permissible ex parte contact by a lawyer with City employees, but requires lawyer for private party generally to deal with government lawyer or obtain his consent to ex parte interview); Brown v. Ore. Dep’t of Corr., 173 F.R.D. 265 (D. Ore. 1997) (plaintiff’s counsel in employment discrimination suit against state agency barred by Rule 4.2 from conducting informal ex parte interviews with the same employees whose alleged conduct formed the basis of the vicarious liability claim against the agency); S.D. Ethics Op. No. 92-15 (1993) (lawyer representing government employee in grievance matter may not write County Commissioners without County Attorney’s consent); Tex. Ethics Op. No. 474 (1991) (Rule 4.2 bars telephone contact by litigant’s lawyer with city council criticizing city’s settlement offer in suit against city). Cf. Hammond v. Junction City, 2002 WL 169370 (D. Kan. Jan. 23, 2002) (ex parte communication with employee defendant city’s director of human relations was not authorized by virtue of employee’s status as government official since the purpose of the communication was not to address any policy issue over which the employee had authority to take or recommend action, and the attorney did not give government counsel reasonable advance notice of the intent to communicate with the official).

\textsuperscript{115} See United States v. Talao, 222 F.3d 1133 (9th Cir. 2000) (California Rule 2-100 applies to ex parte communications by government attorneys, but reverses lower court finding of violation: “We deem manifest that when an employee/party of a defendant corporation initiates communications with an attorney for the government for the purpose of disclosing that corporate officers are attempting to suborn perjury and obstruct justice, Rule 2-100 does not bar discussions between the employee and the attorney.”); N.Y. State Ethics Op. No. 768 (2003) (if a lawyer for a government agency knows that another lawyer represents the counter-party to a government contract in connection with that contract, then the government lawyer may attend meetings with non-attorney representatives of the counter-party, provided reasonable advance notice is given to opposing counsel; without consent of opposing counsel, the government lawyer may advise the lawyer’s own client during the meeting, but may not communicate the government’s position on the matter, respond to inquiries from the counter-party regarding agency filing requirements, nor otherwise negotiate with the counter-party); Tex. Ethics Op. No. 600 (August 2010) (lawyer for Texas governmental agency is not permitted to communicate directly with a regulated person that is represented in the matter by counsel who has not consented to the communication, and is not permitted to cause or encourage such communications by other agency employees, and the agency lawyer is obligated to prevent such communications by employees over whom the lawyer has direct supervisory authority); Cf. EEOC v. Midwest Emergency Associates, Ltd., 2006 WL 495971 (N.D. Ill. Feb. 27, 2006) (EEOC investigator’s interview of management witness did not warrant disqualification of EEOC as plaintiff in discrimination action).
visitor. A lawyer who reads information under these circumstances is thus not “communicating” with the represented owner of the Web site.\footnote{116 See Ore. Formal Ethics Op. No. 2005-164 (2005) (lawyer may access the Web site of his represented opposing party even if the Web site contains information relevant to the litigation pending between the two clients, if the Web site is passive or if the communication from the lawyer is the equivalent of ordering products from a catalog; “[The essence of the analysis] is whether the Internet-based communication has the character of a telephonic or face-to-face conversation. For the same reasons that conversing directly or indirectly with a represented person is forbidden by telephone or in person, it is also forbidden in any electronic format.”).}

Some Web sites allow the visitor to interact with the site. The interaction may consist of providing feedback about the site or ordering products. This kind of one-way communication from the visitor to the Web site also does not constitute communicating “with a person” for the purpose of the ex parte communication rules. Rather, it is the equivalent of ordering products from a catalog by mailing the required information or by giving it over the telephone to a person who provides no information in return other than what is available in the catalog.\footnote{117 See Ore. Formal Ethics Op. No. 2005-164 (2005). See also Ore. Ethics Op. No. 2005-144 (2005) (prior consent of government’s lawyer not required to request and receive public records from the governmental entity; however, if the records clerk is asked to interpret the records or policies expressed in the records, the risk of violating the ex parte communication rules is increased). Note that some one-way communication can violate the ex parte communication rules, such as where a lawyer sends a letter or email to a represented person without the opposing lawyer’s consent.} If the Web site is more interactive and allows visitors to send messages and receive specific responses from the Web site or to participate in a “chat room,” there is the risk that the lawyer visiting the Web site of a represented entity might inadvertently communicate with the represented entity in violation of ex parte communication rules.\footnote{118 Ore. Ethics Op. No. 2005-164 (2005).}

c) Access to Opposing Party’s Use of Social Media

A lawyer is generally permitted to access social media such as Facebook or My Space to obtain information on a represented party without consent of opposing counsel, so long as the lawyer does not “friend” the party or otherwise interact with the party in a manner that would otherwise constitute a prohibited ex parte contact.\footnote{119 N.Y. City Ethics Op. No. 2010-2 (2010) (lawyer may not “friend” an individual under false pretenses to obtain evidence from a social networking website); N.Y. State Ethics Op. No. 843 (2010) (lawyer representing a client in pending litigation may access the public pages of another party’s social networking website (such as Facebook or MySpace) for the purpose of obtaining possible impeachment material for use in the litigation, if the lawyer does not “friend” the party or direct a third party to do so); Ore. Ethics Op. No. 2013-189 (2013) (Lawyer may access publicly available information on a social networking site. A lawyer may also access nonpublic information if the person is not represented by counsel in the matter and no actual representation of disinterest is made by the lawyer. However, a lawyer may not advise or supervise the use of deception in obtaining access to nonpublic information unless the exceptions for lawful covert investigations of violations of civil or criminal law or constitutional rights under RPC 8.4(b) applies); Pa. Ethics Op. No. 2009-02 (March 2009) (Where nonparty witness revealed during deposition that she has “Face Book” and “My Space” accounts, an attorney’s plan to have a third person to seek to “friend” the witness without revealing that the individual works with the lawyer would violate Rule 8.4(c) because the planned communication by the third party with the witness is deceptive in that 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}
6. Communication With Unrepresented Persons

In representing her client, a lawyer may not give an unrepresented individual any advice other than advice to seek counsel.120 The attorney is allowed to discuss the subject matter of the dispute, but may not imply that she is a disinterested person; at all times the lawyer must clarify the exact nature of her role and interest in the dispute.121 As long as there is no overreaching or misrepresentation, the attorney may draft documents and submit them to the unrepresented party for signature.122 Although an attorney should not suggest specific counsel, he or she may suggest legal aid or other bar referral services approved by the bar.123 An attorney may not circumvent this rule by using the client or some third party as a medium to give advice to the unrepresented

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.); San Diego Ethics Op. No. 2011-2 (2011) (attorney may not make an ex parte Facebook friend request of a represented party). Cf. ABA Formal Ethics Op. No. 466 (2014) (a lawyer may review a juror’s/potential juror’s Internet presence, which may include postings by the juror/potential juror in advance of and during trial, but a lawyer may not communicate directly or through another with a juror or potential juror); N.Y. City Ethics Op. No. 2012-2 (attorneys may use social media websites for juror research so long as no communication occurs between the lawyer and the juror as a result of the research. The attorney must not use deception to gain access to the juror’s website or to obtain information, and third parties working for the benefit of the lawyer must comply to all the same restrictions as the attorney. Should a lawyer learn of juror misconduct through otherwise permissible research of a juror’s social media activities, the lawyer must reveal the improper conduct to the court); Lenz v. Universal Music Group, 2010 WL 4789099 (N.D. Cal. Nov. 17, 2010) (plaintiff who sent emails, posted a blog, and engaged in Gmail chat sessions through which she disclosed information relating to her attorneys’ litigation strategy waived the attorney-client privilege for related information). Cf. N.C. 2014 Formal Ethics Op. No. 5 (2014) (lawyer must advise a client about information on social media if information and postings on social media are relevant and material to the client’s representation. The lawyer may advise a client to remove information on social media if not spoliation or otherwise illegal); Philadelphia Ethics Op. No. 2014-5 (2014) (lawyer may advise client to change the privacy settings on the client’s Facebook page and may instruct client to make information on social media “private,” but may not instruct or permit client to destroy/delete a relevant photo, link, text or other content, and must obtain a copy of such information in order to comply with a subpoena or document request).

120 See ABA MODEL RULES R. 4.3, cmt. 4; ABA MODEL CODE DR 7-104.

121 McMillan v. Shadow Ridge At Oak Park Homeowner’s Ass’n, 165 Cal. App. 4th 960 (2008) (Defense counsel’s act of meeting and conferring with pro se plaintiff on pending ex parte motion to compel depositions of her designated experts did not violate ex parte communication rule, even though another attorney had informed defense counsel that he would be assisting plaintiff on the case, where attorney had informed defense counsel that he would not be substituting in as attorney of record and would not be acting as trial counsel, and plaintiff remained counsel of record). See also N.Y. City Ethics Op. No. 2009-2 (February 2009) (DR 7-104(A)(2) permits a lawyer to advise a self-represented person adverse to the lawyer’s client to seek her own counsel and to make certain other related statements. These statements may include, where appropriate, identification of general legal issues that the self-represented person should address with a lawyer; undisputed statements of fact or law such as the position of the lawyer’s client on a contested issue; and references to court-sponsored programs designed to assist a self-represented litigant. A lawyer may at any time explain or clarify the lawyer’s role to the self-represented litigant and advise that person to obtain counsel. The lawyer must volunteer this information if she knows or should know that a self-represented person misunderstands the lawyer’s role in the matter.).

122 See ABA MODEL RULES R. 4.3, ABA MODEL CODE DR 7-104; N.C. 2009 Formal Ethics Op. No. 12 (2010) (lawyer may prepare affidavit and confession of judgment for an unrepresented adverse party provided the lawyer explains who he represents and does not give the unrepresented party legal advice; however, the document cannot include a statement that the adverse party has consulted with his lawyer if he has not in fact done so); Croce v. Kurnit, 565 F. Supp. 884, 890 (S.D. N.Y. 1982) (lawyer breached fiduciary duty by explaining legal ramifications of a contract and not advising unrepresented party to obtain outside counsel).


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When a person who is known to have been represented by counsel declares that the representation has or will be terminated, the communicating lawyer should not proceed without reasonable assurance that the representation has in fact been terminated.  

7. Remedies for Violation of Ex Parte Communication Rules

The remedies imposed by a court for a violation of the ex parte communication rules can vary depending on the facts and circumstances and can include an award of sanctions or exclusion of the evidence obtained. A violation of the ex parte communication rule can result in an order for a new trial or, in extreme cases, the court may order disqualification of counsel.  

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124 N.Y. State Ethics Op. No. 478 (1978). Cf. N.Y. City Ethics Op. No. 2009-5 (2009) (In civil litigation, a lawyer may ask unrepresented witnesses to refrain from voluntarily providing information to other parties to the dispute. A lawyer may not, however, advise an unrepresented witness to evade a subpoena or cause the witness to become unavailable. A lawyer also may not tamper with the witness (e.g., bribe or intimidate a witness to obtain favorable testimony for the lawyer’s client). And while lawyers generally are prohibited from rendering legal advice to unrepresented parties, they may inform unrepresented witnesses that they have no obligation to voluntarily communicate with others regarding a matter in dispute and may suggest retention of counsel.)

125 ABA Formal Ethics Op. No. 95-396; N.Y. State Ethics Op. No. 959 (2013) (A lawyer who knows that an adverse party’s lawyer has withdrawn from the representation or resigned from the bar may contact the adverse party to determine if he/she has retained new counsel or plans to represent himself or herself).

126 Hill v. St. Louis Univ., 123 F.3d 1114 (8th Cir. 1997) (district court did not err in imposing $1,921.85 in attorneys fees as sanctions against plaintiff for her counsel’s ex parte communications with a department chair); Richards v. Holsum Bakery, Inc., 2009 WL 3740725 (D. Ariz. Nov. 5, 2009) (Plaintiff’s counsel violated Rule 4.2 by arranging and attending a breakfast meeting with a current employee of employer and the plaintiff in which he directly questioned the employee on issues directly involving the litigation and induced her to sign a written statement concerning those issues; as a sanction, plaintiff was barred from using any statement, documentation, or information gained from the ex-parte communication, and was required to surrender an notes, memos, copies, or other documents memorializing it, and the court awarded reasonable attorneys’ fees and costs associated with investigating and responding to the inappropriate ex-parte communications.); In re Maxwell, 627 S.E.2d 16 (Ga. 2006) (six-month suspension appropriate for attorney representing employer in sexual harassment case who held meetings with his client’s employees, including those he knew were represented by counsel, without obtaining the consent of their counsel). Compare In re Conservatorship of Becerra, 175 Cal. App.4th 1474 (2009) (Probate court could not impose sanctions on attorney in conservatorship case for allegedly contacting proposed conservatee after conservatee’s court-appointed attorney (CAA) had requested that attorney contact conservatee only though counsel, even if the contact violated the rule of professional conduct governing communication with a represented party, since rule of professional conduct was not a court order or local rule for purposes of awarding sanctions; although there was a court order appointing the CAA, and the CAA had the right to request other attorneys in the case to make contact with her client only through her, violation of that request amounted to violation of the rules of professional conduct, not of court orders.).

127 D.C. Ethics Op. No. 321 (2003) (lawyer for party may send investigator to interview an unrepresented party, so long as the investigator does not mislead party about the investigator’s or the lawyer’s role in the matter and that the investigator does not state or imply that unrepresented party must or should sign forms such as personal statements or releases of medical information; counsel should take reasonable steps to ensure that, where an investigator reasonably should know that the unrepresented person misunderstands the investigator’s role, the investigator makes reasonable affirmative efforts to correct the misunderstanding); Faison v. Thornton, 863 F. Supp. 2d 1204, 1218 (D. Nev. 1993) (ordering production of statements obtained during improper ex parte communications); Porter v. Fieldcrest Cannon, Inc., 514 S.E.2d 517 (N.C. App. 1999) (portions of deposition related to ex parte communication should be excluded); Featherstone v. Schaerrer, 34 P.3d 194 (Utah 2001) (attorney’s unethical behavior in taping ex parte conversation with corporation’s secretary-treasurer vitiated work product privilege with respect to tape recording and transcript (where attorney’s unethical behavior allowed him to obtain transcript) and thus sanctions for attorney’s failure to disclose it were proper).

128 Rowe v. Vaagen Bros. Lumber, Inc., 996 P.2d 1103 (Wash. App. 2000) (as a matter of law, ex parte contact...
counsel.\textsuperscript{129} However, courts are less likely to impose such sanctions where the contact did not result in disclosure of an opposing party’s confidential information or other prejudice to the opposing party.\textsuperscript{130}

with plaintiff’s expert medical witness by employer’s counsel required trial judge to grant a new trial on former employee’s common law tort action for retaliation, during which trial employer would be precluded from using testimony of employee’s medical experts with whom employer had ex parte contact).

\textsuperscript{129} \textit{Weeks v. Independent Sch. Dist. No. I-89}, 230 F.3d 1201 (10th Cir. 2000) (sanction of disqualification of plaintiff’s attorney, for violation of ex parte communications with school district’s managerial employees, was not an abuse of discretion); \textit{MMR/Wallace Power & Industrial, Inc. v. Thames Assoc.}, 764 F. Supp. 712, 724 (D. Conn. 1991) (defense counsel disqualified because he made unauthorized contact with former employees of plaintiff who had been members of litigation team); \textit{Bedoya v. Aventura Limousine & Transportation Service, Inc.}, 861 F. Supp. 2d 1346 (S.D. Fla. 2012) (Attorney for drivers in FLSA action against defendant engaged in sanctionable conduct in violation of Florida ex parte communications rules by (a) his ex parte statement to an officer of defendant company, in connection with court-ordered arbitration in another case, that attorney would never settle with FLSA defendants as long as they were represented by a particular attorney and (b) his ex parte contact with an independent contractor, who performed greeting work for defendant company, in order to review and sign affidavit in support of drivers’ motion for conditional Fair Labor Standards Act (FLSA) collective action certification. Given the egregiousness of the Florida Bar rule violations, and the grave impact drivers’ attorney’s disparaging acts had on the attorney-client relationship between limousine company defendants and their attorney, the only proper remedy was disqualification of drivers’ attorney; furthermore, in light of the small size of drivers’ attorney’s seven lawyer labor law practice, it was appropriate to also disqualify law firm from representation of drivers.);

\textit{Hammond v. Junction City}, 167 F. Supp. 2d 1271 (D. Kan. 2001) \textit{affirmed}, 126 Fed. Appx. 886 (10\textsuperscript{th} Cir. 2005) (imposition of sanctions affirmed) (violation of ex parte communication rules by plaintiff’s counsel in Title VII case warranted disqualification of plaintiff’s counsel, exclusion of evidence obtained through communications unless otherwise obtained through other means, and award of attorneys fees and costs to defendant); \textit{Logan v. Cooper Tire & Rubber Co.}, 2011 WL 3475423 (E.D. Ky. Aug. 9, 2011) (court disqualified two of plaintiff’s seven counsel because they wrote a letter to the defendant’s Vice President and General Counsel proposing a meeting to discuss settlement in seven case against defendant and recommending that any meeting not include defendant’s outside counsel in any of the listed cases; sending such a letter, after refusing to discuss settlement with outside counsel, was the “last straw” in a continuing pattern of unprofessional conduct by Plaintiff’s counsel and interest in requiring professional conduct by an attorney although the Plaintiff’s interest in having seven counsel of her choice particularly at trial); \textit{Zachair, Ltd. v. Driggs}, 965 F. Supp. 741 (D. Md. 1997) (disqualifying counsel for, inter alia, violating Md. Rule 4.2 by engaging in ex parte contact with the former general counsel of a corporate defendant whom counsel knew or should have known possessed substantial privileged information), \textit{aff’d} 141 F.3d 1162 (4\textsuperscript{th} Cir. 1998); \textit{Gifford v. Target Corp.}, 723 F. Supp. 2d 1110 (D. Minn. 2010) (Contacts by employees’ counsel with employer’s senior manager who had significant exposure to employer’s privileged information warranted disqualification of counsel in FLSA action against employer, even though firm did not seek out manager and although firm cautioned manager not to divulge attorney-client information; counsel’s repeated contacts with manager elicited privileged documents that were reviewed in at least a “perfunctory” fashion by counsel, instead of ceasing its review and immediately returning the documents to employer, counsel held documents for more than a month, at least two attorney-client communications were reviewed and evaluated by counsel, counsel interviewed manager regarding employees’ putative collective action, a purpose completely separate from that for which she had approached and retained the firm, and counsel did not agree to represent employees until after its relationship with manager had begun and after privileged and confidential information had been disclosed; \textit{Cordy v. Sherwin-Williams Co.}, 156 F.R.D. 575 (D.N.J. 1994) (defendant’s counsel and law firm disqualified because he retained expert first retained by plaintiffs for same case); \textit{Jones v. Daily News Publ’g Co.}, 2001 WL 378846 (D.V.I. Mar. 16, 2001) (plaintiff’s lawyer disqualified because he represented Jones in employment discrimination action while simultaneously representing a second employee of the Daily News, Gross, where Jones was Gross’s supervisor and had direct involvement in the decision to terminate Gross; because Jones’ testimony goes to the heart of Gross’s suit, continued representation of Jones by Gross’s attorney violates Model Rule 4.2).

\textsuperscript{130} See, e.g., \textit{Ring Plus, Inc. v. Cingular Wireless Corp.}, 614 F.3d 1354 (Fed. Cir. 2010) (Disqualification of
IV. SPECIAL ISSUES REGARDING IN-HOUSE COUNSEL

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

A. Identifying the Corporate/Organizational “Client”

ABA Model Rule 1.13 provides that a lawyer employed or retained by an organization represents the organization, as distinct from its directors, officers, employees, shareholders or other constituents. This rule is easy to state, but sometimes difficult to apply in practice. A competitor’s counsel for allegedly improper ex parte party communications was not warranted in patent infringement action brought by assignee of patent disclosing software based algorithm and method for generating and delivering messages over a phone line during a “ringing signal” period; competitor did not have knowledge of third party’s affiliation with patent assignee, and competitor sought to confirm lack of affiliation before it responded to third party.; La Jolla Cove Motel and Hotel Apartments, Inc. v. Super. Ct., 121 Cal. App. 4th 773 (2004) (Counsel’s ex parte contact with directors of a represented corporation is not barred because the directors’ separate counsel consented to the communication, although the corporation did not. Even if the contact violated the ex parte communication rules, the trial court was correct not to order disqualification of the offending counsel since there was no evidence that they obtained any confidential information that could give their clients an unfair advantage or impact upon the fairness of the trial or integrity of the judicial system); Allstate Ins. Co. v. Bowne, 817 So. 2d 994 (Fla. App. 2002) (in employment discrimination action, former employee’s counsel not disqualified even though he spoke with management level employee of former employee’s wholly owned subsidiary; counsel in good faith believed witness was employed by different entity; witness had not been in management position with former employer itself, counsel researched disciplinary rules, attempted to comply with rules and sought ethics advisory opinion; at beginning of statement, counsel asked witness if current employer was separate and distinct company, witness explained it was subsidiary; filings with Secretary of State indicated they were separate entities; counsel had no reason to believe that statements could constitute admissions and no evidence that confidences were revealed); Ridgeway Nursing & Rehabilitation Facility, LLC v. Lane, 415 S.W.3d 635 (Ky. 2013) (Evidence that nursing and rehabilitation facility employees contacted by opposing counsel’s investigator disclosed, at most, information regarding the employment status of facility employees was insufficient to warrant the issuance of a writ of mandamus disqualifying opposing counsel in the underlying wrongful death and negligence action); Smith v. Cleveland Clinic Found., 784 N.E.2d 158 (Ohio App. 2003) (disqualification of employee’s counsel from employee’s wrongful termination against employer, due to counsel’s contact with several of employer’s employees without informing employer, was improper, where the employer was not prejudiced by the conduct that formed the basis for the disqualification). Cf. Myerchin v. Family Benefits, Inc., 162 Cal. App. 4th 1526 (2008) (where defense lawyer, whom plaintiff considered a friend as well as a business associate, continued to negotiate a settlement directly with plaintiff even after becoming aware that plaintiff had retained counsel to enforce his claims against defendant, such conduct did not itself undermine validity of settlement).
A corporate entity can only act through its duly authorized constituents. Sometimes authorized action can come from several sources, and identifying the authorized representative of the corporate entity can be difficult in some cases. In advising the corporate entity, the lawyer should keep paramount the entity’s interests and his professional judgment should not be influenced by the personal desires of any other person or organization.132 As a practical matter it may be difficult for the in-house counsel to question the authority of a corporate constituent, especially if that constituent holds more effective power within the organization than the attorney. The issue of determining proper authority within the organization is especially important in those jurisdictions that recognize the “control group” test for purposes of the corporate attorney-client privilege, since only communications with persons in a position to control or take substantial part in a decision about any action that the corporation could take upon advice of counsel would fall within the ambit of the privilege.133

Note that this “who is the client” question also arises where the attorney is hired by the union to represent a member in a legal matter that is part of the collective bargaining or union arbitration process. In such cases, it is the union—and not the member—that is the attorney’s client.134

**Corporate/organizational “Miranda Warnings.”** It is sometimes the case that a

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132 See authorities cited at note 218, supra.

133 See Chapter 3.I.A., supra (“The Tests for Determining Corporate ‘Client Confidences’”).

134 See, e.g., *Peterson v. Kennedy*, 771 F.2d 1244, 1258 (9th Cir. 1985) (“We do not believe that an attorney who is handling a labor grievance on behalf of a union as part of the collective bargaining process has entered into an ‘attorney-client’ relationship in the ordinary sense with the particular union member who is asserting the underlying grievance. . . . [W]hether it be house counsel or outside union counsel, where the union is providing the services, the attorney is hired and paid by the union to act for it in the collective bargaining process.”); *United States v. International Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 119 F.3d 210 (2nd Cir. 1997) (attorney-client privilege did not protect communications that union president candidate’s campaign manager had with campaign’s law firm about campaign contribution violations, where communications concerned only matters relevant to the campaign and manager never sought advice in his individual capacity from the campaign’s law firm); *Arnold v. Air Midwest, Inc.*, 100 F.3d 857, 862-63 (10th Cir. 1996) (where a union retains an attorney to represent it in a matter under the collective bargaining agreement, the union, not the member, is the attorney’s client); *Gwin v. National Marine Engineers Beneficial Ass’n*, 966 F. Supp. 4, 7 (D.D.C. 1997) (“[A]n attorney handling a labor grievance on behalf of a union does not enter an ‘attorney-client’ relationship with the union member asserting [a] grievance.”), aff’d, 159 F.3d 636 (D.C. Cir. 1998); *Adamo v. Hotel, Motel, Bartenders, Cooks & Restaurant Worker’s Union*, 655 F. Supp. 1129, 1129 (E.D. Mich. 1987) (“[I]n a labor dispute with an employer it is the union which carries on the dispute . . . and it is the union which is the client of the law firm.”); *Brown v. Maine State Employees Ass’n*, 690 A.2d 956, 960 (Me. 1997) (member did not enter into an attorney-client relationship with union attorney during grievance procedure); *Raymond v. North Carolina Police Benevolent Assn, Inc.*, 721 S.E.2d 923 (N.C. 2011) (when association hires counsel to represent a member, a tripartite attorney-client relationship exists among the association, the member and the attorney, enabling them to assert the privilege to shield their communications from discovery). *See also N.Y. State Ethics Op. No. 743* (2001) (union attorney who represents union member in arbitration proceeding must make clear to member that he/she is not the client and that member’s disclosures will not be kept confidential; having done so, the attorney may share disclosures with union and, at union’s discretion, may distribute arbitrator’s decision).
corporate employee, director, or other constituent may assume (erroneously) that the corporation’s lawyer also represents the employee or constituent personally. This risk of confusion is more likely to occur in the context of litigation against the corporation, since corporate managers and employees usually begin on the same “team” with the in-house lawyer and tend to feel that the lawyer represents “their” interests as well as the corporation (since in their minds these interests are identical). Internal investigations conducted by in-house attorneys present the same risk of confusion, with employees presuming that the in-house lawyer represents them personally. ABA Model Rule 1.13(d) provides that when the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing (such as directors, officers, members, shareholders, etc.), the lawyer must explain the identity of the client. See, e.g., United States v. International Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of Am., 119 F.3d 210 (2nd Cir. 1997) (attorneys in all cases required to clarify exactly whom they represent, and to highlight potential conflicts of interests); Triitek Telcom, Inc. v. Superior Court, 169 Cal. App. 4th 1385 (2009) (Corporate director, who was engaged in litigation against corporation in his capacity as a shareholder, did not have a right to access corporate documents protected by the attorney-client privilege or the attorney work product doctrine, absent evidence that corporation had waived the privilege; director would not have been able to obtain the documents in discovery in the shareholder action, and any documents obtained in his capacity as director could be used to advance director’s personal interest in obtaining damages against the corporation); Cal. Formal Ethics Op. No. 2001-156 (2001) (“[A] city attorney must not mislead constituent sub-entities or officials who have no right to act independently of the governing body of the entity and who are seeking advice in their individual capacity into believing that they may communicate confidential information to the city attorney in such a way that it will not be used in the city’s interest if that interest becomes adverse to the constituent or official.”); Colo. Ethics Op. No. 120 (2008) (When the lawyer representing an organization knows or reasonably should know that the interests of the organization are adverse to those of the non-client constituents with whom the lawyer is dealing, the lawyer must clarify his/her role. In this circumstance the lawyer should advise the constituent that the organization is the lawyer’s client, that a conflict of interest may exist between the organization and the constituent, that the lawyer does not and cannot represent the constituent, and that the constituent may wish to obtain independent counsel. Further in such circumstances the lawyer must inform the constituent that he/she cannot assert the attorney-client privilege with regard to communications between the constituent and the lawyer); D.C. Ethics Op. No. 305 (2001) (representation of a trade association does not, without more, create an attorney-client relationship with each member of the association; particular circumstances of a representation, however, may create an attorney-client relationship with one or more of the members); D.C. Ethics Op. No. 269 (1997) (a lawyer retained by a corporation to conduct an internal investigation represents the corporation only and not any of its constituents, such as officers or employees; corporate constituents have no right of confidentiality regarding communication with the lawyer, but the lawyer must advise them of his position as counsel for the corporation in the event of any ambiguity as to his role); Miss. Ethics Op. No. 248 (2001) (attorney employed as in-house counsel by a mortgage broker should have a clear understanding of whom he represents, and should make sure that all parties involved in the real estate closing understand who is and who is not the attorney’s client, and give the unrepresented parties an opportunity to obtain counsel; assuming that the attorney represents only one party, as he should, and that all other parties are made aware of that representation, there is no conflict with the other parties); Goodrich v. Goodrich, 960 A.2d 1275 (N.H. 2008) (Corporation under new ownership of former terminated employees, who obtained their shares from former shareholder after settling breach of contract, misrepresentation and quantum meruit action against corporation, gained control of attorney-client relationship with law firm that had represented corporation in the prior action, for purposes of determining whether law firm had a disqualifying conflict of interest that barred firm from representing corporation’s former board of directors in employees’ and corporation’s breach of fiduciary duty action against the board; though corporation under new ownership no longer provided engineering and surveying services, it continued to own, manage and lease corporate office building, new ownership continued to operate corporation as a corporation in good standing, and corporation under new ownership continued to possess corporation’s pre-existing rights and liabilities.); N.Y. State Ethics Op. No. 978 (2013) (An attorney acting as general counsel to a closely held corporation represents the entity and not its directors/sole shareholders and 2) must explain to the directors/shareholders that he does not represent them when he becomes aware that action to be taken on behalf of

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See, e.g., United States v. International Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of Am., 119 F.3d 210 (2nd Cir. 1997) (attorneys in all cases required to clarify exactly whom they represent, and to highlight potential conflicts of interests); Triitek Telcom, Inc. v. Superior Court, 169 Cal. App. 4th 1385 (2009) (Corporate director, who was engaged in litigation against corporation in his capacity as a shareholder, did not have a right to access corporate documents protected by the attorney-client privilege or the attorney work product doctrine, absent evidence that corporation had waived the privilege; director would not have been able to obtain the documents in discovery in the shareholder action, and any documents obtained in his capacity as director could be used to advance director’s personal interest in obtaining damages against the corporation); Cal. Formal Ethics Op. No. 2001-156 (2001) (“[A] city attorney must not mislead constituent sub-entities or officials who have no right to act independently of the governing body of the entity and who are seeking advice in their individual capacity into believing that they may communicate confidential information to the city attorney in such a way that it will not be used in the city’s interest if that interest becomes adverse to the constituent or official.”); Colo. Ethics Op. No. 120 (2008) (When the lawyer representing an organization knows or reasonably should know that the interests of the organization are adverse to those of the non-client constituents with whom the lawyer is dealing, the lawyer must clarify his/her role. In this circumstance the lawyer should advise the constituent that the organization is the lawyer’s client, that a conflict of interest may exist between the organization and the constituent, that the lawyer does not and cannot represent the constituent, and that the constituent may wish to obtain independent counsel. Further in such circumstances the lawyer must inform the constituent that he/she cannot assert the attorney-client privilege with regard to communications between the constituent and the lawyer); D.C. Ethics Op. No. 305 (2001) (representation of a trade association does not, without more, create an attorney-client relationship with each member of the association; particular circumstances of a representation, however, may create an attorney-client relationship with one or more of the members); D.C. Ethics Op. No. 269 (1997) (a lawyer retained by a corporation to conduct an internal investigation represents the corporation only and not any of its constituents, such as officers or employees; corporate constituents have no right of confidentiality regarding communication with the lawyer, but the lawyer must advise them of his position as counsel for the corporation in the event of any ambiguity as to his role); Miss. Ethics Op. No. 248 (2001) (attorney employed as in-house counsel by a mortgage broker should have a clear understanding of whom he represents, and should make sure that all parties involved in the real estate closing understand who is and who is not the attorney’s client, and give the unrepresented parties an opportunity to obtain counsel; assuming that the attorney represents only one party, as he should, and that all other parties are made aware of that representation, there is no conflict with the other parties); Goodrich v. Goodrich, 960 A.2d 1275 (N.H. 2008) (Corporation under new ownership of former terminated employees, who obtained their shares from former shareholder after settling breach of contract, misrepresentation and quantum meruit action against corporation, gained control of attorney-client relationship with law firm that had represented corporation in the prior action, for purposes of determining whether law firm had a disqualifying conflict of interest that barred firm from representing corporation’s former board of directors in employees’ and corporation’s breach of fiduciary duty action against the board; though corporation under new ownership no longer provided engineering and surveying services, it continued to own, manage and lease corporate office building, new ownership continued to operate corporation as a corporation in good standing, and corporation under new ownership continued to possess corporation’s pre-existing rights and liabilities.); N.Y. State Ethics Op. No. 978 (2013) (An attorney acting as general counsel to a closely held corporation represents the entity and not its directors/sole shareholders and 2) must explain to the directors/shareholders that he does not represent them when he becomes aware that action to be taken on behalf of
confidential interests, the in-house lawyer is advised to give a corporate “Miranda warning” in which the in-house lawyer makes clear that he/she is conducting the interview on behalf of the corporate or organizational entity and affirmatively disclaims representation of the constituent.\textsuperscript{136} This is especially important in situations where the employee has a potential claim against the corporation, or when the employee may have committed a wrong toward the corporation. Additionally, an explanation of counsel’s loyalty to the organization is often appropriate in connection with internal investigations. In disclaiming representation, counsel should explain the conflict of interest presented by the potential adversity, that the lawyer cannot represent the constituent, and that the employee’s statements may not be kept in confidence with respect to the corporation and may not be privileged.\textsuperscript{137} In some circumstances, counsel may wish to advise the

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\textsuperscript{136} A suggested statement: “I am conducting this interview as the attorney representing [the company] in connection with an investigation of [describe nature of investigation/proceeding]. Anything you tell me may be disclosed to company management or as otherwise directed by [the company] in connection with that proceeding. Although what you say may be considered a confidential communication between the company and its attorneys, I do not represent you personally and thus cannot promise to keep anything you tell me from appropriate company officials.” See also Cal. Formal Ethics Op. No. 2001-156 (2001) (“To avoid unintended formation of such personal attorney-client relationships with constituent officials, attorneys should comply with Rule 3-600(D), which requires the attorney not to mislead the official into believing that the attorney represents the official in his or her separate behalf. The ultimate resolution of the question relies heavily on the specific facts of the situation.”); Zielinski v. Clorox Co., 504 S.E.2d 683 (Ga. App. 1998) (plant supervisor failed to establish existence of personal attorney-client privilege with respect to communications he allegedly had with corporate counsel during meeting with other company employees forming basis of tort claim against supervisor; supervisor never testified he approached law firm in his individual capacity, counsel stated firm had been hired by company to conduct investigation to assist company in handling its investigation of an alleged embezzlement scheme, supervisor failed to maintain confidentiality of communication by seeking advice in the presence of several other employees, and communications concerned affairs of the company with respect to the embezzlement scheme, not individual matters).

\textsuperscript{137} See, e.g., In re Grand Jury Subpoena, 415 F.3d 333 (4th Cir. 2005), cert. denied sub nom., Under Seal v. United States, 126 S.Ct. 1114 (2006) (When company began an internal review of certain business transactions, its inside and outside counsel interviewed three former employees. Later, the SEC began to investigate the same matter and a grand jury was investigation was initiated. The three employees became targets of the grand jury investigation and one of them was later indicted. When the grand jury issued a subpoena for documents relating to the interviews, the company voluntarily waived its privilege. The employees moved to quash, claiming that the lawyers investigating the business transactions individually represented each of them as well as the company and, therefore, the interviews were individually privileged. The Fourth Circuit disagreed, ruling that no individual attorney-client privilege attached to the employees’ communication with the company’s attorneys. Prior to the interviews, attorneys told the employees that the lawyers represented the company and that the company could waive the privilege if it so chose. The lawyers also told the employees that the lawyers “could” represent them; the lawyers did not say that...
they “did” represent them. Thus, the employees could not have reasonably believed that the investigating attorneys represented them personally during that period.; United States v. Ruehle, 583 F.3d 600 (9th Cir. 2009) (Statements made by chief financial officer (CFO) of corporation to corporation’s attorneys who were conducting internal investigation regarding propriety of corporation’s stock option granting practices were not made in confidence, but were instead made for purpose of disclosure to outside auditors, and thus CFO’s statements were not protected by attorney-client privilege; CFO admitted he understood the fruits of attorneys’ inquiries would be disclosed to accounting firm in order to convince independent auditors of the integrity of corporation’s financial statements or to take appropriate accounting measures to rectify any misleading reports and CFO was charged with primary responsibility for corporation’s financial affairs.); United States v. Stein, 463 F. Supp. 2d 459 (S.D. N.Y. 2006) (Conversations between defendant, a partner in a large multinational accounting firm who was later indicted for accounting fraud, and both in-house counsel and outside counsel retained by the firm, which concerned an IRS investigation of the firm’s tax shelter activities, were not protected by the attorney-client privilege, notwithstanding that the firm’s partnership agreement stated that the firm’s counsel acted on behalf of all partners except in a dispute between a partner and the firm, and that outside counsel had previously simultaneously represented the defendant and the firm in prior litigation; conversations did not focus on defendant’s personal interests and liabilities alone, defendant was not deceived by the firm or its attorneys about the nature of her relationship with counsel, and in prior joint litigation defendant was a witness, not a party, in an employment lawsuit against the firm and such representation did not give rise to a reasonable expectation on her part that all communications with counsel, even a long time thereafter, were made in the context of an individual attorney-client relationship.); United States v. Norris, 722 F. Supp. 2d 632 (E.D. Pa. 2010), affirmed, 419 Fed. Appx. 190 (3d Cir.), cert. denied, 132 S.Ct. 250 (2011) (CEO failed to establish that attorney hired by corporation to represent it during Justice Department antitrust investigation also represented CEO personally, as would support assertion of attorney client privilege to preclude admission of attorney’s testimony in obstruction of justice prosecution against CEO, although attorney met with CEO at least twice, was at his side during interviews with government antitrust authorities, provided him with a letter identifying attorney’s law firm as CEO’s counsel for immigration issues, and CEO asked corporation’s contact at law firm if attorney could continue to represent him; CEO never asked law firm or attorney to represent him personally, attorney did not believe he was representing CEO personally, attorney advised CEO to retain separate counsel, and all conversations between CEO and attorney involved only the corporation’s business matters and not CEO’s confidential information or potential personal criminal liability.); New Destiny Treatment Ctr., Inc. v. Wheeler, 950 N.E.2d 157 (Ohio 2011) (No attorney-client relationship existed between nonprofit corporation and law firm and attorney who had represented dissenting member of board of trustees in underlying dispute over control of corporation, and thus corporation could not subsequently bring an action against attorney and firm for alleged negligence in assisting dissenting member, since dissenting member which had hired attorney and firm lacked authority to do so on corporation’s behalf; although dissenting member had represented that attorney was corporation’s attorney in underlying dispute, dissenting member had been relieved of his authority to control daily activities of corporation at time he hired attorney, and corporation took no valid action to ratify hiring of attorney, through a resolution of a board meeting or otherwise.); Kennedy v. Gulf Coast Cancer & Diagnostic Center at Southeast, Inc., 326 S.W.3d 352 (Tex. App. 2010) (Evidence supported finding that corporation alone held attorney-client privilege applicable to memo prepared by law firm at request of counsel, despite counsel’s alleged subjective intent that law firm prepare the memo to benefit both corporation and its officers; memo expressly disclaimed any intent to advise corporation’s owners, officers, or directors, and trial court determined that memo did not come within the exception to the attorney-client privilege applicable to joint clients.). Cf. In re Grand Jury Subpoenas, 144 F.3d 653 (10th Cir.) cert. denied, 525 U.S. 966 (1998) (individual corporate officers were able to assert a personal attorney-client privilege with respect to conversations with corporate counsel where they showed they approached counsel for purpose of seeking legal advice in their individual capacities rather than as representatives, and that the conversations did not concern matters within the company or the general affairs of the company); Bruzga’s Case, 27 A.3d 804 (N.H. 2011) (An attorney-client relationship is created when: (1) a person seeks advice or assistance from an attorney; (2) the advice or assistance sought pertains to matters within the attorney’s professional competence; and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance. Consultation with the intent of seeking legal advice is the fundamental basis of the attorney-client relationship.); Iowa Supreme Court Attorney Disciplinary Board v. Netti, 797 N.W.2d 591 (Iowa 2011) (An attorney-client relationship is presumed to exist between the attorney and the person on whose behalf the attorney enters an appearance, but evidence that the client did not assert to the filing of an appearance may rebut that presumption.).
employee to retain separate counsel.

**Governmental “clients.”** Although the rules for resolving the “who is the client” issue apply equally to both private and public sector entities, there are special considerations peculiar to the governmental context. Unlike a private corporation or organization, a governmental entity may have constituent sub-entities or officials which have the legal authority to act independently of the main entity. For example, a city’s district attorneys and public health officers, among others, have the legal authority to take certain actions within their spheres which do not comport with the wishes of the governmental entity with which they are associated, such as the mayor or city council. The discretion of district attorneys regarding what cases to prosecute and how to deploy staff and the discretion of public health officers to declare public health emergencies are not subject to control by the associated governmental entity and can only be attacked in court. Such truly independent sub-entities or constituencies require alteration of the rules applicable to private sector entities.\(^\text{138}\)

An in-house lawyer may also represent any of its directors, officers, employees, or other constituents, provided the provisions regarding dual representation are followed.\(^\text{139}\) The informed consent of the organization to dual representation must be given by an official of the organization other than the individual who is to be represented, or by the shareholders.\(^\text{140}\)

**B. Responses to Unlawful Activity**

In-house counsel has a special duty to take reasonable remedial action when counsel learns that an officer, employee or other person associated with the organization intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization,

\(^{138}\) See Cal. Formal Ethics Op. No. 2001-156 (2001) (“[The cases] suggest that a court might be less rigorous in interpreting the scope of the Rules of Professional Conduct relating to conflicts of interest when applied to governmental attorneys than to other attorneys.”); Colo. Ethics Op. No. 120 (2008) (Generally, it is improper for a lawyer who represents an organization to assert that he/she has in fact been engaged by the constituents; a lawyer representing an organization does not automatically represent individual constituents by virtue of representing the organization); N.Y. City Ethics Op. No. 2004-03 (2004) (Government lawyers are subject to the rules that ordinarily govern the attorney-client relationship, including those governing conflicts of interest and entity representation; however, the conflict of interest questions encountered by government lawyers in civil representation may be particularly complex, and questions may ultimately be analyzed differently for government lawyers, because of the legal framework within which they function; for example, threshold questions about the identity of the public client, and about whether particular decisions in the representation are entrusted to the government lawyer or to an agency representative, must be determined by reference to the law establishing the government law department, and not exclusively by referring to disciplinary provisions; similarly, the questions of whether a government law department may represent multiple government agencies with differing interests, or even antagonistic positions, is in part a question of law, although ethical considerations suggest that, at the very least, it is advisable to avoid representing public agencies in disputes with each other; in dealing with individuals within the government, government lawyers must comply with DR-5-109, which generally governs representation of an entity; when the agency constituents are unrepresented and the government lawyer does not propose to represent them, the lawyer must clarify his or her role as set forth in opinion; in that event, the government lawyer will be limited in the extent to which he or she may provide advice to the individual.).

\(^{139}\) See ABA Model Rules R. 1.7.

\(^{140}\) ABA Model Rules R. 1.7; Tex. Disciplinary R. Prof’l Conduct R. 3.08 and cmt. 8.
and is likely to result in substantial injury to the organization. Model Rule 1.13(b) requires counsel to proceed as reasonably necessary in the best interest of the organization, which may require reporting “up the ladder” to higher authorities within the organization and, if warranted by the circumstances, reporting to the highest authority that can act on behalf of the organization with respect to the issue. Model Rule 1.13 also provides that counsel may “report out” where, despite counsel’s efforts to report the violation up the organizational ladder, the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or a refusal to act that is clearly a violation of law and counsel reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, but counsel may disclose only to the extent that the lawyer reasonably believes necessary to prevent substantial injury to the organization. However, this reporting out provision does not apply with respect to information relating to the lawyer’s representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

The Sarbanes-Oxley Act of 2002 (“SOX”) subjects attorneys to ethical standards in the context of their representation of public companies, including issuers with securities registered under Section 12 of the Securities Exchange Act of 1934, those required to file reports under Section 15(d) of the Securities Exchange Act, and those that file or have filed a registration statement that has not yet become effective. Section 307 of SOX requires the Securities and Exchange Commission to adopt rules setting forth “minimum professional standards” for attorneys practicing before the SEC and/or representing issuers, including a rule: (1) requiring an

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141 ABA MODEL RULES R. 1.13(b).
142 Id. See also ABA MODEL RULES R. 1.13(e) (lawyer that reasonably believes he/she has been discharged because of the lawyer’s actions under Rule 1.13(b) or (c) or withdraws under circumstances that require or permit withdrawal under either of those paragraphs, shall take reasonable measures to ensure that the organization’s highest authority is informed of the lawyer’s discharge or withdrawal); Mich. Ethics Op. No. RI-345 (October 24, 2008) (Where the corporation’s CEO has informed the corporation’s litigation attorney of his intent to destroy documents that are subject to a discovery order and has asked the lawyer to return copies of these documents, the lawyer should first attempt to dissuade the officer from engaging in threatened misconduct. If the officer does not relent, the attorney should refer the matter to higher authority in the corporation and should decline to return copies of documents in his possession until the matter is resolved. The attorney may continue to represent the corporation and is not required to withdraw merely because the officer suggests improper conduct.).
143 ABA MODEL RULES R. 1.13(c). See also ABA MODEL RULES R. 1.6(b) (permitting disclosure where the lawyer’s services have been used by the client to further a crime or fraud causing substantial injury to the financial interests or property of another); N.Y. Rules of Prof’l Conduct R. 3.3 (eff. April 1, 2009) (Rule may require disclosure of client confidential information necessary to remedy the client’s fraud in the tribunal). Cf. N.Y. State Ethics Op. No. 831 (2009) (where lawyer learns that a client, before April 1, 2009 (eff. date of new Rule 3.3) had committed fraud on a tribunal, the lawyer generally is prohibited from disclosing the fraud if it necessarily would disclose confidential client information).
144 ABA Model Rules R. 1.13(d). Cf. Wash. State Ethics Op. No. 2229 (2012) (where attorney’s client is involved in an ongoing financial scam, the facts of which the lawyer believes would constitute a crime under state or federal law, and the attorney learned of the scam in the course of representation of the client but was not directly involved in the scam nor believes the client has used his legal services to further the scam, the attorney may disclose information about the scam to law enforcement, as long as the attorney only shares that information he reasonably believes necessary to accomplish the law enforcement purpose of the disclosure; in these circumstances it is likely the attorney may be compelled to withdraw from continued representation of the client).
attorney to report “evidence of a material violation of securities law or breach of fiduciary duty or similar violation” by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the legal equivalent thereof); and (2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors. The SEC issued final regulations implementing the attorney conduct rules which, among other things: (a) require an attorney to report evidence of a material violation, determined according to an objective standard, “up the ladder” within the issuer to the chief legal counsel or the chief executive officer of the company or the equivalent; (b) require an attorney, if the chief legal counsel or the chief executive officer of the company does not respond appropriately to the evidence, to report the evidence to the audit committee, a committee of independent directors, or to the full board; (c) authorize, but do not require, an attorney, without the consent of an issuer client, to reveal confidential information related to his or her representation to the extent the attorney reasonably believes necessary (i) to prevent the issuer from committing a material violation likely to cause substantial financial injury to the financial interests or property of the issuer or investors; (ii) to prevent the issuer from committing an illegal act; or (iii) to rectify the consequences of a material violation or illegal act in which the attorney’s services have been used; (d) state that the rules govern in the event the rules conflict with state law, but will not preempt the ability of a state to impose more rigorous obligations on attorneys that are consistent with the rules; (e) state that an attorney who complies in good faith with the rules “shall not be subject to discipline or otherwise liable under inconsistent standards imposed by any state or other United States jurisdiction where the attorney is admitted or practices”; and (f) state that the rules do not create a private cause of action and that authority to enforce compliance with the rules is vested exclusively with the SEC.

The SEC proposed, but to date has not yet adopted, a so-called “noisy withdrawal” provision, under which a covered attorney would be required to withdraw from representing (or working as an in-house attorney for) an issuer and to notify the SEC that they have withdrawn for professional reasons under certain circumstances if there is not an appropriate response to the up-the-ladder reporting. The Commission also voted to propose an alternative to the “noisy withdrawal” that would require attorney withdrawal, but would require an issuer, rather than an attorney, to publicly disclose the attorney’s withdrawal or written notice that the attorney did not receive an appropriate response to a report of a material violation. The proposed rules would also permit an attorney, if an issuer has not complied with the disclosure requirement, to inform the Commission that the attorney has withdrawn from representing the issuer or provided the issuer with notice that the attorney has not received an appropriate response to a report of a material violation. The 60-day comment period for the “noisy withdrawal” provision has long since expired. The SEC regulations purport to immunize lawyers who make disclosures required or

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146 Id., Section 307.
147 See 17 C.F.R. §§ 205.1 through 205.6(c).
authorized by the regulations from discipline for violating state confidentiality provisions or other state rules. This portion of the rule has set up a developing conflict between the SEC and at least two state bar committees. For example, the Washington State Bar has opined that the SEC regulations may not protect lawyers from discipline for violating state privilege or ethics rules, at least insofar as the regulations permit, but do not require, certain disclosures. In response to a draft of the Washington State Bar opinion, the SEC general counsel submitted a written comment asserting that the SEC regulations preempt otherwise conflicting state privilege and ethics rules, to the extent that the SEC regulations require or authorize disclosures that might otherwise violate those state rules. In response to the SEC general counsel’s letter, the Corporations Committee of the California State Bar’s Business Law Section sent a letter to the SEC notifying it that the SEC regulations conflict with California law and that in the absence of an appellate judgment in favor of the SEC’s preemption claim, the California State Bar may not refuse to enforce the obligation under California Business and Professions Code § 6068(e) to maintain client confidences “at every peril to himself or herself.”

C. In-House Counsel Business Advice

It is often the case that the in-house counsel blends the roles of business adviser, corporate employee and lawyer. In general, to be privileged, it must be shown that the communication was given in a professional legal capacity for the purpose of giving legal services rather than providing general business advice. Ordinary business communications not made

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151 17 C.F.R. § 205.6(c).
152 See Wash. Interim Formal Ethics Op. Re: The Effect of the SEC’s Sarbanes-Oxley Regulations on Washington Attorney’s Obligations Under the RPCs (2003) (Washington lawyers’ RPC obligations have not been affected by the SEC regulations; to the extent that the SEC regulations authorize but not require revelation of client confidences and secrets under certain circumstances, a Washington lawyer should not reveal such confidences and secrets unless authorized to do so under the RPCs; a Washington lawyer cannot as a defense against a RPC violation fairly claim to be complying in “good faith” with the SEC regulations, if he/she took an action contrary to this opinion). Compare N.C. 2005 Formal Ethics Op. No. 9 (2006) (lawyer for publicly traded company does not violate state ethics rules if lawyer “reports out” confidential information as permitted by SEC regulations even though such conduct would otherwise violate North Carolina ethics rules).
153 Letter from SEC General Counsel Giovanni P. Prezioso Regarding Washington State Bar Ass’n’s Proposed Op. on the Effect of the SEC’s Attorney Conduct Rules (2003) (the SEC regulation preempts otherwise conflicting state rules and shields an attorney from state discipline if he/she complies in “good faith” with the Commission’s rules. SEC rules also preempt state rules that prohibit attorney actions that are authorized, but not required, by the SEC rules).
155 See, e.g., Rehling v. City of Chicago, 207 F.3d 1009 (7th Cir. 2000) (General Counsel to Superintendent of Police was acting in his legal rather than business capacity when advising ranking members of Police Department about disabled officer’s transfer, and that attorney-client privilege thus barred introduction of substance of conversation in officer’s ADA action; General Counsel was not empowered to make business decision regarding officer’s transfer); Motley v. Marathon Oil Co., 71 F.3d 1547 (10th Cir. 1995) (draft memorandum prepared by company’s in-house counsel for implementation of reduction in force, and lists prepared at request of in-house counsel for use in advising company’s restructuring oversight committee were protected by the attorney-client privilege; the documents were prepared for the purpose of giving legal advice, were treated as confidential documents, the in-house counsel did not render business advice in the memorandum and lists, and the in-house counsel’s opinion was not privileged).
for the purpose of securing legal advice to the corporation are not made privileged simply because a lawyer was involved.  

\[156\] In re Sealed Case, 737 F.2d 94, 99 (D.C. Cir. 1984). See also SEC v. Gulf & W. Indus., Inc., 518 F. Supp. 675, 681 (D.D.C. 1981) (“Business and personal advice are not covered by the privilege.”); Wal-Mart Stores, Inc. v. Vidalakis, 2007 WL 4591569 (W.D. Ark. Dec. 28, 2007) (motion to quash subpoena directed to general counsel denied because it appeared that some of her actions were clearly taken in her role as real estate manager rather than as counsel); United States v. Chevron Corp., 1996 WL 264769 (N.D. Cal. 1996) (to claim the privilege “a corporation must make a clear showing that in-house counsel’s advice was given in a professional legal capacity”); Southern Bell Tel. & Tel. Co. v. Deason, 632 So. 2d 1377 (Fla. 1994) (internal audits conducted by telephone company at request of counsel in response to Commission investigation did not constitute protected “communication” because lawyer was making substantive business decisions in addition to rendering legal advice); Valliere v. Florida Elections Com’n, 989 So.2d 1242 (Fla. App. 2008) (Sufficient evidence that individuals who communicated with attorneys were not seeking legal advice supported ALJ’s determination that the communications were not privileged; individuals had substantial contact with the attorneys for political advice, rather than legal advice, and the conversations at issue took place at a social gathering when the main thrust of the conversation was political); Baran v. Walsh Construction Co., 2007 WL 54065 (N.D. Ill. Jan. 4, 2007) (emails between various officials of defendant construction company and its vice president in charge of insurance department were not protected by the attorney-client privilege, even though the vice president also worked in the legal department of the company, where the vice president was acting in his capacity as the head of the insurance department, not in his capacity as the company’s legal counsel.); Dawson v. New York Life Ins. Co., 901 F. Supp. 1362 (N.D. Ill. 1995) (communications by general counsel and attorneys with corporate officials were not made for purpose of securing legal advice and thus were not protected by attorney-client privilege in defamation action brought by former employee, where attorneys were simply called upon to provide factual information to persons receiving information; attorneys acted more as couriers of information than as legal advisors); Burton v. R.J. Reynolds Tobacco Co., 200 F.R.D. 661 (D. Kan. 2001) (memoranda made in the course of rendering general business advice or for public relations purposes not protected by attorney-client privilege); Lexington Pub. Library v. Clark, 90 S.W.3d 53 (Ky. 2002) (privilege is inapplicable when the attorney acts merely as a business advisor); City of Springfield v. Rexnord Corp., 196 F.R.D. 7 (D. Mass. 2000) (documents that might have been prepared with the assistance of in-house counsel in anticipation of possible litigation were not protected by attorney-client privilege, where they were prepared in anticipation of media inquiries, and thus represented corporation’s public, albeit potential, statements); SR Int’l Business Ins. Co. Ltd. v. World Trade Ctr. Props. L.L.C., 2003 WL 193071 (S.D. N.Y. Jan. 29, 2003) (notes taken by property insurer’s employee and another insurer’s adjuster at market and steering committee meetings were not protected by attorney-client privilege from disclosure in insurer’s suit to recover under policies, even if attorneys took part in meetings, and insurers shared common legal interest, where meetings involved ordinary business, rather than legal, matters, and attorneys later asked all non-attorneys to step out so that lawyers could meet separately); SR Int’l Business Ins. Co. v. World Trade Ctr. Props. LLC, 2002 WL 1455346 (S.D. N.Y. July 3, 2002) (communication between employees of mortgage holder on the World Trade Center and its insurance advisors in drafting documents after 9/11 to address investor concerns following WTC attack were not protected by attorney-client privilege because they constituted information-gathering in the normal course of business, and not in anticipation of litigation); SmithKline Beecham Corp. v. Teva Pharmaceuticals USA, Inc., 232 F.R.D. 467 (E.D. Pa. 2005) (routine, non-privileged corporate communications do not attain privileged status solely because in-house or outside counsel is “copied in” on communications).
V. INADVERTENT DISCLOSURE AND IMPROPER ACQUISITION OF CONFIDENTIAL INFORMATION OF THE OPPOSING PARTY

A. Tape Recording of Parties and Witnesses

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


158 See, e.g., In re Attorney Gen.’s Pet., 417 S.E.2d 526, 527 (S.C. 1992). See also N.Y. City Ethics Op. No. 2003-2 (2004) (lawyer may not, as a matter of routine, tape record conversations without disclosing that the conversation is being taped; a lawyer may, however, engage in undisclosed taping of a conversation if the lawyer has a reasonable basis for believing that the disclosure of the taping would impair pursuit of a generally accepted societal good, such as situations involving investigations of misconduct, such as threats against the lawyer or possible perjury of a witness), modifying N.Y. City Formal Ethics Op. Nos. 80-95 and 95-10. Compare., Committee on Prof’l Ethics & Conduct of Iowa State Bar Ass’n v. Mollman, 488 N.W.2d 168, 172 (Iowa 1992) (prosecutorial exception to rule prohibiting surreptitious recording of conversations by lawyers does not excuse misconduct of private attorney who wears concealed microphone to record conversation with friend and former client to lure friend into trap set by law enforcement in order to secure leniency in attorneys’ own prosecution for drug offense).

159 See ABA Formal Ethics Op. No. 01-422 (2001) (lawyer who electronically records a conversation without the knowledge of the party or parties to the conversation does not necessarily violate the Model Rules; however, a lawyer may not record conversations in violation of the law in a jurisdiction that forbids such conduct without the consent of all parties, nor may the lawyer falsely represent that a conversation is not being recorded; it is inadvisable for a lawyer to record a client conversation without the knowledge of the client); Alaska Ethics Op. No. 2003-1 (2003) (electronic recording of a telephone conversation by a lawyer without consent of the other participant(s) to the conversation is not per se unprofessional conduct if the recording is not prohibited by law or regulation); Ariz. Ethics Op. No. 2000-04 (2000) (attorney may ethically advise a client that the client may tape record a telephone conversation in which one party to the conversation has not given consent to its recording, if the attorney concludes that such taping is not prohibited by federal or state law); Ariz. Ethics Op. No. 90-2 (1990); D.C. Ethics Op. No. 229 (1992) (surreptitious tape recording not a violation where other party—a government agency—reasonably should not expect that discussions were confidential and should expect that such discussions will be memorialized in some fashion by the investigated party’s attorney); Haw. Formal Ethics Op. No. 30 (1995) Idaho Ethics Op. No. 130 (1990); Kan. Ethics Op. No. 96-9 (1997); Ky. Ethics Op. No. E-279 (1984); Me. Ethics Op. No. 168 (1999); Mich. Ethics Op. No. RI-309 (1998); Miss. Ethics Op. 203 (1992); Netterville v. Miss. State Bar, 397 So. 2d 878 (Miss. 1981); N.Y. City Ethics Op. No. 80-95 (1980); N.Y. County. Ethics Op. No. 696 (1993); Ohio Ethics Op. No. 2012-1 (2012) (a surreptitious, or secret, recording of a conversation by an Ohio lawyer is not a per se violation of Prof.
Although witness statements obtained by or at the direction of an attorney may constitute protected work product, the protection may be vitiates if the attorney clandestinely recorded the statements or directed his client to do so.\textsuperscript{160} Even if the attorney did not personally conduct the secret recording or direct his client to do so, the protection may be afforded where the attorney’s actions amount to encouragement or support for the secret recordings.\textsuperscript{161} Note also that most

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\item Conduct R. 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation) if the recording does not violate the law of the jurisdiction in which the recording takes place. The acts associated with a lawyer’s surreptitious recording, however, may constitute misconduct under Prof. Conduct R. 8.4(c) or other Rules of Professional Conduct. In general, Ohio lawyers should not record conversations with clients or prospective clients without their consent. Advisory Opinion 97-3 is withdrawn); Okla. Ethics Op. No. 307 (1994); Ore. Formal Ethics Op. No. 2005-156 (2005) (attorney may tape record telephone conversations with an individual without consent, but may not record private, in-person conversations without informing individual of the recording; decision based on Oregon statutes); Tenn. Ethics Op. No. 81-F-14 (1986); Tex. Ethics Op. No. 575 (2006) (lawyer not prohibited from making an undisclosed recording of the lawyer’s telephone conversations between a client or third party provided that: (1) recordings of conversations involving a client are made to further a legitimate purpose of the lawyer or the client, (2) confidential client information contained in any recording is appropriately protected by the lawyer, (3) the undisclosed recording does not constitute a serious criminal violation under the laws of any jurisdiction applicable to the telephone conversation recorded, and (4) the recording is not contrary to a representation made by the lawyer to any person; overruling prior opinions); Utah Ethics Op. No. 96-04 (1996); Va. Ethics Op. No. 1814 (2011) (lawyer representing a party may ethically surreptitiously record conversations with an unrepresented witness, provided that the witness is informed of the lawyer’s role); Va. Ethics Op. No. 1738 (2000) (approving use of undisclosed taping for purpose of a criminal or housing discrimination investigation and noting that there may be other factual situations in which the same result would be reached). Compare S.C. Ethics Op. No. 91-14 (1991) (attorney may not advise client that client may legally tape record conversations without consent of other party).

\textsuperscript{160} See Parrott v. Wilson, 707 F.2d 1262, 1270-72 (11th Cir. 1983) (plaintiff’s counsel clandestinely recorded telephone conversations he had with two witnesses to the circumstances surrounding the death of plaintiff’s son; work product protection vitiates by attorney’s secretive recording of conversation); Anderson v. Hale, 202 F.R.D. 548 (N.D. Ill. 2001) (surreptitious tape recording of witnesses made by defendants’ counsel was unethical and, therefore, any work product protection that would have otherwise applied to the tapes is vitiates); Ward v. Maritz, Inc., 156 F.R.D. 592 (D.N.J. 1994) (in former employee’s sexual harassment and constructive discharge action, protection of work product doctrine regarding recorded statements with employees was vitiates and recordings discoverable in light of unprofessional behavior of plaintiff’s counsel in advising plaintiff to surreptitiously record those conversations, even if conduct did not violate ethics rules; plaintiff may be deposed regarding circumstances surrounding surreptitious telephone conversations); Bogan v. Northwestern Mut. Life Ins. Co., 144 F.R.D. 51 (S.D. N.Y. 1992) (plaintiff’s tape-recorded conversations with certain witnesses without consent discoverable); Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc., 347 F.3d 693 (8th Cir. 2003) (trial court sanctions against defendant affirmed, based on action of its defense counsel in hiring a private investigator to pose as a consumer, along with his wife or daughter, in visits to plaintiff’s franchisees for the purpose of making secret audio tape recordings of conversations in anticipation of trial; sanctions were the exclusion from trial of the recordings and any other evidence obtained as a result of the recordings); Smith v. WNA Carthage, L.L.C., 200 F.R.D. 576 (E.D. Tex. 2001) (employee’s surreptitious recordings of conversations with other employees, made in anticipation of litigation against employer but prior to her retaining counsel, were not shielded by work product doctrine; employees’ statements were admissible against employer as vicarious admissions and discoverable as a matter of right, recordings could create unfair prejudice in subjecting witnesses to surprise or blackmail, and it would be unfair to allow only one party to use tapes; tapes were not subject to delayed production after depositions of other employees for impeachment purposes).

\textsuperscript{161} See, e.g., Chapman & Cole v. Itel Container Int’l B.V., 865 F.2d 676, 686 (5th Cir. 1989) (failure to reveal clandestinely-recorded tape of conversation between defense counsel and witness waives work product protection as contravention of ABA Model Rules); Roberts v. Americable Int’l, Inc., 883 F. Supp. 499 (E.D. Cal. 1995) (individual defendant manager not entitled to suppression of tape recordings of conversations between plaintiff and himself and between plaintiff and other employees surreptitiously obtained by plaintiff for use in employment discrimination case, even though arguably tortuous under state law; however as a matter of fairness, manager

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courts have required production of secret recordings.\textsuperscript{162}

B. Inadvertent Disclosure and Improper Acquisition of Privileged Information

Attorneys face ethical issues in connection with inadvertent receipt or disclosure of attorney-client communications or other confidential information from an adversary. Such inadvertent disclosure may occur as a result of a document production, a misdirected facsimile or electronic mail transmission, a “switched envelope” mailing, or misunderstood distribution list instructions. In some cases an employee of a corporate party may deliver to the attorney documents which are considered by the corporation to be its confidential or proprietary information or otherwise privileged.

1. Ethical Obligations of Recipient of Inadvertently Disclosed Documents

In this advanced technological age with its frequent use of facsimile machines and electronic mail and the increase in multiparty and document intensive cases, inadvertent disclosures frequently occur, and today’s beneficiary of such disclosures may likely become tomorrow’s victim. Thus, in Formal Opinion 05-437 (2005), the ABA held that a lawyer who

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  \item entitled to review tape before his deposition is taken, even though plaintiff noticed manager’s deposition before he presented the tape; \textit{McWhorter v. Sheller}, 993 S.W.2d 781 (Tex. App. 1999) (tape recording of conference between the parties by attorney violated ethics standards, but sanctions not appropriate because insufficient record to establish intentional act of bad faith by attorney); \textit{Haigh v. Matsushita Elec. Corp. of Am.}, 676 F. Supp. 1332 (E.D. Va. 1987) (plaintiff, acting on own initiative and absent directive from counsel, secretly tape-recorded conversations with 58 individuals, discovery ordered since attorney’s act of reviewing the tapes and using them to prepare the complaint and discovery requests amounted to “active encouragement and affirmative support” for plaintiff’s secret recordings). See also \textit{Apple Corps Ltd., MPL v. International Collectors Soc’y}, 15 F. Supp. 2d 456 (D.N.J. 1998) (tape recording approved in context of investigation of compliance with terms of consent decree in copyright action); \textit{Gidatex S.r.L. v. Campaniello Imports, Ltd.}, 82 F. Supp. 2d 119 (S.D. N.Y. 1999) (The use of private investigators, posing as customers and secretly tape recording their conversations with low level employees who are not involved in any aspect of the litigation, does not constitute an end-run around the attorney-client privilege; investigators were merely recording the normal business routine of the defendant’s showroom and warehouse). \textit{Cf. Gonzalez v. Trinity Marine Group}, 117 F.3d 894 (5th Cir. 1997) (dismissing employment discrimination claim too severe a punishment for employee who secretly tape recorded meeting, then tampered with the tape). See also Philadelphia Ethics Op. No. 2000-1 (2000) (may be unethical for lawyer to surreptitiously use voice-recognition software to analyze the veracity of the speech patterns of deponents and counsel at deposition without their consent; however, if lawyer comes into possession of lawfully-created tape recording without restrictions as to its use, the software may be used to analyze the speech patterns on the tape).
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\textsuperscript{162} \textit{Byrd v. Reno}, 1998 WL 429767 (D.D.C. Mar. 18, 1998) (attorney held in contempt for failing to produce in discovery, in a Title VII action, audiotapecs of telephone conversations with her supervisors and a co-worker secretly tape-recorded by plaintiff, a Justice Department lawyer; the tapes were not protected as work product because plaintiff’s unethical conduct in secretly taping the conversations vitiated the privilege), \textit{appeal dismissed}, 180 F.3d 298 (D.C. Cir. 1999); \textit{Gratton v. Great Am. Communications}, 178 F.3d 1373 (11th Cir. 1999) (trial court did not abuse discretion in dismissing action of individual who produced only two of four to six secretly recorded tapes of conversations with his supervisors and failed to comply with an order to explain this spoliation); \textit{Robertson v. National R.R. Passenger Corp.}, 79 Fair Empl. Prac. Cas. (BNA) 1369 (E.D. La. 1998) (plaintiff who had produced 18 of 36 surreptitiously-made tape recordings of statements of co-workers ordered to produce remainder of tapes before co-workers’ depositions were taken). Virtually all cases dealing with this issue have held that clandestine recordings of conversations with potential fact witnesses, whether made by a party or by counsel, before or after counsel is consulted, are not shielded under the work product doctrine.
receives a document from opposing parties or their lawyers and knows or reasonably should know that the document was inadvertently sent should promptly notify the sender in order to permit the sender to take protective measures.\textsuperscript{163} As the Opinion explained, Rule 4.4(b) of the

\textsuperscript{163} ABA Formal Ethics Op. No. 05-437 (2005). See also Lund v. Myers, 305 P.3d 374 (Ariz. 2013) (Following an inadvertent disclosure of documents, any documents found to be non-privileged may be used in the litigation and any documents determined to be privileged must be returned to the disclosing party or destroyed); Ariz. Ethics Op. No. 2001-04 (2001) (former employee gave her attorney copies of documents of the ex-employer that appear, on their face, to be subject to the attorney-client privilege or otherwise confidential; the former employee was provided copies of the documents by an “ally” who is still employed by the ex-employer and has access to confidential information; under the facts, the lawyer should refrain from further examination of the documents or from making any use of them and, subject to client consent, notify the ex-employer’s counsel of their receipt and abide by that counsel’s instructions or seek a court ruling as to whether they may be kept or used; if client misconduct is involved in obtaining the documents, the client should be counseled about the possible legal consequences of her conduct and be told to discontinue it); Calif. Ethics Op. No. 2013-188 (2013) (If an attorney receives an unsolicited intentionally transmitted communication between opposing counsel and opposing counsel’s client under circumstances reasonably suggesting that it is a confidential communication apparently sent without the consent of its owner or with court approval, the attorney may not ethically read the communication, even if she suspects the crime-fraud exception might vitiate the privilege. The attorney must notify opposing counsel as soon as possible that the attorney has possession of the communication, and the two attorneys should try to resolve the privilege issue or, if that fails, obtain the assistance of a court); Rico v. Mitsubishi Motors Corp., 42 Cal. 4\textsuperscript{th} 807 (Cal. 2007) (an attorney who inadvertently receives plainly privileged documents, regardless of whether they are privileged under the attorney-client privilege, the work product privilege, or any other similar doctrine, must refrain from examining the documents any more than necessary to determine that they are privileged, and must immediately notify the sender that he is in possession of potentially privileged documents; disqualification of plaintiffs’ attorney and experts proper remedy for attorney’s use of documents summarizing dialogue among defense attorneys and defense experts relating to strength and weaknesses of defendants’ technical evidence; document was plainly privileged, and plaintiffs’ attorney surreptitiously copied document, concealed this fact from defense team, then disseminated document among plaintiffs’ legal team, and made full use of document to impeach defense experts during depositions; such unethical conduct caused irreversible damage to defendants); Colo. Ethics Op. No. 108 (2000) (a lawyer who receives documents from an adverse party or an adverse party’s lawyer that on their face appear to be privileged or confidential, has an ethical duty, upon recognizing their privileged or confidential nature, to notify the sending lawyer that he/she has the documents, unless the receiving lawyer knows that the adverse party has intentionally waived privilege and confidentiality. In addition, if the lawyer actually knows of the inadvertence of the disclosure before examining the documents, the receiving lawyer must not examine the documents and must abide by the sending lawyer’s instructions as to their disposition); D.C. Rules of Prof’l Conduct 4.4(b) (a lawyer who receives a writing relating to the representation of the client and knows, before examining the writing, that it has been inadvertently sent, shall not examine the writing, but shall notify the sending party and abide by the instructions of the sending party regarding the return or destruction of the writing); D.C. Ethics Op. 318 (2002) (when counsel in an adversary proceeding receives a privileged document from a client or other person that may have been stolen or taken without authorization from an opposing party, receiving party required to refrain from reviewing and using document if: (1) its privileged status is readily apparent on its face, (2) receiving counsel knows that the document came from someone who was not authorized to disclose it, (3) receiving counsel does not have a reasonable basis to conclude that the opposing party waived the attorney-client privilege with respect to such document); Fla. Ethics Op. No. 2007-01 (2007) (lawyer whose client has provided lawyer with documents that were wrongfully obtained by client may need to consult with a criminal defense attorney to determine if the client has committed a crime; the lawyer must advise the client that the materials cannot be retained, reviewed or used without informing the opposing party that the attorney and the clients have the documents; if the client refuses to consent to disclosure, the attorney must withdraw from the representation); Fla. Ethics Op. No. 93-3 (1994) (attorney who receives confidential documents of an adversary as a result of an inadvertent release is ethically obligated to promptly notify the sender of the attorney’s receipt of the documents); Haw. Ethics Op. No. 39 (2001) (attorney who receives an unauthorized basis materials of an adverse party that the attorney knows to be privileged or confidential should, upon recognizing the privileged or confidential nature of the materials, either refrain from reviewing such materials or review them only to the extent required to determine how appropriately to proceed; the
attorney should then notify the adversary’s lawyer that the attorney has such materials, and should either follow the
instructions of the adversary’s lawyer with respect to the disposition of the materials or refrain from using the
materials until a definitive resolution of the proper disposition of the materials is obtained from the court; \textit{Webb v. CBS Broadcasting, Inc.}, 2011 WL 1743338 (N.D. Ill. May 6, 2011) (duty to notify opposing counsel upon receipt of
inadvertently disclosed privileged information); \textit{In re Shell Oil Refinery}, 143 F.R.D. 105 (E.D. La. 1992) (where
current employee of a party provided an adverse party with confidential documents belonging to his employer, the
receiving party is barred from making any use of the materials); Me. Ethics Op. No. 146 (1994) (receiving lawyer
has duty to notify sending lawyer of receipt of inadvertently disclosed privileged or confidential documents); Md.
learns before examining them that they were inadvertently produced, must immediately return documents unopened
and unreviewed; if the lawyer learns of the inadvertent production only after reviewing the documents, the lawyer
must inform his/her client and opposing counsel and consider whether to return the documents or seek a ruling from
the court; earlier Bar Association decision distinguished); \textit{Resolution Trust Corp. v. First of Am. Bank}, 868 F. Supp. 217 (W.D. Mich. 1994) (receiving counsel not disqualified, but should have notified sender immediately; receiving
counsel cannot use the document at trial and must destroy document); \textit{Arnold v. Cargill Inc.}, 2004 WL 2203410 (D. Minn. Sept. 24, 2004) (attorney who receives privileged documents has an ethical duty to cease review of the
documents, notify the privilege holder, and return the documents); Miss. Ethics Op. No. 253 (2005) (an attorney in
possession of an opposing party’s attorney-client communications for which the attorney-client privilege has not
been intentionally waived should advise opposing counsel of the fact of its disclosure; once the fact of disclosure is
before both parties, they can then turn to the legal implications of the disclosure and a legal assessment of whether
waiver has occurred; in some instances the parties may be able to agree regarding how to handle the disclosure. In
other instances, it may be necessary to seek judicial resolution of the legal issues); \textit{Maldonado v. New Jersey}, 225
F.R.D. 120 (D. N.J. 2004) (retention and use of privileged letter by attorney in which defendants responded to
unfavorable administrative determination of plaintiff’s allegations, warranted disqualification of plaintiff’s counsel
in his subsequent employment discrimination action, in that plaintiff’s counsel should have recognized privileged
nature of letter that was signed by two named defendants, addressed to their attorney, and contained information
relevant to the litigation; counsel did not inform defense attorneys that they possessed letter or attempt to return it
and refused to return letter upon request, and counsel digested, to plaintiff’s advantage, contents of letter, which was
essentially a blueprint to merits of case and defenses, such that its disclosure substantially prejudiced defendants;
simply returning letter and removing possibility of future impingement on privilege would not remove taint.); N.Y.
City Ethics Op. No. 2012-1 (2012) (a lawyer who receives a letter, fax, email or other communication that the
lawyer knows or reasonably should know was transmitted by mistake must promptly notify the sender and follow
any other applicable law; Formal Opinion No. 2003-04, which addressed the same issue under the Code of
Professional Responsibility, is withdrawn, but there may be circumstances in which a lawyer may choose to act in
conformity with the guidance in Formal Opinion 2003-04 without thereby per se violating Rule 4.4(b)); N.Y.
County Ethics Op. No. 730 (2002) (if a lawyer receives information containing confidences that apparently were not
intended for the lawyer, the lawyer should refrain from reviewing the information, notify the sender and comply
with the sender’s instructions on return or disposal of the information); \textit{Knitting Fever, Inc. v. Coats Holding Ltd.},
2005 WL 3050299 (E.D. N.Y. Nov. 14, 2005) (Upon receipt of documents of defendant outside the discovery
process, plaintiffs’ counsel had a clear ethical responsibility to notify defendants’ counsel and either follow the
latter’s instructions with respect to the disposition of the documents or refrain from using them pending ruling by the
court. The relevant issue is not whether the documents are privileged; rather, the issue is whether upon receipt the
documents, which on their face appear to be privileged, and later upon defendants’ assertion of the privilege,
plaintiffs’ counsel satisfied his professional and ethical responsibilities.); \textit{American Express v. Accu-Weather, Inc.},
1996 WL 346388 (S.D. N.Y. June 25, 1996) (receiving lawyer must notify the sending lawyer that documents which
appear on their face to be privileged or confidential have been disclosed); N.C. Ethics Op. No. RPC 252 (1997) (a
lawyer in receipt of materials that appear on their face to be privileged, and later upon defendants’ assertion of the
privilege, plaintiffs’ counsel satisfied his professional and ethical responsibilities.); \textit{In re Shell Oil Refinery}, 143 F.R.D. 105
(E.D. La. 1992) (where current employee of a party provided an adverse party with confidential documents belonging to his employer, the
receiving party is barred from making any use of the materials); Me. Ethics Op. No. 146 (1994) (receiving lawyer
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the court; earlier Bar Association decision distinguished); \textit{Resolution Trust Corp. v. First of Am. Bank}, 868 F. Supp. 217 (W.D. Mich. 1994) (receiving counsel not disqualified, but should have notified sender immediately; receiving
counsel cannot use the document at trial and must destroy document); \textit{Arnold v. Cargill Inc.}, 2004 WL 2203410 (D. Minn. Sept. 24, 2004) (attorney who receives privileged documents has an ethical duty to cease review of the
documents, notify the privilege holder, and return the documents); Miss. Ethics Op. No. 253 (2005) (an attorney in
possession of an opposing party’s attorney-client communications for which the attorney-client privilege has not
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before both parties, they can then turn to the legal implications of the disclosure and a legal assessment of whether
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other instances, it may be necessary to seek judicial resolution of the legal issues); \textit{Maldonado v. New Jersey}, 225
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lawyer knows or reasonably should know was transmitted by mistake must promptly notify the sender and follow
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1996 WL 346388 (S.D. N.Y. June 25, 1996) (receiving lawyer must notify the sending lawyer that documents which
appear on their face to be privileged or confidential have been disclosed); N.C. Ethics Op. No. RPC 252 (1997) (a
lawyer in receipt of materials that appear on their face to be subject to the attorney-client privilege or otherwise
confidential, which were inadvertently sent to the lawyer by the opposing party or opposing counsel, should refrain
from examining the materials and return them to the sender); \textit{Transportation Equip. Sales Corp. v. BMY Wheeled
Vehicles}, 930 F. Supp. 1187 (N.D. Ohio 1996) (counsel receiving inadvertently disclosed privileged documents was
required, as a matter of professional responsibility, to inform sending counsel of his receipt of the document and
containing metadata knows or should have known it was inadvertently sent, the lawyer must notify the sender

\textit{Adapted from \textit{Ethics and Professionalism Handbook for Labor and Employment Lawyers—12th Ed.}}

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ABA Model Rules do not require the receiving lawyer either to refrain from examining the materials or to abide by the instructions of the sending lawyer and, by its terms, does not apply to intentionally transmitted documents.\textsuperscript{164} A number of state ethics rules are in accord with the current version of Rule 4.4(b) of the ABA Model Rules.\textsuperscript{165} In contrast to the ABA rule, a number of state bar ethics committees have held that the receiving lawyer has no obligation to disclose to an adverse party that she possesses the adverse party’s privileged or confidential information and the receiving lawyer may use the materials.\textsuperscript{166}


\textsuperscript{164} Id. See ABA MODEL RULES R. 4.4(b) (“A lawyer who receives a document relating to the representation of the lawyer’s client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.”) Comment 2 to the Rule states that “[w]hether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived.” Similarly, the Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person). See, e.g., Merits Incentives, LLC v. Eight Judicial District, 262 P. 3d 720 (Nev. 2011) (attorney who receives documents regarding a case from an anonymous source must promptly notify opposing counsel or risk being in violation of ethical duties and of being disqualified as counsel; notification must adequately put opposing counsel on notice that the documents were not received in the normal course of discovery and describe, with particularity, the facts and circumstances that explain how the documents came into counsel’s or his/her client’s possession). Cf. N.Y. State Ethics Op. No. 945 (Nov. 7, 2012) (A lawyer may not disclose that the client has been reading the opposing party's client-lawyer e-mails, although not communicating the e-mails or their contents to the lawyer, unless (1) the lawyer knows that the client is committing a crime or fraud and no other remedial measures will prevent harm to the opposing party, or (2) governing judicial decisions or other law require disclosure.).

\textsuperscript{165} See Ariz. Rules of Prof'l Conduct R. 4.4(b); Ark. Rules of Prof'l Conduct R. 4.4(b); Conn. Rules of Prof'l Conduct R. 4.4(b); Del. Rules of Prof'l Conduct R. 4.4(b); D.C. Rules of Prof's Conduct 4.4(b); Fla. Rules of Prof'l Conduct R. 4.4(b); Idaho Rules of Prof'l Conduct R. 4.4(b); Iowa Rules of Prof'l Conduct R. 32:4.4(b); Maine Rules of Prof'l Conduct R. 4.4(b); Minn. Rules of Prof'l Conduct R. 4.4(b); Miss. Rules of Prof'l Conduct R. 4.4(b); Mo. Rules of Prof'l Conduct R. 4.4(b); Mont. Rules of Prof'l Conduct R. 4.4(b); Neb. Rules of Prof'l Conduct R. 4.4(b); Nev. Rules of Prof'l Conduct R. 4.4(b); N.C. Rules of Prof'l Conduct R. 4.4(b); N.D. Rules of Prof'l Conduct R. 4.4(b); Ohio Rules of Prof'l Conduct R. 4.4(b); Ore. Rules of Prof'l Conduct R. 4.4(b); Pa. Rules of Prof'l Conduct R. 4.4(b); R.I. Rules of Prof'l Conduct R. 4.4(b); S.C. Rules of Prof'l Conduct R. 4.4(b); S.D. Rules of Prof'l Conduct R. 4.4(b); (notify sender or sender's lawyer if sender is represented); Utah Rules of Prof'l Conduct R. 4.4(b); Wash. Rules of Prof'l Conduct R. 4.4(b); Wis. Rules of Prof'l Conduct R. 4.4(b). Cf. La. Rules of Prof'l Conduct R. 4.4(b) (lawyer who receives a writing that, on its face, appears to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear that the writing was not intended for the receiving lawyer, shall refrain from examining the writing, promptly notifying the sending lawyer and return the writing); Md. Rules of Prof'l Conduct R. 4.4(b) (lawyer who receives information that is protected from disclosure shall: (1) terminate the communication immediately and (2) give notice of the disclosure to any tribunal in which the matter is pending and to the person entitled to enforce the protection against disclosure).

\textsuperscript{166} See Aerojet-General Corp. v. Transport Indem. Ins., 18 Cal. App. 4th 996 (1993) (attorney who represented insured could not be faulted for examining and utilizing memorandum from insurers’ counsel to insurers’ parent corporation, which attorney received innocently, and attorney could not be sanctioned for failing timely to disclose his receipt of memorandum); McGinty v. Super. Ct., 26 Cal. App. 4th 204 (1994) (sanctions inappropriate when
Of course, the lawyer must notify her own client that confidential information was inadvertently transmitted to and read by opposing counsel.\textsuperscript{167}

2. Waiver of Privilege Due to Inadvertent Disclosure

The question of under what circumstances, if any, an inadvertent disclosure of privileged or confidential material constitutes a waiver of the attorney-client privilege has been approached by the courts in any one of three ways. Some courts follow the “never waived” approach, which holds that a disclosure that was merely negligent can never affect a waiver because, a fortiori, the holder of the privilege lacks a subjective intent to forego protection of the privilege.\textsuperscript{168} In documents received inadvertently would have discoverable through normal channels); Ill. Ethics Op. No. 98-04 (1999) (lawyer who, without notice of the inadvertent transmission, receives and reviews an opposing party’s confidential materials through the error or inadvertence of opposing counsel, may use information in such materials; indeed, lawyer may have ethical obligation to use the material if it is relevant to the representation); Ky. Ethics Op. E-374 (1995) (a lawyer who uses inadvertently-sent privileged documents will not be disciplined for using them); Me. Ethics Op. No. 146 (1984); Md. Ethics Op. No. 89-53 (1989) (lawyer who receives from unidentified source copies of opponent’s documents, has no obligation to reveal matter to the court or opponent; lawyer should keep copies to avoid destruction of evidence, but must return originals received to rightful owner), \textit{distinguished in part by} Md. Ethics Op. No. 2000-04 (2000); Mass. Ethics Op. No. 1999-4 (1999) (where a lawyer mistakenly receives, from his opposing counsel, a letter addressed to the opposing counsel’s client containing important evidence of which he had previously been unaware and informs opposing counsel of what has occurred, has no obligation to return the letter; in fact, if the lawyer “concludes that it is in the client’s best interest to do so, [he/she] must resist opposing counsel’s demand for return of the letter and should urge the tribunal to reject the claim of attorney-client privilege”); Mich. Ethics Op. No. Cl-970 (1983) (“A lawyer who comes into possession of an internal private memorandum of the opposite party during litigation” may use the document at trial for impeachment purposes in civil rights action “provided that the lawyer or client did not procure or participate in the removal of the document; document at issue was “an internal self-evaluating and critical report by the county’s affirmative action officer”); N.Y. City Ethics Op. No. 2003-04 (2004) (lawyer who receives a misdirected communication containing confidences or secrets should promptly notify the sender and refrain from further reading or listening to the communication, and should follow the sender’s directions regarding destruction or return of the communication; however, if there is a legal dispute before a tribunal and the receiving attorney believes in good faith that the communication appropriately may be retained and used, the receiving attorney may submit the communication for in camera consideration by the tribunal as to its disposition; additionally, the receiving attorney is not prohibited from using the information to which the attorney was exposed before knowing or having reason to know the communication was inadvertently sent; however, it is essential that the receiving attorney promptly notify the sending attorney of the disclosure in order to give the sending attorney a reasonable opportunity to promptly take whatever steps he or she feels are necessary); Ohio Ethics Op. No. 93-11 (1993) (lawyer conducting public records search that obtains, through no wrongdoing, copy of attorney-client privileged memorandum, may ethically read it or reveal its contents to client; however, attorney has ethical obligation to notify source and return copy of memorandum on request); Philadelphia Ethics Op. 94-3 (1994) (no obligation to return confidential fax inadvertently received from adversary); Philadelphia Ethics Op. No. 91-19 (1991) (without client consent, Rule 1.6(a) “affirmatively prohibits disclosure” to opposing counsel that client had innocently taken a letter written by opposing counsel when it became mixed up with client’s own papers); \textit{Mt. Hawley Ins. Co. v. Felman Production, Inc.}, 271 F.R.D. 125 (S.D. W. Va. 2010) (lawyer receiving inadvertently sent materials not required to notify another party or that party’s lawyer of receipt as a matter of compliance with ethics rules).

\textsuperscript{167} See III. Ethics Op. No. 98-04 (1999). See also Colo. Ethics Op. No. 113 (2005) (As part of the general ethical duty to keep a client reasonably informed about the status of a matter, a lawyer should fully and promptly inform the client of material developments, including those resulting from the lawyer’s own errors.).

\textsuperscript{168} See Gray v. Bicknell, 86 F.3d 1472, 1483 (8th Cir. 1996) (waiver of privilege only accomplished through client’s intentional and knowing relinquishment, not through mere inadvertent disclosure); Ark. R. Evid. 502 (recognizes “selective waiver”; no waiver for inadvertent disclosure, snap back available); \textit{Dukes v. Wal-Mart}
contrast, a few courts apply a “strict accountability” rule, which finds a waiver of the privilege regardless of the privilege holder’s intent to waive.\(^{169}\) Most state courts have taken an

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intermediate position and have applied a balancing test, which includes an examination of the
reasonableness of the precautions taken against inadvertent disclosure.\(^{170}\) Under this test, the
court will weigh (a) the proportion of documents inadvertently produced against the overall
production;\(^{171}\) and (b) the extent to which the disclosing party took reasonable precautions to

waiver of attorney-client privilege does not require proof that the client intended to do so, only that he or she intended to make the disclosure); Walton v. Mid-Atlantic Spine Specialists, P.C., 694 S.E.2d 545 (W. Va. 2010)
 Disclosure of physician’s letter to his attorney was “inadvertent,” not “involuntary,” in patient’s medical malpractice action against physicians, and thus privilege was waived; there was no evidence suggesting that letter was knowingly produced by someone other than the holder of the privilege through criminal activity or bad faith, physicians did not argue that any criminal activity or bad faith was involved, and all of the evidence indicated that the physicians mistakenly produced the letter.); Cf. Williams v. District of Columbia, 806 F. Supp.2d 44 (D.D.C. 2011) (“[In this Circuit, it used to be the case that virtually any disclosure of a communication protected by the attorney-client privilege, even if inadvertent, worked a waiver of the privilege”; Rule 502(b) partially abrogated this strict approach to waiver); Bensel v. Air Line Pilots Ass’n, 248 F.R.D. 177 (D. N.J. 2008) (Although inadvertent disclosure of material covered by attorney-client privilege is, by definition, unintentional act, if such disclosure results from gross negligence, disclosure will be deemed to be intentional, thus constituting waiver of privilege; in determining whether attorney-client privilege has been waived, court should consider: (1) reasonableness of precautions taken to prevent inadvertent disclosure in view of extent of document production; (2) number of inadvertent disclosures; (3) extent of disclosure; (4) any delay and measures taken to rectify disclosure; and (5) whether overriding interests of justice would or would not be served by relieving party of its error.)

\(^{170}\) See K.L. Group v. Case, Kay & Lynch, 829 F.2d 909 (9th Cir. 1987) (inadvertent production of privileged letter, along with some 2,000 other documents during discovery, did not result in waiver of attorney-client privilege); Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimante, 529 F.3d 371 (7th Cir. 2008) (district court did not clearly err in finding that attorney-client privilege was not waived by defendant’s disclosure of memorandum under balancing approach, even though the fact that the memorandum was filed with the court weighed in favor of waiver; the scope of discovery, given that 30 to 40 boxes were produced on the date memorandum was produced, and defense counsel’s attempts to rectify the error immediately upon learning of the disclosure weighed against finding waiver; balancing test applied); State ex rel. Allstate Ins. Co. v. Gaughan, 508 S.E.2d 75, 95 (W. Va. 1998).

\(^{171}\) Wells Fargo Bank v. Super. Ct., 22 Cal. 4th 201 (2000) (disclosure in good faith belief that law required it not a waiver where law was unsettled and debatable); SEC v. Reyes, 2007 WL 528718 (N.D. Cal. Feb. 13, 2007) (balance of factors supported finding that SEC did not waive privilege when it inadvertently sent a two-page document to the defendant’s attorneys during discovery: (1) the SEC reviewed the materials both prior to and after their production to ensure that the disclosures did not contain confidential material (“[F]oolproof measures are not required; only reasonable measures are.”), (2) very little time elapsed between the SEC’s inadvertent disclosure and its effort to fix the problem, (3) the scope of the production (involving millions and documents and hundreds of thousands of physical pages) was enormous relative to the privileged information produced (two pages), and (4) there were no fairness considerations that required a finding of waiver); Harp v. King, 835 A.2d 953 (Conn. 2003) (Housing Finance Authority’s employees did not waive attorney-client privilege by inadvertently disclosing legal strategies memo to developer of low and moderate income housing; Authority made reasonable efforts to preserve confidentiality of privileged material, only two memos were inadvertently disclosed while a large number of documents were produced; Authority did not delay upon learning that the legal strategies memo inadvertently had been made available, and applying the privilege did not prejudice the developer); Cobell v. Norton, 213 F.R.D. 69 (D.D.C. 2003) (documents did not lose protection of attorney-client privilege despite monitor’s inclusion of the documents as attachments to report, and their subsequent dissemination; government made efforts reasonably designed to preserve privilege, requesting that portions of report discussing the documents be stricken, and timely requesting a protective order); Nova Southeastern University, Inc. v. Jacobson, 25 So.3d 82 (Fla. App. 2009) (Florida courts do not apply a strict rule that counsel’s inadvertent production alone waives the attorney-client privilege; instead, courts consider the following factors in determining whether the privilege has been waived: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production; (2) the number of inadvertent disclosures; (3) the extent of the disclosure; (4) any delay and measures taken to rectify the disclosures; and (5) whether the overriding interests of justice would be served by relieving a

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part of its error); Mattenson v. Baxter Healthcare Corp., 2003 WL 22839808 (N.D. Ill. Nov. 26, 2003) (defendant waived attorney-client privilege with respect to document inadvertently disclosed to plaintiff; defendant made no showing that reasonable precautions were taken to prevent disclosure and scope of discovery was not so large that precautions to prevent inadvertent disclosure could not have been properly taken); MG Capital, LLC v. Sullivan, 2002 WL 1424560 (N.D. Ill. July 1, 2002) (employee waived attorney-client privilege with respect to letter he sent to prospective counsel over claim he contemplated bringing against employer; production occurred in context of formal discovery and was available for attorney review; production was relatively small, same document had previously been inadvertently disclosed in deposition of prospective counsel, and employee did not attempt to undertake remedial measures until almost one month after knowledge of disclosures); Simon Prop., Group, L.P. v. mySimon, Inc., 194 F.R.D. 644 (S.D. Ind. 2000) (consider: (1) extent to which the neglect leading to inadvertent disclosure was excusable or inexcusable, (2) whether it is possible to provide effective relief from the inadvertent disclosure, and (3) whether there is any serious prospect of harm to the interests of the opponent or to the interests of justice if waiver is not found); IMC Che., Inc. v. Niro, Inc., 2000 WL 1466495 (D. Kan. July 19, 2000) (plaintiff waived attorney-client privilege by failing to move expeditiously to recover documents after consultant had taken documents with him when his consultation agreement expired); Corey v. Norman, Hanson & DeTroy, 742 A.2d 933 (Me. 1999) (counsel’s inadvertent disclosure of a memorandum summarizing a telephone conference between counsel and his client, to opposing counsel in legal malpractice action, did not constitute a waiver of the attorney-client privilege, where the documents were mistakenly placed in boxes that were available to opposing counsel to photocopy, and the memorandum was labeled “confidential and legally privileged”); Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251 (D. Md. 2008) (Paul W. Grimm, U.S. Magistrate Judge) (Any attorney-client privilege or work product protected status had been waived for 165 documents that had been stored electronically and voluntarily produced pursuant to document request, where there had been awareness of danger of such inadvertent production and request for court-approved non-waiver agreement had been voluntarily abandoned, keyword search that had been performed on text-searchable electronically stored information had not been reasonable, disclosures were substantive including numerous communications with counsel, disclosure had been discovered by opponent, and there was no overriding interest in justice that would have provided excuse from such consequences); F.H. Chase, Inc. v. Clark/Gilford, 341 F.Supp. 2d 562 (D. Md. 2004) (defendants’ inadvertent disclosure of over 500 pages of privileged documents, out of 7,155 produced in breach of contract action, did not waive the attorney-client privilege; disclosure was result of non-attorney assistant’s transmission of database containing both privileged and unprivileged documents to contractor that branded and printed them for defendants, and although defendants failed to review the printed documents after receiving them from contractor, they notified plaintiff of the mistake on the day it was discovered); Amgen, Inc. v. Hoechst Marion Rousell, Inc., 190 F.R.D. 287 (D. Mass. 2000) (defendant’s inadvertent disclosure of privileged documents effected waiver of attorney-client privilege and work product protection, considering defendant’s inadequate precautions to prevent inadvertent disclosure–not having a paralegal review the copy vendor’s work to ensure that only the intended documents were among the 23 boxes copied to be produced on a single day–the magnitude of the disclosure which consisted of approximately 200 documents comprising 3821 pages, and overriding interests of fairness and justice which dictated the recognition of a waiver of the privilege); Bobbitt v. Academy of Court Reporting, Inc., 2008 WL 4056323 (E.D. Mich. Aug. 26, 2008) (inadvertent disclosure of attorney-client e-mail communications waived privilege: although precautions to prevent disclosure appeared to be reasonable; the disclosures were extremely relevant to the case; although plaintiffs referred to portions of the disputed e-mails in their class certification motion, defense counsel did nothing to contest the use of the privileged e-mails for until four months later, a “day late and a dollar short”; and justice would not appear to be served “by sweeping under the rug highly probative documents that were out in the open for so long without vigorous objection.”); Starway v. Independent Sch. Dist. No. 625, 187 F.R.D. 595 (D. Minn. 1999) (defendant’s inadvertent disclosure of privileged document did not waive attorney-client privilege with respect to that document where precautions taken to prevent disclosure were reasonable, inadvertent disclosure was limited to 4 out of 541 pages, and defendant promptly asserted the privilege when disclosure of the document became known at a deposition); Maldonado v. New Jersey, 225 F.R.D. 120 (D. N.J. 2004) (defendants in employment discrimination action did not waive attorney-client privilege with respect to letter written by two defendants to their then-attorney, and which inexplicably fell into plaintiff’s hands, when defendants took reasonable precautions to safeguard letter and there was no indication that defendants or their attorney were responsible for letter’s disclosure; only one disclosure occurred and way in which it occurred was unexplained; letter essentially was a blueprint to defendants’ thought processes and trial strategy, and it was not in the interests of justice to punish defendants via waiver in light
of their reasonable precautions to prevent dissemination of letter); HSH Nordbank AG New York Branch v. Swerdlow, 259 F.R.D. 64 (S.D. N.Y. 2009) (attorney-client privilege was not waived by carelessness, with respect to inadvertent production, during discovery in action to collect on loan guaranties, by administrative agent for five non-party lenders who participated in syndication of $192 million loan for a residential condominium development, of nine documents involving communications between counsel retained by administrative agent, and the lenders, relating to timing and conduct of litigation to collect on loan guaranties, in which litigation the lenders were not parties; agent reviewed millions of pages of documents, about 250,000 of which were eventually produced during discovery, agent promptly sought to recall the documents, and parties had executed a discovery protective order in which they had agreed that inadvertent production of a document subject to attorney-client privilege would not effect a waiver of the producing party’s rights.); Parkway Gallery Furniture, Inc. v. Kittinger/Pa. House Group, Inc., 116 F.R.D. 46 (M.D.N.C. 1987) (the factors to determine whether a document has lost its privilege when it has been inadvertently disclosed include whether the lawyer took reasonable precautions to prevent inadvertent disclosure, the number of the inadvertent disclosures, the extent of the disclosures, any delays in rectifying the disclosure, and whether justice would be served by relieving party of its error); Evenflo Co., Inc. v. Hantec Agents Ltd., 2006 WL 2945440 (S.D. Ohio Oct. 13, 2006) (defendant waived attorney-client privilege with respect to 135 pages of confidential communications contained within 10,085 pages of documents produced to plaintiff in discovery; defendant did not take reasonable precautions to protect the documents, the number of privileged documents was significant—there were only two boxes to screen—the privileged character of the documents was open and obvious and no privileged documents were found when they were first screened; after the issue was raised by plaintiff, defendant carefully screened the documents two more times and discovered additional documents both times, and defendant did not prepare a privilege log until after all the screenings and the log did not comply with local rules); Nelson v. Granite State Ins. Co., 2009 WL 2252182 (W.D. Okla. July 28, 2009) (“As it appears that defendant inadvertently produced to plaintiff the single page of a privileged communication, the Court finds that the single inadvertently produced page does not waive defendant’s attorney-client privilege as to the claim file at issue because it would fly in the face of the essential purpose of the privilege.”); Goldsborough v. Eagle Crest Partners, Ltd., 838 P.2d 1069 (Ore. 1992) (waiver by disclosure in response to discovery request, no evidence of mistake, inadvertence or lack of client authorization); Kaminski v. First Union Corp., 2001 WL 793250 (E.D. Pa. July 20, 2001) (defendant in age discrimination case waived attorney-client privilege with respect to document entitled “Key Human Resource Issues,” where defendant twice placed the document into the public record by inadvertently attaching it as exhibits to two motions filed with the court); Sampson Fire Sales, Inc. v. Oaks, 201 F.R.D. 351 (M.D. Pa. 2001) (inadvertent disclosure of letter from attorney to client which occurred when it was faxed to the wrong number did not waive attorney-client privilege, considering that attorney took reasonable precautions to prevent disclosure, there was only one inadvertent disclosure totaling one page, the letter arguably revealed strategy, attorney acted promptly to rectify disclosure, and overriding interests of justice required that attorney be relieved of his error); Figuera v. Puerto Rico Elec. Power Authority, 250 F.R.D. 94 (D. Puerto Rico 2008) (Defendant’s request for a protective order seeking return of inadvertently disclosed privileged document is denied where defendant (a) failed to show that it took reasonable precautions to avoid disclosure of privileged documents since it provided no straightforward explanation of steps it took to ensure that no privileged document would be produced beyond its perfunctory statement that all documents produced were reviewed by counsel “to the best of their ability”; (b) more than month and a half passed before defendant realize its error; (c) defendant did not review and produce an unusually large number of documents; and (d) prohibiting plaintiffs from using the document, which they had possessed for more than a month and a half, would work an injustice upon them because they had already incorporated it into their pre-trial preparation, and defendant appeared to be negligent in guarding its privilege); Myers v. City of Highland Vill., 212 F.R.D. 324 (E.D. Tex. 2003) (attorney-client privilege protecting some paragraphs of memo by city manager was not waived when the memo was inadvertently produced during discovery; while city did not establish that it took precautions to prevent the disclosure of the document, the city promptly requested that the document be returned after learning of its disclosure; it had produced approximately 1,500 pages, and the fairness factor weighed in favor of the city); United States v. Citgo Petroleum Corp., 2007 WL 1125792 (S.D. Tex. April 16, 2007) (corporation subject to criminal environmental investigation by DOJ and a federal grand jury waived the attorney-client privilege when it inadvertently produced as part of its response to several grand jury subpoenas; evidence of multiple disclosures on multiple occasions by different law firms lead the court to conclude that the corporation did not take reasonable precautions to prevent disclosure; in addition, it was the corporation’s practice to label all documents related to internal environmental audits “privileged”—whether they were privileged or

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3. **Surreptitious/Improper Acquisition and Inspection of Information**

Note that not all acquisition of information is “inadvertent;” the ethical rules generally preclude lawyers from improperly inducing present or former employees of an opponent to reveal information the lawyer knows to be protected from disclosure by statute or a well-established common law privilege, or to otherwise improperly acquire such information. Courts have generally discouraged a party’s resort to self-help evidence-gathering in pursuit of litigation outside legal process. Thus, where employees have purloined company documents to prevent disclosure, the legal department assisted with the audits; this practice of “mislabeling” most likely led to the inadvertent disclosure in this case; it took the corporation over a year to seek relief from the court after learning of the disclosure; although the total scope of documents produced was voluminous, the amount of privileged documents disclosed was far more significant than the corporation claimed; overriding fairness considerations do not save the corporation from waiver; given that the disclosure was inadvertent, the scope of the waiver only extends to the specific documents disclosed and not to the entire subject matter of the representation; *Gold Standard, Inc. v. Am. Barrick Resources Corp.*, 805 P.2d 164 (Utah 1990) (mining company waived work product privilege regarding memoranda by inadvertently providing documents to mining partner and by failing to file motion for protective order until more than one year after documents had been produced); *FDIC v. Marine Midland Realty Credit Corp.*, 138 F.R.D. 479 (E.D. Va. 1991) (waiver of attorney-client privilege by inadvertent disclosure because sending lawyer had not taken adequate precautions to prevent disclosure).

See *Kovacs v. The Hershey Co.*, 2006 WL 2781591 (D. Colo. Sept. 26, 2006) (attorney-client privilege waived when lawyer disclosed notes from its outside counsel and emails from its in-house counsel and thus plaintiffs may inquire into the “narrow subjects and precise words of the notes and email, which included: (1) whether the case involved a “group term program; (2) whether the Older Worker Benefit Protection Act and its implementing regulations apply to the case and the employer’s exposure to an “age claim risk” if the Act and its regulations do not apply; and (3) whether any adverse impact analyses were conducted by employer in connection with the retirement plan at issue).

ABA Formal Ethics Op. No. 97-408 (1997) (“Gaining from a former government employee information that the lawyer knows is legally protected from disclosure for use in litigation nevertheless may violate Model Rules 4.4, 8.4(c) and 8.4(d) . . . ”); ABA Formal Ethics Op. No. 91-359 (1991) (attorney must be careful not to seek to induce a former employee to violate the attorney-client privilege; such an attempt would violate Rule 4.4, regarding respect for the rights of third persons); Conn. Informal Ethics Op. No. 96-4 (1996) (Rule 4.4 precludes lawyer from reviewing and copying psychiatric records of client’s ex-wife made confidential by statute); N.J. Ethics Op. No. 680 (1995) (if lawyer had surreptitiously copied confidential documents in possession of attorneys for adverse party, and items of evidence were involved, it would constitute a violation of Rule 4.4); N.Y. State Ethics Op. No. 749 (2001) (lawyer may not ethically use available technology to surreptitiously examine and trace email and other electronic documents); Pa. Informal Ethics Op. No. 93-135 (1993) (Rule 4.4 prohibits lawyer from conducting surreptitious inspection of psychiatric records of major witness against client; although information would be very useful in impeaching witness, Pennsylvania case law makes such records absolutely confidential). Compare Ore. Ethics Op. No. 2011-186 (2011) lawyer who receives documents from a third party that may have been stolen or otherwise taken without authorization from the opposing party is not required to notify the opposing party of the receipt of the documents, if the circumstances in which the documents were obtained by the sender involve criminal conduct and its disclosure might link the client to a crime; and in such a case the lawyer may be prohibited from accepting “evidence of a crime” unless the lawyer makes the evidence available to the prosecution). See also *Gomez v. Vernon*, 255 F.3d 1118 (9th Cir. 2001) (state prison officials and their attorneys acted in bad faith in inmates’ civil rights retaliation suit, and thus were subject to sanctions under court’s inherent power and under 28 U.S.C. § 1927 due to their collection, reading and retention of inmates’ communications with their counsel, where communications were obviously privileged, prison officials obtained letters from restricted area of prison law library, and attorneys continued to collect and read documents after being advised by State Bar to send documents to court; counsel’s actions in case “do not pass even the most lenient ethical ‘smell test’”).
support their claim or have otherwise circumvented the formal discovery process, courts have ordered the return of the evidence obtained.\textsuperscript{174} In some cases, courts have awarded sanctions, including dismissal of the action due to documents or other information improperly obtained by a party,\textsuperscript{175} disqualification of the party’s attorney who has received such improperly obtained

\textsuperscript{174} See In re IBP Confidential Bus. Documents Litig., 754 F.2d 787 (8th Cir. 1985); Niswander v. Cincinnati Ins. Co., 529 F.3d 717, 717 (6th Cir. 2009) (employee who worked at home on her home computer and had access to confidential files which she copied and gave to her attorney in support of a pending class action lawsuit to which she had opted in had not engaged in protected activity to support Title VII retaliation claim); Pillsbury, Madison & Sutro v. Schectman, 55 Cal. App. 4\textsuperscript{th} 1279 (1997) (preliminary injunction requiring employees’ attorney to turn over documents that were removed from employer law firm was not an abuse of discretion, since attorney established no applicable exception to general rule prohibiting self-help evidence gathering by employees for use in contemplated litigation against their soon-to-be employers, and trial court chose least sanction cognizable in circumstances by ordering return to status quo existing at time documents were taken); Conn v. Super. Ct., 196 Cal. App. 3d 774, 781 (1987) (trial court within discretion in ordering plaintiff and his attorney to return substantially all documents taken by plaintiff when he was terminated and claimed were his personal files, since “defendants have, and have always had, the right to keep their own documents until met with proper discovery requests or ordered to disclose them by the Court”; documents claimed to be privileged by plaintiff ordered returned because plaintiff’s attorney created the “privileged” documents by making notes on and about documents he had no right to have in the first place); Giardina v. Ruth U. Fertel, Inc., 2001 WL 1628597 (E.D. La. Dec. 17, 2001) (plaintiff’s counsel produced in discovery copy of letter by defendant’s attorney containing attorney-client privileged information of defendant, but refused to reveal how he obtained letter; regardless of whether plaintiff’s communication with defendant violated ex parte communication rules, his receipt of the letter in this manner was inappropriate and contrary to fair play, since the plaintiff “effectively circumvented the discovery process and prevented [the defendant] from being able to raise any objections against the production of the letter”; plaintiff ordered not to make any use of the letter or the information contained therein); Furnish v. Merlo, 128 Lab. Cas. (CCH) ¶ 57,755 (D. Ore. 1994) (former manager and her attorney sanctioned where manager copied a number of confidential documents of her employer and turned them over to her counsel for use in litigation); Hill v. Hassan, 2010 WL 419433 (W.D. Pa. Jan. 29, 2010) (Defendants ordered to return immediately and destroy copies of documents received from an “anonymous source that the parties agree most likely came from one of Plaintiff’s current or former employees and at least some of which were, on their face, covered by Plaintiff’s attorney-client privilege; the justification under the protections afforded to inadvertent productions, including Model Rule 4.4(b), apply with even greater and stricter force in connection with inadvertent but unauthorized disclosures.); Nesselroette v. Allegheny Energy, Inc., 615 F.Supp.2d 397 (W.D. Pa. 2009) (the manner in which employee, employed as an attorney, took employer’s confidential documents violated her common law fiduciary duty of honesty, and in taking the documents for her own gain, she violated duty of fidelity to her client; many of the documents were not only marked “confidential” or “attorney-client privileged,” but were also marked “confidential information” as that term was defined in a confidentiality agreement; and the employee enlisted the help of two of her subordinates to assist her in copying and taking the documents, told no one at the company what she had done, and had no permission to remove the document). Cf. Fla. Ethics Op. No. 07-01 (2007) (A lawyer whose client has provided the lawyer with documents that were wrongfully obtained by the client may need to consult with a criminal defense lawyer to determine if the client has committed a crime. The lawyer must advise the client that the materials cannot be returned, reviewed or used without informing the opposing party that the attorney and client have the documents at issue. If the client refuses to consent to disclosure, the attorney must withdraw from the representation); Coral Reef of Key Biscayne Developers, Inc. v. Lloyd’s Underwriters, 911 So.2d 155 (Fla. App. 2005) (a higher standard applies when considering a motion to disqualify counsel were the plaintiff’s counsel received the privileged documents by a court order that was subsequently quashed; under those circumstances, the party moving to disqualify counsel must show that the opposing counsel’s review of the privileged documents caused actual harm to the moving party and disqualification is necessary because the trial court lacks means to remedy the moving party’s harm).

\textsuperscript{175} See Stephen Slesigner, Inc. v. The Walt Disney Co., 155 Cal. App. 4\textsuperscript{th} 736 (Cal. App. 2007) (to assist it in its prosecution of its lawsuit against defendant for failure to pay royalties, plaintiff licensor hired an investigator to surreptitiously obtain defendant’s documents; other than a purported admonition to obey the law, the plaintiff provided no direction or supervision for the investigator’s activities; the investigator took thousands of pages belonging to defendant, including documents marked privileged and confidential, and obtained the documents by
documents, or other sanctions. Courts have ruled that disqualification and other sanctions are

breaking into defendant’s office buildings and secure trash receptacles and trespassing onto the secure facility of the company hired by defendant to destroy its confidential documents; the documents were passed on to plaintiff’s attorneys and principals, who reviewed them but kept no records of the documents they received or of those they discarded; for seven years, plaintiff concealed the investigator’s activities from defendant and the court, deleting the “confidential” markings from the documents to create the false impression that the documents were not confidential or the false impression that defendant had created both confidential and non-confidential sets of documents; the court of appeals affirmed sanctions of dismissal against the plaintiff. “When a plaintiff’s deliberate and egregious misconduct makes any sanction other than dismissal inadequate to ensure a fair trial, the trial court has inherent power to impose a terminating sanction.”); Lipin v. Bender, 644 N.E.2d 1300 (N.Y. 1994), affirming 597 N.Y.S.2d 340 (App. Div. 1993) (dismissal of sexual harassment and discrimination complaint was appropriate sanction for plaintiff’s taking from counsel’s table in discovery proceedings and use of privileged and confidential defense documents; neither suppression of documents nor suppression of information was realistic alternative, and disqualification of plaintiff’s counsel would not have ameliorated prejudice).

176 Clark v. Superior Court, 196 Cal. App.4th 37 (2011) (law firm representing plaintiff against former employer properly disqualified for keeping, reviewing and using the company’s attorney-client privileged documents that plaintiff had turned over to the firm, where firm retained the documents for over nine months, and the inevitable questions about the sources of firm’s knowledge could undermine the public trust and confidence; trial court’s finding that attorneys’ review of employer’s attorney-client privileged materials could affect the outcome of the proceedings, in disqualifying the attorneys’ law firm from representing employee in litigation against employer, was supported by substantial evidence, including evidence that employee used a privileged memo as the basis for a securities fraud claim, and that questions employee posed to employer’s former chief executive officer might have derived from a privileged legal opinion from an outside law firm.); Snider v. Super. Ct., 113 Cal. App. 4th 1187 (2003) (if an attorney violates the attorney-client privilege of the opposing party, the court may disqualify him or her from further participation in the case and, under certain circumstances, may exclude improperly obtained evidence or take other appropriate measures to achieve justice and ameliorate the effect of the improper conduct); Lynn v. Gateway Unified School Dist., 2011 WL 6260362 (E.D. Cal. Dec. 15, 2011) (former employee’s lawyer and law firm disqualified in employee’s discrimination lawsuit against school district where lawyer knowingly took possession of emails that employee illegally copied from the district’s server, 11% of which contained privileged information, returned the emails to employee after state court finding that emails had been wrongfully obtained and it was unlawful for employee or lawyer to possess them, and violated his duty of loyalty and confidentiality by revealing employee’s crime in declarations opposing motion to disqualify; because lawyer was member of small law firm and other members of firm participated in various aspects of the relevant litigation, all attorneys and employees of the firm were disqualified); MMR/Wallace Power & Industrial, Inc. v. Thames Assocs., 764 F. Supp. 712 (D. Conn. 1991) (attorney who received confidential and privileged information relating to trial strategy and tactics indirectly from a former employee of the adverse party and used it disqualified because of unfair advantage that resulted); Atlas Air, Inc. v. Greenberg Traurig, P.A., 997 So.2d 1117 (Fla. App. 2008) (Law firm’s actions in taking an unfair, “informational” advantage of its adversary in litigation following the inadvertent delivery to law firm of documents protected by the attorney-client privilege required disqualification of the law firm, and not merely the particular attorney who first received the documents); McIntosh v. State Farm Fire & Cas. Co., 2008 WL 941640 (S.D. Miss. April 4, 2008) (consortium of lawyers suing insurers disqualified where one of the lawyers paid two sisters who worked for a company that did claims work for the insurer $150,000 each for “consulting services” and the sisters turned over substantial amounts of the insurers’ confidential information to the consortium; the wrongful obtaining of insurers’ confidential information and the payment of fees to the sisters far greater than that allowed for witnesses warranted disqualification of the lawyers who knew of the sisters’ actions as well as those who “should have known.”); Maldonado v. New Jersey, 225 F.R.D. 120 (D. N.J. 2004) (retention and use of privileged letter to attorney in which defendants responded to unfavorable administrative determination of plaintiff’s allegations warranted disqualification of plaintiff’s counsel in his subsequent employment discrimination action, in that plaintiff’s counsel should have recognized privileged nature of letter that was signed by two named defendants, addressed to their attorney, and contained information relevant to the litigation; counsel did not inform defense attorneys that they possessed letter or attempt to return it and refused to return letter upon request; and counsel digested to plaintiff’s advantage contents of letter, which was essentially a blueprint to merits of case and defenses,
not appropriate where there is no evidence that the improperly obtained confidential information was imparted to the attorney and the attorney has not engaged in misconduct with respect to obtaining the information,\textsuperscript{178} or where the impact of the information on the litigation is not such that its disclosure substantially prejudiced defendants and simply returning letter and removing possibility of future impingement on privilege would not remove taint; \textit{Northwestern National Ins. Co. v. Insco, Ltd.}, 2011 WL 5574953 (S.D. N.Y. Nov. 15, 2011) (law firm disqualified from further representation of defendant in a pending arbitration, where firm’s inappropriate action in obtaining confidential emails between arbitration panel members constituting its deliberations and ignoring plaintiff’s request to identify or produce them); \textit{In re RSR Corp.}, 405 S.W.3d 265 (Tex. App. 2013) (trial court did not abuse its discretion in disqualifying law firm from representing plaintiff corporation in breach of licensing agreement and misappropriation case in Texas court because it could not “rebut the presumption” that former employee of defendant corporation shared privileged information with the firm based on the following: (i) the former employee was a member of defendant corporation’s litigation team and participated in formulating strategy; (2) although the employee made the first overture, defendant corporation’s Chilean and its Texas counsel both responded and agreed to meet with the employee; (3) even though the firm was aware that the employee was a member of defendant’s litigation team and possessed confidential information belonging to it, attorneys and other representatives of the law firm ultimately spent about 150 hours over nineteen days in meetings with the employee; (4) the firm was involved in obtaining an agreement under which the employee was paid for the time he spent meeting with the firm regarding the case and in obtaining an agreement that provided significant protections to the employee in exchange for information and documents relating to defendant corporation; and (5) during his meetings with the firm, the employee disclosed confidential information belonging to defendant corporation. Although the law firm and Chilean counsel cautioned the employee not to disclose confidential information in his possession, a simple, informal admonition to a nonlawyer former employee of an opposing party not to work on a matter is not enough to overcome the presumption. Further, the firm failed to either instruct the employee not to work on the litigation or use formal, institutionalized screening measures to reduce the potential for misuse of confidences to an acceptable level. Rather, the sole purpose of meeting with the employee was to discuss the pending litigation with defendant); \textit{In re Marketing Investors Corp.}, 80 S.W.3d 44 (Tex. App. 1998) (trial court abused its discretion in not ordering former president of defendant corporation to return certain documents taken from corporation following his firing and in not disqualifying his counsel who refused to return the documents; court rejected former president’s argument that he had right to information as president since the attorney-client privilege belonged to the corporation, not to individual constituents, and only the corporation could waive that privilege; displaced managers may not assert or waive the attorney-client privilege over the wishes of current managers, even as to statements that the former might have made to counsel concerning matters within the scope of their corporate duties); \textit{Richards v. Jain}, 168 F. Supp. 2d 1195 (W.D. Wash. 2001) (paralegals of law firm representing plaintiff in employment litigation received computer disks from plaintiff containing a copy of every email stored on plaintiff’s hard drive, including attorney-client privileged information of the employer, in violation of nondisclosure agreement; paralegal’s eleven months of access to privileged materials without the firm disclosing such access to opposing counsel or ceasing review of the materials, warranted disqualification, since paralegals’ conduct and knowledge was imputed to the firm).

\textsuperscript{177} \textit{In re Wixehart}, 721 N.Y.S.2d 356 (App. Div. 2001) (condoning use of opponent’s documents that had been copied by client/employee, failing to advise court and opponent immediately of theft of documents, using those documents to try to extract settlement from adversary, making use of client’s reckless accusations against judges, making scurrilous remarks to judge in motion hearing, and disregarding court’s directive to make no use of documents in litigation and to secure all copies was conduct warranting two-year suspension from practice of law).

\textsuperscript{178} \textit{See, e.g. Neal v. Health Net, Inc.}, 100 Cal. App. 4th 831 (2002) (trial court erred when it disqualified counsel for Neal, a former human resources manager for defendant, based on his former representation of a former legal secretary in discrimination action against defendant’s legal department; although legal secretary admitted accessing a confidential legal file containing information about Neal’s lawsuit, there was no evidence that legal secretary provided any confidential information to attorney or that attorney acted improperly); \textit{Merits Incentives, LLC v. Eight Judicial District}, 262 P. 3d 720 (Nev. 2011) (in determining whether to disqualify an attorney who through no wrongdoing of his/her own received an opponent’s privileged materials, court considers a nonexhaustive list of factors, including: (1) whether the attorney knew or should have known material was privileged, (2) promptness with which attorney notifies opponent as to possession of information, (3) extent to which attorney...

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reviewed and digested information, (4) extent to which disclosure of information would prejudice opponent, (5) extent to which opposing party may be at fault for disclosure, and (6) extent to which nonmovant will suffer prejudice from disqualification; Utah Ethics Op. No. 99-01 (1999) (a lawyer is required to bring to the attention of opposing counsel the receipt of the opposing party’s attorney-client communications unless it is clear from the circumstances that the attorney-client privilege has been intentionally waived); United States v. Stewart, 294 F. Supp. 2d 490 (S.D. N.Y. 2003) (where prosecutor inadvertently read email sent by defendant to her lawyer and then forwarded to her daughter, which email was later found to be protected work product and unavailable to government in trial against defendant, such protection did not warrant disqualification of prosecutor from participating in cross-examination of defendant; email constituted factual work product, there was no allegation that prosecutor engaged in misconduct or other unethical behavior, and the proper remedy, prohibiting the prosecution from using the document at trial, already had been granted here; government’s two-month delay in alerting defendant of inadvertent review of email did not warrant disqualification, where government took prompt steps to protect document and ascertain whether defendant would continue to assert privilege over it; delay was not inappropriate in light of the government’s reaction and the ambiguities in the defendant’s privilege logs; and the factual document was not so critical nor was the prosecutor’s review of it so extensive, that disqualification was warranted); In re Meador, 968 S.W.2d 346 (Tex. 1998) (trial court did not abuse discretion in refusing to disqualify attorney from representing employee in sexual harassment action based on receipt of privileged materials from defendant through no wrongdoing of his own, instead ordering return of the purloined documents and agreement not to use them in the litigation; trial court on disqualification motion should consider: (1) whether the attorney knew or should have known material was privileged, (2) promptness with which attorney notifies opponent as to possession of information, (3) extent to which attorney reviewed and digested information, (4) extent to which disclosure of information would prejudice opponent, (5) extent to which opposing party may be at fault for disclosure, and (6) extent to which nonmovant will suffer prejudice from disqualification).

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

See Quinlan v. Curtiss-Wright Corporation, 8 A.3d 209 (N.J. 2010) (employee’s taking, copying and dissemination of an employer’s confidential documents can be a protected activity under New Jersey Law Against Discrimination (LAD); in determining whether the taking a dissemination of a document is protected activity the court should consider: (1) how the employee obtained the document; (2) what the employee did with the document; (3) the nature and content of the document at issue; (4) the circumstances of the disclosure and whether it was unduly disruptive to the employer; (5) the employee’s expressed reason for copying the document as opposed to requesting it through discovery; and (6) how the court’s decision impacts the public policy embodying LAD and the effect permitting or precluding the use of the documents will have on balancing the legitimate rights of both employers and employees. Compare Vaughn v. Epworth Villa, 537 F.3d 1147 (10th Cir. 2008) (although employee’s conduct in copying and providing to EEOC unredacted patient medical records was protected activity under Title VII, retaliation claim dismissed because such disclosures violated employer policy and no showing that

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4. Using Employer Computer Resources for Confidential Communications

An issue of privilege waiver is raised when an employer inspects or obtains the contents of otherwise confidential communications and other information that an employee or former employee has stored or created using the employer’s computer equipment or files. Generally, the waiver question will hinge on whether the employee had a reasonable expectation that the communications or information stored on the employer’s equipment would be confidential. Where the employer provided effective notice to employees that it monitors (or reserves the right to monitor) use of its electronic equipment, including the content of emails that are created, read or stored using its computer equipment, the courts have found that the employee has no reasonable expectation of privacy with respect to such communications.\(^\text{181}\)

\(^{181}\) See Holmes v. Petrovich Dev. Co., 191 Cal. App. 4th 1047 (2011) (client did not have a reasonable expectation of privacy in her communication with her attorney using her employer’s company email account and her employer’s computer, and thus the communications were not covered by the attorney-client privilege in employee’s subsequent lawsuit against her employer and supervisor, even though employee used a private password to use the computer and deleted the emails after they were sent, the employee had been warned that the account was to be used only for company business, and that the emails were not private, and that the company would randomly and periodically monitor its technology resources to ensure compliance with the policy, absent evidence that the employee knew for a fact that employer never actually monitored email); Farris v. International Paper Inc., 2014 WL 6473273 (C.D. Cal. Nov. 17, 2014) (emails sent by and to an attorney from a company computer not privileged in light of company policy stating that activities on its computers were not private and could be monitored by the employer; nevertheless, court excluded evidence of communications between and his attorney on relevance grounds); In re Information Mgt. Serv., Inc., 81 A.3d 278 (Del. Ch. 2013) (attorney-client privilege did not extend to corporate executive’s emails with her personal lawyer because he sent email through the company’s email account; company maintained a policy that it may monitor employee emails, which nullified the executive’s reasonable expectation of privacy); Alamar Ranch, LLC v. County of Boise, 2009 WL 3669741 (D.Idaho Nov. 2, 2009) (Member of group waived the privilege for email messages she sent from her work computer to her attorney, where the employer put all employees on notice that their e-mails would become employer’s property, be monitored, stored, accessed and disclosed by the employer, and (3) should not be assumed to be confidential; under such circumstances, “[i]t is unreasonable for any employee in this technological age-and particularly an employee receiving the notice the employee received-to believe that her e-mails, sent directly from her company’s e-mail address over its computers, would not be stored by the company and made available for retrieval. With regard to the e-mails the attorney sent to her, there is no question that her email address, that included the employer’s name, clearly put the attorney on notice that he was using her work e-mail address, and employer monitoring of work-based e-mails was so ubiquitous that the attorney should have been aware that the employer would be monitoring, accessing, and retrieving e-mails sent to that address. However, emails that were sent to the attorney by other members of the group with copies to the employee at her work email address, were not waived because there was no evidence that these group members were aware or should have been aware that by copying the employee they were exposing their emails to the scrutiny of the employee’s employer); In re Reserve Fund Securities and Derivative Litigation, 275 F.R.D. 154 (S.D.N.Y. 2011) (Vice president of money market fund had no reasonable expectation of privacy in email communications he sent to his wife using company email system, and thus communications were not protected by marital communications privilege in SEC enforcement action against the fund’s advisors and principals, where company banned personal use of its email system, had reserved its right to access employee email, had warned employees that email sent over company’s system might be subject to disclosure to regulators and courts, and vice president was aware of these policies; company’s policy explicitly stated that employees “should limit their use of e-mail resources to official business,” that company “reserves the right to access an employee’s e-
Some courts held that the privilege applied to an employee’s communication with her attorney using the employer’s computer equipment (such as an employer-issued laptop) where

mail for a legitimate business reasons or in conjunction with an approved investigation,” and that employees’ email communications would be automatically saved and were subject to review; Orbit One Communications, Inc. v. Numerex Corp., 255 F.R.D. 98 (S.D.N.Y. 2008) (predecessor corporation’s executive did not waive attorney-client privilege under New York law for confidential communications concerning Requisition Agreement stored on his work computer, after title to computer passed to successor corporation in acquisition transaction, since executive had reasonable expectation of confidentiality in communications that were never accessible to successor corporation); Scott v. BethIsrael Medical Ctr., 847 N.Y.S.2d 436 (N.Y. Sup. 2007) (physician’s email communications with his attorney, using hospital’s email system, were not made in confidence for purpose of the attorney-client privilege, where hospital’s electronic communication policy, of which physician had actual and constructive notice, prohibited personal use of the hospital’s email system and stated that the hospital reserved the right to monitor, access and disclose communications transmitted on hospital’s email server at any time without prior notice); Kaufman v. SunGard Inv. Sys., 2006 WL 1307882 (D. N.J. May 10, 2006) (because plaintiffs received notice of defendant’s email monitoring policy, plaintiffs waived any privilege claims by using defendant’s email system to send and receive privileged communications); Thygeson v. Bancorp., 2004 WL 2066746 (D. Ore. Sept. 15, 2004) (employee had no reasonable expectation of privacy in files he stored in his personal folder on his computer and in his personal e-mail account because his employer had an “explicit policy banning personal use of office computers and permitting monitoring” and because the employer retrieved such information by accessing its own computer network); United States v. Hamilton, 778 F.Supp.2d 651 (E.D.Va. 2011) (public school employee lacked objectively reasonable expectation of privacy, for Fourth Amendment purposes, in e-mails between him and his wife that were stored on his work computer, since, at time search warrant for his work computer was executed, he was on long-standing notice that contents of his computer were subject to inspection; although the e-mails were exchanged prior to defendant’s employer’s adoption of computer use policy, employer subsequently adopted computer use and privacy policy providing that all information created, sent, received, or stored in employer’s computer system was subject to inspection and monitoring at any time as authorized by Superintendent or designee, and forms acknowledging policy were electronically signed in defendant’s name on his computer); Banks v. Mario Industries of Virginia, Inc., 650 S.E.2d 687 (Va. 2007) (manager’s pre-resignation memorandum to his attorney, which was written using lighting company’s computer and which was retrieved by company by a forensic computer expert, was not protected by the attorney-client privilege; pursuant to company’s employee handbook, employees could use work computers for personal business, but there was no expectation of privacy regarding the computers); Aventa Learning, Inc. v. K12, Inc., 830 F.Supp.2d 1083 (W.D. Wash. 2012) (Under Washington law, materials that vice president of company had saved or stored on his company-issued laptop, including emails contained privileged communications and materials created prior to his employment, were not protected by the attorney-client privilege, since he had no reasonable expectation that the materials were confidential and would be kept confidential; laptop was not his property, and pursuant to company policy, company reserved right to access and disclose any file or stored communication on the device at any time, including web-based personal email accounts accessed through employer-issued computer or laptop); Sims v. Lakeside School, 2007 WL 2745367 (W.D. Wash. Sept. 20, 2007) (plaintiff employee had no reasonable expectation of privacy in the contents of the laptop that was furnished by defendant school, including emails he sent and received on his school email account, since the school’s employee manual was unequivocally clear that user accounts are the property of the school and that the school does not ensure the confidentiality of its employee email records; however, the court found that any web-based emails generated by plaintiff and any material he created to communicate with his attorney and his spouse are protected by the attorney-client and spousal communication privileges; notwithstanding the school’s policy in its employee manual, “public policy dictates that such communications shall be protected to preserve the sanctity of communications made in confidence”); Hanson v. First National Bank, 2011 WL 5201430 (S.D. W.Va. Oct. 13, 2011) (bank president who sent emails to his own criminal defense lawyer through the bank’s computer system implicitly waived the attorney-client privilege as to those communications). Cf. United States v. Hamilton, 701 F.3d 404 (4th Cir. 2012) (Defendant waived the marital communications privilege by communicating with his wife on his workplace computer, through his work email account, and subsequently failing to safeguard the emails; defendant did not take any steps to protect the emails, even after he was on notice of his employer's policy permitting inspection of emails stored on the system at the employer's discretion).

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the employee used a third-party service and the employer’s policy did not specifically address the use in question.\textsuperscript{182} To avoid any arguments premised on a “reasonable expectation of

\textsuperscript{182} United States v. Hudson, 2013 WL 4768084 (D. Kan. Sept. 5, 2013) (employees do not waive the privilege in materials on their work computers simply because the employer can monitor their communications); Curtio v. Medical Communications, Inc., 2007 WL 1452106 (E.D. N.Y. May 15, 2007) (former employee had not waived her right to assert the attorney-client privilege and work product immunity concerning documents allegedly retrieved from employer-owned laptops used by the employee during her employment as a home office; employee took reasonable precaution to prevent inadvertent disclosure in that she sent the emails at issue through her personal AOL account which did not go through the company’s servers and she attempted to delete the material before turning in the laptop, the volume of material was relatively limited, and the employee promptly requested return of the emails upon notification); Fiber Materials Inc. v. Subilia, 974 A.2d 918 (Me. 2009) (Supreme Judicial Court criticized company’s attorneys for unilaterally examining and publicizing apparently privileged memorandum found on a company laptop used by its then president. Each page of memorandum was stamped with the legend “Attorney-Client Privilege/Confidential Work Product.”); National Econ. Research Assoc. v. Evans, 2006 WL 2440008 (Mass. Super. Ct. Aug. 3, 2006) (privilege attached to emails sent by an employee to his personal attorney from a private non-work email account while using his work computer; although the employer warned employees that the computer belonged to the employer and employer had access to employee emails, the warnings only dealt with work emails and the logging of Internet site visits, and did not suggest that such communications such as those engaged in by the employee would or could be monitored: “[I]f an employer wishes to read an employee’s attorney-client communications unintentionally stored in a temporary file on a company-owned computer that were made via a private, password-protected email account accessed through the Internet, not the company’s Intranet, the employer must plainly communicate to the employee that: (1) all such emails are stored on the hard disk of the company’s computer in a “screen shot” temporary file; and (2) the company expressly reserves the right to retrieve those temporary files and read them”); Mason v. ILS Techs., LLC, 2008 WL 731557 (W.D. N.C. February 29, 2008) (attorney-client privilege was not waived where the employee testified that he did not know of the employer’s policy on monitoring of personal emails transmitted on the employer’s email system and employer failed to prove otherwise). Cf. Stengart v. Loving Care Agency, Inc., 990 A.2d 650 (N.J. 2010) (Emails exchanged by employee and her attorney through her personal, password-protected web-based email account were protected by the attorney-client privilege, even though emails were sent via employer’s computer and a version of employer’s handbook purported to transform private emails into company property. By using a personal email account and not saving the password, employee had a subjective expectation of privacy which was objectively reasonable in light of the ambiguous language of the employer’s policy—which referred to company email accounts and did not warn employees that personal, web-based emails are stored on a hard drive and can be forensically retrieved and read, even while permitting “occasional personal use” of email—and the attorney-client privilege. Even with an unambiguous policy allowing employer to retrieve and read an employee’s privileged communications if accessed on a personal, password protected email account would not be enforceable. Actions of employer’s counsel in employment discrimination action by employee, in forensically retrieving and proceeding to read attorney-client e-mail communications sent by employee over employer’s computer without alerting employee that employer’s counsel was in possession of the e-mails and giving employee an opportunity to argue that the communications were privileged, were inconsistent with professional conduct rule relating to receipt of a document that a lawyer has reasonable cause to believe was inadvertently sent, even if employer’s counsel had good-faith belief based on employer’s policy that the e-mails were not protected by any privileged.); Convertino v. U.S. Dept. of Justice, 674 F.Supp.2d 97 (D.D.C. 2009) (Department of Justice (DOJ) employee’s expectation of privacy in e-mails sent to his personal attorney through his work e-mail account was reasonable, and therefore e-mails were protected from discovery by attorney-client privilege; DOJ maintained a policy that did not ban personal use of the company e-mail, and although the DOJ had access to personal e-mails sent through his account, employee was unaware that department would be regularly accessing and saving e-mails sent from his account.); Pure Power Boot Camp v. Warrior Fitness Boot Camp, 587 F. Supp.2d 548 (S.D. N.Y. 2008) (Employer’s access of employee’s personal e-mails, which were stored and accessed directly from accounts maintained by outside electronic communication service provider, was unauthorized, and thus violated Stored Communications Act (SCA); employee, who did not store any of those communications on the employer’s computers, servers, or systems and who did not send or receive such communications through the company e-mail system or computer, had a reasonable expectation of privacy in his personal e-mail accounts, which were protected by passwords, since nothing in employer’s policy
privacy,” employers should emphasize in their email and electronic communication policies that communications sent through third-party email services are equally subject to monitoring. Even assuming that an employee’s communications with her attorney using the employer’s computer equipment is privileged, employer’s counsel may not have an obligation to notify the employee’s counsel about the discovery of these communications, since the “inadvertent disclosure” rules do not necessarily apply.

even suggested that if an employee simply viewed a single, personal e-mail from a third party e-mail provider, over employer’s computers, then all of the his personal e-mails on whatever personal e-mail accounts he used, would be subject to inspection, and employee did not give implied consent to search his e-mails by leaving his login information stored on employer’s computers where it could be discovered and used by employer.; 2012 N.C. Formal Ethics Op. No. 5 (2012) (a lawyer representing an employer must evaluate whether email messages an employee sent to and received from the employee’s lawyer using the employer’s business email system are protected by the attorney-client privilege and, if so, decline to review or use the messages unless a court determines that the messages are not privileged.). Compare Fazio v. Temporary Excellence, Inc., 2012 WL 300634 (N.J. Super. A.D. Feb. 2, 2012) (in contrast to the employee in Stengart, plaintiff took no steps whatsoever to shield the e-mails from his employer; instead he repeatedly sought legal advice about the negotiation for the purchase of TEI using his employer’s own e-mail system on its own computer equipment, and did not password-protect those communications. Under these circumstances, he had no reasonable subjective expectation of privacy.).

To avoid potential employee privacy claims, employer policies should clearly warn the employee concerning the degree to which the employer may (or will) review otherwise private employee communications. See Brooks v. AM Resorts, LLC, 954 F. Supp.2d 331 (E.D. Pa. 2013) (Genuine issue of material fact existed as to whether employer obtained privileged email exchange by accessing his Microsoft Hotmail email account, an act that qualifies as a violation under the Stored Communications Act); Lazette v. Kulmatycki, 949 F. Supp.2d 748 (N.D. Ohio 2013) (That employer informed employee that her e-mail might be monitored on her employer-issued smartphone did not provide implied consent for supervisor to read all her personal e-mail over 18 months after employee returned smartphone upon leaving employer, as required for her Stored Communications Act claims against employer and supervisor).

See, e.g., ABA Formal Ethics Op. No. 11-460 (2011) (When an employer’s lawyer receives copies of an employee’s private communications with counsel, which the employer located in the employee’s business e-mail file or on the employee’s workplace computer or other device, neither Rule 4.4(b) nor any other Rule requires the employer’s lawyer to notify opposing counsel of the receipt of the communications. However, court decisions, civil procedure rules, or other law may impose such a notification duty, which a lawyer may then be subject to discipline for violating. If the law governing potential disclosure is unclear, Rule 1.6(b)(6) allows the employer’s lawyer to disclose that the employer has retrieved the employee’s attorney-client e-mail communications to the extent the lawyer reasonably believes it is necessary to do so to comply with the relevant law. If no law can reasonably be read as establishing a notification obligation, however, then the decision whether to give notice must be made by the employer-client, and the employer’s lawyer must explain the implications of disclosure, and the available alternatives, as necessary to enable the employer to make an informed decision). Cf. Tse v. UBS Fin. Servs., Inc., 2005 WL 1473815 (S.D. N.Y. June 21, 2005) (where defendant employer found diskette belonging to plaintiff at her work station, after her employment ended, which contained letter she had written to her attorney; the letter had not been inadvertently disclosed to defendant and, therefore, there was no waiver of the attorney-client privilege; the letter was stored out of sight, on a disk, inside a file folder in the plaintiff’s work area; it was not printed out or stored in any way that made it easily accessible, or even its existence known, to a third party; a quick glance at the disk’s label indicated it contained personal documents; it was not unreasonable for plaintiff to have assumed that the disk, so clearly identifiable as a personal belonging, would have been returned to her by her employer, and therefore, when it was not returned, to assume that the disk was not in her employer’s possession and that no steps were required to seek its retrieval).
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EEO CASELAW UPDATE

OCTOBER 21-24, 2015

OJAI, CALIFORNIA
EMPLOYMENT DISCRIMINATION LAW UPDATE

By

Paul Grossman
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EMPLOYMENT DISCRIMINATION LAW UPDATE

By

Paul Grossman*

This is a supplement to Lindemann, Grossman & Weirich, Employment Discrimination Law (5th ed. 2013), and the 2014 Supplement put out by the ABA Section of Labor and Employment Law (Debra A. Millenson, Richard J. Gonzalez, and Laurie E. Leader, Executive Editors). It is organized by book chapters. The 2014 Supplement includes Court of Appeals decisions through 2012 and Supreme Court cases through June 30, 2013. With a few exceptions, this update begins with cases decided after January 1, 2013. It focuses almost exclusively on Court of Appeals and Supreme Court decisions.

Disparate Treatment (Ch. 2)

Summary Judgment Standards

Miller v. St. Joseph Cnty., 788 F.3d 714, 127 FEP 448 (7th Cir. 2015) – Summary judgment against police officer who claimed unpleasant assignment to sort guns in police department’s property room constituted racial discrimination – Posner Opinion – “Someone” had to do that job – no change in pay or benefits – summary judgment because of a lack of evidence tying multiple adverse employment decisions to race – Posner joined Judge Diane Wood in advocating abandonment of the cumbersome direct and indirect method of proving discrimination – to defeat summary judgment a plaintiff should be required to show membership in a protected class, an adverse employment action, and that a jury reasonably could find that the adverse action was taken because of protected status and not for a non-discriminatory reason.
Thomas v. Johnson, 788 F.3d 177, 127 FEP 335 (5th Cir. 2015) – Provisionary border patrol agent terminated for lack of candor – was found to have lied about events of possible misconduct relating to others – lack of candor is a legitimate basis for termination.

Mintz v. Caterpillar Inc., 788 F.3d 673, 127 FEP 317 (7th Cir. 2015) – Summary judgment in race disparate treatment case affirmed – no prima facie case since employee not meeting employer’s legitimate expectations – employer expected zero errors of a particular type, and plaintiff, an engineer, had many errors – he admitted his record was “bad” – thus he did not “raise a genuine issue of fact as to whether he was meeting Caterpillar’s legitimate expectations,” 788 F.3d at 680 – Moreover, even if he could meet that burden, he has not identified any other employee with a similar record whom Caterpillar treated more favorably – plaintiff argument that Caterpillar’s expectations were unreasonable rejected – “A federal court does not sit as a ‘super personnel department,’ second-guessing an employer’s legitimate concerns about an employee’s performance,” id.

Washington v. American Airlines, Inc., 781 F.3d 979, 126 FEP 1057 (8th Cir. 2015) – Five whites and one black applied for a machinist position, which required satisfactory completion of an examination – four of the whites, who passed, were not comparable, because they were tested by a different examiner – the examiner who flunked the plaintiff also flunked the white applicant he tested – this negated any racial motivation.

Simpson v. Beaver Dam Cmty. Hosps., Inc., 780 F.3d 784, 126 FEP 648 (7th Cir. 2015) – Summary judgment affirmed against black physician denied staff privileges – comments by member of credentials committee about plaintiff’s disruptive behavior and being a “bad actor,” and that plaintiff might be a “better fit” elsewhere, are not, under the facts of this case, indicative of racial discrimination – it was undisputed that plaintiff was put on academic probation while in residency, that there were two uninsured medical malpractice claims against him, and that the credentials committee received a negative reference from a staff member
at one of plaintiff’s former employers – “[R]ather than refuting the facts that underlie the [hospital’s] concerns, [plaintiff] simply argues that the concerns should not have mattered[,]” 780 F.3d at 798-99 – “That is his view, but the Credentials Committee is entitled to its own view, provided it is not based on an impermissible animus such as race. And the record does not raise a reasonable inference that it was[,]” id. at 799.

_Estate of Bassatt v. Sch. Dist. No. 1_, 775 F.3d 1233, 125 FEP 1171 (10th Cir. 2014) – Hispanic student teacher terminated for masturbating in school parking lot – Hispanic supervisor was decisionmaker – plaintiff had previously complained of discrimination – Administrative Agency found retaliation – not binding since not reviewed by a court – summary judgment for School District – “the relevant inquiry is whether [the Hispanic decisionmaker] subjectively, but honestly, believed that [the employee] had engaged in the misconduct,” 775 F.3d at 1241 – in addition, “Sanchez is Latino, and we conclude that this undermines any suggestion of pretext,” id. – decisionmaker was a founding member of a group that advocates for Latinos in education.

_Moody v. Vozel_, 771 F.3d 1093, 125 FEP 261 (8th Cir. 2014), cert. denied, 135 S. Ct. 2814 (2015) – White male employee discharged for sexual harassment – irrelevant if co-worker’s statement was motivated by racial animus since co-worker is not decisionmaker and no link between statement and employer’s decision to terminate – no evidence employer believed harassment allegations were false – other employees who engaged in harassment and were not terminated were not similarly situated.

_Gosey v. Aurora Med. Ctr.,_ 749 F.3d 603, 122 FEP 665 (7th Cir. 2014) – Race discharge summary judgment reversed – Plaintiff fired for four instances of tardiness following a warning – the company’s own record show that she was not tardy on three of the four dates – “A trier of fact could thus find that the company’s explanation for firing Gosey was not simply mistaken, but false.” 749 F.3d at 608 – Summary judgment affirmed on harassment claim even assuming harassment was of sufficient severity or pervasiveness – no evidence harassment based on race.
Lobato v. N.M. Env’t Dep’t, Envtl. Health Div., 733 F.3d 1283, 120 FEP 989 (10th Cir. 2013) – No cat’s paw liability – supervisor called Hispanic plaintiff “f***ing Mexican” – reliance on Staub – plaintiff contends that Staub has announced a categorical rule that if a biased supervisor’s animus in any way leads to an adverse employment decision, it is the proximate cause even if there is an independent investigation – “Staub does not go this far,” 733 F.3d at 1294 – Staub explained that a necessary element of a claim is the decisionmaker’s uncritical “reliance” on facts provided by a biased supervisor – “If there is no such reliance – that is to say, if the employer independently verifies the facts and does not rely on the biased source – then there is no subordinate bias liability,” id. – Staub recognized the problem that a biased supervisor will frequently initiate an investigation but the decision will be made independently by others – in Staub the court explained “the supervisor’s biased report may remain a causal factor if the independent investigation takes it into account without determining that the adverse action was, apart from the supervisor’s recommendation, entirely justified,” id. (emphasis in original) – “In short, an employer is not liable under a subordinate bias theory if the employer did not rely on any facts from the biased subordinate in ultimately deciding to take an adverse employment action—even if the biased subordinate first alerted the employer to the plaintiff’s misconduct,” 733 F.3d at 1295 – in Staub there was a claim of falsification and the HR Rep did not follow up – here there is no evidence the decisionmakers relied upon the biased supervisor’s version of the facts – “Because there is no genuine dispute that [the employer] decided to dismiss [the plaintiff] after conducting an independent investigation without relying on facts from [the biased supervisor], we conclude this theory of Title VII liability fails,” id. at 1296 – summary judgment affirmed.

Perez v. Thorntons, Inc., 731 F.3d 699, 120 FEP 1 (7th Cir. 2013) – Convenience store employee sold herself $127 worth of candy for $12 and was fired – summary judgment reversed – only a few months earlier plaintiff’s non-Hispanic male supervisor committed a similar act and was merely warned – a jury must hear employer’s evidence “and decide why [the employer] chose to treat arguably similar wrongdoing so differently,” 731 F.3d at 700 – our circuit has jettisoned the “direct/indirect paradigm” in favor of a simple analysis of whether a reasonable jury could infer prohibited discrimination – to use comparative evidence, “a plaintiff must identify at least one employee who is directly comparable to her in all material respects,” 731 F.3d at 704 – but the comparator does not have to
be identical in every conceivable way – the courts must conduct a commonsense examination – her supervisor covered up theft from the store – employer said that the supervisor’s conduct was not comparable because there was no actual economic harm – “[a] jury might buy that explanation, but we cannot resolve that issue on summary judgment,” id. – supervisor covered up larger economic loss and acted in secret whereas we must assume that the discounted candy bars were bought with the supervisor’s consent – 2 to 1 decision – decisionmaker both hired and promoted the plaintiff before he fired her – same decisionmaker argument will be considered by the jury – the assumption that since the decisionmaker was unbiased at Time A when he hired the plaintiff he must also have been unbiased at Time B “is not a conclusive presumption, but we treat it as a reasonable inference,” 731 F.3d at 710.

*Pearson v. Mass. Bay Transp. Auth.*, 723 F.3d 36, 119 FEP 1 (1st Cir. 2013) – Opinion by Associate Justice Souter sitting by designation – summary judgment affirmed on claims of discrimination – arbitrator’s decision overturning discharge not inconsistent with summary judgment – “it simply means that [plaintiff] should not have been fired because [the supervisor’s] directive was ambiguous: there [was] no intimation that the firing had been motivated by racial animus,” 723 F.3d at 41 – to defeat summary judgment plaintiff had to offer some minimally sufficient evidence both of pretext and animus – repeated insubordination is a legitimate non-discriminatory reason – decisionmaker was also African-American. [NOTE – retaliation portion of case discussed in retaliation chapter.]

*Johnson v. Koppers, Inc.*, 726 F.3d 910, 119 FEP 673 (7th Cir. 2013) – Summary judgment affirmed against employee with history of outbursts – in latest outburst, she was terminated for pushing a co-worker – she clearly does not meet the company’s legitimate job expectations even if her work was satisfactory – relevant inquiry is not whether she admitted to shoving the co-worker, or whether she did shove the co-worker, but whether the decisionmaker genuinely believed that she had engaged in the conduct.
Evance v. Trumann Health Servs., LLC, 719 F.3d 673, 118 FEP 1532 (8th Cir.), cert. denied, 134 S. Ct. 799 (2013) – Pentecostal nurse working in nursing home terminated for inappropriate sexual contact with 80-year old resident – she claimed no one ever terminated because of inappropriate sexual contact initiated by the patient – this is not a substitute for comparative evidence – to establish unlawful discrimination she must show that the alleged comparators were similarly situated in all relevant respects – they must have had the same supervisor, been subject to the same standards, engaged in the same conduct without any mitigating or distinguishing circumstances – general allegations are insufficient – only she was accused of misconduct, and investigated by the police.

Muor v. U.S. Bank, N.A., 716 F.3d 1072, 118 FEP 1537 (8th Cir. 2013) – Cambodian banking specialist did not produce proper comparative evidence – comparators not similarly situated in that she did not show that they made the same errors, made errors as frequently, or that their level of experience was commensurate to hers – comment about “slanty eyes” was made years before the decisionmaker was promoted to become a supervisor.

Kuhn v. Washtenaw Cnty., 709 F.3d 612, 117 FEP 935 (6th Cir. 2013) – An extensive internal investigation is not an adverse employment action – black deputy sheriff was accused of rape – full investigation exonerated him – he contended that the mere fact of the investigation was a material adverse action, and he was entitled to a trial on the question of whether it was motivated by race discrimination – he claimed the investigation was not in good faith – no basis for a court imposing a good faith requirement on an employer conducting an internal investigation – “[s]uch an inquiry into the employer’s subjective motive would be contrary to the objective analysis of whether an employment action is adverse,” 709 F.3d at 626.

Haire v. Bd. of Supervisors of La. State Univ., 719 F.3d 356, 118 FEP 917 (5th Cir. 2013) – Summary judgment for employer reversed and case remanded for trial on “cat’s paw” theory – male in LSU Police Department chosen for promotion over female despite the fact that she was a college graduate and he was not – decisionmaker was new to the college – claimant’s immediate supervisor had made sexist statements and ordered her to enter information that supervisor later claimed to decisionmaker violated University policy – cat’s paw theory applicable.
when biased supervisor has influence over the official decisionmaker – remanded for trial.

Ross v. Jefferson Cnty. Dep’t of Health, 701 F.3d 655, 116 FEP 930, 27 A.D. Cas. 1 (11th Cir. 2012) – Summary judgment properly granted on black employee’s race discrimination claim since she waived her complaint of racial discrimination when she was asked whether she “felt like her termination had anything to do with her race” and she responded “no.” 701 F.3d at 661 (alterations omitted).

Autry v. Fort Bend Indep. Sch. Dist., 704 F.3d 344, 116 FEP 1582 (5th Cir. 2013) – White woman without college degree hired from outside in lieu of promoting African-American plaintiff with college degree – decision based on subjective ranking of multiple interviewers – in order to infer discrimination the unsuccessful plaintiff must be “clearly better qualified” - two allegedly racial comments about President Obama – one was purely political – the other “was without force in the face of a motion for summary judgment,” 704 F.3d at 349.

Hicks v. Johnson, 755 F.3d 738, 123 FEP 473 (1st Cir. 2014) – Summary judgment affirmed in promotion case – plaintiff failed to rebut that successful candidate had better interview scores – the contention that interview panel used overly subjective questions rejected – candidates were asked the same 20 questions – three-member interview panel – each scored their answers on a three-point scale – one interviewer favored plaintiff 50-49, the other two favored the white male candidate 54-48 and 45-44.

General

Fatemi v. White, 775 F.3d 1022, 125 FEP 1138 (8th Cir. 2015) – A female doctor was terminated from neurosurgical residency and alleged sex discrimination – no woman had ever successfully completed the program – she was terminated because of multiple complaints about her behavior and professionalism which included walking out on surgeries – summary judgment affirmed – assertion that male residents had engaged in similar misconduct and had not been terminated from the program rejected – male
residents had different supervisors or engaged in less serious conduct – within a week or so of being in the residency program she informed one doctor of her concern about gender discrimination – that doctor insisted that a third party be present when he spoke with plaintiff – with respect to no female ever having completed the program, only two entered the program – one was murdered when she was chief resident, and the other left voluntarily and testified that she did not feel that she was a victim of sex discrimination – comparative evidence fails – we do not require that the plaintiff produce evidence of a “clone” or that the comparators have engaged in exactly identical conduct – three of the comparators had incidents that occurred before the decisionmaker chaired the department – “they had a different ultimate supervisor who was the actual decisionmaker,” 775 F.3d at 1044 – the only comparator whose alleged misconduct occurred under the same decisionmaker engaged in totally different conduct – it was not of comparable seriousness – with respect to her complaint about the doctor who insisted that a third party be present, simply having someone else present during a contentious or sensitive conversation is not discriminatory or hostile – plaintiff’s contention that the hospital employer gave shifting explanations for her termination rejected – the disciplinary warnings were consistent with the basis for the termination – the plaintiff lost her position because of her many professional shortcomings as a resident, not because she is a woman.

*United States v. City of New York*, 717 F.3d 72, 118 FEP 417 (2d Cir. 2013) – Trial court granted summary judgment against New York in disparate treatment pattern-or-practice case – trial court held that conceding disparate impact of written examinations for entry level firefighters warranted summary judgment because under the Supreme Court Teamsters case unless the statistics can be rebutted the defendant loses – the trial court disregarded evidence that the exams were facially neutral and complied with acceptable test development methods – summary judgment reversed and case remanded for trial – in disparate treatment pattern-or-practice case employer may properly defend by accepting plaintiff statistics but producing non-statistical evidence that it lacked discriminatory intent – City fire commissioner not entitled to qualified immunity where trier of the fact could find that he undertook discriminatory course of action by continuing to use the results of exams despite awareness of the disparate impact – case remanded for trial before a different judge since original trial court’s rejection of City’s evidence as “either incredible or inapposite” might cause an objective observer to question his impartiality.
Rapold v. Baxter Int’l, Inc., 718 F.3d 602 (7th Cir. 2013), cert. denied, 134 S. Ct. 525 (2013) – Federal District Court properly denied plaintiff’s request for a mixed-motive instruction – plaintiff alleged an adverse employment action because of his national origin – the employer asserted that it acted because of the plaintiff’s misconduct which included yelling and screaming at co-workers – no evidence of mixed-motive – each party contended there was a single motive – refusal to give a mixed-motive instruction is reviewed for abuse of discretion – “the question of when a mixed-motive instruction is appropriate has engendered considerable confusion,” 718 F.3d at 609 – several Circuits now provide a mixed motive instruction in all Title VII cases – the District Court agreed with the employer that under the evidence the mixed-motive instruction was inappropriate – plaintiff need not concede at trial the legitimacy of the employer-stated reason to seek a mixed-motive instruction – the rule in question is not whether the plaintiff concedes that there is a legitimate reason “but whether the case overall is one where either the plaintiff or the defendant’s evidence lends itself to coexisting dual causes for an adverse employment action,” 718 F.3d at 611 – it is important to remember that a case will not always be easily identified as either “pretext” or “mixed-motive” – at some point in the proceedings the District Court must decide.

Ponce v. Billington, 679 F.3d 840, 115 FEP 1 (D.C. Cir. 2012) – Issue was burden of proof in disparate treatment – jury was instructed that plaintiff must prove that illegal discrimination “was the sole reason” but this was clarified by stating “he must prove that but for his race . . . national origin . . . or . . . his sex, he would have been hired.” (679 F.3d at 843) – “sole” was in error, but the error was harmless because of the but for instruction – “[W]e hereby banish the word ‘sole’ from our Title VII lexicon.” (id. at 846).
Adverse Impact (Ch. 3 & Ch. 4)

_Abril-Rivera v. Johnson_, 795 F.3d 245 (1st Cir. July 30, 2015) – Title VII in 42 U.S.C. § 2000e-2(h) (the “safe harbor” provision) provides in relevant part that “[n]otwithstanding any other provision . . . , it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment . . . to employees who work in different locations, provided that such differences are not the result of an intention to discriminate . . . .”

In this case employees at a FEMA facility in Puerto Rico were put on a rotational schedule when their facility was undergoing safety related repairs and then were laid off when the facility was closed – they filed a disparate impact national origin claim – the U.S. Court of Appeals 2-1 held that the above quoted provision required proof of intent, therefore barring an adverse impact claim – the dissent relied on the fact that the employer did not raise the safe harbor defense below – the majority agreed that normally this is required, but there are exceptions and found that Circuit Courts may raise issues on their own when certain conditions are met – the majority analyzed six conditions, and found that four of them were met and allowed consideration of the safe harbor defense.

_EEOC v. Freeman_, 778 F.3d 463, 126 FEP 323 (4th Cir. 2015) – The EEOC alleged that background checks had an unlawful disparate impact on black and male job applicants – district court granted summary judgment to employer after excluding the EEOC’s expert testimony as unreliable – affirmed – background checks included criminal background checks and credit history checks – under Federal Rule of Evidence 702, expert testimony is admissible if it “rests on a reliable foundation and is relevant” – “The district court identified an alarming number of errors and analytical fallacies in Murphy’s reports, making it impossible to rely on any of his conclusions”  778 F.3d at 466 – “Most troubling, the district court found a ‘mind-boggling’ number of errors and unexplained discrepancies in Murphy’s database,” _id_. at 467 – “The sheer number of mistakes and omissions in Murphy’s analysis renders it outside the range where experts might reasonably differ,” _id_. (citation and internal quotations omitted) – the concurring opinion notes that Murphy “undeniably ‘cherry-picked,’” _id_. at 470 – it notes that this is a “pattern of suspect work from Murphy” for the EEOC, including in _EEOC v. Kaplan Higher Educ. Corp._, 748 F.3d 749 (6th Cir. 2014), where Murphy’s work
was also excluded—“Despite Murphy’s record of slipshod work, faulty analysis, and statistical sleight of hand, the EEOC continues on appeal to defend its testimony.” 778 F.3d at 471— the EEOC owes duties to employers as well as employees— “[A] duty reasonably to investigate charges, a duty to conciliate in good faith, and a duty to cease enforcement attempts after learning that an action lacks merit,” id. at 472 (citation and internal quotations omitted)— “That the EEOC failed in the exercise of this . . . duty in the case now before us would be restating the obvious,” id.  

Johnson v. City of Memphis, 770 F.3d 464, 124 FEP 1741 (6th Cir. 2014) — Police promotional process—equally-weighted test components: an investigative logic test; a job knowledge test; an application of knowledge test; a grammar and clarity test; and a video-based practical test—trial court found test job related, but ruled for plaintiffs because they were less discriminatory alternatives—court of appeal affirmed finding on job relatedness, but reversed the district court’s finding on available alternatives with a lesser impact—trial court accepted plaintiffs’ “broad suggestions [of] alternative testing modalities” as satisfying their Step-Three burden—Title VII requires that plaintiffs prove the availability of equally valid less discriminatory measures, and here the district court did not find equal validity—trial court essentially believed city should have used procedures that eliminated impact in 1996, but those procedures were comprised by security flaws—furthermore, the 1996 simulation required multiple actors to portray a two-hour law enforcement scenario that took nearly three months to evaluate more than 400 applicants—the court should have considered the city’s legitimate interests in test security and practicability in considering the plaintiffs’ alternatives—district court erred by relying solely on the past success of the 1996 process in determining that the 2002 process should have incorporated a large simulation—these legal errors improperly shifted the plaintiffs’ evidentiary burden to the city—appellate court rules as a matter of law that the plaintiffs’ purported showing of equally valid, less discriminatory alternatives is inadequate, and does not even present a triable issue—one of the alternatives allows for subjectivity, which opens the door to random results and real or perceived bias—basically, the plaintiff’s Step-Three showing was no more than “broad suggestions” which is insufficient—plaintiffs’ attack on job validity rejected in an extremely detailed opinion relying on the city’s extensive job analysis.
EEOC v. Kaplan Higher Educ. Corp., 748 F.3d 749, 122 FEP 509 (6th Cir. 2014) – Federal district court properly found that EEOC’s expert attempting to show disparate impact of credit checks “flunked” all Daubert reliability tests – expert attempted to determine the applicant’s race by looking at DMV photos – no way to show that this has been tested or to show error rates – expert’s race raters just eyeballed DMV photos to determine race – EEOC itself runs credit checks on applicants for 84 of the agency’s 97 positions – EEOC’s assertion was that Kaplan’s use of credit checks causes it to screen out more African-American applicants than white applicants pleading disparate impact – EEOC relied solely on its statistical expert – we rely primarily on Daubert factors requiring that a technique for reliability be able to be tested and furthermore, that the court can consider the known or potential rate of error – the EEOC wholly failed to provide evidence to support either of these factors – another factor is whether the theory has been subjected to peer review – no evidence supported this factor – “The EEOC brought this case on the basis of a homemade methodology, crafted by a witness with no particular expertise to craft it, administered by persons with no particular expertise to administer it, tested by no one, and accepted only by the witness himself.” 748 F.3d at 754 – the district court’s dismissal of the case was affirmed.

Adams v. City of Indianapolis, 742 F.3d 720, 121 FEP 948 (7th Cir. 2014), cert denied, 135 S. Ct. 286 (2014) – Judgment on the pleadings in disparate impact case challenging promotion procedure affirmed – no right to amend – District Court wrong in relying on lack of facially neutrally employment policy since disparate impact claims may be based on any employment policy, not just facially neutral – allegations of intentional discrimination do not defeat disparate impact claims – the judgment on the pleadings proper because the amended complaint fails to state a plausible claim through disparate impact – the amended complaint must satisfy the Twombly/Iqbal plausibility standard – but the amended complaint alludes to disparate impact in wholly conclusory terms – words like “disproportionate” “impermissible impact” are legal conclusions, not facts – “There are no allegations about the number of applicants and the racial makeup of the applicant pool as compared to the candidates promoted or as compared to the police or fire department as a whole,” 742 F.3d at 733 – “There are no factual allegations tending to show a causal link between the challenged testing protocols and a statistically significant racial imbalance . . . .” id. – no abuse of discretion in denying plaintiff’s second motion for leave to amend – summary judgment granted in disparate
treatment claims – better scores on the test is a legitimate non-discriminatory reason.

Howe v. City of Akron, 723 F.3d 651, 119 FEP 165 (6th Cir. 2013) – Injunction following trial but before final decision requiring promotion of African-American and older candidates for a fire department promotion affirmed – proper to compare promotion rates rather than exam pass rates – proper to use 4/5ths test to determine adverse impact – all that is required is a substantial likelihood of success on the merits for a preliminary injunction even though no final verdict – irreparable harm present since time in new position helps qualify for future promotions – promotion delays constitute irreparable injury.

Race and Color (Ch. 6)

Ayissi-Etoh v. Fannie Mae, 712 F.3d 572, 117 FEP 1551 (D.C. Cir. 2013) – Summary judgment in racial hostile environment case reversed – a single incident of the employer’s vice-president using the “n” word when he yelled at the employee to get out of his office “might well have been sufficient” by itself for a jury to find harassment severe or pervasive enough, according to two members of the three-member panel – “[P]erhaps no single act can more quickly alter the conditions of employment’ than ‘the use of an unambiguously racial epithet such as [the “n” word] by a supervisor[,]’” 712 F.3d at 577 (citation omitted) – the concurring member of the panel would have found that the single use of the “n” word was sufficient in and of itself to establish a hostile environment claim – although “cases in which a single incident can create a hostile work environment are rare. . . . [n]o other word in the English language so powerfully or instantly calls to mind our country’s long and brutal struggle to overcome racism[,]” id. at 579-80 (Kavanaugh, J., concurring).

Ondricko v. MGM Grand Detroit, LLC, 689 F.3d 642, 115 FEP 1300 (6th Cir. 2012) – Black casino employee terminated – her attorney alleged white female co-worker had also been guilty of a “bad shuffle” at the blackjack table – employer therefore fired white female, commenting that it did not want to do so but “how can I keep the white girl?” – racial balancing is evidence of a discriminatory motive.
National Origin and Citizenship (Ch. 7)

*Cortezano v. Salin Bank & Trust Co.*, 680 F.3d 936, 115 FEP 77 (7th Cir. 2012) – Summary judgment affirmed on claim that plaintiff fired because spouse was undocumented immigrant from Mexico – assuming without deciding that Title VII prohibits employer bias based on the race or national origin of the spouse, here the motivating factor was the illegal status of the spouse – that is not a protected Title VII category.

Religion (Ch. 9)

*EEOC v. Abercrombie & Fitch Stores, Inc.*, ___ U.S. ___, 135 S. Ct. 2028, 2015 U.S. LEXIS 3718 (June 1, 2015) – Abercrombie has a “look” policy that prohibits “caps” – it refused to hire Elauf, a practicing Muslim who wears a headscarf for religious reasons – the assistant manager informed the district manager “that she believed Elauf wore her headscarf because of her faith.” [The district manager stated] that “Elauf’s headscarf would violate the Look Policy, as would all other headwear, religious or otherwise . . . .” 135 S. Ct. at 2031. The Tenth Circuit directed summary judgment on the ground that Elauf did not inform Abercrombie of her need for a religious accommodation – the Supreme Court rejected this view, stating “an applicant need only show that his need for an accommodation was a motivating factor in the employer’s decision,” 135 S. Ct. at 2032 – Title VII does not impose a knowledge requirement, although some anti-discrimination statutes do – “an employer who acts with the motive of avoiding accommodation may violate Title VII even if he has no more than an unsubstantiated suspicion that accommodation would be needed,” 135 S. Ct. at 2033 – imposing a knowledge requirement would be to usurp the legislative function – however, “While a knowledge requirement cannot be added to the motive requirement, it is arguable that the motive requirement itself is not met unless the employer at least suspects that the practice in question is a religious practice – *i.e.*, he cannot discriminate ‘because of’ a ‘religious practice’ unless he knows or suspects it to be a religious practice. That issue is not presented in this case . . . . It seems to us inappropriate to resolve this unargued point by way of dictum, as the concurrence would do.” *Id.* at n.3.
Yeager v. FirstEnergy Generation Corp., 777 F.3d 362, 125 FEP 1685 (6th Cir. 2015) – Employee for religious reasons refused to provide social security number – employer legitimately refused to hire him – regardless of employee’s beliefs federal statute and internal revenue code requires employers to collect and provide social security numbers of their employees, and accommodation for religion does not extend that far.

Williams v. California, 764 F.3d 1002, 124 FEP 127 (9th Cir. 2014) – Community-based organizations that have contracts with state to provide care to developmentally disabled persons can be required to accompany such persons to church services even if such church service is in contradiction to the employee’s own religious beliefs and practices.

Davis v. Fort Bend Cnty., 765 F.3d 480, 124 FEP 101 (5th Cir. 2014), cert. denied, 135 S. Ct. 2804 (2015) – Employer required all technical support employees to work a weekend to install computers – Plaintiff claimed she was unable to work that Sunday morning because of a previous religious commitment – at her Pastor’s request she needed to attend a special church service to feed the community – the employer denied her request on the ground that it wasn’t based on a religious belief or practice – summary judgment for the employer was reversed 2-1 – the two judge majority found that the District Court erred because it improperly focused on “the nature of the activity itself” (feeding the poor) instead of addressing the sincerity of religious belief – the dissenting opinion found that the majority’s conclusion departed from other circuits which have held that the courts must consider both whether the belief was religious in nature and whether it is sincerely held – the dissent also found that there would be undue hardship to have a technically sophisticated supervisor absent at a crucial time.

Nobach v. Woodland Village Nursing Center, Inc., ___ F.3d ___, 127 FEP 1628, 2015 WL 4978749 (5th Cir. Aug. 20, 2015) – In original opinion, Fifth Circuit reversed jury award to plaintiff who was discharged for refusing to pray the Rosary with a patient – Supreme Court granted review and remanded for reconsideration in light of EEOC v. Abercrombie & Fitch Stores, 135 S. Ct. 2028 (2015) – Fifth Circuit reaffirms – plaintiff claimed she was discharged for exercising her religious beliefs – jury had no legally sufficient basis to find religious discrimination because claimant put forth no evidence that her employer was aware of her
religious beliefs before her discharge – “We simply cannot find evidence that, before her discharge, Nobach ever advised anyone involved in her discharge that praying the Rosary was against her religion.” 2015 WL 4978749, at *4 – if there was evidence that the employer knew that she was motivated by religious belief the jury would have been entitled to rule in her favor – post discharge knowledge not material.

Sex (Ch. 10)

Young v. United Parcel Service, Inc., ___ U.S. ___, 135 S.Ct. 1338, 126 FEP 765 (2015) – Pregnancy Discrimination Act requires that employers treat “women affected by pregnancy . . . the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work” – UPS accommodated many but not all workers with all non-pregnancy related disabilities with light duty work – claim was only disparate treatment – not disparate impact – UPS limited light duty work to (1) workers injured on the job; (2) workers with ADA covered disabilities; and (3) workers who lost their Department of Transportation (DOT) certifications – court rejects plaintiff’s claim that if the employer accommodates any subset of workers with disabling conditions, it must accommodate pregnant workers – Congress did not intend “most favored nation” status so that if the employer accommodated anybody it had to accommodate all pregnant workers – disparate treatment law normally allows an employer to implement policies that are not intended to harm members of a protected class, even if their implementation sometimes does harm those members, as long as the employer has a legitimate and non-discriminatory, non-pretextual reason for doing so – 2014 EEOC Guidelines adopted after certiorari was granted rejected – guidelines lack timing, consistency and thoroughness of consideration which is necessary to give it “power to persuade” – pregnant worker can establish a prima facie case by showing that employer did accommodate others “similar in their ability or inability to work” – the employer can then defend by relying on legitimate, non-discriminatory reasons for offering accommodation to some but not others – expense would not normally suffice – assuming a legitimate non-discriminatory reason, “the plaintiff may reach a jury . . . by providing sufficient evidence that the employer’s policies impose a significant burden on pregnant workers, and that the employer’s ‘legitimate, non-discriminatory’ reasons are not sufficiently strong to justify the burden, but rather – when
considered along with the burden imposed, give rise to an inference of intentional discrimination[,]” 135 S.Ct. at 1343 – “The plaintiff can create a genuine issue of material fact as to whether a significant burden exists by providing evidence that the employer accommodates a large percentage of non-pregnant workers while failing to accommodate a large percentage of pregnant workers[,]” 135 S.Ct. at 1355 – “This approach, though limited to the Pregnancy Discrimination Act context, is consistent with our longstanding rule that a plaintiff can use circumstantial proof to rebut an employer’s apparently legitimate non-discriminatory reasons . . . .” – “[T]he continued focus on whether the plaintiff has introduced sufficient evidence to give rise to an inference of intentional discrimination avoids confusing the disparate-treatment and disparate-impact doctrines,” id. (emphasis in original) – “We do not determine whether Young created a genuine issue of material fact . . . . We leave a final determination of that question with the Fourth Circuit . . . .” 135 S.Ct. at 1356 – five Justices, including Chief Justice Roberts, joined in the Opinion of the Court – Justice Alito concurred in Judgment – he was bothered by the fact that employees who lost their DOT certification were accommodated, even when the loss was for misconduct such as drunk driving or off the job injuries – “It does not appear that respondent has provided any plausible justification for treating these drivers more favorably than drivers who are pregnant[,]” 135 S.Ct. at 1360 – the three Justice dissent (Scalia, Thomas and Kennedy) contended that the majority conflated disparate impact with disparate treatment – “Where do the ‘significant burden’ and ‘sufficiently strong justification’ requirements come from? Inventiveness posing as scholarship – which gives us an interpretation which is as dubious in principle as it is senseless in practice[,]” 135 S.Ct. at 1361 – the Court “proceeds to bungle the dichotomy between claims of disparate treatment and claims of disparate impact,” 135 S.Ct. at 1365 – but “plaintiffs in disparate-treatment cases can get compensatory and punitive damages as well as equitable relief, but plaintiffs in disparate impact cases can get equitable relief only[,]” id. – Court does claim that the new test is somehow limited to pregnancy discrimination – “Today’s decision can thus only serve one purpose: allowing claims that belong under Title VII’s disparate impact provisions to be brought under its disparate-treatment provisions instead[,]” 135 S.Ct. at 1366.
Ambat v. City and Cnty. of San Francisco, 757 F.3d 1017, 123 FEP 773 (9th Cir. 2014) – Summary judgment for city which limited supervision of female inmates in county jails to females reversed – BFOQ defense not established at summary judgment – two-part test – first part is whether employer proved that the job qualification is reasonably necessary to the essence of its business – San Francisco did that – second part of the test is employer has the substantial basis for believing that all or nearly all men lack the necessary qualifications whether it is impossible or highly impracticable to ensure by individual testing who has the qualifications – at summary judgment second prong of test not established – total deference to the sheriff’s judgment as to what is necessary to protect female inmates not appropriate – BFOQ is very narrowly construed.

EEOC v. Houston Funding II, Ltd., 717 F.3d 425, 118 FEP 891 (5th Cir. 2013) – Female plaintiff after giving birth informed employer that she was breast feeding and asked if there was a backroom that she could use to pump milk – she apparently did not “demand” this as an accommodation but merely asked – employer discharged her – summary judgment for employer reversed – discharge because of lactation is discharge because of a medical condition related to pregnancy – this is not the same as requiring an accommodation – “Houston Funding contended [plaintiff] was fired because she inquired about whether she would be allowed to use a breast pump. Simply posing this question is not alleged to be a terminable offense. But nothing in this opinion should be interpreted as precluding an employer’s defense that it fired an employee because that employee demanded accommodations,” 717 F.3d at 430 n.7.

Covington v. Int’l Ass’n of Approved Basketball Officials, 710 F.3d 114, 117 FEP 925 (3rd Cir. 2013) – female high school basketball referee may pursue Title VII sex discrimination claim – she was excluded from officiating boys games – the Association of Referees may be deemed either employer or employment agency.
Sexual Orientation and Gender Identity (Ch. 11)

*United States v. Se. Okla. State Univ.*, ___ F.3d. ___, 2015 U.S. Dist. LEXIS 89547 (W.D. Okla. July 10, 2015) – Plaintiff was male to female transgender professor – she can sue for a hostile work environment based on her “presented gender” – summary judgment denied – allegation sufficient to state a claim for sexual harassment under Title VII.

*EEOC v. Boh Bros. Constr. Co., LLC.*, 731 F.3d 444, 120 FEP 15 (5th Cir. 2013) – Jury properly found harassment because of sex in same-sex harassment case – the harassee, a male iron worker, was viewed as not sufficiently masculine – co-workers and male supervisor taunted him tirelessly and used sexual epithets, often two to three times per day, approached him from behind and “humped him” two to three times per week, and male supervisor exposed his genitals to him on about ten different occasions.

*Dixon v. Univ. of Toledo*, 702 F.3d 269, 116 FEP 1604 (6th Cir. 2012), *cert. denied*, 134 S. Ct. 119 (2013) – Black HR official for state university terminated after writing Op Ed piece taking “great umbrage at the notion that those choosing the homosexual lifestyle are ‘civil rights victims[,]’” 702 F. 3d at 272 – No violation of free speech or equal protection in her termination – she was not similarly situated to other University officials who spoke publicly on the issue of gay rights because of the nature of her job.

*Walden v. Ctrs. for Disease Control & Prevention*, 669 F.3d 1277, 114 FEP 454 (11th Cir. 2012) – Employee assistance program counselor refused to provide counseling to employee in a same-sex relationship – counselor described herself as a “devout Christian who believes it is immoral to engage in same-sex sexual relationships” (669 F.3d at 1280) and that her religion precluded her from encouraging such a relationship – her discharge did not constitute religious discrimination.
Age (Ch. 12)

Summary Judgment, Directed Verdict, JNOV, and Reversals of Jury Verdicts

Squyres v. Heico Cos., LLC, 782 F.3d 224, 126 FEP 1317 (5th Cir. 2015) – Plaintiff sold company to defendant and part of the consideration was a three-year employment contract at $400,000 a year. When the contract ended, plaintiff, now age 70, was told the contract would not be renewed – he was offered but did not accept an independent sales representative position with a reduced $120,000 annual salary plus commissions – new position was offered at rate of pay commensurate with anticipated contribution.

Tilley v. Kalamazoo Cnty. Rd. Comm’n, 777 F.3d 303, 125 FEP 1696 (6th Cir. 2015) – Summary judgment – no age prima facie case – not replaced by younger worker – no younger employee who engaged in similar misconduct but was not terminated has been identified – furthermore, no pattern of age discrimination [“We have carefully reviewed the evidence submitted by Tilley, and we find that it falls far short of establishing a “pattern” of anything, much less a ‘pattern’ of age discrimination sufficient to satisfy the fourth prong of his prima facie case,” 777 F.3d at 308].

Widmar v. Sun Chem. Corp., 772 F.3d 457, 125 FEP 440 (7th Cir. 2014), cert. denied, 135 S. Ct. 2892 (2015) – Summary judgment affirmed – plaintiff’s basic evidence was that he was in protected age group and supervisor unfairly blamed him for numerous workplace problems, which were really the fault of others – “The problem . . . is that even if we take each and every one of these facts in the light most favorable to [plaintiff] and even if we were to attribute a nefarious motive to [the supervisor’s] conduct in each incident, we have no way of knowing whether [the supervisor] acted this way because of [plaintiff’s] age. Each and every one of these issues could arise just as easily if [the supervisor] simply did not like [plaintiff’s] personality or his style or, for that matter, his cologne. Title VII does not protect employees from poor managers or unpleasant and unfair employers.” 772 F.3d at 462 – for summary judgment purposes
plaintiff cannot create a factual dispute by stating that his job responsibilities ought to be something other than what they were – the Court cannot say whether it was reasonable for the employer to require plaintiff to be responsible for particular functions – “This Court has repeatedly stated that it is not a super-personnel department that second-guesses employer policies that are facially legitimate” 772 F.3d at 464.

*Perret v. Nationwide Mut. Ins. Co.*, 770 F.3d 336, 124 FEP 1457 (5th Cir. 2014) – Jury verdict in favor of plaintiff in constructive discharge case reversed and JNOV granted – plaintiffs were two oldest managers in region and were placed on performance improvement plans – this is insufficient to constitute a constructive discharge – needed to show working conditions would be so intolerable that a reasonable person would have been compelled to resign – did not present evidence that they were subject to demotions, reductions in pay, menial or degrading work, harassment, humiliations, or offers of early retirement.

*Johnson v. Securitas Sec. Servs. USA, Inc.*, 769 F.3d 605, 124 FEP 1293 (8th Cir. 2014), cert. denied, 135 S. Ct. 1715 (2015) – Termination of 76-year-old security guard legitimate since based on unauthorized departure from site and delay in reporting accident – insufficient evidence of pretext even though one of the three people who made the termination decision told him he was “too old” and “needed to hang up his Superman cape and retire.”

*Loyd v. St. Joseph Mercy Oakland*, 766 F.3d 580, 124 FEP 513 (6th Cir. 2014) – Summary judgment affirmed 2-1 on discharge case alleging race, sex, and age discrimination – plaintiff was on final warning for prior misconduct and hospital held an honest belief that she had committed a major infraction by not assisting staff in a confrontation with a patient – “[T]he hospital took witness statements and made a reasonable assessment . . . before terminating Loyd. The law does not require the hospital to do anything more. . . . To require otherwise would unduly frustrate an employer’s ability to terminate insubordinate employees for legitimate, nondiscriminatory reasons,” 766 F.3d at 591. “The honest belief rule provides that an employer is entitled to ‘summary judgment on pretext even if its conclusion is later shown to be mistaken, foolish, trivial or baseless[,]’” 766 F.3d at 590-91 (citation omitted).
Delaney v. Bank of Am. Corp., 766 F.3d 163, 124 FEP 317 (2d Cir. 2014) – Summary judgment in age layoff case – managers instructed to choose underperforming employees whose dismissal would have the least impact on the business – although plaintiff was the oldest member of the high-yield group and the only one to be terminated, his sales performance in that group was the worst of all employees at his level – with respect to alleged age-based comments by Bank of America managers, which were excluded as hearsay, the Second Circuit held that even if such evidence was admissible “[c]omments about another employee’s age, removed from any context suggesting that they influenced decisions regarding [plaintiff’s] own employment, do not suffice to create a genuine issue of fact as to whether age was the but-for cause of [plaintiff’s] termination[,]” 766 F.3d at 170.

Doucette v. Morrison Cnty., 763 F.3d 978, 124 FEP 1 (8th Cir. 2014) – Plaintiff contended sex plus age discrimination – although she admittedly repeatedly made billing errors, she contended the billing errors were fixable and not as serious as performance deficiencies by male co-workers who were not fired – “we do not sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgments involve intentional discrimination[,]” 763 F.3d at 983 (citation omitted) – alleged comparators conduct was too “different in type” and no evidence of frequency – comment by county sheriff who was decisionmaker that “old people shouldn’t be working in our profession because they get injured” was not sufficiently connected to the decisional process – inquiry by a supervisor as to when she planned to retire insufficient – “asking a question about someone’s retirement plans is not inherently discriminatory,” 763 F.3d at 986 – summary judgment affirmed.

Hutt v. AbbVie Prods. LLC, 757 F.3d 687, 123 FEP 1208 (7th Cir. 2014) – After six years under the supervisor who hired her, plaintiff was given new supervision – one of the new supervisor’s first acts as district manager was to ask for his employee’s dates of birth – this is not indicative of age discrimination – summary judgment affirmed since there is no direct evidence of age discrimination, and no circumstantial evidence under the indirect method – no comparables were “directly comparable.”
Teruggi v. CIT Grp./Capital Fin., Inc., 709 F.3d 654, 117 FEP 773 (7th Cir. 2013) – Summary judgment in age case – no reasonable fact finder could find for plaintiff – “The bits of evidence [plaintiff] offers, which are essentially isolated events or comments with no apparent connection to the termination decision, do not support a reasonable inference of discrimination or retaliatory discharge, either individually or collectively[,]” 709 F.3d at 656-57 – comments by decisionmaker about his retirement plans, being “old,” and being on drugs, were insufficient since they pre-dated his termination by at least 18 months and were not in reference to adverse employment action.

Sims v. MVM, Inc., 704 F.3d 1327, 117 FEP 1 (11th Cir. 2013) – Proximate causation standard for cat’s paw liability set forth in Staub v. Proctor Hosp. is not applicable to the ADEA – under Title VII and USERRA plaintiffs need only show discrimination was a “motivating factor” or a proximate cause – ADEA plaintiffs must show “but-for” causation which requires more than mere proximate causation – summary judgment affirmed in age discrimination case – McDonnell Douglas framework continues to be applicable after Gross – “It is important to note . . . the ultimate burden of persuasion remains at all times with the [employee],’” 704 F.3d at 1333 (citation omitted) – regardless of the analytical framework, a plaintiff will always survive summary judgment if he presents circumstantial evidence that creates a triable issue concerning the employer’s discriminatory intent – there is virtually no evidence that the decisionmaker who was 61-years old had age bias – every supervisor other than the plaintiff thought that plaintiff was one of the two weakest performers and should be laid off – plaintiff also argued that the decisionmaker acted as a mere cat’s paw for the immediate supervisor – even assuming that the immediate supervisor had animus there is no evidence from which this animus could be concluded to be a “but-for” cause of the termination – “[I]n light of the unanimous opinion of all persons consulted (except for [plaintiff]), we conclude that a reasonable juror could not find that Davis’s animus was a ‘but-for’ cause of [plaintiff’s] termination[,]” 704 F.3d at 1337.
Blizzard v. Marion Tech. Coll., 698 F.3d 275, 116 FEP 392 (6th Cir. 2012), cert. denied, 133 S. Ct. 2359 (2013) – Summary judgment affirmed – although alleged comparable made the same type of mistake, the consequences of the plaintiff’s mistakes were much more serious – replacement was 6½ years younger which falls between age difference of six years or less which is not significant and age difference of 10 or more years which is generally considered significant – employer honestly believed that she was not capable of using new software and had made serious mistakes.

**General Issues**

Burrage v. United States, ___ U.S. ___, 134 S. Ct. 881, 122 FEP 237 (2014) – Criminal case involving issue of “but-for” causation – the Supreme Court concluded that the Controlled Substances Act imposing mandatory 20-year sentence when the defendant’s conduct was the “but-for” cause of a death – where A shoots B who dies, A caused B’s death since “but-for” A’s conduct B would not have died – the same conclusion follows if the predicate act combines with other factors so long as the other factors alone would not have produced the death – “[I]f, so to speak, it was the straw that broke the camel’s back. Thus, if poison is administered to a man debilitated by multiple diseases, it is a but-for cause of his death even if those diseases played a part in his demise, so long as, without the incremental effect of the poison, he would have lived.” 134 S. Ct. at 888 – “Consider a baseball game in which the visiting team’s leadoff batter hits a home run in the top of the first inning. If the visiting team goes on to win by a score of 1 to 0 . . . [all] would agree that the victory resulted from the home run. . . . It is beside the point that the victory also resulted from a host of other necessary causes, such as skillful pitching . . . .” Id. “By contrast, it makes little sense to say that an event resulted from or was the outcome of some earlier action if the action merely played a nonessential contributing role in producing the event. If the visiting team wound up winning 5 to 2 rather than 1 to 0, one would be surprised to read in the sports page that the victory resulted from the leadoff batter’s early, non-dispositive home run.” Id. – We interpreted the word “because” in two different cases to require “but-for causation” under the retaliation provisions of Title VII or the ADEA – Price Waterhouse v. Hopkins did not dispense with but-for – it simply allowed a showing that discrimination was a motivating factor to shift the burden of persuasion to
the employer to establish the absence of but-for cause – this was later amended by the Civil Rights Act of 1991 – “In sum, it is one of the traditional background principles ‘against which Congress legislates’ . . . that a phrase such as ‘results from’ imposes a requirement of but-for causation.” – In the case at bar the decedent took lots of different drugs including the defendant’s heroin but nobody was prepared to say that he would have died from the heroin use alone – the government seeking to sustain the conviction appeals to a second line of cases under which an act or admission is considered to be a cause in fact if it was a substantial or contributing factor – we decline to adopt that permissive interpretation – Justices Ginsburg and Sotomayor concurred in the judgment, but reiterated their position in Nassar that in a retaliation case “because of” does not mean “solely because of.”

Karlo v. Pittsburgh Glass Works, LLC, 2014 WL 1317595 (W.D. Pa. Mar. 31, 2014) – In context of motions to decertify proposed collective action under the ADEA, district court discussed viability of age subgroup theories – every Court of Appeals to face the issue has declined to recognize the age subgroup theory with respect to disparate impact claims, id. at *16; all but two district courts have refused to recognize age subgroups, id. at *17.

Fulghum v. Embarq Corp., 778 F.3d 1147, 126 FEP 294 (10th Cir. 2015) – Employer terminated life insurance benefits for retirees – Summary judgment granted on disparate impact claims – ADEA disparate impact claims differ from Title VII because of the reasonable factor other than age defense – employer produced evidence showing 73% of all companies and 85% of non-manufacturing companies do not provide life insurance benefits to retirees – they further produced evidence that the cost reductions would not affect customer service but would assist the company in remaining competitive and profitable – the elimination of group life insurance benefits would result in cash savings of approximately $4 million, annual expense reductions of $9.4 million, and a reduction in accrued balance sheet liabilities of $72.4 million – these are reasonable factors other than age – there is no need under the reasonable factor other than age test to satisfy the standards set forth in 29 C.F.R. § 1625.10(a), which permits reductions in employee benefit plans if justified by significant cost considerations.
Tramp v. Associated Underwriters, Inc., 768 F.3d 793, 124 FEP 1285 (8th Cir. 2014) – Summary judgment in age RIF case reversed – employer wrote its healthcare carrier and stated that it expected lower premiums since it had gotten rid of its “older, sicker employees.”

Walczak v. Chi. Bd. of Educ., 739 F.3d 1013, 121 FEP 506 (7th Cir. 2014), cert. denied, 134 S. Ct. 2733 (2014) – Public school teacher sued for wrongful discharge, and lost in state court – her subsequent federal court ADEA suit was dismissed – claim preclusion – both suits involved the same parties and the causes of action in both cases arose from a single group of operative facts regardless of different theories.

Shelley v. Geren, 666 F.3d 599, 114 FEP 303 (9th Cir. 2012) – Summary judgment reversed 2-1 – district court relied on Gross v. FBL Financial Services and found insufficient facts that age was the “but for” cause of non-selection for promotion – district court declined to analyze the motion in accordance with McDonnell Douglas v. Green – prior to Gross Ninth Circuit applied McDonnell Douglas to motions for summary judgment on ADEA claims – district court’s belief that Gross changes this framework rejected – Gross involved a case that had already progressed to trial – other circuits since Gross have continued to utilize McDonnell Douglas and we join them – McDonnell Douglas shifts only the burden of production – at summary judgment plaintiff must demonstrate that there is a material genuine issue of fact as to whether the employer’s purported reason is a pretext – at trial must meet the “but for” test – triable issue of pretext raised because members of panel deciding on promotion inquired about projected retirement dates – factual dispute as to whether plaintiff was better qualified than successful candidate – conflicting explanations given for reasons of non-selection – reversed and remanded for trial – Fletcher and District Judge Wilken in majority.

Neely v. Good Samaritan Hosp., 345 Fed. App’x 39, 106 FEP 1741 (6th Cir. 2009) (unpublished) – Over-40 employee claimed race discrimination but never claimed age discrimination – district court dismissed all claims except race discrimination and referred matter to mediation – parties reached a settlement which they confirmed on the record – parties never discussed age or right to revoke in mediation – defendant prepared settlement agreement which waived rights under the ADEA and contained a clause allowing employee 21 days to consider and
seven days to revoke – employee signed agreement but revoked within seven days – district court rejected revocation on ground that there was a verbal settlement – court of appeals reversed, holding that it did not matter that there was no age issue – the written agreement expressly allowed revocation – employer clearly wanted to protect itself against any theoretical age claim since plaintiff was over 40 – does not matter that right to revoke was not bargained for – once there was an ADEA release right to revoke was required by law.

Disability/Handicap (Ch. 13)

General

EEOC v. Beverage Distribs. Co., 780 F.3d 1018, 31 A.D. Cas. 541 (10th Cir. 2015) – Judgment for EEOC in direct threat reversed – erroneous jury instruction – employer asserting the direct threat defense must prove only that it reasonably believed that an impaired worker’s job performance would pose a “significant risk of substantial harm” to himself or others, not that the threat actually existed – employee in question was legally blind and wanted to work in a warehouse job – employer reasonably determined he posed a significant risk of substantial harm.

Walz v. Ameriprise Fin., Inc., 779 F.3d 842, 31 A.D. Cas. 573 (8th Cir. 2015) – Plaintiff fired for spate of erratic and disrespectful actions – no disability claim since bipolar disorder wasn’t apparent to employer and plaintiff failed to inform the company of her condition or the work limitations it caused her – ability to work well with others was essential job function.

Jarvela v. Crete Carrier Corp., 776 F.3d 822, 31 A.D. Cas. 313 (11th Cir. 2015) – Employee with alcohol problem checked himself into treatment facility, was released, and cleared for work. The diagnosis was “alcohol dependence” and suggested Alcoholics Anonymous meetings. There was testimony that an alcoholic remains an alcoholic for the remainder of their life. Despite being cleared for work, he was fired upon his return. He was an over the road truck driver and DOT regulations require “no current clinical diagnosis of alcoholism”. The question was whether this was a
current clinical diagnosis of alcoholism. Summary judgment was affirmed because the diagnosis, even though he was cleared for work only one week prior to the discharge.

*Felkins v. City of Lakewood*, 774 F.3d 647, 31 A.D. Cas. 15 (10th Cir. 2014) – Plaintiff claimed fractures were due to bone disease – summary judgment properly granted since employee did not provide medical evidence supporting allegation that she had such a disease or explaining how it substantially limited major life activities – lay testimony regarding the effects of her condition was inadmissible.

*Associated Builders and Contractors, Inc. v. Shiu*, 773 F.3d 257, 30 A.D. Cas. 1793 (D.C. Cir. 2014), cert. denied, 135 S. Ct. 2836 (2015) – The OFCCP’s final rule requiring federal contractors to invite job applicants to identify themselves as qualified individuals with disabilities and with a seven percent utilization goal for employment of such individuals is not illegal because it does not limit affirmative action to those individuals who have been offered jobs – rule not arbitrary and capricious since OFCCP not required to show continuing disparity in contractor’s employment of disabled individuals – rule does not preclude construction contractors from making case-by-case hiring decisions.

*Curley v. City of N. Las Vegas*, 772 F.3d 629, 30 A.D. Cas. 1811 (9th Cir. 2014) – Hearing impaired employee who made violent threats against co-workers and engaged in other unacceptable job activities did not establish that past threats of violence were pre-textual despite medical determination from fitness for duty examination that he was not dangerous – discharge was for past threats rather than danger of future violence – City not required to show he posed direct threat given that past threats alone justified discharge – disputing only one of multiple reasons for summary judgment insufficient to defeat summary judgment.

*Taylor-Novotny v. Health Alliance Med. Plans, Inc.*, 772 F.3d 478, 125 FEP 646 (7th Cir. 2014) – Claims of disability discrimination, failure to accommodate, and race discrimination were all foreclosed by black employees repeated instances of being late or absent – contention that case law establishes that regular attendance is not an essential function for
every job – plaintiff failed to establish that regular attendance was not required in someone for her position – an employer is generally permitted to treat regular attendance as an essential job requirement and need not accommodate erratic or unreliable attendance – “The ADA provides that ‘consideration shall be given to the employer’s judgment as to what functions of a job are essential.’” 772 F.3d at 490. – Here, the employer considered it essential that the employee be accessible at regular times to supervisors, staff, and customers, whether working at home or in the office.

*Weaving v. City of Hillsboro*, 763 F.3d 1106, 30 A.D. Cas. 673 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 1500 (2015) – City police sergeant’s attention deficit and hyperactivity disorders were not ADA protected disabilities – jury award on ADA unlawful discharge claim reversed – not substantially limited in his ability to work – lack of evidence that his condition effected ability to work and his technical competence as police officer – career-long interpersonal difficulties did not constitute substantial impairment of his ability to interact with others.

*Wetherbee v. Southern Co.*, 754 F.3d 901, 29 A.D. Cas. 1697 (11th Cir. 2014) – Tentative job offer rescinded after employee acknowledged bi-polar disorder – ADA revision covering employer’s use of post-offer medical exams and inquiries have limited to those who are actually disabled as defined by the ADA – since plaintiff acknowledged that he couldn’t show he was a qualified individual with a disability, his claim that he was unlawfully excluded from employment failed.

*Jones v. City of Boston*, 752 F.3d 38, 122 FEP 1189 (1st Cir. 2014) – Police Department fired officers whose hair tests showed use of cocaine – ADA challenge rejected on summary judgment – “[N]o jury could reasonably conclude that the department was motivated by a perception that plaintiffs were addicted to drugs,” 752 F.3d at 59 – distinction between use of drugs and being an addict [NOTE: See the race disparate impact aspect of this case which is briefed in Chapter 35.]

*Summers v. Altarum Inst., Corp.*, 740 F.3d 325, 29 A.D. Cas. 1 (4th Cir. 2014) – Temporary impairment may be covered under the ADA Amendments Act if sufficiently severe to substantially limit a major life
activity – Plaintiff was fired shortly after sustaining serious temporary injuries to both legs that prevented him from walking normally for at least seven months – argument that temporary disabilities cannot provide ADA coverage rejected.

*Brumfield v. City of Chi.*, 735 F.3d 619, 28 A.D. Cas. 1328 (7th Cir. 2013) – Allegations of job discrimination cannot be brought under Title II governing public services, only under Title I which directly addresses job bias – regulations promulgated by the Justice Department which stated that Title II also covered disability bias in the public workplace were not entitled to deference – deference is granted only when a statute is not clear, and the ADA is clear.

*Neely v. PSEG Tex., Ltd. P’ship*, 735 F.3d 242, 28 A.D. Cas. 1325 (5th Cir. 2013) – Even after the ADA Amendments Act (“ADAAA”), proper to instruct jury plaintiff must prove he was a “qualified person with a disability” – purpose of amendments may have been to broaden the definition of a disability, but the term remained in the statute – changes made to harmonize the ADA with similar language in Title VII.

*Shirley v. Precision Castparts Corp.*, 726 F.3d 675, 28 A.D. Cas. 609 (5th Cir. 2013) – Two failures to complete entire inpatient drug treatment program required under employer’s substance abuse policy is legitimate grounds for discharge.

*Owusu-Ansah v. Coca-Cola Co.*, 715 F.3d 1306, 27 A.D. Cas. 1583 (11th Cir. 2013), *cert. denied*, 134 S. Ct. 655 (2013) – Employee was lawfully required to undergo mental health fitness for duty evaluation – he banged his fist on a table and said that someone was “going to pay for this” while complaining about alleged harassment – evaluation was job-related and consistent with business necessity – company had objective basis for concern about potential threat to his co-workers’ safety under EEOC Enforcement Guidance.
Qualified Individual with Disability/Essential Job Functions

*Mayo v. PCC Structural, Inc.*, 795 F.3d 941, 31 A.D. Cas. 1556 (9th Cir. 2015) – Plaintiff, who had a major depressive disorder, talked to other employees about bringing a shotgun to kill the supervisor and another manager and stated he was planning to “take out management” – he told HR that he couldn’t guarantee he wouldn’t carry out his threats – when a police officer questioned him he admitted he owns several guns and when asked if he had immediate plans to shoot people, answered “not tonight” – after a hospital stay, a psychiatrist cleared him for return to work, opining that he was not a violent person – contested his discharge, citing *Humphrey v. Memorial Hospitals Association*, 239 F.3d 1128, 1139-40 (9th Cir. 2001) (“[C]onduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination.”) – the 9th Circuit distinguished *Humphrey*, holding “we join several other courts in holding that an employee whose stress leads to violent threats is not a ‘qualified individual[,]’” 795 F.3d at 947.

*EEOC v. Ford Motor Co.*, 782 F.3d 753, 31 A.D. Cas. 749 (6th Cir. 2015) *(en banc)* – By 8-to-5 vote, 6th Circuit finds no violation in rejecting telecommuting for employee with irritable bowel syndrome – “regular and predictable attendance” is an essential job function – EEOC can’t show individual was a qualified individual with a disability able to perform all the job’s essential functions – dissent contended fact issue as to whether her physical presence at the job was essential.

*Majors v. GE*, 714 F.3d 527, 27 A.D. Cas. 1313 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 655 (2013) – Employee with 20-pound lifting restriction requested as accommodation assignment of co-worker to perform heavy lifting – this was not reasonable as a matter of law.

*McMillan v. City of New York*, 711 F.3d 120, 27 A.D. Cas. 929 (2d Cir. 2013) – Summary judgment for employer reversed in chronic tardiness case – punctuality may not be an essential job function for a schizophrenic employee whose medicine made him groggy in the morning – accommodation such as working through lunch or staying late may have been possible – it is not a given that punctuality is essential for every job –
on remand court will have to inquire into the reasonableness of such accommodations.

*Lawler v. Montblanc N. Am., LLC,* 704 F.3d 1235, 27 A.D. Cas. 545 (9th Cir. 2013) – Retail store manager discharged after requesting four months of medical leave because of arthritis – summary judgment affirmed – on site presence is an essential job duty at a retail store – request a shorter work week and four months of leave as accommodations would not have allowed her to perform the job’s essential functions – retaliation claim rejected – discharge decision was based not on her filing a charge but on her inability to perform the job.

**Reasonable Accommodation**

*Schaffhauser v. United Postal Service, Inc.*, 794 F.3d 899, 31 A.D. Cas. 1437 (8th Cir. 2015) – Employee demoted for making racist comment – claimed steroids given in connection with an injury was the cause of the misconduct – duty to accommodate rejected – notice of the disability in a request for accommodation must be made before the misconduct, not after it – “As the district court articulated, liability is not established where ‘an employee engages in misconduct, learns of an impending adverse employment action, and then informs his employer of a disability that is the supposed cause of the prior misconduct and requests an accommodation.’” 794 F.3d at 906 – multiple cases cited for the proposition and an employer is not required to ignore misconduct because the claimant subsequently asserts it was a result of the disability.

*Stern v. St. Anthony’s Health Ctr.*, 788 F.3d 276, 31 A.D. Cas. 1149 (7th Cir. 2015) — Terminated chief psychologist unfit for position – subordinates noted cognitive problems similar to Alzheimer’s – independent third party concluded that plaintiff “definitely had cognitive issues” typical of early Alzheimer’s – court bothered by termination without interactive process – however, plaintiff did not demonstrate how disabilities could be accommodated – not sufficient to suggest delegating essential job functions – summary judgment affirmed.
Noll v. IBM, 787 F.3d 89, 31 A.D. Cas. 1049 (2d Cir. 2015) – 2-to-1 decision finding IBM reasonably accommodated deaf employee – employee demanded captions on all files on the company internet as accommodation – IBM instead provided him with written transcripts of all files he requested, together with a sign language interpreter either onsite or remotely for any file that he requested for immediate translation – plaintiff alleged this wasn’t effective since it’s tiring and difficult for a deaf employee to simultaneously watch the video and a sign language interpreter – IBM entitled to summary judgment since the offered accommodation, while not the preferred accommodation, is “plainly reasonable” – “[I]n other words, the plain reasonableness of the existing accommodation ends the analysis,” 787 F.3d at 94 – plaintiff acknowledged that the accommodation enabled him to perform his job’s essential functions – but he argued that immediate access to files posted on the internet is a benefit of employment that is being denied to deaf employees – the dissent said it should be a jury issue.

Minnihan v. Mediacom Commc’ns Corp., 779 F.3d 803, 31 A.D. Cas. 566 (8th Cir. 2015) – Because of seizures plaintiff could not drive – given accommodation of ten month exemption from driving but told this was not permanent – exemption required co-workers to assume additional duties and work extra hours – job description states that valid driver’s license with good driving was required – no duty to restructure job.

EEOC v. Kohl’s Dep’t Stores, Inc., 774 F.3d 127, 31 A.D. Cas. 2 (1st Cir. 2014) – Summary judgment affirmed – no constructive discharge and no violation of the ADA when employee quit after preferred accommodation of regular day shift was denied – never responded to employer’s good faith efforts to provide interactive process where employer twice requested that she reconsider her resignation to discuss possible alternative accommodations – employee primarily responsible for breakdown in process.

Solomon v. Vilsack, 763 F.3d 1, 30 A.D. Cas. 649 (D.C. Cir. 2014) – Employee with depression requested that she be able to determine her own hours as long as she met agency deadlines – trial court ruled that such an accommodation is not required – without ruling on whether it would be a reasonable accommodation on these particular facts, the D.C. Circuit held that “nothing in the Rehabilitation Act establishes, as a matter of law, that
a maxiflex work schedule is unreasonable,” 764 F.3d at 4 – a separate analysis is required as to whether an accommodation is reasonable and whether it would result in an undue hardship – in view of the technological advances that are being made in many instances it is less essential for employees in many jobs to be physically present during prescribed hours.

_Hwang v. Kan. State Univ.,_ 753 F.3d 1159, 29 A.D. Cas. 1509 (10th Cir. 2014) – University had an inflexible maximum leave of absence for illness of six months. It refused to extend it for the plaintiff. A question, according to the Tenth Circuit, was “must an employer allow employees more than six months’ sick leave or face liability under the Rehabilitation Act?” Their answer: “Unsurprisingly, the answer is almost always no.” – “[I]t’s difficult to conceive how an employee’s absence for six months . . . could be consistent with discharging the essential functions of most any job in the national economy today. Even if it were, it is difficult to conceive when requiring so much latitude from an employer might qualify as a reasonable accommodation,” 753 F.3d at 1162 (emphasis in original) – Contention that all inflexible sick leave policies are illegal violates the Rehabilitation Act rejected – Inflexible leave policies providing unreasonably short sick leave periods might be subject to attack but the six month leave policy herewith does not fall within that category.

_Bunn v. Khoury Enters., Inc.,_ 753 F.3d 676, 29 A.D. Cas. 1518 (7th Cir. 2014) – Vision impaired employee at Dairy Queen could not do some of the jobs through which employees rotate – employer unilaterally decided to assign him full time to one of the jobs, which he could do, which enabled him to work full time – this was a reasonable accommodation – does not matter that he preferred other accommodations – there is no separate cause of action for failure to engage in interactive process – in effect, employer restructured the job and/or modified the job schedule to accommodate plaintiff’s vision problems.

_Koch v. White_, 744 F.3d 162, 29 A.D. Cas. 445 (D.C. Cir. 2014) – Summary judgment affirmed for government employer – employee seeking schedule accommodations to participate in a cardiac rehabilitation program did not cooperate with the private firm that the employer had engaged to handle its EEO investigations – employee claimed concerns about privacy – but plaintiff failed to explain why the extensive privacy
protections in the contract with the firm hired to handle EEO matters was insufficient.

*Feist v. Louisiana*, 730 F.3d 450, 28 A.D. Cas. 813 (5th Cir. 2013) – State Department of Justice attorney with chronic knee condition denied reserved on-site parking spot – summary judgment for employer reversed – need not establish that the accommodation was necessary to perform an essential job function – sufficient that the accommodation made the workplace more accessible even though not tied to an essential job function – summary judgment affirmed on later discharge retaliation claim – temporal proximity to the EEOC charge insufficient – no showing that reason given - mishandling cases - was a pretext for retaliation.

*Basden v. Prof'l Transp., Inc.*, 714 F.3d 1034, 27 A.D. Cas. 1580 (7th Cir. 2013) – Summary judgment affirmed on ADA claim of employee who was discharged for excessive absenteeism – does not matter that employer failed to engage in interactive process and denied her accommodation request for a thirty-day leave – failure to engage in interactive process is not a separate violation – reliance on the fact that her limited attendance at subsequent jobs following her discharge negates any argument that a leave and medication would have enabled her to regularly attend work – regular attendance is an essential job function.

*EEOC v. United Airlines, Inc.*, 693 F.3d 760, 26 A.D. Cas. 1431 (7th Cir. 2012), cert. denied , 133 S. Ct. 2734 (2013) – The issue was the obligations of the employer with respect to reassignment as an ADA accommodation – does a minimally qualified disabled applicant have to be given preference over more qualified non-disabled applicants – 7th Circuit precedent was that no such preference need be given – the 7th Circuit has now reversed its position, now believing that the U.S. Supreme Court’s decision in *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2001), requires such reversal [Note: *Barnett* held that normally violating a seniority system is not a reasonable accommodation, but that in particular cases the employee “remains free to show that special circumstances warrant a finding that, despite the presence of a seniority system (which the ADA may not trump in the run of cases), the requested ‘accommodation’ is ‘reasonable’ on the particular facts,” 535 U.S. at 405]. 7th Circuit remands the case to allow the EEOC to attempt to show that an exception from United’s seniority system would under the facts of the case be a
reasonable accommodation. The Seventh Circuit drew a distinction between a “best qualified selection policy” and a “seniority policy” – the Supreme Court in *Barnett* found that accommodation through appointment to a vacant position is reasonable absent a showing of undue hardship such as violation of a seniority system.

**Retaliation (Ch. 15)**


*Maggi v. Creative Health Care Servs., Inc.*, 608 Fed. App’x. 472, 127 FEP 713 (9th Cir. 2015) (unpublished) – Supervisor, whom plaintiff alleged sexually harassed her, sued her in state court for defamation – her retaliation claim against employer dismissed – no evidence employer was the but-for cause of the lawsuit – the suit was filed in the supervisor’s personal capacity.

*Aldrich v. Rural Health Servs. Consortium, Inc.*, 579 Fed. App’x 335, 124 FEP 19 (6th Cir. 2014) – Employee not engaged in protected activity under participation clause when she forwarded e-mails containing confidential patient information to a personal account – her contention that she was preserving evidence for an age discrimination suit that had been filed by a co-worker did not bring it within protected activity – she was not directly involved in the litigation and was not responding to any request from co-worker’s attorneys.

*Ray v. Ropes & Gray LLP*, __ F.3d __, 127 FEP 1606, 2015 WL 5011753 (1st Cir. Aug. 25, 2015) – Summary judgment for defendant on denying black associate a partnership under up or out policy – after plaintiff filed EEOC charge, two Ropes’ partners who had promised to support his application for a position as an assistant U.S. Attorney refused, one of them stating that he could no longer “in good conscience” write such a letter in light of the “groundless” EEOC claim – plaintiff, an alumnus of Harvard Law School, asked that the Harvard Law School bar Ropes from
campus interviews – a legal media website obtained a copy of Ray’s letter to Harvard and asked for comment – Ropes provided the website with an unredacted copy of the EEOC’s determination which contained sensitive and confidential information about Ray’s employment with the firm, which the website posted – summary judgment on the basic discrimination claim affirmed – the retaliation claim went to the jury – Ropes argued that Ray did not actually believe in his EEOC claim, but just used it to try to extort money – the jury concluded that Ray had not established a prima facie case of retaliation because he had not engaged in protected activity under Title VII – retaliation based on both participation (the rejection of letters of reference after he filed his EEOC claim) and opposition (contacting Harvard) – District Court instructed the jury that the EEOC complaint was protected if done in good faith – jury instructed that opposition was protected if he had shown it was both undertaken in good faith and based on a reasonable belief – the participation clause does not require a reasonable belief – “Simply put, Ray has not set forth a coherent argument on appeal for why the district court erred as a legal matter in requiring him to show good faith for purposes of the participation clause. Thus, we deemed his argument waived for lack of development.” 2015 WL 5011753, at *8 – summary judgment on denial of partnership affirmed – denial was based on negative reviews from partners – contention that associates who received more favorable reviews should not have been so favorably traded fails under comparative evidence discussed – every associate was different – Ray’s reliance on a subjective review process flounders because it is supported only by speculation – plaintiff’s reliance on two racially charged remarks from partners about which he protested not shown to have any connection with the policy committee’s decision – fact that only one black associate had ever been promoted to partner in the history of the firm is unfortunate and troubling but it fails to imply pretext in this case.

DeMasters v. Carilion Clinic, 796 F.3d 409, 127 FEP 1396 (4th Cir. 2015) – Employee whose job was to assist other employees with complaints alleged retaliation because he assisted on sexual harassment complaint – employer cited “manager rule” under Fair Labor Standards Act, which states that in order to engage in protected activity the employee has to step outside of his role as an employee – this has no place under Title VII – lower court dismissal reversed – employee’s job responsibilities included reporting discrimination – if discharged for assisting a fellow employee with discrimination complaint, actionable.

Baird v. Gotbaum, 792 F.3d 166, 127 FEP 961 (D.C. Cir. 2015) – Plaintiff, a former president of a public employee union, is “a frequent filer of Title VII claims” – 792 F.3d at 168 – she claimed that her work environment was made hostile in retaliation for these protected activities – she objects to rude emails, name calling, lost tempers and unprofessional behavior, which she alleged her employer failed to investigate or remediate – “Although [plaintiff] paints an unpleasant picture, she does not allege that [her employer] has done anything illegal. See Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006) (‘Title VII . . . does not set forth a general civility code for the American workplace.’) (quotation marks omitted)).” 792 F.3d at 168 – Plaintiff alleges disparate actions by multiple people and does attempt to tie them together except for the HR department’s refusal to remediate – “a retaliatory failure-to-remediate claim is not actionable unless the underlying incident would itself be actionable.” 792 F.3d at 171 – “A trivial incident does not become nontrivial because an employer declines to look into it. Title VII is aimed at preventing discrimination, not auditing the responsiveness of Human Resources departments.” Id. – Essentially Plaintiff cited an extremely large number of trivial incidents – “[A] long list of trivial incidents is no more a hostile work environment than a pile of feathers is a crushing weight.” 792 F.3d at 172.

Foster v. Univ. of Maryland, E. Shore, 787 F.3d 243, 127 FEP 167 (4th Cir. 2015) – Supreme Court’s decision in Nassar, which required but-for causation and rejected mixed motive theory in retaliation cases, did not alter the plaintiff’s “less onerous” burden of showing causation under the McDonnell Douglas framework at the prima facie case stage – the Nassar Court was silent as to the application of but-for causation in McDonnell Douglas pretext cases – “Nassar did not alter the McDonnell Douglas
analysis for retaliation claims, . . . .” 787 F.3d at 246 – the District Court had denied summary judgment on retaliation claim under McDonnell Douglas prior to Nassar – after Nassar District Court reconsidered, holding that under the causation standard of but-for articulated in Nassar summary judgment was warranted – the Court of Appeal reversed – “We conclude that the McDonnell Douglas framework, which already incorporates a but-for causation analysis, provides the appropriate standard for reviewing Foster’s claim,” 787 F.3d at 249 – Nassar significantly altered the causation standard for claims based on direct evidence of retaliatory animus by rejecting the mixed motive theory – however, this case did not involve direct evidence but the indirect McDonnell Douglas order and allocation of proof – that is unaffected by Nassar – at the third stage of McDonnell Douglas “[i]f a plaintiff can show that she was fired under suspicious circumstances and that her employer lied about its reasons for firing her, the factfinder may infer that the employer’s undisclosed retaliatory animus was the actual cause of her termination,” 787 F.3d at 250 – thus a plaintiff must establish causation at two different stages under McDonnell Douglas – first, in the prima facie case, and second, in satisfying her ultimate burden – other circuits disagree as to whether Nassar has applicability to the causation prong of the prima facie case – we conclude it does not – “Had the Nassar Court intended to retire McDonnell Douglas and set aside 40 years of precedent, it would have spoken plainly and clearly to that effect,” 787 F.3d at 251 – the next question is whether Nassar alters the pretext stage – “Because the pretext framework already requires plaintiffs to prove that retaliation was the actual reason for the challenged employment action, we conclude that it does not,” 787 F.3d at 252 – Nassar’s “but-for” standard is no different from McDonnell Douglas’ “real reason” standard – “We conclude, therefore, that the McDonnell Douglas framework has long demanded proof at the pretext stage that retaliation was a but-for cause of a challenged adverse employment action,” id. – this requires reinstatement of the District Court’s original decision denying summary judgment on the retaliation claim under the McDonnell Douglas test.

*Hamza v. Saks Inc.*, 533 Fed. App’x 34, 120 FEP 244 (2d Cir. 2013) – Summary judgment affirmed against Muslim employee who claimed she was terminated in retaliation for her decision to leave early during Ramadan – “Saks proffered highly persuasive evidence that Hamza was terminated because of deficiencies in her performance, her inadequate customer service skills, her inability to work well with others and her
failure to comply with Saks’s company policies. . . . Hamza has failed to show that any reasonable juror could find Saks’s legitimate, non-retaliatory reasons for her termination to be a pretext for retaliation.” 533 Fed. App’x at 36.

**EEOC v. Allstate Ins. Co.**, 778 F.3d 444, 126 FEP 77 (3d Cir. 2015) – Allstate switched all of its employee agents to independent contractor status in the year 2000. As a condition of offering an independent contractor relationship selling Allstate products, Allstate required that each former employee waive any pending discrimination claims. The EEOC sued, alleging that this constituted retaliation under the federal anti-bias laws – the Court of Appeal ruled for Allstate – the general rule was that employers may require signed releases of claims in exchange for severance pay of other enhanced benefits not normally available – “Allstate followed the well-established rule that employers can require terminated employees to waive existing legal claims in order to receive unearned post-termination benefits.” 778 F.3d at 453.

**Sklyarsky v. Means-Knaus Partners, LP**, 777 F.3d 892, 125 FEP 1677 (7th Cir. 2015), cert. denied , 135 S. Ct. 2861 (2015) – Discrimination claims fail because numerous reprimands show that the employee was not meeting the employer’s legitimate expectations even though the reprimands went to attitude and not actual work performance – retaliation claims fail – first suspended six months after filing bias charges and then fired about seven months after submitting another round of charges – suspicious timing between a protected act and an adverse employment action “alone rarely establishes causation,” 777 F.3d at 898.

**Musolf v. J.C. Penney Co.**, 773 F.3d 916, 125 FEP 918 (8th Cir. 2014) – No prima facie case – seven month time lag between sexual harassment complaint and termination is too long – in the interim she was praised and given salary increase.

**Ward v. Jewell**, 772 F.3d 1199, 125 FEP 437 (10th Cir. 2014) – Screening panel, members of which had been the subject of discrimination charges filed by plaintiff, did not recommend plaintiff to be interviewed by ultimate decisionmaker – they recommended only two of the five
candidates – however, unbiased decisionmaker interviewed all five candidates, and chose someone other than plaintiff – no cat’s paw liability despite bias of screening committee since decisionmaker conducted his own independent investigation.

Cox v. Onondaga Cnty. Sheriff’s Dep’t, 760 F.3d 139, 123 FEP 1185 (2d Cir. 2014) – Summary judgment affirmed against white police officers who were subjected to adverse action for filing knowingly false racial harassment charges against black officer with the EEOC – the employer conducted an investigation, the white officers gave materially inconsistent statements, and the police department concluded that the charges were knowingly false – Title VII does not confer an absolute privilege that immunizes employees who knowingly file false charges with the EEOC – however just because the charges are false does not necessarily permit adverse action – but here the sheriff’s department showed a legitimate, non-retaliatory reason for the adverse action – that the record shows that the officers’ own racial harassment claims were “false, and seemingly intentionally so” – employers have to investigate and curb racial harassment by lower-level employees – the false EEOC charges could themselves be viewed as racial harassment against the black officer they accused of labeling them “skin heads.”

Davis v. Unified Sch. Dist. 500, 750 F.3d 1168, 122 FEP 1204 (10th Cir. 2014) – Head custodian demoted to custodian after found lying naked on his stomach sunbathing on the roof of the elementary school where he worked – over the next five years he applied to be head custodian at seven different schools but was rejected by seven different decision makers – he filed multiple charges with the EEOC during that time frame and is now principally claiming retaliation – “In a nutshell the key issue is whether a common purpose to retaliate . . . must be inferred from the sheer volume of his promotion denials; we think not when seven independent and informed decision makers are involved,” 750 F.3d at 1170 – summary judgment affirmed – with respect to any individual decisions, plaintiff’s proof does not meet the “but-for” test.

Kwan v. Andalex Grp., LLC, 737 F.3d 834, 120 FEP 1805 (2d Cir. 2013) – Summary judgment on retaliation claim reversed – “But-for” test of Univ. of Tex. Sw. Med. Ctr. v. Nassar does not require proof that
retaliation was the “sole” cause of the employer’s actions – only that the adverse action would not have occurred in the absence of a retaliatory motive – there can be multiple but-for causes, each one of which may be sufficient to support liability – in this case terminated female employee had sufficient evidence for a jury to conclude that the employer’s poor performance rationale was a pretext for retaliation – she presented evidence of her employer’s shifting explanations, including its position statement to the EEOC in which it focused on a change in the business rather than her performance – furthermore there was close temporal proximity between her complaint and her termination – thus a reasonable jury could find but-for causation.

*Cook & Shaw Found. v. Billington*, 737 F.3d 767, 120 FEP 1665 (D.C. Cir. 2013) – The Plaintiff Foundation is composed of current and former employees of the Library of Congress, and it helps them pursue allegations of racial discrimination against the Library – the Library recognizes certain employee organizations and gives them meeting space and other benefits – it refused recognition to the Plaintiff Foundation, which sued for retaliation under Title VII – case dismissed – Title VII protects only “employees or applicants for employment” – there was no allegation that a particular employee engaged in statutorily protected activity and then suffered materially adverse action – the Foundation does not fall within the “zone of interests” protected by the retaliation claims – “[r]etaliation by an employer is unlawful only if that retaliation occurred because of actions by ‘employees or applicants for employment,’” 737 F.3d at 772 – to survive a motion to dismiss Plaintiff’s complaint had to contain factual matter under *Ashcroft v. Iqbal* to the effect that a particular Library employee engaged in protected activity and then suffered a materially adverse action – the complaint contains no such allegations.

*Wright v. St. Vincent Health Sys.*, 730 F.3d 732, 119 FEP 1717 (8th Cir. 2013) – Plaintiff was discharged 45 minutes after she called the hospital’s HR Department to complain of racial discrimination – the court characterized the timing as “incredibly suspicious” – nevertheless, it affirmed the trial court’s dismissal following a bench trial – the hospital’s evidence was that the decision to discharge her was made the day before, multiple individuals had been advised of the decision, and the protected conduct occurred after the discharge decision had been made – no error in the discharge decision not being racially motivated despite the fact that
the decisionmaker had discharged three other African-American employees and no Caucasians during her tenure.

Univ. of Tex., Sw. Med. Ctr. v. Nassar, 570 U.S. ___, 133 S. Ct. 2517, 118 FEP 1504 (2013) – The mixed motive amendments to Title VII are not applicable to retaliation cases – the burden of proof in a retaliation case is “but-for” – 5 to 4 decision – status-based discrimination after 1991 amendments is governed by a motivating factor analysis – this is not applicable to retaliation, which was not covered by the amendments – “Causation in fact – i.e., proof that the defendant’s conduct did in fact cause the plaintiff’s injury – is a standard requirement of any tort claim . . . .” 133 S. Ct. at 2524-25. But-for causation is the default unless Congress indicates a different test – Congress has not done so – case is actually governed by Gross, which found a “but-for” test under a statute that prohibited discrimination “because of age” – the two retaliation subsections of Title VII both use the “because of” language – the number of retaliation claims filed with the EEOC have outstripped every type of status-based discrimination except race – “Lessening the causation standard could also contribute to the filing of frivolous claims . . . .

Consider in this regard the case of an employee who knows that he or she is about to be fired for poor performance, given a lower pay grade, or even just transferred to a different assignment or location. To forestall that lawful action, he or she might be tempted to make an unfounded charge of racial, sexual or religious discrimination; then, when the unrelated employment action comes, the employee could allege that it is retaliation.”

Id. at 2531-32. A mixed motive causation standard “would make it far more difficult to dismiss dubious claims at the summary judgment stage,” id. at 2532 – “Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened causation test stated in [the mixed motive amendments]. This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer,” id. at 2533 – contrary interpretation in the EEOC Guidance Manual rejected as lacking persuasive force – dissent contended that majority seizes upon the 1991 amendments, designed to strengthen Title VII, to weaken retaliation protection – dissent suggests reversing this case and Vance through “another Civil Rights Restoration Act.”
Laing v. Fed. Express Corp., 703 F.3d 713 (4th Cir. 2013) – FMLA retaliation case – summary judgment affirmed despite joking related to leaves of absence – “[T]here is a danger in allowing law to squeeze all informality from workplace interactions: every offhand expression of attempted humor need not plant the seed for a discrimination suit. While some such remarks may be hurtful and decidedly not funny, neither should a worksite become a dour place to be,” 703 F.3d at 718.

Pearson v. Mass. Bay Transp. Auth., 723 F.3d 36, 119 FEP 1 (1st Cir. 2013) – Opinion by Associate Justice Souter sitting by designation – “The district court correctly held that there was no causal link between [plaintiff’s] protected conduct and his termination, the reason being obvious: [employer] officials recommended firing [plaintiff] before he wrote the letter. Causation moves forward, not backwards, and no protected conduct after an adverse employment action can serve as the predicate for a retaliation claim.” 723 F.3d at 42 – quotation from state court decision that “[w]here, as here, adverse employment actions or other problems with an employee pre-date any knowledge that the employee has engaged in protected activity, it is not permissible to draw the inference that subsequent adverse actions, taken after the employer acquires such knowledge, are motivated by retaliation[.]” id. (citation omitted). Recommendation had not reached the General Manager prior to the protected conduct, but no evidence that recommendation would have been rejected if no one had known of the protected conduct – quotation from prior First Circuit case – “Were the rule otherwise, then a disgruntled employee, no matter how poor his performance or how contemptuous his attitude toward his supervisors, could effectively inhibit a well-deserved discharge by merely filing, or threatening to file, a discrimination complaint[.]” id. (citation omitted)

Benes v. A.B. Data, Ltd., 724 F.3d 752, 119 FEP 509 (7th Cir. 2013) – Summary judgment affirmed against employee fired for outburst during mediation session – EEOC conducted mediation session – each side instructed to remain in their room with a third party relaying offers back and forth – upon receipt of employer’s offer, employee barged into employer’s room and shouted: “You can take your proposal and shove it up your ass and fire me and I’ll see you in court” – he was promptly fired, and he sued for retaliation, alleging that he was fired for having “participated in any manner” in Title VII proceedings – held fired not for
participating but for the outburst – if the employer would have fired an employee who barged into a superior’s office in violation of instructions and made a similar comment, it was entitled to fire someone who did the same thing during a mediation.

*Colón v. Tracey*, 717 F.3d 43, 118 FEP 777 (1st Cir. 2013) – Employee, HR Generalist, alleged she was demoted in retaliation for having prepared an affirmative action plan that analyzed compensation data and purported to find compensation discrimination – summary judgment for employer affirmed – alleged demotion was not an adverse employment action – it was a reassignment designed to create a more flexible human resources workforce which involved cross-training – multiple individuals other than plaintiff had the same sort of temporary reassignment – disciplinary suspension also affirmed – employee admittedly faxed confidential compensation information outside the company and had it on her home computer. Suspension was with pay and result was that upon return to work she was to receive a final warning.

*Northington v. H&M Int’l*, 712 F.3d 1062, 117 FEP 1053 (7th Cir. 2013) – Female plaintiff and female co-worker both dated same man – co-worker harassed plaintiff – plaintiff complained to company – plaintiff later terminated for refusing drug test – plaintiff claimed retaliation – summary judgment affirmed – the co-worker’s “behavior toward Northington . . . was personal and based on Northington’s involvement with [the male employee]. There is nothing in the record which indicates that [the co-worker] . . . was motivated by anything but personal conflict[,]” 712 F.3d at 1065 – Therefore, there was no purported violation of Title VII and plaintiff’s complaints do not qualify as a protected activity.

*Alam v. Miller Brewing Co.*, 709 F.3d 662, 117 FEP 653 (7th Cir. 2013) – Employee settled Title VII suit with former employer – former employer created joint venture with second company – former employee formed his own company, and sought to do business with the joint venture – joint venture refused because of prior lawsuit – no Title VII violation – joint venture could not be held liable as an employer because plaintiff sought to work for it as an independent contractor, not as an employee.
Grosdidier v. Broad. Bd. of Governors, Chairman, 709 F.3d 19, 117 FEP 946 (D.C. Cir. 2013), cert. denied, 134 S. Ct. 899 (2014) – Denial of promotion alleged to be retaliation for reporting circulation of sexually suggestive image and excessive hugging and kissing between a female co-worker and male co-workers and visitors – the conduct was not protected because a reasonable employee would not believe that the conduct constituted a hostile work environment that violated Title VII.

McGrory v. Applied Signal Tech., Inc., 212 Cal. App. 4th 1510, 117 FEP 184 (Cal. App. 6th Dist. 2013) – Male employee accused of sexual harassment was untruthful and uncooperative with investigator – refusal to participate or cooperate in an internal investigation of alleged discriminatory conduct is not protected activity under Federal or state anti-retaliation provisions – employer may discipline employee for misbehavior during investigation such as attempting to deceive investigator – immunity from participating is limited to sincere participation – public policy does not protect lying in the course of an investigation and it is a legitimate reason to terminate.

Richter v. Advance Auto Parts, Inc., 686 F.3d 847, 115 FEP 1067 (8th Cir. 2012), cert. dismissed, 133 S. Ct. 1491 (2013) – Employee filed charge alleging race and sex discrimination and was subsequently terminated – retaliation claim barred by failure to file separate retaliation charge – reasonably related to exception not applicable – Supreme Court in Morgan held that retaliation is a separate employment practice – the statute requires a charge to be filed “after” the alleged unlawful practice.

Gibson v. Am. Greetings Corp., 670 F.3d 844, 114 FEP 927 (8th Cir. 2012), cert. denied, 133 S. Ct. 313 (2012) – Summary judgment affirmed against African-American husband and wife who were both power truck operators – both received extensive progressive discipline – both after receiving several warnings claimed discrimination – she sued alleging discriminatory and retaliatory denial of transfer – he alleged discrimination and retaliation in discharge – wife failed to make a prima facie case of retaliation – husband was terminated shortly after his discrimination claim – citations to Hervey v. County of Koochiching, 527 F.3d 711, 723 (8th Cir. 2008), and Slattery v. Swiss Reinsurance Am. Corp., 248 F.3d 87, 95 (2d Cir. 2011), for proposition that when timing is the only basis for a claim of retaliation and gradual adverse job actions
began well before the protected activity there is no inference of retaliation.

*Loudermilk v. Best Pallet Co.*, 636 F.3d 312, 111 FEP 865 (7th Cir. 2011) – Black employee was fired on the spot after giving a supervisor a note complaining of racial discrimination – district court granted summary judgment asserting that temporal proximity is not enough, and the supervisor did not read the note – the day before, when the employee orally complained of discrimination, the supervisor told him to “put it in writing” – the Seventh Circuit commented “What did [he] think was in the note he received the next day? An invitation to a birthday party?” 636 F.3d at 314-15 – although temporal proximity is normally not enough to get by summary judgment, this was “so close on the heels of a protected act that an inference of causation is sensible[,]” id. at 315.

*Leitgen v. Franciscan Skemp Healthcare, Inc.*, 630 F.3d 668, 111 FEP 289 (7th Cir. 2011) – Summary judgment affirmed against female doctor who repeatedly complained about hospital policy of paying all doctors in the obstetrics department the same amount of money, where female doctors delivered more babies than male doctors – the Seventh Circuit agreed that she had engaged in protected activity, but affirmed summary judgment because she did not show a causal connection between her complaints and her discharge – she was discharged because of hostility toward the nursing staff and patients – even though there was temporal proximity between her latest complaint and her discharge, “suspicious timing alone is almost always insufficient to survive summary judgment” 630 F.3d at 675 – moreover, plaintiff had been complaining about the compensation system for years before she was fired, and had been put on notice of her interpersonal flaws – did not matter that hospital failed to follow its policy which favored but did not require written warnings.

*Tyler v. Univ. of Ark. Bd. of Trs.*, 628 F.3d 980, 111 FEP 161 (8th Cir. 2011) – Pre-selection of other candidate not evidence of retaliation – black assistant dean filed race charge three years before – despite lack of temporal proximity plaintiff argued that seven months before he had helped a black student file a race charge and was required to move his office – this did not “bridge the temporal gap” or show that the university “took escalating adverse and retaliatory action[,]” 628 F.3d at 987 – the pre-selected applicant had just earned her master’s degree and had
political connections – while evidence of pre-selection and setting job requirements to benefit the pre-selected applicant may in some cases discredit the defendant’s explanation, the university was entitled to modify the job description to fit this person’s qualifications – even if it pre-selected, “that ruse did not conceal retaliation[,]” id. at 988.

**Hiring (Ch. 16)**

*Wilson v. Cook Cnty.*, 742 F.3d 775, 121 FEP 1077 (7th Cir. 2014) – Low-level administrative assistant at county hospital conducted phony interview with plaintiff, provided her with an application form, and told her if she really wanted the job she must provide sex, which she did – there was no job – the interview was phony – no Title VII claim because she cannot show any employment relationship existed, current or prospective – Title VII does cover job applicants and prospective employees – but in this case the hospital had no job opening and that dooms the Title VII claim – even if the wrongdoer’s conduct could be attributed to the employer he did not “refuse to hire” the plaintiff for the simple reason that he was wholly unable to hire her at all – to proceed on a refusal hire to claim a plaintiff must at a minimum establish that she suffered some adverse employment action such as being passed over for a job – but when no job exists there can be no adverse employment action – a plaintiff must at least have been passed over for a job that actually existed.

**Promotion, Advancement, and Reclassification (Ch. 17)**

*Dunn v. Trustees of Boston Univ.*, 761 F.3d 63, 123 FEP 1593 (5th Cir. 2014) – Layoff – two positions combined – younger employee given new position – plaintiff contended he was more qualified – no reasonable jury could find that the disparity in credentials “was so manifest that the only way [the other employee] could have been selected . . . was if age played an impermissible role[,]” 761 F.3d at 73 (emphasis in original).

*Mulrain v. Castro*, 760 F.3d 77, 123 FEP 1591 (D.C. Cir. 2014) – Competitive promotion process terminated and promotion awarded to “superstar” white attorney that federal agency desired to retain – black
attorney failed to show this was pretext for race discrimination even if black attorney was more qualified – senior agency official who made the decision had not been involved in the interview process, did not compare the attorney’s credentials to the black attorney’s or any other applicants, and did not even know the black attorney had applied for the position.

_EEOC v. Audrain Health Care, Inc._, 756 F.3d 1083, 123 FEP 783 (8th Cir. 2014) – No adverse action since employee never submitted formal application for transfer/promotion – male registered nurse wanted operating room nurse position – was told the doctors want more female nurses – this is insufficient to show that an application would have been futile – absent a formal application he did not make a reasonable attempt to convey his interest.

_Dass v. Chi. Bd. of Educ._, 675 F.3d 1060, 114 FEP 1288 (7th Cir. 2012) – Assignment of third grade teacher to teach seventh grade not adverse employment action – plaintiff contended she was denied position for which she was best suited and put in a more difficult position that impaired her ability to succeed for discriminatory reasons – her subjective belief that seventh grade was more difficult to teach than third grade does not make that assignment materially adverse.

### Compensation (Ch. 19)

_EEOC v. Port Auth. of N.Y. & N.J._, 768 F.3d 247, 124 FEP 1071 (2d Cir. 2014) – EEOC equal pay suit on behalf of female attorneys dismissed – judgment on the pleadings affirmed – EEOC failed to compare the attorneys actual job duties to support its claim that the male and female non-supervisory attorneys were performing equal work – EEOC argument that the attorneys had the same job codes dismissed as insufficient – EEOC’s broad allegations ignored legitimate factors other than sex such as “varying workplace demands” – allegations about the same job code were “plainly insufficient to support a claim under the EPA,” 768 F.3d at 256.

_McReynolds v. Merrill Lynch & Co._, 694 F.3d 873, 115 FEP 1668 (7th Cir. 2012) – In _McReynolds I_ the Seventh Circuit reversed a denial of class certification – the African American class alleged that the firm’s
“teaming” and account-distribution policies had the effect of steering black brokers away from the most lucrative assignments and prevented them from earning appropriate compensation – three years after that suit was filed Bank of America acquired Merrill Lynch, and the companies introduced a retention incentive program that would pay bonuses to brokers corresponding to their previous levels of production – this new class action alleged that the bonuses incorporated previous production levels which were the product of discrimination – defendants moved to dismiss for failure to state a claim, arguing that the retention program was race neutral and exempt from challenge under Section 703(h) (“a system which measures earnings by quantity or quality of production”) – motion to dismiss granted – under 703(h) protected from challenge unless adopted with intent to discriminate – conclusory allegations of intent to discriminate insufficient under Ashcroft v. Iqbal – entire case dismissed with prejudice – affirmed – not enough to allege that the bonuses incorporated the past discriminatory effect of Merrill Lynch’s underlying employment practices – disparate impact of those employment practices is the subject of the first lawsuit – motion granted before ruling on class certification – 12(b)(6) motion tests the sufficiency of the complaint not the merits – insufficient to be aware that the program would disfavor black brokers – had to be adopted with that intent – no requirement that the court defer ruling on 12(b)(6) motion until after class certification – to the extent that the plaintiffs are really challenging the disparate impact of the underlying policies “their claim here is subsumed within McReynolds I, and if successful will be remedied there” – import of section 703(h) is that disparate racial impact is insufficient to invalidate a system that measures earnings by quantity or quality production – Teamsters case on seniority determinative – “[t]o the extent that the program incorporated the effects of past discrimination, the same was true of the seniority system in Teamsters,” 694 F.3d 881 – just like in Teamsters (successful plaintiffs could obtain retroactive seniority), plaintiff’s in McReynolds I if they succeed can prove they would have received larger bonuses but for past discrimination and “that loss may be incorporated in the remedy in McReynolds I” – but the retention program itself is shielded from challenge under 703(h) – plaintiffs contend that system is not “bona fide” but those words modify only seniority and merit systems and not production based compensation systems – interpretative question is largely irrelevant because even if the “bona fide” modifier applies, the concept is inherently built into what it means for a system to measure quantity or quality of production – dismissal mandated unless intent to discriminate adequately pleaded – under Twombly, the facts asserted must state a claim
that is “plausible” – *Iqbal* clarified that allegations in the form of legal conclusions are insufficient to survive a 12(b)(6) motion – allegations that Merrill Lynch knew that the system had a disparate impact are legally insufficient – complaint must allege enough facts to support an inference that the retention program was adopted because of its effect on black brokers – all the complaint says is that Merrill Lynch intentionally designed the program based on production levels that incorporated the effects of past discrimination and it did so with the intent to discriminate – the assertion is merely a conclusion unsupported by facts – Lilly Ledbetter Act affects only the question of timing – but under 703(h) there is no Title VII violation in the first place.

**Sexual and Other Forms of Harassment (Ch. 20)**

**Cases Interpreting *Faragher/Ellerth***

*Vance v. Ball State Univ.*, 570 U.S. ___, 133 S. Ct. 2434, 118 FEP 1481 (2013) – Under *Faragher* and *Ellerth*, if the harasser is a co-worker, the employer is judged by a negligence standard – however, if a “supervisor,” and the harassment culminates in a tangible employment action, the employer is strictly liable – but if there is no tangible employment action, the employer may escape liability with an affirmative defense that (1) the employer exercised reasonable care to prevent and correct any harassing behavior and (2) the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities provided – it therefore matters whether the harasser is a supervisor or a co-worker – “We hold that an employee is a ‘supervisor’ for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim . . . .” 133 S. Ct. at 2439.

– Under the Restatement, masters are generally not liable for the torts of their servants if the torts are outside the scope of employment – there is however an exception where the servant was “aided in accomplishing the tort by the existence of the agency relation” – we adapted this to Title VII in *Ellerth* and *Faragher* – neither party challenges the application of *Faragher/Ellerth* to race-based hostile environment claims and we assume that it does apply – lower courts have divided on the test for supervisor – some have followed the EEOC’s Guidance which ties the supervisor’s status to the ability to exercise significant direction over daily work –
“[w]e hold that an employer may be vicariously liable for an employee’s unlawful harassment only when the employer has empowered that employee to take tangible employment actions against the victim, i.e., to effect a ‘significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.’”

133 S. Ct. at 2443 (quoting Ellerth, 524 U.S. at 761). “We reject the nebulous definition of ‘supervisor’ advocated in the EEOC Guidance . . . .” 133 S. Ct. at 2443 – Under test set forth herein “supervisory status can usually be readily determined, generally by written documentation,” id. – the test we adopt “is easily workable; it can be applied without undue difficulty at both the summary judgment stage and at trial,” id. at 2444.

– In responding to the dissent’s contention that one of the supervisors in Faragher would not have qualified under this test, even though the harasser could impose discipline, the Court responded “If that discipline had economic consequences (such as suspension without pay) then [the harasser in Faragher] might qualify as a supervisor under the definition we adopt today,” 133 S. Ct. at 2447 n.9 – In Faragher, the harassing lifeguard threatened the plaintiff to “[d]ate me or clean the toilets for a year” – “That threatened reassignment of duties likely would have constituted significantly different responsibilities for a lifeguard, whose job typically is to guard the beach. If that reassignment had economic consequences, such as foreclosing Faragher’s eligibility for promotion, then it might constitute a tangible employment action,” 133 S. Ct. at 2447 n.9 – In determining supervisory status, “[t]he ability to direct another employee’s tasks is simply not sufficient. Employees with such powers are certainly capable of creating intolerable work environments . . . but so are many other co-workers. Negligence provides the better framework . . . .” Id. at 2448.

– “The interpretation of the concept of a supervisor that we adopt today is one that can be readily applied. In a great many cases it will be known even before litigation is commenced whether an alleged harasser was a supervisor, and in others, the alleged harasser’s status will become clear to both sides after discovery . . . [S]upervisor status will generally be capable of resolution at summary judgment,” id. at 2449 – “[E]ven where the issue of supervisor status cannot be eliminated from the trial (because there are genuine factual disputes about an alleged harasser’s authority to take tangible employment actions), this preliminary question is relatively straightforward,” id. at 2450 – “Contrary to the dissent’s suggestions . . .
this approach will not leave employees unprotected against harassment by co-workers who possess the authority to inflict psychological injury by assigning unpleasant tasks or altering the work environment in objectionable ways. In such cases the victims will be able to prevail simply by showing that the employer was negligent . . . and the jury should be instructed that the nature and degree of authority wielded by the harasser is an important factor to be considered in determining whether the employer was negligent,” *id.* at 2451.

– If an employer has a very small number of individuals who can make decisions involving tangible job actions, they “will likely rely on other workers who actually interact with the affected employee,” and “[u]nder those circumstances, the employer may be held to have effectively delegated the power to take tangible employment actions to the employees on whose recommendations it relies,” *id.* at 2452 – Even under the negligence standard “[e]vidence that an employer did not monitor the workplace, failed to respond to complaints, failed to provide a system for registering complaints, or effectively discouraged complaints from being filed would be relevant,” *id.* at 2453 – “We hold that an employee is a ‘supervisor’ for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim,” *id.* at 2454 – 5 to 4 decision – Justice Ginsburg’s dissent included “[t]he ball is once again in Congress’ court to correct the error into which this Court has fallen, and to restore the robust protections against workplace harassment the Court weakens today.” *Id.* at 2466.

*Stewart v. Rise, Inc.*, 791 F.3d 849, 127 FEP 809 (8th Cir. 2015) – reversing the trial court summary judgment, Circuit Court holds that supervisor may proceed to trial on claims that she was the victim of harassment by her subordinates, that higher management and HR knew about it, and did not protect her – a jury must decide whether the harassment was sufficiently severe and whether employer officials knew or should have known about it – contention that plaintiff should have filed written complaints instead of simply oral complaints rejected – although reversing the Court of Appeals noted that “[w]hen the plaintiff is a supervisor, and the objected-to conduct originates among her subordinates, a jury may look with great suspicion upon claims that the plaintiff adequately presented her concerns up the chain of command.” 791 F.3d at 862 – the summary judgment had been based on *Faragher/Ellerth* and failure to take advantage of corporate procedures for correcting
harassment – the Eighth Circuit viewed failure to follow the harassment procedures as possibly “determinative in the minds of jurors,” but not determinative as a matter of law.

*Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 108 FEP 769 (2d Cir. 2010) – Harassee complained only to manager who was harassing her – employer’s policy allowed harassment complaints to be brought to the attention of the employee’s supervisor, human resources, or any member of management – trial court found it unreasonable for employee not to go to other managers or HR – Second Circuit reversed: “We do not believe that the Supreme Court . . . intended that victims of sexual harassment, in order to preserve their rights, must go from manager to manager until they find someone who will address their complaints.” 596 F.3d at 104-05 – some evidence that pursuing other avenues of complaint would have been futile.

**General**

*Prior v. United Air Lines, Inc.*, 791 F.3d 488, 127 FEP 801 (4th Cir. 2015) – African American flight attendant harassed by anonymous harasser who left racist death threats in her company mailbox – she showed death threats to her supervisor who said he was sorry but there was not much United could do because there were no security cameras covering the area – summary judgment reversed on the theory that a reasonable jury could find that United should have done more to protect the plaintiff – reliance on the fact that United never reported the incident to police – plaintiff had to do so herself – clear that the harassment was severe and pervasive – “[Q]uestion of United’s liability for the anonymous harassing conduct is a closer one[.]” 791 F.3d at 497 – “The anonymous nature of severe threats or acts of harassment may . . . heighten what is required of an employer, particularly in circumstances where the harassment occurs inside a secure space accessible to only company-authorized individuals[,]” id. – “Given the severity of the threat, a reasonable jury could find that United’s response was neither prompt nor reasonably calculated to end the harassment[.]” id. at 498.
Boyer-Liberto v. Fontainebleau Corp., 786 F.3d 264, 126 FEP 1637 (4th Cir. 2015) (en banc) – Employee complained that white supervisor twice called her a “porch monkey” – 4th Circuit overrules prior precedent that this was not protected activity which could support a retaliation claim – proper standard is whether employee had a reasonable belief that a hostile work environment is occurring – even though the incident was isolated the question in an isolated incident case is whether the harassment is physically threatening or humiliating – a reasonable jury could find that this was humiliating.

EEOC v. New Breed Logistics, 783 F.3d 1057, 126 FEP 1403 (6th Cir. 2015), rehr’g en banc denied, 2015 U.S. App. LEXIS 12417 (6th Cir. July 8, 2015) – $1.5 million dollar jury verdict affirmed on behalf of three complainants – the three harasses complained only to the harasser – “[W]e conclude that a demand that a supervisor cease his/her harassing conduct constitutes protected activity covered by Title VII[,]” 783 F.3d at 1067 – Sixth Circuit acknowledged that Fifth Circuit is to the contrary – employer liable because it knew about the protected activities because of the complaints directed to the harasser – all three complainants terminated – two were fired by a different supervisor, but “cat’s paw” liability affirmed – reasonable to conclude that the harasser influenced the terminating supervisor – Faragher/Ellerth defense irrelevant since there were tangible employment actions.

Rickard v. Swedish Match N. Am., Inc., 773 F.3d 181, 125 FEP 633 (8th Cir. 2014) – Summary judgment for employer in male-on-male sexual harassment case – in order to prevail on a same-sex sexual harassment claim, plaintiff had to show that the purported offensive conduct either was motivated by sexual desire or demonstrated a general hostility toward men – the conduct was “manifestly inappropriate and obnoxious” but there was no evidence of the required motivation – age comments such as “old man” and “you’ve got a lot of age on you” insufficient to establish a hostile work environment – voluntary retirement was not a constructive discharge.

Muhammad v. Caterpillar, Inc., 767 F.3d 694, 124 FEP 524 (7th Cir. 2014), cert. denied, 135 S. Ct. 2844 (2015) – Company reasonably responded to complaints of co-worker harassment which included offensive comments and graffiti and perceptions of sexual orientation –
Title VII prohibits the co-workers derogatory comments about race and sexual orientation, but the claims must fail because Caterpillar took prompt action that was reasonably calculated to end the harassment, such as immediately painting over the graffiti and threatening the offending co-workers with termination – prompt response ended the harassment except for one remark that was never reported.

*Adams v. Austal USA, LLC*, 754 F.3d 1240, 123 FEP 485 (11th Cir. 2014) – Only incidents of harassment of which the plaintiff was aware of at the relevant time frame can be considered – reason is that courts must conduct objective assessment from perspective of reasonable person in plaintiff’s position, knowing what the plaintiff knew – this does not allow consideration of what one learns about harassment only after employment ends or through discovery – 24 African-American employees sued together alleging racial harassment, racial graffiti, nooses, Confederate flags, and racial slurs – summary judgment granted against the claims of 13 of the employees on the ground that their work environment was not objectively hostile – this appeal concerns those 13 orders as well as jury verdicts against two of the plaintiffs who went to trial – “We now hold that an employee alleging a hostile work environment cannot complain about conduct of which he was oblivious for the purpose of proving that his work environment was objectively hostile[,]” – 754 F.3d at 1245 – nevertheless several of the employees submitted sufficient evidence and summary judgment must be vacated against them – summary judgment affirmed against the remaining six employees and the two jury verdicts against plaintiffs – the District Court correctly applied a reasonable person standard but erred in judging the severity of the conduct for summary judgment purposes with respect to seven of the thirteen cases decided on summary judgment.

*Clay v. Credit Bureau Enters., Inc.*, 754 F.3d 535, 123 FEP 248 (8th Cir. 2014) – Summary judgment affirmed in hostile work environment/constructive discharge case – cannot consider conduct occurring outside the statutory time frame because not similar in nature, frequency, or severity and involved different supervisors – summary judgment also affirmed on the ground that the conduct was not sufficiently severe or pervasive – the incidents “were infrequent and involved low levels of severity” – there is no allegation the environment was physically threatening.
Velázquez-Pérez v. Developers Diversified Realty Corp., 753 F.3d 265, 122 FEP 1692 (1st Cir. 2014) – Male was fired on the basis of negative job reports from female co-worker who worked in the HR department – the terminated male employee had spurned female co-worker’s advances – female co-worker began criticizing male plaintiff’s job performance – she objected to a plan to put him on a performance improvement plan and asserted he should be terminated: “It is my recommendation this person is terminated immediately” – the First Circuit stated the issue:

“Under what circumstances, if any, can an employer be held liable for sex discrimination under Title VII . . . when it terminates a worker whose job performance has been maligned by a jilted co-worker intent on revenge? We answer that the employer faces liability if: the co-worker acted, for discriminatory reasons, with the intent to cause the plaintiff’s firing; the co-worker’s actions were in fact the proximate cause of the termination; and the employer allowed the co-worker’s acts to achieve their desired effect though it knew (or reasonably should have known) of the discriminatory motivation.”

753 F.3d at 267. Summary judgment for the employer was thus reversed, since the terminated male employee had put the company on notice of his female co-worker’s pursuit of a sexual relationship. The First Circuit noted that the Supreme Court has held that employers are liable for co-worker harassment in the hostile environment context based on a negligence standard, that it knew or should have known of the conduct and the improper motivation, and there was no reason not to extend this negligence standard to quid pro quo claims, where the co-worker goes beyond simple hostile work environment conduct and proximately causes a termination.

Freeman v. Dal-Tile Corp., 750 F.3d 413, 122 FEP 995 (4th Cir. 2014) – In 2-to-1 decision, court holds that third-party harassment claims are actionable under a negligence standard – the company knew or should have known that a sales representative for a customer who had daily contact with the plaintiff was engaging in abusive racial conduct.
Standen v. Gertrude Hawk Chocolates, Inc., 122 FEP 23, 2014 WL 1095129 (M.D. Pa. Mar. 19, 2014) – co-worker harassment – three harassers – Motion In Limine denied – female employee may testify about her suicide attempt even though the evidence may be prejudicial to employer – it is relevant to liability and her prima facie case and also relevant to damages – “[P]laintiff’s suicide attempt is indeed relevant to establishing liability[,]” 2014 WL 1095129, at *2 – Plaintiff must establish that the harassment “had a subjective detrimental effect on the plaintiff” and suicide certainly is relevant – “Here, plaintiff’s suicide attempt is relevant because it is a core component of her prima facie case – that the sexual discrimination detrimentally affected her.” Id. (emphasis in original) – “Stated differently, the law compels plaintiff to offer testimony of her emotional distress, including her suicide attempt. Additionally, plaintiff must be permitted to introduce evidence regarding her suicide attempt to enable the jury to determine plaintiff’s damages. As such, plaintiff’s suicide attempt is relevant.” Id. Defendant argued that the suicide evidence would be unduly prejudicial – “Defendant cites no authority, and our research has uncovered none, to support this proposition.” Id. – “Additionally, while plaintiff’s suicide attempt may be prejudicial, in the sense of being detrimental to defendant’s case, the court finds nothing unfairly prejudicial regarding this evidence. Ergo, the probative value of plaintiff’s suicide attempt is not substantially outweighed by unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” Id. at *3 (emphasis in original).

Ellis v. Houston, 742 F.3d 307, 121 FEP 733 (8th Cir. 2014) – Five black correctional officers sued for racial hostile environment harassment – even if viewed objectively no individual officer experienced acts that were sufficient to establish liability, can aggregate – each individual instance of harassment was experienced by officers as part of a larger pattern of hostile conduct – District Court erroneously dismissed because it failed to consider the cumulative effect of the evidence that supervisors made or condoned racist comments in a group setting on a nearly daily basis.

on the internet, saying that he was a “snake” who “needs to keep his creepy hands to himself” – she also sent text messages to her co-workers containing such allegations – her contention that she was merely trying to gather evidence rejected – properly terminated for improper postings and lying about them – company policy dictates that investigation should be confidential.

*Williams-Boldware v. Denton Cnty.*, 741 F.3d 635, 121 FEP 755 (5th Cir.), *cert. denied*, 135 S. Ct. 106 (2014) – Racial harassment judgment reversed – employer took prompt action – reprimand and requirement to attend diversity training sufficient – “Employers are not required to impose draconian penalties upon the offending employee in order to satisfy this court’s prompt remedial action standard,” 741 F.3d at 640.

*Bertsch v. Overstock.com*, 684 F.3d 1023, 115 FEP 745 (10th Cir. 2012) – Summary judgment properly granted on hostile environment claim – employer took proper remedial action by conducting investigation and issuing written warning to alleged harasser – plaintiff contended that employer did not “follow up” to ensure that the harassment had ended – that is not the employer’s burden – it is the claimant’s burden to seek relief if the harassing conduct continues after the discipline.

*Espinal v. Nat’l Grid NE Holdings 2, LLC*, 693 F.3d 31, 115 FEP 1418 (1st Cir. 2012) – co-worker harassment – “The standard for imposing liability on an employer for workplace harassment is heightened where the perpetrators of that harassment were a plaintiff’s co-workers, not his supervisors.” 693 F.3d at 36. Plaintiff must prove that after having adequate notice of the harassment the employer failed to take prompt and appropriate action – prompt action taken here – plaintiff refused to disclose details of the incidents – summary judgment for employer affirmed.

*Berryman v. SuperValu Holdings, Inc.*, 669 F.3d 714, 114 FEP 808 (6th Cir. 2012) – Eleven African-American employees alleged a racially hostile work environment spread over 25 years – district court properly considered each of the claims separately – summary judgment properly awarded on each of the claims on the ground that the conduct was not sufficiently severe or pervasive – district court properly considered only
conduct directed at the plaintiff or of which the plaintiff was aware –
cannot aggregate experiences of which a particular individual was not
aware.

**Discharge and Reduction in Force (Ch. 21)**

*Watson v. Heartland Health Labs, Inc.*, 790 F.3d 856, 127 FEP 964 (8th
Cir. 2015) – Summary judgment on constructive discharge claim – “Given
the nature of the alleged conduct in this case [sexual harassment by
patient], however, Watson was not reasonable in voluntarily abandoning
her job after giving her employer only ten working days to remedy the
perceived intolerability.” 790 F.3d at 864.

on constructive discharge claim by woman who just returned from
maternity leave – she alleged that her department head told her she should
go home to her babies – “[b]y not attempting . . . to contact human
resources, [Plaintiff] acted unreasonably and failed to provide [the
employer] with the necessary opportunity to remedy the problem she was
experiencing.” 760 F.3d at 769.

**Employers (Ch. 22)**

*Love v. JP Cullen & Sons, Inc.*, 779 F.3d 697, 126 FEP 659 (7th Cir.
2015) – African American plaintiff dismissed from construction job site
after physical altercation with another worker – general contractor
employed a sub-contractor who in turn employed a second sub-contractor
which in turn employed plaintiff – the job superintendent for the second
tier sub-contractor received work instructions from the general contractor,
and passed those instructions on to plaintiff – the general contractor only
gave specific directions if it reviewed a finished product and found it
unsatisfactory – in the event of “serious incidents,” the general contractor
retained the right to investigate alleged misconduct by its subcontractors’
employees and to permanently remove them from the job site – the general
ordered both combatants permanently removed from the job site –
plaintiff’s employer attempted to persuade the general to reinstate plaintiff
but unsuccessfully – plaintiff’s employer terminated him, since it had no other pending projects – court below granted summary judgment on the ground that the general contractor was not the de facto or direct employer – a plaintiff may have multiple employers for the purpose of Title VII liability – precedents have looked to five factors: (1) the extent of the employer’s control and supervision over the employees; (2) the kind of occupation and nature of skill required; (3) the employers responsibility for the cost of operation; (4) the method and form of payment and benefits; and (5) the length of the job commitment. Of all the factors, the employer’s right to control is the most important in determining whether an individual is an employee or independent contractor – here the control was only as to the result to be achieved – if the general reviewed a finished product and found it to be unsatisfactory, it would communicate further instructions – “This minimal supervision is essentially limited to ‘the result to be achieved,’ which militates against a finding of control.” 779 F.3d at 703 – when control is examined, the key powers are hiring and firing – here the general retained the final decision regarding the continued presence of any worker on the project site – but the record lacks any evidence that the general attempted to jeopardize plaintiff’s continued employment with the sub-contractor – the fact that the sub-contractor had no other projects is unrelated – here none of the five factors support an employment relationship – our prior cases have indicated that an entity other than the direct employer may be considered a Title VII employer if it directed the discriminatory act – but the general didn’t fire him, it just directed that he be removed from its project – in any case, “evidence that a de facto employer ‘directed the discriminatory act’ is not – without more – enough to establish a de facto employer-employee relationship under Title VII[,]” 779 F.3d at 706 (internal quotation marks omitted) – the general’s decision to remove plaintiff from the project is relevant but not determinative on the control issue – summary judgment affirmed.

Sklyarsky v. Means-Knaus Partners, LP, 777 F.3d 892, 125 FEP 1677 (7th Cir. 2015) – Terminated janitor sued both the maintenance contractor for whom he worked, and the building’s management company – summary judgment properly granted in favor of the management company – that the management company played no role in the maintenance company’s decision to fire the plaintiff – with respect to plaintiff’s claim against his actual employer, the plaintiff incurred five reprimands including two suspensions in less than three years – plaintiff’s inability to show that he was meeting the maintenance company’s legitimate expectations is fatal to his reliance on the indirect method of proof.
**EEOC v. Simbaki, Ltd.**, 767 F.3d 475, 124 FEP 713 (5th Cir. 2014) – Female bartenders, represented by counsel, brought harassment charges only against the franchisee – the EEOC served both the franchisee and the franchisor – District Court dismissed for failure to name the franchisor – circuit court decisions have allowed exceptions to the named party requirement for pro se plaintiffs, but never for plaintiffs represented by counsel – this makes no sense – remanded for determination as to whether the franchisor was adequately put on notice.

**Knitter v. Corvias Military Living, LLC**, 758 F.3d 1214, 123 FEP 1023 (10th Cir. 2014) – Plaintiff, a handyman, worked for a contractor that supplied handyman services to Military Living, a company that provided housing for military personnel. When a unit was vacated, the housing company paid the contractor a flat fee to send in a handyman and do all necessary repairs. The contractor then paid the handyman. The housing company was the sole client of the contractor. Plaintiff sued the housing company. Summary judgment was granted and affirmed on the ground that the housing company was not plaintiff’s employer or joint employer – under the joint employer test, the two entities must share or co-determine matters governing the essential terms and conditions of employment – both entities must exercise significant control such as promulgating work rules and day-to-day supervision – no reasonable jury could find that plaintiff was an employee of the housing company – the housing company did not have authority to terminate plaintiff, did not pay her directly, did not have authority to supervise or discipline beyond the confines of a vendor-client relationship – the housing company treated the plaintiff as a vendor providing a service rather than an employee – ability to ask that the employee not work on housing company projects is not the same as authority to terminate – although some degree of supervision and even discipline is to be expected when a vendor’s employee comes on another’s worksite, here the supervision and discipline was too limited to support a joint employer finding – the housing company exerted only the sort of control that one would expect from a client to exert over its vendors – supervising limited aspects of their work, providing them with instruction on particular tasks, and furnishing some supplies when necessary.
Unions (Ch. 23)

*Green v. Am. Fed’n of Teachers Local 604*, 740 F.3d 1104, 121 FEP 619 (7th Cir. 2014) – Union liable if it refuses to process a grievance for a terminated employee because of his race.

Charging Parties and Plaintiffs (Ch. 25)

*Marie v. Am. Red Cross*, 771 F.3d 344, 125 FEP 264 (6th Cir. 2014) – Catholic nuns who volunteered to work with the Red Cross as disaster relief helpers were not employees protected by Title VII – reliance on fact that they received no compensation or substantial benefits, they retained considerable discretion and flexibility over when and how they volunteered, and Red Cross did not exercise any real control over them.

*Bluestein v. Cent. Wis. Anesthesiology, S.C.*, 769 F.3d 944, 124 FEP 1459 (7th Cir. 2014) – Issue was whether anesthesiologist who was partner and shareholder of medical practice was employee or employer – plaintiff worked as an employee for 2½ years and then became a full partner – she had a vote in all matters – physician shareholders shared profits and losses equally – most issues were resolved by a majority vote – plaintiff participated in many votes – summary judgment affirmed – extensive analysis of non-exclusive list of 6 factors under *Clackamas* – no one factor is determinative – there were approximately 16 shareholders at the time of her termination – hire and fire decisions were by vote – indeed plaintiff voted on her own termination – “the right to cast a vote equal to that of any other board member unequivocally indicates that Bluestein was an employer rather than an employee,” 769 F.3d at 953 – the second part of the first factor, whether the organization set the rules and regulations of the individual’s work, does not assist plaintiff – it was not the organization but the physician shareholders who collectively voted on rules and regulations – the second factor, whether the organization supervises the individual’s work, undisputed that plaintiff was not supervised – third factor, whether she reports to someone higher in the organization, is essentially coextensive with the second factor on supervision – the fourth factor is to what extent the individual is able to influence the organization – she had a full vote – Bluestein’s situation was markedly different from *EEOC v. Sidley Austin* where a large law firm consisting of more than 500
Partners was controlled by a small self-perpetuating executive committee – we held some shareholders may be considered employees and remanded for discovery – the fifth factor, whether the parties intended the individual to be an employee, we note that she did have an employment agreement – the language in plaintiff’s contract cannot overcome the reality of her position – as to the sixth factor, she clearly shared in profits – “Our conclusion that she was an employer is fatal to all her discrimination claims,” 769 F.3d at 956 – summary judgment affirmed – award of attorneys’ fees against plaintiff and her lawyer also affirmed since case was frivolous – trial court found that “a reasonable amount of legal research should have alerted counsel to the implausibility of success on the merits of any of her claims,” 769 F.3d at 957. – “A reasonable jurist could conclude that [plaintiff’s] suit was frivolous, unreasonable and without foundation, and we therefore affirm the award of attorneys’ fees.”

Mariotti v. Mariotti Bldg. Prods., Inc., 714 F.3d 761, 118 FEP 224 (3d Cir. 2013), cert. denied, 134 S. Ct. 437 (2013) – plaintiff who was officer, board member and shareholder of closely held family corporation was not a Title VII employee – Clackamas Supreme Court decision, although arising under the ADA, governs the test under Title VII also.

Kirleis v. Dickie, McCamey & Chilcote, PC, 107 FEP 1121, 2009 U.S. Dist. LEXIS 100326 (W.D. Pa. Oct. 28, 2009), aff’d, 109 FEP 1428 (3d Cir. 2010), cert. denied, 131 S. Ct. 925 (2011) – Law firm equity shareholder/director was employer and not employee under Title VII and Equal Pay Act – court conducted six-factor analysis set forth in Clackamas Gastroenterology Associates v. Wells, 538 U.S. 440 (2003) – plaintiff bears burden of proof that she was a statutory employee and not employer – six Clackamas factors are not exhaustive – plaintiff at firm for over 20 years – 10 years as an associate, three years as Class B shareholder, and nine years as Class A shareholder/director – bylaws provided plaintiff with car allowance, annual trip to legal seminar, reimbursement of 70% of country club dues, and life insurance policy – board of directors on which plaintiff sat under the bylaws effectively ran the firm - plaintiff contended that the bylaws were not followed in fact, that she had not received a copy, and that in practice the firm is run by a small group of senior partners – firm had between 61 and 69 Class A shareholders during relevant time frame, and plaintiff contended she had
no real opportunity to effect decisions – directors including plaintiff voted on all major decisions – lower-level attorneys did not – whether the organization can fire the plaintiff weighs in favor of the firm – Plaintiff could be terminated for cause only by a vote of three-fourths of the board of directors – “This factor weighs heavily in defendant’s favor . . . .” 107 FEP at 1134-35 (emphasis in original) – directors including plaintiff have access to a great deal of financial information that lower-level attorneys do not have – the one exception is access to compensation of individual shareholders – plaintiff sees the withholding of that information as indicating a lack of independence – the court does not agree – since three-fourths of the directors can amend the bylaws, confidentiality of compensation was the choice of the directors – who “reports” to whom at the firm is not a simple question – plaintiff has far more independence than associate attorneys – plaintiff devoted 90% of her time to one large firm client, and was closely supervised with respect to that work – the same rules applied to every attorney handling cases for that client – plaintiff had almost complete autonomy with regard to her own clients – she can turn down assignments unlike associates – she set her own hours and work schedule – associates did not have the same flexibility – with respect to hiring non-lawyer employees, her authority was no different from any other director – plaintiff was able to influence the organization because she had a vote – she was eligible to be elected to the executive committee – generally deferring to the recommendations of the executive committee does not establish that all other directors are employees – plaintiff was an equity owner – finding that plaintiff has substantial influence, even though less than members of the executive committee, which supports a finding that she is an employer – on compensation, when profits go up, shareholders make more money – all shareholders make a contribution toward liability – the Clackamas monetary factor weighs heavily in favor of the firm – summary judgment granted to the firm.

*Kirleis v. Dickie, McCamey & Chilcote*, 109 FEP 1428 (3d Cir. 2010) (nonprecedential unpublished), *cert. denied*, 131 S. Ct. 925 (2011) – Affirming decision reported at 107 FEP 1121, Third Circuit finds that shareholder in law firm is employer and not employee – summary judgment reviewed *de novo* – plaintiff has been a Class A shareholder for the last eight years – she alleged equal pay violations – to determine whether a shareholder/director of a professional corporation is an employer or an employee we look to six Clackamas factors: (1) right to hire or fire; (2) supervision of the individual’s work; (3) reporting to
someone higher in the organization; (4) ability of the individual to influence the organization; (5) the parties’ intention; and (6) share in profits – touchstone is control – employee claims her purported position was a mere rubber stamp and that executive committee, not board of directors, makes all important decisions and sometimes forces shareholders to resign – her work for the firm’s largest client is closely supervised – she is not employee because she had the ability to participate in the firm’s governance, she has right not to be terminated without a three-quarters vote of the board of directors for cause, and she shared profits and losses – for these and all the other reasons set forth in the district court’s thorough opinion, Kirleis is an employer as a matter of law and is precluded from suing under the employment discrimination laws.

EEOC Administrative Process (Ch. 26)

_EEOC v. Aerotek, Inc._, 498 Fed. App’x 645, 117 FEP 26 (7th Cir. 2013) (non-precedential) – The EEOC regulations state that any recipient of an EEOC subpoena who does not intend to fully comply must petition for revocation or modification and that such petitions must be mailed “within five business days . . . after service of the subpoena.” 29 C.F.R. § 1601.16(b). – Here the petition to revoke or modify was submitted six business days later, one business day late. “The EEOC argues that Aerotek has waived its right to challenge the enforcement of the subpoena. We agree. . . . Aerotek has provided no excuse for this procedural failing . . . .” 498 Fed. App’x at 647-48 – No other Circuit Court has ruled on the question of whether an employer’s failure to timely challenge before the EEOC precludes a later challenge to the enforcement of the subpoena in the Title VII context – two District Courts allowing such challenges are not particularly instructive – other District Courts have found that an employer waives its objections by simply failing to file a timely petition – “EEOC may enforce its subpoena because Aerotek has waived its right to object.” _Id._ at 649.

_EEOC v. Royal Caribbean Cruises, Ltd._, 771 F.3d 757, 30 A.D. Cas. 1553 (11th Cir. 2014) – EEOC investigation of hiring and firing – EEOC subpoenaed information about both U.S. and non-U.S. citizens – EEOC subpoena power does not extend to non-U.S. citizens since their employment conditions are not relevant to the charge under investigation.
Timeliness (Ch. 27)

Continuing Violation

*Jenkins v. City of San Antonio Fire Dep’t*, 784 F.3d 263, 126 FEP 1527 (5th Cir 2015) – Three-day presumption of receipt after mailing determines whether Title VII suit was timely filed when date of receipt of EEOC right-to-sue letter is unknown.

*Bass v. Joliet Pub. Sch. Dist. No. 86*, 746 F.3d 835, 122 FEP 243 (7th Cir. 2014) – Female custodian failed to file charge within 300 days of reassignment of duties requiring her to clean more restrooms – reassignment of duties is a discrete act, and nothing about its duration or repetition changes the nature in such a way that a cumulative violation arises.

General Issues

*Green v. Donahoe*, ___ U.S. ___, ___ FEP ___, 135 S. Ct. 1892 (April 27, 2015) – Supreme Court grants *certiorari* to decide when the limitations period under Title VII runs on constructive discharge claims – did plaintiff’s constructive discharge claim accrue when the U.S. Postal Service gave him a choice between retiring or taking a significantly lower paying job 300 miles away, or when he resigned two months later, claiming a constructive discharge – the Tenth Circuit joined the District of Columbia and Seventh Circuit in holding that the limitations period begins to run from the last discriminatory act – but five other Circuits have held that a constructive discharge claim accrues when the employee actually resigns.

*Castagna v. Luceno*, 744 F.3d 254, 121 FEP 1533 (2d Cir. 2014) – A timely EEOC charge does not toll the statute of limitations with respect to tort claims – both the Seventh and Ninth Circuits have already so held.
Dyson v. District of Columbia, 710 F.3d 415, 117 FEP 277 (D.C. Cir. 2013) – No equitable tolling with respect to charge not filed within 300 days even though intake questionnaire was filled out within 300-day time limit and EEOC did not send a draft charge until after deadline – intake questionnaire is not a charge – no discussion of Federal Express Corp. v. Holowecki, 552 U.S. 389, 102 FEP 1153 (2008) (questionnaire can constitute a charge under the ADEA if it contains an allegation of discrimination, names the employer, and reasonably can be construed to request the agency to take remedial action).

Jurisprudential Bars to Action (Ch. 28)

Robinson v. Concentra Health Servs. Inc., 781 F.3d 42, 126 FEP 925 (2d Cir. 2015) – Black plaintiff awarded total disability benefits under social security for multiple sclerosis – this bars her from pursuing Title VII and Section 1981 claims – her social security claims were filed months before she was fired – but she asserted in support of her bias claims that she was qualified at the time of her discharge – summary judgment granted since plaintiff failed to explain the contradiction – she was judicially estopped – plaintiff argued that she couldn’t have been totally disabled when she applied for social security since she was still working – this “demonstrates only that her statements to the SSA and the ALJ may have been false,” but doesn’t affect judicial estoppel – reliance on Cleveland v. Policy Management System Corp., 526 U.S. 795 (1999) (to overcome contradictions between SSA application and lawsuit there must be a “sufficient explanation”).

Myers v. Knight Protective Serv., Inc., 774 F.3d 1246, 31 A.D. Cas. 1 (10th Cir. 2014), cert. denied, 135 S. Ct. 2061 (2015) – Security guard injured on previous job applied for social security disability benefits – represented was in constant pain, could only walk or stand between 10 and 20 minutes, and could not lift more than 10 pounds – new employer noticed he seemed to be in pain and stated he could not continue without a physical exam – plaintiff never scheduled the exam but sued for disability discrimination – in law suit claimed could perform essential functions of job – no prima facie case since could not show was qualified in light of such “seemingly inconsistent statements” unless he could explain the “apparent contradiction,” which he failed to do.
Huon v. Johnson & Bell, Ltd., 757 F.3d 556, 122 FEP 1540 (7th Cir. 2014) – Claim preclusion bars federal court discrimination suit – litigated and lost state court suit alleging defamation and intentional infliction – even though he had the right to allege discrimination in a state court complaint, he elected not to do so – he thus had a full and fair opportunity to litigate his discrimination claims in his state court suit.

Peoples v. Radloff, 764 F.3d 817, 124 FEP 124 (8th Cir. 2014) – Bankruptcy trustee settled Chapter 7 debtors employment discrimination claims – Bankruptcy Court approved – debtor failed to show any reasonable possibility of surplus after satisfying all debts – she therefore lacked pecuniary interest in Bankruptcy Court’s order and is not a person aggrieved.

Dzakula v. McHugh, 746 F.3d 399, 121 FEP 636 (9th Cir. 2014) – Case dismissed because Plaintiff failed to list discrimination claim as an asset in Chapter 7 Bankruptcy – only after Defendant moved to dismiss did she amend her Bankruptcy schedules – no evidence suggested that the omission was inadvertent or mistaken – while appeal pending Ninth Circuit decided Ah Quin v. County of Kauai Department of Transportation, 733 F.3d 267 (9th Cir. 2013) – in that case the District Court applied a narrow interpretation to the terms “inadvertent or mistaken” – the trial court in Ah Quin held that since the Plaintiff knew about the claim and had a motive to conceal it, that barred the claim as a matter of law – we reversed and held that mistake and inadvertence should be interpreted using the ordinary understanding of the terms – in that case there had been some facts supporting the conclusion that the omission may have been inadvertent – in that case viewing the facts most favorably to plaintiff we remanded for further facts – Ah Quin is distinguishable – the District Court did not apply the wrong legal standard – the District Court interpreted inadvertent or mistaken under the ordinary understanding of those terms – Plaintiff presented no evidence explaining her initial failure to include the action on her Bankruptcy schedules – Plaintiff seems to argue that our Ah Quin decision mandates an evidentiary hearing every time a plaintiff debtor omits a claim – Ah Quin is applicable only when a reasonable jury could conclude based on the factual record that the failure to list the asset was inadvertent – argument that the District Court abused its discretion in assessing the three principle factors that one relies on in these cases rejected – as to the first factor, by failing to list the claim while
at the same time pursuing the claim Plaintiff clearly asserted inconsistent positions – as to the second factor the Bankruptcy Court was misled by Plaintiff’s omission – on the third factor, Plaintiff derived an unfair advantage in Bankruptcy Court by failing to list the claim – summary judgment affirmed.

_Ah Quin v. Cnty. of Kauai Dep’t of Transp._, 733 F.3d 267, 119 FEP 321 (9th Cir. 2013) – 2-1 decision – Ninth Circuit refuses to dismiss lawsuit based on omission from bankruptcy schedule – “inadvertence or mistake” exception to judicial estoppel might apply when the debtor reopens her bankruptcy case and amends her schedule to include a previously omitted claim after the employer moved for summary judgment – District Court had dismissed the case on the ground that the employee knew about her claims and had a motive to conceal them from creditors – District Court should have determined whether her bankruptcy filing was in fact inadvertent or mistaken as those terms are commonly understood – knowledge of the claim and motive to conceal it are factors but not enough by themselves – relevant inquiry is plaintiff’s subjective intent when she was filling out the bankruptcy schedule.

_Wilson v. Dollar Gen. Corp._, 717 F.3d 337, 27 A.D. Cas. 1697 (4th Cir. 2013) – Unlike Chapter 7, Chapter 13 Bankruptcy does not preclude debtor from maintaining lawsuit – Fourth Circuit joins five other Circuits that have so concluded – under Chapter 7, assets are liquidated and paid to creditors – under Chapter 13, the debtor remains in possession of the property and cures his indebtedness under the supervision of a trustee by way of regular payments to creditors.

_Salas v. Sierra Chem. Co._, 59 Cal. 4th 407, 30 A.D. Cas. 17 (2014), _cert. denied_, 135 S. Ct. 755 (2014) – Undocumented alien may sue for discrimination under California’s FEHA – full relief can be obtained except that back pay cannot be awarded for any period of time after the employer became aware of the undocumented alien’s illegal status – it is at the point of the employer’s awareness that the employer is prohibited from continuing the individual in its employ.
Title VII Litigation Procedure (Ch. 29)


McCleary-Evans v. Maryland Dep’t of Transp., 780 F.3d 582, 126 FEP 640 (4th Cir. 2015) – 12(b)(6) dismissal affirmed since complaint did not contain sufficient factual matter to state a plausible claim of discrimination because plaintiff was African American or female under Iqbal and Twombly – the complaint simply alleged in conclusory fashion that the decision-makers were biased with respect to her not being selected for promotion – plaintiff relies on Swierkiewicz v. Sorema, 534 U.S. 506 (2002) (prima facie case not necessary to survive motion to dismiss) – but under Iqbal and Twombly a complaint must contain factual allegations sufficient to create a non-speculative right to relief – a complaint must contain sufficient factual matter which if accepted as true states a claim to relief that is “plausible on its face” – this complaint stopped short of a line between the possibility of discrimination and the plausibility of discrimination – “the Supreme Court in Swierkiewicz applied a different pleading standard than that which it now requires under Iqbal and Twombly[,]” 780 F.3d at 586 – while Swierkiewicz remains good law, Twombly and Iqbal did alter the criteria in at least two respects – (1) it rejected the holding that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff could prove no set of facts sufficient for relief, and (2) “Iqbal and Twombly articulated a new requirement that a complaint must allege a plausible claim for relief, thus rejecting a standard that would allow a complaint to ‘survive a motion to dismiss whenever the pleading left open the possibility that a plaintiff might later establish some ‘set of [undisclosed] facts’ to support recovery[,]’” 780 F.3d at 587 (internal quotation marks omitted; emphasis in original).
Climent-Garcia v. Autoridad de Transporte Maritimo, 754 F.3d 17, 122 FEP 1543 (1st Cir. 2014) – Employer waived right to challenge jury loss on basis of sufficiency of evidence when, although it moved for directed verdicts at the close of the employee’s case and at the close of all the evidence, it failed to file a JNOV motion after the jury returned a verdict or to move for a new trial.

Gilster v. Primebank, 747 F.3d 1007, 122 FEP 527 (8th Cir. 2014) – Rebuttal closing argument by plaintiff’s counsel where she recounted her own experience of being sexually harassed basis for new trial – this was plainly calculated to arouse jury sympathy – not sufficient that court instructed the jury that statements, arguments, questions, and comments by lawyers are not evidence – “[T]he timing and emotional nature of counsel’s improper and repeated personal vouching for her client, using direct references to facts not in evidence, combined with the critical importance of [plaintiff’s] credibility to issues of both liability and damages, made the improper comments unfairly prejudicial and require that we remand for a new trial,” 747 F.3d at 1013 – where a lawyer departs from the path of legitimate argument she does so at her own peril and that of her client.

Caudle v. District of Columbia, 707 F.3d 354, 117 FEP 525 (D.C. Cir. 2013) – $1 million award set aside and new trial ordered because of “golden rule” and “send a message” statements by plaintiff’s counsel during closing argument – golden rule arguments are impermissible regardless of whether they address liability or damages – “put yourselves in the plaintiff’s shoes” is also impermissible – “send a message” might not have warranted reversal by itself, but when coupled with the other comments which followed three sustained objections a new trial is necessary – a jury has a duty to decide the case based on facts and law instead of emotion – even though District Court sustained the employer’s objections and gave the jury a curative instruction and gave it a general instruction to decide the case without prejudice these measures failed to mitigate the prejudice caused by four impermissible statements.

Conroy v. Vilsack, 707 F.3d 1163, 117 FEP 385 (10th Cir. 2013) – Two of plaintiff’s experts properly excluded – female claimed Forest Service refused to promote her because she is a woman and that re-advertising the position with a college degree requirement was discriminatory – first
expert proposed to testify on “sex stereotyping” and how it affected the
decision to select a male employee over the plaintiff – the second wanted
to testify that the decision to re-advertise the position to include the
requirement of a college degree was “purposefully designed to deny [her]
the position,” 707 F.3d at 1170 - District Court properly found
stereotyping expert to be unqualified even though she had previously
tested as an expert in discrimination cases – she had never researched or
written about sex stereotyping, and became familiar with the topic only
after being retained for this case – she could not recall articles or relevant
cases supporting the application of sex stereotyping research to disparate
treatment cases – the second witness was excluded as unreliable because
he “‘demonstrated a lack of knowledge’” and “‘failed to provide a
meaningful analysis of how he came to conclude what he did while
showing that his testimony reliably applied to the facts of this case[.].’” id.
(citation and alteration omitted) - the expert was “oblivious to . . . key
facts,” including the fact that the job as re-advertised required either a
college degree or equivalent professional experience.

Gates v. Caterpillar, Inc., 513 F.3d 680, 102 FEP 609 (7th Cir. 2008) – In
response to summary judgment motion in retaliation case, employee in
declaration alleged for the first time that she had made a statement to her
supervisor opposing gender bias – statement made for first time in
declaration properly disregarded even though there was never a specific
deposition question calling for the comment – “Although the affidavit
statement does not necessarily conflict with [plaintiff’s] testimony from
her previous deposition, the omission of such a significant statement
during her deposition in a sex discrimination case speaks volumes.”
513 F.3d at 688 – while we have long held that a plaintiff cannot avoid
summary judgment by contradicting a prior deposition, it is less obvious
when the new statement does not directly contradict prior testimony –
“Under the circumstances at hand here, where specific, gender-based
complaints are vital to [plaintiff’s] claim and where she made no mention
of the statement in her deposition, it is reasonable to exclude it.” Id.
at 688 n.5 – summary judgment affirmed.
EEOC Litigation (Ch. 30)

*Mach Mining, LLC v. EEOC*, ___ U.S. ___, 135 S. Ct. 1645, 126 FEP 1521 (2015) – Courts may review EEOC conciliation efforts prior to filing a lawsuit but the scope of review is narrow – 7th Circuit holding that Title VII shields EEOC’s pre-suit conciliation efforts from any review rejected – nothing in Title VII “withdraws the courts’ authority to determine whether the EEOC has fulfilled its duty to attempt conciliation of claims,” 135 S.Ct. at 1656 – but the EEOC has considerable discretion over the conciliation process and judicial review is limited – if a court finds for the employer regarding a conciliation shortfall, the remedy is not dismissal but further conciliation.

*EEOC v. Propak Logistics, Inc.*, 746 F.3d 145, 122 FEP 247 (4th Cir. 2014) – EEOC must pay $189,000 in attorneys’ fees in class type case – lawsuit dismissed under doctrine of laches because of the EEOC’s unreasonable delay – the EEOC’s class lawsuit was effectively moot by the time it was filed more than six years after the charge – when EEOC filed its complaint it failed to identify a class of victims who could be entitled to money and injunctive relief – the EEOC acted unreasonably in initiating this litigation.

*EEOC v. Peoplemark, Inc.*, 732 F.3d 584, 120 FEP 181 (6th Cir. 2013) – $751,942 attorney and expert witness fees award against EEOC for frivolous lawsuit – claim that agency had a blanket companywide policy of denying jobs to applicants with felony records groundless – decision was 2 to 1 – EEOC unreasonably continued to litigate once discovery revealed that no such policy existed – case was not groundless when filed but became groundless.

*EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 114 FEP 1566 (8th Cir. 2012), *pet. for cert. filed*, No. 14-1375 (May 19, 2015) – 2-1 decision affirming dismissal of most of a section 706 sexual harassment class action – District Court reversed on holding that EEOC could not seek individual relief under § 706 – However, EEOC had failed to investigate and conciliate the claims of each putative class member – EEOC cannot proceed on behalf of class members for whom there was no adequate investigation and conciliation – the result would have been different if EEOC had alleged a pattern or practice under section 707, because then no
individual conciliation obligation would have existed – court unanimously vacated $4.5 million fee award against EEOC because two individual harassment claims survived summary judgment and were remanded for trial – as a result, the company no longer was a “prevailing defendant” in every respect – individual plaintiff who did not disclose claims in bankruptcy estopped.

**Federal Employee Litigation (Ch. 32)**

*Kannikal v. Attorney General U.S.*, 776 F.3d 146, 125 FEP 1475 (3d Cir. 2015) – Six-year statute of limitations for suits against the United States does not apply to Title VII actions – Title VII provides no limit to how long employees can await the conclusion of the administrative process.

*Toy v. Holder*, 714 F.3d 881, 118 FEP 229 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 650 (2013) – Female former intelligence analyst terminated after FBI revoked her access to the regional office in which she had worked as a contract employee – plaintiff contended that new FBI office director “had problems with women” – case dismissal affirmed based on the plain language of the statute creating an exception to Title VII where granting “access to the premises” of a secure location is related to national security.

**Class Actions (Ch. 33)**

*Tyson Foods, Inc. v. Bouaphakeo*, ___ U.S. ___, 135 S. Ct. 2806, 2015 U.S. LEXIS 3860 (June 8, 2015) – *Cert. granted* to review 2-to-1 decision of Eighth Circuit which held District Court didn’t abuse it’s discretion in certifying a collective action under the FLSA – plaintiffs claim that the time Tyson automatically added to paychecks to cover donning and doffing and required walking wasn’t sufficient – issue is whether representative proof could be used when there are individual variances with respect to time spent – plaintiffs claim that the employer’s burden was to keep records and when it didn’t representative proof was acceptable – the employer argued “where liability and damages will be determined with statistical techniques that presume all class members are
identical to the average observed in a sample” that this violated its Constitutional rights.

*Comcast Corp. v. Behrend*, ___ U.S. ___, 133 S. Ct. 1426 (2013) – Antitrust case – no credible theory as to how to award damages if liability found – therefore, class improperly certified under Rule 23(b)(3) – class certification requires a method by which damages can be measured classwide – “If anything, Rule 23(b)(3)’s predominance criterion is even more demanding than Rule 23(a). Rule 23(b)(3), as an adventurous innovation, is designed for situations in which class action treatment is not as clearly called for.” 133 S. Ct. at 1432 (citation and internal quotation marks omitted). “Without [an adequate] methodology, respondents cannot show Rule 23(b)(3) predominance: Questions of individual damage calculations will inevitably overwhelm questions common to the class.” *Id.* at 1433. “Calculations need not be exact . . . but at the class certification stage (as at trial), any model supporting a plaintiff’s damages case must be consistent with its liability case . . . .” *Id.* (internal citation and quotation marks omitted) – “The first step in a damages study is the translation of the legal theory of the harmful event into individual analysis of the economic impact of that event,” *id.* at 1435 (citing the Federal Judicial Center Reference Manual on Scientific Evidence; emphasis in original) – decision was 5 to 4 – dissent contended that since plaintiffs conceded they did not have an adequate damages model therefore “the Court’s ruling is good for this day and case only.” *Id.* at 1437. [Note: Shortly following the decision, the Court remanded an employment case to the 7th Circuit for reconsideration in light of Comcast.]

*Phipps v. Wal-Mart Stores, Inc.*, 792 F.3d 637, 127 FEP 945 (6th Cir. 2015) – Follow on class action to *Dukes* case, covering smaller geographic area, is entitled to the benefit of American Pipe tolling.

*Brown v. Nucor Corp.*, 785 F.3d 895, 126 FEP 1793 (4th Cir. 2015) – Class of black employees alleging promotion discrimination meets commonality requirement even after *Dukes* – statistical evidence is sound and yields results that satisfy *Dukes*’ requirements – statistical disparity in promotions is significant at 2.54 standard deviations.
Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 20 W.H. Cas. 2d 801 (2013) – FLSA collective action – sole individual plaintiff rejected Rule 68 offer that provided full relief – under Third Circuit precedent this mooted her action – Third Circuit held that although her action was mooted (which she did not contest) that a collective action remained viable because defendant should not be allowed to “pick off” named plaintiffs – Supreme Court reversed – Supreme Court did not decide Circuit split as to whether an unaccepted Rule 68 offer moots the action – “We . . . assume, without deciding, that petitioners’ Rule 68 offer mooted respondent’s individual claim[.]” 133 S. Ct. at 1529 – Rule 23 authority inapposite to FLSA – since individual plaintiff’s claim moot, this mooted the entire action – plaintiff had no economic stake in the case – 5-4 decision – dissent stated that the premise of the majority’s decision, its assumption a rejected offer of settlement moots anything – is clearly erroneous – “An unaccepted settlement offer – like any unaccepted contract offer – is a legal nullity, with no operative effect[.]” id. at 1533.

Stockwell v. City and Cnty. of San Francisco, 749 F.3d 1107, 122 FEP 795 (9th Cir. 2014) – San Francisco moved from a 1998 qualifying exam for promotion to a new Sergeant’s Exam – individuals who had passed the 1998 exam but either refused to take the new exam or did not pass it sued alleging disparate impact age discrimination under California’s FEHA – District Court denied certification because of inadequacies in the plaintiffs’ statistical showing – the regression analysis did not account for numerous alternative explanations other than age for the alleged statistical disparity – Ninth Circuit reversed – District Court engaged in an improper merits analysis – “[C]ourts must consider merits issues only as necessary to determine a pertinent Rule 23 factor, and not otherwise[.]” 749 F.3d at 1113 – It may be that the defects in the statistics will bar 23(b)(3) certification and this is remanded – Disparate impact under FEHA is parallel to under the ADEA – the officers produced a statistical study purportedly showing a disparate impact – whatever its failings the class’s statistical analysis affects each class members’ claims uniformly and thus is similar to the Supreme Court’s decision in Amgen Inc. v. Connecticut Retirement Plans and Trust Funds, 133 S. Ct. 1184 (2013), where the court held that merits questions need be considered only to the extent that they are relevant to determining Rule 23 prerequisites – “The district court . . . critiqued that study as inadequate for–among other reasons–failing to conduct a regression analysis to take account of alternative explanations, unrelated to age, for any statistical imbalance. But whatever the failings
of the class’s statistical analysis, they affect every class member’s claims uniformly, just as the materiality issue in Amgen affected every class member uniformly[,]” 749 F.3d at 1115 – “To so recognize is in no way to approve of the statistical showing the officers have made as adequate to make out their merits case,” 749 F.3d 1116 – “The defects the City has identified may well exist, but they go to the merits of this case, or to the predominance question[,]” id.

Odle v. Wal-Mart Stores, Inc., 747 F.3d 315, 122 FEP 532 (5th Cir. 2014) – Odle is a member of the original Dukes case, but was eliminated when the Ninth Circuit en banc ruled that former employees could not participate in the 23(b)(2) certification – however, the Ninth Circuit remanded to the district court to consider whether or not former employees could be part of a 23(b)(3) class – Supreme Court then granted review, and decertified the entire class – the issue was whether Odle will receive the benefit of American Pipe tolling running from the Supreme Court decision, or whether she had to take action when the Ninth Circuit en banc eliminated her from the case – district court dismissed on the ground that once the Ninth Circuit eliminated her, she had to take action to preserve her rights – Fifth Circuit reverses – since the Ninth Circuit remanded for the district court, which had originally certified the action, to consider (b)(3) certification, it was not clear after the Ninth Circuit en banc decision that she would not be a member of a Dukes class – her suit filed in a timely fashion after the Supreme Court decertified everything can thus proceed.

Scott v. Family Dollar Stores, Inc., 733 F.3d 105, 120 FEP 473 (4th Cir. 2013), cert. denied, 134 S. Ct. 2871 (2014) – Original complaint alleging subjective decisionmaking dismissed in light of Dukes – amended complaint reversed course and alleged four company-wide policies and high-level corporate decisionmaking – by 2 to 1 vote District Court denial of leave to amend reversed – these allegations are substantively different from those rejected in Dukes – dissenting judge argued that “plaintiffs in this case played fast and loose with the district court, offering not an ‘amended complaint,’ but rather a completely contradictory one,” 733 F.3d at 135.
Wang v. Chinese Daily News, Inc., 737 F.3d 538 (9th Cir. 2013) – This supersedes the opinion reported at 709 F.3d 829 – this exemption, off the clock, meal and rest period case was certified, tried, and a substantial judgment entered – the Ninth Circuit affirmed – the Supreme Court remanded for reconsideration in light of Wal-Mart – prior certification had been under (b)(2) and this is reversed in light of Wal-Mart – remanded to the District Court to consider whether injunctive relief could proceed under (b)(2) and to reconsider its analysis in light of Wal-Mart under Rule 23(a) and 23(b)(3) – this case is much smaller than Wal-Mart – “[n]onetheless, there are potentially significant differences among the class members,” 737 F.3d at 544 – on remand plaintiffs need not show that every question in the case or even a preponderance of questions is capable of class-wide resolution – Wal-Mart indicated that so long as there is “even a single common question,” commonality could be satisfied – (b)(2) certification reversed – Wal-Mart made it clear that individualized monetary claims belong in (b)(3) – Wal-Mart left open the question of whether incidental monetary claims could remain in (b)(2) but did not answer that question – it is possible that an injunctive class could remain under (b)(2) – even though none of the named plaintiffs remain employed, it is possible that an injunctive claim could survive if there are identifiable class members still employed – on (b)(3), this becomes relevant only if there is first a determination that 23(a) commonality is satisfied – next, the District Court relied on the fact that all reporters were classified as exempt in finding common questions, which is clearly erroneous – the District Court abused its discretion in relying on a uniform internal exemption policy to find common questions – another (b)(3) consideration is the California Supreme Court Brinker decision – the employer need not ensure that employees take meal breaks – the employer is liable for compensation only if it knew or should have known that workers were working through an authorized meal period – but an employer cannot undermine a policy by creating incentives to skip breaks – in deciding (b)(3) certification the District Court should consult the entire record.

Davis v. Cintas Corp., 717 F.3d 476, 118 FEP 903 (6th Cir. 2013) – Nationwide female job applicant class certification denial affirmed – hiring system had both objective and subjective elements – percent female between 1999 and 2002 never rose above 7 percent – efforts to increase female hiring raised it in following years to 7.8 percent, 10.9 percent, and 20.8 percent – hiring done at individual locations – heavy reliance on Dukes – “Dukes, in many ways, is similar to this case. Each involves a
challenge to a national corporation’s employment practices. In each, the allegedly discriminatory employment decisions are ascribed to a corporate culture allegedly unfavorable to women. In each, applicants had to meet a basic set of criteria, but managers retained significant discretion . . . . And in each, the class representative sought to prove her discrimination claim with a combination of statistical and anecdotal evidence.” 717 F.3d at 486 - statistical evidence found by District Court to be unpersuasive, and District Court found equally unconvincing Dr. Barbara Reskin’s expert opinion that Cintas had a white-male dominated business culture which replicated itself in hiring decisions

– “Davis claims that . . . her ‘short-fall-based model’ is distinguishable from the ‘trial-by-formula’ system the Supreme Court expressly rejected in Dukes.” 717 F.3d at 490 – the court would calculate a short-fall, order Cintas to hire class members randomly to eliminate the short-fall, calculate class-wide back pay liability, and distribute it pro-rata among eligible class members – this if anything is worse than the Dukes’ trial-by-formula system – therefore, class certification properly denied for failure to meet commonality under 23(a)(2) and for failure to satisfy 23(b)(2) with respect to any method of calculating damages – individual summary judgment reversed with respect to hiring rejection in 2003 but affirmed with respect to hiring rejection in 2004 – individual disparate impact claim summary judgment affirmed – plaintiff wishes to amalgamate numerous steps of the hiring system into one – plaintiff did not identify a “particular employment practice” within the meaning of Title VII by pointing to all the subjective elements in the hiring system – and she did not satisfy the 1991 amendments by explaining why the well-defined discreet elements of the hiring system were not capable of separation for analysis – “[T]he simple fact remains: Davis did not isolate the specific practices that caused the disparate impact . . . .” 717 F.3d at 497.

Espenscheid v. DirectSat USA, LLC, 705 F.3d 770, 20 W.H. Cas. 2d 298, (7th Cir. 2013) – FLSA case decertified because of inability to calculate damages – Rule 23 requirements of efficiency comparable to those under FLSA – technicians were paid on piece rate system – many did not work more than 40 hours a week – others may work more than 40 hours a week – variance would also result from different technicians doing different tasks – “[T]o determine damages would, it turns out, require 2341 separate evidentiary hearings, which might swamp the Western District of Wisconsin with its two district judges[,]” 705 F.3d at 773 – “[E]ven if the
42 [representative plaintiffs scheduled to testify], though not a random sample, turned out by pure happenstance to be representative in the sense that the number of hours they worked per week on average when they should have been paid (or paid more) but were not was equal to the average number of hours of the entire class, this would not enable the damages of any members of the class other than the 42 to be calculated,” 705 F.3d at 774. – “They continue on appeal to labor under the misapprehension that testimony by 42 unrepresentative ‘representative’ witnesses, supplemented by other kinds of evidence that they have been unable to specify, would enable a rational determination of each class member’s damages. They must think that like most class action suits this one would not be tried – that if we ordered a class or classes certified, DirectSat would settle. That may be a realistic conjecture, but class counsel cannot be permitted to force settlement by refusing to agree to a reasonable method of trial should settlement negotiations fail. Essentially they asked the district judge to embark on a shapeless, freewheeling trial that would combine liability and damages and would be virtually evidence-free so far as damages were concerned,” 705 F.3d at 776. – “[I]f class counsel is incapable of proposing a feasible litigation plan though asked to do so, the judge’s duty is at an end. And that’s what happened.” Id. – Plaintiffs opposed bifurcation of liability and damages and subclasses – if liability was established on a group basis damage claims could usually be settled with the aid of a special master – Posner opinion.

_Tabor v. Hilti, Inc._, 703 F.3d 1206, 117 FEP 157 (10th Cir. 2013) – Two female inside sales employees who were denied promotions to more lucrative outside sales jobs were properly denied certification of a nationwide class action – In the individual case the plaintiffs contended there were inappropriate sexist comments made during their interviews for the outside jobs, comments such as women had “inferior knowledge of tools,” 703 F.3d at 1217 – The nationwide class alleged excessive subjectivity – but _Dukes_ rejected the use of “discretionary practices” as the basis of such claims – _Dukes_ emphasized that different considerations are at issue in a class certification analysis compared with an individual disparate impact claim – summary judgment reversed with respect to individual disparate impact claims – at least one of the claimants stated a prima facie disparate impact claim based on statistical evidence indicating a sizeable disparity between male and female promotions.
McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482, 114 FEP 710 (7th Cir. 2012) – Posner opinion reversing denial of certification of a class of 700 African-American financial advisers – class sought injunctive relief against company policies that allegedly had a race-based adverse impact, specifically a “teaming” policy (which allows advisers to team up to share accounts) and policy for distributing accounts of departing advisers (generally favoring those with the best prior record of production) – rejecting the company’s reliance on Wal-Mart Stores, Inc. v. Dukes – it is true that the company policies are implemented at the local level by local managers, but the local managers still are implementing a company-wide policy – if those “company-wide policies authorizing broker-initiated teaming, and basing account distributions on past success, increase the amount of discrimination,” 672 F.3d at 490, then “[t]he incremental causal effect . . . of those company-wide policies — which is the alleged disparate impact — could be most efficiently determined on a class-wide basis[,]” id. – court emphasized that plaintiffs did not seek a classwide determination of monetary relief – Rule 23(c)(4) allows “an action [to] be brought or maintained as a class action with respect to particular issues,” id. at 491 – here the question of class-based adverse impact – “The practices challenged in this case present a pair of issues that can most efficiently be determined on a class-wide basis . . . .” Id. – it is true that “resolving an issue common to hundreds of different claimants in a single proceeding may make too much turn on the decision of a single, fallible judge or jury,” id., but “that is an argument for separate trials on pecuniary relief,” id., not injunctive relief – “We have trouble seeing the downside of the limited class action treatment that we think would be appropriate in this case[,]” id., because no money will be paid without individualized factfinding - even if adverse impact is established, “hundreds of separate trials may be necessary[,]” id., to decide who is entitled to monetary relief, in which “[e]ach class member would have to prove that his compensation had been adversely affected by the corporate policies, and by how much[,]” id. – “[A]t least it wouldn’t be necessary in each of those trials to determine whether the challenged practices were unlawful.” Id.

Bolden v. Walsh Constr. Co., 688 F.3d 893, 115 FEP 1153 (7th Cir. 2012) – Black employees claim that by granting discretion to job site supervisor company allowed discrimination against them with respect to assigning overtime and in working conditions – no commonality – class members worked on at least 262 different construction sites having different
superintendents and foremen – the sites had materially different working conditions – the only policy being protested was the policy of affording discretion to each job site superintendent – commonality is the basis of the Wal-Mart v. Dukes case – “when multiple managers exercise independent discretion, conditions at different stores (or sites) do not present a common question,” 688 F.3d at 896 – “[t]he sort of statistical evidence that plaintiffs present has the same problem as the statistical evidence in Wal-Mart: it begs the question,” id. - “[i]f [the company] had 25 superintendents, 5 of whom discriminated in awarding overtime, aggregate data would show that black workers did worse than white workers – but that result would not imply that all 25 superintendents behaved similarly, so it would not demonstrate commonality,” id. - “[a]ccording to plaintiffs – in Wal-Mart and this case alike – local discretion had a disparate impact that justified class treatment,” id. at 897 – but Wal-Mart rejected that proposition – in Wal-Mart the court recognized that discretion might facilitate discrimination (Watson v. Fort Worth Bank & Trust) but it also observed that some managers will take advantage of the opportunity to discriminate while others won’t – “One class per store may be possible; one class per company is not,” id. – the District Court relied on McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482 (7th Cir. 2012) – in that case we remarked that the class in Wal-Mart would not have been manageable – in McReynolds we held that a national class could be certified to contest the policy allowing brokers to form and distribute commissions within teams and to determine who would be on a team – this single national policy was the missing ingredient in Wal-Mart – plaintiffs contend McReynolds supports their position – “it doesn’t.” While plaintiff’s brief on appeal contends Walsh has 14 policies that present common questions, they all boil down to affording discretion – “Wal-Mart tells us that local discretion cannot support a company-wide class no matter how cleverly lawyers may try to repackage local variabilility as uniformity,” 688 F.3d at 898 – this is applicable to both the overtime class and the hostile work environment class – “[t]he order certifying two multi-site classes is reversed.” Id. at 899.

Overview

Unanimous – case improperly certified under Rule 23(b)(2) – claims for monetary relief may not be so certified at least where the monetary relief is not incidental – individualized monetary claims must be certified if at all under 23(b)(3).

Unanimous – Wal-Mart is entitled to individualized determinations of each employee’s eligibility for back pay – this is required by § 706(g) of Title VII and by the Teamsters line of cases – this right cannot be replaced by “trial by formula.”

5-4 – commonality requirement of 23(a)(2) not established – common question means determination of its truth or falsity will resolve a central issue.

5-4 – plaintiffs must factually prove all requirements of Rule 23 – Eisen does not prohibit considering merits evidence when relevant to Rule 23 issues.

Detail of Majority Opinion

Wal-Mart store managers have great discretion with respect to pay and promotions utilizing their own subjective criteria – plaintiffs say because Wal-Mart is aware of statistics indicating men were favored that this amounts to disparate treatment – plaintiffs contend strong and uniform corporate culture permits bias against women to infect these discretionary decisions making every woman the victim of a common practice – Ninth Circuit en banc approved nationwide class certification based on three forms of proof: statistical evidence, anecdotal reports, and a sociologist’s testimony – Ninth Circuit would allow formula relief by randomly selecting claims that would be litigated and then extrapolating the value of those claims to the entire class – crux of the case is commonality – whether the named plaintiffs’ claims and the class claims are so
interrelated that the interests of the class members will be fairly and adequately protected in their absence – commonality requires the plaintiffs to have suffered the same injury as the class members – “Their claims must depend upon a common contention – for example, the assertion of discriminatory bias on the part of the same supervisor” (131 S. Ct. at 2550) – commonality “means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke” (id.) – quoted a commentator that commonality requires “the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation” (id. at 2551) (citation omitted; emphasis in original) – analysis is rigorous – plaintiff must prove with evidence that frequently will overlap the merits of each of the Rule 23 requirements – Eisen case has been mistakenly believed to preclude consideration of merits evidence even if relevant to Rule 23 issues – not so – it merely precludes deciding the merits – “Proof of commonality necessarily overlaps with [plaintiffs’] merits contention of a pattern or practice of discrimination” (id. at 2552) (emphasis in original) – crux of the inquiry is the reason for a particular employment decision – here plaintiffs wish to sue about literally millions of employment decisions at once – “Without some glue holding the alleged reasons for all those decisions together, it will be impossible to . . . produce a common answer to the crucial question why was I disfavored.” (id.) (emphasis in original) – Falcon describes how commonality must be proven: “[s]ignificant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes.” (id. at 2553) (quoting Falcon) – significant proof is absent – the only evidence of a general policy of discrimination was the testimony of Dr. William Bielby, plaintiffs’ sociological expert, who testified that Wal-Mart has a strong corporate culture which makes it vulnerable to bias – but “[a]t his deposition . . . Dr. Bielby conceded that he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking.” (id.) – the parties dispute whether Bielby’s testimony should even be admissible under Daubert – the district court concluded that Daubert did not apply to experts at the certification stage – “We doubt that is so” but even if properly considered, Bielby’s testimony adds nothing in light of his concession that he cannot even estimate what percent of employment decisions were infected by stereotypes – the only corporate policy attacked is allowing discretion by local supervisors – this “is a
policy against having uniform employment practices” (id. at 2554) (emphasis in original) – subjective decisionmaking is common and presumptively reasonable – when different store managers can operate differently, “demonstrating the invalidity of one manager’s use of discretion will do nothing to demonstrate the invalidity of another’s. A party seeking to certify a nationwide class will be unable to show that all the employees’ Title VII claims will in fact depend on the answers to common questions.” (id.) – the statistical studies are insufficient – “As Judge Ikuta observed in her dissent, ‘[i]nformation about disparities at the regional and national level does not establish the existence of disparities in individual stores, let alone raise the inference that a company-wide policy of discrimination is implemented by discretionary decisions at the store and district level.’ [citation omitted] A regional pay disparity, for example, may be attributable to only a small set of Wal-Mart stores, and cannot by itself establish the uniform, store-by-store disparity upon which the plaintiffs’ theory of commonality depends.” (id. at 2555) – moreover, despite the requirements of \textit{Wards Cove} plaintiffs have identified no specific employment practice that ties together their 1.5 million claims – the anecdotal evidence is too weak – in \textit{Teamsters} it was one anecdote for every 40 class members – here it is one for every 12,500 – next, certification under 23(b)(2) was improper – whether or not monetary relief can ever be certified under (b)(2) “we now hold that they may not, at least where (as here) the monetary relief is not incidental to the injunctive or declaratory relief” (id. at 2557) – “Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class” (id.) – these claims could be certified if at all under 23(b)(3), which “allows class certification in a much wider set of circumstances but with greater procedural protections” (id. at 2558) – moreover, the test of whether injunctive relief predominates, which plaintiffs urge, creates perverse incentives for class representatives to place at risk potentially valid claims for monetary relief, including, in the \textit{Wal-Mart} case, dropping compensatory damages – “Contrary to the Ninth Circuit’s view, Wal-Mart is entitled to individualized determinations of each employee’s eligibility for backpay. Title VII includes a detailed remedial scheme.” (id. at 2560) - § 2000e-5(g)(1) flatly bars backpay to any non-victim – “[I]f the employer can show that it took an adverse employment action against an employee for any reason other than discrimination, the court cannot order backpay under §2000e-5(g)(2)(A)” (id. at 2560-61) – \textit{Teamsters} sets forth the procedure – a district court must usually conduct additional proceedings to determine individual relief – the burden of proof will shift to the company but it will have the right to raise
any individual affirmative defenses – “The Court of Appeals believed that it was possible to replace such proceedings with Trial by Formula” (id. at 2561) – “We disapprove that novel project.” (id.) – the Rules Enabling Act forbids interpreting Rule 23 to abridge any substantive right and therefore “a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims.” (id.).

Discovery (Ch. 34)

Brown v. Oil States Skagit Smatco, 664 F.3d 71, 113 FEP 1537 (5th Cir. 2011) (per curiam) – Title VII case properly dismissed for perjured deposition testimony – at deposition plaintiff testified that he quit for only one reason – racial harassment, in his accident personal injury lawsuit, he testified under oath that he left his job “solely” because of the back pain caused by the accident – lawsuit dismissed with prejudice – “[D]ismissal with prejudice [is] a more appropriate sanction when the objectionable conduct is that of the client, not the attorney,” 664 F.3d at 77 – contention lesser sanction should have been imposed rejected – “Brown deceitfully provided conflicting testimony in order to further his own pecuniary interests . . . and, in doing so, undermined the integrity of the judicial process. Through his perjured testimony, Brown committed fraud upon the court, and this blatant misconduct constitutes contumacious conduct[,]” id. at 78 – the lesser sanction of a monetary sanction would not work because Brown could not pay it – not everyone like Brown will be caught and when perjury is discovered the penalty needs to be severe – “Brown plainly committed perjury, a serious offense that constitutes a severe affront to the courts and thwarts the administration of justice. . . . Brown, and not his attorney, committed the sanctionable conduct, which makes the harsh sanction of dismissal with prejudice all the more appropriate.” Id. at 80.
Statistical and Other Expert Proof (Ch. 35)

*Burgis v. NYC Dep’t of Sanitation, ___ F.3d ___, 127 FEP 1341, 2015 WL 4590507 (2d Cir. July 31, 2015)* – Statistical proof alone can be used to prove intent under Section 1981 and/or the equal protection clause if statistically significant and makes other plausible non-discriminatory explanations very unlikely – dismissal affirmed because statistical proof was inadequate, basically showing simply declining percentages of minorities as one went up the job scale – in order to show discriminatory intent “the statistics must not only be statistically significant in the mathematical sense, but they must also be of a level that makes other plausible non-discriminatory explanations very unlikely[,]” 2015 WL 4590507, at *3.

*Jones v. City of Boston, 752 F.3d 38, 122 FEP 1189 (1st Cir. 2014)* – Summary judgment for employer in disparate impact hair drug test reversed – during an eight-year period, black police officers and cadets tested positive for cocaine 1.3% of the time, while white officers and cadets tested positive under .3% of the time – Court rejects contention that even though statistical significance, there was no practical significance – “With no objective measure of practical significance, the label may mean that simply the person applying it views a disparity as substantial enough that a plaintiff ought to be able to sue over it.” 752 F.3d at 50. “Courts would find it difficult to apply such an elusive, know-it-when-you-see-it standard . . . . *Id.* – The statistics definitely demonstrate that the result was not due to chance – Plaintiffs also offered evidence that blacks tend to have higher levels of melanin in their hair and that melanin causes cocaine to bind to hair at a higher rate and that cocaine can show up on the hair of non-users who are nearby – however the plaintiffs did not claim that they were exposed to cocaine prior to their tests – since the statistics are unrebutted, “We therefore reverse the district court’s decision to deny partial summary judgment to the plaintiffs on that component [*prima facie case*] of their Title VII disparate impact case[,]” *id.* at 53 – Court of Appeal declined to address whether the drug testing program is job related and consistent with business necessity or whether plaintiffs have offered an adequate alternative – no one contests that the abstention from illegal drugs is an important element of police officer behavior – the issue is whether the Department’s testing procedures are “predictive of or significantly correlated with” drug use – plaintiffs say that hair testing is
not sufficiently reliable – Appellate Court declined in the first instance to assess business necessity since trial court granted summary judgment based solely on \textit{prima facie} case – Americans with Disabilities Act challenge rejected – “no jury could reasonably conclude that the department was motivated by a perception that plaintiffs were addicted to drugs[,]” \textit{id.} at 59.

\textit{Apsley v. Boeing Co.}, 691 F.3d 1184, 26 A.D. Cas. 1439 (10th Cir. 2012) – Boeing sold a division, and Boeing supervisors recommended which of its employees be hired by the successor – plaintiff’s experts say that their non-discriminatory model predicted that out of the approximately 10,000 employees, 8,028 employees over the age of 40 should be recommended, more than the actual number recommended, 7,968 – aggregating these statistics yielded five standard deviations and only a 1 in 50,000 chance that the results were random – similarly with respect to hires the model predicted 7,285 hires over the age of 40, and the actual number, 7,237 was over four-and-a-half standard deviations less – again only a 1 in 50,000 chance – summary judgment affirmed on age pattern of practice – quoting Kaye & Freedman, the District Court reasoned that “‘when practical significance is lacking – when the size of the disparity or correlation is negligible – there is no reason to worry about statistical significance[,]’” 691 F.3d at 1199 (citation omitted) – another treatise criticized the District Court’s analysis – concerns about ignoring statistical significance are not wholly baseless – nevertheless, summary judgment affirmed – pattern or practice requires a jury to conclude that discrimination was the standard operating procedure – but the statistics suggested at most isolated or sporadic instances of age discrimination – plaintiffs’ own figures showed that the company’s recommended and hired over 99 percent of the older workers they would have been expected to recommend and hire – these statistics would not permit a jury to find that discrimination was the company’s standard operating procedure – furthermore, the percentage of older workers before and after the divestiture was almost the same – it declined only from 87.4% to 86.6% – for the same reason the disparate impact claim fails – beyond a requirement of statistical significance the court may require that the disparity be substantial.
The Civil Rights Acts of 1866 and 1871 (Ch. 36)


Burton v. Ark. Sec’y of State, 737 F.3d 1219, 120 FEP 1793 (8th Cir. 2013) – State Police Chief can be individually liable under Section 1983 for alleged racial discrimination in termination – however, qualified immunity for retaliation claim brought under the Equal Protection Clause – right to be free from retaliation is a First Amendment right, but this complaint alleged only the Equal Protection Clause.

Reverse Discrimination and Affirmative Action (Ch. 38)

Fisher v. Univ. of Tex. at Austin, 570 U.S. ___, 133 S. Ct. 2411, 118 FEP 1459 (2013) – University automatically admitted top ten percent of each high school graduating class – of the remaining slots, race was one of many plus factors – program upheld by Fifth Circuit – Court reaffirms Bakke, Grutter v. Bollinger, and Gratz v. Bollinger – diversity can be taken into account – however, a strict scrutiny standard applies – Fifth Circuit should have required University to prove there was no alternative to considering race in order achieve the objective of diversity – case remanded to Fifth Circuit – decision was 7 to 1 – Ginsburg dissent contended University had carefully followed the teachings of the Supreme Court’s prior strict scrutiny decisions.

Shea v. Kerry, 796 F.3d 42, 127 FEP 1507 (D.C. Cir. 2015) – White foreign service officer challenged state department affirmative action plan – proper analytical framework is set forth in the Supreme Court’s Johnson and Weber cases despite contention that Ricci “strong basis in evidence” standard should apply – Johnson and Weber are directly applicable to this situation, and Ricci via implication did not overrule these decisions – burden was thus to establish that affirmative action plan was based on a “manifest racial imbalances in traditionally segregated job categories” – state department met this test – summary judgment affirmed.
Maraschiello v. City of Buffalo Police Dep’t, 709 F.3d 87, 117 FEP 665 (2d Cir. 2013), cert. denied, 134 S. Ct. 119 (2013) – White police captain had highest score on exam – city replaced exam with new exam designed to increase minority representation – white police captain chose not to take new exam – evidence that city was in part concerned about disparate impact of prior exam insufficient to show that the purpose of the new exam was to achieve racial balance.

Monetary Relief (Ch. 41)

Johnson v. Nextel Commcn’s, Inc., 780 F.3d 128, 126 FEP 473 (2d Cir. 2015) – Company and law firm representing over 500 employees entered into agreement to set up a dispute resolution process and drop lawsuits – total payout to employees was $3.9 million – approximately double that amount went to the law firm – class action suit versus company and class malpractice suit versus law firm – class certification reversed – claims were under state law, and laws of different states differed on relevant issues – punitive damages trial plan unacceptable – in Simon II Litigation v. Philip Morris U.S.A., Inc., 407 F.3d 125 (2d Cir. 2005), the court rejected a trial plan that called for the jury to determine a lump sum of punitive damages for the entire class, prior to any determination of actual injury to individual plaintiffs – such a trial plan might conflict with State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003), which held that punitive damage awards must be tethered to compensatory damages in order to comply with due process – plaintiffs attempted to avoid this problem by proposing that the phase two jury determine only a punitive damages ratio that would then be applied to each class member’s compensatory damages – under the specific facts of this case, determining a punitive damages ratio without any grounding in a compensatory damages award is impracticable and fails to give the jury an adequate basis for determining what measure of punitive damages is appropriate – as State Farm explained, while there is no rigid upper limit on a ratio of punitive damages to compensatory damages, the propriety of the ratio can be meaningfully assessed only when comparing the ratio to the actual award of compensatories – a larger punitive to compensatory ratio might be appropriate where there were particularly egregious acts but little damages – similarly, “[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee[.]” 780 F.3d at 149.
(quoting State Farm, 538 U.S. at 425) – under plaintiff’s trial plan the phase two jury would determine a ratio based on an amalgam of the actual damages to only the named plaintiffs yet based on the defendants’ conduct toward the entire class – “This one-size-fits-all punitive damages ratio would therefore be no more tethered to compensatory damages than the lump sum we disapproved of in Simon II[,]” id. – “Plaintiffs’ trial plan therefore suggests that . . . the punitive damages inquiry in this case fails to meet the predominance and superiority requirements of Rule 23(b)(3)[,]” id. at 150.

EEOC v. N. Star Hospitality, Inc., 777 F.3d 898, 125 FEP 1681 (7th Cir. 2015) – Proper to award 15% tax component increase to retaliation claimant to offset tax burden and he will face as a result of a lump sum back pay award – because of a lump sum award he will be bumped into a higher tax bracket.

Turley v. ISG Lackawanna, Inc., 774 F.3d 140, 125 FEP 895 (2d Cir. 2014) – Punitive damage award of $5 million in racial harassment case required further reduction despite extremely egregious conduct – compensatory award of $1.32 million is particularly high, so 4-to-1 ratio serves neither predictability nor proportionality – 2-to-1 ratio is maximum allowable under these circumstances.

Arizona v. ASARCO LLC, 773 F.3d 1050, 125 FEP 753 (9th Cir. 2014) (en banc) – A $300,000 punitive damage award under Title VII is constitutionally permissible even though the prevailing plaintiff recovered only $1 in nominal damages on her sexual harassment claim – the due process analysis set forth by the U.S. Supreme Court in BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996), must be modified in the Title VII context – Gore’s ratio analysis has little applicability in the Title VII context – Title VII places a consolidated cap on both compensatory and punitive damages – Under Title VII when compensatory damages are awarded that decreases the punitive damages.

Miller v. Raytheon Co., 716 F.3d 138, 118 FEP 212 (5th Cir. 2013) – employee terminated because of his age is not entitled to both liquidated damages under ADEA and punitive damages under state law – liquidated damages under ADEA were higher than punitive damages which could be awarded under state law, so liquidated damages but not punitive damages allowed.
May v. Chrysler Grp., LLC, 716 F.3d 963 (7th Cir. 2013) – horrific harassment over lengthy period of time against Cuban-Jewish employee – jury awarded $3.5 million in punitive damages – District Court reversed, finding that Chrysler could have done more to stop the harassment but did make an effort – that Chrysler’s failure to comply with Title VII by preventing the harassment was not malicious or reckless – Seventh Circuit originally reversed the denial of punitive damages, 692 F.3d 734, but on reconsideration amended its opinion and affirmed the denial of punitive damages – “To be sure, Chrysler could have done more to stop the harassment. But given the situation that it faced – an anonymous harasser, an assembly plant covering four million square feet, and a three-shift-a-day operation, Chrysler’s response was enough as a matter of law to avoid punitive damage liability.” 716 F.3d at 975-76.

Attorney’s Fees (Ch. 42)

Fox v. Vice, 131 S. Ct. 2205 (2011) – Must apportion attorney’s fees between those caused by frivolous cause of action and fees that would have been incurred without frivolous cause of action – “but for” test – just as plaintiffs may receive fees even if they are not victorious on every claim, so too may a defendant even if the plaintiff’s suit is not wholly frivolous – but defendant is not entitled to fees caused by the non-frivolous claims – the issue is whether the attorney’s fees and costs would have been incurred in the absence of the frivolous allegation – this should not result in a second major litigation since the essential goal is rough justice, not auditing perfection – case filed in state court with § 1983 claim – removed by defendant to federal court - § 1983 claim dismissed and state claims remanded to state court – award of totality of attorney’s fees vacated and remanded.

Perdue v. Kenny A., 559 U.S. 542, 130 S. Ct. 1662, 109 FEP 1 (2010) – Prevailing plaintiff in civil rights case can have lodestar increased but only in “extraordinary circumstances” – lodestar approach is key – it has “achieved dominance” – six important rules govern decision – (1) reasonable fee is one that is sufficient to induce a capable attorney to take a meritorious case but does not provide “a form of economic relief to improve the financial lot of attorneys.”” 130 S. Ct. at 1673 (citation omitted); (2) strong presumption that lodestar method yields a sufficient fee; (3) Court has never sustained an enhancement of a lodestar for
performance and has always said enhancement is only for “rare” and “exceptional” circumstances; (4) lodestar includes most if not all of the relevant factors constituting a reasonable attorney’s fee and thus an enhancement may not be based on a factor already subsumed such as novelty, complexity or the quality of an attorney’s performance; (5) burden of proving an enhancement is necessary is borne by the fee applicant; and (6) an applicant seeking enhancement must produce “specific evidence” supporting the enhancement to ensure that the calculation is objective and capable of being reviewed – lodestar may be overcome only in those rare instances in which the lodestar does not adequately account for a factor that may be properly considered in determining a reasonable fee – it would be a rare and exceptional case where the lodestar does not take into account superior attorney performance – an example might be where the lodestar hourly rate is based on years of practice but the attorney’s ability transcends that measure – an enhancement might be warranted if the attorney had to advance extraordinary expenses and the litigation is exceptionally protracted – the enhancement amount in such cases must be calculated through objective criteria – an enhancement may be appropriate where an attorney’s performance involves exceptional delay – enhancement in this case reversed – reliance on the contingency of the outcome was inappropriate and contravenes Burlington v. Dague, 505 U.S. 557 (1992) – case is remanded for proceedings consistent with the opinion.

McKelvey v. Sec’y of U.S. Army, 768 F.3d 491, 30 A.D. Cas. 1142 (6th Cir. 2014) – Lodestar cut in half before successful plaintiff – rejected Rule 68 offer that was more favorable than final result – most of attorney’s fees were accrued after offer was rejected.

Muniz v. United Parcel Service, Inc., 738 F.3d 214, 120 FEP 1549 (9th Cir. 2013) – Ninth Circuit 2 to 1 in opinion written by District Court judge sitting by designation approved $697,971.80 in attorneys’ fees in a case where the plaintiff recovered only $27,280 – District Court judge reduced lodestar by 10% to account for lack of success – did not explain reasoning why the number was 10% – plaintiff originally sought $2 million in fees – unreasonably inflated – under state law would qualify as a special circumstance that would have justified a substantial reduction in total denial of fees – but majority holds that this is discretionary.
Alternative Dispute Resolution (Arbitration) (Ch. 43)

Am. Express Co. v. Italian Colors Rest., 570 U.S. ___, 133 S. Ct. 2304 (2013) – American Express arbitration agreement with the restaurant barred class actions, barred joinder or consolidation of claims for parties, required confidentiality, and precluded any shifting of costs to American Express even if Italian Colors prevailed, 133 S. Ct. at 2316 (dissent); maximum recovery for anti-trust violation when trebled was $38,549 – in order to establish the anti-trust violation, use of economic experts would cost hundreds of thousands and perhaps more than a million dollars – plaintiff opposed arbitration on the ground that as a practical matter precluding class actions in the arbitration agreement absolutely prevented vindication of statutory rights under the anti-trust laws – District Court ordered arbitration – Court of Appeals reversed, Supreme Court remanded for reconsideration in light of Stolt-Nielsen – also reconsidered in light of Concepcion – 2d Circuit stood by its reversal – en banc review was denied with five judges dissenting – “[C]ourts must rigorously enforce arbitration agreements according to their terms, including terms that specify with whom [the parties] choose to arbitrate their disputes, and the rules under which that arbitration will be conducted . . . .” 133 S. Ct. at 2309 (citations and internal quotation marks omitted; emphasis and second alteration in original). “[T]he antitrust laws do not guarantee an affordable procedural path to the vindication of every claim[,]” id. – “Nor does congressional approval of [FRCP] 23 establish an entitlement to class proceedings for the vindication of statutory rights[,]” id. – “The Rule [23] imposes stringent requirements for certification that in practice exclude most claims[,]” id. at 2310. Plaintiff’s major reliance was on a line of cases that hold that an arbitration agreement cannot be enforced if it bars “effective vindication” of statutory rights – this is dicta – the dicta would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights – it might cover excessive filing or administrative fees that make arbitration impracticable – “[B]ut the fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy[,]” id. at 2311 (emphasis in original) – “The class-action waiver merely limits arbitration to the two contracting parties[,]” id. This result is all but mandated by AT&T Mobility – “[T]he switch from bilateral to class arbitration’, we said, ‘sacrifices the principle advantage of arbitration’ – its informality[,]” id. at 2312 (citation omitted; first alteration in original) –
“We specifically rejected the argument that class arbitration was necessary to prosecute claims that might otherwise slip through the legal system[,]” id. (citation and internal quotation marks omitted) – Court of Appeals theory would require federal courts to litigate the cost of proving a case, and then decide whether that precluded effective enforcement of rights – “Such a preliminary litigating hurdle would undoubtedly destroy the prospect of speedy resolution[,]” id. at 2312 – Decision was 5 to 3 (Justice Sotomayor took no part) – Kagan dissent for three dissenting Justices stated “AmEx has insulated itself from antitrust liability – even if it has in fact violated the law. The monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse,” id. at 2313.

*Oxford Health Plans LLC v. Sutter,* ___ U.S. ___, 133 S. Ct. 2064 (2013) – Supreme Court refused to overturn arbitrator’s decision that arbitration agreement allowed class action – relevant agreement language was: “No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration . . . pursuant to the rules of the American Arbitration Association . . . .” 133 S. Ct. at 2067. “The parties agreed that the arbitrator should decide whether their contract authorized class arbitration . . . .” Id. – Arbitrator reasoned that clause sent to arbitration anything that could have been filed in court – “Under the FAA, courts may vacate an arbitrator’s decision only in very unusual circumstances,” id. at 2068 (citation and internal quotation marks omitted) – serious errors of fact and law do not matter – key is the parties’ agreement that the arbitrator should decide whether or not the arbitration agreement allowed class action litigation –

“We would face a different issue if Oxford had argued below that the availability of class arbitration was a so-called ‘question of arbitrability.’ Those questions – . . . ‘whether a concededly binding arbitration clause applies to a certain type of controversy’ – are presumptively for courts to decide.

[Id. at 2068 n.2.] *Green Tree Fin. Corp. v. Bazzle,* 539 U.S. 444, 452 . . . (2003) (plurality opinion). A court may therefore review an arbitrator’s determination of such a matter *de novo* absent clear and unmistakable evidence that the parties wanted an arbitrator to resolve the dispute. [Citations, quotation marks and alterations omitted.]
Stolt-Nielsen made clear that this Court has not yet decided whether the availability of class arbitration is question of arbitrability. See 559 U.S. at 680 . . . . But this case gives us no opportunity to do so because Oxford agreed that the arbitrator should determine whether its contract with Sutter authorized class procedures.”

133 S. Ct. at 2068 n.2 – Oxford relies on Stolt-Nielsen – but there “[t]he parties in Stolt-Nielsen had entered into an unusual stipulation that they had never reached an agreement on class arbitration,” id. at 2069 – so there the arbitrator could not have construed the contract – here the arbitrator did construe the contract – “[Section] 10(a)(4) bars . . . overturn[ing the arbitrator’s] decision only when the arbitrator strayed from his delegated task of interpreting a contract, not when he performed that task poorly.” – “Nothing we say in this opinion should be taken to reflect any agreement with the arbitrator’s contract interpretation, or any quarrel with Oxford’s contrary reading. All we say is that convincing a court of an arbitrator’s error – even his grave error – is not enough.” 133 S. Ct. at 2070. – Concurring opinion of Justices Alito and Thomas pointed out that “unlike petitioner, absent members of the plaintiff class never conceded that the contract authorized the arbitrator to decide whether to conduct class arbitration. It doesn’t.” Id. at 2071. Not clear that absent class members will be bound unless the class arbitration is opt-in – “In the absence of concessions like Oxford’s, this possibility [the absent class members would not be bound but could unfairly claim a benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one] should give courts pause before concluding that the availability of class arbitration is a question the arbitrator should decide.” Id. at 2072. [NOTE: Essentially, the court is saying it has not yet decided a normal case – no stipulations – arbitration agreement is silent on class actions – employer takes the position that a court must decide arbitrability of a class action – arbitrator nevertheless orders class arbitration].

AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011) – California’s judicially created Discover Bank rule finds arbitration agreements unconscionable if they do not allow classwide arbitration – the Discover Bank rule is preempted by the FAA – the issue is “whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures” (131 S. Ct. at 1744) – the answer is yes – the FAA was enacted in response to widespread judicial hostility to arbitration agreements – federal policy
favors arbitration – Section 2 of the FAA permits arbitration agreements to
be declared unenforceable “upon such grounds as exist at law or in equity
for the revocation of any contract” (id.) – this allows arbitration
agreements to be invalidated by generally applicable defenses such as
fraud, duress or unconscionability “but not by defenses that apply only to
arbitration or that derive their meaning from the fact that an agreement to
arbitrate is at issue.” (id. at 1746) – plaintiffs argue that unconscionability
is included within FAA Section 2 – when state law prohibits outright the
arbitration of a particular claim the analysis is straightforward – FAA
preemption – inquiry is more complex when a normally applicable
document such as duress or unconscionability is alleged to have been
applied in a manner that disfavors arbitration – an obvious illustration
would be a state policy finding unconscionable arbitration agreements that
fail to provide for judicially monitored discovery, or finding
unconscionable arbitration agreements that fail to abide by the Federal
Rules of Evidence – although Section 2’s savings clause preserves
generally applicable contract defenses it is not intended to preserve state
law rules that stand as an obstacle to the accomplishment of the FAA’s
objective – “Requiring the availability of classwide arbitration interferes
with fundamental attributes of arbitration and thus creates a scheme
inconsistent with the FAA.” (id. at 1748) – arbitration is a creature of
contract – parties may agree to limit the issues – parties may agree to limit
with whom they will arbitrate – parties can agree that the proceedings will
be kept confidential to protect trade secrets – the parties can agree on
streamlined procedures – “California’s Discover Bank rule . . . interferes
with arbitration. . . . [Its] rule is limited to adhesion contracts . . . but the
times in which consumer contracts were anything other than adhesive are
long past.” (id. at 1750) – “States remain free to take steps addressing the
concerns that attend contracts of adhesion – for example, requiring class-
action waiver provisions in adhesive agreements to be highlighted. Such
steps cannot, however, conflict with the FAA or frustrate its purpose to
ensure that private arbitration agreements are enforced according to their
terms.” (id. at 1750 n.6) – Gilmer case cited as allowing ADEA claims
“despite allegations of unequal bargaining power between employers and
employees” (id. at 1749 n.5) – as held in Stolt-Nielsen cannot interpret
silent arbitration agreement to allow class arbitration – huge differences
between individual and class arbitration – arbitrators not generally
knowledgeable about procedural aspects of certification – “The conclusion
follows that class arbitration, to the extent it is manufactured by Discover
Bank rather than consensual, is inconsistent with the FAA.” (id. at 1750-
51) – switch from bilateral to class arbitration sacrifices the principal
advantage of arbitration, its informality – as of September 2009, AAA had opened 283 class arbitrations, 121 remained active, and “[n]ot a single one, however, had resulted in a final award on the merits” (id. at 1751) – class arbitration was not envisioned by Congress when it passed the FAA – “[I]t is at the very least odd to think that an arbitrator would be entrusted with ensuring that third parties’ due process rights are satisfied” (id. at 1751-52) – class arbitration greatly increases the risks to defendants – “[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims. Other courts have noted the risk of ‘in terrorem’ settlements that class actions entail . . . . (id. at 1752) – “Arbitration is poorly suited to the higher stakes of class litigation. In litigation, a defendant may appeal a certification decision on an interlocutory basis and, if unsuccessful, may appeal from a final judgment as well.” (id.) – “We find it hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision.” (id.) – “Because it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress . . . California’s Discover Bank rule is preempted by the FAA.” (id.) (citation and internal quotation marks omitted) – 5-4 decision – Justice Thomas concurred based on his interpretation of the wording of the FAA, which allowed a failure to enforce only based on grounds applicable to all contracts “for the revocation of any contract” (id. at 1753).

Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp., 559 U.S. 662, 130 S. Ct. 1758 (2010) – Arbitration agreement was silent on class arbitration – parties stipulated that there was no agreement on arbitrating class cases – AAA found that silent contract allowed for class arbitration – Supreme Court reversed – imposing class arbitration on those who had not agreed is “fundamentally at war” with the Federal Arbitration Act since under the FAA arbitration is a matter of consent – an implicit agreement on class arbitration “is not a term that the arbitrator may infer solely from the fact of the parties’ agreement to arbitrate,” 559 U.S. at 685 – FAA’s purpose is to enforce private arbitration agreements according to their terms – a party may not be compelled to arbitrate under the FAA unless there is a contractual basis for concluding that the party agreed to do so – the differences between individual and class arbitration are just too great to
presume a consent to class arbitration from silence – one enters into individual arbitration agreements for reasons such as speed and lower costs but that is not true for class arbitration – a presumption of confidentiality does not apply in class arbitration – rights of absent parties are adjudicated – what is at risk is comparable to class action litigation but without judicial review – “We think that the differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties’ mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings[,]” id. at 687 – since the parties stipulated there was no agreement to class arbitration, “We have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration.” Id. 687 n.10.

Ashbey v. Archstone Prop. Mgmt., Inc., 785 F.3d 1320, 126 FEP 1789 (9th Cir. 2015) – Arbitration agreement binding – plaintiff waived rights to go to court when he signed a form acknowledging receipt of the company’s policy manual, which mandated arbitration – irrelevant that acknowledgment form did not lay out the terms, since the “full text of the Policy was at [plaintiff’s] fingertips,” 785 F.3d at 1325 – “[T]he Acknowledgment here explicitly notified [plaintiff] the Manual contained a Dispute Resolution Policy . . . .” Id.

Davis v. Nordstrom, Inc., 755 F.3d 1089, 22 W.H. Cas. 2d 1432 (9th Cir. 2014) – Original arbitration agreement in employee handbook did not prohibit class claims – employer sent employees a letter telling them that under the provision in the handbook allowing updates it was unilaterally amending the arbitration agreement to prohibit class actions – under California Supreme Court precedent it is permissible to tell employees that continued employment indicates consent to revised agreement.

Johnmohammadi v. Bloomingdale’s, Inc., 755 F.3d 1072, 22 W.H. Cas. 2d 1428 (9th Cir. 2014) – Class overtime claim barred by arbitration agreement – Bloomingdales announced the arbitration pact and gave employees thirty days to opt out – plaintiff did not opt out – plaintiff is bound by arbitration agreement – “Bloomingdale’s merely offered her a choice: resolve future employment-related disputes in court, in which case she would be free to pursue her claims on a collective basis; or resolve such disputes through arbitration, in which case she would be limited to pursuing her claims on an individual basis.” 755 F.3d at 1076.
Santoro v. Accenture Fed. Servs., LLC, 748 F.3d 217, 122 FEP 1208 (4th Cir. 2014) – Dodd-Frank Act holds that agreements to arbitrate whistleblower claims are not “valid or enforceable” – this does not invalidate an arbitration agreement between an employer and employee who is claiming age discrimination – invalidation is limited to Dodd-Frank claims – nothing suggests that Congress sought to bar arbitration of every claim if the agreement in question did not exempt whistleblower claims.

Tillman v. Macy’s, Inc., 735 F.3d 453, 120 FEP 998 (6th Cir. 2013) – Arbitration ordered – no signed agreement – employee notified of arbitration program at mandatory meeting – watched video on arbitration – provided with informational brochure – received three separate mailings at her home that reiterated need to opt-out if did not want to be bound by agreement – had more than two months to review agreement and over a year to opt-out which she did not do – “Arbitration should therefore have been required, notwithstanding the absence of an employee-signed written agreement to arbitrate,” 735 F.3d at 455.

Richards v. Ernst & Young, LLP, 744 F.3d 1072 (9th Cir. 2013), cert. denied, 135 S. Ct. 355 (2014) – District Court improperly denied motion to compel individual arbitration – did not matter that employer failed to move to compel arbitration until after there had been some rulings, discovery, and expense – expenses employee incurred were as a result of her deliberate choice of an improper forum and does not establish prejudice – argument that Ninth Circuit should follow NLRB D.R. Horton decision rejected since that was not argued below – However, footnote “without deciding the issue” noted that two courts of appeal and the overwhelming majority of district courts have determined not to defer to D.R. Horton.

Kilgore v. KeyBank, N.A., 718 F.3d 1052 (9th Cir. 2013) (en banc) – Non-employment case – arbitration agreement prohibited class actions – District Court refused to order arbitration – en banc 9th Circuit reversed – California law governed – “Plaintiffs claimed below that the [arbitration agreement’s] ban on class arbitration is unconscionable under California law, but that argument is now expressly foreclosed by Concepcion . . . . Plaintiff’s assertion that students may not be able to afford the arbitration fees fairs no better. See Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90-91 . . . (2000) (‘The “risk” that [a plaintiff] will be saddled with prohibitive costs is too speculative to justify the invalidation of an
arbitration agreement.’).” 718 F.3d at 1058 – Confidentiality Agreement not a reason to find an arbitration clause unconscionable – “[T]he enforceability of the confidentiality clause is a matter distinct from the enforceability of the arbitration clause in general. Plaintiffs are free to argue during arbitration that the confidentiality clause is not enforceable,” id. at 1059 n.9.

Parisi v. Goldman, Sachs & Co., 710 F.3d 483, 117 FEP 1055 (2d Cir. 2013) – District Court which refused to honor arbitration agreement’s prohibition of class claims reversed – plaintiff claimed that since “pattern or practice” cases could proceed only on a class basis and that she had a statutory right to bring such a case, this rendered the arbitration agreement’s prohibition on class actions unenforceable – the 2nd Circuit reversed – “[T]here is no substantive statutory right to pursue a pattern-or-practice claim,” 710 F.3d at 486 – that term simply refers to a method of proof and does not create a separate cause of action.

D.R. Horton, Inc. v. NLRB, 737 F.3d 344 (5th Cir. 2013) – NLRB held that D.R. Horton violated the NLRA by requiring its employees to sign an arbitration agreement that prohibited a collective or class action – by a 2 to 1 vote, the Fifth Circuit holds that the Board did not give proper weight to the Federal Arbitration Act – Board upheld on requiring Horton to clarify with its employees that the arbitration agreement did not eliminate their right to file unfair labor practice charges with the NLRB – the Board held that Section 7 of the National Labor Relations Act protected the right of employees to join together to pursue workplace grievances including through litigation and arbitration – the Board has not been commissioned to effectuate the policies of its Act so single-mindedly that it may wholly ignore other and equally important congressional objectives – the Federal Arbitration Act has equal importance – arbitration has been deemed not to deny a party any statutory right – class action procedure is not a substantive right – the Board determined that invalidating restrictions on class or collective actions would not conflict with the FAA – basically the NLRB concluded that the policies behind the NLRA trumped the different policy considerations supporting the FAA – under the FAA arbitration agreements must be enforced according to their terms – there are only two exceptions: (1) the FAA saving clause; and (2) application of the FAA may be precluded by another statute – the Board relied on the FAA saving clause but analysis of Concepcion leads to the conclusion that the Board’s rule does not fit within the FAA saving clause – in Concepcion the court
found that California’s prohibition on class action waivers did not fall within the saving clause – like the statute in *Concepcion*, the Board’s interpretation prohibits class action waivers – *Concepcion* held that requiring class actions under arbitration agreements interferes with the fundamental attributes of arbitration – the NLRA does not contain a congressional command to override the FAA – there is no basis in the wording of the statute to override the FAA – there is no evidence in legislative history of an intent to override the FAA – “[b]ecause the Board’s interpretation does not fall within the FAA’s ‘saving clause,’ and because the NLRA does not contain a congressional command exempting the statute from application of the FAA, the Mutual Arbitration Agreement must be enforced according to its terms[,]” 737 F.3d at 362 – “Every one of our sister circuits to consider the issue has either suggested or expressly stated that they would not defer to the NLRB’s rationale,” id. (citations to Second, Eighth, and Ninth Circuits).

**Settlement (Ch. 44)**

*Golden v. Cal. Emergency Physicians Med. Grp.*, 782 F.3d 1083, 126 FEP 1169 (9th Cir. 2015) – In 2-1 decision, Ninth Circuit refused to enforce settlement agreement that not only barred the physician plaintiff from working at any facility where the emergency physician’s group staffed the emergency room, but it also provided that the emergency physician’s group had the right to terminate the plaintiff if it took over responsibility for any emergency room where he was working – the Ninth Circuit said the issue was whether the restraint imposed was of a substantial character – it remanded for determination of that issue – Judge Kozinsky in dissent said that the settlement agreement had no effect on the plaintiff’s right to pursue his profession.

*Sanchez v. Prudential Pizza, Inc.*, 709 F.3d 689, 117 FEP 966 (7th Cir. 2013) – Accepted Rule 68 covered “all . . . claims for relief” but did not specify that it covered attorney’s fees – plaintiff was entitled to attorney’s fees in addition to Rule 68 judgment amount – “[T]he offering defendant bears the burden of any silence or ambiguity concerning attorney fees [and] ‘must make clear whether the offer is inclusive of fees when the underlying statute provides fees for the prevailing party[,]’” 709 F.3d at 692 (citation omitted; emphasis in original).

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<td>Orrick, Herrington &amp; Sutcliffe</td>
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<tr>
<td>Jane Howard-Martin</td>
<td>Toyota Motor Sales, U.S.A., Inc.</td>
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<td>Jocelyn Hunter</td>
<td>The Home Depot</td>
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<td>Teresa J. Hutson</td>
<td>Microsoft Corporation</td>
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<td>T. Warren Jackson</td>
<td>DIRECTV</td>
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<td>W. Carl Jordan</td>
<td>Vinson &amp; Elkins</td>
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Danny Kaufer  
*Borden Ladner Gervais*

Allan King  
*Littler Mendelson, P.C.*

Jeffrey Klein  
*Weil, Gotshal & Manges LLP*

Elaine Koch  
*Bryan Cave*

Nancy Lee  
*Google Inc.*

Lori Lightfoot  
*Mayer Brown*

Leah Lively  
*Ogletree Deakins*

Donald Livingston  
*Akin Gump*

Kathleen Lundquist  
*APTMetrics*

Heather Morgan  
*Paul Hastings LLP*

James Murphy  
*Ogletree Deakins*

Terrence Murphy  
*Littler Mendelson, P.C.*

Mark Nordstrom  
*General Electric Company*

Robert O’Hara  
*United Technologies Corporation*

Anthony Oncidi  
*Proskauer Rose LLP*

Eric Reicin  
*MorganFranklin Consulting*

Michael Reiss  
*Davis Wright Tremaine LLP*

Jim Rowader  
*Target*

Christian Rowley  
*Seyfarth Shaw LLP*

Richard Rufolo  
*United Parcel Service*

William Sailer  
*Qualcomm Incorporated*

Karen Schanfield  
*Fredrikson & Byron, P.C.*

Juana Schurman  
*Oracle Corporation*

Sally Sommers  
*The Western Union Company*

Carrie Storer  
*Discovery Communications*

Shawna Swanson  
*The Walt Disney Corporation*

Matthew Swaya  
*Starbucks Coffee Company*

Janet Thornton  
*ERS Group*

Trishanda Treadwell  
*Parker Hudson Rainer & Dobbs LLP*

Gerlind Wisskirchen  
*CMS International*
Nancy Abell is a partner resident in the firm’s Los Angeles office. She is a trial lawyer who works exclusively in the representation of private and public employers in all aspects of employment law and litigation, including discrimination as well as wage and hour class and collective actions; trials of statutory and common law claims; appeals; Office of Federal Contract Compliance Programs systemic cases and affirmative action compliance reviews; unfair labor practice charges and other proceedings before the NLRB; organizing campaigns; labor negotiations; arbitrations; systemic charges and complaints before the EEOC, state anti-discrimination agencies, the Department of Labor and state wage and hour compliance agencies; and disability access cases under Title III and state laws. From 2000 to April 2014 she was the Global Chair of Paul Hastings’ employment law practice, which has been recognized as Labor & Employment Litigation Department of the Year by The American Lawyer and the recipient of Chambers USA’s 2013 Award for Excellence in Labour & Employment.

In December 2014 Ms. Abell was one of 50 lawyers recognized on The National Law Journal’s inaugural “Litigation Trailblazers & Pioneers” list of professionals who have changed the practice of litigation through the use of innovative legal strategies. In 2010 she was named as one of the decade’s 40 most influential lawyers (one of three employment lawyers) by The National Law Journal. In 2014 Ms. Abell was recognized by Chambers USA as one of the top-ranked employment defense lawyers in California and by the Legal 500 as one of America’s leading employment litigators and counselors. She is a Fellow of the College of Labor and Employment Lawyers, has been named in The Best Lawyers in America for more than 25 years and was named UCLA School of Law Alumni of the Year for Professional Achievement.

Ms. Abell’s clients include major technology companies, defense contractors, manufacturing and entertainment companies, professional firms, financial institutions, and retailers. She has successfully defeated numerous high-profile discrimination and wage-hour class actions, represented numerous leading law firms in partner and glass ceiling cases and defended members of the judiciary.

Ms. Abell has been the prevailing lead counsel in many seminal cases that have shaped employment discrimination class action law. She regularly presents training sessions for justices and judges, including the Council of Chief Judges, on employment issues.

Ms. Abell is Co-Founder and Co-Chair of the UCLA Law Women LEAD initiative to advance women in the legal profession, a member of the Board of Advisors of the UCLA School of Law, a member of the Advisory Board of the American Employment Law Council, and a Governor Emeritus and past Chair of the Board of Governors of the Institute for Corporate Counsel.

Ms. Abell graduated first in her class from Pitzer College of the Claremont Colleges. She graduated Order of the Coif and Order of the Barristers from the UCLA School of Law. While there, Ms. Abell was co-winner of the Roscoe Pound Moot Court Competition, a member of the National Moot Court Team and an extern clerk to the Honorable Shirley Hufstedler, United States Court of Appeals for the Ninth Circuit. Prior to studying law, she was the Affirmative Action Director of the City of Los Angeles.
Fred Alvarez is one of the preeminent employment lawyers in the United States. His practice combines a unique blend of public service with legal profession leadership. He has an active individual and class action litigation practice devoted to defending employers in claims brought by private and governmental parties and by former senior executives. Fred has represented clients in a range of industries, including energy, retail, communications, financial services, and technology. He focuses substantial attention on strategic and compliance advice and internal investigations. His practice includes serving as a court-appointed monitor of class action decrees. He has testified before Congress on several occasions.

Appointed by President Reagan and confirmed by the Senate, Fred served in two federal government sub-cabinet positions. As Assistant Secretary of Labor, he managed the Wage and Hour Division and the Office of Federal Contract Compliance Programs. He also served as a Commissioner of the U.S. Equal Employment Opportunity Commission. He began his career as a trial attorney with the National Labor Relations Board.

Fred is consistently ranked in legal guides as among the top employment law practitioners representing employers. He is an adviser to the ALI Restatement of Employment Law and has been appointed to a variety of task forces as well as to judicial-selection committees. He is a former chair of the ABA Commission on Racial and Ethnic Diversity in the Profession and has served on the ABA Commission on Women in the Profession. Fred currently serves on the board of trustees of Stanford University and on the board of governors of Public Advocates Inc.

EXPERIENCE HIGHLIGHTS
Global media and technology company has decertification of state wide class action affirmed by California Court of Appeal
G6 Hospitality earns dismissal in class action suit
Marvell Semiconductor wins dismissal and summary judgment in multi-plaintiff wage and hour suit

HONORS & DISTINCTIONS
Best Lawyers in America (2007-2016), including 2015 and 2016 Northern California "Lawyer of the Year" in Labor Law — Management
Fellow, College of Labor and Employment Lawyers
One of the "Most Powerful Employment Attorneys," Human Resource Executive (2012-2016)
Latino Business Leadership Award, San Francisco Hispanic Chamber of Commerce (2008)
President, The Bar Association of San Francisco (2000)

LANGUAGES
Spanish

EDUCATION
Stanford University (J.D. 1975; B.A. in Economics with honors 1972)

BAR ADMISSIONS
California

GOVERNMENT SERVICE
Mary Dunn Baker, Ph.D.

Dr. Mary Dunn Baker, Managing Director at ERS Group, is a labor economist specializing in statistical and economic analysis for all aspects of employment discrimination matters. She conducts analyses to determine how the outcomes of employment decision-making processes (e.g., hiring, promotion, termination and pay) relate to demographic group status (e.g., gender, race/ethnicity and age). She is also involved in a number of wage and hour cases analyzing issues such as misclassification, off-the-clock work and time-shaving.

Dr. Baker has given expert testimony in more than 60 cases in federal courts and other judicial settings. Among these cases are EEOC v. CRST Van Expedited, Inc.; Smith, et al., v. City of Jackson, Mississippi Police Department; Eurioste et al., v. Continental Airlines, Inc.; American Association of University Professors v. University of Cincinnati; McClain, et al., v. Lufkin Industries, Inc.; Satchell, et al., v. FedEx Express; Serrano, et al., and Avalos, et al., v. Cintas Corporation; Thompson, et al., v Northrop Grumman Ship Systems, Inc.; Powers and McCarthy, et al., v. U.S. Department of Transportation and EEOC v. BMW Manufacturing Co., LLC.

She also designs programs to proactively monitor the outcomes of selection and compensation systems and works with federal government contractors to prepare for OFCCP audits and defend against notices of violation. On numerous occasions, she has been invited by organizations such as the American Employment Law Council, the American Bar Association’s Labor & Employment Section and EEO Committee, the American Association for Affirmative Action and various Industry Liaison Groups to give lectures, conduct workshops and participate in panel discussions about the use of economics and statistics in employment discrimination and wage and hour cases.

Dr. Baker has been employed by ERS Group since 1986. Prior to joining ERS Group, Dr. Baker served as a member of the economics faculty at Auburn University at Montgomery. She has also served as an adjunct professor at Florida State University. Dr. Baker received her Ph.D. in Economics from Florida State University in 1986.
William C. ("Cory") Barker is a General Attorney for AT&T Services, Inc. He is responsible for management and oversight of employment law class and collective action claims throughout the United States. He also advises internal clients regarding policy issues associated with threatened or pending litigation. Prior to joining AT&T, Mr. Barker spent over sixteen years in private practice. His private practice experience was focused on representing employers in a wide variety of industries in class and other complex employment litigation.

Mr. Barker is a frequent speaker and writer on employment law and complex litigation topics, including wage and hour issues, class and collective action procedural issues, and electronic discovery. He was the Associate Editor of the Fourth Edition of “Employment Discrimination Law” by Barbara Lindemann and Paul Grossman and a Chapter Editor for the Class Action Chapter of the Fifth Edition. Mr. Barker is active in a number of bar associations and was Chair of the Labor & Employment Section of the Atlanta Bar. Mr. Barker was selected to The Best Lawyers in America© 2014 in the field of Litigation - Labor and Employment.
Bernard J. Bobber

Bernard J. ("Bud") Bobber is a partner and litigation lawyer with Foley & Lardner LLP. Although he maintains his office in Milwaukee, Mr. Bobber represents employers before federal and state courts and administrative agencies throughout the country in all areas of employment law, with particular focus on wage and hour, trade secrets/noncompete, employee benefits and employment discrimination matters. Mr. Bobber has extensive experience in the defense of class action cases. He also routinely represents clients in labor arbitrations and in unfair labor practice proceedings before the National Labor Relations Board. Mr. Bobber is vice chair of the firm’s national Labor & Employment Practice and co-chair of the Trade Secret/Noncompete Specialty Practice.

Mr. Bobber also provides both organized and union-free employers with employment and labor law advice, and provides assistance with problem prevention. For example, Mr. Bobber drafts employment agreements and company policies with confidentiality, non-competition and other restrictive covenants for employers to use with key employees. He also counsels employers on reductions and reorganizations, harassment issues, disability accommodation, problematic terminations, collective bargaining strategy, and a host of other workplace issues that require thoughtful analysis and practical application of the legal rights and obligations of employers.

Mr. Bobber is an experienced trial lawyer, having tried cases before juries and judges in federal courts in Illinois, Wisconsin, New York and Missouri, as well as in state courts in Wisconsin and Illinois. Additionally, he has tried well over 100 arbitration cases. He also has argued appeals before the United States Courts of Appeals for the Seventh, Sixth, Tenth, Third and Second Circuits. From 2001 through 2008, Mr. Bobber has served as a co-coordinator of the firm’s Litigation Department Training Program. In that role, Mr. Bobber had responsibility for the training of the firm’s litigation associates, numbering approximately 150, in the areas of trial advocacy and related litigation skills.

In addition to his litigation and counseling work for clients, Mr. Bobber rounds out his practice by frequently speaking and teaching on employment and labor law topics. For example, for over nine consecutive years, Mr. Bobber has been invited by the largest employer organization in Wisconsin
and Illinois to give the keynote address on overall employment law developments at its annual employment law update seminar conducted for its member organizations.

Recognition

Mr. Bobber’s abilities and professionalism have been observed and acknowledged by others as he has been Peer Review Rated as AV® Preeminent™, the highest performance rating in Martindale-Hubbell’s peer review rating system. The publisher that conducts the review process explains that the rating awarded to Mr. Bobber confirms “preeminent legal ability,” and reflects his “very high professional ethics.” Similarly, Chambers USA, a company based in London that reviews and rates American lawyers and publishes its ratings for European and American businesses, rated Mr. Bobber to be one of the top labor and employment attorneys in the state of Wisconsin. Chambers confirmed that top rating in each of its 2003-2015 publications. Mr. Bobber is also listed in The Best Lawyers In America®, and Who’s Who Legal USA – Management Labour & Employment 2006. He was also selected for inclusion in the 2005-2014 Wisconsin Super Lawyers® lists.*

Education

Mr. Bobber is a native of Oak Lawn, Illinois, a near suburb of Chicago. He received his J.D. from Northwestern University School of Law in 1987, where he was elected to the Order of the Coif distinction for graduating in the top ten percent of his class. He earned his bachelor’s degree in economics from the University of Illinois in 1984. He also is a proud alumnus of Quigley Preparatory Seminary High School on Chicago’s south side.

Admissions

Mr. Bobber is licensed to practice in the states of Wisconsin and Illinois, and is admitted to the bar of the United States Supreme Court, and numerous federal appellate and trial courts.

Professional Memberships

Mr. Bobber is a member of the American Bar Association (both its litigation section and labor and employment law section), the State Bar of Wisconsin, and the Milwaukee Bar Association.

Firm Leadership

In 2009, Mr. Bobber was appointed by Foley’s CEO to chair the firm’s Professional Development Committee. Mr. Bobber also currently serves on Foley’s National Pro Bono Committee. He previously served on Foley’s Recruiting Committee from 1997 to 2004, and has been especially active in minority hiring efforts.

Affiliations and Community Engagement

He served on the board of directors for the Girl Scouts of Milwaukee Area for six years, in addition to other community involvement such as his work on United Way Campaigns.

Aside from the Law

Mr. Bobber lives in Mequon, Wisconsin with his wife, Joyce, and their three children.

Publications and Presentations
Presenter, MRA Employment Law Update: Federal & Wisconsin, "Employment Law Year in Review" (February 20, 2015)


Presenter, Nestle Purina Petcare Co. HR Manager Conference, "Labor and Employment Law Issues In Turbulent Times" (July 2009)

Presenter, "Employment and Labor Law Trends" (July 2009)

Presenter, Foley & Lardner LLP 2009 Employment Law Update, "Key Employment Law Developments From 2008 (And Beyond)" (March 2009)

Presenter, Foley & Lardner LLP 2009 Employment Law Update, "Key Employment Law Developments From 2008" (February 2009)

Presenter, MRA 21st Annual Federal and Wisconsin Employment Law Update (January 2009)

Presenter, NewsFeed - Foley's Quarterly Food Industry Web Conference Series, spoke on probable labor and employment changes following the November 2008 election: a revolutionary change to labor organizing, new employment discrimination protections for employees, potential new wage rights (May 2008)


Presenter, Foley & Lardner LLP 2008 Employment Law Update, "Employment Law Developments from 2007" (February 2008)

Author, "The Job Candidate Has A Noncompete – Now What?" Foley & Lardner LLP Employment Law Update (September 2007)

Presenter, NewsFeed - Foley's Quarterly Food Industry Web Conference Series, "Labor & Employment Update: Food Manufacturers Face a Slew of Class Actions Seeking Wages" (April 2007)

Presenter, Foley & Lardner LLP Employment Law Update 2007 (February 2007)

Presenter, 19th Annual Federal and Wisconsin Employment Law Update (January 2007)

*The Illinois Supreme Court does not recognize certifications of specialties in the practice of law and no award or recognition is a requirement to practice law in Illinois.
Ted Borromeo leads the employment and benefits law group at McKesson Corporation, a Fortune 14 drug distribution and healthcare technology solutions company with over 43,000 employees and $135B in revenue. With the recent acquisition of Celesio, McKesson’s global employee headcount and revenue are now approximately 80,000 and $180B. Ted has 35 years of employment and labor law experience representing employers, almost all in-house at Fortune 200 companies in distinct industries. In 2009 he was inducted as a Fellow in the College of Labor and Employment Lawyers.

Prior to McKesson, Ted was the Vice President of Employment and Benefits Law at Sun Microsystems, Inc., where he managed a global team of attorneys, and was recognized with the company’s corporate Leadership Award for innovation, integrity, courage, pace and collaboration. Earlier in his career Ted was Labor and Employment Counsel at Kaiser Aluminum and Chemical Corporation, and Labor Counsel at Lockheed Missiles & Space Company. Ted received his law degree from U.C. Berkeley Boalt Hall School of Law, and his undergraduate degree magna cum laude from San Francisco State University.

Ted is active in professional and social service organizations: as an Executive Committee member of the Labor and Employment Section of the Bar Association of San Francisco; as co-chair of the Labor and Employment Committee of the San Francisco chapter of the Association of Corporate Counsel; and as a Board and HR Committee member of Catholic Services CYO for San Francisco, Marin and San Mateo. Ted is a frequent panel speaker for continuing legal education programs, including for the American Bar Association; California State Bar; International Bar Association; SF Bar Association Labor Section; National Employment Law Council; California Minority Counsel Program; National Asian Pacific American Bar Association, and others.
Michael S. Burkhardt represents employers in a wide range of labor and employment disputes, including employment discrimination class actions, systemic discrimination investigations, and multiplaintiff litigation. He handles FLSA and state wage and hour actions, as well single-plaintiff disability, sex, age, and race discrimination claims. He also represents clients in whistleblower and wrongful discharge claims. Michael has experience in all areas of employment litigation and counseling, particularly EEOC systemic investigations, class action litigation, noncompetition litigation; and compensation, promotion, and hiring analyses.

Michael is the co-leader of the firm’s systemic employment litigation practice, and represents employers across the US in systemic discrimination investigations and litigation. He represents employers in state and federal court through trial and at the appellate level in litigation matters, including noncompete injunction matters, whistleblower litigation, wellness program EEOC ADA litigation; age, EPA, and FLSA collective actions; and single-plaintiff discrimination claims.

Michael also counsels clients performing pay equity analyses; hiring, termination, and promotion analyses; testing and disparate impact analyses; policy audits; and diversity analyses.

Michael speaks and publishes on a range of employment topics, such as the use of statistical evidence in employment discrimination cases, affirmative action, and electronic interaction in the workplace. He was a contributing author and editor of “The Duty to Bargain,” Chapter 13 in Hardin, The Developing Labor Law (Chicago, Il.: BNA Books, 1995, 1996 Supp.), and is a contributing editor to the Pennsylvania Chamber of Business and Industry Labor Report.

AWARDS AND AFFILIATIONS
Noted in The Legal 500 for Labor and Employment Litigation (2014)

ADMISSIONS
- New Jersey
- Pennsylvania
CLERKSHIPS
- Clerkship to Judge Ronald Buckwalter of the US District Court for the Eastern District of Pennsylvania

EDUCATION
- Saint Joseph’s University, 1990, B.A.
- University of Michigan Law School, 1992, J.D.

SECTORS
- Life Sciences
- Technology

SERVICES
- Labor, Employment & Benefits
- Systemic Employment Litigation
- Employment Counseling
- Trade Secrets, Proprietary Information & Noncompetition/Nondisclosure Agreements
- Wage and Hour Litigation & Counseling
- Whistleblowing & Retaliation
- Life Sciences Transactions

REGIONS
- North America
Mark Codd is responsible for providing HR support to Publix’s 1,100 stores and support locations. He is responsible for the Labor Relations Department, the Survey Office, and he also serves on a number of strategy teams as an HR Generalist.

Mark has over 25 years of HR management experience with particular emphasis on employment, labor and employee relations. Mark joined Publix Super Markets in 1998 and prior to joining Publix worked at H.B. Zachry Company, a large international general contractor.

Mark graduated from the University of Texas at San Antonio with both an MBA, and a Bachelors degree in HR. He is also currently in his third year attending classes for Doctoral studies in psychology at Nova Southeastern University.

Mark is also in his eleventh year serving as an Adjunct Professor of the Graduate HR Program for Webster University. Mark is also actively involved in numerous charitable, professional and industry committees and Boards.
Experience:

2006-present
Partner and Special Counsel at Hunton & Williams LLP in Miami, representing employers in employment litigation in the state and federal courts and counseling related to those matters; co-head of the Labor & Employment team until retirement from the partnership.

1979-2006
Founded the Labor & Employment practice for Morgan Lewis & Bockius in Miami; representing employers in employment litigation, including class actions, arbitration and related counseling; managing partner of Miami office; member of the firm Governing Board.

1976-1979
Labor Relations Counsel in house at National Airlines, Inc. in Miami; handled pattern & practice discrimination matter with EEOC; negotiated system wide conciliation agreement; supervised outside counsel in litigation matters; handled labor arbitrations under numerous collective bargaining agreements.

1973-1976
Trial Counsel, U.S. Department of Justice, Civil Rights Division, Employment Section; handled desegregation and pattern & practice cases against public & private employers including several state police agencies; member of task force detailed to establish EEOC litigation team when Title VII was amended to give the agency litigation authority previously held by Justice.

1968-1973
Judge Advocate, Captain U.S. Air Force: served mainly as defense counsel in numerous courts martial and administrative boards in Denver, Southeast Asia, Tacoma, Washington and at the Pentagon; counsel to commanders on discipline and related issues.

Education:

Georgetown University Law Center: L.M Labor 1975
Seton Hall University Law School: J.D. 1967
Georgetown University College of Arts & Science: A.B. 1964

Memberships:

College of Labor & Employment Lawyers: fellow since 2000
American Employment Law Council
Academy of Florida Management Attorneys: charter member
Alumni Board: Georgetown University Law Center
Board of Visitors: Seton Hall University Law School
American Bar Association: Labor and Employment Section-EEO Committee
Florida Bar Association: Labor & Employment Section – Past Chair
**Recognition:**  Best Lawyers in America
Chambers & Partners: Tier One recognition 2003-15
Martindale Hubbell AV
International Who’s Who

**Other:**


Adjunct faculty: University of Miami School of Law – Employment Law

Adjunct Lecturer on Arbitration:
- University of Tartu, Estonia 2008
- Palacky University, Olomuc, Czech Republic 2010
- University of Pecs, Hungary 2012
Catherine A. Conway

Contact:

333 South Grand Avenue
Los Angeles, CA 90071-3197
Tel: 213.229.7822
cconway@gibsondunn.com

Cathy has sealed her reputation as a leading labor and employment litigator with more than 25 years trial experience representing major companies in high-stakes employment cases. Her practice focuses on complex employment litigation, including class actions with an emphasis on wage and hour litigation trials. She has trial experience in state and federal litigation, including wage and hour claims, employment discrimination, sexual harassment, wrongful discharge, unfair competition, protection of employer trade secrets and unfair business practice litigation under California Business and Professions Code Section 17200. Cathy has advised boards of directors in many confidential investigations and represents a large variety of employers, including national retail companies, insurance companies, Internet companies, manufacturers, banks, investment banking and financial services firms, national restaurant chains, oil companies and law firms.

Cathy joined Gibson Dunn in April 2012.

Cathy has been recognized as a leading employment lawyer by Chambers USA: America's Leading Lawyers for Business in 2009-2015. She is also recognized by her peers as one of The Best Lawyers in America in the area of Employment Law. The Daily Journal named her as one of the Top Labor and Employment Lawyers in California in 2009-2013 and one of the Top Women Lawyers in 2012 and 2014. Cathy also received the California Lawyer of the Year award from California Lawyer magazine in the employment law category in 2010.
Kevin Covert

VP & Deputy General Counsel-HR
Corporate Law
Law

Kevin M. Covert is the Vice President and Deputy General Counsel for Human Resources at Honeywell International Inc. In this role, he leads a department of over 15 legal professionals, with responsibility for all worldwide legal matters (including litigation, compliance and corporate transactions) relating to labor, employment, employee benefits and compensation. He came to Honeywell in 1998 and has been in his current role since 2003. Kevin is a graduate of Rider University (BS—Finance), Rutgers University School of Law (J.D.), New York University (LL.M. in Taxation), and the Wharton School of Business at the University of Pennsylvania (MBA—Major in Finance).

Kevin lives in Philadelphia with his wife, Amy, and two young children. He is a board member of the ERISA Industry Committee (Chair, Legal Committee) and the American Benefits Council. He is a graduate of Honeywell’s Executive Development Program and is Six Sigma Green Belt Certified.
Melanie is a partner on our Employment and Benefits Team. Her diverse practice covers the full spectrum of employment law issues, both for employers and employees, as an advisor to clients on complex non-contentious workplace issues and as an experienced litigator before all employment related fora. Melanie is the go-to employment lawyer for some of Ireland’s biggest domestic and multi-national companies and employers including the Legal Aid Board, the Health & Safety Authority, Facebook, Twitter, arvato, Activision, Zenimax, Yahoo!, accenture and Western Union.

Melanie has advised many large companies either entering the Irish market for the first time or increasing their market presence and on all matters relating to their workforces, often involving hundreds of employees. She assists clients in drafting bespoke employment contracts, agreements and HR policies and procedures. She also provides on-going support to HR managers in relation to the management of day to day disciplinary issues, the handling of employee related complaints, internal reorganisations and rationalisations, terminations and transfer of undertakings.

Melanie is the External Examiner in Employment Law for the Law Society of Ireland. She is also entrenched in the delivery of training on Employment Law to trainee solicitors in the Law Society and participants in the Law Society's Advance Diploma in Employment Law.

Authorship:

Melanie has contributed to several international publications such as the Irish chapter of the International Expatriate Employment Handbook, the Irish chapter of EU and International Employment Law, the Irish chapter of Employment and Labour Law – Jurisdictional Comparisons and the Irish chapter of Restrictive Covenants and Trade Secrets in Employment Law – An International Survey.

Memberships:

Law Society of Ireland
International Labor Law Section of the American Bar Association (ABA).
Co-Chair of the International Labor Law Subcommittee of the Employment Rights and Responsibilities Section of the ABA.
American Employment Law Council (AELC)
European Employment Lawyers Association (EELA)
Employment Law Association (UK)
Employment Law Association of Ireland (ELAI)
Dennis P. Duffy
Partner
Houston
T 713.646.1364 | F 713.751.1717
dpduffy@bakerlaw.com

"Walking encyclopedia’ Dennis Duffy is well regarded for his management defense expertise in a broad range of matters, from discrimination to wrongful termination and whistle-blower retaliation claims."
— Chambers USA 2014

Dennis Duffy concentrates exclusively on representation of management in all aspects of labor and employment law matters. Client responsiveness and thorough preparation are the hallmarks of Dennis's practice, as Dennis ensures that he is available to his clients, responding quickly, with a thorough approach when addressing their workplace challenges.

Dennis is Board Certified in labor and employment law by the Texas Board of Legal Specialization, a fellow in the College of Labor and Employment Lawyers, and ranked in Chambers USA as a "Leading Lawyer." Dennis is the author of the “Ethics and Professionalism Handbook for Labor and Employment Lawyers" (13th Ed. 2015)

Recent Experience

- Lead trial counsel in retaliation, discrimination and breach of contract case brought by former outside counsel for leading seismic services company claiming status as employee. Obtained defense verdict on all issues following a two-week jury trial.
- Obtained summary judgment in multi-count federal gender discrimination and retaliatory discharge claims against a leading water technology company. Obtained permanent injunction in a parallel state court action against the same plaintiff arising from misappropriation of confidential information.
- Lead counsel in FLSA nationwide putative collective action case against a leading information technology company. Defeated conditional certification of class and successfully obtained order referring remaining claims of named plaintiffs to binding arbitration.

Recognition

- Chambers USA: Labor & Employment in Texas (2011 to 2015)
- The Best Lawyers in America© (2009 to 2015)
- Human Resource Executive "Nation's Most Powerful Employment Attorneys—Top 100" (2009 to 2015)
- Texas "Super Lawyer" (2008 to 2015)

Services
- Employment Litigation
- Appellate and Major Motions
- Employment Counseling
- Wage and Hour
- Noncompete and Trade Secrets

Admissions
- U.S. Supreme Court
- U.S. Court of Appeals, Fifth Circuit
- U.S. District Court, Northern, Southern, Eastern and Western Districts of Texas
- U.S. District Court, Northern, Central and Eastern Districts of California
- Texas
- California

Education
- J.D., University of Virginia School of Law, 1982
- A.B., Princeton University, 1979
Hope B. Eastman

Hope B. Eastman is Co-Chair of the Employment Law Group.

Ms. Eastman has more than 30 years experience representing a variety of businesses, trade associations, and non-profit organizations in all areas of employment law, including age, gender, race, and disability discrimination; sexual and other harassment; wage and hour matters; and non-competition disputes. A significant portion of the practice involves representing employers before the EEOC, the OFCCP, the Department of Labor, other federal agencies, and in federal and state court. She is also a mediator focusing on employment disputes.

According to Chambers and Partners USA, Ms. Eastman “is recognized as a talented player in labor and employment law. She enjoys a fine reputation for her wide-ranging and successful representation of employers from various industries.” Chambers also reported that Ms. Eastman “is praised for her ‘strategic and analytical approach.’ She is experienced in a broad range of labor and employment matters, but is particularly commended for her success in employment litigation defense.”

Ms. Eastman’s practice also focuses on helping employers develop regulatory-sensitive employment policies for recruitment, selection, promotion, discipline, and termination of employees, and on evaluating and advising them with regard to major changes planned for their workforces. Throughout her career, she has been directly involved in the shaping of federal employment law, both before Congress and with the Executive Branch.

Hope Eastman

Principal
(301) 951-9326
(301) 654-7354 fax
heastman@paleyrothman.com

Education
Harvard Law School (J.D.)

Bar Admissions
Maryland
California
District of Columbia
Hope B. Eastman

As a mid-sized regional firm, Paley Rothman has received national rankings in the prestigious annual *US News-Best Lawyers* rankings of law firms. Paley Rothman's Employment Law group was one of seven firms with offices in Maryland, selected as a 2015 “Best Law Firm,” for the third year in a row, with *national* rankings (Tier 1 or 2) in Employment Litigation. All of the other firms are well known national and international firms with between 250 and 900 lawyers in multiple offices.

Paley Rothman also was one of twelve firms to receive a national ranking for Employment Law–Management (Tier 3). Again, the other firms had between 250 and 2500 lawyers, with multiple offices around the country. The Employment Law group received similar recognition locally, earning a Tier 1 ranking in Washington, D.C. for Litigation–Labor & Employment and a Tier 2 ranking for Employment Law–Management.

Active in professional organizations, Ms. Eastman is the Chair of the Board of Directors of the American Employment Law Council (AELC), a national invitation-only organization for experienced, high-level management employment counsel, both in-house and outside counsel. She is the past President of The College of Labor and Employment Lawyers and previously served as a member of the Governing Council of the American Bar Association’s Labor and Employment Law Section.

Ms. Eastman has been recognized for her accomplishments. In addition to Chambers USA, she has been selected by *Washingtonian Magazine* as one of the top employment lawyers in the DC area. She has also been listed in the 2006-2016 *Best Lawyers in America*, The International Who’s Who of Management Labour and Employment Lawyers for 2006-2015, the Maryland Super Lawyers for 2007-2015 in the area of employment litigation defense and Washington D.C. Super Lawyers for 2007-2015. She has also been listed as one of the Top 25 Women Lawyers in the State of Maryland and as one of Maryland’s Top 100 Women.

Ms. Eastman graduated cum laude from Harvard Law School. She is a member of the Bars of Maryland, California and the District of Columbia and is admitted to practice before various state and federal courts, including the Supreme Court of the United States.
Gary Eisenstat is a board certified labor and employer lawyer and a partner in the Dallas litigation boutique of Figari + Davenport, LLP. He has been with the firm for nearly 30 years. Mr. Eisenstat defends and tries commercial, as well as labor and employment cases, in federal and state courts and in arbitration proceedings throughout Texas and the southwest. His practice also includes appearance before various federal and state governmental administrative agencies and tribunals. He has extensive experience representing management in all aspects of traditional employment law (including claims for FLSA violations, discrimination, wrongful termination, sexual harassment, and retaliation), as well as covenants not to compete, theft or misappropriation of trade secrets, unfair competition claims, and both partnership and agency disputes. He also represents clients in NLRB proceedings and in labor arbitrations. He counsels employers in pre-litigation labor and employment matters, including class and collective action avoidance. Mr. Eisenstat also represents a variety of clients in complex commercial disputes and has been a certified mediator since 2000.

Mr. Eisenstat is a Fellow of the College of Labor and Employment Lawyers. He has been named to both the 2015 Top 100 Lawyers in Texas by Texas Super Lawyers and the Best Lawyers in Dallas by D Magazine in 2014 and 2015. Mr. Eisenstat has been listed in The Best Lawyers in America under Labor and Employment Law every year since 2008, and been named a Texas Super Lawyer continuously from 2003 by Texas Monthly magazine. Since 1997, he has co-authored the Annual Survey of Texas Law – Texas Civil Procedure, which is published in the SMU Law Review. Mr. Eisenstat is a Fellow of the Dallas Bar Foundation, and a member of the College of the State Bar of Texas. He is also a frequent continuing education speaker to both lawyers and other professionals on a variety of subjects.

Before practicing law in Dallas, Mr. Eisenstat earned his B.S. in Business Administration from the University of Colorado in 1982 and his J.D. from the Boston University School of Law in 1985.

Mr. Eisenstat is a Vice President of the Dallas Holocaust and Human Rights Museum and the immediate past President of the Dallas Region of the American Jewish Committee.
David S. Fortney

Mr. Fortney is a co-founder of Fortney & Scott LLC, a Washington, D.C.-based law firm, counseling and advising clients on the full spectrum of workplace-related matters, including employment discrimination and labor matters, compliance programs, government contracting, executive employment and compensation, and developing strategies for avoiding or responding to workplace-related crises. Mr. Fortney has a broad-based practice representing and counseling employers in employment and labor matters, including wage and hour matters, government enforcement agencies’ audits and regulatory matters, judicial proceedings, Equal Employment Opportunity requirements, federal contractor's affirmative action and non-discrimination obligations, collective bargaining and union organizing, and workplace health and safety. Mr. Fortney is a Fellow in the College of Labor and Employment Lawyers; he co-chairs the American Bar Association’s Federal Legislative Development Committee; and, he is a frequent lecturer at professional conferences. Fortney & Scott, LLC has been recognized as a leading management employment law firm in the prestigious Best Law Firms survey for 2011-2015 by U.S. News & World Report and Best Lawyers for Washington, D.C.

Mr. Fortney’s wage and hour practice includes counseling clients with respect to policies and procedures to ensure compliance with the minimum wage and overtime obligations under the Federal Fair Labor Standards Act (FLSA) and state wage and hour laws, including the proper classification of positions as exempt or non-exempt, overtime practices for non-exempt employees, compensation practices for exempt employees, and time and record keeping procedures; conducting preventive compliance audits; and advising and representing clients facing audits by the U.S. Department of Labor’s Wage and Hour Division. Additionally, Mr. Fortney established and co-chairs the Practicing Law Institute’s nationally acclaimed annual wage and hour seminar in New York, and has been doing so since 2010.

Before co-founding the firm, Mr. Fortney previously served as the chief legal officer of the U. S. Department of Labor in Washington, D.C. during President George H. W. Bush Administration. As Acting Solicitor of Labor, he was responsible for enforcing over 140 laws regulating the nation's workplaces and managing an agency with 800 attorneys and support staff. He advised Secretaries of Labor Elizabeth Dole and Lynn Martin and the Department of Labor agencies on a broad range of legal, policy, legislative, regulatory, and enforcement issues. The major Department of Labor agencies Mr. Fortney represented included the Wage and Hour Division, the Office of Federal Contract Compliance Programs (OFCCP), Occupational Safety and Health Administration (OSHA), and Mine Safety and Health Administration (MSHA), among others.

Mr. Fortney has been widely recognized for his professional accomplishments, including being named one of the leading employment lawyers in Washington, D.C. by the Chambers USA survey of America’s Leading Lawyers for Business in all years from 2005 through present. He was selected for inclusion in the 2009 to present editions of The Best Lawyers in America, Washington D.C.’s, Washington D.C.’s Best Lawyers and Super Lawyers. Mr. Fortney was also awarded an AV rating (the highest level) by Martindale-Hubbell.

Mr. Fortney is a frequent lecturer and writer on employment-related topics, including appearances on CNN, CBS and Fox News. Mr. Fortney is the co-editor of a monthly newsletter, the Federal Employment Law Insider, Chapter Eight of The Family and Medical Leave Act (2006) published by BNA Books, co-author of the Military Leave Compliance Kit (2001), published by M. Lee Smith Publishers, and lead author of the Guide to Employee Leave (1997), published by Warren, Gorham & Lamont. Mr. Fortney received his B.A. from The Pennsylvania State University and his J.D. from Duquesne University School of Law.
Paul Grossman is a partner in the Employment Law practice of Paul Hastings and is based in the firm’s Los Angeles office. Mr. Grossman represents major private employers in all aspects of employment law, including class action, wage and hour, wrongful discharge, discrimination, sexual harassment, and whistleblower cases. He is the general counsel of the California Employment Law Council (CELC), an organization of approximately 65 of California’s largest employers. Its mission is the development of moderate employment law through amicus briefs, education, and legislative activities.

Accolades and Recognitions

- The International Who’s Who of Business Lawyers on three occasions in the last ten years, most recently in 2010, rated Mr. Grossman as the “leading lawyer in the world for management labor and employment expertise.” Who’s Who also has found for numerous consecutive years that Paul Hastings has the world’s strongest management employment practice.
- In its most recent 2015 edition, Chambers USA placed Mr. Grossman in its “Band 1” for California employment litigation. As it has done for many consecutive years, Chambers USA has continued to rate Paul Hastings as the sole occupant of its “Band 1” – as having the best employment litigation practice in California.

Speaking Engagements and Publications

- Mr. Grossman is the co-author of Lindemann, Grossman and Weirich Employment Discrimination Law, the official book of the American Bar Association in its field – the fifth edition was released in 2013. It has been cited on multiple occasions by the U.S. Supreme Court and the courts of every circuit and is generally regarded as the principal publication in its field.

Education

- Yale Law School, J.D., 1964 (member, board of editors, Yale Law Journal)
- Amherst College, B.A., 1961
John Hamlin
Marsh & McLennan Companies
New York

John Hamlin is Chief Employment Counsel and leads the Employment Law Group for Marsh & McLennan Companies, Inc., one of the world’s leading professional services firms with over 57,000 employees in more than 100 countries. The firm’s operating companies include Marsh, Mercer, Guy Carpenter, and Oliver Wyman. Prior to joining Marsh & McLennan, John was Of Counsel with the law firm of Paul, Hastings Janofsky & Walker LLP. While in private practice, he represented employers in all aspects of labor and employment law, before various state and federal courts and administrative agencies, and provided advice on an array of personnel-related issues.

John is a fellow of the College of Labor and Employment Lawyers. He has published various articles on employment law and has presented at numerous seminars on assorted employment-related topics. In 2014 John was selected as one of The Legal 500’s GC Powerlist “Corporate Counsel 100: Rising Stars,” which recognizes leading in-house lawyers for innovation, quality and excellence. In June he was selected by the International Law Office and the Association of Corporate Counsel as the recipient of the 2015 ILO Global Counsel Award for Individual Employment Lawyer.

John has a law degree with honors from the University of Connecticut School of Law, where he was Editor-in-Chief of the Connecticut Journal of International Law. After law school, he served as a Law Clerk to the Honorable B. Avant Edenfield, Judge of the United States District Court for the Southern District of Georgia in Savannah.
James R. Hammerschmidt

James R. Hammerschmidt is a principal of the firm and Co-Chair of the firm’s Employment Law practice group, as well as a member of its Litigation and Appellate practice groups, whose practice includes a wide range of commercial, corporate and employment counseling and litigation.

His general civil litigation and appellate practice experience includes matters involving real estate, land development, breach of contract, trusts and estates, construction, shareholder disputes, business disputes, consumer protection law, RICO, conspiracy and defamation among many others.

Mr. Hammerschmidt has equally extensive experience representing and counseling clients on employment law issues. He represents clients in federal and state court, as well as before agencies such as the EEOC, Department of Labor and local and state human rights commissions and labor departments, involving claims arising under Title VII, ERISA, FLSA, FMLA, ADA, ADEA, Wage Payment and Collection Law and Wage and Hour Law statutes. He counsels clients on and litigates a wide range of employment issues such as breach of contract, wrongful termination, trade secret claims and non-competition and non-solicitation agreements. In addition to litigation, he provides daily advice to clients dealing with difficult employees and employee discipline, and routinely assists clients in developing and implementing employment policies and practices, drafting employee manuals and preparing employment agreements. Mr. Hammerschmidt has been recognized for his outstanding work in employment law with his inclusion in the 2016 Best Lawyers in America list, the Maryland Super Lawyers list (2014-2015) and the Washington D.C. Super Lawyers list (2014-2015).

As a mid-sized regional firm, Paley Rothman has received national rankings in the prestigious annual US News-Best Lawyers rankings of law firms. Paley Rothman’s Employment Law group was one of seven firms with offices in Maryland, selected as a 2015 “Best Law Firm,” for the third year in a row, with national rankings (Tier 1 or 2) in Employment Litigation. All of the other firms are well known national and international firms with between 250 and 900 lawyers in multiple offices.
James R. Hammerschmidt

Paley Rothman also was one of twelve firms to receive a national ranking for Employment Law–Management (Tier 3). Again, the other firms had between 250 and 2500 lawyers, with multiple offices around the country. The Employment Law group received similar recognition locally, earning a Tier 1 ranking in Washington, D.C. for Litigation–Labor & Employment and a Tier 2 ranking for Employment Law–Management.

An active participant in the local legal community, Mr. Hammerschmidt served as Chairman of the Board for the Federal Bar Association’s Maryland Chapter, on the Council for the Maryland State Bar Association’s Employment Law Section, on the Board of the Federal Bar Association’s Labor and Employment Section and the Maryland State Bar Association’s Special Committee on Voir Dire. He is also a member of the Litigation and Employment Law Sections of the American Bar Association, a past Chair of the Federal Bar Association’s Labor and Employment Law Section, a past Co-Chair of both the Employment Law Section and the District Court Mediation Program of the Bar Association of Montgomery County and a two-time member of the Judicial Panel Selection Committee of the Bar Association of Montgomery County. He has written articles on employment law topics for the Washington Business Journal, Business Gazette and Maryland’s daily legal publication, The Daily Record. He is also a contributing editor to the American Bar Association’s Employment Discrimination Law (3d Ed.) and the American Bar Association’s Annual Developments in Business and Corporate Litigation in addition to speaking on all aspects of employment law.

His community involvements include a pro bono membership on the Board of Directors of the Lubuto Library Project, a 501(c) (3) organization working to build children’s libraries and create educational opportunities for children affected by HIV/AIDS in Africa. He also served as Board Counsel to the Board of Trustees for the Green Acres School.

After obtaining his B.S.B.A. from Washington University in St. Louis, Mr. Hammerschmidt graduated cum laude from Saint Louis University School of Law in 1993. While attending law school, he served as Executive Editor of the Public Law Review, Co-Editor-in-Chief of the American Bar Association’s Fidelity and Surety Law publication and a member of the school’s trial advocacy team while also receiving a Certificate in Labor and Employment Law. As a result of his achievements and service in law school, he was nominated to the Alpha Sigma Nu National Honor Society. Prior to joining Paley Rothman, he spent four years in the General Counsel’s Office of the Manville Personal Injury Settlement Trust, where he last served as Assistant General Counsel.
Ms Ming Henderson
Partner

Ming is a Partner in the International Labor & Employment practice of Seyfarth Shaw (UK) LLP’s London office and has over 20 years of experience as an employment lawyer. Ming is admitted in both France and the UK. Before joining Seyfarth Shaw, Ming worked as the in-house employment counsel for a global software and hardware company covering Europe, Middle-East and Africa (EMEA). She was also previously Head of the EMEA Employment Law Practice for a global financial institution in London and worked 12 years in Paris in private practice. With a unique combination of in-house and private practice experience, Ming specialises in multi-country employment law transactions for global companies. Ming has considerable knowledge in cross-border employment laws, including in the context of corporate restructuring, mergers and acquisitions, global changes to terms and conditions, collective consultation with unions and employee representatives and mass redundancies.

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Lynne Hermle, a Silicon Valley employment partner, is consistently recognized one of the best employment lawyers in the country. She has a long track record of jury trial wins as well and has consistently defeated certification in class actions. Chambers USA has described her as "a fantastic lawyer and fabulous litigator." She has been named as one of the two best employment defense lawyers in the Bay Area and one of California Top Women Attorneys (by The Recorder); as one of the Top Ten Leaders of the Pack in America (by Human Resource Executive); in the Top 25 of The Best of The Best USA (by Euromoney); one of America's Top 50 Women Litigators (National Law Journal); and one of America's Top 500 Lawyer and Top 500 Leading Litigators (Lawdragon).

Lynne has special expertise in the retail and tech industries. In wage-and-hour class actions, she has represented employers which include Apple, The Gap, Sears, Burlington Coat Factory, Gymboree, Spencer's Gifts, Banana Republic, Old Navy, Williams Sonoma and Pottery Barn Kids, and Morgan Stanley, bucking the trend and consistently defeating class certification or obtaining summary judgment.

Some of her more notable engagements include the following cases.

- **Class Actions.** Lynne has represented several large employers in wage-and-hour class actions, including The Gap, Blockbuster and Burlington Coat Factory. Bucking the legal tide, she has defeated class certification in statewide wage-and-hour class actions for Banana Republic, Old Navy, Pottery Barn Kids and Burlington Coat Factory and has had other cases dismissed on summary judgment and other grounds.

- **Discrimination.** In the high-profile trial of Maghribi v. Advanced Micro Devices, Lynne obtained a quick defense verdict for her client, AMD. Plaintiff, a senior Arab Muslim executive, sought US$200 million in lost compensation in the form of lost salary, bonuses and stock options, and sought emotional distress damages, punitive damages and attorneys' fees in a case alleging post-September 11th discrimination. After a several-week trial, the jury returned in less than two hours with a defense verdict.

- **Inland Container Corp.** In Thrush v. Inland Container Corp., Lynne obtained directed verdicts for Inland Container on disability
discrimination, intentional infliction of emotional distress and related claims after several weeks of a federal jury trial.

- **City of Tracy.** In *Vizza v. The City of Tracy*, Lynne obtained directed verdicts for the City of Tracy and two individual defendants on all nine claims brought by the City’s former Director of Public Works, including constitutional and common law claims, after five days of jury trial in federal court.

- **IBM.** In *Pi v. IBM*, Lynne represented IBM in a hard-fought jury trial alleging claims of retaliation for sexual harassment complaints. After several weeks of trial, the jury returned a defense verdict on all claims.

- **Varian.** In *Kern v. Varian Associates, Inc.*, Lynne obtained dismissal of all wrongful discharge claims asserted by plaintiff David Kern, and then obtained a verdict of more than US$3.5 million on Varian’s cross-claim for trade secret theft. Mr. Kern subsequently served time in a federal prison for that theft.

Lynne serves as an Early Neutral Evaluator for the Northern District of California and has been appointed by that court to serve as a mediator in a complex class action. In addition to training and counseling employers, she teaches classes on trial advocacy and substantive employment topics.

Before coming to Orrick, she was in house counsel for AT&T, where she handled employment matters for a several state region.

**Admitted in**
- California

**Memberships**
- The College of Labor and Employment Lawyers
- State Bar of California

**Publications**
- "How class actions can help kids," *The Recorder*, August 2, 2010
- "Risking Liability? Legal Challenges to Diversity Programs," *For The Defense*, May 2010
- "The A-List: What companies should expect from their outside employment counsel," *GC California*, July/August 2009
- "Danger Ahead: A brief guide to minimizing the risk of employment claims," *GC California*, April 2009
Jane Howard-Martin

ASSISTANT GENERAL COUNSEL
TOYOTA MOTOR SALES, U.S.A., Inc.

Jane Howard-Martin is Assistant General Counsel for Toyota Motor Sales, U.S.A., Inc. ("TMS") and manages the Labor and Employment group in TMS’s Legal Department. She also manages the Immigration and Benefits practice.

Prior to joining Toyota in 2003, Howard-Martin was a partner with Morgan, Lewis and Bockius LLP in their Los Angeles and Pittsburgh offices, and previously was a partner at Kirkpatrick & Lockhart in Pittsburgh, Pennsylvania.

Howard-Martin has been featured in a number of publications and symposiums. She authored a column on employment issues for USAToday.com, a treatise on Title III of the Americans with Disabilities Act, and served on the Editorial Review Board of the Pennsylvania Labor Letter. Howard-Martin also appeared as a panelist on MSNBC’s "Today in America" on the issue of sexual harassment.

Howard-Martin earned a Bachelor of Arts from Harvard University in 1979, and received her juris doctorate degree from Harvard Law School in 1982.

She lives in Los Angeles with her husband, Gus Martin, who is on the faculty at California State University, Dominguez Hills.
Jocelyn Hunter

Jocelyn Hunter is the Vice President and Deputy General Counsel – Merchandising, Supply Chain, Intellectual Property, International, Employment Law & Benefits at The Home Depot. Ms. Hunter has been a member of The Home Depot Legal Department since 1997 serving in roles of increasing responsibility.

In her current role, Ms. Hunter has responsibility for Home Depot’s worldwide Benefits, Employment, Supply Chain, International, Merchandising, Intellectual Property and Regulatory legal matters. She is the leader of the Company’s cross-functional team charged with responding to data breaches and identity theft issues. She is also the Secretary to the Compensation Committee of the Home Depot’s Board of Directors with responsibility for related governance and legal issues. Home Depot has more than 350,000 associates and more than 2,000 locations enterprise-wide.

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Education

Duke University Law School
J.D., 1987

Duke University
B.A., 1984

Professional Associations

Board of Directors of the Alliance Theatre Company

Board of Directors of the Atlanta History Center

Board of Directors of the American Employment Law Council

Fellow of the College of Labor and Employment Lawyers

Duke Law Alumni Association Board of Directors

Member of the Duke Law Center for Judicial Studies

Recipient of 2013 Georgia Multicultural Leadership Award
Teresa J. Hutson
Microsoft Corporation
Assistant General Counsel, Global Employment and Migration Group

Teresa J. Hutson leads the global employment and immigration team at Microsoft. In her role, Teresa advises management and human resources professionals regarding key cross-border programs and policies, covering a range of issues including global mobility, strategic workforce planning, external staff, employee privacy, cross-border M&A deals, employee representation, background checks and compliance programs, and cross-border reductions in force.

Prior to joining Microsoft, Teresa worked at Paul Hastings LLP in San Francisco. While in private practice, Teresa handled wage & hour class actions and individual suits regarding discrimination, sexual harassment, wrongful termination, retaliation, disability accommodation and compliance matters for a variety of clients including UPS, Target, Wal-Mart, UBS, Safeway, Microsoft, Bechtel, and Amgen.

Teresa received her law degree from Cornell Law School and her bachelor’s degree from Syracuse University.
T. Warren Jackson is senior vice president and associate general counsel of DIRECTV. He is responsible for general litigation, labor and employment law matters, executive compensation, benefits, and compliance programs.

Jackson has three decades of service at DIRECTV and Hughes Electronics, Inc., having joined Hughes (then parent company of DIRECTV) in 1984. Previously he was an employment lawyer in the Los Angeles office of O’Melveny & Myers.

In 2003, Jackson was elected as a Fellow of the College of Labor and Employment Lawyers. He currently serves on the Legal Committee of the California Employers Group and on the boards of the Constitutional Rights Foundation, the Riordan Programs at UCLA Anderson and the Ronald Reagan UCLA Medical Center Board. He has served two terms on the Cornell University Council (2005-2009 and 2011-2015).

From 1994 to 1996, he served on the Los Angeles Civil Service Commission (appointed by Mayor Riordan), whereupon he was then appointed to the Los Angeles Police Commission, serving from 1996-2001; and as a vice president on both Commissions. From 1992 to 1999, he served two four-year terms on the California Fair Employment and Housing Commission (appointed by Gov. Pete Wilson). He was also a deputy general counsel to the William Webster Commission, which reviewed and reported on the Los Angeles Police Department’s performance during the April 1992 civil disturbance in Los Angeles. Jackson was appointed to the California Workforce Investment Board by Gov. Gray Davis in April 2003 and was reappointed by Gov. Arnold Schwarzenegger in 2005, serving until 2010.

In 1991, Jackson was named In-House Counsel of the Year by the John M. Langston Bar Association, of which he is a past member of the Board of Directors. He has been active in local and national bar associations, including multiple speaking engagements at the American Bar Association’s Annual Meeting, and as trustee of the Los Angeles County Bar Association.

Jackson holds bachelor’s degrees in Economics and History from Cornell University and a J.D. from Harvard Law School. He has also completed the Executive Management Program at UCLA, and the Cornell University Human Resource Executive Development Program.

Originally from Philadelphia, Jackson is based at DIRECTV’s El Segundo, Calif. headquarters.
Carl Jordan has more than 40 years of experience representing employers in a broad range of employment, ERISA, and labor-related trial and appellate matters. He regularly counsels clients concerning their most important and sensitive employment issues.

Carl has extensive experience advising and defending employers with respect to ERISA, FLSA, and discrimination matters involving class and systemic issues, whistleblower matters including under Sarbanes-Oxley and Dodd Frank, mandatory dispute resolution programs, and internal investigations concerning systemic and highly sensitive matters.

Carl has been recognized as a leading employment and labor practitioner. Chambers USA has described Carl as being held “in high esteem for his knowledge of all facets of labor and employment work”, as “equally comfortable in big-ticket litigation or in the boardroom” and as continuing to “carve out a place for himself at the leading edge.” Human Resource Executive and LawDragon recently named him “one of the most powerful employment attorneys in America.”

Carl also serves as the firm’s General Counsel.

**Experience Highlights**

- Represented a major energy company in litigation involving severance pay and executive compensation claims by numerous former officers and managers displaced as the result of a merger
- Represented a national insurance company in an age discrimination and fraud lawsuit brought by several former officers displaced as a result of a nationwide reorganization
- Represented an international construction company in the jury trial of a sexual harassment lawsuit (jury verdict for the employer)
- Represented a major oil-refining company in arbitration of random drug testing issues in several states (obtained awards upholding validity of testing program)

**Additional Experience**

- Represented major corporations in several public policy wrongful discharge litigations, including trials, brought by former executive and professional employees alleging they were discharged for refusing to engage in illegal activities
- Represented clients in connection with numerous class action employment discrimination lawsuits involving issues of disparate treatment and disparate impact, including trials on the merits and negotiation of consent decrees
- Represented clients in collective actions under Fair Labor Standards Act
- Assistance to clients concerning the development of dispute resolution programs and defense before courts of such programs
- Represented clients in OFCCP glass ceiling reviews and defense of affected class discrimination findings
- Represented clients in several administrative proceedings involving claims under federal whistleblower statutes, including the Sarbanes-Oxley Act
- Conducted numerous sensitive investigations for Boards of Directors, CEO’s, and General Counsels of major clients

**Carl’s Practices**

- Labor
- Whistleblower Counseling & Defense
- Internal Investigations
- ERISA & Employee Benefits Litigation
- Appellate
- Class Actions & Multi-District Litigation

**Education**

- Harvard Law School, J.D. with honors, 1974
- Baylor University, B.A. with honors, 1971
- Admitted to practice: Texas, 1974; United States Supreme Court; U.S. Courts of Appeal for the Third, Fourth, Fifth, Ninth, Tenth, and Eleventh Circuits; U.S. District Courts for the Northern, Southern, and Eastern Districts of Texas

**Recognition**

- Chambers USA, Labor & Employment (Texas), 2003–2015; Senior Statesman in Labor & Employment (Texas), 2014 and 2015
- Human Resource Executive, one of the Top 10 Employment Lawyers in America, 2008
- Who’s Who Legal (Law Business Research)
### Insights

#### Insights of W. Carl Jordan

- Legal Media Group’s (Euromoney’s) Guide to the World’s Leading Labor and Employment Lawyers, 2004
- Selected to the Texas Super Lawyers list, Super Lawyers (Thomson Reuters), 2003–2015
- Selected to the Top 100 Houston Region Super Lawyers list, Super Lawyers (Thomson Reuters), 2003–2005
- Member: Labor and Employment Section, and Section’s Committee on Equal Employment Opportunity Law, American Bar Association (various leadership positions)
- Fellow: American College of Labor and Employment Lawyers

### Activities

- Member: Labor and Employment Section, and Section’s Committee on Equal Employment Opportunity Law, American Bar Association (various leadership positions)
- Fellow: American College of Labor and Employment Lawyers
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Labour and Employment
Litigation and Arbitration

EXECUTIVE SUMMARY

Mr. Kaufer focuses his practice on labour and employment law. He is widely recognized for his expertise in negotiation and arbitration and has been involved in many high-profile certification matters. He represents employers before federal and provincial authorities as well as before various arbitration boards across Canada.

Mr. Kaufer has spoken extensively at events hosted by the American Bar Association's Labour and Employment Section, more specifically its International Labour and Employment Committee, of which he is immediate past Management Chair. He is also a member of the Planning Committee for the Section's Equal Employment Opportunity (EEO) Committee of the American Bar Association's Labour and Employment Law section.

Mr. Kaufer is a Fellow of the College of Labor and Employment Lawyers.

Mr. Kaufer has taught labour law and contract administration at McGill University's Faculty of Management and is on the board of editors of the Federated Press journal Management Rights.

PUBLICATIONS & PRESENTATIONS

- Speaker, "Free Trade Agreements in International Law," American Employment Law Council (AELC), October 2015 (Ojai, California).
- Speaker, "Tough Topics – Labour," Canadian Association of Counsel to Employers (CACE), September 2015 (Halifax, Nova Scotia).
- Speaker, "Enforcing Trade Agreements: Jordan FTA, NAFTA and Beyond," American Bar Association (ABA), May 2014 (Tel Aviv, Israel).
- Speaker, "Employment Responsibilities," International Financial Law Review (IFLR), European In-house Counsel Summit, Chair of the Panel,
January 2013 (London, United Kingdom).


- Speaker, "Managing in a Multinational Workforce in a Global Marketplace," American Bar Association, Section of Labor and Employment Law, November 2012 (Atlanta, Georgia).

- Speaker, "Employment Agreements and Restrictive Covenants (non-competes, confidentiality, intellectual property assignments) for use in the U.S. and internationally," American Employment Law Council (AELC), October 2012 (Greensboro, Georgia).

- Speaker, "The Recent Canadian Law Changes and its Effect on the Retail Sector: Spam Legislation," National Retail Federation, October 2012 (Dallas, Texas).

- Speaker, "Getting the Deal Done in the Age of the Internet," Canadian Association of Counsel to Employers, September 2012 (St. John's, Newfoundland).


- Speaker, "International Employment Law," National Retail Federation, April 2012 (Longboat Key, Florida).

- Speaker, "Track II - Give me your lunch Money! Dealing with Bullies in Today's WorkPlace," American Bar Association, March 2012 (San Francisco, California).


**RANKINGS & RECOGNITIONS**

• Recognized in the 2016 edition (and since 2011) of *The Best Lawyers in Canada®* (Labour and Employment Law).


• Recognized in the 2015 and 2013 editions of the *Canadian Legal Lexpert® Directory* (Employment Law, Labour Relations).

• Recognized in *The International Who’s Who of Management Labour & Employment Lawyers 2013* (Among the top ten international labour and employment attorneys in the world).


• Fellow at the College of Labor and Employment Lawyers.

**ABOUT BORDEN LADNER GERVAIS LLP**

Borden Ladner Gervais LLP (BLG) is a leading, national, full-service Canadian law firm focusing on business law, commercial litigation and arbitration, and intellectual property solutions for our clients. BLG is one of the country’s largest law firms with more than 725 lawyers, intellectual property agents and other professionals in five cities across Canada. We assist clients with their legal needs, from major litigation to financing to trademark and patent registration.
Allan G. King

Co-Chair, Class Actions Practice Group
Shareholder

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Overview

Allan G. King is a shareholder and co-chair of the Littler Mendelson’s Class Action Practice Group, and is a frequent speaker on continuing legal education programs. He combines his expertise in employment law with his prior experience as a labor economist to handle statistical issues that typically arise in class action and "pattern and practice" cases.

Education

J.D., University of Texas School of Law, 1986, With Honors
Ph.D., Cornell University, 1972
M.S., Cornell University, 1969
B.A., City College of New York, 1967

Recognition

- Named, The Best Lawyers in America®, 2008-2016
- Chancellor-At-Large, University of Texas School of Law
- Order of the Coif
- Awarded, AV® Peer Review Rating, Martindale-Hubbell
Jeffrey S. Klein is chair of Weil’s Employment Litigation Practice Group. For more than 30 years, Mr. Klein has represented employers in all aspects of labor and employment relations law, including defending companies in complex employment discrimination claims (race, sex, age, national origin and disability), wage and hour claims, ERISA and related employee benefits litigation matters, and trade secrets and restrictive covenants litigation, including in the class action, investigation, arbitration, trial, and mediation contexts. He also counsels boards of directors, special committees, and senior executives of public companies with respect to internal investigations.

Mr. Klein’s long-standing partnerships with leading global companies put him at the forefront of leading employment and labor law issues, including class and agency discrimination matters, wage & hour disputes, whistleblower and restrictive covenant matters, and more. Recent notable experience includes defending Sterling Jewelers in a 44,000-plaintiff class arbitration involving discrimination claims, which, if certified, would be the largest employment class case in the United States; and representing Merrill Lynch and Bank of America in a suite of high-profile race discrimination cases brought by financial advisors. Mr. Klein also serves as go-to counsel for major, industry-leading corporations such as MasterCard Worldwide, Kraft Heinz, Tiffany & Co., Godiva Chocolatier, Hudson’s Bay Company, UnitedHealth Group, and Under Armour, among others, for their employment and labor needs, including counseling on non-competes, hiring practices, crisis management and more.

Mr. Klein is also a highly-sought after sports attorney and player agent with experience representing athletes, sports organizations and front-office personnel, as well as major corporations and celebrities, with respect to a variety of challenging legal issues relating to the sports industry. He has been called to take a front seat in many high-profile sports law representations, including litigation, contract negotiations, licensing, and endorsement agreements on behalf of numerous professional athletes and management personnel, sports broadcasters, entertainers, players associations, and sports entities. For example, Mr. Klein represented Jim Harbaugh, former head coach of the San Francisco 49ers NFL football team, in connection with his employment search and ultimately his signing with the University of Michigan to lead its college football team – obtaining what has been reported to be among the highest value contracts ever for a college coach.

Outside of his active practice, Mr. Klein is a regular speaker at leading industry conferences, including the annual Workshop on Employment Law for Federal Judges, and is the author of numerous articles, including a bi-monthly column for 20 years for the New York Law Journal concerning current developments in employment law. He also serves as pro bono outside counsel to the Public Art Fund.

On account of his wide-ranging expertise and thought leadership, clients, colleagues, and industry publications alike have long-recognized Mr. Klein as among the leading lawyers in the U.S. by publications including Chambers USA, Human Resources Executive, Legal 500, Best Lawyers, and Lawdragon, among others.
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Partner, Kansas City  
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**PRACTICE AREAS**  
Labor and Employment; Class and Derivative Actions; Commercial Litigation; Internet & New Media; Retail

**ADMISSIONS**  
Kansas, 1989; Missouri, 1988; Texas, 1984

**EDUCATION**  
Columbia University, J.D., Harlan Fiske Stone Scholar, 1984; University of Tennessee, B.A., summa cum laude, 1980

Elaine Koch has more than 30 years’ experience as a trial lawyer. Her practice focuses primarily on employment litigation, civil rights litigation and business torts, in addition to counseling clients on employment issues. She has tried a wide variety of jury trials in state and federal court. She has also tried arbitrations, bench trials, and the largest individual taxpayer case in the history of the United States Tax Court. Her litigation experience includes contract disputes, class actions, employment litigation, business torts, products liability, and civil rights litigation. Ms. Koch served as the Global Leader of the Labor and Employment Group at Bryan Cave for eight years. She is a national speaker on employment law and litigation techniques, served on the editorial board of the Practical Litigator, and has been an active member of the American Bar Association, serving in a number of national leadership roles in the Labor and Employment Section and frequently speaking at national meetings. She was awarded the David Dixon Award for outstanding achievement in appellate advocacy, the KCMBa President’s Award for founding an internship program for inner city youth, the Hon. H. Michael Coburn Community Service Award by Legal Aid of Western Missouri, and was inducted as a Fellow in the College of Labor and Employment Lawyers. Ms. Koch has been repeatedly named by the Kansas City Business Journal as one of the "Best of The Bar" in the Kansas City area, and she has been repeatedly named a "Super Lawyer" in Kansas and Missouri (including "Top 50 Women" in Kansas and Missouri). Ms. Koch has also been named by USA Chambers as a leader in Labor and Employment. She has also been selected by the Kansas City Business Journal to the Women Who Mean Business group and by the Kansas City Magazine as one of the city’s Influential Women.
Publications

Quoted in *Women Rainmakers: Roadmap to Success, November 2014*

Professional Affiliations

- Nelson Atkins Museum Business Council, Co-Chair, Executive Committee
- The Pembroke Hill School, Board of Trustees, Treasurer, Executive Committee
- Member of the Board of Directors of the Kansas City Bar Foundation
- ABA Sections of Labor and Litigation, the Missouri, Kansas, Texas, and Kansas City Metropolitan Bar Associations
- Women Lawyer’s Association
- *The Practical Litigator*, National Editorial Board Member
- Former Co-Chair with Judge Fernando Gaitan of the UMKC Law School Minority Affairs Committee
- Former Regional President and member of the Executive Committee of the NCCJ
- Former Chair of the Western District of Missouri Federal Practice Committee (Advisory Committee to the Court)
Nancy Lee is a VP in Google's People Operations organization where she manages teams responsible for Global Diversity & Inclusion, HR Integrity (Compliance) and Governance, and K-12/Pre-University Programs.

Nancy joined Google in June 2006 as Employment Counsel in Google's Legal Department and transitioned into a People Operations leadership role in August 2010 to head the Product Management HR Business Partner and Staffing teams. Prior to joining Google, Nancy managed commercial litigation and employment law for Providian Financial Corporation, which was acquired by Washington Mutual Inc. in October 2005. Before joining Providian, she was an associate in the San Francisco office of Orrick, Herrington & Sutcliffe LLP. With over 14 years of experience as a practicing attorney, both as in-house counsel and in private practice, and as a leader in the People Operations function at Google, Nancy brings deep expertise on people and strategy issues.

Nancy received her law degree from UC Berkeley Boalt Hall School of Law and her undergraduate degree from UC Davis.
Lori E. Lightfoot
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Lori Lightfoot is a trial attorney, investigator and risk manager.

**Civil Litigation:** She has extensive experience in every facet of complex commercial litigation in areas ranging from breach of contract and business tort claims; franchisor/franchisee disputes; foreclosure actions and other real estate related litigation; and products liability actions. Lori also has litigated or otherwise resolved disputes concerning employment discrimination, particularly class actions or those involving senior executives. Lori regularly advises clients on avoidance of and preparation for potential litigation.

**Criminal and White Collar Matters:** Lori also regularly advises clients on a range of complex criminal law, state and Federal False Claims Act investigations and suits, as well as other matters stemming from federal, state or local grand jury investigations or investigations by federal, state or local inspectors general. These client engagements have included internal investigations, preparation of and defending witnesses in interviews with the investigative bodies, compliance with document subpoenas and litigation.

Lori also has direct experience in designing and implementing internal and external messaging strategies for clients.

**Other Experience:** includes advising on all facets of the federal Disadvantaged Business Enterprise (DBE) rules and regulations as well as related state and local programs. Lori has served as an expert witness on these matters. She has advised clients on a variety of other matters such as internal compliance, risk management, corporate governance, procurement processes, disciplinary systems, ethics.

**Firm Responsibilities:**
- Advisor to Mayer Brown’s General Counsel and Management Committee
- Co-Chair, Committee on Diversity and Inclusion
- Action Group Leader, Commercial Litigation Action Group

Both as a civil litigator and as Assistant US Attorney in the Criminal Division of the US Attorney’s Office, Northern District of Illinois (1996–2002), Lori has tried over 20 federal and state jury and bench trials. She has also argued cases in state and federal appellate courts, and she has successfully conducted numerous internal investigations on range of issues and precipitated by both internal and external factors. In addition, Lori has considerable experience in instituting risk-management and compliance...
practices.

**Government Experience:** From 2002 to 2005, Lori worked with the City of Chicago as Interim First Deputy Procurement Officer, Department of Procurement Services (DPS); General Counsel and Chief of Staff, Office of Emergency Management and Communications (OEMC); and Chief Administrator, Office of Professional Standards (OPS) of the Chicago Police Department. At OPS, Lori managed a 100-person office of civilian investigators charged with investigating police-involved shootings, allegations of excessive force and other misconduct alleged against Chicago police officers. She also coordinated joint investigations with state and federal criminal authorities and facilitated the implementation of new compliance and risk-management systems that included redesign of the disciplinary processes for sworn and civilian members, creation of a management intervention program for problem employees, and targeted tracking of litigation costs associated with complaints against department members.

During her service as Interim First Deputy Procurement Officer of the city’s Department of Procurement Services, Lori conducted an across-the-department reorganization and reform of DPS business practices. She was responsible for redesigning Chicago’s minority and women business enterprise program; streamlining the annual $2 billion procurement process; developing training curricula for internal and external use; and creating and implementing vendor and buyer accountability measures.

As Chief of Staff and General Counsel for Chicago’s Office of Emergency Management and Communications, Lori oversaw the City’s 9-1-1 emergency and non-emergency call systems, emergency response operations, homeland security initiatives and related technologies. She also developed management accountability metrics for each OEMC operational unit. Highlights of her OEMC experience include managing the recovery of the city’s 9-1-1 system following a catastrophic crash and serving as point person for recovery efforts during and following natural disasters, such as large scale fires and weather-related emergencies.

Lori has been associated with Mayer Brown since 2005 and, previously, between 1990 and 1996. Earlier, she served as Law Clerk to The Honorable Charles Levin, Michigan Supreme Court (1989–1990).

**Representative Experience**

- **Federal Grand Jury Investigation.** Served as lead counsel for senior construction company executive in a criminal investigation initiated by a whistleblower pursuant to the federal False Claims Act which alleged fraud in major government infrastructure projects spanning a decade. After a two year investigation, government declined prosecution.
- **Federal and Inspector General Investigation.** Assisted clients in managing a General Services Administration Inspector General and Department of Justice investigation stemming from a whistleblower FCA suit which alleged fraudulent billing in connection with a GSA schedule contract. After a multi-year investigation, case settled civilly with no criminal charges.
- **State of Illinois, ex rel. Schad, Diamond & Shedden, Pc. V. The Nautilus, Inc.** Lead counsel in resolving a FCA claim brought by a purported whistleblower against an internet retailer for allegedly fraudulent tax practices.
- **McReynolds v. Merrill Lynch.** Served as a lead counsel in defending an international financial services provider in a class action lawsuit filed in the Northern District of Illinois, in which the putative class alleges race discrimination in hiring, promotion and retention.
• Offutt v. Doctor’s Associates Inc. Lightfoot served as one of the lead counsel in representing franchisee controlled advertising fund in contractual dispute against the Subway quick service restaurant franchisor in federal court proceeding that resulted in a bench trial and then eventual settlement.

• Art’s Rental, et al. v. Bear Creek Construction, et al., Lightfoot serves as the litigation lead for a large international bank in a $80 million foreclosure action pending in Ohio state court which involves over 100 parties.

• State v. Planey, et al., Lightfoot won the acquittal of a police officer in the Circuit Court of Cook County, Criminal Division, who was charged with aggravated battery and other charges stemming from an off-duty incident with civilians.

• United States v. Veysey. Served as one of the lead AUSAs in the investigation, charging, trial, conviction and sentencing of a complex insurance and mail fraud prosecution of a serial arsonist and murderer. Following conviction, the defendant received a 110-year sentence that was upheld on appeal.

• United States v. Baxter International. Participated in the defense of a large international medical devices, pharmaceuticals and biotechnology company against federal prosecution for alleged violations of the anti-boycott statute.

• United States v. Jones, et al. Served as one of the lead AUSAs in the investigation, charging, trial, conviction and sentencing of a Chicago City alderman and associate for bribery and extortion.

• Hastert v. Board of Elections. Participated in the successful litigation of the 1990 Illinois Congressional redistricting plan before a three judge panel on behalf of the Illinois Republican Congressional delegation. This litigation led to establishment of the first majority Latino Congressional district in Illinois.

• U.S. v. Donaldson, et al. Served as lead AUSA in the prosecution of multiple defendants in a Medicare fraud case involving the submission of fraudulent billings for purported mental health treatments of elderly nursing home patients.

• Gilfand, et al v. Planey, et al. Following a two-week jury trial in federal court, successfully defended clients in a section 1983 action which also included various state law claims.

Education

• The University of Chicago Law School, JD, 1989
• University of Michigan, BA, with honors, 1984
• American University, 1983; Additional coursework

Admissions

• Illinois, 1989

Activities

• Taught trial advocacy at various law schools and bar association-sponsored seminars
• Lectured on ethics and discipline at the Chicago Police Academy, the Police Executive Institute, and to City of Chicago employees as part of basic procurement training
• Sits on Boards of directors of several not-for-profit civic and charitable organizations.
News & Publications

- "Mayer Brown partners Lori Lightfoot and Audrey Harris featured in GIR’s “Women in Investigations 2015”," 8 April 2015
- "DA: Lodi Police Officers Justified in Killing Mentally Ill Army Vet," The Sacramento Bee, 30 December 2014
- "Ferguson Officer Compared Brown to Hulk Hogan," Bloomberg, 25 November 2014
- "Most US Police Shootings are not Prosecuted," Associated Press, 24 November 2014
- "Ferguson Police Officer Avoids Charges as Protests Erupt," Businessweek, 24 November 2014
- "US Department of Justice Announces New Policy to Record Statements," Legal Update, 29 May 2014
- "Securities Investigations: Internal, Civil and Criminal," Practising Law Institute, August 2012
- "Successful Pro Bono Defense of Police Officer Accused of Battery," 17 June 2009
- "Facilitating Success - DBE Administrators, Vendors Must Have Solid Relationships," Article, 1 June 2009
- "Credit Market and Subprime Distress: Responding to Legal Issues," Practising Law Institute, November 2008

Events

- Good Deals Gone Bad - Frequently Litigated Contractual Provisions in Transactional Documents, 25 June 2014
- Whistleblowing and the Supreme Court’s Ruling in Lawson v. FMC LLC— What Outside Consultants, Firms and Subcontractors Need to Know Now?, 4 June 2014
- Global Sourcing and Technology Changes: Reboot Your Sourcing Strategies, 8 May 2014
- Northwestern Law's Women's Leadership Committee Symposium: "Do Nice Girls Get the Corner Office?", 10 February 2014
- White Collar Crime + Corporate Governance Conference, 18 April 2012
- Black Women Lawyers' Association 25th Anniversary Summit, 12 April 2012 - 14 April 2012
- Expanding Challenges Facing US Accounting Firms – New York, 16 June 2011
- Managing the Early Stages of Commercial Litigation: Critical First Steps – Whom to Notify When: What Notifications Might Be Required, 4 November 2010
Leah C. Lively exclusively defends employers from claims of harassment, discrimination, retaliation, wrongful discharge, and wage and hour violations. Leah represents and advises employers of every size, including Fortune 100 companies, non-profit organizations, and locally-owned businesses. Leah appreciates that a client’s needs must be assessed and responded to on an individual basis to ensure efficient and effective representation.

Leah is an experienced trial attorney having tried more than 40 jury trials in multiple states and jurisdictions during her career. In addition to her expertise in defending single-plaintiff employment claims, Leah has significant experience defending wage and hour claims, including class actions. Leah acted as lead defense counsel in a putative wage/hour misclassification class action in Oregon and co-managed the defense of a 40,000 putative class-member case for a national restaurant chain in California. Leah is one of very few lawyers nationwide to have defended a wage and hour collective action to a jury.

Following a defense verdict on behalf of a real estate development/investment firm, in a race discrimination and retaliation case in the Eastern District of Pennsylvania, the presiding federal magistrate, Jacob P. Hart, described Leah as “everything a good litigator should be. She was completely prepared on every issue, clear and convincing to the jury[.]”

Leah is recommended by Chambers USA for Labor and Employment (2008-2014), Best Lawyers in America for Labor and Employment (2011-2014), Super Lawyers for Labor and Employment (2011-2014) and is AV Preeminent Peer Review rated in Martindale-Hubbell.

Admitted to Practice:

- Oregon
- California
- Idaho
- Washington
- Alaska

Honors and Awards:

- Chambers USA (2008-2014)
- Best Lawyers in America (2011-present; 2015 Portland OR Litigation - Labor and Employment "Lawyer of the Year")
- AV rated by Martindale-Hubbell
Donald R. Livingston represents large employers in all aspects of civil rights and employment discrimination law, with an emphasis on complex employment litigation, and representations before the EEOC. Since joining Akin Gump in 1993, he has served as defense litigation counsel in numerous fair employment class actions and EEOC pattern or practice cases, including Gutierrez v. Hooters, Inc., which The Washington Post termed EEOC’s “biggest defeat.” Mr. Livingston recently represented the Freeman Company in the first case to test the EEOC’s 2012 policy guidance on criminal and background checks, as well as testing the boundaries of Title VII of the Civil Rights Act of 1964. The Wall Street Journal covered the decision, stating that Freeman defeated “one of the [EEOC’s] most high-profile crusades.”

Practice & Background

Mr. Livingston is a former general counsel of the U.S. Equal Employment Opportunity Commission (EEOC), where he was responsible for the federal government’s enforcement of Title VII of the Civil Rights Act of 1964, the Equal Pay Act, the Age Discrimination in Employment Act and the Americans with Disabilities Act.

Mr. Livingston is a member of the American Bar Association (ABA), and serves as the co-chair of the EEO Committee of the ABA’s Labor & Employment Section. He was chairman of the Labor and Employment Law Section of the Georgia Bar in 1986, and served on the Section’s executive board from 1983 to 1987.

Mr. Livingston previously served as co-chair of the firm’s labor and employment practice.

Mr. Livingston is the author of EEOC Litigation and Charge Resolution (BNA 2d. ed. 2014), a treatise covering all aspects of attorney interactions with the EEOC. In addition, he has written numerous articles and spoken extensively on employment discrimination. He has contributed to Employment Discrimination Law (Lindemann & Grossman) and Sexual Harassment in Employment Law (Lindemann & Kadue).

In 2003, Mr. Livingston was elected to the College of Labor and Employment Lawyers.

Awards & Accolades

- Who’s Who in American Law, Who’s Who in America
- The International Who’s Who of Business Lawyers
- The International Who’s Who of Management Labour & Employment Lawyers
- Chambers USA: America’s Leading Lawyers for Business — labor and employment
- 500 Leading Lawyers in America, Lawdragon (2007)
Kathleen K. Lundquist, Ph.D., is a nationally-recognized organizational psychologist who testifies frequently as an expert witness in employment discrimination class-action lawsuits for both defendants and plaintiffs. As a result of class-action settlements, she also serves as a court-appointed expert in diversity measurement and the design and implementation of legally defensible human resources processes for organizations such as Morgan Stanley, Bank of America, Dell, Sodexo, The Coca-Cola Company, Abercrombie & Fitch, Ford Motor Company and the Federal Bureau of Investigation. She has also been court-appointed as a Monitor and as a Special Master in the resolution of litigation—roles most often performed by attorneys. Dr. Lundquist has been appointed by the U.S. State Department to serve a three-year term as a member of the Examiner’s Board for the Foreign Service.

Dr. Lundquist is president and CEO of APTMetrics, Inc., an international firm which consults with Fortune® 100 employers on the design and implementation of HR processes. In consulting with clients, she recommends proactive measures to improve the fairness, validity and legal defensibility of HR processes before they are challenged. Her clients range from multinational corporations in the finance, pharmaceutical, aerospace, telecommunications and technology fields, to government and nonprofit employers.

She is a former research associate with the National Academy of Sciences, a fellow in psychometrics with the Psychological Corporation, and a summer research fellow with the Educational Testing Service.

She is a frequent presenter at the Society for Industrial and Organizational Psychology, the American Bar Association’s Equal Employment Opportunity Committee and the American Employment Law Council. Kathleen is a recipient of the National Association of Women Business Owners Connecticut Woman Business Owner of the Year Award.

In 2008, Kathleen was named in Diversity Executive Magazine’s feature on “Who’s Who in Diversity and Inclusion.” She is a recipient of the “2010 Champions of Diversity” Award from DiversityBusiness.com. She is also the recipient of the Hartford Business Journal’s 2010 Diversity Policy/Advocacy-Individual Award. She is a member of the Corporate Circle for the National Council for Research on Women and sits on their board of directors.
Heather Morgan is the Global Chair of the Paul Hastings Workforce Data and Technology practice, a partner in the Employment Law department, and is based in the firm’s Los Angeles office. Ms. Morgan represents employers in all aspects of employment law, with an emphasis on defending “high stakes” class actions and other complex litigation. She devotes a significant portion of her practice to helping employers develop or revamp personnel policies, build “best practices,” and ensure compliance with federal and state laws and regulations impacting recruitment, hiring, promotion, compensation, performance evaluation, termination, affirmative action compliance, voluntary diversity programs, succession planning, and other personnel practices. In particular, she has significant experience partnering with employers who seek to design improved and compliant personnel processes through a transition to new or upgraded workforce-related software and HR technologies, including advising on steps to ensure compliance with multi-jurisdiction privacy, e-signature and data retention requirements. Ms. Morgan’s practice also includes a special focus on the development and analysis of statistics used in case defense, to conduct preventative, privileged diagnostic reviews of employers’ personnel practices, and to develop diversity metrics.

Recent Representations

- Regularly defends employers in litigation and agency enforcement actions, with an emphasis on high stakes discrimination class actions. The Sixth Circuit Court of Appeals affirmed denial of class certification in one such case—a nationwide hiring discrimination lawsuit against Cintas Corporation.
- Defended and successfully resolved a race discrimination class action against a large healthcare employer.
- Defended and successfully resolved an alleged multi-state race discrimination class action against a large employer in the retail industry (no class certification).
- Defended and successfully resolved a threatened nationwide race discrimination class action against a large technology industry employer (no class certification).
- Advised hospitality industry employers on employment law issues implicated in the opening of and mass hiring at several new hotel and casino properties in various U.S. jurisdictions (3,000 to 10,000+ new employees at once).

Speaking Engagements and Publications

- Regular ABA guest speaker on systemic “pattern or practice” discrimination claims, e-discovery, and workforce-related technology law issues
- Associate Editor, Workplace Data: Law and Litigation (BNA); co-author of Chapter 11, “Online Social Media and Earlier ‘New Technology’ in the Employment Context”

Professional and Community Involvement

- Co-chair, American Bar Association’s Technology in the Practice & Workplace Committee, Labor & Employment Law Section
- Member, Board of Governors of the Institute for Corporate Counsel

Education

- University of California at Los Angeles School of Law, J.D., 1994
- University of Wisconsin Madison, B.A. (with distinction), 1988
Jim Murphy is Co-Chair of the firm’s Defense Contracting Industry practice group. He has over 20 years of experience providing advice and representation to management clients in the defense, shipbuilding, technology, automotive, and entertainment industries. As a former corporate counsel, Jim worked side-by-side with business leaders for many years and understands the importance of delivering solutions that are practical and workable.

Mr. Murphy’s practice covers legal advice on human resources and labor strategy, compliance with federal and state employment laws, and litigation and arbitration of workplace disputes. Jim advises management clients on an array of issues, including workplace discrimination, employee relations, executive separations, workforce restructuring, diversity initiatives, wage and hour matters, arbitration programs, data privacy, and cross-border employment assignments. Jim also assists clients with respect to federal ethics compliance. He has deep experience with the rules governing the recruitment and employment of government officials and the acceptance of gifts and travel by executive and legislative branch personnel.

From 2005 to 2015, Mr. Murphy was the chief labor and employment counsel for General Dynamics Corporation, a global defense company with over 90,000 employees worldwide. From 2002 to 2005, he practiced labor and employment law at Northrop Grumman Corporation, where he was the lead labor and employment counsel for Northrop Grumman Mission Systems. Previously, he was in private practice in the Washington office of an international law firm, where he advised and represented clients in collective bargaining, Department of Labor investigations, NLRB hearings, union organizing campaigns, labor arbitrations, and wage and hour litigation.

Mr. Murphy is a frequent speaker and panelist at conferences for in-house counsel and human resources professionals and formerly served as an Advisory Board Member for ACC Docket magazine.

**Admitted to Practice**
- Massachusetts
- District of Columbia

**Education**
- J.D., *cum laude*, Catholic University School of Law
- A.B., College of the Holy Cross
TERRENCE H. MURPHY

Terrence H. Murphy is a Shareholder in the Pittsburgh, Pennsylvania office of Littler Mendelson, P.C. He represents employers in class and individual employment discrimination actions, OFCCP matters and wrongful discharge claims, and wage-hour collective and class actions, and also in National Labor Relations Board proceedings, collective bargaining and labor arbitration. He has had extensive jury trial experience and substantial experience in litigation with the Equal Employment Opportunity Commission.

Mr. Murphy is admitted to practice in Pennsylvania and New York, before multiple federal appellate and district courts. He is a member of the American Bar Association’s Labor and Employment Law Section, and its Equal Employment Opportunity Committee, and the Litigation Section. He also is a member of the New York State Bar Association’s Section on Labor and Employment Law.

Since 2004, Chambers USA has identified Mr. Murphy as one of the Pennsylvania’s leading employment lawyers for business. Since 2006, his peers have selected him to be included in The Best Lawyers in America. He is a Fellow in the College of Labor and Employment Lawyers and in listed in The International Who’s Who of Management Labour and Employment Lawyers. He is a recognized author, commentator and lecturer on workplace issues. He has published articles in the University of Pittsburgh Law Review, the Syracuse Law Review and the Labor Law Journal. He is co-author of the Employment Law Deskbook for Human Resources Professionals (West Group, 2001 and 2005). He has been a chapter editor and a senior editor of Employment Discrimination Law (BNA). He received his B.A. from the University of Rochester, his M.S. from Cornell University and his J.D. from the University of Pittsburgh School of Law.
Mark A. Nordstrom  
"Mark"  
*Senior Counsel - Labor and Employment Law*  
*Corporate Legal Staff*  
*Fairfield, CT*

Mark graduated from Colgate University in 1973, obtained a Master's Degree in Public Administration from S.U.N.Y and graduated from Albany Law School, where he was a member of the Albany Law Review. After law school, he served as Labor Counsel for GE's Lighting Business in Cleveland, Ohio, in 1985 and 1986. After that, he left GE to work at McCarter & English in Newark, NJ. In 1989, Mark joined GE’s Corporate Legal Staff. Mark presently serves as Sr. Counsel – Labor and Employment Law with global responsibility for the legal aspects of GE’s human resource policies and practices. Mark also leads GE’s global practices pertaining to Human Rights. Mark is Chairman of the Pro Bono Partnership, on the Board of the American Employment Law Council, and is a member of the UN Global Compact Human Rights Working Group.

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Robert O'Hara is the Vice President of Employment Law & Global HR Compliance at United Technologies Corporation (UTC) in Hartford, Connecticut.

Bob has full functional responsibility for all employment-related cases at UTC and is responsible for Global Human Resource Compliance for 225,000 employees operating in 162 countries.

Bob leads the Equal Employment Opportunity and Affirmative Action Planning processes at UTC and maintains close working relationships with the Legal and Global Compliance functions while playing a significant role in the broader enterprise-wide risk management and compliance function.

Bob joined UTC in 2001 at Pratt & Whitney as an Assistant Counsel and was promoted to Director of EEO & Employment at UTC Corporate in 2006.

Prior to joining UTC, Bob spent 13 years at the National Security Agency in a number of intelligence positions, including more than two years in the White House as the chief intelligence analyst on the National Security Council, and assignments in the Pentagon with the Office of the Secretary of Defense and Chairman of the Joint Chiefs of Staff, and the US Treasury Department.

Upon earning his law degree, he joined Day, Berry & Howard in Hartford, Connecticut as a Trial Attorney in their Commercial Litigation and Bankruptcy practice.

Bob received a Bachelor of Arts degree in History and English from Walsh University, North Canton, Ohio, a Master of Science in Strategic Intelligence from the Joint Military Intelligence College, and a Juris Doctor from Georgetown University Law Center both in Washington, DC.

Bob is also currently the Chair of the Equal Employment Advisory Council, in Washington, the premier organization representing the interests of US federal contactors in the nation's capital.
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Anthony J. Oncidi is a partner in the Firm and the Chair of the Labor and Employment Department in the Los Angeles office. Tony represents employers and management in all aspects of labor relations and employment law, including litigation and preventive counseling, wage and hour matters, including class actions, wrongful termination, employee discipline, Title VII and the California Fair Employment and Housing Act, executive employment contract disputes, sexual harassment training and investigations, workplace violence, drug testing and privacy issues, Sarbanes-Oxley claims and employee raiding and trade secret protection. A substantial portion of Tony’s practice involves the defense of employers in large class actions, employment discrimination, harassment and wrongful termination litigation in state and federal court as well as arbitration proceedings, including FINRA matters.

Tony is recognized as a leading lawyer by such highly respected publications and organizations as the Los Angeles Daily Journal, The Hollywood Reporter, and Chambers USA, which gives him the highest possible rating (“Band 1”) for Labor & Employment and ranks him as a leading lawyer in his field who is “credible and confident” who provides “spot-on service” with “know-how and the ability to get to the point quickly.” He is ranked as one of the “Nation’s Top 100 Most Powerful Employment Attorneys” (Human Resource Executive) and one of the “Top 10” employment defense attorneys in California/Top 5 in Los Angeles, “Top 100 lawyers in California” (Daily Journal) and one of the top 100 “power lawyers” (The Hollywood Reporter). He was selected by his peers throughout the United States to be a Fellow in the prestigious College of Labor and Employment Lawyers. Additionally, he has received the highest Martindale-Hubbell rating (“AV”), indicating “very high to preeminent legal ability and very high ethical standards as established by confidential opinions from members of the Bar.”

Tony also is a regular commentator on employment-related issues for public radio station KALW-FM in San Francisco and has been a featured guest on Fox 11 and CBS News in Los Angeles. He has been interviewed and quoted by leading national media outlets such as The National Law Journal, Bloomberg News, The New York Times, The Wall Street Journal, CBS News, and Newsweek and Time magazines. Tony is a frequent speaker on employment law topics for large and small groups of employers and their counsel, including the Society for Human Resource Management (“SHRM”), PIHRA, the National CLE Conference, the Employment Round Table of Southern California (Board Member), the Council on Education in Management, the Institute for Corporate Counsel, the State Bar of California, the California Continuing Education of the Bar Program and the Los Angeles and Beverly Hills Bar Associations. He has testified as an expert witness regarding wage and hour issues as well as the California Fair Employment and Housing Act and has served as a faculty member of the National Employment Law Institute. He has served as a party-selected arbitrator in an employment discrimination matter.

Tony is the author of the treatise titled Employment Discrimination Depositions (Juris Pub’g 2015; www.jurispub.com), co-author of Proskauer on Privacy (PLI 2015) and, since 1990, has been a regular columnist for the official publication of the Labor and Employment Law Section of the State Bar of California as well as the Los Angeles Daily Journal.

Tony is an appointed Hearing Examiner for the Los Angeles Police Commission Board of Rights and has served as an Adjunct Professor of Law and a guest lecturer at USC Law School and at UCLA Law School.

He received his Bachelor of Arts degree, cum laude, Phi Beta Kappa, from Pomona College, and his Juris Doctor degree from the University of Chicago Law School. He is a member of the State Bar of California and is admitted to practice before the U.S. Court of Appeals for the Ninth Circuit and all U.S. District Courts in California.

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Eric Reicin serves as Vice President, General Counsel, and Corporate Secretary for the global organization MorganFranklin Consulting, LLC. He serves as Chief Legal Officer and leads the Corporate Investigations & Dispute Solutions consulting practice. Eric fulfills multiple internal and external roles and is also responsible for leading the Contracts department.

Prior to joining MorganFranklin, Eric most recently served as Senior Vice President and Deputy General Counsel at Sallie Mae, one of the country’s largest lenders. He spent 14 years working in senior legal roles at Sallie Mae, partnering with the executive business team. Eric gained valuable expertise providing strategic and operational legal advice to the company and several subsidiaries. He led a team of attorneys and professionals based in six cities and led the bankruptcy litigation operations group. As Deputy General Counsel, Eric served as the company’s chief litigation, labor and employment, collections, government contracts, and intellectual property attorney. As leader of the legal risk mitigation group, he was responsible for managing legal support to several subsidiaries, the Board of Directors Audit Committee, and the Sallie Mae Political Action Committee (PAC), and he provided secondary legal support to other subsidiaries, mergers and acquisitions (M&A), and board governance.

Eric is active in the legal community and he has worked closely with in-house counsel at Fortune 500 companies nationwide. In October 2014, he completed a six-year term on the global board of the Association of Corporate Counsel Association (WMACCA), the largest regional in-house bar association. He currently serves on the advisory boards of the Georgetown University Law Center Corporate Counsel Institute and the American Employment Law Council (AELC). Eric also serves as the 2015 management chair of the American Bar Association Section of Labor and Employment Law Annual Meeting, and he is a Fellow of the American Bar Foundation. Eric is the immediate past management chair of the American Bar Association Section of Labor and Employment Law EEO Committee, and he recently served on the faculty of the Virginia State Bar Professionalism Course.

Earlier in his career, Eric was a litigator at law firms in Washington, D.C., and Chicago. He received his Juris Doctor degree from the University of Illinois College of Law and his Bachelor of Arts degree in economics and political science from the University of Michigan.

“What drew me to MorganFranklin was the strong culture and the quality and character of the firm’s people. Creative, adaptive, nimble, flexible, innovative, responsive—these are all terms that clients use when describing MorganFranklin. I enjoy being part of an organization that delivers this level of quality and hands-on service.”
Michael Reiss
Partner - Seattle, Washington Office

Areas of Practice
Employment, Litigation

Representative Experience
Litigated jury and non-jury cases on behalf of large and small employers in Washington, Oregon, California and elsewhere throughout the United States
Lead counsel in state-wide and nationwide race discrimination, sex discrimination and wage-and-hour class actions
Served as court-appointed Special Master in nationwide Title VII race discrimination class action
Mediator in numerous employment cases pending in state and federal courts

Prior Experience
Law professor, University of Southern California Law Center, 1968-79

Trial Advocacy Teaching and Training
Instructor in Trial Advocacy, University of Washington School of Law; Program Director, Team Leader and Faculty, National Institute for Trial Advocacy (NITA); Trial skills instructor, Washington State Bar Association and similar organizations

Representative Clients
American Red Cross, ARCO, AT&T, Bank of America, Boeing, Denny's, Entercom, Home Depot, NFL, Nissan, Paccar, The Seattle Times, Seattle Seahawks, Teledesic, University of Puget Sound, and Virginia Mason Medical Center

Publications and Presentations
Lectured and written extensively in the area of employment discrimination law
Principal contributor, Lindemann & Grossman, Employment Discrimination Law
Frequent speaker on employment law and employment litigation topics

Recognition and Memberships
Fellow, College of Labor & Employment Lawyers
Named as one of the "Best Lawyers in America" in Labor and Employment Law by Woodward/White, 1993-2008
Named one of The Nation's 50 Most Powerful Employment Attorneys in Human Resource Executive magazine in a list prepared by Lawdragon
Named as one of "America's Leading Business Lawyers" by Chambers USA, 2003-2006
Lawyer Representative to the 9th Circuit Judicial Conference
American Employment Law Council, Advisory Board
National Employment Law Institute, Advisory Board
National Institute for Trial Advocacy, Program Director

Education
J.D., Yale Law School, 1968
- Editor, Yale Law Journal and Order of the Coif
B.A., high honors, Harvard College, 1965
EMLOYEE AND LABOR RELATIONS

Jim Rowader
Vice President and General Counsel
Employee and Labor Relations

Jim leads a department of more than 70 team members, including 20 attorneys, 10 paralegals and more than 40 HR professionals responsible for all labor and employment litigation, ER/LR strategy, HR Compliance, HR legislative strategy, and field investigations.

Jim began his career with Target in 1994 as Employee Relations Counsel. He has held various positions within Employee Relations and Labor Relations and was promoted to his current position in September, 2008. Prior to Target, Jim was an attorney for the National Labor Relations Board in Detroit, and subsequently for a Twin Cities law firm. Jim is currently a Board member of the Hispanic National Bar Association's Legal Education Fund and is also a member of the Minnesota Hispanic Bar Association. Jim also serves as a Board member of the Minneapolis United Youth Soccer Club.

Education
Undergraduate: University of Illinois, BA, Political Science
Graduate School: University of Michigan Law School, Juris Doctor
Christian J. Rowley

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Areas of Practice
Labor & Employment
Wage & Hour Litigation

Experience
Christian Rowley is a partner in the Wage & Hour Litigation Practice Group in Seyfarth Shaw's San Francisco office and Chair of the San Francisco Labor & Employment Group and of the firm's California Employment Law Practice Group. Mr. Rowley represents employers in employment matters, including complex wage and hour class actions, and multi-plaintiff discrimination and harassment cases, before state and federal courts throughout the United States, the EEOC, and various state agencies. He also advises management in traditional labor matters, including organizing campaigns, labor arbitrations, NLRB cases, and collective bargaining negotiations, and he assists companies in designing, negotiating, and implementing executive employment and separation agreements, compensation structures, reductions-in-force, and human resources policies and procedures.

He is a frequent lecturer at public and private seminars nationwide on labor and employment issues, and has published numerous legal articles, including the introductory chapter in Wrongful Employment Termination Practice (CEB 1997), a premier reference on California's wrongful termination laws.

Prior to joining Seyfarth Shaw, Mr. Rowley practiced labor and employment law at law firms in Boston, Massachusetts and in San Francisco, California. He also served as law clerk to then-Chief Justice Michael D. Zimmerman of the Utah Supreme Court.

Education
J.D., University of Utah College of Law (1993)
Order of the Coif; Editor, Utah Law Review; National Moot Court Board & Team; William H. Leary Scholar; Outstanding Scholastic Achievement Award; Legal Writing & Research Teaching Assistant

B.S., University of Utah (1990)
Admissions
California
Massachusetts
Utah

Accolades
Recognized as a leading lawyer for Labor and Employment in California in the 2009, 2014 & 2015 Chambers USA: America’s Leading Business Lawyers, in which he was described (in 2009) as having “a rising profile for contentious employment matters and traditional labor work.” Similarly, in 2015 Chambers stated: “Christian Rowley is well regarded for his traditional labor space as well as his ability to resolve large class actions. Clients praise Rowley as “extremely responsive” noting: “You always know where you stand.”
Richard M. Rufolo, Vice President, United Parcel Service

Rick Rufolo is the Labor and Employment and Litigation practice group coordinator for the UPS Legal Department. Mr. Rufolo manages attorneys with responsibility for Employment Litigation, Labor Negotiations and Arbitrations, Employee Benefits and Pension/401(k) and Commercial and General Litigation practice areas at UPS.

He has been employed at UPS for 27 years. In addition to several assignments in the Legal Department, Mr. Rufolo has held positions in the real estate, asset acquisitions and procurement functions.

Mr. Rufolo is a member of the UPS Diversity & Inclusion Advisory Council and is a member of the board of directors for the Truancy Intervention Project and the Atlanta Legal Aid Society. He also serves on the advisory boards of the American Employment Law Council, the Boys & Girls Clubs of Fulton County and Life Teen Covecrest.

He received his undergraduate degree from Old Dominion University and his law degree from the Seton Hall University School of Law. Rick, his wife Gina and their four kids reside in Dunwoody, Georgia.
Bill Sailer is Senior Vice President & Legal Counsel for Qualcomm Incorporated, where he has handled a wide variety of legal matters for the company, including employment law, litigation and ethics and compliance matters. Prior to joining Qualcomm, Mr. Sailer was a partner at Gray Cary Ware & Freidenrich. In 2011, Mr. Sailer was elected as a Fellow of the College of Labor & Employment Lawyers.

Bill has served in leadership positions in numerous business and charitable organizations, including:

Professional Organizations
- The Association of Corporate Counsel (Director, Executive Committee);
- San Diego Chapter of the Association of Corporate Counsel (President/Director)
- The California Employment Law Council (President/Director)
- State Bar of California Labor & Employment Law Section (Executive Committee);
- San Diego Chapter of the Industrial Relations Research Association (President)
- San Diego County Bar Association Labor & Employment Law Section (Chair)
- San Diego Convention & Visitor’s Bureau (General Counsel)
- J. Clifford Wallace Inn of Court (Founding Master/Executive Committee)

Community Organizations
- The Legal Aid Society of San Diego (President/Director)
- The San Diego County Bar Foundation (Director/Executive Committee)
- Rady Children’s Hospital Foundation of San Diego (Chair/Director)
- Rady Children’s Hospital (Trustee)
- Voices for Children (Director/Executive Committee)
- The National Conflict Resolution Center (Director/Executive Committee)
- The Junior Seau Foundation (Director/Executive Committee)
- Kids Included Together, Inc. (Director/Executive Committee)

Mr. Sailer Chairs the Qualcomm Pro Bono Program and has thrice been awarded the Wiley E. Manual Award by the State Bar of California for his pro bono work, as well as thrice receiving the San Diego Volunteer Lawyer Program’s Distinguished Service Award. He was also recognized as the “Corporate Lawyer of the Year” by the San Diego Chapter of the Corporate Counsel Association.

Mr. Sailer has spoken and written widely on employment law and anti-corruption issues. He has authored many publications including the treatise California Employment Litigation: Strategies and Tactics for Lexis Law Publishing. He served on the Editorial Review Board for the Matthew Bender Periodical California Employment Law Bulletin. He is also contributing author and consultant to the CEB treatises, Advising California Employers and Employment Law Compliance for New Business. In addition, Mr. Sailer has served as a guest lecturer for the University of San Diego Law School, California Western School of Law, San Diego State University and the San Diego State University College of Extended Studies.

Mr. Sailer graduated from Swarthmore College with Honors in Economics. He received his J.D., cum laude from the University of Michigan Law School.
Karen advises and represents employers on a broad range of workplace matters, including harassment, discrimination, non-compete agreements, retaliation, whistleblower claims, accommodation, down-sizing, leaves of absence, wage and hour compliance and union issues. Her clients include publicly traded companies, non-profit organizations, government entities and executives. Karen serves as national labor and employment counsel for companies with operations in several states.

Karen has handled several high profile matters, including the investigation of top public officials for alleged sexual harassment, the termination of executives for illegal conduct, and whistleblower claims. Her expertise includes leaves of absence, wage and hour issues, harassment, discrimination, disability and religious accommodation, retaliation, non-compete agreements, executive agreements and compensation, whistleblower claims and union matters.

Karen has over twenty-five years’ experience working with health care providers, clinics, hospitals, long-term care facilities and other health care organizations. She has drafted and enforced physician employment and separation agreements and provides counsel on employment matters unique to the health care setting, such as HIPAA violations and the use of EMR. Karen also works closely with colleges and universities, advising on the denial of tenure and promotion, termination of faculty appointments, academic freedom claims and student matters.

Karen is a certified arbitrator and mediator. She has decided and helped parties resolve workplace issues involving claims of discrimination, harassment, retaliation, FMLA and other leave of absence issues, whistleblower claims, defamation, and wage and hour disputes.

**EDUCATION**
- University of Minnesota, J.D., *cum laude*, 1978
- University of St. Thomas, M.A., *with honors*, 1972
- University of Minnesota, B.A., *magna cum laude*, 1971

**BAR ADMISSIONS**
- Minnesota, 1978
- U.S. District Court, District of Minnesota, 1978
- U.S. Court of Appeals, Eighth Circuit, 1979

**HONORS**
- Best Lawyers’ “Lawyer of the Year” in Minneapolis Employment Law - Management, 2016
- Fellow, College of Labor and Employment Lawyers
- Member, American Employment Law Council
- Labor and Employment Law Specialist, certified by the Minnesota State Bar Association
- Chambers USA: America’s Leading Lawyers for Business, Minnesota-Labor & Employment, multiple years
- Minnesota Super Lawyers, Super Lawyer-Employment & Labor, multiple years
- Minnesota Super Lawyers, “Top 50 Women in Minnesota,” multiple years
- Minnesota Super Lawyers, “Top 40 Labor and Employment Law Attorneys,” multiple years
- Law and Leading Attorneys, multiple years
- Martindale-Hubbell, AV Preeminent® Peer Review Rated, multiple years
- Minnesota State Bar Association, North Star Lawyer, 2013
Juana Schurman

Senior Vice President Legal at Oracle, Compliance Officer North America & Canada

Senior Vice President and Associate General Counsel managing global team with worldwide responsibility for employment law issues in a diverse and complex organization of approximately 130,000 employees in over 50 countries. Regional Compliance Officer for North America and Canada.

Specialties: Experience in a multitude of employment law issues including those related to wage and hour, discrimination, trade secrets, incentive plans, investigations, mergers and acquisitions, stock options, reductions in force, cross border claims, immigration, ERISA, change in control plans, works councils, noncompete agreements and OFCCP audits.

Joined Oracle in 1989 from Pillsbury Winthrop (formerly Pillsbury Madison & Sutro)
Sally M. Sommers  
The Western Union Company  
Englewood, CO  
(720) 332-5236

**Associate General Counsel,**  
**Global Employment, Benefits and Labor Law Group**

Sally Sommers is an Associate General Counsel and leads the Global Employment, Benefits and Labor Group for The Western Union Company which provides legal support for approximately 10,300 employees in 57 countries in the areas of employment, labor, compensation and benefits. Prior to the spin-off of Western Union from First Data Corporation in 2006, Ms. Sommers led the Global Employment, Benefits, and Labor Law Group of First Data Corporation, consisting of approximately 30,000 employees in 50 countries.

Previous experience includes 20 years as a business and employment attorney in various leadership roles for Chevron Corporation, as well as clerkships for the Missouri and Colorado Court of Appeals.

Ms. Sommers earned her B.A., *cum laude*, from the University of Notre Dame and graduated from the Saint Louis University School of Law.
Carrie Storer is Senior Vice President in the legal department of Discovery Communications, a publicly-traded media company reaching more than 150 billion cumulative subscribers in over 200 countries. Discovery has more than 130 television networks worldwide, led by the flagship Discovery Channel, with 7,000 employees in more than 40 countries.

Carrie’s portfolio includes heading the global employment law team, serving as Discovery’s corporate compliance officer, and leading Human Resources for Discovery’s in-house production studios. On a day-to-day basis, Carrie handles a broad range of matters, including executive compensation, contract negotiations, talent issues and internal investigations. Carrie joined Discovery in September 2008 as Discovery was completing the transaction to become a public company.

Carrie graduated from Georgetown University Law Center in 1994 and spent three years on active duty with the U.S. Army JAG Corps. Carrie also practiced as an employment litigator in several large law firms and worked as in-house employment counsel for The Dow Chemical Company for six years.

Carrie lives in Kensington, Maryland, with her husband and two children.
SHAWNA M. SWANSON has been practicing employment law in California since 1993, when she graduated with honors from Harvard Law School. She began her legal career with Sidley & Austin in Los Angeles, and in 1996 joined Fenwick & West LLP in Palo Alto. In 2000, Ms. Swanson became a partner with Fenwick & West and in 2002 she started up the firm’s employment Law practice in its growing San Francisco office. Ms. Swanson served as Hiring Partner, Associate Review Chair, and a member of the Diversity Counsel.

While handling all aspects of employment law, Ms. Swanson’s representation of her largely technology-based clients focused on trade secret litigation and wage and hour class actions. She also conducted hundreds of training sessions on sexual harassment and managing within the law, handled several high profile sexual harassment matters, and spoke regularly on employment law topics with organizations including the National Employment Law Institute.

In 2006, Ms. Swanson left law firm practice to become Vice President, Counsel for The Walt Disney Company and in 2012 was promoted to Associate General Counsel. She serves as employment counsel for all businesses across the Disney family of companies, including Walt Disney Studios, Parks & Resorts, ABC, ESPN, Disney Consumer Products, Marvel and most recently Lucasfilm. Ms. Swanson serves as chief counsel to the Executive Vice President and Chief Human Resources Officer and provides employment advice, manages litigation, and handles executive employment agreements across the Disney enterprise.

Ms. Swanson has tried many employment cases to verdict, including while at Disney – co-chairing (with outside counsel) a sexual harassment case, which resulted in a unanimous defense verdict.
Matthew E. Swaya, Chief Ethics and Compliance Officer, joined Starbucks Coffee Company in 1997. He has led the Employment Practice Group, the Litigation Practice Group responsible for non-employment litigation and the Commercial Practice Group, responsible for supporting the company’s major business transactions and contracts with suppliers, vendors and business partners.

In his role as Starbucks CECO, Matt sets the vision and direction for the ethics and compliance function, working with senior leaders and the Audit & Compliance Committee of the Board of Directors to align on strategies in support of the company’s values. Starbucks Business Ethics and Compliance is comprised of partners (employees) across the globe working to promote ethical business practices and support Starbucks culture and values. Matt and his team develop and implement programs and initiatives such as risk assessments; enterprise policy management; training; reporting; conducting investigations; consulting with leaders and managing the company’s legal and regulatory risks.

In addition to leading Starbucks Business Ethics and Compliance Team, Matt serves as the senior vice president and principal lawyer for Starbucks global labor and employment matters (litigation and counseling) and is the primary lawyer to, and member of, the Partner Resources Leadership Team. Matt is also a leader in Starbucks Department Law and Corporate Affairs.

Matt is an elected Fellow of the College of Labor and Employment Lawyers, Class of 2009.

Prior to joining Starbucks, Matt was a partner at Lane Powell, LLP in Seattle, Washington. Previously, he worked as a director, Labor Relations for both Pan American World Airways and Trans World Airlines in New York. Matt obtained his Bachelor of Science degree in Industrial and Labor Relations from Cornell University and earned his Juris Doctorate degree from Brooklyn Law School.

About Starbucks
Since 1971, Starbucks Coffee Company has been committed to ethically sourcing and roasting the highest quality arabica coffee in the world. Today, with stores around the globe, the company is the premier roaster and retailer of specialty coffee in the world. Through our unwavering commitment to excellence and our guiding principles, we bring the unique Starbucks Experience to life for every customer through every cup. To share in the experience, please visit us in our stores or online at starbucks.com.
Dr. Thornton, a Managing Director of ERS Group, joined the firm in 1986. She is a labor economist specializing in the analysis of employment and credit decisions and has testified as an expert witness in Federal court, state court and administrative hearings. She has prepared economic and statistical analyses involving allegations of gender, race, ethnicity, and age discrimination in a variety of employment practices including selection, termination, and compensation, as well as Fair Labor Standards Act compliance. Dr. Thornton has performed analyses for employers both proactively and in response to litigation and OFCCP audits.

In addition to her research of labor economics, Dr. Thornton has also studied customer characteristics as they relate to the ability to obtain credit and their effect on the terms of credit transactions, and has also been retained as an expert witness in voting rights matters.


Dr. Thornton has been an adjunct professor of quantitative methods and statistics at Florida State University. She has also published in the Journal of Legal Economics and the Journal of Forensic Economics and co-authored a chapter in the anthology Developments in Litigation Economics. Dr. Thornton is often asked to speak before legal, human resources, and corporate groups. Dr. Thornton holds doctoral and master’s degrees in economics from the Florida State University. She also has a bachelors’ degree from the University of Central Florida in economics and political science.
Trish Treadwell is a partner with Parker Hudson Rainer & Dobbs LLP’s Litigation and Employment practice group. She represents clients in state and federal courts in commercial litigation, primarily including employment and franchise law disputes, but also including UCC and other banking litigation and general complex commercial litigation and arbitration.

Trish provides counseling, general advice, and litigation representation on a panoply of employment-related issues. Trish represents clients before the Equal Employment Opportunity Commission, the Georgia Department of Labor, and FINRA, as well as in state and federal courts. Representative engagements include claims for discrimination and retaliation based on age, gender, race, religion, and disability; breach of employment agreements; alleged violations of federal and state wage and hour and leave laws; and advice regarding employment handbooks, policies, trade secrets, non-competes and other restrictive covenants, and executive and employee agreements. Trish is actively engaged in the legal community as both a speaker and writer at various industry and bar association conferences and seminars.

As part of her franchise law practice, Trish represents and advises franchise systems in the hotel and quick-service restaurant sectors among others. She has represented franchisors in actions to enforce franchise agreements against franchisees, in actions by third parties asserting employer-based and other vicarious liability claims against the franchise system, and in more complicated matters involving system-wide class actions and RICO claims. The recent movements by the NLRB to try to designate franchisors as responsible for franchisees’ employees have created an interesting intersection for employment and franchise law practices, and Trish is uniquely positioned to provide counseling and representation on that issue.

Trish graduated with honors from Atlanta-based Oglethorpe University with a Bachelor of Arts in English. She recently concluded her eighth and final year (for now) as a member of the Board of Trustees for the University. After a three-year stint teaching, Trish attended and graduated with honors from Georgia State University College of Law. She currently serves on her law school alma mater’s Board in addition to service on the Board and Executive Committee of the non-profit Trees Atlanta and on the Advisory Council for the Atlanta Legal Aid Society. Trish is also the new president of the national leadership organization, the Leadership Institute for Women of Color Attorneys.
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Focus
Gerlind Wisskirchen is a specialist lawyer in the area of labor and employment law with a special focus on advising international corporations. The excellence of her advice lies in her profound understanding of the business environments of her clients and her strategic, precise, clear recommendations. She and her team are performance-driven and strive to forge workable and strategic business solutions to real-world problems so that clients can achieve their business objectives. Part of this advice is project management, i.e. understanding the relevant factors, defining the goals, selecting the best methods and tools, and on precise implementation of the set objectives. Gerlind Wisskirchen advises multinational corporations notably on the issues of reorganization, national and international labor and employment law and compliance. She provides support to management – as a strategic advisor or member of the supervisory/advisory board – from the HR and labor and employment law perspective when business plans and strategies are being developed.

In a globalized world in which national borders are increasingly diminishing and corporations are facing global challenges, she has particular expertise in cross-border projects like business reorganizations (outsourcing, off-shoring), compliance issues, cross-border compensation programs, cross-border audits and internal investigations, board level co-determination, matrix structures of multinational corporations, the European works council, the implementation of codes of conduct and whistleblowing systems, the posting of employees and data privacy protection issues. She developed the "EU Labor & Employment Law Navigator", a comparative analysis of the labor and employment law systems in Europe.

Gerlind Wisskirchen is a regular moderator and panelist at national and international conferences on the legal issues of international HR management and on issues of cross-border Labor and employment law, like, for example at the International Bar Association, the American Bar Association and the American Employment Law Council. She is a lecturer for the MBA program "International Human Resources Management" at Cranfield University, UK, one of the leading European business schools. She has published numerous articles in German and English.

Resume
Studied law at the University of Bonn, the University of Lausanne, Switzerland and Georgetown University, USA. PhD in 1993 on "Indirect Discrimination in Employment (Disparate Impact Cases): USA – Europe". Student and graduate scholar of Konrad-Adenauer-Stiftung. Worked for two U.S. law firms (1991-1992, 1995) and for the international department of the German Treasury (1995-1998). Joined the law firm in 1998 to strengthen the international section of the labor and employment law team.

Languages
German, English, French